THE INEFFECTIVENESS OF THE *BATSON* CHALLENGE: TEXAS' STRUGGLE WITH RACIAL DISCRIMINATION IN JURY SELECTION AND PATHS TO REFORM

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I. ABSTRACT AND THESIS

As stated by Justice Thurgood Marshall, discrimination in jury selection is "perhaps the greatest embarrassment in the administration of [the] criminal justice system."[1] It is easy for prosecutors to exclude people of a certain identity from a jury. Preemptory challenges allow each party in a criminal case to remove, for any reason whatsoever, a defined number of potential jurors from the jury pool. In 1986, the Supreme Court decided in *Batson v. Kentucky* that parties may not challenge potential jurors "solely on account of their race."[2] The Supreme Court, however, has in effect rendered its own decision "meaningless, ineffective, and unthreatening."[3] *Batson* only protects defendants from "the most overtly discriminatory or impolitic lawyer."[4] If an attorney's strike of a juror is challenged with a potential *Batson* claim, current doctrine only requires that the judge determine that the attorney using the strike stated a reason that is not explicitly race- or gender-based.[5] The burden to prove that the strike is rooted in racial animus sits with the opponent of the strike. It is almost impossible to prove racial intent and a proponent of a peremptory strike must only provide an explanation for his strike that is race-neutral on its face. This makes it extremely difficult to successfully litigate *Batson* claims and allows lawyers to exclude jurors from the jury pool on the basis of race. In the wake of heightened attention to racial disparities in the United States, many jurisdictions are trying to come up with creative solutions to address the exclusion of jurors on the basis of race despite the difficult test the court has established for this issue. This paper will examine some of those solutions and assess their effectiveness in addressing racial discrimination in the jury selection process.

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1. Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting to denial of certiorari).

2. Batson v. Kentucky, 476 U.S. 79, 89 (1986); *but see* Powers v. Ohio, 499 U.S. 400, 402 (1991) (modifying *Batson* and holding that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races).

3. Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501 (1999).

4. *Id.*

5. *Id.* at 504–05; *see also* J.E.B. v. Alabama, 511 U.S. 127 (1994) (expanding *Batson* to gender challenges).

II. INTRODUCTION

A. What are peremptory strikes and how many do the defense and prosecution get?

Peremptory challenges allow parties in a criminal case to strike prospective jurors without assigning, or being required to assign, a reason for the challenge.[6] The Supreme Court has stated that "[t]he right to exercise peremptory challenges in state court is determined by state law."[7] The Constitution does not confer a right to peremptory challenges, and "[s]tates may withhold peremptory challenges altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."[8]

Depending on the type of criminal case, in Texas, both the State and the defendant are entitled to a specific number of peremptory strikes. In capital cases in which the State seeks the death penalty, "both the State and defendant shall be entitled to fifteen peremptory challenges."[9] Where two or more defendants are tried together, "the State shall be entitled to eight peremptory challenges for each defendant; and each defendant shall be entitled to eight peremptory challenges."[10]

B. What is the Batson Test?

The Supreme Court in 1986 held that a "State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause."[11] The Court held that peremptory challenges on the basis of race are unconstitutional unless a race-neutral reason can be provided to explain the exclusion of the jurors. Texas has codified this rule in the Code of Criminal Procedure, Article 35.261.[12] If a defendant suspects that jurors of a racial group are being excluded from a jury, the defendant can request a new jury array from which the jury will be chosen.[13]

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6. TEX. CODE CRIM. PROC. art. 35.14.
7. Rivera v. Illinois, 556 U.S. 148, 152 (2009).
8. *Id.* (quoting Georgia v. McCollum, 505 U.S. 42, 57 (1992)).
9. TEX. CODE CRIM. PROC. art. 35.15.
10. *Id.*
11. Batson v. Kentucky, 476 U.S. 79, 89 (1986).
12. TEX. CODE CRIM. PROC. art. 35.261.
13. *Id.* ("After the parties have delivered their lists to the clerk . . . and before the court has impanelled (sic) the jury, the defendant may request the court to dismiss the array and call a new array in the case. . . . If the court determines that the attorney

Despite this rule, peremptory strikes have often been used to "discriminate against black jurors."[14] When analyzing a *Batson* challenge at trial, the district court must engage in a three-step process. If a party suspects that the opposing party is peremptorily striking jurors for invidious racial reasons, the opponent of the challenge must (1) present "a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[15] Then, "[o]nce the defendant makes the requisite showing, the burden shifts to the State to [(2)] explain adequately the racial exclusion."[16] When explaining the exclusion, "[t]he State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'"[17] Finally, the trial court must then (3) determine whether the opponent of the strike has proven purposeful racial discrimination after the defendant attempts to rebut the State's explanations.[18]

III. FLAWS IN THE CURRENT TEST

A. The current test requires a very high burden of proof.

Batson has been called a "tremendous failure" because of its high burden of proof.[19] To prove a claim of racial discrimination in the use of peremptory strikes, the opponent of the strike must "establish by a preponderance of the evidence that the strike was the product of the proponent's purposeful discrimination."[20] Further, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the peremptory strike."[21] This places a

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representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.").

14. *See Batson*, 476 U.S. at 99; Miller-El v. Dretke, 545 U.S. 231 (2005).

15. *Batson*, 476 U.S. at 93–94.

16. *Id.* at 94.

17. *Id.* (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

18. *Id.* at 98.

19. *Panelists Call Batson a Failure, Offer Solutions*, AM. BAR ASS'N (Mar. 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/march-2017/panelists-call—i-batson—i—a-failure—offer-solutions_(quoting Stephen B. Bright) [hereinafter *Panelists* Article].

20. Harper v. State, No. AP-76,452, 2012 Tex. Crim. App. LEXIS 1087, at *9 (Tex. Crim. App. Oct. 10, 2012).

21. Davis v. Fisk Elec. Co., 268 S.W.3d 508, 514 n.4 (Tex. 2008) (quoting Goode v. Shoukfeh, 943 S.W.2d 441, 445–46 (Tex. 1997)).

crippling burden of proof that ultimately makes the proponent of the strike "largely immune from constitutional scrutiny."[22] Not only do opponents of a strike have to make a prima facie case of racial discrimination, but they must also convince a court that the race-neutral reasons provided are not actually race-neutral.

The requirement to prove "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[23] Even if opponents of a strike think they have made a strong case to establish purposeful discrimination, the trial court is ultimately in a unique position to determine the sufficiency of the neutral reasons given by the State for the peremptory challenge.[24] The trial judge's decision is accorded great deference and will not be overturned unless it is clearly erroneous.[25] Judges are given substantial deference in part because of their ability to observe the prosecutor's and prospective jurors' demeanors.[26] The challenge with the level of deference given to judges and trial courts is the difficulty of the findings the test is asking them to make. Not only does a judge need to find that there was intentional race discrimination in the peremptory strikes, but she must also find "that the prosecutor lied and gave a reason that is not the real reason when in fact the reason was race."[27] The Supreme Court has recognized that deference in this context makes "particular sense" because the finding will "largely turn on an evaluation of credibility."[28] If a trial judge does not believe the race-neutral reason given for a strike, she is inseparably calling the prosecutor uncredible. Trial judges are "understandably reluctant to call someone out for being a racist and a liar."[29] The deference given to judges in deciding the validity of *Batson* claims is yet another example of the difficulties defendants face when attempting to combat racial discrimination in the jury selection process.

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22. Peter J. Henning, *Prosecutorial Misconduct And Constitutional Remedies*, 77 WASH. U. L. Q. 713, 783 n.269 (1999) (quoting *Batson*, 476 U.S at 92–93).

23. *Batson*, 476 U.S. at 86.

24. Jasper v. State, 61 S.W.3d 413, 421–22 (Tex. Crim. App. 2001).

25. *Id.*

26. Bobby Marzine Harges, Batson *Challenges in Criminal Cases: After* Snyder v. Louisiana, *Is Substantial Deference to the Trial Judge Still Required?*, 19 B.U. PUB. INT. L.J. 193, 217 (2010).

27. *Panelists* Article, *supra* note 19.

28. Hernandez v. New York, 500 U.S. 352, 353 (1991).

29. *Panelists* Article, *supra* note 19.

B. It is almost impossible to show racist intent.

Once the opponent of a peremptory strike has made a prima facie case of racial discrimination, the proponent must only tender an explanation that is racially neutral on its face. A race-neutral explanation for striking jurors has to be based on something other than race—any explanation that does not have inherent discriminatory intent in its explanation will be deemed race-neutral.[30] The proponent of the peremptory strike does not even have to provide an explanation that is "persuasive, or even plausible."[31] Unless the discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.[32] Even if the race-neutral reason given is "silly or superstitious," the judge is not obligated to terminate the *Batson* inquiry because the ultimate burden of persuasion rests with, and never shifts from, the opponent of the strike.[33]

The intent requirement demands that the court determine the prosecutor's[34] subjective intent; showing disparate impact is not enough.[35] Equal Protection Clause jurisprudence has developed to make "facially neutral" laws and policies that have a disparate impact on certain groups of people very difficult to challenge in court. The Court has held time after time that disparate impact is not enough to prove discriminatory intent.[36] If a prosecutor were using all of his peremptory strikes on black jurors, which would have a disparate impact on black people, the defendant would still have to prove that the prosecutor struck the jurors *because* they were black. To show racially discriminatory intent, the opponent of the peremptory strike must prove that the prosecutor struck the juror because of, not in spite of their race. Additionally, if a prosecutor, at step two of the *Batson* inquiry, suggests both race-neutral and racially discriminatory motives behind a peremptory strike, the strike "does not violate the juror's Fourteenth Amendment right to equal protection of the law" as long

30. *Hernandez*, 500 U.S. at 360.

31. Purkett v. Elem, 514 U.S. 765, 768 (1995).

32. *Id.*

33. *See id.* (stating that terminating the *Batson* inquiry at the second step if the proponent gives a silly or superstitious race-neutral explanation would be a violation of the principle that the burden sits with the opponent).

34. Assuming that the prosecutor is the one against whom the *Batson* claim is being made.

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

36. *E.g.*, Washington v. Davis, 426 U.S. 229, 247 (1976); Vill. of Arlington Heights v. Metro. Dev. Corp., 429 U.S. 252, 265 (1977).

as he can show that the juror would have been struck solely on the neutral reasons.[37] The current *Batson* test undoubtedly perpetuates racism in the legal system. As stated by Derrick Bell, "[r]acism provides a basis for a judge to select one available premise rather than another when incompatible claims arise."[38]

The current test also does not account for implicit bias. Harvard's "Project Implicit" has tested over two million individuals for unconscious biases based on factors such as race, gender, sexuality, weight, and disability using Implicit Associations Tests (IATs).[39] The results of the race IAT show that "average white Americans in every single state are moderately to highly biased against African Americans."[40] The results of this test are highly concerning because they only represent the opinions of a subset of the population. The general population is likely more biased against blacks because the people who took the test likely actively sought it out. This demographic tends to be young, liberal, and educated, which is not reflective of a majority of the American population.[41] Finding racist motivations under *Batson* is already difficult when lawyers deliberately conceal their motives; it becomes significantly more difficult when trying to uncover unconscious prejudice.[42]

C. "Race-neutral" reasons for peremptory strikes have been accepted in the Texas Court of Criminal Appeals.

The Texas Court of Criminal Appeals has encountered multiple appeals for *Batson* challenges. The Court has consistently and frequently held that the use of peremptory strikes against certain individuals or groups of people were not inherently racially discriminatory, and therefore were racially neutral and did not violate *Batson.* The court has also held that race *may* be a factor coexisting with a non-racial reason; however, race may not be *the* reason for a strike.[43] All of the following case studies are examples of courts accepting implicit bias as a valid reason for striking potential jurors because the racism was not "explicit" and "intentional."

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37. Guzman v. State, 85 S.W.3d 242, 244 (Tex. Crim. App. 2002).

38. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992).

39. Anna L. Tayman, *Looking Beyond Batson: A Different Method of Combating Bias Against Queer Jurors*, 61 WM. & MARY L. REV. 1759, 1772 (2020).

40. *Id.*

41. *Id.*

42. *Id.* at 1772–73.

43. Hill v. State, 827 S.W.2d 860, 866 (Tex. Crim. App. 1992).

The use of a peremptory strike against a Hispanic male venireperson in the capital murder trial of a Hispanic male defendant was not racially discriminatory.[44] In *Flores*, the Court of Criminal Appeals held that a prosecutor's use of a peremptory strike against a Hispanic venireperson based on his inability to verbalize how he felt about the death penalty and his limited command of the English language was not racially discriminatory.[45] The venireperson was confused about the proceeding and when the judge offered to question him further, the prosecutor used a peremptory strike against him.[46] Another non-Hispanic jury member expressed that he had "absolutely no understanding [of the proceeding], even after the law was repeatedly explained to him," but was not struck by the prosecution.[47] The trial judge determined that the other jury member had a "better understanding of the law" than the defendant had argued, and disagreed with the defendant's characterization of the juror.[48] The trial court found that the appellant "failed to make a prima facie case of discrimination" and that the State "proffered a race-neutral explanation for its use of a peremptory strike" on the venireperson.[49] The Court of Criminal Appeals held that there was no "inherently discriminatory intent" in the prosecutor's explanation, and the defendant did not attempt to rebut the State's reasons, so the trial court's finding that the State's explanations were race-neutral was therefore not clearly erroneous.[50]

The peremptory strike of an black female venireperson, after an extensive out-of-court investigation, was not racially discriminatory.[51] In *Herron*, a venireperson was struck from a capital murder trial because an extensive out-of-court investigation suggested that she had a "reputation at her workplace for being stubborn and close-minded."[52] The prosecutor also learned from an investigator that the struck venire member "ha[d] a chip on her shoulder" and "would likely let race influence her verdict."[53] There were also multiple "domestic relations problems" on her record which indicated a level

44. Flores v. State, No. 74258, 2004 WL 3098822, at *2 (Tex. Crim. App. Oct. 20, 2004).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Herron v. State, 86 S.W.3d 621, 631 (Tex. Crim. App. 2002).
52. *Id.* at 630.
53. *Id.* at 631 (alteration in original).

of "instability in her life."[54] The defendant objected to this peremptory strike, arguing that it was "an extraordinary measure" and evidenced the State's willingness to "go to any length to ensure that African-Americans would not serve on the jury."[55] The prosecution responded and said they had investigated nearly half of the other venire members regardless of race.[56] The court held that the defendant failed to rebut the State's "race-neutral motives" for its strike, so the State did not violate *Batson*.[57]

Striking a venireperson based on the country she was born was considered a "race-neutral" reason to peremptorily strike her.[58] In *Wamget*, the Court of Criminal Appeals held that the appellant did not meet the burden of persuasion required under *Batson* because his argument was based solely on the venireperson's country of birth.[59] Before making a final decision, the Court did extensive research on what is meant by "race" for the purposes of the Equal Protection Clause and the "invisible link between race and national origin."[60] While "race" for the purposes of *Batson* "encompasses notions of ancestral line and ethnicity," ethnicity and national origin (the country where one was born) are often not the same.[61] Discrimination on the basis of one's ancestral line or ethnicity is race discrimination while discrimination based on the country where one was born is not race discrimination.[62] The Court of Appeals "did not hold that race was a reason for the strike in this case."[63] The Court upheld the lower court's holding that discrimination on the basis of place of birth is not the same as discrimination based on ethnicity and therefore not a violation of the Equal Protection Clause.[64] Where one was born may not

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. Wamget v. State, 67 S.W.3d 851 (Tex. Crim. App. 2001).
59. *Id.* at 859.
60. *Id.* at 856.
61. *Id.* at 857–59.
62. *Id.* at 858.
63. *Id.* at 853.
64. *Id.* at 859 (holding that "the party alleging discrimination based on nationality or ethnicity under Batson will not adequately establish the venireperson's ethnicity and cognizable racial group by showing only the country of their birth, and such party will likewise fail to meet its burden of persuasion of race discrimination by showing that the peremptory strike was based only on the country of the venireperson's birth.").

coincide with their ethnicity, and is therefore race-neutral.[65] Striking a venire member solely because she was "born in Liberia" did not meet the "burden of persuasion to establish race discrimination based on ethnicity."[66]

IV. IMPLICATIONS OF A DIFFICULT TEST

The current *Batson* test makes it extremely difficult to prove that racial discrimination is taking place in court. Defendants face significant barriers in achieving a fair and representative jury. Due to the difficulty of challenging peremptory strikes based on racial discrimination, prosecutors are able to strike jurors based on race, religion, etcetera without being held accountable. Instead of giving defendants a jury of their peers, peremptory strikes give prosecutors juries of their choice. Despite national efforts to address systemic racial discrimination, the judicial system, under the current landscape of *Batson,* perpetuates racial discrimination. While the *Batson* test is a well-intentioned method of attempting to "eradicate bias from the judicial process," it instead "perpetuate[s] legal fictions that allow implicit bias to flourish."[67] A jury is supposed to be a body composed of peers or equals of the person "whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[68] By using racial discrimination to restrict who serves on the jury, prosecutors deny defendants that right.

Additionally, courts allow implicit bias to run rampant in the jury selection process. Implicit biases are "unstated and unrecognized and operate outside of conscious awareness. . . . [they are] hidden, cognitive, or automatic biases [that] are nonetheless pervasive and powerful."[69] In an attempt to eradicate intentional discrimination and explicit bias, many laws may "exacerbate the impact of implicit bias as it is now understood, perpetuating and reinforcing discrimination."[70] If prosecutors or judges hold certain stereotypes

65. *Id.* at 859.

66. *Id.* at 860.

67. Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

68. Batson v. Kentucky, 476 U.S. 79, 86 (1986) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

69. Bennett, *supra* note 67, at 152.

70. *Id.*

about different groups, they may unintentionally strike jurors for "race-neutral" reasons that are actually rooted in their implicit biases. For example, Justice Marshall, in *Batson*, described the possibility that a prosecutor could strike a black juror for being "'sullen' or 'distant,' a characterization that would not come to his mind if a white juror had acted identically."[71] Justice Marshall foreshadowed the role implicit bias could play in peremptory strikes.

V. *BATSON* LITIGATION IN TEXAS

Batson has been rendered "toothless" in Texas, and even when it does bite, the "wound will only be superficial."[72] In the First and Fourteenth Courts of Appeals, both of which have jurisdiction over Houston and Harris County, and where more prisoners have been put to death than any other county in the nation,[73] there are very few instances of either court reversing on a *Batson* challenge. The only case in this jurisdiction where a *Batson* violation was found was a Fourteenth Court of Appeals decision which upheld the lower court's finding.[74] Even when the Court of Criminal Appeals found that the record *might* support a *Batson* violation, it held that the trial court did not err in denying the *Batson* challenge.[75]

In *Peetz v State*, the Court of Appeals upheld a *Batson* challenge in a racially motivated crime involving a white defendant and black victim.[76] In that case, the trial court found that the defendant's reasons for striking three black jurors were not race-neutral and therefore a violated *Batson*.[77] The defendant appealed, and the Court of Appeals affirmed the lower court's ruling.[78] The State raised *Batson* challenges against all three strikes, and the judge upheld one strike but placed the other two excluded jurors back on the jury.[79] After the court found that the reasons the two excluded jurors were

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

72. Tennyson v. State, 662 S.W.3d 401, 408 (Tex. Crim. App. 2018) (Alcala, J., dissenting from refusal of appellant's petition for discretionary review).

73. *Executions by County*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-county (last visited May 8, 2022).

74. *See* Peetz v. State, 180 S.W.3d 755, 759 (Tex. App. 2005). This statement is accurate as of concluding research in May 2022.

75. Watkins v. State, 245 S.W.3d 444, 446 (Tex. Crim. App. 2008).

76. Peetz, 180 S.W.3d at 759.

77. *Id.* at 760.

78. *Id.* at 761.

79. *Id.* at 757.

removed were not race-neutral, the defendant requested two additional peremptory strikes.[80] The court did not reinstate the strikes.[81] The appellant was "[e]ssentially ask[ing] [the court] to adopt the rule that a party may engage in racial discrimination and suffer no consequences."[82] The court refused to adopt the defendant's rule because that "would only foster greater discrimination."[83]

In a non-capital burglary case, the defendant claimed that the State exercised a number of its peremptory challenges to remove black panelists on account of their race.[84] The court found that the State used its peremptory challenges against black veniremen at a grossly disproportionate rate as compared to non-blacks.[85] The prosecutor in the case "directed at least one line of questioning designed to ferret out objectionable jurors towards African-American veniremen at twice the rate one would expect from random selection."[86] But because not *every* factor "support[ed] a conclusion of pretext,"[87] and the prosecutor's explanations for striking two black jurors were race-neutral, the court did not overturn the trial court's ruling in favor of the State.[88] While the court held that the trial court did not err, it stated that "the record might support an opposite resolution as well."[89]

Successful *Batson* claims are few and far between in Texas, especially in courts that have jurisdiction over Harris County. The only case where a *Batson* claim was granted was one in which the lower court had already found a *Batson* violation and the State was the party that brought the claim. Even when the court thought there may have been a *Batson* violation, because there could have also been a race-neutral explanation for the use of peremptory strikes against blacks, the court held that there was no *Batson* violation. Despite the "protection" against racial bias in jury selection, these cases illustrate the significant difficulty in successfully litigating a *Batson* claim.

VI. POTENTIAL SOLUTIONS TO ADDRESS THE INEFFECTIVENESS OF

80. *Id.*
81. *Id.*
82. *Id.* at 760.
83. *Id.*
84. Watkins v. State, 245 S.W.3d 444, 446 (Tex. Crim. App. 2008).
85. *Id.* at 451.
86. *Id.* at 456–57.
87. *Id.* at 457.
88. *Id.*
89. *Id.*

BATSON

A. The Supreme Court can make it easier to successfully litigate Batson claims.

Recently, there have been instances of successful *Batson* litigation in the Supreme Court.[90] If the Supreme Court makes it easier to successfully litigate *Batson* claims, there may be a trickle-down effect resulting in lower courts adjusting their approach to *Baston* litigation.

In a 2016 death penalty case, the petitioner produced evidence showing that every black venireperson in the jury pool had been color-coded to denote their race.[91] Through this color-coding process, the prosecutor was able to exclude black jurors through peremptories without explicitly removing them because of race.[92] The Court found that the use of the peremptory strikes was "motivated in substantial part by discriminatory intent."[93] The Court further found that there was a "concerted effort to keep black prospective jurors off the jury" and therefore reversed the lower court's ruling.[94]

In 2019, the Court overturned a capital murder conviction because there was impermissible discrimination on the basis of race during jury selection. In a case involving Curtis Flowers, a black man, seated white jurors were asked an average of one question while black prospective jurors were asked an average of twenty-nine questions.[95] The Court held that striking forty-one out of forty-two black prospective jurors over the course of six trials for the defendant was evidence of discriminatory use of peremptory challenges.[96] The State's use of peremptory strikes was "motivated in substantial part by discriminatory intent."[97] The Court also held that the disparate questioning of prospective black jurors compared to white jurors during jury selection established that the trial court had committed error and that the prosecutor's actions were motivated in substantial

90. Foster v. Chatman, 578 U.S. 488 (2016); Flowers v. Mississippi, 139 S. Ct. 2228 (2019).
91. *Foster*, 578 U.S. at 593.
92. *Id.* at 514.
93. *Id.* at 513.
94. *Id.* at 514.
95. *Flowers*, 139 S. Ct. at 2247.
96. *Id.* at 2251.
97. *Id.* at 2235.

part by discriminatory intent.[98] With two decisions coming out in favor of defendants in the last couple of years, lower courts may adjust their approach to *Batson* claims and offer protection against discrimination in the jury selection process.

B. Eliminate peremptory challenges.

Both prosecutors and defendants have the right to challenge a prospective juror for cause when his views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[99] At the end of voir dire, both parties are also authorized to make peremptory challenges when they do not want a prospective juror to be impaneled. It is the use of peremptory strikes that often results in the infiltration of implicit bias in the jury selection process.

In order to adequately address "the racial discrimination that peremptories inject into the jury-selection process," courts must "eliminat[e] peremptory challenges entirely."[100] Justice Breyer has shared similar sentiments.[101] He maintained that no one "can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype."[102] So, in order to truly address the presence of racial stereotypes in choosing a jury panel, it is "necessary to reconsider *Batson's* test and the peremptory challenge system as a whole."[103] By eliminating peremptory challenges, many of the concerns regarding implicit bias in the jury selection process can also be eliminated.

C. Reduce the number of preemptory strikes.

In 1990, the Supreme Court's Advisory Committee on Criminal Rules proposed that the number of preemptory strikes

98. *Id.* at 2251.

99. Wainwright v. Witt, 469 U.S. 412, 424 (1985).

100. Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

101. *See* Miller-El v. Dretke, 545 U.S. 231, 266–67 (2005) (Breyer, J., concurring) (stating that "Justice Thurgood Marshall predicted that the Court's rule would not achieve its goal. The only way to 'end the racial discrimination that peremptories inject into the jury-selection process,' he concluded, was to 'eliminat[e] peremptory challenges entirely.' . . . . Today's case reinforces Justice Marshall's concerns.") (alternation in original).

102. Rice v. Collins, 546 U.S. 333, 343 (2006) (citing Justice Breyer's concurrence in *Miller-El*, 545 U.S. at 267–68).

103. *Miller-El*, 545 U.S. at 273 (Breyer, J., concurring).

granted to each side should be significantly reduced because of fears that the challenges were being misused to make "systematic exclusions of a class of persons."[104] The reasoning behind the proposed amendment to lower the number of peremptories available was (1) to address the ability of peremptories to diminish or destroy the representativeness of the jury, and (2) to accelerate the voir dire process and permit the use of smaller venires.[105] The issues associated with the use of peremptory challenges had been acknowledged by the Supreme Court many years ago, but the amendment did not pass, and there has been little systemic change in addressing the racialized use of peremptory challenges.

Limiting the number of peremptory challenges granted to each party could ultimately reduce the amount of discrimination in voir dire.[106] If prosecutors only have a limited number of strikes, they may be more responsible about using them validly instead of basing them on racial identity.

D. Establish blind jury selection.

One way to reduce both implicit and explicit bias in jury selection would be to make the entire process blind. During voir dire, questions would be asked only by questionnaire, and counsel for both parties would be prohibited from seeing the potential jury pool, while also enforcing a ban on racially-charged questions.[107] Jury panelists would be identified by numbers and not their names, and "no questions regarding cognizable group status (such as race, ethnicity, or sex) would be permitted."[108] This would force lawyers to exercise their

104. Comm. on Rules of Prac. and Proc. of the Jud. Conf. of the U.S., *Report on Proposed Amendments to Rules of Criminal Procedure and Evidence*, U.S. CTS. CXXIV (Jan. 12 1990), https://www.uscourts.gov/sites/default/files/fr_import/CR01-1990.pdf.

105. Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 389 (1992) (quoting H.R. DOC. NO. 464, 94th Cong., 2d Sess. (1976)).

106. Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. PUB. POL'Y 323, 335 (2002).

107. Anuva Ganapathi, *Re-Thinking* Batson *in Light of* Flowers*: An Effort to Cure A 35-Year Problem of Prosecutorial Misconduct*, 33 GEO. J. LEGAL ETHICS 503, 512 (2020).

108. Jean Montoya, *The Future of the Post-*Batson *Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 1015–16 (1996).

peremptory strikes based on questionnaire answers and would not give them the opportunity to confront the jury panelists in person.[109]

By asking questions through a questionnaire, parties would have information on every juror instead of only hearing from jurors who are called on or volunteer during traditional voir dire. This would also save time and resources for courts because all venire members would fill out the questionnaire simultaneously. With blind jury selection, "litigants would not have the opportunity to examine jury panelists visually or orally" and would therefore "eliminate the more subjective, pretextual explanations based on demeanor, voice, and appearance, such as no eye contact, staring, body language, accent, hair style, and dress."[110]

In a system that used blind jury selection, "lawyer[s] . . . would not know . . . the race or gender of the prospective juror[s] (e.g., the juror could be a male nurse or a woman with military experience)."[111] If unlawful discrimination can be eliminated or reduced in jury selection, trial and appellate courts will ultimately save money because *Batson* motions will decrease. Some may argue that it is crucial to be able to observe body language and nonverbal demeanor of potential jurors, especially when discussing important issues or facts related to a case. Although this is important, it does not outweigh the benefits of potentially eliminating, or at least reducing, "invidious discrimination in jury selection."[112] While using a color-blind approach may not necessarily result in diverse juries, it will help ensure that jurors are not struck because of their race.

E. Abolish an "intent" test and instead use a cultural meaning test.

The Supreme Court has consistently adopted an "intent" test in assessing whether laws, practices, or procedures are racially discriminatory. Unless a practice is overtly discriminatory, the Court will likely not strike it down for its invidious racialized effects. This often leads to practices that have a racially discriminatory impact though they may not have discriminatory intentions. In the *Baston* context, courts may allow prosecutors to strike jurors for "race-neutral" reasons that actually have discriminatory impacts. To address

109. *Id.* at 1016.
110. *Id.* at 1017–18.
111. *Id.* at 1018.
112. *Id.* at 1021.

this covert racism, a court may benefit from adopting a cultural meaning test to assess whether strikes are discriminatory in their application. The cultural meaning test, as coined by Charles Lawrence, would measure "unconscious but unconstitutional discrimination."[113] By focusing on the social or cultural meaning of an act instead of intent, courts can better reach unconscious bias in jury selection. As mentioned earlier, one reason courts hesitate to challenge race-neutral reasons for striking jurors is that they do not want to accuse prosecutors of being racist. With a cultural meaning test, courts would not have to call anyone racist; they would simply be asking if the reason a juror was struck had a cultural meaning that *could* be understood as racist.

A potential drawback of employing the cultural meaning test is that it is difficult to define the cultural meaning of acts. Courts would eventually have to decide what the cultural meaning of an act is, and that does not seem like an effective way to address overt discrimination—especially because the cultural meaning of an act would likely be decided by a white male judge. Nonetheless, courts must be able to account for implicit bias in the use of peremptory strikes to strike people from the jury pool. While the cultural meaning test may help identify implicit bias, courts may be better off employing a blind jury selection process to eliminate (or significantly reduce) discrimination in the jury selection process from the get-go.

VII. RECENT STATE RESPONSES TO *BATSON*

With national attention on the implications of *Batson* challenges (or lack thereof) in jury selection, states are beginning to explore various strategies to reform the discriminatory exclusion of black jurors. While many states are beginning to address the issue, the most notable changes have been employed by Arizona, Washington, and California. Many additional states have also adopted *Batson* reform heavily modeled after Washington's General Rule 37.[114]

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113. *See* Robin Charlow, Batson *"Blame" and Its Implications for Equal Protection Analysis*, 97 IOWA. L. REV. 1489, 1503 n.52 (2012) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 355–56 (1987)).

114. 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

A. Arizona ended the use of peremptory strikes.

In 2021, the Arizona Supreme Court published a rule modification ending the use of peremptory challenges in civil and criminal cases. The amended rule became effective on January 1, 2022. A pair of Arizona judges who had petitioned for the Arizona Supreme Court to abolish peremptory challenges stated that "decades of litigation over *Batson* challenges have consumed countless hours of attorney time and judicial resources. Yet in Arizona, only five cases have been reversed over a *Batson* challenge."[115] By eliminating peremptory challenges, the court was also able to eliminate racial discrimination through peremptory strikes.

B. Washington adopted General Rule 37, which considers implicit bias and unconscious racism in the use of peremptory strikes.

In April 2018, the Washington Supreme Court adopted General Rule 37 (GR37). The Rule moves away from the requirement of purposeful discrimination and instead focuses on determining if there is implicit bias or other unconscious racism at play when striking jurors.[116] The Rule "disallows peremptory challenges if an 'objective observer could view [a juror's] race or ethnicity as a factor in the use' of the strike."[117] GR37 also "lists presumptively invalid reasons for a strike including expressing a belief that law enforcement engages in racial profiling, having prior contact with law enforcement, and living in a high-crime neighborhood. GR37 also makes it . . . difficult to strike a juror based on a behavioral reason such as failing to make eye contact or exhibiting a 'problematic' attitude."[118] The court employed these changes after extensive research and stakeholder feedback to ensure "integrity in the justice system it oversees."[119]

(discussing how Arizona, Colorado, Connecticut, Massachusetts, and North Carolina all adopted rules modeled after Washington's General Rule 37).

115. Ian Millhiser, *Arizona launches a bold new experiment to limit racist convictions*, VOX (Aug. 31, 2021, 8:00 AM), https://www.vox.com/22648651/arizona-jury-race-batson-kentucky-peremptory-strikes-challenges-thurgood-marshall.

116. Annie Sloan, *"What to Do About* Batson*?": Using A Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233, 236 (2020).

117. *Id.* (quoting WASH. CT. GEN. R. 37(f)) (alteration in original).

118. *Id.*

119. *Id.* at 265.

C. *California passed AB3070, which requires a showing of clear and convincing evidence that the use of peremptory strikes is not racially motivated.*

In 2020, the California Legislature passed AB3070, which increases transparency in jury selection by requiring an attorney exercising peremptory strikes to show clear and convincing evidence that his or her action is unrelated to a juror's membership in a protected group or class.[120] AB3070 intends to expand "federal precedent in . . . jury selection in both criminal and civil cases."[121] AB3070 specifically lists "race neutral reasons" that will be presumptively invalid because of the frequency with which they have been offered to challenge jurors of color as modeled by Washington's GR37.[122] The presumption of invalidity can only be overcome by clear and convincing evidence.[123]

AB3070 also eliminates the intentionality requirement and instead instructs judges to sustain objections against any challenge "[i]f the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor."[124]

VIII. CONCLUSION

Batson litigation is an important and relevant topic being discussed at the national level and across states. It is imperative that black and minority defendants are afforded their fundamental right to

120. CAL. CODE CIV. PROC. § 231.7(e).

121. Brian T. Gravdal, *AB 3070 and Peremptory Juror Challenges in California: Strengthening Protection Against Discriminatory Exclusion*, BERMAN, BERMAN, BERMAN, SCHNEIDER & LOWARY, LLP (July 29, 2023), https://b3law.com/all-cases-list/ab-3070-and-peremptory-juror-challenges-in-california/.

122. CAL. CODE CIV. PROC. § 231.7(e)(1)–(9) (enumerating the following reasons, among others, as presumptively invalid: (1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system, (2) expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner, (3) having a close relationship with people who have been stopped, arrested, or convicted of a crime, (4) a prospective juror's neighborhood, (5) having a child outside of marriage, (6) receiving state benefits, (7) not being a native English speaker, (8) the ability to speak another language, and (9) dress, attire, or personal appearance.).

123. *Id.*

124. *Id.* at § 231.7(d)(1).

a representative jury. Many states have established statutory rules that expand the protections afforded to defendants in the *Batson* context, modeled after Washington's General Rule 37. More states should adopt GR37 and use the extensive (though not comprehensive) list of reasons that should not be accepted as "race-neutral" reasons to strike jurors. This will force prosecutors to be more intentional about why they strike jurors and how their implicit biases may be at play. Another potential solution to address racial discrimination in jury selection is employing the use of blind jury selection. While *Batson* is supposed to address overt, intentional racism in jury selection, it does not reach implicit bias that may be at play when jurors are selected. By making the entire jury selection blind, there is significantly less risk of a prosecutor's personal biases and subconscious racism influencing the jury selection process. Blind jury selection can eliminate or at least reduce invidious discrimination in jury selection. It is imperative that states begin addressing the harmful effects that racial discrimination in jury selection has on defendants and adopt methods to address these harms in their respective judicial systems.