Dear Colleagues,

Thank you so much for taking the time to read a draft of my current project. I very much look forward to our discussion, and to learning from you all!

Cheers,
Daniel

FACILE RACIAL JUSTICE

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ABSTRACT

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

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

Thus, this Article urges caution before scholars trumpet and policymakers adopt proposals to eliminate peremptory strikes as a racial justice measure. In sounding this cautionary note, this Article hopes to serve as a broader warning against "facile racial justice," where one looks to simple solutions to address discrimination without adequately considering the complexities of race and racial bias underlying the problem. Eliminating peremptory challenges may seem like a surefire way of addressing more systemic issues of racism, but in an attempt to address one problem, the solution may well exacerbate others.

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INTRODUCTION

Racial discrimination in jury selection seems an intractable problem.[1] Despite it being unconstitutional to strike a juror because of their race,[2] studies from jurisdictions across the country show that peremptory challenges—challenges that do not require the prosecutor[3] to give any justification for removal[4]—are disproportionately used to exclude people of color, particularly Black people, from juries.[5] For decades, scholars and judges have bemoaned the problem of racial discrimination in jury selection, leading many to advocate for getting rid of peremptories altogether.[6] Recently, several States have considered various policy solutions in an effort to address the problem, ranging from strengthening the *Batson*[7] inquiry to better detect racial bias in the use of peremptory strikes, to more radically, jettisoning peremptory challenges altogether.[8] And in a first for the Nation, on January 1, 2022, Arizona

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[1] *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) ("[T]he use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensure More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077 (2011) ("[V]irtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials.").

[2] *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that striking jurors because of race violated the Equal Protection Clause of the Fourteenth Amendment).

[3] This Article focuses on criminal trials and the discriminatory use of peremptory strikes by prosecutors. Whether or not the concerns articulated in this Article play out the same in the civil context or when peremptory challenges are exercised by criminal defendants is beyond the Article's scope.

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

[5] *See, e.g.*, Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201, 239-241 (2021) (recalling various studies that have demonstrated persistent racial discrimination in jury selection); Whitney DeCamp and Elise DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. OF RESEARCH & CRIME 3 (2020) (conducting a study showing racial disparities in the use of peremptory challenges in Mississippi).

[6] *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 786 ("Peremptory strikes, and criticism of the permissive constitutional framework regulating them, have dominated the scholarship on race and the jury for the past several decades793-97 (2020) (noting racial disparities in the use of for-cause challenges."); *id.* at n.1 (collecting articles).

[7] Batson v. Kentucky, 476 U.S. 79 (1986).

[8] Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 CHI-KENT L. REV. 65 (2023) (discussing how different States have approached the problem of curbing the discriminatory use of peremptory challenges); Thomas Ward Frampton

became the first State to eliminate the peremptory challenge.[9] Many praised Arizona's move, heralding it as "a bold new experiment to limit racist convictions."[10]

This Article complicates the racial justice narrative surrounding the elimination of peremptory challenges.[11] Of course, eliminating peremptory strikes will end the discriminatory use of peremptory strikes—there will be no more strikes to wield. Therefore, getting rid of peremptories "has the virtue of simplicity."[12] But this Article suggests that eliminating peremptories will not be the boon for racial justice that many scholars and policymakers have suggested for at least four reasons.

First, there is the question of whether peremptory elimination will actually affect the racial composition of juries. There is reason to be skeptical. As the literature explains, there are other factors in the jury formation process that lead to the underrepresentation of people of color in the venire[13] (for example, juror qualification laws and the way venire lists are compiled), which in turn skew the racial makeup of the petit jury.[14]

Second, racism is adaptive, and there is reason to think that in the absence of peremptory strikes, the discrimination will move to other points in the jury selection process. [15] For instance, data show that for cause challenges—where the prosecutor gives a reason to exclude a juror that a judge

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& Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1. (2024) (same).

[9] *See infra* Part II.

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

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

[12] Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, *supra* note 27 at 101.

[13] The venire is the "panel of persons selected for jury duty and from among whom the jurors are to be chosen." BLACK'S LAW DICTIONARY (11th ed. 2019).

[14] *See, e.g.*, Mary R. Rose, Raul S. Casarez & Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378, 400-01 (2018); Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 103 (2019).

[15] *See, e.g.*, Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239 (2016); Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal*

accepts as disqualifying[16]—are also disproportionately used to exclude jurors of color.[17] Indeed, many reasons that prosecutors give for a cause challenge, such as negative interactions with law enforcement, are racially coded and therefore lead to the disparate exclusion of Black people and other people of color.[18] Doing away with peremptory challenges does not address the mindset that leads prosecutors to discriminate in the first place. This matters when considering whether the elimination of peremptory strikes is a win for racial justice.

Third, before championing the elimination of peremptory strikes as a racial justice win, it is important to consider what is lost. Thirty years ago, Professor Charles Ogletree urged us to "just say no" to proposals to eliminate peremptory challenges.[19] Ogletree's reasoning was straightforward: eliminating peremptory challenges risked harming defendants. As he explained: "Absent the peremptory challenge, some defendants may find themselves facing jurors who should not have been empaneled, jurors whom they hate or fear or believe on some arguably reasonable grounds to be seriously biased

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Jurisprudence, 110 CALIF. L. REV. 681, 709 (2022); Angela Onwuachi-Willig, *The Boundaries of Whiteness: From Till to Trayvon*, in CARVING OUT A HUMANITY: RACE, RIGHTS, AND REDEMPTION, 332 (eds. Janet Dewart Bell & Vincent M. Southerland 2020) ("[T]he fact that race operates in different ways than it di din the past . . . does not mean racism is not present.").

[16] BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a for cause challenge as a "party's challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror").

[17] *See, e.g.*, Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, *supra* note 25 at 793-97 (noting racial disparities in the use of for-cause challenges).

[18] *See, e.g.*, Vida B. Johnson, *Arresting* Batson: *How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 408 (2016) (discussing the disqualification of jurors based on arrest records); Anna Offit, *The Character of Jury Exclusion*, 106 MINN. L. REV. 2173, 2173 (2022) ("In American jury trials, cause challenges and peremptory strikes can be caused to excuse otherwise eligible jurors based on their previous encounters with, or experience-based impressions of, the criminal justice system."); Elisabeth Semel, Dagen Downard, Emma Tolman, Anne Weis, Danielle Craig, & Chelsea Hanlock*, Whitewashing the Jury Box: How California Perpetuates the Exclusion of Black and Latinx Jurors*, BERKELEY L. DEATH PENALTY CLINIC, at vi (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf ("Prosecutors are trained to strike prospective jurors who have had or whose relatives have had a negative experience with law enforcement or are distrustful of the criminal legal system. They are, in other words, instructed to exploit the historic and present-day differential treatment of Whites and people of color, especially African Americans and Latinx people, by the police, prosecutors, and the courts.").

[19] Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994).

against them, but whom they are powerless to remove."[20] This Article explains that those who propose eliminating peremptory challenges often do not treat Ogletree's arguments with the gravitas they deserve.

Fourth, on top of the outcome-based problem with peremptory elimination that Ogletree raises, there is a separate issue grounded in autonomy that Ogletree did not discuss: eliminating peremptory strikes disempowers defendants in a system where they already have very little power.[21] Even if a defendant's use of a peremptory strike will not change the outcome of any individual trial, the *availability* of peremptory strikes gives defendants some agency in a proceeding designed to decide their fate and in a process that is wholly agency stripping. As other scholars have noted, there are a number of mechanisms in the prosecutorial process that disempower and silence defendants.[22] Eliminating peremptory strikes only exacerbates the problem. And in a society where criminal defendants are disproportionately people of color,[23] and in a system that is broadly acknowledged as being racially biased,[24] one cannot claim the elimination of peremptory challenges as a win for racial justice without also considering what criminal defendants *lose* by eliminating peremptory challenges.[25]

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[20] *Id.* at 1145.

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

[22] *See, e.g.*, Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1452-53 (2005); M. Eve Hanan, *Talking Back in Court*, 96 WASH. L REV. 493, 495-96 (2021); Bennett Capers, *Bringing Up the Bodies*. U. CHI. LEGAL F. 83, 86-97 (2022) (considering all the ways in which the criminal legal process silences defendants); Vida B. Johnson, *Silenced By Instruction*, 70 EMORY L.J. 309 (2020).

[23] *See* Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 824 (2014) ("The U.S. criminal justice system has a long history of disproportionately prosecuting and incarcerating people of color."). To be sure, the racial pathologies of the criminal legal system hurt White people too. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 444 (1994).

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

[25] The dynamics are not the same for the government. *See* Toni M. Massaro, *Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 561 (1986) (explaining that "the defendant's regard of the jury is simply more important

This Article explores the racial justice complexities of peremptory elimination over the course of three Parts. Part I briefly traces the origins of peremptory strikes and the relevant jurisprudence before turning to *Batson v. Kentucky*, the case where the Supreme Court held it is unconstitutional to strike a juror because of their race.[26] The Part then catalogues the calls from judges and scholars to eliminate peremptory strikes, including Justice Thurgood Marshall's warning in *Batson* that they only way to prevent the discriminatory use of peremptory challenges is to end the peremptory practice altogether.[27]

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

Part III asserts that the calls urging the elimination of peremptory strikes as an important racial justice measure are underdeveloped—the racial justice dynamics of peremptory elimination are much complicated than the conversations make it seem. Indeed, as this Part argues, there are measures other than eliminating peremptories that can address the problem of discrimination during jury selection that better protect the various racial justice interests. The Part concludes by drawing on the teachings of Professor Derrick Bell to warn against "facile racial justice"— where we reach for simplistic measures to solve the deeply entrenched, perhaps intractable problem of racial injustice in America without fully acknowledging the complexities underlying the problem.

To be clear, this Article does not outright dismiss the elimination of

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than is the state's. The state has repeated opportunities to enforce the penal code and hence to protect society; the defendant has only one day in court to protect his or her interests. The state argues on behalf of the public interest, which generally can be adequately served by favorable results over time as opposed to a favorable result in a particular case. If the state loses, it does not lose its liberty, as the defendant does if he or she loses").

[26] Batson v. Kentucky, 476 U.S. 79 (1986).

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

peremptory challenges as a potential solution to the problem of racial discrimination in jury selection, although this Article does believe there are better first order solutions if the goal is in fact racial justice. It does caution, however, that the conversation requires a nuance that has thus far been lacking. There needs to be careful consideration of the *full* panoply of racial justice implications that accompany the elimination of peremptory challenges before pursuing such a drastic remedy.[28] The racial justice interests surrounding peremptory elimination are complicated. Therefore, any proposal to abolish peremptory strikes should at the very least be sensitive to this fact.

I. THE INTENSIFYING CALLS FOR ELIMINATING PEREMPTORY CHALLENGES

Peremptories have been around "for nearly as long as juries have existed."[29] Although the practice can be traced back to the Roman Empire, like much of the U.S. jury system,[30] the American peremptory tradition was adopted from Medieval England.[31] The history of peremptories, though interesting, is unnecessary to rehash here.[32] For our purposes, it is sufficient to note that nearly all of colonial America permitted criminal defendants the use of peremptory challenges, whereas the use of peremptories by the prosecution was far less settled.[33] Thus, while by 1790 most States guaranteed criminal defendants peremptory challenges by statute, it would not be until the mid-to-late 1800s that most States would enact laws granting peremptory challenges to the prosecution.[34] Today, besides Arizona, "every state recognizes some form of peremptory challenge for both sides in criminal and civil cases."[35]

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

[29] *Id.* at 119 (Burger, C.J., dissenting).

[30] *See* Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 606-07 (2021).

[31] *See* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64. U. CHI. L. REV. 809, 823 (1997).

[32] For a detailed discussion of the history of peremptory challenges, see *id.* at 813-30.

[33] *See* Swain v. Alabama, 380 U.S. 202, 216-17 (1965); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 148-149 (Ballinger 1977).

[34] *See Swain*, 380 U.S. at 216-17.

[35] Hoffman, *supra* note 57 at 827.

Before Reconstruction, the use of peremptory challenges based on race was not really an issue given that many States legally prohibited racial minorities from serving on juries.[36] Yet after the Civil War and with the passage of the Fourteenth Amendment and Civil Rights Act of 1875, States needed to go back to the drawing board, as they were now prohibited from such open discrimination.[37] Peremptory challenges thus became an important tool of racial exclusion, working as "an incredibly efficient final racial filter."[38] And given the persistence of racial discrimination in the exercise of peremptory challenges, judges and scholars alike have advocated for their end. This Part catalogues those calls, detailing the race and non-race-based reasons given in support of peremptory elimination.

A. From Strauder *to* Batson

Before the ratification of the Fourteenth Amendment, Black people were legally prohibited from serving on juries in much of the United States.[39] To remedy this, the Civil Rights Act of 1875, designed to enforce the Fourteenth Amendment's promise, specifically forbade States from disqualifying people otherwise eligible for jury service based on race.[40]

A few years later in *Strauder v. West Virginia*, the Supreme Court confirmed what the law by then should have made clear: people of color "enjoy[ ] all the civil rights that under the law are enjoyed by white persons."[41] The Court therefore held that a West Virginia statute limiting jury service to white men violated the Fourteenth Amendment.[42] In so holding, the Court did not focus on the rights of the people of color who were unable to serve on West Virginia juries. Rather, the Court focused on the rights of Black criminal defendants facing trial, asking "how can it be maintained that compelling a colored man to submit to a trial . . . by a jury drawn from a panel from which the State has expressly excluded every man of his race . . . is not a denial to him of equal legal protection?"[43]

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[36] *Id.* at 827-28.
[37] *Id.* at 828-29.
[38] *Id.* at 828.
[39] *See* EQUAL JUSTICE INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION (2021), *available at* https://eji.org/report/race-and-the-jury/.
[40] *See* 18 U.S.C. § 243 ("No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude.").
[41] 100 U.S. 303, 306 (1879).
[42] *Id.* at 310.
[43] *Id.* at 309. As Professor Kenneth Nunn argues, the Supreme Court in *Strauder* "realized

Over a century would pass before the Court would hold in *Batson v. Kentucky* that prosecutors using peremptory challenges to strike jurors based on race violated the Fourteenth Amendment.[44] In so holding, the Court developed a new framework for how a criminal defendant can prove discrimination in the use of peremptory challenges.[45] The now well-known *Batson* framework has three parts. First, the defendant must make a prima facie showing that the prosecutor exercised their peremptory strikes based on race.[46] Second, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation" for the strikes.[47] Third, the judge must decide whether the defendant proved purposeful discrimination, including an assessment of whether the prosecutor's race-neutral reasons were pretextual.[48]

In reaffirming that the Fourteenth Amendment prohibits discrimination against a juror because of race, the *Batson* Court's analysis shifted its focus from the rights of the defendant that animated *Strauder* to the rights of the perspective juror and the community more broadly.[49] Post-*Batson*, the Court often frames its jury discrimination precedents around the harms to prospective jurors and by extension, to society, while largely ignoring the rights of defendants.[50] This shift in approach matters—peremptory strikes were originally designed to protect *defendants* from potential jurors' biases. Now, the Court's case law is trained at protecting *jurors* from *litigants*' biases.[51]

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

[44] Batson v. Kentucky, 476 U.S. 79, 96-98 (1986).

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

[46] *Id.* at 96-97.

[47] *Id.* at 97.

[48] *Id.* at 98

[49] *Id.* at 87.

[50] *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 407 (1991); Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019).

[51] Tetlow, *supra* note 43 at 1718 ("[T]he Court elevates the interests of potential jurors against being stereotyped above the interests of defendants and victims in a fair criminal justice system."); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?,* 92 COLUM. L. REV. 725, 728 (1992) (arguing that the Court's post-*Batson* jurisprudence "is better understood as chiefly vindicating the equal protection right of the excluded jurors, a right in which the defendant has a strong strategic interest but

In a concurrence in *Batson*, Justice Thurgood Marshall presaged that despite its best efforts, the Court could never prevent the discriminatory use of peremptory strikes, leading him to call for the end of peremptories.[52] In his words: "Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge," which was "both common and flagrant."[53] Justice Marshall believed that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal legal system."[54]

Time has proven Justice Marshall right. Discrimination in the use of peremptories has persisted despite the Court's efforts (best or otherwise).[55] Since *Batson*, studies from jurisdictions across the country have found racial disparities in how prosecutors exercise peremptory challenges.[56] Given the stubborn persistence of racial discrimination in jury selection, both judges and scholars have relied on Justice Marshall in support of their arguments to eliminate peremptories across the board.[57]

B. The Non-Raced-Based Calls for Peremptory Elimination

Since *Batson*, a growing chorus of scholars and judges have championed the elimination of peremptory strikes. And while their reasons vary, many center themes of racial justice. But before turning to the racial justice

no personal constitutional claim"); *see also Flowers*, 139 S. Ct. at 2273 (Thomas, J., dissenting ("Peremptory strikes are designed to protect against fears of partiality by giving effect to the parties' intuitions about jurors' often-unstated biases."). *Batson* would later be applied to criminal defendants' use of peremptory strikes. *See* Georgia v. McCollum, 505 U.S. 42, 59 (1992) (extending *Batson*'s holding to criminal defendants).

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

[53] *Id.*

[54] *Id.* at 107.

[55] This is despite Justice Kavanaugh's claim that "*Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants." *Flowers*, 139 S. Ct. 2242. *See* Bellin & Semitsu, *supra* note 19 at 1129 ("Unfortunately, there is little evidence that the primary guarantor of race-neutrality in jury selection, the three-part test set forth in *Batson v. Kentucky*, is equal to the critically important task it has been given.").

[56] *See, e.g.*, DeCamp & DeCamp, *supra* note 24 at 9-12 (2020); Semel, et al., *supra* note 38; Miller-El v. Dretke, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring).

[57] It's worth nothing that it was not until after Justice Marshall left the bench that the Court would "reverse" *Batson* and hold that the decision applies to use of peremptory challenges by criminal defendants, too. *See* Georgia v. McCollum, 505 U.S. 42 (1992).

arguments for eliminating peremptories, it's worth briefly capturing the three non-race-based arguments commentators have made in favor of elimination: partiality (independent of race), efficiency, and public confidence (again, independent of race).

1. Partiality

Putting race aside, one key reason why certain commentators have called for the elimination of peremptory strikes is an argument that strikes stack the deck.[58] This partiality concern was perhaps best articulated by Professor Albert Alschuler shortly after *Batson* came down. In asking whether it was "bedtime for *Batson*," Alschuler was resigned to the fact that "there appears no escape from [the] conclusion that Justice Marshall reached in [his] concurring opinion" concerning the need to eliminate peremptory strikes.[59] Alschuler's resignation was founded in the fact that prosecutors "use their peremptory challenges, not to secure impartial juries, but to secure juries likely to favor their positions."[60] Thus, while parties may rationally use peremptory challenges to advance their goal of winning, that is not necessarily compatible with the Sixth Amendment's command of impartiality.[61]

Professor Akhil Amar made a similar argument in support of ending peremptories, except he framed his argument in democratic terms. He explained that peremptory challenges "allow repeat-player regulars – prosecu-

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

[59] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 169 (1989).

[60] *Id.* at 203. Alschuler also explains, citing a study by Professor Hans Zeisel and Shari Seidman Diamond, that in attempting to stack the jurors, prosecutors' intuition about who or who not may favor their position is wrong—"prospective jurors whom government lawyers excluded were as likely to favor conviction as the jurors actually seated." *Id.*

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

tors and defense attorneys – to manipulate demographics and chisel an unrepresentative panel out of a cross-sectional venire."[62] Amar therefore concluded that peremptories should be "eliminated" to ensure the juries "represent the people, not the parties."[63] Thus, as this flavor of argument goes, parties use peremptory strikes to skew the jury rather than balance it. This reality militates in favor of peremptory elimination.

2. Efficiency

Efficiency issues have also been raised as a reason to eliminate peremptory challenges, and perhaps it's no surprise that judges have most forcefully raised this concern. For example, one judge argued that the current peremptory regime "unquestionably require[s] lawyers and judges to expend increasing amounts of time in litigating whether the reason given by the trial lawyer for striking the potential juror was not a 'pretext for discrimination.'"[64] As this judge saw it, the peremptory system requires judges to "devote[ ] more and more of [their] energy to sideshows and less and less to the merits of the case."[65] This all led the judge to conclude that "[t]he cost to society in the use of trial time for procedures which accomplish no justiciable purpose . . . is certainly [a] reason to abolish peremptory challenges."[66]

Other judges have said similar things. For example, another trial judge asserted that peremptories should "be banned as an unnecessary waste of time and an obvious corruption of the judicial process."[67] A New York Court of Appeals judge concluded that "[t]he proliferation of *Batson*-generated trial court colloquies" militated in favor of ending the peremptory practice.[68] A

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[62] Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995).
[63] *Id.*; *see also* Roberts, *supra* note 28 at 1510 ("The first critique is that to remove citizens from the jury in the absence of the kind of demonstrated bias that would justify a challenge 'for cause' is anti-democratic.").
[64] Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 420 (1992).
[65] *Id.* (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting) (quotation marks omitted)); *see also* United States v. Thompson, 827 F.2d 1254, 1263 (9th Cir. 1987) (Sneed, J., dissenting) (opining that the peremptory process is "time-consuming" and "encumbered" and therefore asserting that it might be better to eliminate the peremptory challenge as "preferable to the costs elaborate *Batson* litigation will impose").
[66] *Id.* at 421. D.C. Superior Court Judge Arthur Bennett also argued peremptories should be abolished to "conserve valuable judicial resources." Arthur L. Burnett, Sr., *Abolish Peremptory Challenges Reform Juries to Promote Impartiality*, CRIM. JUST., Fall 2005, at 26, 34.
[67] Minetos v. City Univ. of New York, 925 F. Supp. 177, 183 (S.D.N.Y. 1996).
[68] People v. Bolling, 79 N.Y.2d 317, 328–29, 591 N.E.2d 1136, 1144 (N.Y. 1992) (Bellacosa,

justice on the Supreme Court of Washington maintained that peremptories should be eliminated "to reduce wasteful administrative and litigation costs."[69] And an intermediate appellate court judge from Florida stated that the current peremptory system was "extremely difficult to administer and, in [his] view, not worth preserving."[70] In short, the cumbersome nature of the *Baston*-infused peremptory process has led many judicial commentators to conclude that peremptory strikes should be abandoned altogether.[71]

3. Public Confidence

A final non-race-based reason commentators give in support of eliminating peremptory strikes is that they undermine public confidence in the jury system.[72] To this point, one Colorado trial judge lamented that the peremptory system can lead to what he called the "balkanization" of the jury—"with six pro-prosecution jurors and six pro-defense jurors."[73] And even when a jury is not in fact balkanized, the judge worried that peremptory challenges "create the unmistakable impression that balkanization is the goal."[74] In this judge's opinion, the very idea of the jury the being balkanized undermines public confidence in the institution because the jurors who are excused will think they were excused because they were unbiased and that the lawyers simply wanted jurors who would be in their corner.[75]

Leading expert on the jury Professor Nancy Marder has made a similar point. She argues that "[a]lthough jurors are told that lawyers can exercise

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J., concurring).

[69] State v. Saintcalle, 112, 309 P.3d 326, 368 (Wash. 2013) (González, J., concurring).

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

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

[72] Indeed, Blackstone called peremptories "an arbitrary and capricious species of challenges." 2 WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 346 (Katz ed. 1979).

[73] Hoffman, *supra* note 57 at 866.

[74] *Id.*

[75] *Id.* at 867.

peremptories, and that they should not take it personally, it can still be demoralizing for jurors when they are excluded." [76] This demoralization undermines confidence in the jury system, Marder continues, because "the excluded juror misses the opportunity to be seen as a full citizen," and when "jurors are excluded from the jury, they feel like second-class citizens."[77] Thus the use of peremptories, according to Marder, can result in a broader distrust and therefore destabilization of the entire jury system.[78]

C. The Race-Based Calls for Peremptory Elimination

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

1. Inevitability

Scholars and judges have argued that peremptory challenges should be eliminated because so long as they are around, race-based discrimination is inevitable. There are two interlocking pieces to this inevitability argument: the current standard used to ferret out discrimination is ineffective and subject to manipulation. And relatedly, it is near-impossible to detect all racialized uses of peremptories, especially given what we now know about implicit and unconscious racial bias.

The first flavor of the inevitability argument begins with the notion that the standard the *Batson* Court set to remediate racial discrimination in the use of peremptory challenges was bound to be ineffectual. Justice Marshall made this very point in *Batson* when he pointed out that a defendant will only be able to prove racial discrimination under the standard the Court set if

[76] Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585, 1609 (2012)
[77] *Id.*
[78] *See id.*

the discrimination is "flagrant."[79] But even once a defendant clears this hurdle, Marshall continued, "trial courts face the difficult burden of assessing prosecutors' motives" and "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror" that "trial courts are ill-equipped to second-guess."[80]

Scholars and judges consistently maintain that Justice Marshall was right: "*Batson's* promise of protection against racially discriminatory jury selection has not been realized."[81] Some commentators argue that the problem is the *Batson* framework itself. For instance, in looking at step two of the framework—the requirement that the government provide race-neutral reasons for its strikes after the defendant has made a prima facie case, scholars have pointed out that "prosecutors regularly respond to a defendant's prima facie case of racially motivated jury selection with tepid, almost laughable 'race-neutral' reasons, as well as purportedly 'race-neutral' reasons that strongly correlate with race," which courts then accept.[82] Other commentators have objected that *Batson* requires defendants to prove intentional discrimination, which is generally "difficult to prove," and here, the difficulty is even more "pronounced" given that prosecutors have the opportunity "to muddy the waters by providing false justifications."[83] Then there is the awkwardness of the whole enterprise, as "[n]o judge wants to be in the position of suggesting that a fellow professional—whom the judge may have known for years—is exercising peremptory challenges in a discriminatory manner."[84] While the criticisms of *Batson* abound,[85] one scholar summed it up neatly: "The *Batson* doctrine has been rendered so ineffective a tool against

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[79] Batson v. Kentucky, 476 U.S. 79, 105 (1986) (Marshall, J., concurring).
[80] *Id.* at 105-06.
[81] Camille A. Nelson, Batson*, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008); *see also* Catherine M. Grosso, Barbara O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 KY. L.J. 651, 652-53 (2017).
[82] Bellin & Semitsu, *supra* note 19 at 1093.
[83] Jonathan Abel, Batson's *Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 720 (2018).
[84] Coombs v. Diguglielmo, 616 F.3d 255, 264 (3d Cir. 2010); *see also* Hon. Gregg Costa, *A Judge's Comments*, in FIXING *BATSON* (2022), https://www.americanbar.org/content/dam/aba/publications/litigation_journal/summer-2022/fixing-batson.pdf ("Judges don't like saying that lawyers discriminate. That aversion is unfortunate because it undermines the guarantee of equal protection, but it is understandable. Judges have relationships with lawyers who appear before them. In some jurisdictions, those lawyers are a source of votes and campaign funds. And judges favor collegial courtrooms free of personal criticisms. *Batson*'s failure to eradicate discrimination thus is largely a problem of judicial mentality and courage.").
[85] For a helpful summary of the various critiques of the *Batson* framework, see Abel, *supra* note 108 at 718-22.

racism . . . that *Batson* and its progeny have proven to be less an obstacle to discrimination than a roadmap to it."[86]

But Justice Marshall also explained that his concerns reached beyond "outright prevarication by prosecutors."[87] A "prosecutor's own conscious or unconscious racism may lead him easily to conclude that a prospective black juror" should be struck, and a "judge's own conscious or unconscious racism may lead him to accept" that strike.[88] Any prosecutor intent on discriminating can easily get away with it under the *Batson* framework—indeed, some prosecutor offices have even created guides on how to discriminate under *Batson*.[89] But even if one could fix the *Batson* framework to more easily catch the *intentional* discriminators, there is still the problem of those who discriminate *unintentionally* or unconsciously.

Scholars and judges therefore contend that there is no way to maintain a peremptory system that adequately checks for implicit bias.[90] Professor Anthony Page expands on this point, stating that it's a fact that people habitually and automatically categorize others by race and engage in unconscious race-based stereotyping.[91] Reviewing several psychological studies, Page explains that "[o]nce stereotypes have formed, they affect us even when we are aware of them and reject them."[92] As such, an "attorney exercising the peremptory challenge will be unaware of this biased information processing and so will be unaware of her . . . race-based discrimination."[93] In other words, "good

[86] Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 545; *see also* Hoffman, *supra* note 57 at 836; Marder, Batson v. Kentucky: *Reflections Inspired by a Podcast*, 105 KY. L.J. 621, 624 (2017); Alschuler, *supra* note 84 at 175.
[87] *Id.* at 106. Justice Breyer has echoed these points. *See* Miller-El v. Dretke, 545 U.S. 231, 266 (2005) (Breyer, J., concurring); Rice v. Collins, 546, U.S. 333, 342 (2006) (Breyer, J., concurring).
[88] *Id.* at 106. Justice Breyer echoed these points in his *Miller-El* concurrence and reiterated them in *Rice v. Collins*. *See* Miller-El v. Dretke, 545 U.S. 231, 266 (2005) (Breyer, J., concurring); Rice v. Collins, 546, U.S. 333, 342 (2006) (Breyer, J., concurring).
[89] *See, e.g.*, Bennett L. Gershman, *How Prosecutors Get Rid of Black Jurors*, SLATE, May 26, 2016, https://slate.com/news-and-politics/2016/05/how-prosecutors-get-away-with-striking-potential-black-jurors.html (describing some of the trainings used by prosecutor offices to circumvent *Batson* and remove Black people from juries).
[90] *See, e.g.*, State v. Holmes, 334 Conn. 221 A.3d 407, 411 (Conn. 2019) ("[T]he United States Supreme Court's landmark decision in *Batson v. Kentucky* has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias . . . .") (citation omitted)).
[91] Anthony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 184 (2005).
[92] *Id.* at 160.
[93] *Id.*

people often discriminate, and they often discriminate without being aware of it."[94] In light of the phenomenon of implicit and unconscious bias, Page, and others, believe that the "most extreme solution"—eliminating the peremptory—is the "best solution."[95]

2. Fairness & Faith

Scholars have also argued for the elimination of peremptory strikes by asserting that the disparate removal of people of color from juries hurts the fairness of the outcome of trials and undermines faith in the jury system more broadly. When Alschuler argued for eliminating peremptories, he asserted that abandoning peremptories would better allow for juries that reflect "the breadth of our communities rather than the group left over when lawyers had expended their peremptory challenges on pet hates."[96]

Unpacking Alschuler's statement further, studies have shown that having juries that reflect "the breadth of our communities" leads to more conscientious decision-making. "[R]acially-mixed juries ha[ve] longer, more thorough deliberations than all-White juries."[97] The argument therefore goes that if we want higher quality jury deliberations, then peremptories, which lead to more homogenous juries, should be eliminated.[98] And not only is the deliberative *process* more thorough when a jury is racially diverse, racially diverse juries have a *substantive* upside in that they also protect against racially biased outcomes. Studies show that the presence of even one Black person on a jury can affect the outcome in any one case.[99] Given this data, it

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[94] *Id.*

[95] *Id.* at 245. Former federal Mark Bennett similarly thought that abolishing peremptory challenges was the only way "to eliminate lawyers' tendency to strike jurors due to stereotype and bias." Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 167 (2010). But thinking ending the practice of peremptories was unlikely, Judge Bennett also proposed other measures to address implicit bias. *See id.*

[96] Alschuler, *supra* note 84 at 232.

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

[98] *See, e.g.*, Morrison, *supra* note 44 at 40.

[99] Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1019 (2012) ("The evidence regarding the impact of the jury pool on conviction rates is straightforward and striking: the presence of even one or two [B]lacks in the jury pool results in significantly *higher* conviction rates for [W]hite defendants and *lower* conviction rates for [B]lack defendants."); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremp-*

is argued that the elimination of peremptory strikes has the upshot of enhancing the process *and* substance of jury deliberations by clearing the way for more diverse juries.

There is also the perception of fairness point that commentators raise. For instance, Marder argues that "[i]f peremptories were eliminated, then juries would be more diverse. One benefit is that juries would then 'look more like America' and help the public have faith in the jury as an institution."[100] Given that the jury serves a "populist function," racially diverse juries will lead to more "community acceptance of verdicts."[101] When everyone can look to juries and see themselves reflected in those decisional bodies, then that is a visual demonstration of the fact that the institution is open to all, which in turns inspires confidence in its ability to operate fairly.[102]

3. Citizenship

A final racial justice reason to eliminate peremptories that commentators raise is that the disparate removal of Black people and other people of color from juries deprives them of an important badge of citizenship. In its post-*Batson* jurisprudence, in shifting its focus from the rights of defendants to the rights of the jurors, the Supreme Court has consistently declared that, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[103] Thus, when Black people and other people of color are routinely denied the right to jury service through the discriminatory use of peremptory

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tory Challenges, 76 CORNELL L. REV. 1, 5 (1990) ("Historical evidence and recent sociological data show that all-white juries are unable to be impartial in cases involving the rights of African-American defendants or crime victims."); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 71 (1993) ("[C]onviction rate studies show a decrease in conviction rates following changes in jury selection procedures that resulted in the inclusion of more black and Latino jurors.").

[100] Marder, *Reflections Inspired by a Podcast*, *supra* note 111 at 646.

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

[102] *See id.* at 621-23; *see also* Stephen B. Bright, Opinion, *Our Jury System is Racially Biased. But it Doesn't Have to be That Way*, WASH. POST. Mar. 27, 2019, https://www.washingtonpost.com/opinions/2019/03/27/our-jury-system-is-racially-biased-it-doesnt-have-be-that-way/ ("But people in communities who see members of their race being excluded from juries in case after case recognize it as discrimination even if the courts do not. They lose faith in the credibility and legitimacy of the courts."); State v. Saintcalle, 112, 309 P.3d 326, 368 (Wash. 2013) (González, J., concurring) (arguing for peremptory abolition because racial minorities "can be emotionally harmed, and the appearance of fairness is considerably eroded).

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

strikes, they are also denied the right to equal citizenship. For this reason, Professor Douglas Colbert argues that "peremptory striking of prospective black jurors is a badge and incident of slavery because it perpetuates blacks' inferiority."[104] As Colbert continues: "When the peremptory challenge is used to systematically strike black citizens from the jury box, the message that black citizenship is inferior to white citizenship is resoundingly clear."[105] Under this reasoning, scholars and judges have raised the equal-citizenship point when promoting the elimination of peremptory strikes. [106]

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Derived from a storied English tradition, peremptory challenges have always been a feature of the U.S. jury system.[107] Now, with uncontroverted evidence that the strikes can, have, and will continue to be used to discriminate against Black people and other people of color, the calls to end the peremptory practice are reaching a crescendo. While those calls were at one time mostly relegated to law review articles and judicial musings, recently, the calls have featured more prominently in policy debates. The next Part explores how the argument to eliminate peremptory strikes plays out in the policy arena, detailing how the policy arguments often center race and racial justice.

II. THE RACIALIZED POLICY DEBATES SURROUNDING PEREMPTORY ELIMINATION

Amid 2020's summer of racial reckoning,[108] state court systems across the country pledged introspection, promising to tackle the persistent problem of racial bias in the criminal legal system.[109] Policymakers, too, were

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[104] Colbert, *supra* note 124 at 16.

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

[106] *See, e.g.*, Marder, Batson *Revisited*, *supra* note 101 at 1609; Broderick, *supra* note 89 at 422-23; Karen M. Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 565 (1992).

[107] Savanna R. Leak, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution*, 111 J. CRIM. L. & CRIMINOLOGY 273, 282-85 (2020).

[108] Ailsa Chang, Rachel Martin & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020, 9:00 AM), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit.

[109] *See, e.g.*, Daniel S. Harawa, *The False Promise of Peña-Rodriguez*, 109 CALIF. L. REV.

prompted to act, commissioning taskforces and introducing legislation designed to reduce the racial inequities in the administration of justice. In thinking about concrete steps forward, many policymakers (including court systems that have rulemaking authority[110]) believed jury reform to be a logical place to start given the well-documented issues of racial bias.[111] And while, in pursuing this racial justice charge, some states moved to rework the *Batson* standard to make it more effective at addressing racial discrimination in the use of peremptory challenges,[112] other states considered (or are considering) eliminating peremptory challenges altogether. This Part surveys different policy proposals aimed at eliminating peremptory strikes and the racial justice arguments made in their support, with each proposal taking different forms. The Part first examines legislation proposed in New York. It then examines taskforce reports from California and Oregon. And it finally looks at the judge-initiated petition in Arizona. This Part demonstrates that as of late, there has been real movement on the policy front to translate the academic calls for peremptory elimination into concrete action, all in the name of racial justice.

A. New York Legislation

Twice since 2020, democratic lawmakers have introduced legislation in New York attempting to end the use of peremptory challenges in criminal trials.

In the 2021-2022 legislative session, three Democratic senators introduced a bill to eliminate peremptory challenges and explicitly cited racial

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2121, 2159 & n.249 (2021) ("In the wake of Black Lives Matter protests gripping the globe, state supreme courts have released statements both acknowledging that racism permeates the criminal legal system and committing to take action to remedy the invidious influence of race in the administration of justice."); Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61, 66 (2021) (describing how, after the Summer of 2020, "[s]tate and local governments . . . across the nation adopted measures aimed to address racial injustice").

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

[111] *See, e.g.*, *infra* Part III.

[112] UC Berkeley School of Law's Death Penalty Clinic has a helpful repository tracking *Batson* reform by state. *See BATSON* REFORM: STATE BY STATE, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ (last visited July 5, 2024).

discrimination as the basis for the legislation.[113] In justifying the legislation, the senators raised the inevitability of discrimination concern: "Theoretical and empirical evidence across disciplines, such as psychology, sociology, criminology, and law agree, having concluded that peremptory challenges, by their very nature, are fertile ground for the influence of bias on jury selection."[114] They raised the problem of both explicit discrimination and implicit racial bias.[115] They asserted fairness and faith concerns: "diverse jury compositions reduce bias and encourage more thorough jury deliberations," whereas "homogenous juries that are not representative of their communities tend to elicit skepticism rather than confidence in the system."[116] And they surfaced citizenship concerns, explaining that the discriminatory use of peremptory challenges "further disenfranchises those who have historically been disproportionately harmed by the criminal justice system, namely young black men."[117] The senators therefore quoted Justice Marshall to conclude that "only by banning peremptories entirely can such discrimination be ended."[118]

In a committee hearing on the bill, Republican senator and former district attorney Anthony Palumbo spoke out in opposition. In his view, the bill would have "terrible unintended consequences," in that it would "adversely affect" criminal defendants.[119] Senator Palumbo thought it was unwise to eliminate peremptories because peremptory challenges allow for attorneys to remove jurors who claim to be fair, but their life experiences would suggest otherwise.[120] Acknowledging the discrimination concerns motivating the bill, Palumbo thought a better approach would be to tweak the *Batson* standard so that it could better redress any racial discrimination.[121] That said, in opposing the legislation, Palumbo also did not suggest there were countervailing racial justice interests that weighed in favor of retaining peremptory challenges.

The committee vote on the legislation broke down largely along party

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[113] New York State Senate, *Senate Bill S6066*, https://www.nysenate.gov/legislation/bills/2021/S6066 (last visited July 11, 2024).
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* (quotation marks omitted).
[119] New York State Senate, *Codes Meeting May 19, 2021*, https://www.nysenate.gov/calendar/meetings/codes/may-19-2021/codes-meeting (last visited Mar. 6, 2024).
[120] *Id.*
[121] *Id.*

lines. Five democratic senators voted for the legislation.[122] Three republican senators voted against the legislation.[123] And five senators—four democratic and one republican—voted "aye with reservations," essentially avoiding taking a position on the bill.[124] Interestingly, of the three no votes, two of the senators were former prosecutors and one was a former law enforcement official.[125]

The 2021 bill ultimately stalled in committee. As a result, two of the same three democratic senators who sponsored the failed 2021 legislation introduced identical legislation in the 2023-2024 legislative session.[126] And again, the senators provided the same racial justice justifications for the bill.[127] As of writing, the legislation is similarly stalled in committee.[128]

B. California and Oregon Committee Reports

1. California

Preceding the summer of racial reckoning, in January 2020, the Supreme Court of California announced the formation of the Jury Selection Work Group.[129] The Work Group's charge was to evaluate discrimination in the jury process, which included a review of the current peremptory challenge regime.[130] Because of the COVID-19 pandemic, the group did not actually convene until July 2020, smack dab in the middle of when racial justice protests were roiling the world.[131] And before the Work Group had a chance to

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[122] *See supra* note 138.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] New York State Senate, *Senate Bill S282*, https://www.nysenate.gov/legislation/bills/2023/S282 (last visited July 11, 2024).
[127] *Id.*
[128] *Id.* Additionally, the same senator who was the primary sponsor for the bill to abolish peremptory strikes also introduced legislation to fortify the *Batson* standard similar to the approach adopted in California and Washington. New York State Senate, *Senate Bill S5574*, https://www.nysenate.gov/legislation/bills/2023/S5574#:~:text=2023%2DS5574%20(ACTIVE)%20%2D%20Sponsor%20Memo&text=of%20the%20Criminal%20Procedure%20Law%20to%20provide%20a%20standard%20which,States%20found%20in%20Batson%20v (last visited Mar. 6, 2024). That bill seems to be moving more quickly through the legislative process. *See id.* (noting that the bill has passed the senate).
[129] JURY SELECTION WORK GROUP: FINAL REPORT TO THE SUPREME COURT OF CALIFORNIA 1 (July 2022), available at https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-09/Jury%20Selection%20Work%20Group%20Final%20Report.pdf
[130] *Id.*
[131] *Id.* at 2.

get fully off the ground, the California legislature passed a law that modified the *Batson* framework to try to make it more effective at redressing discrimination.[132]

As part of its charge, the Work Group considered whether California should eliminate peremptory challenges altogether. The Work Group's report acknowledged that "[j]udges across the country have increasingly suggested the elimination of peremptory challenges as the remedy for bias in jury selection," as has a "significant" amount of legal scholarship.[133] The report also noted that other states have sought to eliminate peremptory strikes, highlighting the New York legislation just discussed, and the Arizona Supreme Court rule that will be discussed below.[134] The committee made clear there was no consensus on the issue, however, noting that taskforces out of Connecticut and Washington recommended against eliminating peremptories.[135] The report also considered whether the number of peremptories should be reduced rather than eliminated altogether, which the Group worried would still allow for bias to flourish.[136]

Ultimately, the Working Group punted, stating that it was "highlight[ing] this important issue" but not "propos[ing] any changes at this time."[137] The California Work Group thought it best to defer "further discussion of this issue to allow for time for the impact of [the legislation amending

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[132] *Id.* For a more in-depth discussion of States' attempts to beef up *Batson*, see infra Part III.C.
[133] *See* JURY SELECTION WORKING GROUP, *supra* note 154 at 26.
[134] *Id.* at 27.
[135] *Id.* A taskforce convened by the Chief Justice of Connecticut's Supreme Court and a workgroup formed by the Washington Supreme Court considered and recommended against eliminating peremptory challenges. The Connecticut task force provided four reasons that it found militate against getting rid of peremptory challenges: (1) it would require a constitutional amendment; (2) peremptories serve important goals; (3) abolishing peremptories would face backlash from the bench and bar; and (4) it's unclear whether abolishing peremptories would reduce discrimination. REPORT TO THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 30-31 (Dec. 31, 2020), available at https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf. The Washington workgroup, which was formed before the summer of 2020, found that eliminating peremptories was "not the preferred way to address juror discrimination" as peremptories "are still useful as long as they are not based on the race or ethnicity of the juror," and "the removal of peremptory challenges would force appellate courts to examine the challenges for cause, which would lead to an inconsistent or possibly unwanted outcome." PROPOSED NEW GR 37—JURY SELECTION WORKGROUP FINAL REPORT 3 (2018), available at https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf.
[136] *Id.*
[137] *Id.*

the *Batson* framework] to be realized."[138] Thus, if the new *Batson*-reform legislation does not wield any meaningful change, presumably the elimination of peremptory strikes will be back on the table in California.[139]

2. Oregon

The Racial Justice Task Force formed in Oregon was far less noncommittal over what should be done about peremptory challenges. In the summer of 2020, Willamette University College of Law announced the launch of the Racial Justice Task Force.[140] "The Committee on Bias in the Oregon Justice System charged the Task force with proposing a rule that would reduce racial discrimination in Oregon's criminal jury selection process."[141] The Task Force's first recommendation: eliminate the peremptory challenge.[142]

The Task Force believed that it was necessary to eliminate peremptory challenges because "otherwise, racial discrimination in jury selection will continue."[143] The group thought it insufficient to fortify the existing *Batson* framework given that Oregon is "a state with deep roots in White supremacy,"[144] the history of which manifests in the Oregon jury system today.[145] The Task Force report was particularly motivated by concerns of implicit bias, with it deciding that even a strengthened *Batson* framework could not adequately address that issue.[146] Situating itself alongside judges and

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[138] *Id.*

[139] Importantly, before the Working Group even released its report, California state Senator Tom Umberg, who chairs the Senate Standing Committee on the Judiciary, introduced a bill to eliminate peremptory challenges in criminal trials under belief that amending the *Batson* framework is insufficient. *See* Cheryl Miller, *Key Lawmaker Proposes eliminating Peremptory Challenges in Criminal Cases*, THE RECORDER, Mar. 11, 2021, https://www.law.com/therecorder/2021/03/11/key-lawmaker-proposes-eliminating-peremptory-challenges-in-criminal-cases/. The legislation was widely opposed by civil rights and public defense groups. *See* Senate Committee on Public Safety, *Prospective Jurors for Criminal Trials: Peremptory Challenges: Abolition* (Mar. 10, 2021), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB212. The bill died in committee. *Id.*

[140] *See* Sarah Bellow, *Willamette Law Launches Racial Justice Task Force*, WILLAMETTE UNIVERSITY, Feb. 16, 2021, https://willamette.edu/news/library/2021/02/racial-justice-task-force.html.

[141] Willamette University College of Law Racial Justice Task Force, *Remedying* Batson's *Failure to Address Unconscious Juror Bias in Oregon*, 57 WILLAMETTE L. REV. 85, 87 (2021) (parenthetical omitted)

[142] *Id.*

[143] *Id.* at 117.

[144] *Id.*

[145] *Id.* at 117-19.

[146] *Id.* at 118.

scholars who have called for the elimination of peremptory challenges,[147] the Task Force concluded:

> For Oregon to move forward from its racist origins and continuing perpetration of racial injustice, it needs to take a hard line against the persistent racial discrimination enabled by the use of peremptory challenges. . . . Eliminating the peremptory challenge does more than simply eliminate a toll that has been wielded against historically disadvantaged groups—it sends a powerful message of inclusion and progress in the justice system.[148]

The Oregon Council on Court Procedures, which promulgates court rules, considered the Task Force's report when contemplating reforms to Oregon's jury selection process,[149] and noted that it received "strong recommendations to eliminate peremptory challenges entirely."[150] But ultimately, the Council proposed strengthening jury selection procedures to better "promote diversity on jury panels and provide protection against bias" as opposed to eliminating peremptories altogether.[151]

C. Arizona Judge-Initiated Petition

As of writing, one state has eliminated peremptory strikes: Arizona. But the road to ending peremptories in the Grand Canyon State was slightly peculiar.[152] As was the case with many states, a working group was established to study the efficacy of *Batson*.[153] This working group, formed by the Arizona Bar Association, recommended strengthening the *Batson* inquiry

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[147] *Id.* at 117.
[148] *Id.* at 119. Alternatively, the Task Force proposed adopting a rule strengthening the *Batson* framework. *Id.* at 120-22.
[149] Oregon Supreme Court Council Inclusion & Fairness, *Meeting Minutes*, Nov. 19, 2021, https://www.courts.oregon.gov/programs/inclusion/meetings/Documents/OSCCIF%20-%20Meeting%20Minutes%20-%20November%202021%20-%20Adopted%20at%20February%202022%20Meeting.pdf.
[150] OREGON COUNCIL ON COURT PROCEDURES RECOMMENDATION REGARDING ORCP 57, 5 (2021), available at https://counciloncourtprocedures.org/Content/Promulgations/Amendments%20to%20the%20ORCP%20Promulgated%2012-10-2022.pdf.
[151] *Id.*
[152] For a fascinating exploration of the lead up to Arizona abolishing peremptories, see Frampton & Osowski, *supra* note 8 at 35-49.
[153] Recent Order, *Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure and Rule 47(e) of the Rules of Civil Procedure*, No. R-21-0020 (Ariz. 2011), 135 HARV. L. REV. 2243, 2244 (2022).

such that it would be better at capturing racial discrimination.[154] But two Arizona Court of Appeals judges did not believe the recommendation went far enough. Using an Arizona Supreme Court rule that allows "any interested person or entity" to petition the Arizona Supreme Court to amend its rules of procedure,[155] Judges Peter Swann and Paul McMurdie urged the Court to abandon the practice of peremptories altogether.[156]

In arguing that the Arizona Supreme Court should consider amending the rules of procedure to eliminate peremptory challenges, the judges noted that the "current system is not only ineffective at combatting the use of race in jury selection—it is also inefficient."[157] According to these judges, "[d]ecades of litigation over *Batson* challenges have consumed countless hours of attorney time and judicial resources. Yet in Arizona, only five cases have been reversed over a *Batson* challenge."[158] The judges asserted that the use of peremptories frustrates the constitutional requirement of juries being comprised of a representative cross-section of the community, explaining that Black, Native American, and Hispanic jurors are vastly underrepresented on Arizona juries.[159] To the judges, a rule fortifying *Batson* would not be "a death blow to the racially inappropriate use of peremptory strikes."[160] They therefore proposed a "neutral rule" abandoning peremptory challenges altogether, claiming that the this rule would better build "public trust and confidence," and "eliminate[] bias in all directions."[161]

The Arizona Bar's opposition to this proposal "was nearly unanimous,"[162] with both prosecutors and defense lawyers writing in to oppose the proposal. The Maricopa County Attorney's Office, the largest prosecutor's office in the State, warned that eliminating peremptories will "ultimately lead

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[154] *Id.*
[155] Ariz. R. Sup. Ct. 28(a) ("Any person may petition the Arizona Supreme Court to adopt, amend, abrogate a court rule that has statewide application.").
[156] Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure at 1-2.
[157] *Id.* at 11.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 15.
[161] *Id.* at 13 (capitalization omitted). "Several trial judges voiced support for Judges Swann and McMurdie's proposal." Recent Order, *supra* note 178 at 2245; *see, e.g.*, Comment of the Committee on Superior Court, No. R-21-0020 (Ariz. Apr. 12, 2021); Comment by John Napper, Presiding Judge for Yavapai County Superior Court, No. R-21-0020 (Ariz. Apr. 15, 2021).
[162] Recent Order, *supra* note 178 at 2245; *see, e.g.*, Comment of the Arizona Attorney General's Office, No. R-21-0020 (Ariz. May 3, 2021); Comment of the State Bar of Arizona, No. R-21-0020 (Ariz. Apr. 30, 2021).

to trials that are less fair for all sides."[163] As that office saw it, "peremptory challenges allow a litigant to remove a prospective juror who has revealed deeply held biases even if the juror has said the magic words that they think they can be fair and impartial."[164] The Arizona Prosecuting Attorneys' Advisory Council opposed ending peremptories for much the same reason, explaining that "parties typically use peremptory strikes on jurors who have given answers during the jury selection process that suggest that they would potentially favor the opposing side, do not respect the gravity of the process, or are just not interested in being jurors."[165]

As for the defense bar, the National Lawyers Guild (NLG) opposed the proposal by declaring "it will do nothing to eliminate explicit and implicit bias from the jury selection process."[166] In support of its position, the NLG argued that eliminating peremptories does nothing to remove biased people from juries; instead, it shifts the responsibility to jurors to openly recognize and articulate their bias, and then shifts the power to judges to strike those jurors for cause.[167] As the NLG explained, history shows that jurors are not good at recognizing their own biases and judges have proven incompetent in striking jurors for bias.[168] The NLG briefly made another equally important point: eliminating peremptory challenges "will deprive the accused in criminal cases, who are disproportionately people of color because of discriminatory policing and prosecution policies, of the only tool available to them to participate in a system widely viewed as rigged against them from the start."[169]

The Arizona defense bar was not unanimous in its total opposition to the proposal, however. The Arizona Attorneys for Criminal Justice (AACJ), the state affiliate of the National Association of Criminal Defense Lawyers, took a somewhat different position.[170] While this group preferred the pro-

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[163] Maricopa County Attorney's Comment in Opposition, No. R-21-0020 (Ariz. May 3, 2021).
[164] *Id.* at 4.
[165] Comment of the Arizona Prosecuting Attorney's Advisory Council, No. R-21-0020, 1-2 (Ariz. Apr. 30 2021).
[166] *See* Comment of the Central Arizona National Lawyers Guild Opposing the Abolition of Peremptory Strikes, No. R-21-0020 (Ariz. Apr. 30, 2021).
[167] *See id.* at 10.
[168] *See id.* at 6-9.
[169] *Id.* at 5.
[170] *See* Comment of Arizona Attorneys for Criminal Justice, No. R-21-0020 (Ariz. May 3, 2021).

posal seeking to reform *Batson*, it thought the elimination of peremptory challenges as better than the "status quo."[171] To the AACJ, while abolishing peremptories "may not be ideal, and it does look a lot like 'throwing the baby out with the bathwater,' [as Judges Swann and McMurdie] aptly state, it would definitively solve the problem of discriminatory strikes. If given the choice between the current practice of prosecutors striking venirepersons based on race or gender and alternative where no strikes are permitted, it seems the latter may be preferable."[172]

Mere months after receiving the petition, the Arizona Supreme Court entered "a simple order that contained no reasoning" that had the effect of eliminating peremptory challenges in both civil and criminal trials.[173] With no fanfare, Arizona became the first state to take the massive step of peremptory elimination that Justice Marshall advocated decades ago.

Legal scholars applauded Arizona's ending of peremptories. Professor Nancy Marder praised Arizona's decision for its "simplicity and the potential for effectiveness," labeling it a "blueprint" that states could follow.[174] Professor Jack Harrison similarly urged states to use Arizona "as a template."[175] Professor Robert Chang was "shocked but happy the [Arizona Supreme Court] went for abolishment."[176] And Professors Colleen Graffy,

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[171] *Id.* at 4.

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

[173] Recent Order, *supra* note 178 at 2246; *see* Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021).

[174] Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, *supra* note 27 at 101.

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

[176] Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS, Sept. 1, 2021, https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/. *See also* William H. Locke, *Only Good at Being Bad: Peremptory Challenges and the Holmesian Bad Guy*, 104 MASS. L. REV. 31, 41 (2023) (urging states to follow Arizona's lead an abolish peremptory challenges). Ian Millhiser, *Arizona Launches a Bold New Experiment to Eliminate Racist Convictions*, VOX, Aug. 31, 2021, https://www.vox.com/22648651/arizona-jury-race-batson-kentucky-peremptory-strikes-challenges-thurgood-marshall (expressing optimism that Arizona's move to eliminate peremptory challenges will "lead to juris in the state being more racially diverse, and thus less likely to treat racial minorities more harshly").

Not long after the Arizona Supreme Court announced the new rules, legislation was introduced that would restore peremptory challenges. *See* Hassan Kanu, *'How We've Done Things For Ages': Pushback from Arizona Peremptory Strike Change*, REUTERS, Feb. 4, 2022, https://www.reuters.com/legal/government/how-weve-done-things-ages-pushback-

Harry Caldwell, and Gautam Sood called the "Arizona model the best path to follow if our goal is to end discrimination in the jury selection process rather than simply hide it."[177] The arguments long made in law reviews were finally coming to fruition.[178]

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

III. THE COMPLICATED RACIAL JUSTICE PICTURE OF PEREMPTORY ELIMINATION

The debate over peremptory elimination at one point seemed just an academic exercise. Now, there is real movement on the policy front.[179] And

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arizona-peremptory-strike-change-2022-02-04/. A group of Arizona scholars studying the effects of the rule change "urged against any efforts to "rescind this reform before it can get off the ground." Valena Beety, Henry F. Fradella, Jessica M. Salerno, Cassia C. Sophn, & Shi Yan, *Arizona Bill Would End an Effort to Stop Racial Bias in Jury Selection Before It Begins*, AZ CENTRAL, Feb. 22, 2022, https://www.azcentral.com/story/opinion/op-ed/2022/02/22/arizona-bill-allowing-peremptory-challenges-would-stop-re-form/6871234001/. The legislation has thus far been unsuccessful.

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

[178] Some interesting student notes have also celebrated Arizona's decision to abolish peremptory strikes and have urged other states to follow suit. *See, e.g.*, Michael A. Kilbourn, Comment, *Abolishing Peremptory Challenges: A Fir Price to Pay for Just Jury Selection*, 100 DENV. L. REV. 495 (2023); Timothy J. Conklin, Note, *The End of Purposeful Discrimination: The Shift to an Objective* Batson *Standard*, 63 B.C. L. REV. 1037 (2022). A Georgia public defender also urged Georgia to follow Arizona's lead. *See Ariane Williams*, *"[T]here appears to be Intention Discrimination in the Panel": The Case for Abolishing Peremptory Challenges in Georgia*, 2 GA. CRIM. L. REV. 212 (2024).

Other judges have taken notice of Arizona's actions Recently, three justices on the Colorado Supreme Court supported the elimination of peremptory challenges. People v. Johnson, 549 P.3d 985, 1001 (Colo. 2024) (Márquez, J., concurring). However, as the justices noted, eliminating peremptory challenges under Colorado law would require legislative action. *Id.*

[179] Social justice thinktanks have also championed abolishing peremptory strikes. *See, e.g.*,

in the face of Arizona eliminating peremptory challenges and other states considering the same, scholars still are claiming peremptory elimination as a racial justice measure. This Part urges caution in that assessment. As this Part explains, those who champion ending peremptories as a racial justice measure often fail to consider the countervailing racial justice interests that militate in favor of *retaining* peremptories. Focusing first on prospective jurors, this Part explains that ending peremptories as a fix for discrimination is ineffectual given other mechanisms in the jury formation process that allow racial bias to flourish. Then, turning to defendants, it explains that eliminating peremptories may only perpetuate racial *in*justice, as it may allow for more biased decision-making and will disempower defendants, who are disproportionately people of color. As such, this Part looks to other solutions, such as amending the *Batson* standard and asymmetric peremptory elimination, that may better address the competing racial justice interests. Finally, this Part asks what broader lessons can be learned from peremptory elimination and warns against facile racial justice—racial justice measures that fail to account for the complexities of racial bias. Maybe on balance eliminating peremptory challenges will better serve racial justice than retaining them. But before one can make that call, it is important to interrogate the *full* set of racial justice interests at play.

A. Against Elimination: Racial Justice & Jurors

In *McCollum v. Georgia*,[180] Justice Thomas warned "that black criminal defendants would rue the day that this Court ventured down this road [of *Batson*] that inexorably will lead to the elimination of peremptory strikes."[181] Thomas's opinion was grounded in the reality that "the racial composition of a jury may affect the outcome of a criminal case."[182] As he said, "Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial."[183]

New Jersey Institute for Social justice, *Statement of the New Jersey Institute for Social Justice Dissenting from Recommendations 13 & 25 in the Judicial Conference on Jury Selection Committee Report*, Apr. 19, 2022, https://www.njcourts.gov/sites/default/files/notices/2022/04/n220428a.pdf; D.C. Justice Lab, *Striking Peremptory Challenges in Jury Trials: Costs, Benefits and the Restoration of Rights*, https://dcjusticelab.org/wp-content/uploads/2022/09/Striking-Peremptory-Challenges-in-Jury-Trials.pdf.

[180] 505 U.S. 42 (1992) (Thomas, J., concurring).

[181] *Id.*

[182] *Id.*

[183] *Id.* at 61. Justice Thomas made a similar point in a dissent almost thirty years later. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2269-74 (2019).

The literature proves Justice Thomas right—jury diversity is substantively (not to mention symbolically) important.[184] Studies show that majority-white juries (both mock and real) are harsher on Black and Latino defendants than racially diverse juries.[185] And diverse juries engage in better, more thorough, deliberations.[186] Thus, arguments for peremptory elimination generally do not advocate for ending peremptories just because peremptories are used discriminatorily (although that is a good reason to get rid of them). Rather, they also explain that in addition to ending discrimination, peremptory elimination will lead to more diverse juries, which in turn will lead to more just outcomes for criminal defendants.[187]

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

1. Jury Composition

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

[184] *See* Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 876–77 (2015).

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

[186] *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606 (2006).

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

citizens.[188] This requirement "excludes the estimated 13.1 million lawful permanent residents in the United States" from jury service,[189] operating to disproportionately exclude Asian, Latino, and increasingly Black residents.[190] Most states prohibit people from serving on juries if they have past criminal convictions.[191] "In the United States, there are roughly nineteen million people with a felony conviction—8 percent of the total population, and studies estimate that close to a quarter of the Black population has a felony conviction, including one-third of Black men."[192] Thus, this particular qualification disproportionately excludes Black people from jury service. Most states also exclude people with limited English proficiency from jury service, which "further limits the number of racial minorities eligible for jury service."[193] In short, the way the law contemplates who is eligible to be a juror frustrates any aspiration of racially diverse juries.

Then, even when people of color are qualified to be jurors, the way jury pools are sourced leads to their systematic exclusion. For instance, most jurisdictions rely on voter registration lists to compose their jury pools,[194] and available data shows that white people are registered to vote at higher rates

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

[189] Diamond & Hans, *supra* note 53 at 909.

[190] *See* Motomura, *supra* note 213 at 1508; *see* Christine Tamir, *Key Findings about Black Immigrants in the United States*, PEW RSCH. CTR., Jan. 27, 2022, https://pewrsr.ch/3u1VIxT.

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

[192] Harawa, *The False Promise of Peña-Rodriguez*, *supra* note 134 at 2141 & n.130.

[193] Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 819 (2014).

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

than any other demographic.[195] Studies also show that "even though most jurisdictions randomly choose which qualified potential jurors to summon as veniremembers, the summoning process itself sometimes yields a lower percentage of minorities than whites."[196]

Finally, consider the burden of jury service. "Research suggests that disparities in the number of individuals who report for jury service based on race, often correspond to concern about the financial consequences of participating."[197] Most states and the federal government do not require employers to pay their workers for time spent in jury service. And the pay that courts provide jurors for their service often does not equal what a jury would make working an 8-hour day earning minimum wage.[198] Thus, for many jurors, jury service results in significant financial hardship, which is disproportionately felt by poorer jurors, who are more likely to be people of color.[199] There are also transportation costs, childcare costs (if needed), and other ancillary costs associated with jury service that go uncompensated.[200] Thus, the financial hardship attendant to jury service is yet another barrier to racially (not to mention socioeconomically) representative juries.

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[195] *See* Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 117 (2019) ("In many cases, the racial disparity in the jury system is allegedly or demonstrably caused by the jury system's use of voter registration rolls as a source list for juror names. Voter registration rolls typically underrepresent African-Americans and [Latinos]."); *see also* Harawa, The *False Promise of Peña-Rodriguez*, *supra* note 134 at 2141 & n.131 (providing the racial demographic breakdown for voter registration rates for the 2018 election cycle).

[196] Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 717 (1993); *see also* Chernoff, *supra* note 220 at 120-122. Professor Nina Chernoff provides some examples of how jury office procedures, though race-neutral and innocuous on their face, lead to the systematic exclusion of people of color from venires. *See* Nina W. Chernoff, No *Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1729-1732 (2016).

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

[198] Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 296 (2002) ("Throughout the nation, legislators have set jurors' average per diem compensation at nearly half the minimum wage and well below the daily equivalent of the poverty threshold."); Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community"*, 69 S. CAL. L. REV. 155, 171–72 (1995) ("Obviously, a person forgoing a regular source of earned *172 income in order to serve on a jury is very likely to suffer a substantial loss for the period served.").

[199] *See* Offit, *Benevolent Exclusion*, *supra* note 222 at 630-31.

[200] *See, e.g.*, Rose Jade, *Voter Registration Status As A Jury Service Employment Test: Oregon's Retracted Endorsement Following* Buckley v. American Constitutional Law Foundation, Inc., 39 WILLAMETTE L. REV. 557, 743 n.105 (2003) ("Low juror pay and the lack of court-funded childcare and public transportation can turn jury service into a real hardship for the poor or for single parents who work outside the home.").

There are important structural issues with jury service that are necessary to focus on to ensure equal representation, many of which are eminently fixable or at least can be easily worked upon.[201] And these issues are just as, if not more, urgent than eliminating peremptories. Indeed, peremptories require individual decision makers to act out (consciously or subconsciously) their bias, while these structural issues reveal that bias is baked into the jury system more broadly, rendering racially proportionate jury representation an illusory concept. A call to eliminate peremptories to ensure jury diversity without calling out these other issues seems wildly insufficient if what one desires is making this important marker of citizenship equally accessible to everyone.

2. Adaptable Racism

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

Professor Thomas Frampton recently examined whether there are racial disparities in the use of for cause challenges.[202] As he explained, jury scholarship is so focused on racial bias in the peremptory process that the literature often overlooks other points in the jury selection process where there may be bias.[203] Frampton therefore reviewed 317 Louisiana jury trials and found that "prosecutors overwhelmingly used challenges for cause to exclude nonwhite jurors."[204] According to the data, "[B]lack jurors were 3.24 times more likely than white jurors to be excluded by the government for

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[201] For example, not all states permanently exclude people with felony convictions from jury service. *See, e.g.*, Erik Ortiz, *Most Former Felons in California are Now Eligible for a New Role: Jury Duty*, NBC NEWS, Jan. 1, 2020, https://www.nbcnews.com/news/us-news/most-former-felons-california-are-now-eligible-new-role-jury-n1108726. Some states have recently taken the steps to increase juror pay. *See* National Center for State Courts, *Following NCSC Report, Six States Increase Juror Pay*, July 5, 2023, https://www.ncsc.org/newsroom/at-the-center/2023/following-ncsc-report,-six-states-increase-juror-pay. And jurisdictions have taken steps to increase diversity in the response to jury summonses. *See, e.g.*, U.S. Courts, *Courts Seek to Increase Jury Diversity*, May 9, 2019, https://www.uscourts.gov/news/2019/05/09/courts-seek-increase-jury-diversity.

[202] Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, *supra* note 25 at 785.

[203] *See id.* at 788.

[204] *Id.* at 794.

cause."[205] Frampton found similar racial disparities when looking at for cause challenges in Mississippi. Looking at the data from 83 trials, "prosecutors were 6.8 times more likely to initiate a challenge for cause against any given Black prospective juror than any given white prospective juror."[206] Another interesting finding by Frampton—in Mississippi, *judges* would often initiate for-cause removal, and did so to disproportionately exclude Black jurors.[207] Frampton's study is important in that it shows that both a judge's *and* a prosecutor's racial bias can manifest in the for-cause challenge process. Understanding the adaptability of racism,[208] it is easy to see how.

Recall that, like peremptory challenges, for cause challenges are supposed to ensure impartiality by allowing an unlimited number of strikes to remove jurors who are irredeemably biased.[209] But the reasons given to strike jurors for cause are often racially coded or skewed. For instance, even if felony convictions do not automatically disqualify one from jury service, prior arrests can form the basis for for-cause challenges.[210] And given the disparities in policing and prosecution, this leads to the disparate exclusion of Black people and other people of color.[211] Likewise, financial hardship is often the basis for for-cause challenges, which again, given wealth and income disparities, this, too, leads to the disparate exclusion of Black people and other people of color.[212] And familiarity with people involved in the case can lead to for cause removal,[213] and in a racially-segregated society, and where criminal defendants are disproportionately people of color, this, too, leads to the disparate removal of jurors of color.[214]

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[205] *Id.* at 795 (quotation marks omitted).
[206] *Id.* at 797.
[207] *Id.*
[208] Boddie, *Adaptive Discrimination*, *supra* note 35 at 1239 (explaining that racial discrimination is "adaptive" in that it "morphs to avoid legal and social sanction").
[209] *See supra* note 77 & accompanying text.
[210] *See, e.g.*, Vida B. Johnson, *Arresting* Batson: *How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 389 (2016); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 602 (2013).
[211] *See Daniel S. Harawa*, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 925 (2023) (noting the racial disparities in policing and prosecution).
[212] *See* Offit, *Benevolent Exclusion*, *supra* note 222 at 629 ("Judges' uses of cause challenges to excuse prospective jurors who raise hardship concerns results in juries that are socio-economically and racially homogenous.").
[213] *See, e.g.*, Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, *supra* note 25 at 828.
[214] *See generally* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 173 (2019) ("America is profoundly segregated along racial lines. We attend separate schools, live in separate neighborhoods, attend different churches, and shop at different stores.")

There are also certain experiences or opinions that are racially coded that are deemed to render potential jurors partial and therefore unfit to serve. As an example, distrust of or negative interactions with law enforcement or the belief that the criminal legal system is racially biased have been grounds that judges have found to justify for cause challenges.[215] Layer on top of this the fact that judges have near-unfettered discretion to remove jurors for cause, and are often the final arbiter over what makes a potential juror too partial to serve,[216] and you can see the many ways racial bias can influence for cause challenges, too. And, as far as I know, no one who advocates for the elimination of peremptories also urges the elimination of for cause challenges. After all, there needs to be *some* mechanism to ensure jury impartiality.

Without question, many who champion getting rid of the peremptory challenge also recognize the need to overhaul the jury formation and selection process to better ensure racial diversity.[217] But a system that is operated by people and that necessarily involves discretion is *always* going to be susceptible to racial bias, no matter how comprehensive any one fix.[218]

B. Against Elimination: Racial Justice & Defendants

Legal scholars and policymakers advocating for the elimination of

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[215] *See, e.g.*, Offit, *The Character of Jury Exclusion*, *supra* note 38 at 2188 ("Prospective jurors may be dismissed from jury service using cause challenges and peremptory strikes based on their experience with, or recognition of, racism as a feature of the legal system."). In capital trials, opposition to the death penalty leads to the disproportionate striking of jurors of color. *See* Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 118 (2016).

[216] *See* 50A C.J.S. Juries § 370 ("The trial court has broad discretion in determining the competency or qualifications of a juror for the trial of a case, and in determining whether to exclude a juror from the jury for cause, as in the case of a challenge for cause."); *see also* Ogletree, *supra* note 39 at 1143-44.

[217] *See, e.g.*, Marder, *Race, Peremptory Challenges, and State Courts*, *supra* note 27 at 100-01 (noting suggestions made for reforming voir dire in Arizona after it abolished peremptories).

[218] *See generally* State v. Veal, 930 N.W.2d 319, 343 (Iowa 2019) (Appel, J., concurring) ("[A]ll of us--judges, lawyers, legislators, and jurors--have unconscious or implicit biases"). For example, wittingly or not, a prosecutor or judge may take steps to rehabilitate a white juror who expressed bias and not take those same steps to rehabilitate a Black juror. *See, e.g.*, Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, *supra* note 25 at 802; Barbara O'Brien, Catherine M. Grosso, Abijah P. Taylor, *Examining Jurors: Applying Conversation Analysis to Voir Dire in Capital Cases, A First Look*, 107 J. CRIM. L. & CRIMINOLOGY 687, 723 (2017).

peremptories often center potential *jurors*. This focus flows from *Batson* itself,[219] as the decision's central focus was not on the defendant, but on "the harms to the excluded juror and the community."[220] Thus, as in the jurisprudence, in legal scholarship, the concerns of the defendant often come second in debates over peremptory elimination.

To the extent the interests of the defendant are discussed in the conversations about peremptory elimination, the discussion is often framed in terms of the absence of peremptories hampering a defendant's ability to remove biased people from their jury.[221] This, of course, is important, and should counterbalance any proposal to end the practice of peremptories. But there is a second interest of the defendant that often gets lost in the debate: the interest of autonomy. The availability of peremptories gives defendants a small amount of control in an otherwise autonomy-stripping, dehumanizing process. Disallowing defendants this last modicum of control in the name of racial justice should not be done lightly in a world where criminal defendants are disproportionately poor people of color, and where the criminal legal system writ large serves a racially subordinating function.

1. Racially Biased Jurors

The most vocalized opposition to peremptory elimination that centers racial justice is rooted in the purpose of peremptories themselves: without peremptories, it is more likely that biased jurors will be seated. The Supreme Court has described the purpose of peremptories as an "effective means of obtaining more impartial and better qualified jurors," assuring "the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[222] While for-cause challenges allow for the removal of jurors with "cognizable bias," the "peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable."[223]

With this understanding of peremptories in mind, it is easy to see why

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[219] *See supra* Part I.A.
[220] Sheri, Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI-KENT L. REV. 475, 481-82 (1998) (criticizing *Batson*'s "blurred rationale"); *see also* Tetlow, *supra* note 43 at 1715 (". . . *Batson* focuses on discrimination against jurors, we still need a solution for the problem of discrimination by jurors.").
[221] *See, e.g.*, *supra* Part I.C.
[222] Swain v. Alabama, 380 U.S. 202, 218-19 (1965).
[223] *Id.* at 220; *see also* Hayes v. Mississippi 120 U.S. 68, 70 (1887) ("Experience has shown that one of the most effective means to free the jurybox from [persons] unfit to be there is the exercise of the peremptory challenge").

some believe eliminating peremptories would be antithetical to racial justice. If peremptories are truly designed to keep biased jurors out of the jury box, then it seems that they would be an especially important tool for keeping *racially* biased jurors out of the jury box. Here's why. One, people are unlikely to overtly express their racial bias during voir dire.[224] Thus, to the extent bias is revealed during voir dire, it's more likely to manifest in vague, coded ways.[225] In those cases, especially given the discomfort that comes with labeling someone as racially biased, a judge may be unwilling to strike a juror for cause—either because they do not recognize the bias or do not want to engage in the labeling, leaving the defendant with the peremptory as the only option for removal.[226]

Professor Charles Ogletree raised a variant of this concern in his sustained critique of peremptory elimination.[227] Ogletree believed that without peremptory strikes, "some defendants may find themselves facing jurors who should not have been impaneled, jurors whom they hate or fear or believe on some arguably reasonable grounds to be seriously biased against them, but whom they are powerless to remove."[228] True, at least one study shows[229] that *most* exercises of peremptory strikes will not affect the verdict.[230] Still, peremptory strikes for defendants are an important "hedge" against biased jurors given that the same study suggests peremptories make a difference in at least

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

[225] *See generally* William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 3 (2015) (explaining that there has been a shift from "old-fashioned racism, classical racism, redneck racism, and blatant racism" to more "symbolic racism, subtle racism, ambivalent racism, laissez faire racism, aversive racism, and modern racism"). IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS 129 (2015) ("The once pervasive use of epithets has morphed into the coded transmission of racial messages through references to culture, behavior, and class. We live in a political milieu saturated with ugly racial innuendo.").

[226] *See* Babcock, *supra* note 83 at 554.

[227] *See* Ogletree, *supra* note 39.

[228] *Id.* at 1145.

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

[230] *See* Ogletree, *supra* note 39 at 1145 n.222 (explaining that the study found "that most attorneys do not exercise their peremptory challenges wisely, and that therefore most actual exercises of peremptory challenges fail to affect the verdict." And then explaining that "[t]his conclusion is given much more prominence than their separate conclusion that in a significant minority of cases the challenges probably matter a lot").

some trials.[231] At bottom, then, without peremptories, more defendants, at the margin, "are likely to be falsely or unjustly convicted."[232] In a world where criminal defendants are disproportionately poor people of color,[233] and where Blackness is associated with criminality and thus there is very real risk that prospective jurors will harbor anti-Black bias (knowingly or not),[234] it is easy to see why *retaining* peremptories can be seen to *further* racial justice. Even assuming peremptories work to remove biased jurors and change the outcome of trial in the rarest of cases, keeping tools in place to ensure that *no* defendant is convicted out of racial bias is of vital importance.[235]

2. Disempowering Defendants

In arguing against Arizona eliminating peremptories, the National Lawyers' Guild briefly made a point that often goes overlooked in the literature:[236] the elimination of peremptories "will deprive the accused in criminal cases, who are disproportionately people of color because of discriminatory policing and prosecution policies, of the only tool available to them to participate in a system widely viewed as rigged against them from the start."[237]

Although this comment could seem like a throwaway observation, NLG made a vital connection between what Professor Caren Morrison has called a litigant's interest in "autonomy"[238] and how criminal defendant autonomy has a particularly racialized valence. Morrison argues that perhaps "the most persuasive argument in favor of the peremptory challenge is that it protects the parties' autonomy by allowing them an active role in choosing

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[231] *Id.* at 1146.

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

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

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

[235] *See* Rose v. Mitchell, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *see also* Tetlow, *Solving* Batson, *supra* note 212 at 1938 ("The defendant's right to an impartial jury matter more than the democratic role of juries.").

[236] *But see* Morrison, *supra* note 44 at 15-17 (discussing defendant autonomy as a reason to retain peremptories).

[237] *Supra* note 191.

[238] Morrison, *supra* note 44 at 15.

their fact finder, beyond the court's control."[239] While Morrison suggests that this is a reason to retain peremptories across the board, she takes a beat to note that "in a criminal justice system that can reduce defendants to near-powerlessness, the challenge's arbitrariness can give participants a sense of control—they can get rid of jurors simply because they develop a spontaneous dislike for them based on nor more than sudden impressions and unaccountable prejudices."[240] This important observation deserves to be further ventilated, as it is worth thinking of the many ways—from policing, to arrest, to trial should a defendant even get there—that the criminal legal system strips people, particularly Black people and other people of color, of power and autonomy.

Depending on where you live and/or the color of your skin, before even making official contact with the criminal legal system, your movement through the world is monitored and restricted. You may live in a community that is surveilled by sky or by camera.[241] You may live in a neighborhood where police patrol in military-style vehicles, wear riot gear, and who may aggressively "jump out" at you at any given moment, forcing you to justify your presence and dissuade them of a presumed criminality.[242] You may be afraid to run in your neighborhood,[243] wear certain colors,[244] or exercise your

[239] *Id.*

[240] *Id.* at 16.

[241] *See, e.g.*, Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 334-34 (4th Cir. 2021) (en banc) (describing the Baltimore Police Department aerial surveillance program); *see also* Joseph Lanuti, *In the Officer's Omnipresence: Live Surveillance and Warrantless Misdemeanor Arrests*, 55 AM. CRIM. L. REV. ONLINE 29, 29-30 (2018) (discussing the surveillance programs of the Las Vegas, Baltimore, and Los Angeles police departments).

[242] *See, e.g.,* Jackson v. D.C., No. 23-CV-922 (CRC), 2023 WL 7182120, at *6 (D.D.C. Nov. 1, 2023) (describing the tactics of the gun recover unit of the D.C. Metropolitan Police Department).

[243] *See, e.g.*, Elise C. Boddie, *Racially Territorial Policing in Black Neighborhoods*, 89 U. CHI. L. REV. 477, 495 (2022) ("As a practical matter, no one will be free to run in a high-crime area if the police are around because one's "unprovoked flight" may be interpreted as evasion of the police. Knowing this, many may adjust their routines to avoid the hassle if they see the police or suspect that they are near. They might decide not to take a run around the neighborhood, or they might exercise caution when playing games with their friends in a park. They might avoid walking fast to make it home for dinner. This is the psychic cost of racial territoriality: the heightened sense that danger at the hands of the police is always around the corner, even during the most ordinary and mundane activities of day-to-day life.").

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

fundamental rights.[245] You may be constantly followed, waiting with bated breath for the next time police harass you.[246] In other words, long before arrest, police have an ominous omnipresence in certain people's lives. When thinking about autonomy, it's important to remember that certain people, particularly poor people and people of color, regardless of whether they have engaged in criminalized conduct, walk the world less freely than others.

After arrest, the official power stripping begins. The arrestee, though presumed innocent, may be jailed pending trial—a far more likely outcome if they are Black and poor.[247] There is no need to dwell on the fact that being held behind bars is disempowering. And even if they are not jailed, they may be forced to comply with demeaning, autonomy-stripping pretrial release requirements (urine tests, check-ins, ankle monitoring, movement restrictions, and so on).[248] Then, if the now-labeled defendant is indigent, they have to put their fate in a stranger's hands. This can be a particularly dicey proposition for poor people who have little choice over who will represent them, and even more so for poor defendants of color, who could be appointed counsel who lacks basic cultural competency, or worse, is outright racist.[249] And before even getting to trial, a defendant—already from a position of relative powerlessness—must withstand the awesome power of the prosecutor and the other

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

[246] *See, e.g.*, Monique Jindal, Kamila B. Mistry, & Maria Trent, *Police Exposures and the Health and Well-being of Black Youth in the US,* 176 JAMA PEDIATRICS 78 (2021) (discussing how police contact affects Black youth's mental health).

[247] *See, e.g.*, Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POLICY (October 9, 2019), available at https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ (noting that Black and brown defendants are at least 10-25% more likely than white defendants to be detained pretrial or have to pay money bail); Bernadette Rabuy & Daniel Kopf, *How Money Bail Perpetuates An Endless Cycle Of Poverty And Jail Time*, PRISON POLICY (May 10, 2016), available at https://www.prisonpolicy.org/reports/incomejails.html.

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

[249] Alexis Hoag*, Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1512-1520 (2021); Peter A. Joy, *Unequal Assistance of Counsel*, 24 KAN. J. OF L. & PUB. POL'Y 518, 519 (2015). ("[C]lass and race are largely determinative of the lawyer, and often the amount of justice one receives."). For examples of cases where it was discovered that defense counsel said racist things, see *Commonwealth v. Dew*, 210 N.E.3d 904 (Mass. 2023) (where it was discovered that a white defense lawyer repeatedly posted racist and islamaphobic sentiments on Facebook), and *Ellis v. Harrison*, 947 F.3d 555, 556 (9th Cir. 2020) (where it was revealed that a white defense lawyer was a "virulent racist"). *See also* Paul Messick, *Represented by a Racist: Why Courts Rarely Grant Relief to Clients of Racist Lawyers*, 109 CALIF. L. REV. 1231, 1246 (2021) (giving more examples of cases where defense counsel said racist things).

forces of the criminal legal system that impel defendants, particularly defendants of color, to plead guilty regardless of their innocence or the strength of the government's case.[250] In short, from the first moment of contact, the criminal legal system reminds criminal defendants, particularly poor defendants of color, of the precarious position they are in and how little power they have.

Given the above, in many ways, making it to trial is an act of resistance. But even when a defendant gets to trial, most of what they do is sit and watch.[251] While witnesses testify about events, lawyers argue about the law and facts, judges issue rulings that shape the case, and twelve strangers sit in judgment, defendants sit silent.[252] Indeed, the jurors will likely not hear the defendant's voice before they render their verdict. It is hard to imagine anything more demeaning than being a planted supplicant forced to do nothing while your life is on the line. The subjugating nature of the trial process is only intensified by the racial bias—both subtle and overt—that thrives in the everyday criminal courtroom.[253]

Against this backdrop, the idea of stripping *any* power from a criminal defendant, no matter how slight, should be viewed with immense skepticism. This is true for all defendants, but is especially true for poor defendants of color who are navigating a system that is likened to Jim Crow and is traced back to slavery.[254] In a system that renders defendants powerless, any morsel of agency must be jealously guarded, even if it's only the power to lean over to one's lawyer and tell them to strike a juror because they do not like the

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[250] *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018); *see generally* CARISSA BYRNE HESSICK, *The Rise of Plea* Bargaining, in PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021); Daniel Harawa, *Trials Without Justice*, INQUEST, Sept. 21, 2021, https://inquest.org/trials-without-justice/ .

[251] Hanan, *supra* note 45 at 495.

[252] *See supra* note 45.

[253] *See, e.g.*, L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 864, 867 (2017); Amanda Carlin, Comment, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 453 (2016).

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

look of them.[255]

Focusing on just the interests of potential jurors, whether eliminating peremptory challenges is the promised boon for racial justice that commentators suggest raises complex questions about efficacy and approach. When one weaves in and elevates the interests of defendants, particularly defendants of color, then the racial justice picture becomes much more complicated, as there are competing concerns that weigh in favor of retaining peremptories. This knotty racial justice picture must be accounted for, and the tradeoffs acknowledged—both in the literature and the policy debates—before trumpeting peremptory elimination as a racial justice win.

C. Protecting All Interests: Alternative Solutions

When thinking about the interests of citizens of color who wish to exercise their right to serve on a jury, and defendants of color who wish to retain the power to shape the jury that will judge them, there are solutions other than eliminating peremptories that better protect both sets of interests. This subpart uplifts two: beefing up the *Batson* standard—an approach already taken by some States; and asymmetric elimination of peremptories—where prosecutors do not exercise strikes.

1. Beefing Up Batson

Before getting rid of peremptory strikes, one approach jurisdictions can take to solve the problem of prosecutors discriminatorily wielding their peremptories is to amend the *Batson* framework to better detect and prevent bias—an approach already taken by several States. Recall[256] that *Batson* has three steps. First a defendant must make out a prima facie case of discrimination, which generally requires a defendant to show a pattern of strikes

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

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

ANTHONY AMSTERDAM & RANDY A. HERTZ, TRIAL MANUAL 8 FOR THE DEFENSE OF CRIMINAL CASES, 1190 (2023).

[256] *See infra* Part I.A.

against jurors of color. Then, the prosecutor can rebut that prima facie showing by providing race-neutral reasons for the strikes. Finally, the burden shifts back to the defendant to prove that the prosecution's race-neutral reasons were pretextual and that the prosecutor purposefully discriminated.

Some States have attempted to reenforce the *Batson* framework by eliminating step one. For instance, in California, Connecticut, New Jersey, and Washington, a defendant does not have to make out a prima facie case of discrimination.[257] Rather, they can object to a strike, cite the relevant rule, and then the burden shifts to the prosecutor to justify the strike.[258]

States have also amended *Batson* step two to presumptively take some common, racially-coded race-neutral reasons off the table as legitimate justifications for a strike. For example, Washington provides a list of "presumptively invalid" reasons for a strike that historically "have been associated with improper discrimination in jury selection," e.g., "distrust of law enforcement."[259] California likewise provides a list of presumptively invalid reasons for a strike—like a juror's neighborhood—"unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race . . . ."[260] Connecticut has a similar list of presumptively invalid "race-neutral" yet race-coded reasons, including the receipt of state benefits.[261]

Additionally, many of the states that have altered the *Batson* framework have gotten rid of the purposeful discrimination finding. Thus, in California, a court reviewing a *Batson* challenge must, rather than determining whether there was purposeful discrimination, instead ask whether "there is a substantial likelihood that an objectively reasonable person would view race . . . as a factor in the use of the peremptory challenge."[262] Washington also has an objective observer standard, and an objective observer under Washington law is one who is explicitly "aware that implicit, institutional, and unconscious biases, in additional to purposeful discrimination, have resulted in

[257] *See* Wash. R. Gen. 37; N.J. Ct. R. 1:8-3A; Cal. Civ. Proc. Code § 231.7; CT R Super. Ct. Gen. § 5-12.
[258] *See id.*
[259] Wash. R. Gen. 37(h)(1).
[260] Cal. Civ. Proc. Code § 231.7(e).
[261] CT R Super. Ct. Gen. § 5-12(g). New Jersey did not codify a list of presumptively invalid reasons, but did list some reasons that a court should "bear in mind" that "have historically been associated with improper discrimination, explicit bias, and implicit bias in jury selection" as presumptively invalid. N.J. Ct. R. 1:8-3A cmt. 3.
[262] Cal. Civ. Proc. Code § 231.7(d)(1).

the unfair exclusion of potential jurors . . . ."[263] Connecticut similarly has an objective observer standard in which the observer is presumed to be aware of "implicit, institutional, and unconscious biases."[264] New Jersey asks whether a "reasonable, fully informed person would believe that a party removed a prospective juror based on the juror's [race]."[265]

In other words, these states have attempted to identify the weak points in the *Batson* framework and fortify them. Under some of the reforms, now a defendant does not have to prove a pattern of discrimination at step one, rather, every strike can be objected to and thus must be justified. That means that a prosecutor likely has to think twice before striking a juror of color, and if they do, must be ready to justify that strike. Even still, because some of the "race-neutral" reasons that prosecutors most often give for striking jurors of color—e.g., distrust of law enforcement, family members with experience with the criminal legal system, appearance[266]—are now off the table given the changes made to step two of the *Batson* framework. This means that it is now more likely that a prosecutor will have to have a *legitimate* reason for a strike independent of a juror's race. But even if a prosecutor comes up with a permissible race-neutral reason, there is the backstop of the objective observer standard. If an objective person who is aware of racial bias in all its permutations could still reasonably believe that a strike was in-part motivated by race, the objection will be sustained.

While it's still early and thus there is little data exploring how effective these reforms have been at diversifying juries, on their face, they are far more robust than the current *Batson* standard. To be sure, these reforms may not catch all racism. Prosecutors may become even more imaginative in their reasons for striking jurors of color and still may fall prey to their implicit and subconscious biases, and judges may still be loath to sustain *Batson* challenges for fear of calling the prosecutor a racist.[267] But still, these reforms will likely do some real work at curbing discrimination in jury selection, while also allowing defendants to retain the power to use peremptories to remove potentially biased jurors, and retain the power to shape the decisional body that will decide their fate. Thus, beefing up *Batson* may better protect the various racial justice interests implicated by peremptory elimination.

[263] Wash. R. Gen. 37(e) & (f).
[264] CT R Super. Ct. Gen. § 5-12(e).
[265] N.J. Ct. R. 1:8-3A(e).
[266] *See, e.g.*, Cal. Civ. Proc. Code § 231.7(e); Wash. R. Gen. 37(h).
[267] *See, e.g.*, *Fixing* Batson, 48 LITIGATION 1 (2022), https://www.americanbar.org/content/dam/aba/publications/litigation_journal/summer-2022/fixing-batson.pdf

There is another added benefit that a more robust *Batson* standard has over outright peremptory elimination: more honest conversations about race in the courtroom.[268] By creating standards that require an understanding of implicit bias, historic bias, and unconscious bias, States that are adopting these more robust *Batson* frameworks are requiring the bar to become competent in their ability to have nuanced discussions about race. Lawyers will not have to go out on a limb to bring racial realism into the courtroom.[269] Some of the standards that States have adopted give room for open discussions of racism in the criminal courtroom, a place where race and racism is always salient, but often goes unaddressed.[270]

To this point, in Washington you see the cascading effects of how open discussions of race in one legal context can lead to open discussions in other contexts. There, the Washington Supreme Court cited GR 37—the rule amending *Batson*—to adopt a similar objective observer standard to be applied in the Fourth Amendment seizure context.[271] In the process, the court explicitly noted that it was doing so to encourage more legal truth telling: "Today we formally recognize what has always been true: in interactions with law enforcement, race and ethnicity matter."[272] Therefore, beefing up *Batson* creates a world in which the law encourages lawyers to engage in honest discussions about race and how it operates in the criminal legal system. By contrast, eliminating peremptories suppresses discussion, "feed[ing] into the fiction that race is irrelevant, and the world is postracial and thus law should be too."[273]

2. Asymmetric Elimination

Another solution to the problem of discrimination in the use of peremptories that better protects the racial justice interests of both potential jurors and defendants is a solution previously urged by a handful of scholars: asymmetric elimination of peremptory strikes—denying peremptories to prosecutors only. This solution makes better sense for several reasons.

First, it is *prosecutorial* abuse of the peremptory system that has led

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[268] *See generally Harawa, Whitewashing the Fourth Amendment*, *supra* note 236 at 979 (discussing the importance of litigating race in the criminal cases in the Fourth Amendment context). I am thankful to Judge Veronica Galván of King County Superior Court for highlighting this benefit of the rule.
[269] *See id.* at 980
[270] *See id.* at 927-28.
[271] State v. Sum, 511 P.3d 92, 106 (Wash. 2022).
[272] *Id.* at 119-10.
[273] Harawa, *Whitewashing the Fourth Amendment*, *supra* note 236 at 981.

to the systematic exclusion of people of color from juries.[274] It therefore makes sense to deny the tool to the party that has abused it, rather than taking it away from everyone. Indeed, individual defendants, even if they wished to discriminate, could not engage in the same systematic discrimination that government actors have engaged in.[275]

Second, prosecutors do not have the same interests in using peremptory challenges as defendants. Under the Constitution, the defendant, not the prosecution, has a right to an impartial jury, and thus asymmetry is a feature of constitutional design.[276] As the Supreme Court has said, the "right to jury trial is granted to criminal defendants in order to prevent oppression *by the Government*."[277] Indeed, given that prosecutors have an ethical obligation to purge the courtroom of bias, there is even more reason for prosecutors to forgo their peremptories while defendants retain them.[278]

Third, "[t]here is ample historical precedent for the allotment of peremptories to defendants but not the government."[279] At the Founding, many states allotted defendants peremptory strikes and not the government.[280] And the trend toward parity would not happen until the mid-to-late Nineteenth Century, when by States could no longer exclude Black people from jury service by law. Therefore, a number of States granted prosecutors the peremptory power as a new "procedural weapon" to ensure racial exclusion.[281] Fast-forward to today, and the idea of peremptory parity has become deeply embedded in our collective consciousness, with many resisting asymmetric elimination, perceiving it to be "an unfair advantage to the defense"[282] despite this sordid history, and even though the idea of an unfair advantage to the defense in the face of the awesome power of the prosecutor is laughable.

Even though there is historical precedent for the uneven distribution

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[274] *See* Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1169 (2014).
[275] *See id.*
[276] *See* Roberts, *Asymmetry as Fairness*, *supra* note 28 at 1539.
[277] Duncan v. Louisiana, 391 U.S. 145, 155 (1968).
[278] *See* ABA Criminal Justice Standards for the Prosecution Function 3-1.6(b) (2017) ("A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified.").
[279] Ogletree, *supra* note 39 at 1148; *see also* Roberts, *supra* note 28 at 1536.
[280] *See supra* Part I.
[281] *See* Colbert, *supra* note 98, at 81.
[282] Roberts, *supra* note 28 at 1539.

of peremptory challenges, and even though asymmetric distribution adheres to constitutional structure, scholars have worried that there may not be legislative or judicial will to eliminate peremptory challenges for prosecutors but retain them for defendants.[283] Thus, for asymmetric elimination to happen, we may be left to hope for prosecutors voluntarily waiving their peremptory challenges.[284] Unilateral disarmament may have once seemed a pipedream. But in the wake of the "progressive" prosecutor movement,[285] asymmetric elimination may now be feasible given that a key tenet of the progressive prosecutor platform is to reduce racial disparities in the criminal legal system.[286] As proof, there is at least one example of a prosecutor taking this previously unimaginable step.

Parisa Dehghani-Tafti is a former public defender and was elected Commonwealth Attorney for Arlington County and the City of Falls Church, Virginia in November 2019.[287] As part of her platform, Dehghani-Tafti explicitly recognized "the outsized impact the legal system has on people of color," and "committed to highlighting, addressing, and reversing these disparities."[288] One policy Dehghani-Tafti adopted to further this mission is

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[283] *See id.* at 1542; Aliza Plenar Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L.L. REV. 357, 389-80 (2019).

[284] Howard, *supra* note 86 at 372.

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

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

[287] Arlington Virginia, *Parisa Dehghani-Tafti*, https://www.arlingtonva.us/Government/Departments/Courts/Commonwealth-Attorney/Meet-Parisa (last visited July 8, 2024).

[288] *Id.* In an interview Dehghani-Tafti said the policy has not had an impact on their win rates. Nicole Rinconeno, Haleigh Sinclair, Eden Kinlock, *Striking Peremptory Challenges in Jury Trials: Costs, Benefits, and the Restoration of Rights*, DC JUSTICE LAB, 4-5 (2022), https://dcjusticelab.org/wp-content/uploads/2022/09/Striking-Peremptory-Challenges-in-Jury-Trials.pdf.

"eliminating peremptory strikes in juries," although it appears that this elimination is not absolute, as Dehghani-Tafti's policy still allows prosecutors to use peremptory strikes if a lawful for cause challenge is denied."[289] Thus, though not absolute, Dehghani-Tafti's policy is proof that there may be prosecutors who will willingly forgo the use of peremptory challenges given the fact that they have historically been a tool of discrimination. Asymmetric peremptory elimination of this kind will hopefully lead to more diverse juries while also allowing defendants the ability to retain peremptories to preserve their unique set of interests. Indeed, one would hope that given that prosecutors are supposed to be "ministers of justice" who have an ethical obligation to "be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race,"[290] many more prosecutors will follow Commonwealth Attorney Dehghani-Tafti's lead.

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

D. Facile Racial Justice

The debates surrounding whether to eliminate peremptory challenges reveal an important story that resonates far beyond that one context. They are a reminder to beware of "facile racial justice"—racial justice measures that

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[289] *See* Jenny Roberts, *Defense Lawyering in the Progressive Prosecution Era*, 109 CORNELL L. REV. __, 55 & n.234 (forthcoming 2024).

[290] ABA Model Rules of Professional Conduct, Rule 3.8 comment (2017) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate"); ABA Criminal Justice Standards for the Prosecution Function 3-1.6(b) (2017).

are neat and tidy on their face but when scrutinized, fail to adequately account for the complexities and nuances of race and racial bias. There is no one right way to do "racial justice" (though there could be obviously wrong ways). As such, when speaking of facial racial justice, this Article is focused less on the quality of the racial justice measure, and more on the process and thought that went into formulating the proposal. To that end, the Article suggests that for a racial justice measure to not be facile, its proposers must grapple with the various pros and cons underlying the measure. This grappling can be done along many dimensions: feasibility, effectiveness, reach, etc. And depending on which dimension one prioritizes, the solution may well look different. Not grappling with the complexities is what this Article cautions against, as that risks unwittingly adopting solutions that ensconce racism and racial bias as opposed to alleviating it. With that in mind, there are at least three lessons we can learn from the ongoing peremptory elimination debates that can be applied when evaluating other racial justice measures going forward.

1. Beware Cosmetic Fixes

First, the story of peremptory elimination is a broader reminder to be aware of racial justice measures that are cosmetic in that they do not actually do the work of addressing the root causes of the racial bias. The problem with discrimination in the use of peremptory challenges is not the availability of peremptories, it's that prosecutors are wont to discriminate. This could be for good reason—perhaps prosecutors genuinely believe that race is a good indicator of the views of a juror.[291] As recovering federal prosecutor Professor Paul Butler explained: "Like any other lawyer, a prosecutor wants a jury that is predisposed to decide the case in favor of his client. In that equitation, of course race makes a difference."[292]

If that is the reason for the widespread discrimination in the use of peremptory challenges, getting rid of strikes does not solve the problem. To the contrary, it just pushes prosecutors to act out their bias in other ways—with or without peremptory strikes, most prosecutor will still have the urge

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[291] As Professor Paul Butler recalled from his time as a federal prosecutor:

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

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

[292] *Id.* at 12; *see* Paul Butler, *Confronting Mass Incarceration: Lecture from the 2018-2019 Jorde Symposium*, 107 CALIF. L. REV. 1955 (2019).

to empanel a jury that they think will be favorable.[293] This, of course, supports the data showing that there are racial disparities in the use of for cause challenges, too.[294]

This is why cosmetic racial justice measures are unlikely to solve the problem they are trying to fix—they do nothing to address the root causes of bias. It is understandable why cosmetic fixes are appealing—the logics of racism are engrafted onto our societal DNA and given that, it may well be difficult, if not impossible, to fully remediate racism and racial bias. With these headwinds, cosmetic quick wins might be the most (or only) viable path forward. But if that's the case, it is important to acknowledge that. If we think that racism and racial bias is such an intractable problem that we can only seek out cosmetic reform, then honesty about that point is important, as it reinforces the existence of a racial hierarchy in a moment where we are constantly told that racism is in America's rearview mirror.[295]

With this in mind, it is important to revisit Justice Marshall's call to eliminate peremptories in *Batson*.[296] True, Justice Marshall did champion getting rid of peremptories across the board. But he did so against the backdrop of spending his career fighting for racial justice and equity, advancing a broader vision of the antiracist and emancipatory power of the law.[297] It thus would be a mistake to believe Justice Marshall would think that eliminating peremptories alone would solve a problem as complex as that of discrimination in jury selection—after all, he spent a career defending Black men being tried by all white juries. He of anyone would have understood that eliminating racial discrimination in jury selection would require an enduring, multi-pronged approach, of which eliminating peremptories would be just one step.

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[293] *Id.*

[294] *See* Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, *supra* note 25 at 793-97.

[295] *See, e.g.*, Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1236 (2024) (accusing civil rights litigants raising racial gerrymandering claims of "seek[ing] to transform federal courts into weapons of political warfare that will deliver victories that eluded them in the political arena" (quotation marks omitted)); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 204 (2023) (announcing that "[t]he time for making distinctions based on race had passed"); Flowers v. Mississippi, 588 U.S. 284, 301 (2019) *(asserting that "Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants"); Shelby County v. Holder, 570 U.S. 529, 547 (2013) (declaring that things have "changed dramatically" since the passage of the Voting Rights Act).

[296] *See infra* Part I.A.

[297] *See generally* Gilbert King, Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America (2013).

Selling simplistic racial justice measures as a fix to systemic problems of racial discrimination, especially in the criminal legal system, does nothing but obscure the real role that race plays in society, ensuring true racial equity will never be realized. That is the opposite of what Justice Marshall would have wanted.

2. Heed Non-Racial Justice Interests

Second, the story of peremptory elimination is a call to pay close attention to other interests unrelated to racial justice or equity that may be driving a proposed reform measure. In addition to scholars, the loudest calls to eliminate peremptory challenges come from judges. That the group most stridently championing peremptory elimination is not the group directly harmed by the discrimination should raise eyebrows, especially given that those who *do* suffer from the discrimination have resisted getting rid of peremptory challenges. Those eyebrows should be raised even further when you untangle the various reasons judges cite in support of peremptory elimination.

Certainly, judges who push for eliminating peremptories claim to do so to address the rampant discrimination in the use of peremptories. But that is not the only reason. Alongside the racial justice reason, judges often also cite efficiency concerns as a reason to eliminate peremptories, arguing that eliminating peremptories can save the time and expense of conducting *Batson* inquiries.[298] Judges wanting to eliminate peremptories to streamline court proceedings has little to do with racial justice. In fact, the efficiency reason reveals an underlying impatience with the difficult process of ferreting out racial bias.[299]

Related to efficiency, many judges just do not like *Batson*. As one group of judges explained, "our society is very uncomfortable talking about

[298] *See supra* Part I.B.2. A recent survey of jury trials showed that on average, the median length of voir dire was 2 hours. PAULA HANNAFORD-AGOR & MORGAN MOFFETT, STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS, 15 (2023), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0041/99995/SOS-Voir-Dire.pdf

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

discrimination," and a "*Batson* challenge is almost always perceived as an accusation that the opposing lawyer is a racist."[300] Thus, getting rid of peremptories not only has the upside of addressing the discriminatory use of peremptories; from a judge's perspective, it leads to more efficient trials and relieves them of having to find that a lawyer may have discriminated.

In that way, the debates around peremptory elimination call to mind what Professor Derrick Bell referred to as interest convergence.[301] In discussing the school desegregation litigation culminating in *Brown*, Bell asserted that the "interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[302] And it was this convergence of interests that led to the Supreme Court's decision in *Brown*, Bell contended, as the interests of Black people in pursuing equal education for their children converged with the interests of white people "in policymaking positions able to see the economic and political advances at home and abroad that would follow from the abandonment of segregation."[303] What else, Bell asked, could account "for the sudden shift in 1954 away from separate but equal doctrine towards a commitment to desegregation."[304]

But if the story of peremptory elimination is also a story of interest convergence—the interests of people of color not being discriminated against during jury selection converging with the non-racial interests of a predominately white judiciary yearning for efficiency—then it is equally important to remember Bell's admonition about being "hard-eyed" about the permanence of racism.[305] Bell believed that "yearning for racial equality is a fantasy."[306] But Bell did not suggest that this meant giving up hope. Rather, as he saw it, one could recognize "the futility of action (where action is more civil rights strategies that are destined to fail)" and nevertheless maintain "the unbelievable conviction that something must be done, that action must be taken."[307]

Taking a step back, if a racial justice measure is seemingly borne from

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[300] Judge Steven Kirkland, Judge Latosha Lewis Payne, & Judge Ravi. K. Sandill, Batson*: Protecting Every Citizen's Right to Participate in Jury Service*, HOUS. LAW., September/October 2020, at 34, 36; *see also* Coombs v. Diguglielmo, 616 F.3d 255, 264 (3d Cir. 2010).
[301] Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).
[302] *Id.* at 523.
[303] *Id.* at 524.
[304] *Id.*
[305] Derrick A. Bell Jr., *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79, 79 (1991).
[306] *Id.* at 91.
[307] *Id.*

a convergence of interests, some of which have nothing to do with racial justice or equity, that does not necessarily mean that the measure should not be pursued.[308] Indeed, one may prioritize interests other than racial justice when promoting the elimination of peremptories, such as broader democracy interests. If so, it is important to be explicit about that.

The debate over eliminating peremptories with the various interests at play is a reminder to be clear-eyed about the converging of interests and a warning that it would be a mistake to think that any one remedial measure is racism's silver bullet.[309] Instead, each measure taken must be seen as a call to do more, as our humanity "grows stronger through resistance to oppression even if that oppression is never overcome."[310]

3. Mind Competing Racial Justice Interests

Third, the story of peremptory elimination is at bottom a story of how racial justice interests can conflict,[311] and thus a call for us all to contemplate how proposed racial justice measures mediate those conflicts. Black people can at times have competing intracommunity interests. Derrick Bell taught us this lesson, too.

In his seminal article *Serving Two Masters*, Bell also explored the racial justice tensions underlying the school desegregation strategy.[312] On one hand there was the interest in racial integration prioritized by civil rights groups and the Black middle class.[313] But as Bell explains, in the face of increasing resistance to integration, many Black community groups shifted fo-

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[308] In a future work, I hope to explore the idea of interest convergence as a sliding scale, the thought being that when the more important the Black interest, the more willing we should be to accept whatever downsides come with convergence.
[309] *See id.* at 92.
[310] *Id.*
[311] *See* Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699 (2023). In an important work discussing the competing interests in the Black community towards penal administration, Gardner identifies three distinct interests that Black Americans may have in the administration of criminal law: a liberty interest, security interest, and democratic interest. *Id.* at 1703. And Gardner explains that there can be conflict among these interests when pursuing various forms of criminal justice reform, and that some reforms may not be able to satisfy all three interests. *Id.* at 1703-04.
[312] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976)
[313] *Id.* at 489.

cus, caring less about integration and instead deciding to place greater emphasis on upgrading quality of education.[314] In telling this story, Bell excavates a very real tension that existed within the Black community, often divided by class, over what racial justice meant in this particular context.

Similarly, when thinking about racial justice and the criminal legal system, it's important to be mindful of the fact that the interests of Black people, and people of color more broadly, may not be neatly aligned.[315] This is abundantly clear in the jury context. First, there are the interests of jurors of color who wish to serve, which is being frustrated by the use of peremptories. Prioritizing this racial justice interest, peremptory elimination makes sense (although, as discussed above, whether it should be the first fix is debatable). Defendants, especially defendants of color, have an interest in shaping their jury, both as an exercise of autonomy and as a measure to ensure biased people do not sit in their judgment. Eliminating peremptory strikes frustrates this interest.

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

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The proponents of eliminating peremptory challenges as a racial justice measure have failed to consider the full set of racial justice interests—particularly those of defendants of color. Likewise, they have not fully explained how eliminating peremptory challenges is a viable means to ensuring

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[314] *Id.* at 482.

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

jury diversity given the structural barriers to jury service that disproportionately exclude people of color, and the adaptability of racism that will allow biases to operate at other points in the jury formation process. If proponents had considered all these complicating dynamics, then they may well have looked to other fixes to the jury selection process, like fortifying the *Batson* framework or eliminating peremptories for prosecutors only. Or, they might have looked to address the structural barriers that hurt the diversity of the jury pool more broadly. This is not to say that one could not ponder each of these options and still walk away thinking that eliminating peremptory challenges is the best first solution. But one cannot be so sure without the full consideration of all the interests and options that are available.

CONCLUSION

While eliminating peremptories has simplistic appeal, as a racial justice measure, this solution has predictable downsides: By not addressing the underlying biases that drive the discriminatory use of peremptories, the bias will likely manifest elsewhere in the jury formation process. By not solving the structural issues that lead to the underrepresentation of people of color in jury pools across the country, there will still be issues of jury diversity. By taking away a tool of agency, we are disempowering defendants, who are disproportionately people of color, in a system that engages in totalizing dehumanization. And these are just the predictable downsides. There could be others that may not be so easily imaginable. If one considers all this and still believes that peremptory elimination is the best path forward, sobeit. I may not agree with that solution as a first measure if racial justice is the goal, but if it is a solution that is adopted with foresight and care, then I am also humble enough to know that there is often more than one answer to complex problems. But to be clear, eliminating all vestiges of racial bias, both in the jury system and beyond, will never be so simple; it "is the struggle of a lifetime, or maybe even many lifetimes, and each of us in each generation must do our part."[316]

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