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First Twelve in the Box: Implicit Bias Driving the Peremptory Challenge to the Point of Extinction

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ABSTRACT

Peremptory challenges in jury selection are being used in a biased and discriminatory manner. The Batson v. Kentucky *safeguards are not working as intended and have not resolved the problem of jury bias. States now need to decide: will they follow Arizona's bold lead in 2022 and abolish peremptory challenges, or will they follow Washington and try to improve on* Batson*?*

This Article presents a compelling argument for abolishing peremptory strikes in jury selections. The authors trace the historical development of peremptory challenges, highlighting their evolution

from a mechanism to ensure impartiality to their current use in shaping a biased jury. After examining Washington's "neutral observer" standard and Arizona's complete elimination of peremptory challenges, the authors advocate for a shift to the English model—where "the first twelve in the box" become jurors. The Article includes a helpful chart showing the direction in which key states are leaning. It raises thought-provoking questions about implicit bias, the limitations of current methods, and the advantages of a simplified approach to jury selection.

INTRODUCTION

The historical arc for the peremptory juror challenge is headed toward its demise. Such a profound assessment will strike many practitioners of jury trials as startling, but for those monitoring recent legislative and judicial developments, the specter of change is looming.

Peremptory challenges were devised under English common law to aid in achieving an impartial jury and to protect the accused from the excesses of the Crown.[1] Yet, over time, United States prosecution and defense lawyers have manipulated peremptory challenges to achieve not an impartial jury, but a jury partial to their cause.[2] Further, in the United States, prosecutors have manipulated peremptory challenges for a more invidious purpose: to exclude Black individuals from juries.[3]

The Fourteenth Amendment grants citizenship to "[a]ll persons born or naturalized in the United States" and provides all citizens with "equal protection of the laws."[4] As far back as 1879, in *Strauder v. West Virginia*, the Supreme Court decreed that laws barring Black citizens from jury service were unconstitutional.[5] After ending upfront discrimination, peremptory challenges became the instrument of choice to discriminate through the back door.

Despite the *Strauder* decision and federal legislation outlawing race-based discrimination, excluding Black citizens from juries not only continued through peremptory challenges but was endorsed by the

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1 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 96 (1972).

2 *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1096 (2011).

3 *See id.*

4 U.S. CONST. amend. XIV, § 1.

5 Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

Supreme Court's deference to state court decisions.[6] It was not until the infamous "Scottsboro Boys" case in 1935 that the Supreme Court finally called out local and state officials for illegally excluding Black individuals from juries[7]—but the practice continued through more selective peremptory challenges.[8]

In 1965 the Supreme Court reversed that trend when they held that peremptory challenges could not be used to intentionally exclude Black individuals from jury duty in *Swain v. Alabama*.[9] However, the Court required proof of intentional discrimination, a very high bar, allowing the system of bias to continue.[10]

The 1986 case *Batson v. Kentucky* overturned *Swain* and allowed the defendant to prove racial bias in jury selection by pointing to a pattern of peremptory strikes showing discriminatory intent.[11] Justice Thurgood Marshall, concurring, warned that although the new standard was a step in the right direction, its application left open a loophole allowing prosecutors to discriminate as long as they gave a race-neutral explanation for their strike.[12] Justice Marshall went on to note that proving a prosecutor's motive behind a pretextual discriminatory strike would be difficult, and the only way to truly end racial discrimination would be by "eliminating peremptory challenges entirely."[13] Chief Justice Warren Burger, dissenting, argued that such an argument was too extreme, maintaining that "[a]n institution like the peremptory

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6 *See, e.g.*, Brownfield v. South Carolina, 189 U.S. 426, 426, 428–29 (1903) (holding that the record disclosed no wrongdoing even though attorneys selected a grand jury composed of all white people—despite Black individuals constituting four-fifths of the county's population).

7 *See* Norris v. Alabama, 294 U.S. 587, 588, 596 (1935) (finding evidence of discrimination after all prospective Black jurors were struck for a trial involving nine Black men allegedly raping two white women); *see also* Douglas O. Linder, *The Trials of "the Scottsboro Boys": An Account*, UMKC, https://famous-trials.com/scottsboroboys/1531-home [https://perma.cc/KU8A-KABG].

8 *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2240, 2250–51 (2019) (holding the trial court erred in finding the State's peremptory strike of a prospective Black juror was not motivated by discriminatory intent, in violation of *Batson*).

9 *See* Swain v. Alabama, 380 U.S. 202, 208, 227 (1965) (finding that a criminal defendant is not constitutionally entitled to a proportionate number of his or her race on the jury).

10 *Id.* at 227.

11 *See* Batson v. Kentucky, 476 U.S. 79, 95 (1986); *see also infra* Part III.

12 *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

13 *Id.* at 102–03, 106.

challenge that is part of the fabric of our jury system should not be casually cast aside."[14]

Thirty-two years post *Batson* proved both Justices right. Study after study showed that prosecutors were continuing to use peremptory challenges to strike Black prospective jurors and that the racially neutral stated reasons were sufficient to obfuscate allegations of discrimination, just as Justice Marshall predicted. And just as Justice Burger asserted, neither states nor the federal government have been able to cast aside the practice of peremptory challenges casually.

It was not until 2018, after mounting criticism focused on the inadequacies of *Batson*, that Washington became the first state to close the *Batson* loophole.[15] California followed suit in 2022 along with Colorado, Connecticut, and New Jersey.[16] In 2022, Arizona concluded that further tinkering and tailoring of *Batson* would not cure the problem and heeded Justice Marshall's solution by becoming the first state to abolish peremptory challenges entirely.[17]

States are now at a crossroads. Since *Batson*, objections during jury selection and piecemeal judicial modifications to its application have proven ineffective at rooting out racially discriminatory peremptory challenges.[18] States must decide whether to follow Washington's lead and revise the *Batson* framework, pursue Arizona's approach and eliminate peremptory challenges altogether, or simply maintain the status quo from the 1986 *Batson* decision.

This Article argues that states should follow Arizona and abolish peremptory challenges entirely. The original justification for creating peremptory challenges—to aid in ensuring an impartial jury to protect the defendant—is not served by their continued use. On the contrary, peremptory challenges are now a tool for advocates to create a partial jury to the detriment of the accused and should be ended.

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14 *Id.* at 133 (Berger, C.J., dissenting).

15 *See* WASH. CT. GEN. R. 37(e).

16 *See infra* Section VI.D.

17 ARIZ. R. CRIM. P. 18.4; 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, 1, 3, 5 (Ariz. 2021).

18 *See infra* notes 140–166 and accompanying text.

I
OVERVIEW OF JURY FORMATION

A verdict rendered by an impartial jury is the cornerstone of the American justice system.[19] The Sixth Amendment guarantees that the accused in a criminal trial shall receive a "speedy and public trial" with an "impartial jury" that has been drawn "from the state and district wherein the crime [was] committed."[20] In most jurisdictions, this constitutional right is effectuated through a series of procedural measures including the random selection of a jury venire and a voir dire process where litigants question prospective jurors to determine whether they can be fair based on the circumstances of the case before them.[21] During this process, advocates may make use of for-cause and peremptory challenges to eliminate members of the venire they perceive to be incapable of impartiality or undesirable for the advocate's objective.[22]

A. Jury Venires

Jury venires, the broader pool of individuals from which a sworn jury is chosen, are constructed by summoning a random grouping of members of the community located via voter rolls and driver's license registration records such that the venire's composition reflects a fair cross section of the community from which it has been drawn.[23] Once a venire is created, a randomized subset of this pool, usually twelve to eighteen individuals, are chosen as a first panel of potential jurors who will be subjected to the voir dire process, where judges and advocates for each party are generally permitted to ask questions regarding a

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19 *See* U.S. CONST. amend. VI.; *see also* Taylor v. Louisiana 419 U.S. 522, 530 (1975) ("We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation."); Gray v. Mississippi, 481 U.S. 648, 668 (1987) ("[T]he impartiality of the adjudicator goes to the very integrity of the legal system . . . .").

20 U.S. CONST. amend. VI.

21 *See Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining voir dire as "to speak the truth"); *see also* 28 U.S.C. § 1863(a)–(b) (outlining requirements for U.S. district courts to have random selection of grand and petit jurors); *Juror Qualifications, Exemptions and Excuses*, U.S. CTS., https://www.uscourts.gov/services-forms/jury-service/juror-qualifications-exemptions-and-excuses [https://perma.cc/H6DS-YSJ7].

22 *See* Lauren Kingsbeck, Note, *A History of Exclusion: "For Cause" Challenges and Black Jurors*, 19 U. ST. THOMAS L.J. 654, 658 (2023).

23 *See, e.g.*, Williams v. State, 555 N.E.2d 133, 138 (Ind. 1990) (stating that "[t]he purpose of the jury selection procedures is to assure that jurors are chosen on a random basis, to avoid even the possibility of bias").

juror's life experiences to assist in determining their ability to impartially judge the evidence in the case.[24]

B. Challenges for Cause

Either the parties or the judge, sua sponte, may issue a "challenge for cause" or "for-cause challenge" if a prospective juror is found to have actual or implied bias or lack sufficient qualifications.[25] Typically, such challenges are based on specific reasons that would affect a prospective juror's ability to render an impartial verdict.[26] For example, individuals carrying extreme or explicitly discriminatory views about the defendant, the attorneys, or other relevant parties might be sufficient for sustaining a for-cause challenge.[27] Other instances where a for-cause challenge could be sustained relate to a potential juror's personal relationships or acquaintanceships with the parties or witnesses to the case, prior knowledge related to the specific evidence of the case, or an inability to serve due to lack of capacity or serious mental illness.[28]

C. Peremptory Challenges

While for-cause challenges are unlimited, they require a judge to agree to the basis for the potential juror's exclusion.[29] If a for-cause challenge is raised by a party and denied by the judge, the juror remains eligible to serve as a juror on the case.[30] However, a party may still

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[24] *See, e.g.*, CAL. R. CT. STANDARD 4.30 (outlining areas of inquiry that parties should use when determining qualifications for jurors); *see also* Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 241 (1993) (explaining that "[*v*]*oir dire* is designed to eliminate potential jurors who may be biased").

[25] Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMPAR. L.J. 507, 536–37 (1997).

[26] *See Challenge for Cause*, LEGAL INFO. INST. (Oct. 2022), https://www.law.cornell.edu/wex/challenge_for_cause [https://perma.cc/SN5A-KFQ7].

[27] *Id.*

[28] *Id.* For federal proceedings, see generally 28 U.S.C. § 1865, which specifies the qualifications that render a juror unqualified to serve on federal juries.

[29] Batson v. Kentucky, 476 U.S. 79, 135 (1986) ("[C]hallenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality.").

[30] *See, e.g.*, WASH. REV. CODE § 4.44.150 (2023) (describing Washington's process for making challenges for cause); ARIZ. R. CIV. P. 47(d)(2) (outlining Arizona's court procedure of ruling on challenges for cause under a preponderance of the evidence standard

direct a peremptory challenge—which is discretionary—toward the same juror, or any other juror, without, in most cases, requiring the approval of the trial judge.[31] Under ordinary circumstances, when a juror is successfully challenged—either for-cause or peremptorily—a new random member of the original venire is selected to replace them, and the voir dire process continues until either both parties agree to the constitution of the jury or until all for-cause and peremptory challenges are exhausted by both parties.[32]

II
THE EVOLUTION OF PEREMPTORY CHALLENGES

From where and when did peremptory challenges emerge? Section A looks at the origins of the peremptory challenge in twelfth-century England and the reasons for its demise in the twentieth century. Section B follows the history of peremptory challenges in the United States from their adoption as part of our English common law inheritance, through the *Batson* restrictions, to the present.

A. The Development of Peremptory Challenges in England

The Normans are thought to have brought the concept of juries to England after the Norman Conquest of 1066.[33] Local individuals familiar with an alleged incident would be called upon as part of a

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to illustrate the juror cannot render a fair and impartial verdict); CAL. CIV. PROC. CODE § 227 (Deering 2023) (explaining California's challenges for cause).

[31] *See Batson*, 476 U.S. at 96; PETER G. BERRIS, CONG. RSCH. SERV., *BATSON V. KENTUCKY* AND FEDERAL PEREMPTORY CHALLENGE LAW 3 (2022), https://sgp.fas.org/crs/misc/R47259.pdf [https://perma.cc/L7PG-B9TD]; *see also infra* Part IV. State criminal and civil procedure rules set forth the maximum number of peremptory challenges each party possesses in state proceedings. In federal court, three peremptory challenges are permitted in civil trials and the number of peremptory challenges in criminal trials varies depending on the nature of the underlying case. For federal criminal proceedings, see FED. R. CRIM. P. 24(b), which allows twenty peremptory challenges in capital cases, three challenges in misdemeanor cases for each party, and for noncapital cases six challenges for the government and ten for the defendant. For federal civil proceedings, see FED. R. CIV. P. 47, which says each party is entitled to three peremptory challenges as set forth in 28 U.S.C. § 1870.

[32] *See, e.g.*, WASH. REV. CODE § 4.44.210 (2023); CAL. CIV. PROC. CODE § 227(h) (Deering 2023).

[33] 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 74 (London, Cambridge: at the University Press 2d ed. 1898) (explaining the origins of key aspects of English common law and society and the development of individual rights as carved out by the Crown and the Church).

jury to give an oath as to what had happened.[34] At the beginning of the twelfth century, a grand jury would indict the accused, and a petty jury would decide guilt or innocence.[35] Indictors from the grand jury were expected to sit on the petty jury, and judges played a role in deciding the composition of the petty jury from the grand jury.[36] This process, rather predictably, seems to have favored guilty verdicts—a result reinforced by the fact that indictors sitting on the petty jury who acquitted the defendant could be fined or imprisoned for contradicting themselves.[37]

By 1352, the practice of having members of the grand jury or an enemy of the accused sit on the petty jury was established as unjust, and accordingly the accused could "challenge for this cause."[38] Although the grand and petty juries evolved into separate and distinct entities, agents of the Crown were charged with choosing the panel from which the jury was selected.[39] To balance this potential for injustice, the accused were permitted to challenge up to thirty-five jurors for any reason.[40] The Crown's unlimited number of such peremptory challenges was replaced with the power to challenge for cause only.[41] This handicap for the prosecution was short-lived after the introduction of the technique of "standing by" for the Crown.[42] During the jury selection process, while a panel was being assembled, the prosecutor had the option to request certain jurors "stand by" and await their turn to be called—if necessary.[43] Only if all potential jurors were exhausted—which was unlikely as the size of jury pools increased—would the prosecution be forced to include these

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34 Hence the term juror, from the Latin *jurare*, to swear an oath.

35 1 POLLOCK & MAITLAND, *supra* note 33, at 323–24.

36 1 HOLDSWORTH, *supra* note 1, at 325.

37 Chase & Graffy, *supra* note 25, at 522 (examining the jury selection process in England where peremptory challenges were gradually abolished).

38 *Id.* at 523.

39 1 HOLDSWORTH, *supra* note 1, at 325. Depriving or hampering the accused's liberty of defense was not only tolerated but applauded by public opinion because the government was so weak, and its enemies so strong, that many reasonably felt that the government must take every advantage of its enemies. 5 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 196 (1924).

40 Chase & Graffy, *supra* note 25, at 523.

41 *Id.*

42 *Id.*

43 *Id.*

individuals on the jury or challenge for cause to keep them off.[44] The number of peremptory challenges by the defense was lowered to twenty by 1509, seven in 1948, and three in 1977.[45]

In 1985, an editorial in *The Times* (London) sparked a debate in Parliament about the continued use of peremptory challenges.[46] The view was that defense counsel were using peremptory challenges to shape a jury "likely to be hostile to the prosecution and sympathetic to the defendant."[47] Shortly thereafter, the Fraud Trials Committee[48] Report determined that peremptory challenges were diluting the principle of random selection and that "the public, press and many legal practitioners now believe that this ancient right is abused cynically and systematically to manipulate cases toward a desired result."[49] The Committee recommended that the right of peremptory challenge be abolished in any fraud case.[50] That same year the government's White Paper on Criminal Justice argued that, despite some of its advantages, Parliament should put an end to peremptory challenges.[51] During the debate, supporters of peremptory challenges noted that there was no established link between their use and acquittal rates, although that had been the perception.[52] Opponents of retention, including the Home Secretary, argued that their use derogated from the principle that jury selection should be random:

> We used to have 35 peremptory challenges. Then it was reduced to seven. No doubt, the profession was keen that nothing should be done and thought that there was magic in the word "seven," yet it was reduced to three. Obviously, through the years Parliament has felt that, as the system as a whole becomes fairer to the defendant, this tilt in favour of the defendant is no longer necessary. We propose a

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44 *Id.*

45 *Id.*; *see also* Criminal Law Act 1977, c. 45, § 43 (Eng.).

46 Editorial, *No Challenge*, TIMES (London), June 13, 1985, at 11.

47 *Id.*

48 The U.K. government uses committees to investigate, report on, and propose legislation for Parliament to address areas of concern. The committee is chaired by a preeminent person of authority. In 1983 the Lord Chancellor (a member of the Cabinet and the House of Lords who is in charge of the courts) set up the Fraud Trials Committee (also known as The Roskill Committee) under the chairmanship of Lord Roskill due to growing concern about the length of some fraud trials and the difficulties for juries to deal with often complex and voluminous evidence. FRAUD TRIALS COMMITTEE, FRAUD TRIALS COMMITTEE REPORT, 1986, Cmnd.1522.

49 *Id.* ¶ 7.37.

50 *Id.* ¶ 7.38.

51 HOME OFFICE, CRIMINAL JUSTICE: PLANS FOR LEGISLATION, 1986, Cmnd. 9658.

52 Chase & Graffy, *supra* note 25, at 527.

> strengthening of the jury system. This is a strengthening of the random principle which lies at the heart of the jury system. It is the slow, organic conclusion of a process which has been going on for a long time.[53]

Parliament ultimately approved the Criminal Justice Bill of 1988, which contained the provision abolishing peremptory challenges, and it became law on January 5, 1989.[54]

According to defense barristers who practiced law before 1989, peremptory challenges were their best option to "pack the jury" if their cause was hopeless.[55] The evolution of peremptory challenges away from protecting a defendant from the excesses of the Crown to increasing the odds of a "not guilty" verdict for a client underscored the view that "th[e] tilt in favor of the defendant [was] no longer necessary."[56] The "strengthing [sic] of the random principle . . . at the heart of the jury system"[57] through the abolition of peremptory challenges did not create any discernible difference to members of the English Bar—except for a more expeditious empaneling of jurors.

B. The Development of Peremptory Challenges in the United States

American colonists carried over common-law traditions regarding jury trials from England. These were reinforced further through the many copies of William Blackstone's *Commentaries on the Laws of England* that made their way from the farmhouses to the courthouses of the new land.[58] Published between 1765 and 1769, the four volumes of the English common law would eventually serve as the

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53 *See* HC Deb (31 Mar. 1987) (113) cols. 996–99.

54 Criminal Justice Act (1988) § 118, CURRENT LAW (Eng.). England and Wales have a separate legal system to Northern Ireland and Scotland, all which make up the United Kingdom. For simplicity, the laws of England and Wales have been referred to as "England" only.

55 Multiple barristers who practiced law before 1989 communicated this to me when I was in London in July 2023. *See generally* LORD BARON ALFRED DENNING, WHAT NEXT IN THE LAW (1982) (noting that the peremptory challenge may work to "pack the jury-box" with sympathetic jurors). *See also* James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 322–23 (1988-1989) ("A lawyer who can pack the jury with persons whose life experiences, values, and personality incline them to his or her client's position has won a significant battle in the overall war.").

56 HC Deb, *supra* note 53.

57 *Id.*

58 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 347 (University of Chicago Press, 1979) (1769).

basis of America's yet-to-be-established legal system.[59] Those volumes included the concept of peremptory challenges for criminal defendants in capital cases. Blackstone reasoned that a defendant should not "be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike."[60] Americans tasked with establishing a new legal system concurred with Blackstone's reasoning and adopted peremptory challenges as a safeguard in criminal cases where the death penalty could be the ultimate sentence post-conviction.[61]

The common-law view was that voir dire questioning on potential bias would dishonor a prospective juror by suggesting that he might prejudge a case; it was therefore rarely done.[62] This custom was largely followed in the early years of the United States.[63] When it came time to draft the Bill of Rights and the Constitution, delegates debated the inclusion of a right to peremptory challenges, but did not embrace it in the final document.[64] Although not established in the Constitution, defendants' right to peremptory challenges in federal law cases was set out in the Crimes Act of 1790, which allowed defendants thirty-five peremptory challenges in treason cases and twenty for any other capital offenses.[65]

Federal law and most state law did not allow the "stand-aside" privileges that the prosecution enjoyed in England.[66] Instead, United States courts gave prosecutors a predetermined number of peremptory challenges that was usually fewer than the number given to the defense.[67] Another break with the mother country was to allow peremptory challenges in civil trials and extend their application to

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59 *See id.*

60 *Id.*

61 *See id.* at 346.

62 *Id.*

63 *See* S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 295–99 (1972) (providing a detailed discussion on the merits of the voir dire process).

64 *Id.* at 296.

65 Crimes Act of 1790, ch. 10, § 30, 1 Stat. 112, 119 (1790) (current version at 28 U.S.C. § 1870) (amended 1865 & 1872). For current rules in federal criminal cases see FED. R. CRIM P. 24(b). For current rules in federal civil cases see FED. R. CIV P. 47(b).

66 *See* Chase & Graffy, *supra* note 25, at 523.

67 *Id.* at n.19.

noncapital criminal trials and misdemeanor cases.[68] Perhaps the greatest divergence from the common law, however, was the expansion of pretrial juror questioning, which effectively increased the utility of peremptory challenges.[69]

The augmentation of venire questioning stems from two high-profile cases. The first was the sensational trial of James T. Callender in 1800 on grounds of seditious libel,[70] and the second was the 1807 trial of former Vice President Aaron Burr for treason.[71] In both trials, the initial questions posed required further questioning to elicit precision as to the nature of the opinions that the prospective juror had formed.[72] As Chief Justice Marshall determined in the *Burr* trial: "[A] man must not only have formed, but declared an opinion, to disqualify him as a juror."[73]

Extensive questioning as established in the *Callender* and *Burr* cases gradually provided a path for lawyers to both uproot bias to achieve an impartial tribunal and to cultivate bias to achieve a tribunal partial to their cause.

III
THE *BATSON V. KENTUCKY* THREE-PRONG TEST

In 1982, James Kirkland Batson, an African American resident of Louisville, Kentucky, was charged with second-degree burglary and receipt of stolen goods.[74] After a hung jury caused by an African American woman who "did not think [Batson] was guilty," the prosecutor, Joe Guttman, decided to retry Batson.[75] In the second trial, Batson was tried by an all-white jury after Guttman used four of his eight peremptory challenges to strike the four African American

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68 April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 STAN. J. C.R. & C.L. 1, 19 (2020).

69 Chase & Graffy, *supra* note 25, at 536.

70 United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).

71 United States v. Burr, 25 F. Cas. 2 (C.C.D. Va. 1807) (No. 14,692a); *see also* James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND. L.J. 163, 165 (1984).

72 United States v. Burr, 25 F. Cas. 41, 44 (C.C.D. Va. 1807) (No. 14,692f).

73 *Id.* at 59.

74 Batson v. Kentucky, 476 U.S. 79, 82 (1986); *see also* Nancy S. Marder, Batson v. Kentucky *Reflections Inspired by a Podcast*, 105 KY. L.J. 621 (2016).

75 Marder, *supra* note 74, at 627.

prospective jurors. In the episode, "Object Anyway," from the *More Perfect* podcast,[76] Batson states that he told his lawyer to object to the all-white jury and courtroom. The lawyer told him that he had no basis to object, but Batson said, "object anyway."[77] After he was found guilty on both counts and sentenced to twenty years in prison, Batson appealed.[78] His lawyer from the Public Defender's Office identified a pattern of strikes by prosecutors that used peremptories to remove African American prospective jurors from the venire.[79] Citing violation of the Sixth and Fourteenth Amendments, the Supreme Court reversed Batson's conviction and established what the Court believed were guardrails against prosecutors' improper use of peremptory challenges.[80]

Prior to *Batson v. Kentucky*, a party could exercise a peremptory challenge for virtually any reason they deemed appropriate, dismissing and replacing the juror without further inquiry.[81] In the wake of *Batson*, peremptory challenges that courts found had been made discriminatorily—due to the jurors' ethnicity, race, or gender—were denied.[82]

A judge is limited to considering the evidentiary record created during voir dire when making the determination whether a party's peremptory challenge was grounded.[83] If a *Batson* challenge is raised,

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76 *More Perfect: Object Anyway*, NAT. PUB. RADIO (July 16, 2016), https://www.npr.org/podcasts/481105292/more-perfect [https://perma.cc/QUX9-B2DV].

77 *Id.*

78 *Id.*

79 *Id.*

80 *See* Batson v. Kentucky, 476 U.S. 79, 96–100 (1986). "Defense counsel moved to discharge the jury . . . on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws." *Id.* at 82.

81 *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) ("[P]eremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked.").

82 *Batson*, 476 U.S. at 86 ("Purposeful racial discrimination in [jury] selection . . . violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.").

83 An evidentiary record is deemed a verbatim transcript of all comments made by the judge and both parties while court is in session. *See Record, Evidentiary Value*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see, e.g.*, People v. Bell, 151 P.3d 292, 302 (Cal. 2007) ("[T]he party may show that his opponent has struck most or all of the members of the identified group from . . . venire, or has used a disproportionate number of his peremptories against the group."); Miller-El v. Dretke, 545 U.S. 231, 231 (2005) (illustrating the court's

alleging that a party has dismissed a juror on the basis of a protected characteristic, then the court will apply a three-part test to the evidentiary record to evaluate whether the juror's dismissal was improper.[84]

In the test's first prong, an opposing party must raise a *Batson* challenge and show purposeful discrimination, which may include a pattern of strikes of jurors from the defendant's ethnic or racial group.[85] In the second prong, the court turns to the attorney who exercised the peremptory challenge and requests a "race-neutral" explanation for the challenged strike.[86] In the third prong, after both sides have presented their positions, the judge does the following: assesses the explanations given by each party; considers the evidentiary record before it; and determines whether the explanations provided by the exercising party are credible, genuine, and in fact race-neutral.[87] If the judge determines that the reasons provided by the counsel for the peremptory challenge were pretextual and merely a facade for discriminatory intent, the challenge may be invalidated.[88]

In theory, the three-prong *Batson* process seems like a suitable set of rules to effectuate the Sixth Amendment's promise of an impartial jury. However, new scientific research since *Batson* in the fields of psychology and behavioral science have demonstrated that a party may not explicitly intend to dismiss jurors for discriminatory reasons, but they may unwittingly do so in such a subtle manner that it is not detected by themselves, the opposing party, or even the judicial officer evaluating the process.[89] The culprit responsible for this phenomenon is implicit bias.

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discretion to consider the "'totality of . . . relevant facts' about a prosecutor's conduct" when considering purposeful discrimination).

84 *Batson*, 476 U.S. at 96; *Flowers*, 139 S. Ct. at 2243.

85 *Batson*, 476 U.S. at 96.

86 *Id.* at 96–97 (indicating that reasons provided for race neutrality must be clear, reasonable, and specifically articulated that no discriminatory motive was relied upon); *see also* Johnson v. California, 545 U.S. 162, 168 (2005); Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

87 *Batson*, 476 U.S. at 97.

88 *Id.* at 98 (citations omitted); *see also* Swain v. Alabama, 380 U.S. 202, 214 (1965) (citing Snyder v. Louisiana, 552 U.S. 472, 485 (2008) ("A pretextual explanation naturally gives rise to an inference of discriminatory intent.")).

89 *See* 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, 158 (2010) (highlighting experience of a federal judge evaluating his use of implicit bias in jury selection).

IV
IMPLICIT BIAS: THE REEF LURKING BENEATH THE SURFACE

To understand implicit bias and the potential disassociation between one's nondiscriminatory intent and one's discriminatory conduct, and how that bias can manifest in the exercise of peremptory challenges, it would be prudent to pause to lay a foundation of how biases—whether explicit or implicit—may be created.

A. Areas of the Brain Responsible for Bias

Bias is a complex and multifaceted phenomenon that arises from a combination of biological, cognitive, and environmental factors—the neural basis of which is still an active area of research today. The goal of this section is to provide recent academic and scientific literature relating to the neuroscience and behavioral science of bias creation and biased decision-making. This information illuminates for a legal audience how bias can actively impact jury selection decisions. However, this section is in no way intended to be either a comprehensive or an exhaustive understanding of how biases are created. By first obtaining a functional understanding of how the brain's anatomy and its processes contribute to bias showing up in our decision-making, we can then examine those elements in the light of the stressful, high-stakes context of jury selection.

Research indicates that two sections of the brain—the limbic system and the cerebral cortex—are relevant to biased decision-making.[90]

1. The Limbic System

The limbic system, or "emotional brain," is a more primitive section of the brain and is composed of a network of brain structures that have links to our emotional, memory, and motivational processes.[91]

The amygdala is the small, almond-shaped structure inside the limbic system that aids in detection of danger and plays a role in

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[90] *See* Jie Zheng et al., *Amygdala-Hippocampal Dynamics During Salient Information Processing*, NATURE COMMC'NS. 2 (Feb. 8, 2017) (explaining that processing emotionally salient events in humans engages an amygdala-hippocampal network by examining direct recordings in the amygdala and hippocampus from human epilepsy patients to monitor oscillatory activity during processing of fearful faces compared with neutral landscapes).

[91] *See* Ahmad R. Hariri et al., *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43, 43, n.30 (Jan. 17, 2000).

behavior, emotional control, and learning.[92] The main emotion the amygdala is known to control is fear; it is responsible for "fight, flight, or freeze" reactions.[93] The amygdala processes stimuli that are heard and seen—often even before we are consciously aware of them—and uses that input to determine whether the environment could be dangerous or suboptimal based on memories associated with substantially similar past experiences.[94] Research demonstrates that the amygdala may use implicit or unconscious memory in that process, which allows our brains to connect a variety of disparate dots, such as remembering emotions associated with memories and how to do certain tasks without remembering how they were learned—as well as determining how to interpret someone's intentions from how they speak or behave.[95]

The hippocampus, which is also part of the limbic system, is described as something similar to the "flash drive" of the human brain, since it helps commit information to memory to help detect future threats.[96] In lower animals, the hippocampus assists in decisions to eat certain foods based on how they smell, avoid danger, and react to life and death scenarios.[97] The hippocampus is closely connected with the amygdala and adjacent brain regions such that any stimulation of adjacent sections of the brain also stimulates the hippocampus itself.[98] The hippocampus contains a mechanism to "consolidat[e] verbal and

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92 *See Amygdala*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/body/24894-amygdala (last updated Apr. 11, 2023) [https://perma.cc/K7L2-3FSD].

93 *See* Rupa Gupta et al., *The Amygdala and Decision Making*, 4 NEUROPSYCHOLOGIA 760, 766 (2010) (finding that patients with amygdala damage lack various autonomic responses).

94 *See* Goran Šimić et al., *Understanding Emotions: Origins and Roles of the Amygdala*, 6 BIOMOLECULES 823, 823 (2021) (finding that the amygdala participates in the regulation of autonomic functions, such as fight-or-flight reactions, via efferent projections from its central nucleus to cortical and subcortical structures).

95 CLEVELAND CLINIC, *supra* note 92.

96 Leslie A. Fogwe et al., *Neuroanatomy, Hippocampus*, NIH: NAT'L CTR. BIOTECHNOLOGY INFO. (2022), https://www.ncbi.nlm.nih.gov/books/NBK482171/ [https://perma.cc/62XC-J2VM] (providing a detailed discussion on the hippocampus and its structure and function).

97 *See* Scott E. Kanoski & Harvey J. Grill, *Hippocampus Contributions to Food Intake Control: Mnemonic, Neuroanatomical, and Endocrine Mechanisms*, 9 BIOLOGICAL PSYCHIATRY 748, 750 (2017) (finding that neurons in multiple hippocampal subregions constitute an important neural substrate linking the external context, the internal context, and mnemonic and cognitive information to control both appetitive and ingestive behavior).

98 Fogwe et al., *supra* note 96.

symbolic thinking into information that can be accessed when needed for decision-making."[99]

In simple terms, when the amygdala is strongly activated due to fear, it signals to the hippocampus to pair the emotions felt to that event and similar-seeming future events.[100] When experiences that have previously triggered fear are experienced again, the hippocampus will monitor the environment for familiar contexts and signal to the amygdala to activate similar prior feelings again.[101]

2. The Cerebral Cortex

The cerebral cortex is the outermost layer of the brain and is composed of four lobes: the frontal, parietal, temporal, and occipital lobes.[102] Each lobe holds special responsibilities for proper brain functioning, but the region as a whole has been shown to be responsible for "higher-level processes of the human brain, including language, memory, reasoning, thought, learning, decision-making, emotion, intelligence[,] and personality" as well as functions related to our senses.[103]

This section of the brain is commonly referred to as the "gray matter" of the brain and evolved much more recently relative to the limbic system.[104] Activity in the cerebral cortex is much more closely connected to our deliberative, conscious awareness—as opposed to the limbic system, where much of the processing is done unconsciously.[105]

B. Brain Processing, Bias, and Jury Selection

Daniel Kahneman, in his seminal 2011 work *Thinking, Fast and Slow*, articulated a widely accepted framework for understanding cognitive functioning by distinguishing between two different forms of mental processing that he refers to as System 1 and System 2 thinking.[106] Kahneman describes System 1 as a process that "operates

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99 *Id.*

100 Šimić et al., *supra* note 94.

101 *Id.*

102 *Cerebral Cortex*, CLEVELAND CLINIC (May 23, 2022), https://my.clevelandclinic.org/health/articles/23073-cerebral-cortex [https://perma.cc/ZP64-B9BT] (discussing the cerebral cortex and its structure and function).

103 *Id.*

104 *Id.*

105 *Id.*

106 DANIEL KAHNEMAN, THINKING, FAST AND SLOW 21 (2013).

automatically and quickly, with little or no effort and no real sense of voluntary control"[107]—arguably the limbic system. In comparison, "System 2 allocates attention to the effortful mental activities that demand it, including complex computations . . . [and] the subjective experiences of agency, choice, and concentration"[108]—arguably the cerebral cortex.

1. Brain Processing in System 1

A simple distillation is that System 1 thinking occurs the vast majority of the time as the brain uses involuntary, almost-reflexive thinking to navigate ordinary challenges.[109] This form of thinking requires little-to-no conscious effort.[110] System 1 occurs when detecting whether one object is more distant than another, orienting to the source of a sudden sound, detecting hostility in a voice, or answering very basic math questions, like 2 + 2 = 4.[111] System 1 uses learned associations between ideas and becomes so finely tuned through repetition that its operations are nearly automatic, reflexive, and involuntary after a lifetime of making sense of the world.[112] System 1 draws on knowledge stored in memory and accesses it without intention or effort.[113]

In this system, the amygdala likely activates, connects to memories stored within the hippocampus, and quickly draws on that information to respond to a particular stimulus.[114]

2. Brain Processing in System 2

System 2, on the other hand accounts for our focused attention—or the spotlight of our awareness.[115] We might use System 2 thinking when we compare two items to assess their overall value, look for a particular person within a crowd, or compute a more difficult math equation, like 856 x 249.[116] In these situations, we must pay attention,

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107 *Id.* at 20.
108 *Id.* at 21.
109 *Id.* at 24.
110 *Id.*
111 *Id.*
112 *Id.* at 23.
113 *Id.*
114 *See* PRAGYA AGARWAL, SWAY: UNRAVELLING UNCONSCIOUS BIAS 68 (2020).
115 KAHNEMAN, *supra* note 106, at 22.
116 *Id.* at 22.

and we perform less effectively if we are not ready or if our attention has been misdirected unintentionally.[117] "In summary, most of what [we] think and do originates in . . . System 1, but System 2 takes over when things get difficult, and it normally has the last word."[118] It could be said that System 2 is more closely tied to the cerebral cortex and the conscious thought processes so associated with human intelligence.[119]

Per Kahneman, the division of labor between these systems is highly efficient and works well most of the time. System 1 is able to develop models of familiar situations, make accurate short-term predictions, and usually swiftly and appropriately react to challenges.[120] However, System 1 has biases: it is prone to make errors in particular circumstances unless our System 2 attention can take over.[121]

3. Brain Processing Between Systems 1 and 2

Psychologists estimate that the amygdala helps our brains process billions of bits of information per day, nearly eleven million bits every second, even though our conscious awareness can focus on only forty to fifty bits of information at any one time.[122] German physiologist Dietrich Trincker likened our conscious awareness to something of a spotlight that emphasizes a specific aspect of what we observe, like the face of an actor, "while all the other persons, props, and sets on the vast stage are lost in the deepest darkness."[123] Although we may be capable of consciously processing only forty to fifty bits of information at any given time via System 2, the balance of the volume of input not consciously acknowledged must be either stored or disregarded entirely.[124] The hippocampus likely stores at least some of this unconsciously ingested information to build future associations for System 1 to respond reflexively and instinctively.[125]

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117 *Id.* at 23.

118 *Id.* at 25.

119 *See* AGARWAL, *supra* note 114, at 66.

120 KAHNEMAN, *supra* note 106, at 25.

121 *Id.*

122 *See* TOR NØRRETRANDERS, THE USER ILLUSION: CUTTING CONSCIOUSNESS DOWN TO SIZE 126 (1999) (discussing that consciousness represents only an infinitesimal fraction of our ability to process information, because although we are unaware of it, our brains sift through and discard billions of pieces of data to allow us to understand our world).

123 *Id.*

124 AGARWAL, *supra* note 114, at 16; *see also* Deborah E. Hannula & Anthony J. Greene, *The Hippocampus Reevaluated in Unconscious Learning and Memory: At a Tipping Point?*, 6 FRONTIERS IN HUM. NEURO. 80 (2012).

125 AGARWAL, *supra* note 114, at 29–30, 74.

Consider a situation where one is hiking down a trail and sees a long, thin stick that resembles a snake. In this situation, it is likely that the amygdala activates (fight-or-flight) and enables the hiker to make associations about the situation's threat level based on learned associations to this shape and the remembered associations of the dangers of snakes stored by the hippocampus.[126] This System 1 reaction "happens without any effort or conscious reasoning."[127] System 2 then requires direct and immediate engagement with the prefrontal cortex to tell the amygdala to process that the object is actually a stick rather than a feared snake.[128] Our conscious brain in that initial moment of becoming aware of the stick does not have the chance to interpret the information fully, so our survival instinct is likely to be governed by snap judgments and interpretations that have not fully processed all the available information. Thus, our reactions will be based on semiprocessed, immediately accessible, efficient shortcuts or heuristics via learned associations applied through System 1.[129] From an evolutionary perspective, System 1 taking the lead during potential life and death scenarios is very beneficial, as it quickly orients individuals toward self-preservation-oriented responses. But when the brain applies the same process to lower-stakes circumstances, like how we may feel when we meet someone new, System 1 may be less suited for interpreting a broader interpersonal context.

4. Implicit Bias and Decision-Making

The learned associations for social interactions that take place in the limbic system and serve as the knowledge templates that shape System 1 responses constitute what scholar Beverly Daniel Tatum calls environmental smog.[130] Our brains, whether we are consciously aware of them or not, are ingesting cultural associations from a multitude of sources: families, peer groups, relatives, television programs, and any other stimulus we may be exposed to.[131] Even though we are

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126 *See id.* at 64–66, 69–72.

127 *Id.* at 81.

128 *See id.*

129 *Id.* at 64.

130 *See* DOLLY CHUGH, THE PERSON YOU MEAN TO BE: HOW GOOD PEOPLE FIGHT BIAS 52 (2018).

131 *See* AGARWAL, *supra* note 114, at 16, 29; *Interview with Beverly Daniel Tatum*, PBS BACKGROUND READINGS: RACE-THE POWER OF AN ILLUSION (2003), https://www.pbs.org/race/000_About/002_04-background-03-04.htm [https://perma.cc/96ZT-G7CC].

consciously aware of *some* of these associations, we internalize many others subconsciously—creating templates of source material in our hippocampus that our amygdalas and System 1 processing use to reflexively respond and categorize.[132]

If our environmental smog is filled with stereotypes, judgments, and coded language that marginalizes groups of individuals, our System 1 processing may reflexively associate someone with that stereotypical, discriminatory environmental smog and respond consistent with that environmental smog.[133] Hope, however, is not lost; for as long as we can activate our System 2 in those moments to intervene, take control, and handle the new stimulus with a deliberate awareness, we are better equipped to respond appropriately.[134]

Unfortunately, cognitive stressors can stand in the way of System 2's ability to intervene against System 1's subconscious associations.[135] If individuals lack the time to process information accurately, there is a tendency to endorse a schematic,[136] or heuristic-based, processing of information based on System 1's implicit associations.[137] This arguably is what happens when we see a stick that looks like a snake on a hiking trail. Additionally, when individuals lack cognitive resources due to an increased cognitive load, the likelihood of applying stereotypes to groups of individuals is greater, making it more challenging to activate System 2's reasoned approach to new

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132 *See* AGARWAL, *supra* note 114, at 15–16, 73–74; *see also* Valerie Soon, *Implicit Bias and Social Schema: A Transactive Memory Approach*, 177 PHIL. STUD. 1, 13 (2020); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160 (2012) (citing generally the concept of schemas); Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1455 (2010); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

133 AGARWAL, *supra* note 114, at 65 (noting that "[i]mplicit social cognition is often disrupted by conscious information processing").

134 KAHNEMAN, *supra* note 106, at 28; AGARWAL, *supra* note 114, at 65.

135 *See, e.g.*, Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCIS. U.S. 6889 (2011); *see also* Tiffani J. Johnson et al., *The Impact of Cognitive Stressors in the Emergency Department on Physician Implicit Racial Bias*, 23 ACAD. EMERGENCY MED. 297, 302 (2016).

136 *See* Jeff Pankin, *Schema Theory*, MASS. INST. TECH. (Fall 2013), https://web.mit.edu/pankin/www/Schema_Theory_and_Concept_Formation.pdf [https://perma.cc/U2X2-ZPS8] (explaining that a schema is an organized unit of knowledge for a subject or event based on past experience).

137 *See* AGARWAL, *supra* note 114, at 73; Daniël H. J. Wigboldus et al., *Capacity and Comprehension: Spontaneous Stereotyping Under Cognitive Load*, 22 SOC. COGNITION 292, 307 (2004); Jeffrey W. Sherman et al., *Stereotype Efficiency Reconsidered: Encoding Flexibility Under Cognitive Load*, 75 J. PERSONALITY SOC. PSYCH. 589, 600 (1998).

interactions.[138] Further compounding this dilemma is that when we make a System 1 reflexive response and receive no input that our System 1 response may have been incorrect or misguided—we come to rely on our System 1 response, making it much less likely we will engage System 2 to correct the problematic behavior or judgment.

5. Implicit Bias Manifested in Jury Selection

Putting all the above in the context of jury selection, it is easy to see how prone advocates are to using a reflexive System 1 process that defaults to implicit biases rather than a more egalitarian, deliberative System 2 process, which could yield a fairer jury.[139]

During voir dire, advocates may be given as little as ten to fifteen minutes to elicit, digest, and evaluate as much information as possible about twelve to eighteen prospective jurors' fitness for service on a case. Usually this takes the form of perceiving a potential juror's immediately visible social identities and using reference schemas and heuristics influenced by environmental smog to quickly assess their suitability for a particular case. Overlaying this already prone process is a specific desire for advocates to impanel as favorable a jury as possible, yet advocates receive no more than a few moments to weigh voir dire information and decide whether to exercise a peremptory challenge against a potential juror.

Irrespective of how experienced, intelligent, or skilled an advocate may be, the time- and information-restricted nature of the selection process will almost necessarily require advocates to make quick, snap judgments based on the amygdala's connections to smog-influenced, stereotypical schemas rather than strategic, deliberative decisions thoughtfully weighed out in the cerebral cortex. Even if an advocate is well-intentioned and seeks not to use stereotypical justifications for striking jurors, the time-sensitive nature of the process, high levels of stress, and even higher associated stakes leave advocates relying on snap judgments based on a snapshot perception and categorization of a juror—rather than something more substantive.

It flows then that any process like *Batson* that seeks to root out biased strikes cannot be effective if it relies simply on what an opponent alleges or even what a judge believes could be biased. The

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138 Wigboldus, *supra* note 137, at 307; AGARWAL, *supra* note 114, at 88–89.

139 *See* AGARWAL, *supra* note 114, at 73.

science demonstrates that an advocate may not clearly know why they chose to strike a particular juror. Thus, any framework that builds on an allegation-based correction, like *Batson*, is less effective than it otherwise could be.

V
BATSON AND ITS INADEQUACIES

The Court's decision in overturning petitioner James Batson's conviction established that an advocate raising what is now known as "the *Batson* challenge" can demonstrate purposeful discrimination in jury selection by presenting evidence of the prosecutor's pattern of peremptory challenges.[140] Despite its well-intentioned efforts, the *Batson* challenge has become easy for prosecutors to overcome, but more fundamentally it has proven to be completely ineffectual at protecting litigants from instances of implicit discrimination.[141] The Supreme Court ruled that during the second step of the *Batson* test, a trial judge had to consider even a "silly" or "superstitious" explanation, provided it was facially race and gender neutral. A court could dismiss these explanations during the third step only if it determined that the attorney was untruthful. Under this framework, prosecutors were able to successfully use "almost laughable 'race-neutral' reasons" to overcome a defendant's *Batson* challenge.[142]

These *Batson* challenges were granted disproportionately on various levels. "Notably, criminal defense lawyers have been disproportionately unsuccessful at offering neutral explanations to rebut prima facie *Batson* claims."[143] In comparison, "prosecutors have enjoyed the highest success rate at rebutting prima facie *Batson* complaints with [race-]neutral explanations."[144] Additionally, there was a disproportionate amount of success for *Batson* challenges between different races. Black individuals were often the target of *Batson* challenges, accounting for 87.38% of all *Batson* challenges

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140 Batson v. Kentucky, 476 U.S. 79, 97 (1986).

141 *See supra* Part III.

142 Bellin & Semitsu, *supra* note 2, at 1093; *see also supra* Part III.

143 *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 461 (1996) (showing on Table D-1 that defense attorneys had success rates of 15.38%, while prosecutors had a 79.93% success rate).

144 *Id.*; *see infra* Section V.A.

made.[145] Both Black and Hispanic individuals had similarly low rates of success in their *Batson* challenges.[146] *Batson* challenges based upon claimed discrimination against other targeted groups produced greater success rates.[147]

A. Nominally Race-Neutral Reasons Can Overcome a Batson *Challenge*

The litany of laughable reasons that have successfully passed muster as being "race neutral" include striking someone due to their lack of family values, unkempt appearance, baggy clothing, single relationship status, harboring a naive view of the criminal mind, having a family member in prison, and not being smart enough.[148] As more cases came through the courts, additional race-neutral reasons succeeded in overcoming a *Batson* challenge such as having an "angry" look,[149] having a strong personality,[150] gut feelings,[151] wearing T-shirts,[152] wearing a beret one day and a sequined cap the next,[153] having a dental abscess,[154] having relatives who had been convicted or imprisoned,[155] and having negative experiences with the police.[156]

B. Judicial Reluctance to Sustain Batson *Challenges*

Another criticism of the *Batson* framework was trial courts' reluctance to impugn the character of an advocate defending a disingenuous *Batson* strike.[157] Under *Batson*, "the trial court . . . determin[es] credibility, [and] to refuse to accept a peremptory

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145 *Id.* at 462.

146 *Id.* at 462–63 (explaining the number of cases where a final *Batson* decision was rendered and examining the success rates of such claims on behalf of subgroups, found White individuals had a 53.33% success rate, Black individuals a 16.95% success rate, and Hispanic individuals a 13.33% success rate).

147 *Id.* at 462.

148 People v. Hamilton, 200 P.3d 898, 930–31(Cal. 2009).

149 United States v. White, 552 F.3d 240, 251–52 (2d Cir. 2009).

150 United States v. Fields, 378 F. Supp. 2d 1329, 1331 (E.D. Okla. 2005).

151 Elder v. Berghuis, 644 F. Supp. 2d 888, 895–96 (W.D. Mich. 2009).

152 Cook v. La Marque, No. 02-2240, 2007 WL 3243864, at *8 (E.D. Cal. Nov. 1, 2007).

153 Smulls v. Roper, 535 F.3d 853, 856 (8th Cir. 2008) (en banc).

154 United States v. Walley, 567 F.3d 354, 357 (8th Cir. 2009).

155 United States v. McKay, 431 F.3d 1085, 1092 (8th Cir. 2005).

156 Green v. Travis, 414 F.3d 288, 300 (2d Cir. 2005).

157 *See* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 177 (2005).

challenge is the equivalent of calling the attorney a liar, and maybe racist or sexist as well."[158] Such a characterization is "likely to color the rest of the trial, and other trials in jurisdictions where lawyers appear frequently before the same judges."[159] This reluctance to impose pejorative labels on attorneys has even been extended to cases involving direct evidence of discrimination from the striking attorney.[160] The tight-knit, insular nature of the local bar association within a county—coupled with repeated interactions between judges, prosecutors, and defense attorneys not just within the courtroom but at bar events, fundraisers, and social outings—creates a high social cost for any trial judge to make findings impugning an advocate's character. Thus, when there is a hard decision for a judge, there are strong motivations for the benefit of any doubt available being given to the striking advocate.[161] When we further consider that most state judges are elected and have to rely on members of the bar to serve as donors, fundraisers, and advocates for their services to the general public—a vested interest in keeping everyone happy is likely to carry the day.

C. Marshall's Call for Abolition

In his prescient *Batson* concurrence, Justice Marshall cited the Court's inadequate solution and called for eliminating peremptory challenges[162]:

> The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that 'justice . . . sit supinely by' and be flouted in case after case before a remedy is available. I nonetheless write separately to express my views. The decision today will not end the racial

158 *Id.*

159 *Id.* at 177–78.

160 *See* Transcript from Commonwealth v. Basemore, 744 A.2d 717 (2000) *quoted in* Commonwealth v. Cook, 952 A.2d 594 (Pa. 2008) (denying *Batson* challenge despite direct evidence of discrimination whereby supervising attorney instructed counsel to "mark something down" in the court's presence to present a façade that there was a legitimate reason to strike a Black juror).

161 *See* Tania Tetlow, *Solving* Batson, 56 WM. & MARY L. REV. 1859, 1897–98 (2015) (explaining how *Batson*'s focus on pretext requires personally insulting prosecutors and defense attorneys in a way that judges do not take lightly, as it technically constitutes an ethics violation. Tetlow argues that dysregulation of jury selection from the motives of lawyers will make judges far more likely to enforce the rules).

162 Batson v. Kentucky, 476 U.S. 79, 102–04 (1986).

> discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.[163]

Although *Batson* sought to recalibrate the peremptory challenge's racially discriminatory use, it did not achieve the impartial tribunal as required by the Sixth Amendment. Justice Marshall's view that *Batson*'s implementation would not eradicate the racial discrimination potential of peremptory challenges proved correct.

VI
RETHINKING *BATSON*: RESTRICTING OR ABOLISHING PEREMPTORY CHALLENGES

Given *Batson*'s inadequacies, it is not surprising that various jurisdictions have called for reform. The recent rule changes can be broadly categorized into two approaches: (1) the Washington Model, which we explore in Section A, adapts the existing strike procedures by replacing the requirement of intentional discrimination with an "objective observer" standard; and (2) the Arizona Model, which we explore in Section B, eliminates peremptory challenges altogether.

A. The Washington Model

After reviewing key court decisions and the *Batson* framework's inadequacies, Washington's highest court, in conjunction with the American Civil Liberties Union (ACLU), drafted what eventually became General Rule 37 (GR 37) in an effort to curb both explicit discrimination and also unintentional, unconscious bias.[164] Washington's GR 37 arose out of a Task Force formed in 2010 to investigate race and its effect on the criminal justice system.[165] The

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163 *Id.* at 102–03.

164 Annie Sloan, Note, *"What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 246–47 (2020).

165 Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 637 (2012); *see also* State v. Jefferson, 429 P.3d 467, 483 (Wash. 2018). The Washington Supreme Court discussed the inadequacies of peremptory strikes in an attempted murder case where the prosecution used its last strike against the only Black individual in the jury pool. Under Washington's procedure at the time, the prosecution's reasoning, although vaguely based on attitudes toward jury deliberation being a "waste of time," was still valid. However, had GR 37 then been in effect, the court would have likely found issue with the peremptory strike.

Task Force concluded that a majority of Washington's disparities arising from "facially neutral policies [had] racially disparate effects."[166] The Task Force highlighted the pervasive role of implicit and often unconscious, racially driven bias in legal decision-making.[167]

In 2018, thirty-two years after the *Batson* decision, Washington became the first state to implement specific legislation to reduce race and ethnic bias during peremptory challenges.[168] In pertinent part, GR 37 reads:

> (c) . . . A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.
>
> (e) . . . The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.
>
> (f) . . . For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to

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166 Sloan, *supra* note 164, at 244.

167 *Id.* at 247.

168 *See Batson Reform: State by State*, BERKELEY L., https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ [https://perma.cc/Y28K-DXWF] (noting that the "[k]ey differences between *Batson* and General Rule 37 include" (1) "the elimination of *Batson*'s first step and of the requirement that the strike opponent prove purposeful discrimination"; (2) "the inclusion of 'presumptively invalid' reasons 'historically . . . associated with improper discrimination in jury selection,' such as a prospective juror's 'prior contact with law enforcement officers,' 'expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling,' or 'living in a high-crime neighborhood'"; and (3) "the requirements that the court make its determination 'acting as an objective observer' who is aware that 'implicit, institutional, and unconscious biases have resulted in the unfair exclusion of potential jurors in Washington State' and that the court deny the peremptory challenge if it 'could view race or ethnicity as a factor in the use of the peremptory challenges'"). *But see* Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 91–92 (2020) (suggesting that though Washington is the first state to implement a revolutionary and comprehensive program to stop "attorneys from using race-based peremptory challenges at not only a conscious and explicit bias level, but also at an implicit, unconscious, and systematic bias level," "like any other voir dire challenge, [it] does nothing to educate" the jurors—"the decisionmakers of the courtroom"—about implicit bias).

> purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.[169]

Fundamentally altering the *Batson* approach, GR 37 shifts the assessment of peremptory challenge legitimacy.[170] Instead of merely accepting a nonracial or nonethnic reason to justify a peremptory strike, the trial court may invalidate the strike if an objective observer may view a juror's race or ethnicity as merely *a factor* in exercising the strike.[171]

GR 37 shifts the burden of evaluating the challenge's propriety from the party making the challenge to an impartial magistrate.[172] Even though judges within the *Batson* framework could deny challenges that may well have discriminatory intent, in practice they granted many illegitimate challenges.[173] As discussed, denying an advocate's challenge might well cast that advocate in a negative light and carry significant professional and social reputational costs. Even under the objective observer standard, judges may remain reluctant to deny an advocate's strikes out of a concern that doing so might disparage the striking advocate and brand them with something of a scarlet letter, effectively irreparably harming their reputation. Despite these ongoing concerns, GR 37's neutral observer standard eliminates any pretextual argument, thereby reducing the personal aspect of the striking advocate's rationale.

As another innovation, Washington created a list of presumptively invalid reasons for a strike. The list includes "belief[s] that law enforcement engages in racial profiling[;] having prior contact with law enforcement[;] . . . living in a high-crime neighborhood;" "having a close relationship with people who have been stopped, arrested, or convicted of a crime; having a child outside of marriage; receiving state benefits; and not being a native English speaker," all which have been historically associated with discrimination in selecting juries.[174]

Although GR 37 brought about a radical shift in the conceptualization of jury selection, limited data exist as to the effect.[175]

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169 WASH. CT. GEN. R. 37.

170 *See id.*

171 *Id.*

172 *Id.*

173 Sloan, *supra* note 164, at 235.

174 *Id.* at 236 & n.17.

175 *Id.*

Indeed, it may be difficult to measure data other than the uptick in trial judges sustaining GR 37 objections or appellate courts more heavily scrutinizing peremptory challenges.[176] Since its enactment, more and more states have followed the Washington approach employing the objective observer standard.[177]

B. The Arizona Model

In 1864, the Territory of Arizona joined other jurisdictions in passing laws that allowed only white men to serve on juries.[178] Federal legislation and Supreme Court decisions eventually afforded equal protection, but discrimination in jury selection in Arizona continued even after *Batson*. The Arizona Constitution gives the Arizona Supreme Court exclusive authority in adopting court rules.[179] For this reason, the Arizona judiciary played a key role in deciding whether to follow Washington and rework *Batson*, or to eliminate peremptory challenges. Three recent Arizona Supreme Court cases shined a spotlight on *Batson*'s inadequacies for Arizona.

In 2018, *State v. Urrea* presented a *Batson* challenge alleging that the prosecutor's peremptory strikes disproportionately targeted jurors with "Hispanic ethnic background[s]."[180] The trial court determined that the prosecutor could not provide a race-neutral reason for striking the three challenged jurors, resulting in a *Batson* violation. However, the court did not find prosecutorial misconduct. The court voided the prosecutor's three strikes, reinstated the jurors, and dismissed Urrea's

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176 Following GR 37's passage, Washington appellate courts have zealously scrutinized peremptory challenge rulings. In 2020, the Washington Supreme Court reversed and remanded a first-degree murder conviction, finding the trial court improperly allowed the prosecution to strike the only Black juror on the venire after she said she had a brother who was convicted of attempted murder and that the process "left a bad taste in her mouth." The prosecutor defended the challenge on the grounds that the juror had strong opinions that the system had not treated her brother fairly, a presumptively invalid reason. State v. Pierce, 455 P.3d 647 (Wash. 2020). That same year, the court also held that the State improperly struck the only Black juror on a venire after he said he would have problems following the law if he disagreed with it. State v. Listoe, 475 P.3d 534 (Wash. App. 2020). Later, in *State v. Omar*, the court affirmed the trial court's denial of a peremptory challenge in a robbery case where the Asian juror disclosed that she had worked at a bank while it was robbed. State v. Omar, 460 P.3d 225 (Wash. App. 2020).

177 For a full list of states following Washington's lead, see *infra* Section VI.D.

178 The Howell Code, First Legislative Assembly of the Territory of Arizona, Chapter XLVII 293–96 (1864).

179 ARIZ. CONST. art. VI, § 5.5 (providing the power to make rules relative to all procedural matters in any court).

180 State v. Urrea, 421 P.3d 153, 154 (Ariz. 2018).

motion for a mistrial and venire dismissal. The court proceeded to select the first nine jurors, including two of the reinstated ones. An amicus brief filed on behalf of Urrea urged the court to "seize the opportunity" to bolster procedures in Arizona for detecting bias during jury selection and establish that Arizona courts may impose remedies more severe than those discussed in *Batson.*[181] The brief also reiterated the effect of discriminatory juror exclusion on the American criminal justice system.[182] The court also noted these concerns in its opinion:

> The harm done by such state discrimination is not limited to violation of a defendant's constitutional rights. It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship. Worse yet, such methods create a perception that the American criminal justice system is imposed on certain minorities rather than operating to protect and further the rights of all citizens.[183]

However, the court declined to go further than to find that the trial court's remedy had not been an abuse of its "considerable discretion."[184]

In *State v. Gentry*, a 2019 decision, the defendant made a *Batson* challenge after the last Black juror was struck from the jury.[185] The state proffered that there were similarities in background between the juror's Black husband and the defendant that might affect the juror's ability to be impartial in the case.[186] The court accepted the state's reason and determined that the prosecution's peremptory challenge was

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[181] Brief of *Amici Curiae* the American Civil Liberties Union Foundation of Arizona and the Arizona Attorneys for Criminal Justice in Support of Petitioners at 20, State v. Urrea, 421 P.3d 153 (Ariz. 2018) (No. 17-0261) [hereinafter ACLU Amicus Brief]; Batson v. Kentucky, 476 U.S. 79, 96 n.24 (1986) ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire . . . .").

[182] ACLU Amicus Brief, *supra* note 181.

[183] State ex rel. Crim. Div. of Att'y Gen.'s Off. v. Superior Ct. ex rel. Maricopa Cnty., 760 P.2d 541, 545–46 (Ariz. 1988).

[184] State v. Urrea, 421 P.3d 153, 157 (Ariz. 2018).

[185] State v. Gentry, 449 P.3d 707, 710 (Ariz. Ct. App. 2019).

[186] *Id.* at 711, ¶ 11.

not inherently or purposefully discriminatory.[187] The defendant requested that the court look at Washington's "objective observer" standard[188] as well as its list of racially neutral reasons that are presumed invalid. The court responded clearly: "We are neither bound by Washington state law, nor are we inclined to ignore well-established Arizona legal precedent."[189]

In 2020, the defendant in *State v. Porter* raised a *Batson* challenge when the prosecutor employed peremptory challenges against the only two Black individuals in the jury venire and had previously sought to strike a third for cause.[190] The trial court denied the challenge.[191] The court of appeals struggled to determine whether the wobbly race-neutral reasonings given by the prosecution were enough to support the district court's conclusion.[192] The appeals court wanted to give "great deference" to the trial court's finding but also "vigorously enforce[]" the *Batson* framework, "[o]therwise, a *Batson* analysis becomes nothing more than a rubber stamp allowing the government to discriminate with impunity."[193] Citing *Urrea*, the appeals court noted that states "have flexibility in formulating appropriate procedures to comply with *Batson*" but acknowledged that "Arizona has not elaborated on the basic framework."[194] Nonetheless, the appeals court held that it could take a more "granular" approach and require the trial court to "determine expressly that the racially disproportionate impact of the pattern [was] justified by genuine, not pretextual, race-neutral reasons."[195] The dissent argued that under the traditional *Batson* analysis, the operative question was whether the superior court "*clearly erred*" by failing to find the striking party was "motivated in substantial part by discriminatory intent."[196]

There was one area of agreement between the court of appeals' majority opinion, delivered by Chief Judge Peter B. Swann, and the

187 *Id.* ¶ 12.

188 *See infra* Section VII.A.

189 *Gentry*, 449 P.3d at 711, ¶ 13.

190 State v. Porter, 460 P.3d 1276, 1278 (Ariz. Ct. App. 2020), *vacated*, 491 P.3d 1100, 1103 (Ariz. 2021).

191 *Id.*

192 *See id.* at 1277–78.

193 *Id.* at 1281 (citing Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019)).

194 *Id.* at 1280 (quoting Johnson v. California, 545 U.S. 162, 168 (2005)).

195 *Id.* at 1283 (emphasis omitted).

196 *Id.* at 1285 (McMurdie, J., dissenting) (citing *Flowers*, 139 S. Ct. at 2244).

dissent, given by Presiding Judge Paul J. McMurdie—*Batson* was not working in Arizona.

Judge McMurdie believed that reworking the *Batson* framework should not be done via an appeal. The Arizona Supreme Court agreed and overturned the court of appeals. This reinforced the position that although *Batson* might afford "flexibility in formulating appropriate procedures to comply with *Batson*," Arizona had not done so, and the court of appeals could not insert that which *Batson* did not require.[197] Judge McMurdie pointed to a recent petition for a change to Supreme Court Rule 24 on Jury Selection as "the ideal forum to engage in this much-needed discussion."[198]

1. Petitioning the Arizona Supreme Court for a Rule Change

Under the Arizona system, "[a]ny person may petition the Arizona Supreme Court to adopt, amend, or abrogate a court rule" that is applicable statewide.[199] The Arizona State Bar's Civil and Criminal Practice and Procedure Committees formed a *Batson* Working Group to study proposed Rule 24 on Jury Selection and eventually submitted a petition that drew mainly from Washington's GR 37 but "with selective refinements."[200]

The Working Group's exhaustive study of Arizona cases found that 93.1% of *Batson* challenges were unsuccessful.[201] The predominant group status of stricken jurors was Hispanic jurors, followed by Black

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197 *Id.* at 1280 (quoting *Johnson*, 545 U.S. at 168).

198 *Id.* at 1291. Petitioner Kevin Heade filed Petition R-20-0009 in January 2020 on behalf of the Central Arizona National Lawyers Guild. The petition proposed a new Supreme Court Rule 24 on "Jury Selection" to stop the unjust exclusion of prospective jurors based on Washington's General Rule 37.

199 ARIZ. R. SUP. CT. 28(a)(1). Approximately half of the states give their courts jurisdiction to adopt court rules while the other half include the state legislature in the rulemaking process. For example, the Alabama State Legislature can change rules adopted by the courts. The Alaska State Legislature can also change court-adopted rules by a two-thirds vote. *See* Christopher Reinhart & George Coppolo, *Court Rules in Other States-Legislative Approval*, CONN. GEN. ASSEMB. (Dec. 30, 2008), https://www.cga.ct.gov/2008/rpt/2008-R-0430.htm [https://perma.cc/U6VP-H4SC].

200 *See supra* note 198. The 2020 Petition R-20-0009 was withdrawn to allow time for the *Batson* Working Group to complete its study and analysis. The new Petition R-21-0008 to Amend the Arizona Rules of Supreme Court to Adopt New Rule 24 on Jury Selection was submitted on January 8, 2021.

201 Petition to Amend the Rules of the Supreme Court of Arizona to Adopt Rule 24—Jury Selection at 2, No. R-21-0008, app. E (Ariz. Jan. 8, 2021).

jurors.[202] The Working Group determined that peremptory challenges persistently serve as a pretext for bias, frequently leveraging group characteristics such as race, gender, religion, or other factors to anticipate jurors' decision-making. They concluded that "[t]his breeds unfair strikes, promoting cynicism about the law and delegitimizing the important work of our courts."[203]

In January 2021, Judges Swann and McMurdie coauthored their own petition to amend rules relating to peremptory challenges.[204] The judges viewed efforts by Washington and California to strengthen *Batson* safeguards as "too nuanced to achieve their desired effect in the real world."[205] They noted that although no other state had abolished peremptory challenges, both England[206] and Canada[207] had done so, and the judges advocated that Arizona be the first to follow suit in the United States.[208]

2. Opposition by Practitioners

In response, Arizona practitioners nearly unanimously opposed the Swann & McMurdie Petition and flooded the public comment period.[209] Criticisms on the practicality of such changes highlighted

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202 *Id.*

203 *Id.* at 1.

204 Petition to Amend the Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure, No. R-21-0020 (Ariz. Jan. 11, 2021); *see also Criminal Procedure—Jury Selection—Arizona Supreme Court Abolishes Peremptory Strikes in Jury Selection—Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021)*, 135 HARV. L. REV. 2243, 2245 (2022).

205 Petition to Amend the Rules 18.4 and 18.5 of the Supreme Court of Arizona to Adopt Rules of Criminal Procedure and Rule 24—Jury Selection47(e) of the Arizona Rules of Civil Procedure, *supra* note 204, at 3, No. R-21-0008 (Ariz. Jan. 8, 2021).

206 Criminal Justice Act 1988, ch. 33, § 118 (UK), https://www.legislation.gov.uk/ukpga/1988/33/contents [https://perma.cc/CP93-M74V]; *see also supra* Section III.A.

207 An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, Bill C-75, S.C. 2019, c 25 (Can.), https://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/royal-assent#ID0EZC [https://perma.cc/RL8S-UQSU].

208 Petition to Amend the Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure, *supra* note 204, at 3–4, No. R-21-0008 (Ariz. Jan. 8, 2021).

209 *See generally R-21-0020 Petition to Amend the Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, ARIZ. JUD. BRANCH: CT. RULES FORUM (Jun. 1, 2021, 8:32 PM), https://www.azcourts.gov/Rules-Forum/aft/1208 [https://perma.cc/6MW4-GCK4]. Comments in Opposition to Petition No. R-21-0020 to abolish peremptory challenges included Arizona Attorney General's Office,

that potential jurors frequently hesitate to share their opinions openly in the courtroom.[210] It takes time, critics noted, for prospective jurors to become comfortable enough to respond to questions that might reveal bias rendering them incapable of serving as a truly impartial juror.[211] Trial attorneys across the state argued that by eliminating peremptory challenges altogether, litigants would "have no recourse . . . if a judge failed to grant an appropriate challenge for cause."[212]

Judges Swann and McMurdie tackled their critics in a response:

> Comments opposing the petition have a central theme: the assertion that the loss of the right to peremptorily challenge jurors will harm the fairness of trials by allowing biased jurors to survive voir dire and sit on an empaneled jury. As rightly passionate as the commenters are about the paramount importance of quality justice, the comments cite no evidence that peremptory challenges successfully eliminate bias, nor do they address the overall impact of years of discrimination on the integrity of a jury system.
>
> If peremptory challenges are eliminated, one thing is certain: there will be no discrimination on the basis of any prohibited category in our courts. That in itself would make Arizona the national leader in combatting this pernicious problem. And the concern about biased jurors is, in my view, overstated. Challenges for cause would remain unlimited, and a skilled advocate should be able to articulate the bases for concern about a juror's impartiality. Any thought that an advocate can detect inarticulable bases for bias and exercise peremptory challenges in the direction of fairness, while tantalizing, is actually little more than hopeful speculation. (And in practice, very few advocates seek unbiased juries—they naturally seek favorable juries).[213]

Arizona Chapter of the American College of Trial Lawyers, Arizona Prosecuting Attorneys' Advisory Council, Central Arizona Chapter, National Lawyers Guild, Maricopa County Attorney's Office, Phoenix Chapter of American Board of Trial Advocates, State Bar of Arizona. *Id.*

210 *See* Deborah Serrata, at 3–4, Comment to *R-21-0020 Petition to Amend the Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, ARIZ. JUD. BRANCH: CT. RULES FORUM (May 3, 2021, 6:54 PM), https://www.azcourts.gov/Rules-Forum/aft/1208 [https://perma.cc/6MW4-GCK4].

211 *Id.*; *see also* State Bar of Arizona, at 6–7, Comment to *No. R-21-0020 Petition to Amend the Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, ARIZ. JUD. BRANCH: CT. RULES FORUM (Apr. 30, 2021, 10:36 PM), https://www.azcourts.gov/Rules-Forum/aft/1208 [https://perma.cc/6MW4-GCK4] (arguing that having only for-cause challenges requires extensive voir dire in an already time-constrained, resource-depleted process).

212 *See* Serrata, *supra* note 210, at 2.

213 Bcrmember, Comment to *No. R-21-0020 Petition to Amend Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, ARIZ.

3. Support from the Judiciary

Although the response was overwhelmingly against the petition to abolish, there were several standout voices in favor. The Chief Justice of the Washington Supreme Court, Steven C. González, made a persuasive contribution to the debate. The Chief Justice offered that although his state's new rule was an important step toward eliminating racial bias in jury selection, it was a "lesser step."[214] He encouraged Arizona to take the further step: "[T]he science makes clear that the complete elimination of peremptory challenges is the only way to fully overcome this problem and . . . serve the interests of justice . . . ."[215]

A majority of judges from the Superior Court in Mohave County and the Yavapai County Superior Court bench were also in favor. The Yavapai County Superior Court bench focused on the amount of court time devoted to correcting peremptory strikes' misuse. Court intervention often proves challenging to enforce and can lead to allegations of racial bias against lawyers. Additionally, peremptory challenge rules require that the jury commissioner summon three times the needed jurors and that the court qualify twice the needed jurors.[216] "This over inflation is unnecessary and has consequences."[217] The Mohave County Superior Court expressed concerns that "[i]f the makeup of juries tends to skew one way, it creates an understandable perception that they are not juries of one's peers, but rather juries of one group sitting in judgment on another."[218] While no jury will have perfect balance, "differences resulting from the randomness of jury

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JUD. BRANCH: CT. RULES F. (June 1, 2021, 8:32 PM), https://www.azcourts.gov/Rules-Forum/aft/1208/afpg/2 [https://perma.cc/6CPP-NVSF].

214 *See* Bcrmember, Comment to *No. R-21-0008 Petition to Amend the Arizona Rules of Supreme Court to Adopt New Rule 24 on Jury Selection*, ARIZ. JUD. BRANCH: CT. RULES F., at 1 (Apr. 30, 2021, 10:25 PM), https://www.azcourts.gov/Rules-Forum/aft/1196 [https://perma.cc/8MNU-W95T]. The procedural rule came into force January 1, 2022.

215 *Id.*

216 Comment of the Yavapai County Superior Court at 1, No. R-21-0020 (Ariz. Apr. 15, 2021); John Napper, Comment to *No. R-21-0020 Petition to Amend Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, ARIZ. JUD. BRANCH: CT. RULES F., at 1 (Apr. 15, 2021, 4:15 PM), https://www.azcourts.gov/Rules-Forum/aft/1208 [https://perma.cc/6MW4-GCK4].

217 *Id.*

218 Kay L. Radwanski, Comment to *No. R-21-0020 Petition to Amend the Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, ARIZ. JUD. BRANCH: CT. RULES F., at 3 (Apr. 12, 2021, 6:29 PM), https://www.azcourts.gov/Rules-Forum/aft/1208 [https://perma.cc/6MW4-GCK4].

summonses are not the same as disparities resulting from the lawyers' tactical decisions."[219]

4. Arizona Leads the Nation

The sole attorney voice in support of the Swann & McMurdie Petition—and a public defender at that—stated his views succinctly: "Should the goal of the Courts be to end discrimination in the jury selection process, or simply [to] hide it?"[220] He ventured that peremptory challenges are the "primary culprit"[221] in continuing discrimination because they allow "the implicit and explicit biases of attorneys to impact jury composition and may provide a false veneer of racial neutrality to jury trials."[222] "[The Swann & McMurdie Petition]," he offered, "is an elegant solution—if peremptory strikes are being used to discriminate, eliminate peremptory strikes."[223] The Arizona Supreme Court chose the "elegant solution" and on August 30, 2021, amended the state's rules of civil and criminal procedure to remove lawyers' ability to dismiss prospective jurors without cause—making Arizona the first state in the nation to do so.[224]

C. Developments in the Wake of Washington and Arizona's Legislation

Washington's 2018 initiative, along with the Berkeley Law Death Penalty Clinic study, sparked a nationwide reexamination of respective approaches to peremptory challenges. The Berkeley study analyzed nearly 700 California appellate cases from 2006 to 2018 that involved objections to prosecutors' peremptory challenges.[225] The study demonstrated that "*Batson* is a woefully inadequate tool" and that there

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219 *Id.*

220 Mikel Steinfeld, Comment to *No. R-21-0020 Petition to Amend the Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, ARIZ. JUD. BRANCH: CT. RULES F., at 11 (May 3, 2021, 11:56 AM), https://www.azcourts.gov/Rules-Forum/aft/1208 [https://perma.cc/6MW4-GCK4].

221 *Id.* at 4.

222 Bennett, *supra* note 89, at 150.

223 *See* Steinfeld, *supra* note 220, at 7–8.

224 *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, *supra* note 17.

225 ELISABETH SEMEL ET AL., BERKELEY L. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS vi (2020).

is overwhelming prosecutorial use of peremptory challenges to exclude Black and Latinx prospective jurors, finding that prosecutors removed Black jurors in nearly seventy-two percent of the cases analyzed and Latinx jurors in twenty-eight percent of the cases.[226] Despite the extensive use of peremptory strikes by prosecutors, the California Supreme Court found only 2.1% of those challenges constituted *Batson* error.[227]

D. Chart

Since 2018 many states (including California, Colorado, Connecticut, and New Jersey) have followed Washington's lead by initiating legislative and judicial *Batson* reform. Most states to date have applied variants of Washington's model by eliminating the first prong of *Batson* and introducing an "objective observer" standard to determine whether a peremptory challenge was rooted in a discriminatory purpose. While some states used judicial or legislative directives to conduct task forces exploring racial bias in jury selection, others have proposed procedural change through judicial directives or commentary in judicial opinions. In many states, courts have exclusive authority to adopt court rules of practice and procedure. In others, the legislature has a role in the rulemaking process.[228] The influx of *Batson* reform to date is examined in Table 1, which outlines current state trends in modifying the use of peremptory strikes.

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226 *Id.* at iv.

227 *Id.* at 23.

228 Reinhart & Coppolo, *supra* note 199.

Table 1. Batson *Reforms: Current State Trends*

State[229]	Current Status	***Batson*** **Three-Prong Test Remains**	**Leaning Toward Wash. Approach**	**Leaning Toward Arizona Approach**	**Notes**
Arizona	Effectively Changed 1/1/2022			✓	Abolished peremptory challenges
California	Effectively Changed 1/1/2022		✓		Eliminates first prong of *Batson*; does NOT require strike opponent prove purposeful discrimination; includes "presumptively invalid" reasons for excluding prospective jurors
Colorado	Effectively Changed 6/20/2022		✓		Eliminates first prong of *Batson*; does NOT require strike opponent prove purposeful discrimination; includes "presumptively invalid" reasons for excluding prospective jurors
Connecticut	Effectively Changed 10/1/2022		✓		Striking party must state reason for peremptory challenge; includes a list of "presumptively invalid" reasons for excluding prospective jurors
Florida	Relies on Case Law Interpre-tation	✓			Case law requires striking party to state reason for peremptory challenge
Iowa	Under Review	✓			Judicial review in progress

[229] This Article distinguishes legislative and judicial changes to the traditional Batson three-prong test based on two predominant approaches: (1) the Washington state approach, which modifies the first prong of Batson and relies on whether an "objective observer" would view race or ethnicity as a factor in the peremptory challenge to make a finding of discrimination in jury selection; and (2) the Arizona approach, which eliminates peremptory challenges entirely. While the states' changes vary, these two approaches capture most state-level reforms across the United States. The chart is current as of August 29, 2023. *See Batson Reform: State by State*, *supra* note 168.

State[229]	Current Status	*Batson* Three-Prong Test Remains	Leaning Toward Wash. Approach	Leaning Toward Arizona Approach	Notes
Kansas	Under Review		✓		Legislative review in progress
Massa-chusetts	Under Review		✓		Legislative and judicial review in progress
Missi-ssippi	Under Review				Legislative review in progress
Missouri	Relies on Case Law Interpre-tation	✓			Case law requires striking party to state reason for peremptory challenge
Montana	Under Review				Legislative and judicial review in progress
New Jersey	Effectively Changed 7/12/2022		✓		Eliminates first prong of *Batson*; does NOT require strike opponent prove purposeful discrimination; does NOT provide a list of "presumptively invalid" reasons, but refers to historically invalid reasons associated with improper discrimination
New York	Under Review			✓	Legislative review in progress
North Carolina	Under Review		✓		Legislative review in progress
Oregon	Under Review		✓		Judicial review in progress

State[229]	Current Status	***Batson*** **Three-Prong Test Remains**	**Leaning Toward Wash. Approach**	**Leaning Toward Arizona Approach**	**Notes**
U.S. Court of Military Appeals	Effectively Changed, 1989		✓		Eliminated first prong of *Batson*; requires strike opponent to state reason for peremptory challenge
Utah	Under Review		✓		Judicial review in progress
Washington	Effectively Changed 4/2018		✓ (model)		Eliminates first prong of *Batson*; does NOT require strike opponent prove purposeful discrimination; includes "presumptively invalid" reasons for excluding prospective jurors

VII
CRITICISMS OF NEW RULE CHANGES

In this Part we set out some of the most salient criticisms to changing peremptory challenges' procedural rules. Section A notes that the "objective observer" standard is difficult to apply, as it relies on judges' ability to identify subjectivity factors in attorney decision-making, potentially leading to ambiguous rulings. Section B acknowledges the calls for additional study, including to explore alternative solutions and to substantiate evidence favoring any changes before implementing reforms. Section C harkens back to Chief Justice Warren Burger's admonition that peremptory challenges are part of the fabric of our jury system. Critics are apprehensive that reforming or eliminating peremptory strikes may disrupt long-standing legal traditions essential for ensuring fair trials. Section D raises the concern that abolishing peremptory challenges may limit prosecutors' ability to handle unsuitable jurors for specific cases, potentially impeding the fairness of criminal trials. Section E warns that the "could view" approach (that a neutral observer could view the peremptory challenge as discriminatory) might lead to unfounded misconduct allegations

that create a chilling effect on peremptory challenges. Recent rule amendments suggest that attorneys may have to report each other, potentially further exacerbating this issue.

A. Ambiguity of the Objective Observer

The American Bar Association (ABA) maintains that the changes exemplified by the Washington and Arizona models present "practical obstacles that should temper any expectations for widespread and immediate change in the composition of juries."[230] While noting that an "objective observer" standard may seem well-intentioned, the ABA contends that it remains "difficult to apply" given courts' lack of experience in being able to identify such discrimination.[231] Placing the trial court in the role of one who is "aware that unconscious, implicit, and institutional biases have resulted in the unfair exclusion of potential jurors," the objective observer standard assumes that judges can proactively identify when attorneys use individual subjectivity factors such as race, ethnicity, or gender.[232] One of the predominant criticisms of the objective observer standard has been threshold language used by some states, such as Washington, whereby a "strike would be invalid if

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230 Jeffrey Gross & Woodworth Winmill, *States' New Challenges to Peremptory Challenges*, AM. BAR ASS'N (Apr. 26, 2022), https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2022/states-new-challenges-to-peremptory-challenges/?login.

231 "Courts have far more experience identifying discrimination based on claims of discriminatory intent (such as through the analysis of pretextual race-neutral explanations under *Batson*) or statistical evidence about the results of race-neutral policies." *Id.*; *see also* Kelso L. Anderson, *Will Striking Peremptory Challenges Remove Bias in Juries?*, AM. BAR ASS'N (May 24, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/may-2022/will-striking-peremptory-challenges-remove-bias-juries/ ("[The] ABA Litigation Section leaders are divided as to whether peremptory challenges remain necessary to empanel an impartial jury of one's peers, or whether they may reinforce stereotypes about a person's race or sexual orientation."). While Washington and California's procedural modifications are too recent to fully assess whether such changes can eliminate bias, both criminal prosecutors and defense attorneys alike have already highlighted the practical and dangerous implications of state peremptory challenge changes, echoing the ABA's concern over the court's inability to objectively determine whether there was either conscious or unconscious discrimination.

232 *Batson Reform: State by State*, *supra* note 168; *see, e.g.*, CHASE T. ROGERS & OMAR A. WILLIAMS, STATE OF CONN. JUD. BRANCH, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 1, 17 (2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf [https://perma.cc/9RV8-XDQY]. Connecticut's definition of the "objective observer" as one who is "aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity."

an objective observer '*could view*' or '*would view*' race or ethnicity a factor in the strike."[233]

Opponents argue that the "could view" approach is an ambiguous, unworkable standard; challenges are easily molded into the vast range of purposeful or merely implicit discriminatory attacks such that courts deny a majority of strikes.[234] For example, as one critic puts it in the context of racial discrimination, "to find a peremptory challenge permissible under [the "objective observer"] standard, a trial judge must find that race could not have *possibly* been a factor in a peremptory challenge used against a juror of color."[235] Using speculation as a standard, the objective observer standard has the potential to form juries who may appear impartial but "whose partiality may not be fully discernible in a challenge for cause."[236]

B. Insufficient Study

National trial associations and state legislative groups have also vocalized disdain for the trend toward peremptory challenge reduction or elimination, arguing for additional studies into best practices for jury selection reform before implementing drastic reconfiguration.[237] The American Society of Trial Consultants (ASTC) issued a report pleading to keep peremptory challenge procedures, noting "such changes are unsubstantiated and concerns about potential bias in their use are better addressed by alternative solutions."[238] Yet the Berkeley Project's evidence overwhelmingly persuades that prosecutorial peremptory challenge practices in the 2020s appear to be just as invidious as the *Batson* case's systematic exclusion of four Black individuals in the

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233 Timothy J. Conklin, *The End of Purposeful Discrimination: The Shift to an Objective* Batson *Standard*, 63 B.C. L. REV. 1037, 1068 (2022).

234 *Id.*; *see also* CAL. CIV. PROC. CODE § 231.7(d)(2)(B). California has a similar "could view" approach with "substantial likelihood" of discrimination defined as "more than a mere possibility but less than a standard of more likely than not."

235 Conklin, *supra* note 233, at 1087 ("This regime will therefore prevent some discriminatory strikes that would have otherwise been permissible under any other Batson standard in use.").

236 *Id.* at 1088.

237 *Id.*

238 LESLIE ELLIS ET AL., AM. SOC'Y OF TRIAL CONSULTANTS, ASTC POSITION PAPER ON THE ELIMINATION OF PEREMPTORY CHALLENGES: AND THEN THERE WERE NONE 2 (2022), https://www.astcweb.org/resources/Documents/ASTC%20Position%20Paper%20on%20the%20Elimination%20of%20Peremptory%20Challenges%20-%20FINAL%207-14-2022.pdf [https://perma.cc/5BCB-WPN8].

criminal trial of a Black defendant. Leaving unaltered a practice that has demonstrably proven to discriminate makes it difficult to allow the practice to continue in its present form. Something clearly must be done.[239]

C. Upsetting Well-Established Precedent

Critics also argue that restricting or abolishing peremptory strikes will upset well-established precedent in jury selection procedures.[240] Groups like the National Association of Attorneys General have argued for maintaining the option for peremptory challenges, highlighting "the fact that peremptory challenges have been a part of the common law, statutes, and court rules, for over 700 years[,] indicat[ing] that they still have a place in ensuring a fair trial for all parties."[241]

But this values the number of years peremptory challenges have been around over their original purpose—or how they are being used now. The organizational hyperbole aside, if the empirical data does not support the efficacy of the rule under question, that rule must be examined in light of our evolving understanding of the implicit bias in jury selection.

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239 *See* Jim Frederick, *New Jury Selection Procedure in California: Is This the End of Peremptory Challenges? Is This the End of* Batson*?*, NAT'L L. REV. (Dec. 2, 2020), https://www.natlawreview.com/article/new-jury-selection-procedure-california-end-peremptory-challenges-end-batson [https://perma.cc/G78E-WK74]. The California District Attorneys Association (CDAA) has publicly criticized California's AB 3070 as one-sided, noting the change "represents nothing less than an upheaval of California's jury selection process, and it is being advanced without the benefit of extensive debate, careful review and sober consideration that should attend such expansive changes to our justice system." *See also Noted with Interest: A Sea Change to Peremptory Challenges: The Effects of California's AB-3070*, QUINN EMANUEL TRIAL LAWYERS (Apr. 21, 2021), https://www.quinnemanuel.com/the-firm/publications/noted-with-interest-a-sea-change-to-peremptory-challenges-the-effects-of-california-s-ab-3070/ [https://perma.cc/4EXY-KWL4] ("[The CDAA] criticize the presumptively invalid reasons for dismissing a juror as a laundry list created by criminal defense attorneys to ensure that only jurors predisposed to acquit can serve.").

240 *Noted with Interest: A Sea Change to Peremptory Challenges: The Effects of California's AB-3070*, *supra* note 239.

241 Daniel Edwards, *The Evolving Debate Over* Batson*'s Procedures for Peremptory Challenges*, NAT'L ASS'N OF ATT'YS GEN. (Apr. 14, 2020), https://www.naag.org/attorney-general-journal/the-evolving-debate-over-batsons-procedures-for-peremptory-challenges/ [https://perma.cc/7MHF-ACM5].

D. Leaving Prosecutors Vulnerable to Suspect Jurors

Given the stringent requirement of proving a criminal case beyond a reasonable doubt[242] and the largely embraced standard of unanimous verdicts for criminal convictions[243] under the new law, prosecutors are vulnerable to prospective jurors who may be idiosyncratically undesirable for a particular case. While there is substantial evidence that prosecutors use peremptory challenges for discriminatory purposes, not every peremptory challenge is based on a juror's race, ethnicity, or other protected characteristic. Some potential jurors are simply unsuitable for a specific case, and no malicious intent is at the root of their removal. Prosecutors traditionally could challenge such a prospective juror via a peremptory challenge. But if peremptory challenges are abolished or an objective standard invoked, excusing such a juror would not be possible—particularly in cases where a juror's race or ethnicity closely aligns with that of the accused.

E. Prosecutors' Vulnerability to Misconduct Allegations

The "could view" approach[244] adopted by many states has left prosecutors vulnerable to faulty misconduct allegations. Judges have expressed that if they sustain a challenge to the advocate's strike, they are now required to report the advocate exercising the strike to the state bar for attorney misconduct under the American Bar Association

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242 *See* Brooks Holland, *Confronting the Bias Dichotomy in Jury Selection*, 81 LA. L. REV. 165, 181–84 (2020) (observing that under the challenge-for-cause system "the legal standard of removal for cause is high," "deficient by design in its ability to detect *implicit* juror biases," and "often inadequate to the full task of ensuring an impartial jury").

243 *See* Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury."); *see also* State v. Jupin, 602 A.2d 12, 19 (Conn. App. Ct. 1992) ("A conclusion of guilt requires proof beyond a reasonable doubt, and proof to that extent is proof which precludes every reasonable hypothesis except that which it tends to support, and is consistent with the defendant's guilt and inconsistent with any other rational conclusion. . . . But the requirement of proof beyond a reasonable doubt does not mean that the proof must be beyond a possible doubt, and a possible hypothesis or supposition of innocence is far different from a reasonable supposition. . . . Emphasis needs to be placed on the distinction between the word 'reasonable' and the word 'possible.' . . . Proof of guilt must exclude every reasonable supposition of innocence . . . '[A] mere "possible hypothesis" of innocence will not suffice.'") (citations omitted).

244 *See supra* Section VII.A.

(ABA) Model Rules of Professional Misconduct.[245] This is troublesome as no actual discrimination has to be found under the new standard for a judge to sustain the challenge to the advocate's strike, meaning that attorneys are being reported to the state bar and facing serious professional misconduct allegations not because they acted in a discriminatory manner, but because it "could be" viewed that way. These allegations have a chilling effect on the use of peremptory challenges for many prosecutors, as they fear the personal consequences if the judge sustains the challenge to their strike.[246]

As of August 1, 2023, the ABA has further amended Model Rule 8.3 and extended the obligation of reporting misconduct to the state bar to attorneys as well.[247] Under the amended rule, it is likely that advocates will have to report one another if the judge sustains the challenge to an advocate's use of a peremptory challenge. If the required reporting by the judge alone has already caused a chilling effect on prosecutors' use of peremptory challenges, this effect is likely to intensify when attorneys are also required to report each other. If the fear of professional misconduct allegations is causing attorneys, including prosecutors, to stop using peremptory challenges, why not eliminate the option of exercising them and eradicate the possibility of faulty professional misconduct allegations?

VIII
MOVING FORWARD

Returning to the question posed at the outset of this exercise, should states follow Washington's lead and revise the *Batson* framework as Justice Burger put forth, or should American courts follow the Arizona

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245 State criminal trial court judges in California provided anecdotal evidence to the author when discussing the new peremptory challenge law and professional misconduct rule 8.3. *See* MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR. ASS'N 1998) (amended 2023) (explaining when judicial officers have an obligation to report an attorney to the bar).

246 Deputy District Attorneys practicing in both Southern and Northern California provided anecdotal evidence to the author when discussing California's new peremptory challenge.

247 CAL. R. PRO. CONDUCT 8.3 (2023), https://www.calbar.ca.gov/Portals/0/documents/rules/Rule-8.3.pdf_[https://perma.cc/9TDU-7H26] (explaining that, effective August 1, 2023, Rule 8.3 requires that "[a] lawyer shall, without undue delay, inform the State Bar, or a tribunal with jurisdiction to investigate or act upon such misconduct, when the lawyer knows of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects").

model as recommended by Justice Marshall and abolish peremptory challenges altogether?

Critics of abolition argue that eliminating peremptory strikes will upset well-established precedent in jury selection procedures,[248] and because they have "been . . . part of the common law, statutes, and court rules for over 700 years," peremptory challenges still ought to have a place in our system.[249] That analysis is unpersuasive given peremptory challenges' historical use, nor does it justify what the empirical and scientific evidence demonstrates—peremptory challenges are a mask for explicit and implicit bias that cuts at the very fabric of our justice system.

Several truths emerge from this Article concerning peremptory challenges, biases, and the various approaches to combat bias in jury selection. The first truth is that the *Batson* approach is fatally flawed. As demonstrated in contemporary studies, it is ineffective in combating discriminatory peremptory challenges. The gaping hole in *Batson* is that specious race-neutral reasons could be brought forward to mask discriminatory intent—a testament to its inadequacy. Furthermore, trial judges' willingness to accept an advocate's specious reasons for a challenge, out of fear of impugning the character of the advocates, compromises *Batson*'s approach. Frankly, the extensive litany of *Batson*'s jurisprudence is a barometer for evaluating the inadequacy of its approach.

The second truth is that while the Washington model theoretically plugged the oft-abused "race-neutral" hole of *Batson*, it is arguably optimistic. After all, the model's reliance on a bench officer to unilaterally determine whether an advocate's peremptory challenges may have been influenced by implicit bias is squarely disconnected from the current state of science and our collective constitutional goal of a consistent and accurate application of the law to all parties at trial.

While it is commendable that states following the Washington model have embraced the role that implicit bias plays in decision-making, it is not reasonable to presume that judges have the wherewithal and clairvoyance to enter the minds of advocates based on an individual decision made about a juror and accurately decipher the advocate's motivation. Implicit biases are unconscious by their

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248 *Noted with Interest: A Sea Change to Peremptory Challenges: The Effects of California's AB-3070*, *supra* note 239.

249 Edwards, *supra* note 241.

nature and virtually invisible to the holder, such that a decision-maker may not even be aware of the reason they made the decision they did. The new Washington framework makes nearly every strike of any prospective juror—irrespective of their background—subject to scrutiny for *possibly* being discriminatory. This fact alone renders the peremptory challenge an invitation for an allegation of discrimination—whether opposing counsel raises the allegation earnestly or not.

Because the new Washington standard makes all peremptory strikes vulnerable to enhanced scrutiny, what guarantee or trust can we have in a bench officer's ability to decipher biased from unbiased challenges on a consistent basis? Are these bench officers being trained to look for cues to assist in their determinations, or are the determinations arbitrary? Can it be the case that the dismissal of a Black juror on one case was for biased reasons, while another was not? Why? How might such a determination be made? Can advocates appearing within these courts be prepared to predictably know how to respond to such allegations? Will judges be required to produce a criterion that they will apply before trial begins, or will their own snap decisions about whether an advocate's strike was biased be subject to their own implicit biases about the advocate? How will we know it was not?

Unquestionably, the Washington model identifies the right problem but the wrong solution. To appropriately solve this problem, we must either agree to abolish peremptory challenges altogether as Arizona has prescribed, or we must drastically rethink the entire peremptory challenge framework.

The third truth is that the Arizona model eliminating peremptory challenges, while at first blush seemingly radical, is the most prudent approach. If one accepts that identifying implicit bias is a bridge too far, then reducing juror challenges to only for-cause challenges that are more readily surfaced is perhaps the most realistic path forward.

The Arizona model recognizes the difficult reality of identifying implicit bias and therefore relies on the random nature of the venire made up of one's peers. Prospective jurors are randomly selected, subjected to questions designed to identify any cause challenges, and then sworn in and seated. There is no opportunity for advocates to manipulate the composition of the jury with peremptory challenges because there are no peremptory challenges.

The English common law devised peremptory challenges to protect the accused from the excesses of the Crown and create an impartial

jury. As the system became fairer to the defendant, and the peremptory challenge safeguard became unfairly used by the defense, Parliament abolished them. Peremptory challenges were no longer needed to ensure an impartial jury and were being used to create a partial one. We have come to a similar crossroad in the United States. Evidence shows the discriminating role of peremptory challenges used to create a partial jury. Whatever value peremptory challenges had in the United States, as with England, they no longer serve their purpose and have a detrimental effect on our justice system. The fix-it approach of *Batson* is fatally flawed; the Washington model simply creates different challenges. The Arizona model is the best path to follow if our goal is to end discrimination in the jury selection process rather than simply hide it. We urge other states to follow Arizona's elegant solution: if peremptory strikes are being used to discriminate, eliminate peremptory strikes, and put the "first twelve in the box."