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“We” the Jury: The Problem of Peremptory Strikes as Illustrated by Flowers v. Mississippi

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COMMENT

“WE” THE JURY: THE PROBLEM OF PEREMPTORY STRIKES AS ILLUSTRATED BY *FLOWERS V. MISSISSIPPI*

KAYLEY A. VITEO*

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I. INTRODUCTION

On July 16, 1996, a quadruple homicide devastated the town of Winona, Mississippi. Four employees of Tardy Furniture, a Winona institution, had been shot in the head execution-style in the middle of the day. With almost no evidence except for shoe prints and bullet casings, investigators scrambled to identify the perpetrator. Ultimately, the investigation focused on one person: Curtis Flowers, an African-American ex-employee of Tardy Furniture. Flowers was eventually tried six times for the Tardy Furniture quadruple homicide. Three times, a jury convicted Flowers and sentenced him to death, only to be reversed by the Mississippi Supreme Court due to prosecutorial misconduct.¹ In 2019, with its decision in *Flowers v. Mississippi*,² the Supreme Court vacated Flowers's conviction and death sentence for the murders, finding the prosecutor at his trial had unlawfully used race as a basis for peremptorily striking potential jurors.³ This was the *sixth* time Flowers had been convicted and sentenced for the Tardy Furniture murders, and the *fourth* time a conviction was vacated because of race-based strikes.⁴

While not a constitutional right, the peremptory challenge was, for five hundred years, reserved as a fundamental right solely for criminal defendants.⁵ The peremptory challenge is a tool used by litigants to strike, without cause, qualified jurors from serving on the jury panel.⁶ It is a long-venerated tool, and coupled with it are the sacrosanct, constitutional rights

1. See *Flowers v. State*, 947 So. 2d 910, 939 (Miss. 2007) (asserting the State's intentional discrimination in jury selection warrants vacating the conviction); see also *Flowers v. State*, 842 So. 2d 531, 538 (Miss. 2003) (vacating conviction due to various errors, including findings of prosecutorial misconduct); see also *Flowers v. State*, 773 So. 2d 309, 334 (Miss. 2000) (finding the Mississippi Circuit Court erred in overruling the *Batson* challenge).

2. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

3. *Id.* at 2235.

4. *Id.* The fourth and fifth trials ended in mistrials. *Id.*

5. A draft of the Sixth Amendment included peremptory challenges solely for defendants as a measure of ensuring fair trials. Though this provision was not included in the final draft, peremptory challenges remained a central concern resulting in Congress formally granting defendants the right of peremptory challenge in federal cases in 1790. See John J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 VT. L. REV. 297, 301–02 (2005) (discussing the history of peremptory challenges).

6. See Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. & PUB. POL'Y 323, 324–27 (2002) (“The basic premise of not disclosing a reason for eliminating a juror is why the peremptory challenge was created—in order to enhance the prospect of sitting an impartial jury.”).

governing the jury as a whole.⁷ Thus, history demonstrates, while “the peremptory challenge . . . enjoys a strong link to the right to a fair trial,” the concentration of this link was for five hundred years was intended to protect the *criminal defendant’s* right to a fair trial.⁸

It would not be until the mid-nineteenth century that states would grant a more restricted right to peremptory challenges to prosecutors.⁹ Some argued this in direct response to the Thirteenth Amendment as a way of ensuring a restriction on African-Americans’ ability to serve on a jury, despite the right guaranteed by the Constitution.¹⁰ Through the mid-twentieth century, the peremptory challenge tool created jury panels of rich white men, as these were “members of a reasonably elite group of propertied men”¹¹ However, as eligibility requirements for jury service broadened, jury panels became more diverse.¹² Prosecutors, in particular, used challenges as a way to prevent Black jurors from serving.¹³ Of course,

7. The United States Constitution grants that any trial except for impeachment “shall be by Jury” U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment to the Constitution expands on that right by including the right to “an impartial jury of the State and district wherein the crime shall have been committed” U.S. CONST. amend. VI, § 1.

8. See Francis, *supra* note 5, at 300–05 (“[H]istory demonstrates that it is a defendant’s right.”).

9. See *id.* at 302 (explaining prosecutors were generally given fewer peremptory strikes when states granted this right).

10. See *id.* at 304 (“The challenge could be used to exclude African Americans from jury service, even though the Thirteenth Amendment, in principal, guaranteed this right to black Americans.”).

11. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 165 (1989); see also Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 982 (1996) (“This method of jury selection worked for a time, at least as long as jury panels were comprised of affluent white men.”).

12. See Montoya, *supra* note 11, at 982 (explaining the changing use of the peremptory challenge due to more diverse jury pools). Diverse juries were the nightmare for white Southerners, who “conceived black jury service ‘as a form of political officeholding,’ and for . . . several decades, the battle to integrate the jury box was a critical and constant feature of Southern politics.” Activism to end “the Jim Crow Jury” stretched nationwide. Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1600–10 (2018).

13. Even after the *Batson* decision, prosecutors devised—and publicized—ways to circumvent the requirement of race-neutral explanations due to the prominent belief that “good jur[ies]” won cases and “good jury lawyers” were essential. See, e.g., Jack McMahon, *Jury Selection with Jack McMahon*, YOUTUBE (Apr. 6, 2015), <https://www.youtube.com/watch?v=Ag2I-L3mqsQ> [<https://perma.cc/ML8E-U43V>] (emphasis added). In a video published shortly after the *Batson* decision, Pennsylvania prosecutor Jack McMahon acknowledged that any lawyer must play by the rules, but also explained: “The best thing I can suggest is make a code for yourself And you all do your own little code to know what that particular response means. . . . Whatever it is for you.” *Id.* McMahon further described the individual questioning by the prosecution as relating to the code previously written. *Id.* He went on to say:

Black jurors' fear was, and is, based on stereotypes about their ability to serve.¹⁴ The use of “stereotypes is a virtually inherent aspect of a system of peremptory challenges.”¹⁵ The use of the peremptory challenge thus became a tool for race and gender discrimination.¹⁶

It was the Court's hope, through *Batson v. Kentucky*,¹⁷ to correct this use of peremptory challenges by establishing “[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.”¹⁸ However, *Batson* created a secondary problem—the “enforcement nightmare”—by requiring a defendant to have a prima facie case showing discrimination before a prosecutor would provide his required “neutral explanation” for striking the juror in question.¹⁹ In addition to the

When you have a juror that you obviously like by just their appearance, okay, it's . . . at this critical stage is how you phrase your questions. If it's this wonderful looking common law juror, the guy that would hang his mother, you know, if she did anything . . . you want to ask the questions in a fashion that's gonna make them not answer it in a way that's gonna get them excused for cause. . . . *You lead the witness . . . This is somebody you want as a juror.*

Id. (emphasis added).

14. See Nancy S. Marder, *Batson v. Kentucky: Reflections Inspired by a Podcast*, 105 KY. L.J. 621, 630 (2016) [hereinafter Marder, *Reflections Inspired by a Podcast*] (noting, in an interview with the podcast, prosecutor Jack McMahon told Marder that he “believes African-Americans are more likely to question police testimony and so he uses peremptories to remove them.”); see also Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U.L. REV. 155, 156 (2005) (arguing “the *Batson* peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection” due to an attorney's implicit bias); see also Joshua C. Polster, *From Proving Pretext to Proving Discrimination: The Real Lesson of Miller-El and Snyder*, 81 MISS. L.J. 491, 493 (2012) (“Historically, prosecutors used challenges to eliminate African-American veniremembers, who they theorized were unfit for service and would be sympathetic to black defendants.”).

15. Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 452 (1996). But see Laurel Johnson, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide*, 5 U. DENV. CRIM. L. REV. 215, 223 (2015) (emphasis added) (“While there are disadvantages associated with the use of peremptories . . . they have long been utilized as a valuable tool in the creation of impartial juries.”).

16. See Montoya, *supra* note 11, at 982 (discussing the unfair and biased uses of peremptory challenges); see also Polster, *supra* note 14, at 493 (“[A]s much scholarship has argued, peremptory challenges are still used by some prosecutors as vehicles for discrimination.”).

17. *Batson v. Kentucky*, 476 U.S. 79 (1986).

18. *Id.* at 86.

19. Alschuler, *supra* note 11, at 169 (addressing issues associated with peremptory challenges post-*Batson*); *Batson*, 476 U.S. at 97. But see Laura I. Appleman, *Reports of *Batson's* Death Have Been Greatly Exaggerated: How the *Batson* Doctrine Enforces A Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607, 611 (2005) (arguing *Batson* “is a special type of enforcement mechanism, one that differs from the rest by accurately and immediately policing wrongdoing.”).

obvious issue of how to rise to the evidentiary burden, a prosecutor could easily furnish a so-called race-neutral explanation for his strike—known as pretextual reasoning²⁰—or the reasoning could be such that it is “a close proxy for race.”²¹

Perhaps nowhere are these issues more clearly displayed than in the 2019 case of *Flowers v. Mississippi* and its history. The prosecutor’s actions in *Flowers I-VI* represents the worst of what the peremptory challenge can be—unbridled prosecutorial misconduct four (arguably six) times over—and exemplifies why a fresh discussion of the system of peremptory strikes is central to the criminal justice system. This Comment will present the history of the peremptory challenge, specifically identifying its influences before and after *Batson*. Using *Flowers*, in particularly the dissent by Justice Clarence Thomas, this Comment will present the argument for and against abolishing the peremptory challenge system. It will also present alternatives to abolishment. Despite the Court’s attempts to rid the jury selection of racial (and other forms of) discrimination, the peremptory challenge system remains one of “undisguised racial discrimination” and should be abolished.²²

II. HISTORY OF THE STRIKE

A. Peremptory Challenges Before *Batson*

In contrast to the English system, which utilized peremptory challenges were rarely used and abolished them entirely in 1988, use “flourished in the

20. Pretext is defined as “[a] false or weak reason or motive advanced to hide the actual or strong reason or motive.” *Pretext*, BLACK’S LAW DICTIONARY (11th ed. 2019). An example of pretextual reasoning is a North Carolina “cheat sheet” used by prosecutors in the 1990s, which listed “approved reasons for minority strikes,” including “such reasons as ‘lack of eye contact,’ ‘air of defiance,’ ‘arms folded,’ ‘leaning away from the questioner,’ and ‘evasive.’” Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate *Batson* Record*, 94 N.C.L. REV. 1957, 1980 (2016).

21. Alschuler, *supra* note 11, at 174–75; *see also* Frampton, *The Jim Crow Jury*, *supra* note 12, at 1626–27 (“[I]t makes it painfully easy to cloak even the most overt forms of racism through pretextual race-neutral justifications . . .”).

22. Alschuler, *supra* note 11, at 167; *see also* Nancy S. Marder, *Foster v. Chatman: A Missed Opportunity for *Batson* and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1137 (2017) [hereinafter Marder, *A Missed Opportunity for *Batson**] (“[I]n the end the only way to eliminate discriminatory peremptory challenges is to eliminate the peremptory challenge.”); *see also* Jere W. Morehead, *When A Peremptory Challenge Is No Longer Peremptory: *Batson*’s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 641 (1994) (arguing peremptory challenges are inherently biased and the Court should abolish them entirely).

United States.”²³ In the Reconstruction Era following the Civil War, it was not uncommon for states to have laws directly preventing African-Americans from serving on a jury by ensuring they could not qualify.²⁴ In *Strauder v. West Virginia*,²⁵ the Supreme Court found such a statute unconstitutional on equal protection grounds and overturned the corresponding conviction due to the resulting all-white jury.²⁶ As a workaround to outright unconstitutional laws, some states designed laws predicated on excluding jurors on other, more nebulous grounds.²⁷ The Supreme Court’s response to laws “using white stereotypes of black characteristics as criteria for service,” was not unconstitutional because race was not “enumerated as a factor” specifically.²⁸ These discretionary laws were not unconstitutional because “it ha[d] not been shown that their actual administration was evil, only that evil was possible under them.”²⁹ This would be a striking statement except that equal protection challenges require a finding of intent, which makes bringing cases like a *Batson* challenge so difficult in the first place.³⁰

The requirement of intentional discrimination paralyzes any judicial inquiry when a case does not involve explicit racism, leading to an ineffective review of contextual facts that could demonstrate intentional discrimination.³¹ Instead of identifying a *particular* wrong, equal protection

23. Caren M. Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 10–11 (2014).

24. Francis, *supra* note 5, at 306.

25. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

26. See Francis, *supra* note 5, at 306 (explaining the Court’s reasoning and the rights granted under the Fourteenth Amendment). Despite the seemingly positive move forward, “Black activists had no trouble identifying and critiquing the emerging Equal Protection framework as inadequate to ensure equitable black participation on juries.” Frampton, *The Jim Crow Jury*, *supra* note 12, at 1607.

27. See Francis, *supra* note 5, at 306–07 (describing the 1892 Mississippi law providing “three state officials with the power to select jurors based on their ‘good intelligence, sound judgment and fair character.’”).

28. *Id.* at 306.

29. *Williams v. Mississippi*, 170 U.S. 213, 225 (1898).

30. See Sandra Guerra Thompson, *The Non-Discrimination Ideal of Hernandez v. Texas Confronts a “Culture” of Discrimination: The Amazing Story of Miller-El v. Texas*, 25 CHICANO-LATINO L. REV. 97, 116 (2005) (“Proving that the exclusion is the product of intentional discrimination is a real challenge for defendants.”); see also Polster, *supra* note 14, at 493–94 (“Much of the inability of courts to detect discrimination can be attributed to the inherent difficulty of distinguishing when a challenge is based on a prediction that a prospective juror will be unfavorable and when a challenge is based on race.”).

31. See *Batson v. Kentucky*, 476 U.S. 79, 90 (1986) (“A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State.”); see also Page, *supra* note 14, at 181–82 (“Motivation, intent, purpose, and, most importantly, conscious awareness . . . are not

challenges must show an *intentional* wrong, changing the scope and level of judicial scrutiny by asking judges to assess the prosecutor's heart.³² Thus, a judge may not hear evidence exemplifying how implicit bias in making a peremptory strike may equal intentional bias and, therefore, intentional discrimination.³³ Proving intentional discrimination will very rarely be easy because everyone is, or at least should be, aware that they must avoid showing exactly this in making any peremptory strikes.³⁴

Racial discrimination within the peremptory challenge system did not become a significant issue until the Civil Rights Act of 1875 when African-Americans were increasingly called to jury service.³⁵ The racial discrimination of the justice system thus evolved from "explicit statutory bans on African-American participation in jury service to strategic but no less blatant uses of peremptory challenges."³⁶ As a result, "[t]he Jim Crow jury never fully fell."³⁷

necessary pre-requisites for stereotyping and any resulting discrimination."); *see also* Polster, *supra* note 14, at 494–95 (arguing prosecutors may "explain their challenges with strategic reasons," based on "background, demeanor, and statements during voir dire . . . defendants generally cannot show that [the reasons] are inaccurate.").

32. Justice Thomas's *Flowers* dissent provides an interesting example of this paradox. Justice Thomas argued that "Flowers presented no evidence whatsoever of purposeful race discrimination by the State . . ." But, in his determination that there was no intentional discrimination, he pointed only to the final race-neutral reasoning of the State as sufficient, despite a clear pattern of behavior designed to keep African-Americans from the final jury panel. In other words, because the State provided exactly what *Batson* proscribed—any race-neutral reason—the path it took to get to that reason hardly matters. Thomas was adamant this is the case even when factors may show discriminatory intent because "the bare numbers are meaningless outside the context of the reasons for the strikes." For Justice Thomas, judicial review of *Batson* challenges begins and ends with the race-neutral reason. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2269 (2019) (Thomas, J., dissenting). Any other "reliance on race-neutral strikes to show discrimination is judicial alchemy." *Id.* at 2255–57 (Thomas, J., dissenting).

33. *See id.* at 2273 ("Peremptory strikes are designed to protect against fears of partiality by giving effect to the parties' intuitions about jurors' often-unstated biases.") (emphasis added).

34. *See* 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, 547 (1999) ("Any experienced trial attorney will know better than to state any preference for or aversion to a particular race, gender, or ethnicity. The same trial lawyers will know how to undermine any trial judge's attempted examination of the unstated or subconscious."); *see also* Polster, *supra* note 14, at 495 ("Judicial focus on defendants' ability to prove that reasons are pretextual thereby effectively prevents most defendants from proving discrimination.").

35. Morrison, *supra* note 23, at 11.

36. *Id.* at 17.

37. Frampton, *The Jim Crow Jury*, *supra* note 12, at 1620; *see also* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 827–30 (1997) (arguing the peremptory challenge is the "[l]ast [b]est [t]ool of Jim Crow.").

The first challenge to peremptories at the Supreme Court came in *Swain v. Alabama*,³⁸ a decision addressing whether denying African-Americans the right to sit on a jury violated equal protection. In *Swain*, an African-American man was sentenced to death by an all-white jury created by the liberal use of peremptory strikes of every African-American potential juror. The Court reaffirmed the “State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors . . . violates the Equal Protection Clause[,]” but also reaffirmed its use of peremptories to “demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury.”³⁹ The Court imposed a high burden of proof on any defendant claiming an Equal Protection violation, requiring a showing of “the prosecutor’s systematic use of peremptory challenges against Negroes over a period of time.”⁴⁰ The high burden of proof practically ensured defendants would encounter significant obstacles in proving a discrimination case, not the least of which was the requirement that discrimination had to continue for some time before rising to the level of a violation.⁴¹ As a result, the peremptory challenge remained the “last bastion of undisguised racial discrimination in the criminal justice system.”⁴²

B. *The Batson Challenge*

After *Swain*, the landscape for the peremptory challenges was clear, though difficult: the systematic use of strikes on a race basis had to be proven by the defendant.⁴³ *Batson* effectively changed this landscape.⁴⁴ James Batson, an African-American man, was charged with burglary.⁴⁵ During voir dire, the prosecutor struck all four Black potential jurors, leading to an all-white jury.⁴⁶ Defense counsel immediately objected, arguing this violated Mr. Batson’s right to equal protection via the Fourteenth Amendment.⁴⁷ However, the Court’s hands were tied—*Swain*’s

38. *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

39. *Id.* at 204, 219.

40. *Id.* at 227.

41. *Id.*

42. Alschuler, *supra* note 11, at 167.

43. *Swain*, 380 U.S. at 227.

44. See Appleman, *supra* note 19, at 608 (“Properly understood, the *Batson* procedure enforces a normative framework of legal ethics, providing an aspirational standard for the legal profession.”).

45. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

46. *Id.* at 83.

47. *Id.*

decision specifically created a right only where discriminatory strikes could be proven as used over a period of time.⁴⁸ Mr. Batson claimed discrimination only within his own case.⁴⁹ In "[r]ecognizing this assault on the constitutional principle of equality, the United States Supreme Court in *Batson v. Kentucky* sought to end the unbridled use of peremptory challenges as a tool for racial discrimination."⁵⁰

The *Batson* Court faced head-on the challenging burden of proof laid at the feet of any defendant.⁵¹ In doing so, the Court revised its approach to the question of purposeful discrimination.⁵² In answer to Mr. Batson's complaint, the Court re-examined *Swain* and reaffirmed *Strauder v. West Virginia*.⁵³ *Strauder* "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination . . . [and e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."⁵⁴ Per *Swain*, if the presumption was without proof of historical discrimination, the Court would presume the peremptory strikes were appropriate.⁵⁵ *Batson* instead prescribed that a trial judge must apply a three-step analysis to assess whether a violation occurred:⁵⁶

[T]he defendant [first] must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury

48. *Id.* at 84.

49. *Id.*

50. Mikal C. Watts & Emily C. Jeffcott, *A Primer on Batson, Including Discussion of Johnson v. California, Miller-El v. Dretke, Rice v. Collins, & Snyder v. Louisiana*, 42 ST. MARY'S L.J. 337, 341 (2011).

51. *See Batson*, 476 U.S. at 95 (highlighting the Court's history of addressing the issue).

52. *Id.* at 90.

53. *Strauder v. West Virginia*, 100 U.S. 303 (1879); *see Batson*, 476 U.S. at 89 (reaffirming equal protection guarantees the State will not exclude jurors on account of race and rejecting any restriction by the principles of *Swain* to systematic conduct over more than one case).

54. *Batson*, 476 U.S. at 85. *But see* William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 110 (1987) ("[The Court's] opinion in *Batson* turned not on the Sixth Amendment issue, but instead on the Equal Protection Clause . . . this development produced some background skirmishing in the opinions over the propriety of the Court's resolving an important issue . . . other than that on which certiorari had been granted.").

55. *See Batson*, 476 U.S. at 91 (explaining the presumption of validity of preemptory strikes outlined in *Swain*).

56. *See id.* at 95 ("[T]he trial court must undertake a 'factual inquiry' that 'takes into account all possible explanatory factors' in the particular case.").

selection practice that permits “those to discriminate who are of a mind to discriminate.” Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors . . . raises the necessary inference of purposeful discrimination.⁵⁷

Assuming the defendant has successfully made a prima facie showing that a violation occurred, it is then the State’s burden to supply a race-neutral reason for why the juror was struck specific to the case at hand.⁵⁸ Finally, it is the trial court’s responsibility to adjudicate if purposeful discrimination was shown.⁵⁹ However, although the prosecutor bears the small responsibility of advancing neutral reasons, the burden of proof remains with the challenger.⁶⁰

The *Batson* holding was not without its immediate detractors.⁶¹ Chief Justice Burger confronted the requirement of race-neutral explanation as essentially eliminating the true peremptory strike, proposing that in doing so, “exercising the challenge will be difficult to distinguish from a challenge for cause.”⁶² Beyond his fear that this effectively eliminated the peremptory challenge from “the fabric of our jury system,” Chief Justice Burger was additionally concerned the case would cause enormous logistical

57. *Id.* at 96 (citations omitted).

58. *Id.* at 97.

59. *Id.* at 98.

60. *See id.* at 90 (“A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State.”); *see also* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2268 (2019) (Thomas, J., dissenting) (“[The challenger] bears the burden of proving racial discrimination . . .”).

61. *See* Montoya, *supra* note 11, at 992 (“These Justices also predict doom for the implementation of *Batson*. Their more notable assertions are that *Batson* interjects racial matters into the jury selection process . . . [and] effectively abolishes the peremptory challenge . . .”). *But see* Melynda J. Price, *Expanding Reach: The Importance of Batson v. Kentucky Thirty Years On*, 105 KY. L.J. 609, 618 (2017) (“Even with very strong dissents over the years, the Court has stayed the course in *Batson*.”).

62. *Batson*, 476 U.S. at 127 (Burger, J., dissenting). Scholarship has echoed this concern, arguing *Batson*’s decision effectively makes the real issue not that discrimination was present, but “whether the criteria upon which the discriminations are based are reasonable and acceptable.” Melilli, *supra* note 15, at 449; *see* Marder, *A Missed Opportunity for Batson*, *supra* note 22, at 1140 (“*Batson* was a noble effort to maintain the peremptory challenge and to eliminate discrimination during jury selection, but discriminatory peremptory challenges endure.”); *see also* Pizzi, *supra* note 54, at 115 (“[T]he decisions of the litigants in a particular case to strike prospective jurors stands on a different footing. . . . [with] limited information about the prospective jurors.”).

complications for trial courts.⁶³ Even further, Chief Justice Burger was concerned that *Batson* created a secondary problem of how the principle of equal protection extended—to discrimination based on sex, age, religion, and possibly further?⁶⁴ In some sense, Chief Justice Burger's *Batson* dissent foretold the roadmap for post-*Batson* issues and cases.⁶⁵

Chief Justice Burger also pinpointed the major problem with *Batson*—it tries to do too much with too little, and as a result, “attempts to decree a middle ground.”⁶⁶ The “middle ground” Chief Justice Burger refers is the conflation of the challenge for cause and the race-neutral reasoning.⁶⁷ Chief Justice Burger envisioned that the peremptory challenge the *Batson* Court described would be “a challenge for cause that [is] just a little bit arbitrary—but not too much.”⁶⁸ The question then becomes: what is the “right” amount of arbitrary?⁶⁹

In forcing this issue through its three-part framework, *Batson* overlooks—or outright ignores—implicit bias in jury selection.⁷⁰ When challenged, counsel must provide race-neutral reasoning; however, counsel may effectively provide any arbitrary reason, discriminatory or not.⁷¹ This could be because counsel understands stating a clearly discriminatory rationalization is effectively a path to nowhere except possible sanction and bias against their own case; however, it may also be because counsel does

63. See *Batson*, 476 U.S. at 130, 133 (“This process is sure to tax even the most capable counsel and judges . . .”); see also Cavise, *supra* note 34, at 541 (“The failure of *Batson* becomes almost scandalous when one takes into account the procedural morass it has created in the trial courtrooms and the clogged dockets in the appellate courts.”).

64. *Batson*, 476 U.S. at 124 (Burger, J., dissenting).

65. See Pizzi, *supra* note 54, at 115 (predicting future cases by asserting “limit[ing] the holding of the case to cognizable racial groups was inconsistent with settled equal protection law which required . . . exten[sion] beyond racial groups to embrace exclusions . . . on the basis of sex, religious or political affiliation . . . and so on”).

66. *Batson*, 476 U.S. at 127 (Burger, J., dissenting).

67. See *id.* (arguing the two will ultimately be “difficult to distinguish” from one another).

68. *Id.* at 128.

69. See Page, *supra* note 14, at 158 (“The difficult question was how to reconcile the dictates of the Constitution with the tradition of the unfettered ‘arbitrary and capricious’ peremptory challenge.”).

70. See Morrison, *supra* note 23, at 31 (“*Batson* rests on outdated and inaccurate assumptions about human behavior—assumptions that were recognized as problematic even at the time.”); see also Jarod S. Gonzalez, *A Custom Fit: Tailoring Texas Civil Jury Selection Procedures to Case Tiers*, 43 ST. MARY’S L.J. 495, 516–17 (2012) (“Basically, an attorney is permitted to exercise peremptory challenges based entirely on hunches and stereotypes, and such motivations are outside the court’s control.”); see also Griebat, *supra* note 6, at 325 (“Bias or partiality stems from one’s state of mind or psychographic features such as attitude] and mental impressions . . .”).

71. See Hoffman, *supra* note 37, at 140 (“Peremptory challenges are a combination of psychiatry and palm reading, which probably overlap greatly anyway.”).

not recognize how their own methods of jury selection may be discriminatory due to their own implicit biases or biased methods.⁷² Cognitive research has shown that people automatically categorize others upon first contact and use the most salient characteristics, such as race and gender, to do so.⁷³

While counsel's eventual reason may be facially race-neutral, the methods by which counsel arrived at said reason might be discriminatory, including disparate questioning and the use of jury shuffling.⁷⁴ Disparate questioning is an especially common method to arrive at "race-neutral" reasoning where counsel asks minority prospective jurors more, or different, questions during voir dire than white prospective jurors. This heavy questioning will inevitably lead to a "race-neutral" reason, though these "often correlate with race . . . or the reasons are simply specious"⁷⁵ Therefore, a judge may accept a strike as race-neutral due to a minority juror having a tenuous connection with the prosecutor's office by virtue of family or friends having been prosecuted, but that race-neutral reason may only exist due to counsel excessively questioning minorities based upon the stereotype of their likely connection to criminal activity.⁷⁶ Counsel may not even recognize their methods or questioning as discriminatory and honestly believe the race-

72. This creates a fundamental paradox for counsel:

[A]sking lawyers to identify their own implicit biases is "at best uninformative and at worst misleading." If a lawyer is unaware of how a juror's race has affected her decision to strike, she will be unable to explain it. Conversely, if she is aware that race informed her decision to strike, she will have the double incentive of not losing the strike by admitting that race was a factor and the generally shared desire not to appear racially biased.

Morrison, *supra* note 23, at 32 (quoting Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection*, 63 AM. PSYCH. 527, 532 (2008)); *see also* Page, *supra* note 14, at 160 (asserting everyone, including attorneys, are affected by stereotypes, "even if people do not consciously allow these stereotypes to affect their judgment"). *But see* Appleman, *supra* note 19, at 624 (arguing "*Batson* provides a forum in which to establish a norm that discourages unconscious discrimination, while promoting attorneys' efforts to overcome it . . . [by virtue of] *Batson's* ethical imperative . . . [that] compel[s] ethical behavior from prosecutors, judges, and defense counsel").

73. More disturbingly, the same research shows that not only do "people automatically categorize," but also "with the result that many Americans show *automatic* preference for white over black." Morrison, *supra* note 23, at 30–31 (emphasis added).

74. *See* Polster, *supra* note 14, at 503 (arguing guidebooks often instruct in how to build a jury "consider[ing] . . . race," and jury experts advise on how to achieve the best "demographic").

75. *See* Thompson, *supra* note 30, at 117 (explaining "involve[ment] in the criminal justice system," "living or working in a high crime area," and "[various] socio-economic factors" are racially coded and often not race-neutral reasons).

76. *See generally id.* at 118 ("The high rate of involvement by African-Americans in the criminal justice system means that this reason will correlate strongly with race.").

neutral reason is a justified, sufficient strike.⁷⁷ This is a crucial problem in the *Batson* framework—"its inability to address the honest, well-intentioned lawyer who nevertheless still discriminates."⁷⁸

C. *The Peremptory Challenge After Batson*

1. *Batson's* Expansion of Applicability and Race-Neutrality

In the years after the "*Batson* challenge" was established, a slew of sub-issues came to the Court's attention fairly rapidly, centralizing around where and to whom *Batson* applied. In 1991, *Powers v. Ohio*⁷⁹ established that the defendant raising the challenge need not be of the same race as the struck juror.⁸⁰ Also in 1991, *Hernandez v. New York*⁸¹ established that the *Batson* challenge extended to Latinos.⁸² That year also saw *Batson's* extension to civil cases.⁸³ By 1994, the Court also held the equal protection principles of *Batson* extended to gender.⁸⁴

In addition to cases regarding to whom *Batson* was applicable, the Court decided precisely what a race-neutral reason could be.⁸⁵ *Hernandez* expanded the race-neutral reason as early as 1991 to include even those decisions resulting in discriminatory impact.⁸⁶ A race-neutral reason could thus be anything, so long as it was not made with discriminatory purpose.⁸⁷ The issue of race-neutrality in peremptory strikes is then one of facial

77. See Page, *supra* note 14, at 180 ("Such unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes.")

78. *Id.* at 179.

79. *Powers v. Ohio*, 499 U.S. 400 (1991).

80. See *id.* at 402 (holding a defendant may make objections to prospective jurors being excluded on the basis of race regardless if defendant and jurors are of different race).

81. *Hernandez v. New York*, 500 U.S. 352 (1991).

82. See *id.* at 369–70 (concluding the prosecutor's statement of doubt that Latino prospective jurors would rely on official Spanish translations was not discrimination based on race).

83. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) ("Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.")

84. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 127 (1994) ("[G]ender-based peremptory challenges cannot survive the heightened equal protection scrutiny that this Court affords distinctions based on gender."). Though the end-result of *J.E.B.* is positive in its extension of protection to gender, the Court yet again "failed to provide a sufficient standard for judges to apply when evaluating suspect explanations." Nancy J. Cutler, *J.E.B. v. Alabama ex rel. T.B.: Excellent Ideology, Ineffective Implementation*, 26 ST. MARY'S L.J. 503, 521 (1994).

85. See Watts & Jeffcott, *supra* note 50, at 345–46 (arguing *Batson* cases before 2005 allowed greater use of the *Batson* challenge while simultaneously limiting it as well).

86. *Hernandez*, 500 U.S. at 359–60 (1991).

87. *Id.* at 360.

validity, and “[u]nless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”⁸⁸ In *Hernandez*, the allegedly race-neutral reason was language, a reason that would plainly disproportionately affect people of color. However, although the prosecutor’s reasoning was specifically related to the fact that a potential juror spoke Spanish, the Court accepted the prosecutor’s explanation that his concern was not race, but doubt that a juror who did not speak English would rely on translators rather than his own memory.⁸⁹

The Court took the concept of facial neutrality in race-neutral reasoning even further in *Purkett v. Elem*,⁹⁰ asserting not only must the challenged reason be no more than facially valid, but also it need not be “persuasive, or even plausible.”⁹¹ The *Purkett* Court found any argument for the race-neutral reason’s persuasiveness to be inapplicable until the third and final *Batson* step, where “a trial judge *may choose to disbelieve* a silly or superstitious reason” rather than requiring the *Batson* challenge to end at step two.⁹² As a result of the cases above, “by 2005, the Supreme Court had modified *Batson*’s framework by expanding the availability of *Batson* under step one while simultaneously limiting, and thereby perhaps eviscerating, its practical utility under steps two and three.”⁹³

2. Establishing a Prima Facie Case Under *Batson*

In *Johnson v. California*,⁹⁴ the Court was once again asked to establish the parameters of a prima facie case under *Batson*’s principles.⁹⁵ At trial, defense counsel made two separate objections due to the prosecutor’s peremptory strikes of three individual Black jurors, leaving an all-white jury.⁹⁶ After each objection, the trial judge reasoned the defense had not presented a “strong likelihood” that the strikes were based on group bias without asking

88. *Id.*

89. *See id.* (finding the prosecutor’s “doubt [in the juror’s] ability to defer to official translation” was sufficiently race-neutral despite petitioner’s arguments that the focus on the Spanish language itself was essentially a proxy for race discrimination).

90. *Purkett v. Elem*, 514 U.S. 765 (1995).

91. *Id.* at 768.

92. *See id.* at 768 (asserting ending a *Batson* challenge inquiry at step two “violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.”).

93. *Watts & Jeffcott*, *supra* note 50 at 347.

94. *Johnson v. California*, 545 U.S. 162 (2005).

95. *See id.* at 168 (addressing if whether a peremptory strike was “more likely than not” a result of bias was a sufficient standard of review).

96. *Id.* at 164.

the prosecutor for race-neutral explanations.⁹⁷ The Court held a “more likely than not” standard of review was inappropriate as to the first step under *Batson*: establishing a prima facie case based on facts giving “rise to an inference of discriminatory purpose.”⁹⁸ Importantly, the Court further held the intention of the *Batson* first step was not to be so difficult to establish as to foreclose “*Batson* challenges” entirely; rather, adequate evidence giving rise to *even an inference* of discrimination provided for the burden to shift to the State to explain any strike(s).⁹⁹

This “burden-shifting framework” thus “assumed . . . that the trial judge would have the benefit of all relevant circumstances . . . before deciding whether it was *more likely than not* that the challenge was improperly motivated.”¹⁰⁰ The “more likely than not” standard of review adopted by *Johnson* was thus for *Batson* step three only.¹⁰¹ However, later in the Court’s opinion, it reaffirmed a central piece established within *Purkett*—the burden of persuasion never shifts from the defendant.¹⁰² Despite the dangers racially biased jury selection present to the overall administration of justice, the Court suggested these may all be solved by merely directly questioning the prosecutor, even while it recognized that the State could easily produce a “frivolous or utterly nonsensical justification for its strike.”¹⁰³

D. *Peremptory Challenges After Miller*

The inherent tension in identifying racial discrimination in a discretionary process came strongly to the fore in the *Miller-El* cases.¹⁰⁴ In that case, the Court first considered expanding *Batson* in *Miller-El v. Cockrell*¹⁰⁵ (*Miller-El I*), where ten of eleven eligible Black jurors were struck in the capital

97. The trial judge did warn the prosecutor, indicating they were “very close.” *Id.* at 165.

98. *Id.* at 168–69 (2005); *Batson v. Kentucky*, 476 U.S. 79, 94 (1986).

99. *Johnson*, 545 U.S. at 170.

100. *Id.* (emphasis added).

101. *Id.* at 171.

102. *Id.* at 170–71; *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

103. *See Johnson*, 545 U.S. at 171, 172 (“The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.”).

104. *See Watts & Jeffcott, supra* note 50, at 350 (“[R]ecogniz[ing] ‘the practical difficulty of ferreting out discrimination in selections discretionary by nature.’”).

105. *Miller-El v. Cockrell*, 537 U.S. 322 (2003). This was later reaffirmed by the Court. *Rice v. Collins*, 546 U.S. 333 (2005); *see Watts & Jeffcott, supra* note 50, at 356–57 (“Thus, *Snyder* and *Rice* establish that, unless the cold record states the trial court’s basis for a credibility determination, a reviewing court cannot defer to such a finding and can uphold the trial court’s step three determination only where another proffered reason is deemed nondiscriminatory.”).

murder trial of a Black defendant, Tomas Joe Miller-El.¹⁰⁶ The *Miller-El I* Court remanded the case to the Court of Appeals after concluding the petitioner had, in fact, presented significant evidence of pretext.¹⁰⁷ The Court firmly established that while deference is necessary when evaluating the trial court's decision, it "does not imply abandonment or abdication . . . [and] does not by definition preclude relief."¹⁰⁸ Most importantly, the *Miller-El I* court laid the foundation for recognizing the problem of implicit bias even in the face of race-neutral reasoning.¹⁰⁹ Specifically, *Miller-El I* envisioned an inquiry by which the prosecutor's "state of mind" is of particular importance.

The Court remanded the case to the Fifth Circuit, which again found no *Batson* violation. When the case once again reached the Court in *Miller-El v. Dretke*¹¹⁰ (*Miller-El II*), the Court's frustration with the deferential analysis given by the Court of Appeals came through clearly.¹¹¹ For the first time, the Court provided "non-exhaustive, yet illustrative factors" in determining whether a peremptory strike resulted from discriminatory pretext.¹¹² The factors of *Miller-El II* recognize the difficulty of identifying pretext precisely because it is not usually blatant or as easy as counsel proffering an openly discriminatory reason when a strike is challenged. These five factors include, but are not limited to: (1) statistical analysis; (2) direct comparisons between struck Black jurors and white members of the jury panel; (3) disparate questioning; (4) jury shuffling; and (5) counsel's history of strikes.¹¹³ *Miller-El II* also entered the territory of implicit bias, building on the groundwork of *Miller-El I*, by acknowledging race: "the implication of

106. Watts & Jeffcott, *supra* note 50, at 350; *Miller-El*, 537 U.S. at 326.

107. See *Miller-El*, 537 U.S. at 341 ("[T]he District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case."). In *Miller-El I*, 90.9% of African-American jurors were challenged versus every other juror at 12.9%, making an African-American "7 times more likely to be removed by the prosecutor than a non-African-American." Joseph L. Gastwirth, *Statistical Testing of Peremptory Challenge Data for Possible Discrimination: Application to Foster v. Chatman*, 69 VAND. L. REV. EN BANC 51, 66 (2016).

108. *Miller-El*, 537 U.S. at 340.

109. See *id.* at 339 (providing the trial court must investigate the credibility of race-neutral explanations by evaluating "among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy").

110. *Miller-El v. Dretke*, 545 U.S. 231 (2005).

111. See *id.* at 237–38 (asserting racial prejudice in the courtroom harms prospective jurors, defendants, the court itself, and "public confidence in adjudication.").

112. Watts & Jeffcott, *supra* note 50, at 350.

113. *Id.* at 350–54.

race in the prosecutors' choice of questioning cannot be explained away."¹¹⁴

The acceptance of discrimination as something which can be implied, even within a race-neutral explanation, acknowledges the very problem that race-neutral explanations pose.¹¹⁵ Though this problem was referenced in *Batson*,¹¹⁶ *Miller-El II* was the first time the Court acknowledged both a need and a path to discover such implicit racial biases as part of any peremptory strike evaluation.¹¹⁷ In short, *Miller-El II* provided that "all of the circumstances that bear upon the issue of racial animosity must be consulted."¹¹⁸ This evaluation, coupled with the five factors described, applies to the *Batson* third step but also "presumptively apply to step one's lighter burden for proving an inference of discrimination."¹¹⁹

The Court expanded on this reasoning in *Snyder v. Louisiana*,¹²⁰ which held "the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike. . . ." ¹²¹ In *Snyder*, the trial judge did not independently review a prosecutor's demeanor-based strike, allowing a peremptory strike based on a Black prospective juror's "nervousness."¹²² Additionally, a secondary reason for the strike—the same prospective juror's student-teacher schedule appearing problematic—was not evaluated by the judge at all, despite a white juror with a more problematic schedule not being struck.¹²³ Further, the *Snyder* Court held that while a trial court should be given deference in its

114. *Miller-El*, 545 U.S. at 263.

115. See Alschuler, *supra* note 11, at 175 ("[T]he characteristic might be such a close proxy for race that, in the language of the *Batson* opinion, it would not supply a 'neutral explanation for challenging black jurors.'").

116. Despite *Batson's* recognition of the inherent problem in identifying race-neutrality, the Court expressly declined to provide any instructive procedures. See Pizzi, *supra* note 54, at 112 ("The Court left to the lower courts the task of working out the procedures to be followed if the prosecutor does not rebut the defendant's prima facie case—whether, for example, to start the jury selection process over with a new panel or to require the reinstatement of improperly challenged jurors.").

117. See *Miller-El*, 545 U.S. at 240 ("If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand.").

118. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (emphasis added).

119. Watts & Jeffcott, *supra* note 50, at 354.

120. *Snyder v. Louisiana*, 552 U.S. 472 (2008).

121. *Id.* at 477.

122. *Id.* at 479.

123. *Id.* at 483–84.

determination, an appellate court should not give deference without findings of fact as to credibility in the record.¹²⁴

The next *Batson* decision prior to *Flowers* was *Foster v. Chatman*,¹²⁵ significant because it exemplified precisely how *Batson* failed to end discrimination.¹²⁶ *Foster* presented a particular ironic quagmire specifically because the prosecutor's race-neutral explanations survived challenge at the trial and appellate court level. It was only after the discovery of documents "reveal[ing] the disjuncture between the proffered reasons and the motivating reasons" on the part of the State that the Court found discriminatory intent and reversed the judgment.¹²⁷ This fundamental disparity between the reason given and the actual reason for the strikes highlighted that but for a prosecutor making a "rookie mistake" and admitting discriminatory intent in his or her explanation, a proverbial "smoking gun" is necessary at the trial court level to result in a successful *Batson* challenge.¹²⁸ This is despite the power of statistical evidence of discriminatory challenges.¹²⁹ It has been argued the Court's "fact-bound opinion" in *Foster* missed a crucial opportunity to correct *Batson* so that disparities such as those highlighted above are not possible, or merely not worth the effort due to the increased likelihood of discriminatory intent findings.¹³⁰

124. Watts & Jeffcott, *supra* note 50, at 354–57.

125. *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

126. See Marder, *A Missed Opportunity for Batson*, *supra* note 22, at 1137 ("Batson is easy to evade, so discriminatory peremptory challenges persist and the harms from them are significant."); see also Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 511 (1994) ("[D]emonstrating the inability of the judicial process to discover racially motivated peremptory challenges.").

127. Marder, *Reflections Inspired by a Podcast*, *supra* note 14, at 1141. The documents included copies of the jury list where prospective Black jurors were specifically highlighted, a draft affidavit containing a provision for if they "had to pick a black juror," notes by the prosecutors showing all Black jurors struck, additional documents which listed the potential Black jurors as "definite NO's," and a note that said: "No Black Church." *Foster*, 136 S. Ct. at 1744 (emphasis in original).

128. *Id.* at 1141–42; see Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357, 357 (2017) ("A framework that depends on such transparency is weak and ineffective.").

129. Joseph B. Kadane, *Statistics for Batson Challenges*, L. PROBABILITY & RISK 1, 5 (2018) (presenting statistical evidence showing all four Black prospective jurors were challenged in *Foster*, while only five of thirty-two white prospective jurors were challenged). The "number of African-Americans removed by the prosecutor is statistically significantly higher than expected under random selection. Indeed, disparities of [this] magnitude . . . provides strong support for the defendant's claim." Gastwirth, *supra* note 107, at 55.

130. See Marder, *Reflections Inspired by a Podcast*, *supra* note 14, at 1141–42 ("If the Court tweaks the *Batson* test, it can try to give the defendant a variety of ways of establishing discriminatory intent, which is a difficult showing for a defendant to make. It could do this by permitting the defendant to

Batson's history is one of frustration—a legacy of constant revision, with each methodology continuing to fall short of its goal in eradicating racial discrimination in the courtroom.¹³¹ The line of cases began by merely asking to whom *Batson* applied,¹³² before evaluating the procedure in establishing a prima facie case and the role of the prosecutor's explanation.¹³³ Finally, the third prong's development, whether there is intentional discrimination, represents the Court's inability or unwillingness to address *Batson*'s inadequacies.¹³⁴ There is a sense of exasperation in each of the Court's opinions at the inability to put race-based challenges behind it.¹³⁵ The Court acknowledged post-*Strauder* that "critical problems persisted," and yet it was unable to recognize the same for the post-*Batson* reality in its *Flowers* opinion.¹³⁶ Without reflection of the "critical problems" which could allow for such a breach of law, *Batson* and its progeny remain fundamentally well-intentioned but toothless.

infer discriminatory intent from a 'discriminatory effect' or a 'discriminatory practice.'"); see also Cover, *supra* note 128, at 359 ("[I]nstead, it largely functions as a reminder not to leave behind written evidence of such misconduct.").

131. See *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try."); see also *Batson*, 476 U.S. at 102–03 (Marshall, J., dissenting) ("The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories . . . [t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process."); Marder, *Reflections Inspired by a Podcast*, *supra* note 14, at 625 ("Fifty years of experimentation should be sufficient to establish that these tests do not work—they have not eliminated discriminatory peremptory challenges.").

132. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) (discussing whether *Batson* encompasses gender); see also *Hernandez v. New York*, 500 U.S. 352, 352 (1991) (determining whether discrimination against Latinos was also prohibited).

133. See *Johnson v. California*, 545 U.S. 162, 164 (2005) (addressing whether the "more likely than not" standard of review is appropriate for determining possible group bias); *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995) (finding the prosecutor's explanation need not be "persuasive, or even plausible.").

134. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019); *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016); *Snyder v. Louisiana*, 552 U.S. 472, 485–86 (2008); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005); *Miller-El v. Cockrell*, 537 U.S. 322, 338–40 (2003).

135. See Page, *supra* note 14, at 161 ("This is the heart of the *Batson* problem, rather than the deliberately dishonest racist and sexist lawyer.").

136. *Flowers*, 139 S. Ct. at 2239. The opinion of *Flowers* is, in some sense, eerily similar in wording to *Batson* itself. The *Batson* Court was "called upon . . . to review the application of those principles to particular facts." *Batson*, 476 U.S. at 90. *Flowers* answers the same call: "We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case." *Flowers*, 139 S. Ct. at 2251.

III. FLOWERS AND THE FAILURE OF BATSON

A. *History of Flowers*

If you try a man and you go six times for the same crime well, something is wrong about the Constitution or something is wrong about the law or something is wrong about the prosecution or something is wrong about the defense or something is wrong about the *entire* system.¹³⁷

In July 1996, a quadruple homicide shook the small town of Winona, Mississippi. Four employees, three white and one Black, of Tardy Furniture, were found shot in the head inside the store—three were declared dead at the scene, and the fourth died later in the local hospital.¹³⁸ Although the murder was committed downtown and on a sunny morning, Winona police had little evidence.¹³⁹ The community wanted results fast, as “[t]here was no apparent motive, and the randomness of the crime made it terrifying.”¹⁴⁰ What resulted was a perfect storm of prosecutorial misconduct and one defendant’s dogged protests of innocence in a racially divided community:¹⁴¹ Flowers would ultimately experience “[s]ix trials over twenty-one years” for the same crime.¹⁴²

Doug Evans, who is white, prosecuted all six trials.¹⁴³ All but the first two trials were for all four murders.¹⁴⁴ The history of jury selection within these six trials is critical; as the Supreme Court later put it: “The numbers speak loudly.”¹⁴⁵ Over the course of five trials,¹⁴⁶ Evans struck forty-one

137. *July 16, 1996, In the Dark*, APM REPORTS, at 2:14, (May 1, 2018) (downloaded using iTunes) (emphasis added).

138. Parker Yesko, *The Tardy Furniture Store Murders: What Happened That Morning in July '96?*, APM REPORTS (May 1, 2018), <https://www.apmreports.org/story/2018/05/01/tardy-furniture-murders-what-happened> [<https://perma.cc/N4VW-W9BX>].

139. *Id.*

140. *Id.*

141. *See Flowers*, 139 S. Ct. at 2236 (“The town is about 53 percent black and about 46 percent white.”); *see also July 16, 1996, supra* note 137, at 2:48 (“[A]nd it’s clear that the way people think about the Curtis Flowers case, for the most part, depends on whether they’re white or black.”).

142. *July 16, 1996, supra* note 137, at 1:21.

143. *Flowers*, 139 S. Ct. at 2236.

144. In the first two trials, Flowers was charged for solely one murder. *Id.* at 2236.

145. *Id.* at 2245.

146. A breakdown of the first four trials and respective strikes by racial breakdown is provided in the Appendix—data of prospective jurors for the fifth trial is not available. *See Appendix infra*. The seated “jury was composed of nine white jurors and three black jurors.” *Id.* at 2237.

out of forty-eight Black prospective jurors.¹⁴⁷ Despite numerous objections by defense counsel, the trial judge identified only one of these strikes as racially motivated.¹⁴⁸ This is despite Evans not once, but twice, using *all* of his available peremptory strikes *solely* to strike Black jurors, and on two other occasions striking all of the prospective Black jurors due to their small numbers.¹⁴⁹ Flowers appealed each conviction, and the Mississippi Supreme Court reversed each conviction except the sixth, finding by the third trial that “[t]he instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.”¹⁵⁰

Flowers reaffirms *Batson*’s two critical components: (1) a prosecutor’s peremptory strike history may be used as evidence by the defendant in establishing a prima facie case of racial bias, and (2) the front line guarding against racially discriminatory strikes remains the trial judge.¹⁵¹ The latter is of particular import given any appellate review of a *Batson* review is highly deferential to the trial court.¹⁵²

Curtis Flowers’s attorneys offered four categories of evidence to prove discrimination:

(1) the history from Flowers’ six trials, (2) the prosecutor’s striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor’s dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor’s proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial.¹⁵³

Justice Kavanaugh, writing for the majority, held that the totality of this evidence warranted a reversal due to the trial court’s clear error.¹⁵⁴ In so

147. *Id.* at 2236–37.

148. In the second trial, the trial judge found that the race-neutral reason the prosecution offered was fabricated, and the “*Batson* challenge” by Flowers was sustained. *Id.* at 2236.

149. In the third trial, Evans used all fifteen available peremptory strikes to strike fifteen prospective Black jurors. *Id.* at 2236. One Black juror was seated only “after the State ran out of peremptory strikes.” *Id.* at 2237. This pattern repeated in the fourth trial, where all eleven available peremptory strikes were used against Black jurors. *Id.*

150. *Id.* at 2237.

151. *See id.* at 2243 (“[D]efendants may present: statistical evidence about the prosecutor’s use of peremptory strikes [T]he job of enforcing *Batson* rests first and foremost with trial judges.”).

152. *Id.* at 2244.

153. *Id.*

154. *Id.* at 2251.

doing, Justice Kavanaugh asserted: “[W]e break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.”¹⁵⁵

The Court’s repeated assertions that *Flowers* is an extraordinary case undercuts its reinforcement of *Batson*.¹⁵⁶ Indeed, the facts in *Flowers* are not extraordinary, particularly in the deep south or any smaller jurisdiction divided along racial lines.¹⁵⁷ History proves *Flowers* is not unique—disparate questioning and weighty statistical evidence of discriminatory strikes against Black jurors were also present in *Miller-El*, decided by the Court almost fifteen years prior.¹⁵⁸

In his concurring opinion, Justice Alito highlighted the fault line of *Batson*—racially discriminatory methods during jury selection may result in “racially neutral” explanations accepted by the trial court. He wrote that “another prosecutor in another case in a larger jurisdiction” could give the same rationalizations as the State in *Flowers*, and this would be sufficient, ignoring the methods by which the prosecution took to get the information in the first place and that this information did not produce same or even similar results across Black and white prospective jurors.¹⁵⁹ Prosecutorial explanations for peremptory strikes may thus appear, at the outset, to be convincingly race-neutral; however, those explanations may be thinly-veiled proxies for race, the result of racially discriminatory methods, or both.¹⁶⁰

155. *Id.*

156. *Id.* at 2235, 2251; *see also id.* at 2251 (Alito, J., concurring) (“As the Court takes pains to note, this is a highly unusual case.”).

157. *See* Frampton, *The Jim Crow Jury*, *supra* note 12, at 1623 (“[R]ace-based exclusion from jury service . . . has been central to criminal adjudication throughout American history. It remains so now.”).

158. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 235–36 (2005) (asserting there was sufficient evidence to support defense counsel’s *Batson* challenge due to prosecutor’s extensive jury panel shuffling, incomparable strikes between white and Black jurors, and exclusion of 91% of eligible Black jurors).

159. *Flowers*, 139 S. Ct. at 2251–52 (Alito, J., concurring). Beyond the blatant historical statistical evidence of racial discrimination, “the State engaged in dramatically disparate questioning of black and white prospective jurors. And it engaged in disparate treatment of black and white prospective jurors . . .” *Id.* at 2251.

160. *See* Thompson, *supra* note 30, at 117 (explaining reasoning is not often race-neutral due to various socio-economic factors and “involve[ment] in the criminal justice system . . . and living or working in a high crime area,” which are racially coded).

The acceptance of these strikes results in effectively voiding—or, more cynically put, validating—the original discriminatory conduct.¹⁶¹

The problem with *Batson*, then, is it ignores the larger, systemic effect of racism and implicit biases entirely, focusing on curing or eliminating racism which expresses itself loudly either in the instant or cumulative effect.¹⁶² This does not consider how racism has changed over the three decades since *Batson* was decided.¹⁶³

The courts' approach to *Batson* challenges misses the small kernel of truth that underlies race-based strikes: representation does, in fact, matter.¹⁶⁴ And it should. As peers to the defendant, prospective minority jurors' racial identity gives them relevant experience by which they can judge a witness, view the evidence, assess culpability, and more.¹⁶⁵ Research has shown that diverse juries are vitally important in order to combat unconscious biases.¹⁶⁶ "[A]ll-white jur[ies are] more likely to convict a black defendant"

161. See Hoffman, *supra* note 37, at 139 ("Peremptory challenges mean that we have concluded it's just too hard to answer all those icky questions about bias, so let's just let the lawyers exclude a few jurors without having to convince us those jurors are actually biased.")

162. For example, the written policy manual "Jury Selection in a Criminal Case," which mandated "a formal policy to exclude minorities from jury service," was the root of the *Miller-El* cases. *Miller-El*, 545 U.S. at 264 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 334 (2003)). Though written in 1968, these policies remained available to the District Attorney's Office through the *Miller-El* trial in 1989. *Miller-El*, 545 U.S. at 264–65.

163. Racism has shifted over the decades, from overt displays to subtlety, and is arguably now even more pervasive:

The nature of this bias has evolved somewhat over the decades. For some, it has shifted from being conscious and on the surface to a phenomenon that is more subtle, yet still pervasive. Psychologists believe racism among whites still exists in modern America, but the manifestation of bias has changed. Overt racism is frowned upon in most white social circles, leaving the expression of racial ideations to occur in more subtle or "acceptable" manners. One such "acceptable" manner is to oppose social policies . . . which are designed to lead to equality.

Francis, *supra* note 5, at 333. This perspective of racism as a thing of the past also ignores how subtle racism "can be as insidious as the older traditional form of discrimination." Page, *supra* note 14, at 185.

164. See Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U.L. REV. 777, 798 (1994) ("To the extent that persons of color can contribute points of view that may not be readily apparent to majority jurors, the deliberative process may be substantially fairer and wiser.")

165. See Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1038 (2003) (arguing lack of diversity on jury panels creates a myopic perspective without "differing life experiences and potentially differing expectations and predispositions that can influence the assessments of the evidence, including judgments about witness credibility, that characterize the impartial jury . . .").

166. Without diverse juries, similar jurors are grouped together. Page, *supra* note 14, at 195–96. This can result in group bias, whereby individuals within that same group are judged less harshly than

for the same crime as a white defendant and are also more likely to convict a Black defendant entirely.¹⁶⁷ Given “demographic realities,” smaller numbers of African-American persons will be presented as prospective jurors, leading even a single peremptory strike to be a potential total elimination of any jury diversity.¹⁶⁸ Thus: “The desire to achieve a color-blind system actually thwarts efforts to obtain a racially balanced jury for the people who historically have had the most difficulty obtaining equal protection under the law.”¹⁶⁹ This same sensibility is present in Justice Thomas’s *Flowers* dissent.

B. *The Batson Paradox: Thomas’s Dissent in Flowers*

Justice Thomas’s dissent in *Flowers* has become somewhat infamous, in large part because his opinion is “genuinely outraged—not by the prosecutor but by his fellow-Justices . . .”¹⁷⁰ Justice Thomas, faced with what some would identify as a mountain of evidence of discriminatory intent, argued that the majority decision (authored by a fellow conservative, Justice Kavanaugh) “distorts the record of this case, eviscerates our standard of review, and vacates four murder convictions because the State struck a juror who would have been stricken by any competent attorney.”¹⁷¹ In short, Justice Thomas’s opinion of the case itself boils down to the simple defense that the State had provided “strong race-neutral reason[s]” for every strike, including those specifically at issue on certiorari.¹⁷²

those outside it. *Id.* Not only will “same-group” people view those outside more negatively, they “even selectively process information that will reinforce these views over information that does not.” *Id.*

167. Francis, *supra* note 5, at 298.

168. *See id.* at 299 (“[D]emographic realities place minority defendants at a greater disadvantage than other litigants.”).

169. *Id.* at 298.

170. Jeffrey Toobin, *Clarence Thomas’s Astonishing Opinion on a Racist Mississippi Prosecutor*, NEW YORKER (June 21, 2019), <https://www.newyorker.com/news/daily-comment/clarence-thomass-astonishing-opinion-on-a-racist-mississippi-prosecutor> [<https://perma.cc/3ZYR-DL17>] (emphasis added). *See also* Thomas W. Frampton, *What Justice Thomas Gets Right About Batson*, 72 STAN. L. REV. ONLINE 1, 4 (2019) (“Justice Thomas alleges the seven Justices in the majority were not engaged in a good-faith effort . . . [but] to ‘boost its self-esteem.’”).

171. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2253 (2019) (Thomas, J., dissenting).

172. *Id.* at 2255–56 (Thomas, J., dissenting). This is despite the overwhelming evidence which shows that even “the more overt variety of racially motivated exclusions . . . remain common.” Frampton, *The Jim Crow Jury*, *supra* note 12, at 1627.

As others have noted, Justice Thomas's systematic and, some would argue, willfully blind defense of the State, is misguided.¹⁷³ Justice Thomas's claims of strikes being race-neutral is incorrect—in the third *Flowers* case (*Flowers III*) before the Mississippi Supreme Court, the conclusion that there were multiple *Batson* violations was unanimous.¹⁷⁴ The decision was a plurality only because one justice did not believe the violation should result in a new trial, not because she disagreed that a violation occurred.¹⁷⁵ Additionally, Justice Thomas's argument that defense counsel similarly utilized discriminatory strikes—striking eleven white jurors and no Black jurors—is disingenuous. Mississippi grants the right of peremptory strikes to defendants only after the State has accepted a juror.¹⁷⁶ In *Flowers III*, because the State struck nearly all Black prospective jurors, the defense was left with only one Black juror to potentially strike in the first place.¹⁷⁷ How Thomas's statistical analysis is framed ignores the crucial underlying fact which “reveals much about the success of prosecutors' efforts to eliminate Black potential jurors and little about *Flowers*'s alleged anti-white biases.”¹⁷⁸

Though flawed in its extremes, Justice Thomas's dissent contains a core argument—that *Batson* has failed—which is valid.¹⁷⁹ As Justice Thomas argues, and many legal scholars would surely agree, *Batson* “ignores . . . the realities of racial prejudice.”¹⁸⁰ The reality to which Thomas refers is the widespread nature of racism—not just that it still exists, but that it remains deeply ingrained in our nation's culture and fabric.¹⁸¹ Though Justice Thomas's argument runs further, citing the nature of the peremptory strike “reflect[ing] no judgment . . . [I]nstead, [being] exercised based on intuitions that a potential juror may be less sympathetic to a party's case,”

173. See Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 4 (“Such jabs might land softer if Justice Thomas weren't so sloppy (or mendacious) with the statistical evidence in the case.”).

174. *Flowers v. State*, 947 So. 2d 910, 939 (Miss. 2007).

175. See *id.* at 939 (Cobb, J., concurring) (“I concur with this Court's judgment . . . I write separately because I do not agree that this case is reversible on the *Batson* issue alone.”).

176. Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 4.

177. *Id.* at 4–5.

178. *Id.* at 5.

179. See *id.* at 1–2 (contending “Justice Thomas's dissent . . . gets right many things about the *Batson* doctrine and race in the courtroom that the Court's liberal wing has proven loath to confront.”).

180. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2272 (2019) (Thomas, J., dissenting).

181. Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 6; see also Frampton, *The Jim Crow Jury*, *supra* note 12, at 1620 (“[A]cross American jury boxes today there are thousands of missing nonwhite jurors. Instead, these seats are filled by white jurors that, absent systemic racial exclusion, a nonwhite juror would be occupying.”).

his initial contention is essentially an argument of the reality and dangers of implicit bias.¹⁸² The roots of Justice Thomas's argument sprout from his fundamental "race pessimism, a belief in the perdurability and protean quality of racism."¹⁸³ Moreover, Justice Thomas's belief is strident that racism is a *national* problem.¹⁸⁴ By this, Justice Thomas means that racism is a past, present, and future reality, unconstrained by geography, which cannot be ignored—it is an inescapable fact that is embedded into every fabric of life, and even integration will not cure it.¹⁸⁵

This notion that racism permeates everything and everyone reflects "the paradox of *Batson*."¹⁸⁶ This paradox is defined by the Court's absolute rejection that race has any effect on a juror's perspective and decision-making capabilities in a courtroom and violations "have nothing to do with the reliability of verdicts" as a result; yet, there are justices who believe race is, in fact, "at least a minimally rational predictor . . . and who see no error of any kind in a *Batson* situation."¹⁸⁷ This draws a bold line down the middle of the Court, and is reflected in the *Batson* line of cases which refine its principles over and over again, exemplifying "the full paradox of *Batson*: the

182. *Flowers*, 139 S. Ct at 2272.

183. Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 6.

184. *See id.* at 7 ("The Court's sole southerner, Justice Thomas also seems to resent the implication that American racism is the exclusive provenance of backwoods southern whites."). Justice Thomas's seeming anger and disbelief at the majority opinion is an expression of this deep-seated anger, and perhaps resentment, at those on the Court "who believe that racism is either defeated or being diminished." Corey Robin, *Clarence Thomas's Radical Vision of Race*, *NEW YORKER* (Sept. 10, 2019), <https://www.newyorker.com/culture/essay/clarence-thomass-radical-vision-of-race> [<https://perma.cc/JV3S-XG5C>].

185. *See* Juan Williams, *A Question of Fairness*, *ATLANTIC* (Feb. 1987), <https://www.theatlantic.com/past/docs/politics/race/thomas.htm> [<https://perma.cc/BK19-JLPL>] (interviewing Justice Thomas, quoted as saying "There is nothing you can do to get past black skin . . . I don't care how educated you are, how good you are at what you do—you'll never have the same contacts or opportunities, you'll never be seen as equal to whites."); *see also* Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 6 ("Perhaps more than anyone in the Court's history, Justice Thomas 'believes that racism is so profoundly inscribed in the white soul that you'll never be able to remove it.'").

186. Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 *YALE L.J.* 93, 96 (1996); *see also* Morrison, *supra* note 23, at 21 ("What we have now is the worst of both worlds: persistent concerns about racial discrimination paired with a peremptory challenge that does not function properly.").

187. Muller, *supra* note 186, at 96; *see also* Alschuler, *supra* note 11, at 154–55 ("[W]e have captured the worst of two worlds, creating burdensome, unnecessary and ineffective jury controls at the front end of the criminal trial while failing to implement badly needed controls at the back end.").

Justices who would find harm in a *Batson* violation *cannot*; the Justices who *can* find harm in a *Batson* violation will not."¹⁸⁸

Justice Thomas's theory of *Batson* as a fundamental failure is supported not only by a surfeit of academic scholarship but also by statistical evidence.¹⁸⁹ In the thirty years since the Supreme Court decided *Batson*, North Carolina's Supreme Court has not found even one substantive violation, despite its review of seventy-four cases comprising of eighty-one *Batson* challenges.¹⁹⁰ In fact, "in all the 114 North Carolina appellate *Batson* cases involving minority jurors decided on the merits since 1986, the courts have *never* found a substantive *Batson* violation where a prosecutor has managed to articulate even one reason, however fantastic, for the peremptory challenge."¹⁹¹ Yet, the Court of Appeals did adjudicate two "successful 'reverse *Batson*' claims where the court found purposeful discrimination against *white jurors* challenged by black defendants."¹⁹² Thus, Justice Thomas's worst nightmare—*Batson* as a use *against* a Black defendant—is an actual reality.¹⁹³

This demonstrated that a lack of fair representation is critical when considered in relation to death penalty trials.¹⁹⁴ The likelihood of all-white

188. Muller, *supra* note 186, at 96.

189. See Frampton, *The Jim Crow Jury*, *supra* note 12, at 1621–22 (presenting data collected by investigative journalists into a study based in Louisiana, the largest ever on the use of peremptory strikes, which shows "[p]rosecutors wield both peremptory strikes and for-cause challenges to eliminate black potential jurors at an extraordinarily disproportionate rate, and they do so with greater frequency when prosecuting black defendants.").

190. Pollitt & Warren, *supra* note 20, at 1961. Further, the North Carolina Court of Appeals, deciding forty-three *Batson* claims, "has found a substantive . . . violation . . . in only one case." Pollitt & Warren, *supra* note 20, at 1962.

191. *Id.* at 1963 (emphasis added).

192. *Id.* at 1962 (emphasis added).

193. See *id.* at 1963–64 (presenting a twenty-year study by Michigan State University College of Law, finding in 173 capital cases, "prosecutors struck black jurors at 2.48 times the rate they struck all other jurors."). During Doug Evans's tenure as District Attorney, 418 trials have taken place. Of those 418, 225 trials have race and peremptory strike information recorded. In those 225 trials, "prosecutors struck black prospective jurors at almost 4½ times the rate they struck white prospective jurors In every instance, a racial disparity in strikes persisted." Will Craft, *Mississippi D.A. Has Long History of Striking Many Blacks from Juries*, APM REPORTS (June 12, 2018), <https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-juries/> [https://perma.cc/QL7R-25TV].

194. See generally Noelle Nasif et al., *Racial Exclusion and Death Penalty Juries: Can Death Penalty Juries Ever Be Representative?*, 27 KAN. J.L. PUB. POL'Y 147, 148 (2018) ("Convening a jury that is non-representative of the country's population has growing implications for death penalty trials."); see also Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 3 (1982) ("Capital jury selection practices . . . have taken on added importance in recent years . . . in view of the high potential for arbitrary and discriminatory

juries is particularly critical given “death penalty supporters are far more likely to be white, male, and conservative.”¹⁹⁵ Prosecutors will undoubtedly take this into account in utilizing their challenge, particularly post-*Uttecht v. Brown*,¹⁹⁶ which “gave prosecutors the right to challenge the seating of jurors who express any doubt about the death penalty,” a process whereby jurors are certified as *death qualified*.¹⁹⁷ What results is an increased likelihood (perhaps even a near certainty) that death penalty juries will be largely, if not entirely, white, male, and conservative, due to “[t]he increased ability to exclude minority jurors . . . creat[ing] inherently unconstitutional juries . . .”¹⁹⁸ “These [same] jurors [also] tend to be more prone to convict.”¹⁹⁹ Consequentially, “the chance that a person is convicted and sentenced to death because of race . . . rises dramatically.”²⁰⁰

In light of a “record so remarkable and disappointing,” it is no surprise, then, that Justice Thomas’s dissent in *Flowers* argues *Batson* should be abolished, but peremptory strikes should remain.²⁰¹ Justice Thomas’s argument stems from the perspective that *Batson*, and the cases that expanded *Batson*’s reach, are an attempt to regulate peremptory challenges, which should remain discretionary to preserve their true function: “I would return to our pre-*Batson* understanding—that *race matters* in the courtroom—and thereby return litigants one of the most important tools to combat prejudice in their cases.”²⁰² Thus, the peremptory challenge must remain for the sake of the Black defendant.²⁰³ As such, in Justice Thomas’s view, the defendant’s ability to pick, or simply not strike, prospective jurors of

application of the penalty” when “leaving the life or death decision to the unfettered discretion of the jury.”).

195. Nasif et al., *supra* note 194, at 148.

196. *Uttecht v. Brown*, 551 U.S. 1 (2007).

197. Nasif et al., *supra* note 194, at 148–49 (2018); *see also* Winick, *supra* note 194, at 5 (1982) (asserting “[t]he systematic exclusion of jurors generally opposed to the death penalty by prosecutorial use of the peremptory challenge may violate a defendant’s due process right to an impartial jury”).

198. Nasif et al., *supra* note 194, at 149; *see also* Winick, *supra* note 194, at 72 (“In view of the size and distinctive character of the segment of the community opposed to capital punishment, systematic exclusion . . . would seem to raise a prima facie violation of the sixth amendment cross-section requirement.”).

199. Nasif et al., *supra* note 194, at 153.

200. *Id.* at 149.

201. Pollitt & Warren, *supra* note 20, at 1964; *see* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2271 (2019) (Thomas, J., dissenting) (explaining “[t]he more fundamental problem is *Batson* itself”).

202. *Flowers*, 139 S. Ct. at 2271 (Thomas, J., dissenting) (emphasis added).

203. *See id.* (Thomas, J., dissenting) (arguing peremptory challenges allow the defendant to secure same-representation on the jury, thereby giving a greater chance for a fair trial).

their own race is a pathway to overcoming racial bias precisely because they can, in turn, strike hostile white jurors.²⁰⁴ Justice Thomas's vision of the peremptory strike as an almost revolutionary tool for a minority defendant to effectively "balance the scales" is laudable. However, it ignores the mathematical truth of "demographic realities" which, even when strikes are utilized equally by the defense and State, can *still*, and indeed "[are] far more likely," to ensure all-white juries.²⁰⁵

Batson and *Flowers* are separated by more than thirty years, and yet nothing has changed.²⁰⁶ *Batson*'s jurisprudence is an optimistically stark moment for the Court—a hope that, with its decision, racial discrimination in the courtroom will cease to exist.²⁰⁷ *Flowers* represents a much different mark for the Court—*Batson* simply has not worked, and "despite the optimistic tone of Justice Kavanaugh's majority opinion, it is an open secret that *Batson* ensnares only the 'unapologetically bigoted or painfully unimaginative attorney.'"²⁰⁸ This is the core of Justice Thomas's disgust with the *Flowers* opinion—" '[r]ace matters . . .' in a host of ways that the *Batson* doctrine is ill-equipped to confront," and the Court, exemplified by Justice Kavanaugh's optimistic opinion, refuses to acknowledge it.²⁰⁹ The question then becomes—what can be done to resolve this paradox? The

204. See *id.* at 2272 (Thomas, J., dissenting) (asserting the ability to choose for both the defense and the State "eliminate[s] extremes of partiality on both sides[.]" allowing for greater fairness and impartiality).

205. For example:

[A] pool of 36 qualified jurors, 67% of whom (24) are white and 33% of whom (12) are nonwhite. If both the defendant and prosecutors have 12 peremptory strikes, and may wield them in a racially discriminatory manner, the State can ensure an all-white jury in every case.

Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 5 n.25; see also Francis, *supra* note 5, at 299 ("[D]emographic realities place minority defendants at a greater disadvantage than other litigants . . .").

206. See Frampton, *The Jim Crow Jury*, *supra* note 12, at 1593 ("The Jim Crow jury never fell. Over a century later, state-sanctioned racial discrimination in jury selection remains ubiquitous, and the racial composition of juries continues to shape substantive trial outcomes.").

207. See Appleman, *supra* note 19, at 608 (arguing the *Batson* framework procedure positively affects both lawyers and the public by compelling "a normative framework of legal ethics . . . [which] foster[s] . . . nondiscrimination" within jury selection and encourages the moral aspirations of the bar).

208. Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 8.

209. *Id.* at 9–10; see also Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1811 (1993) (arguing the Supreme Court has "been unwilling to confront the pervasive effects of racism in any meaningful way."); Muller, *supra* note 186, at 98 ("For many years, the Supreme Court has struggled with the similar question of whether it is rational for an attorney to draw inferences about viewpoint from a prospective juror's race . . .").

answer ultimately boils down to whether the peremptory strike should be abolished entirely or retained with certain restrictions.²¹⁰ The ultimate unifying ideal is precisely what Justice Thomas has expressed—“race always matters in the courtroom,” with the disagreement arising as to precisely how to navigate such murky waters.²¹¹

C. *Peremptory Challenge in the Wake of Flowers*

Before any argument can be made to abolish or fundamentally change the peremptory challenge system, it is crucial to evaluate the arguments that support its continuation. Two reasons have been identified for the peremptory challenge system's use: (1) a litigant could simply dislike, with reason or not, a certain juror; and (2) a defendant could have reason to think a prospective juror may begrudge him or her, and exercise a challenge effectively in defense.²¹² Thus, “[t]he 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 far.”²¹³ This effectively breaks down into three factors, which are the primary benefits of the peremptory challenge system: (1) impartiality, (2) compensating for the challenge for cause, and (3) autonomy and participation.²¹⁴

These justifications simply do not withstand scrutiny. There exists an enormity of evidence to suggest counsel does not utilize challenges in search of a truly “impartial” jury, but rather[,] to eliminate those who are sympathetic to the other side,” precisely the *opposite* of impartiality.²¹⁵ It is

210. See Morrison, *supra* note 23, at 22 (“Proposals to improve the current regime fall into two camps: either a complete overhaul of jury selection procedures or a strengthening of the *Batson* framework.”).

211. Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 11.

212. Morrison, *supra* note 23, at 11.

213. *Id.* at 11–12.

214. *Id.* at 12–15. Other benefits include increased confidence in the jury selection system as a whole while also promoting confidence for the lawyers themselves by allowing them some measure of control over the process. This undoubtedly explains why “the vast majority of practicing trial lawyers in the United States want to continue using peremptory challenges in voir dire.” Griebat, *supra* note 6, at 329.

215. Barbara Allen Babcock, *Voir Dire: Preserving Its Wonderful Power*, 27 STAN. L. REV. 545, 551 (1975); see Frampton, *The Jim Crow Jury*, *supra* note 12, at 1595–96 (“Recent scholarship illustrates how the legacies of Jim Crow infect and permeate contemporary criminal justice—from surveillance and policing to mass incarceration and execution . . . [b]ut the enduring role of racial exclusion in jury selection—and the stark, outcome-determinative impact of this exclusion—remains undercontextualized and inadequately documented.”).

true peremptory strikes can function as a safety net from unsuccessful challenges for cause, but in actual practice may suffer from being “used too parsimoniously.”²¹⁶ Finally, the argument that the peremptory strike provides autonomy and participation has an essential root in the challenge’s history—the strike was for hundreds of years a right accorded solely to the defendant.²¹⁷ As the population has changed and as rights have been afforded to minority populations, the grant to the prosecutor of the right to strike limited that autonomy and participation as jury selection became a question not of a jury panel’s capability to provide a reliable verdict, but a game to win by selecting the best players for each side.²¹⁸

D. *Alternatives to the Peremptory Challenge System*

In response to the *Batson* paradox and what it represents for the peremptory challenge system as a whole, scholarship has increasingly focused on alternatives. These divide into two groups: those wishing to abolish the system entirely and those wishing to restrict/modify the existing system to “improve” the *Batson* doctrine.²¹⁹ Abolishing the system entirely is perhaps most often cited, with many arguing it is not a constitutional right and should, therefore, not be guaranteed to continue.²²⁰ However, with

216. Morrison, *supra* note 23, at 15. Moreso, “it hardly seems unreasonable to consider ways in which to improve the challenge for cause, rather than leaving it in an unsatisfactory state and relying on the peremptory challenge to mop up after it.” *Id.*

217. Francis, *supra* note 5, at 301.

218. See Akhil R. Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1174 (1995) (arguing lawyers have increasingly “aggrandiz[ed] their own roles in litigation at the expense of the jury” due to personal motives, leading to them “wrest[ing] control from the *whole* people, embodied in the jury idea”); see also Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 419 (2010) (“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. . . . [T]he prosecutor should ‘take the high road’ and waive peremptories.”). *But see* Appleman, *supra* note 19, at 608 (“By fostering a nondiscrimination norm as a part of the norm of professionalization, *Batson* improves the actions of both lawyers and judges during jury selection while at the same time constructing and compelling an aspirational code of ethics.”).

219. Morrison, *supra* note 23, at 22 (“Proposals to improve the current regime fall into two camps: either a complete overhaul of jury selection procedures or a strengthening of the *Batson* framework.”).

220. See Alschuler, *supra* note 11, at 209 (“Few peremptory challenges could survive even rational basis scrutiny under the Equal Protection Clause. These challenges are not worth saving.”); see also Marder, *Reflections Inspired by a Podcast*, *supra* note 14, at 625 (“Not only should *Batson* be abandoned, but peremptories should be eliminated.”); Melilli, *supra* note 15, at 503 (“It is time for the peremptory challenge to go. It will not be missed.”); Morrison, *supra* note 23, at 24 (“The only truly effective curb on racially motivated peremptory challenges is to eliminate them entirely.”).

support from counsel and judges on both sides of the aisle, it seems unlikely such turnover will occur.²²¹

Other scholars disagree with the notion that the peremptory challenge system should be eliminated entirely. Perhaps most famous is Justice Thomas's argument²²² that *Batson* should not be eliminated, retaining the peremptory system as a way to provide, in particular, Black defendants the right to fight pervasive racism from which there is no escape—a perfect tool to balance the scales, one needing no modification.²²³ Justice Thomas's argument is the minority one—many scholars propose retaining the peremptory system with various modifications to ensure non-discriminatory practices as much as is possible. A simple proposal to refine *Batson* is to shift from a focus on pretext to one specifically geared to identifying intentional discrimination.²²⁴ Though the hardships in either “may be equivalent . . .[,] it is extremely difficult for defendants to show any given reason is pretextual . . .”²²⁵ Additional examples of these other alternatives include the blind peremptory challenge,²²⁶ congressional and/or legislative requirements for representative juries,²²⁷ expansion of challenges for cause,²²⁸ allowing for

221. See Morrison, *supra* note 23, at 25-26 (“[L]awyers are not likely to part with their challenges anytime soon.”). But see Hoffman, *supra* note 37, at 135-36 (“[T]rial lawyers love peremptory challenges and trial judges don’t. . . . When the robes go on, the bloom falls off the peremptory challenge rose.”).

222. See discussion *supra* Part II, Section B.

223. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2271 (2019) (Thomas, J., dissenting) (asserting the ability to choose for both the defense and the State provides a balance to both extremes, allowing for greater fairness and impartiality).

224. Polster, *supra* note 14, at 547-48.

225. *Id.* at 548.

226. The blind peremptory system suggests keeping the peremptory challenge the same except for identifying prospective jurors by number only. Jurors would be questioned by a written questionnaire only, with no ability to ask questions relating to “cognizable group status.” Scholars argue the blind peremptory system “frees the litigant to exercise more principled peremptory challenges.” Montoya, *supra* note 11, at 981; see also Griebat, *supra* note 6, at 324-25 (arguing the blind questionnaire process eliminates discrimination and provides more impartial juries).

227. Nasif et al., *supra* note 194, at 166.

228. See Morrison, *supra* note 23, at 15 (“[P]rocedures that excuse jurors neutrally (by the clerk of court, say).”). An example of an expansion to the challenge for cause in place of peremptory strikes would be the “inferable bias” challenge, granting the trial judge discretionary right to excuse a juror. This would require additional training for “judges[,] [who] must be sensitized to the signposts of discrimination.” Cavise, *supra* note 34, at 550.

judges to play a more active role in the peremptory process,²²⁹ and additional training for lawyers.²³⁰

Perhaps the most intriguing of these alternatives to the peremptory challenge system is the hybrid strike.²³¹ These are peremptory strikes that can "only be exercised after the ex ante articulation of a race-neutral and meaningful argument for exclusion."²³² This would require counsel to provide "meaningful reasons" without the *Batson* first step requirement.²³³ Effectively, counsel would still be allowed to make a peremptory strike but must presumptively explain why the prospective juror is not fit to serve.²³⁴ This "would enforce rationality and equal protection where it was previously lacking [by] . . . provid[ing] cover for impermissible racism and sexism."²³⁵ Whatever the method, it is clear the peremptory challenge problem, even when not used intentionally to discriminate, must be significantly reworked to combat those who argue the "existing Fourteenth Amendment jurisprudence may be even more infirm than cynics allege."²³⁶

IV. CONCLUSION

It is easy to blame this travesty on a single prosecutor from Mississippi. That would be a mistake. The brand of racism at work in this case is systemic. People believed Flowers was guilty for the same reason they believe in conspiracy theories like QAnon. Those who fear their cherished way of life is in jeopardy are predisposed to trust authority figures who embody their fear. . . . [I]n a brief statement released the day of [Flowers's] liberation, he

229. Cavise, *supra* note 34, at 549–50.

230. See Morrison, *supra* note 23, at 15 ("Bar associations could improve lawyer training so that they can conduct effective voir dire without offending prospective jurors."). As an example—in Texas, scholars have argued for a very specific individual peremptory challenge: "to provide a mechanism for merit-based jury selection," essentially a rejection of a "one-size-fits-all approach." Jury selection, thus, would be specific to individual cases. Though proposed solely in the civil context, this is an interesting argument that could also be considered for criminal trials—particularly with death penalty juries. Gonzalez, *supra* note 70, at 538–39.

231. Cover, *supra* note 128, at 360.

232. *Id.* at 360.

233. *Id.* at 378.

234. *Id.*

235. *Id.* at 379.

236. Frampton, *The Jim Crow Jury*, *supra* note 12, at 1627.

said that what happened to him is happening throughout Mississippi and across America. Tragically, he's right.²³⁷

As the State of Mississippi now apparently agrees, it is time, after six tries, to admit that Curtis Flowers could not be given a “fair trial.”²³⁸ In its motion to dismiss, the Attorney General's office made no mention of the reasoning for why the Supreme Court vacated the sixth trial's conviction, the numerous complaints against prosecutor Doug Evans, the shadowy history of the investigation into Flowers in the first place, or the dark, racial bias inherent to the case's history; instead, the motion focused on the *current* lack of evidence to prosecute Flowers a seventh time.²³⁹ The State recognized “there is no key prosecution witness that incriminates Mr. Flowers who is alive and available and has not had multiple, conflicting statements in the record,” that “the only witness who offered direct evidence of guilt recanted,” and that there were “alternative suspects with violent criminal histories, as well as possible exculpatory evidence not previously considered.”²⁴⁰

What does this mean for Curtis Flowers, a man who has been through six trials, convicted and sentenced to death multiple times, and spent a total of 23 years in prison only for the Attorney General's office to file for dismissal? A man who was given conditional release under house arrest, limiting his freedom while he waited for the Attorney General's office to decide if it would try him for a seventh time?²⁴¹ Flowers's wait lasted for several months until September 4, 2020, when the Order of Dismissal of

237. Alan Bean, *After 23 Years In Prison, Curtis Flowers is Free*, BAPTIST NEWS GLOBAL (Sept. 5, 2020) <https://baptistnews.com/article/after-23-years-in-prison-curtis-flowers-is-free/> [<https://perma.cc/DU3X-SKJ9>].

238. Elliott C. McLaughlin, *Curtis Flowers Posts Bail After 23 Years and 6 Trials That Ended in Mistrial or Overturned Convictions*, CNN (Dec. 23, 2019), <https://www.cnn.com/2019/12/16/us/mississippi-curtis-flowers-bail-await-seventh-murder-trial/index.html> [<https://perma.cc/W8LU-EH64>]. Judge Joey Loper granted the Mississippi Attorney General's motion to dismiss the case. *Id.* Parker Yesko, *It's Over: Charges Against Curtis Flowers Are Dropped*, APM REPORTS (Sept. 4, 2020), <https://www.apmreports.org/episode/2020/09/04/charges-against-curtis-flowers-are-dropped> [<https://perma.cc/L3T8-FZ3L>] [hereinafter Yesko, *It's Over*].

239. Motion of the State of Mississippi to Dismiss the Indictment Against Curtis Giovanni Flowers at 2, *State v. Flowers*, No. 2003-0071-CR (5th Cir. Sept. 4, 2020).

240. *Id.*

241. Elliott C. McLaughlin, *supra* note 238.

Indictment with Prejudice was finally signed, ending a "legal odyssey"²⁴² for all involved and a legal tragedy for Flowers himself.²⁴³

What does this mean for the prosecutor of all Flowers's trials, Doug Evans? A prosecutor whose history of peremptory strikes covers twenty-six years, with Black Americans struck "at nearly 4.5 times the rate [Evans and his assistant district attorneys] struck white ones."²⁴⁴ Collectively, the Mississippi Supreme Court and the U.S. Supreme Court found Evans guilty of prosecutorial misconduct four times.²⁴⁵ Evans's history of what some—and what I—would call open racial bias led to Mississippi's National Association for the Advancement of Colored People (NAACP) filing a civil rights lawsuit against Evans.²⁴⁶ In a darkly ironic twist, this lawsuit was dismissed on the same day Flowers became officially free.²⁴⁷ Despite multiple courts acknowledging Evans's problematic pattern of bias, his position remains as good as it ever was. He is still chief prosecutor, reelected after running unopposed, and, despite multiple complaints filed against him with the Mississippi Bar Association, remains "a lawyer in good standing" who "has not been the subject of any public disciplinary action."²⁴⁸

Evans's lack of discipline does not come as a surprise; in fact, it is representative of the problem with the peremptory challenge system itself.²⁴⁹ Evans is not the first prosecutor identified with a long history of racial bias in jury selection, nor will he be the last. What Evans can be—ideally—is an example of "how flawed the system is. . . . 'Evans is not an exception. He's just an extreme example of what's really wrong with the system in terms of holding prosecutors accountable.'"²⁵⁰ However, what Evans will be—without acknowledgment of systemic racism in the criminal

242. Yesko, *It's Over*, *supra* note 239.

243. Order of Dismissal of Indictment with Prejudice, *State v. Flowers*, No.-2003-0071-CR (5th Cir. Sept. 4, 2020).

244. Parker Yesko, *Judge Dismisses Lawsuit Against DA Doug Evans*, APM REPORTS (Sept. 11, 2020), <https://www.apmreports.org/story/2020/09/11/judge-dismisses-lawsuit-against-doug-evans> [<https://perma.cc/NW4U-DFE5>] [hereinafter Yesko, *Judge Dismisses Lawsuit*].

245. See Appendix *infra*.

246. Yesko, *Judge Dismisses Lawsuit*, *supra* note 245.

247. *Id.*

248. Parker Yesko, *Will Doug Evans Face Accountability?*, APM REPORTS (Oct. 14, 2020), <https://www.apmreports.org/story/2020/10/14/will-doug-evans-face-accountability> [<https://perma.cc/GJV5-92WZ>]; E-mail from Office of General Counsel, The Mississippi Bar (on file with author).

249. Yesko, *Will Doug Evans Face Accountability?*, *supra* note 249.

250. *Id.*

justice system—is an example of how the peremptory challenge system is a destructive echo chamber.²⁵¹

It would be a shame, then, if *Flowers* did not signal the beginning of an attempt to find a way out of the *Batson* paradox. *Flowers* is striking in the Court's continued resistance to address the gulf of uncertainty the peremptory challenge is beset by, but we are *still* left with one question: what do we do with the pretextual problem? Some scholars believe it is an inexorable facet of any peremptory challenge system due to the nature of implicit bias, and yet others believe that the system can be refined in such a manner as to reduce any ill-effects. For the former, the entire system must begin with a clean slate, such as any can be achieved; for the latter, it simply is not worth throwing the baby out with the bathwater. Inevitably, this boils down to a question of cost—is the system worth protecting in that its benefits outweigh its costs?

In *Georgia v. McCollum*,²⁵² Justice Thomas foresaw the peremptory collapse post-*Batson*: “black defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.”²⁵³ Justice Marshall's concurrence in *Batson* understood the same reality—*Batson* was perhaps necessary for the immediate need to solve outrageously blatant racism in the courtroom, but the decision was limited in that it could never solve it completely.²⁵⁴ For Justice Thomas, *Batson*'s enforcement would inevitably lead to a crisis point of racism and the courtroom. This was, and is, due not just to peremptory strikes, but the jury selection process as a whole.²⁵⁵ However, where

251. Without attorney discipline, in particular *public* disciplinary action, there is no incentive keeping Evans, or any other prosecutor, on the right side of the line. It certainly does not keep any counsel from exercising implicit biases by offering “neutral” reasons. This results in a system depending on self-regulation, which has already proven itself time and time again to be untenable. See Kayley Viteo, *Ethics in an Echo Chamber: Legal Ethics & the Peremptory Challenge*, 11 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 90, 99 (2020) (“This is not ethics in practice, it is ethics in an echo chamber.”).

252. *Georgia v. McCollum*, 505 U.S. 42 (1992).

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

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

255. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2262 (2019) (Thomas, J., dissenting) (arguing the use of statistics by the majority belies the fundamental reality that Winona, Mississippi is a small town, and the pool of potential jurors was large but interrelated, and many jurors were struck for cause). As Justice Thomas notes in his *Flowers* dissent, challenges for cause also play a crucial role in the

Justice Thomas sees cause and strikes such that "[a]ny reasonable prosecutor"²⁵⁶ would make, the inadequacy of his proposal to end *Batson*-type inquiry is made clear by the intractable facts of *Flowers*. Those facts demonstrate the system's benefits do not and cannot outweigh its costs. In an adversarial system guaranteeing the right to a fair trial, how can such a system *fairly* produce even one instance of a man being tried six times for the same crime? *Flowers* tells us decisively that there is a fundamental, uneven balance to jury selection warranting, at minimum, eradicating the peremptory challenge system as a whole.²⁵⁷

The argument for abolishing the peremptory strike, though made by many scholars, should neither be a simple nor easy solution by any imagination. In making this argument, I do so with the understanding that this must entail more than merely not allowing the use of the peremptory challenge. It must also account for Justice Thomas's legitimate view that race matters and involve "a candid reckoning with racism's stubborn intractability."²⁵⁸ This includes evaluating the interplay between Black defendants and American juries, particularly when said jury is deciding on the death penalty.²⁵⁹ Thus, while Justice Thomas's dissent in *Flowers* goes to lengths which can be described as nonsensical, it should also "serve as an invitation for creative thinking about what a 'fair trial' means today."²⁶⁰

makeup of juries. *See id.* (Thomas, J., dissenting) ("Before peremptory strikes even started, the venire had gone from 42% to 28% black.").

256. *Id.* at 2263 (Thomas, J., dissenting).

257. *See* Erin T. Campbell, *Challenges Under Batson: If We Can't Get It Right, Perhaps We Shouldn't Get It at All*, 40 S.U.L. REV. 551, 565 (2013) ("[N]o tradition should continue if it does not serve justice efficiently, effectively, and lawfully. Perpetration of injustice derogates, and exists contradictory to, the justice system.").

258. Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 16.

259. *See generally* Nasif et al., *supra* note 194, at 148 ("Convening a jury that is non-representative of the country's population has growing implications for death penalty trials.").

260. Frampton, *What Justice Thomas Gets Right About Batson*, *supra* note 170, at 16. In contemplating what a fair trial might look like in a world without peremptory challenges, we can rely on two goals: impartiality and diversity. Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1871–73 (2015) (discussing how to achieve and balance two of the competing goals of jury selection). The Sixth Amendment guarantees the right to an impartial jury, and "the Supreme Court has interpreted the Sixth Amendment to encourage a diverse jury." *Id.* at 1871. Though "[a] racially diverse jury does not necessarily equate to an impartial jury," a systematic push for diversity in jury selection will abate pervasive discrimination and lead to increasingly more impartial juries due to "a group containing enough variety of life experiences to add to the richness of understanding of the case and to deliberations." *Id.* at 1871, 1873. Acknowledging the way in which peremptory challenges obstruct impartiality, and removing them as a possible method of jury selection will "provide a means for eradicating discrimination during jury selection . . ." Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1047 (1995).

Calling for the abolition of the peremptory challenge system is undoubtedly a controversial argument to make. As those who support it constantly state, it is revered as a tool for counsel during trial. However, its history is fraught when compared to today's implementation—it is now granted to defendants and prosecutors alike, its application entirely rife with frustration, and any attempts to provide remedies for discrimination fractured across a racial divide. Though the Court would like to believe *Batson* has solved the problem of racially motivated jury exclusion, “the practice has been central to criminal adjudication throughout American history [and] . . . remains so now.”²⁶¹ Contrary to Justice Thomas's view, the peremptory system, regardless of *Batson*'s attempted fixes and beyond, works *only* for white prospective jurors and against anyone else. We must, therefore, move forward with a system that produces juries of “peers” by random selection,²⁶² representing the diverse experiences and lives of the criminal defendants in the nation's courts, with the shared goal of a truly fair trial for *all*.

261. Frampton, *The Jim Crow Jury*, *supra* note 12, at 1623.

262. See Tetlow, *supra* note 260, at 1939–40 (“A system of random selection better protects the basic democratic principle of citizen participation in juries without interference from a process designed to weed out bias More random selection would create juries that represent the public . . .”).

V. APPENDIX

Breakdown by race of prosecutorial peremptory strikes per trial.

	PROSPECTIVE JURORS			STRIKES USED	STRUCK JURORS		FINAL JURY		TRIAL RESULT	RESULT ON APPEAL
	<i>Black</i>	<i>White</i>	<i>Total</i>		<i>Black</i>	<i>White</i>	<i>Black</i>	<i>White</i>		
#1	5	31	36	11 ²⁶³	5	6	0	12	Convicted, death sentence	Reversed, Miss. Sup. Ct. - prosecutor misconduct
#2	5	25	30	7 ²⁶⁴	5 ²⁶⁵	2	1	11		
#3	17	28	45	15	15	0	1	11		
#4	16	20	36	11	11	0	5	7	Mistrial	N/A
#5	<i>No data available.</i>						3	9		
#6	6	20	26	6	5	1 ²⁶⁶	1	11	Convicted, death sentence	Vacated, U.S. Sup. Ct. - Batson violations
T O T A L	48	124	173	50	41	9	11	61		

263. *Batson* Challenge - JURY OUT at 233–35, *State v. Flowers*, CR-97-369 (Cir. Ct. Lee Cnty. 1997).

264. Selection of Jury - JURY OUT at 1362–63, *State v. Flowers*, CR-97-372 (Cir. Ct. Harrison Cnty. 1999).

265. Prosecutor Evans attempted to strike five Black jurors, but a *Batson* challenge for one juror was sustained and he was allowed on the final jury panel. Selection of Jury - JURY OUT at 1362–63, *State v. Flowers*, CR-97-372 (Cir. Ct. Harrison Cnty. 1999).

266. Craft, *supra* note 193.