AN UNEVEN SCALE—THE DIFFERENCE IN PROSECUTORS' AND DEFENDANTS' ABILITY TO SHAPE CRIMINAL TRIAL JURIES AND THE POSSIBILITY FOR CHANGE

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ABSTRACT

The right to serve on a trial jury dates back to before the founding of the United States, directly influenced by the English common law system. For decades, this right was reserved only for white, land-owning men. Beginning in the 1880s, the Supreme Court addressed efforts to exclude individuals from jury service based on race. However, states continued to restrict Black individuals from serving on juries. To further combat these discriminatory practices, in *Batson v. Kentucky*, the Supreme Court ruled that prosecutors could not use peremptory strikes based on race. Still, this decision did little to protect defendants, as prosecutors only needed to provide minimal justification for a peremptory strike. While peremptory strikes represent a significant obstacle to racial diversity on juries, prosecutors can also challenge, without limitation, individual jury members for cause and have them dismissed by a judge. This article proposes solutions to address ongoing disparities in criminal jury selection, recognizing that peremptory strikes are not the only challenge—challenges for cause are equally crucial to address. The author proposes the best solution lies with judges, who hold the most influence over the composition of the jury at trial. Judges should carefully assess whether the alleged bias is valid and scrutinize the motivations of a party bringing challenges for cause. Another approach involves granting a party additional peremptory strikes to offset any unequitable distribution in dismissals of jurors for cause. Given the unlikely nature of larger jury reforms, these approaches

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may provide the best route to accessing change and minimize the impact of bias.

INTRODUCTION

From Reconstruction through the Civil Rights era, and to present day, a pervasive and nearly unavoidable problem stains both state and federal criminal trials in the United States. Although defendants are often Black or Hispanic, the juries determining their guilt or innocence tend to be disproportionately white.[1] This disparity occurs even in jurisdictions with considerable nonwhite populations.[2] Although the law may presume that a juror is impartial until proven otherwise, the disproportionate racial composition of criminal juries creates severe problems in maintaining both the administration and appearance of justice.

Just as Reconstruction promised Black people the right to vote, so were the promises of other citizenship rights, including jury service. Nevertheless, over the post-Reconstruction decades and into the start of the twentieth century, these rights were stripped away through intimidation campaigns from white mobs[3] and the enactment of state statutes intentionally drafted to disenfranchise Black people.[4] Through the early twentieth-century, the possibility that a Black person could serve on a jury

1. *See* Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project-Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1425–26 (2018) (finding, in felony trials in North Carolina in 2011, judges removed nonwhite jurors at a higher rate than white jurors and prosecutors removed nonwhite jurors at about twice the rate as white jurors; of the retained jurors, at least 10,402 were white and only 2,628 were nonwhite); *see also* Eli Jones, *The Inherent Implicit Racism in Capital Crime Jury Deliberation*, 9 VA. J. CRIM. L. 109, 117 (2020).

2. *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 793–97 (2020) (finding, from criminal jury trial data across Louisiana and Mississippi's Fifth Judicial District, that Black and other nonwhite jurors, while making up over 34% of the initial venire in both areas, were excluded by prosecutors and judges at a higher rate than white jurors); *see also* Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 519 (1994) (stating from the authors' own experience that "a [B]lack defendant can still find himself facing a jury from which the overwhelming majority, if not all, of the prospective jurors of his race have been excluded. This is true even in counties that have [B]lack populations exceeding thirty or forty percent.").

3. *See* Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 60 n.25 (2020) (providing numerous examples of white mob violence against Black people exercising their civil rights or engaging in political action throughout Southern states such as Louisiana, Tennessee, Mississippi, Alabama, and South Carolina).

4. *See id.* at 62.

for a court in the South was practically impossible.[5] The use of discriminatory jury selection policies continued in federal courts until 1968, with the passage of the Jury Selection and Service Act.[6] Seven years later, the Supreme Court applied similar protections to state courts when the cross-sectional ideal was constitutionalized in *Taylor v. Louisiana*.[7]

Although outright discrimination in jury selection is impermissible, courts continue to encounter the problem of disproportionate racial composition in criminal trial juries. Many scholars blame this persistent problem on prosecutors' discriminatory use of peremptory strikes.[8] A peremptory strike is, "an objection to a prospective juror that may be asserted without stating a reason or cause," which gives the exercising party, "the nearly unqualified right to remove a prospective juror."[9] However, peremptory strikes are limited because they cannot be based on an individual's race or gender, as doing so would violate the Equal Protection Clause of the Fourteenth Amendment.[10] Although criminal defendants are theoretically protected from a prosecutor's discriminatory use of peremptory strikes, now referred to as a *Batson* violation,[11] critics have argued the Supreme Court's standard to prove such an abuse fails to effectively check prosecutors.

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5. *See* Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1407 (1983) ("… [I]n the period from roughly 1890 to 1930 that [B]lack jurors were rare indeed. Certainly the federal and state court reports are filled with cases in which [B]lack defendants protested to no avail against the unfairness of all-white grand and petit juries.").

6. 28 U.S.C. § 1861 (1968); *see also* Frampton, *supra* note 2, at 809.

7. 419 U.S. 522, 530 (1975) (holding the Sixth Amendment mandates that petit juries must be drawn from a source fairly representative of the community).

8. *See, e.g.*, Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.– C.L. L. REV. 357 (2017); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.–C.L. L. REV. 227 (1986); Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of* Batson, 45 U.C. DAVIS L. REV. 1359 (2012); C.J. Williams, *Striking Some Strikes: A Proposal for Reducing the Number of Peremptory Strikes*, 68 DRAKE L. REV. 789 (2020).

9. Stephen E. Arthur & Robert S. Hunter, FEDERAL TRIAL HANDBOOK: CRIMINAL § 15:22 (Law. Coop. Pub. eds., 4th Ed., 2023).

10. Batson v. Kentucky, 476 U.S. 79, 86 (1986) ("Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that [B]lack jurors as a group will be unable impartially to consider the State's case against a [B]lack defendant.") (citation omitted).

11. *See generally id.*

Some attribute the ineffectiveness to discomfort attorneys may encounter in accusing another of intentional discrimination, and judges' similar apprehension in finding an attorney guilty of the significant offense of violating the Equal Protection Clause.[12] If a party does initiate a *Batson* challenge and establishes a prima facie case of purposeful discrimination, the alleged violator is only required to provide a race-neutral explanation for striking the juror, which judges will often accept.[13] One proposal to strengthen *Batson*'s protections is an increased burden on the prosecution to justify their peremptory strikes when accused of a *Batson* violation.[14] Others have argued for going even further. Justice Marshall, in his *Batson* concurrence, went as far to say that "[i]f the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay."[15] Drawing from these words, others have argued for the complete elimination of peremptory strikes.[16]

These proposals could be beneficial if peremptory strikes were the only problem. However, data indicates that Black jurors are not only dismissed at a higher rate by prosecutors' peremptory strikes but also when jurors are challenged for cause and dismissed by a judge.[17] A challenge for cause requires stating a specific reason a potential juror cannot be impartial.[18]

12. *See* Darby Gibbins, *Six Trials & Twenty-Three Years Later: Curtis Flowers and the Need for A More Expansive* Batson *Remedy*, 59 HOUS. L. REV. 713, 724 (2022) (discussing the extent prosecutorial misconduct evades *Batson* violation enforcement).

13. In his concurrence to *Batson*, Justice Marshall foresaw this problem, writing: "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed uncommunicative, or never cracked a smile and, therefore did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory." *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

14. *See, e.g.*, Cover, *supra* note 8, at 379.

15. *Batson*, 476 U.S. at 108 (Marshall, J., concurring) ("But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial.") (citations omitted).

16. *See, e.g.*, Gurney, *supra* note 8, at 244.

17. *See* Frampton, *supra* note 2, at 792–98 (providing data from Louisiana and Mississippi demonstrating differences between prosecutors and defendants in arguing challenges for cause and effect on final jury composition).

18. There is no definitive standard or technical analysis applied when dismissing a juror for cause. Instead, the challenges are reviewed on a determination of a potential juror's impartiality by the trial judge. *See* Frampton, *supra* note 2, at 788.

While this limits the availability of challenges for cause; evidence suggests that they play a prominent role in crafting the disproportionate racial composition of criminal juries than peremptory strikes. For example: in the Supreme Court's three most recent cases involving a *Batson* violation, challenges for cause eliminated most of the Black prospective jurors, not peremptory strikes.[19] Collectively, these cases cast doubt on whether expanding *Batson*'s protections would significantly change criminal juries to better reflect the racial composition of the local community.

Like the existing scholarship on *Batson*, this article proposes solutions to address racial disparities in criminal juries. However, this article will analyze these proposals assuming that challenges for cause are slightly less, or just as, discriminatory as peremptory strikes. A solution targeting abuse of peremptory strikes, while beneficial, is just one piece in solving the larger puzzle of jury selection discrimination. Implicit in much of this discussion is a criticism of the partial/impartial binary that shapes much of jury selection today. Given the Supreme Court has provided little to no guidance on when a juror may be dismissed for cause,[20] trial judges must subjectively determine[21] whether certain factors justify disqualifying a juror from service.[22] These decisions can be susceptible to outright discriminatory motives or the implicit bias of a prosecutor who argues for granting or denying a challenge for cause.[23] The judge's biases are also relevant to this issue, as the decision whether to accept or dismiss a juror for cause ultimately rests with the judge.[24]

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19. *Id.* at 790–91. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228 (2019); Foster v. Chatman, 578 U.S. 488 (2016); Snyder v. Louisiana, 552 U.S. 472 (2008).

20. *See* Skilling v. United States, 561 U.S. 358, 386 (2010) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.") (quoting United States v. Wood, 299 U.S. 123, 145–46 (1936)).

21. A judge's decision to dismiss a juror is reversable only for an abuse of discretion. *See, e.g.*, United States v. Cantu, 229 F.3d 544, 550 (6th Cir. 2000); United States v. Webster, 162 F.3d 308, 342 (5th Cir. 1998); Davis v. State, 594 S.W.2d 47 (Ark. Ct. App. 1980); State v. Depaz, 204 P.3d 217 (2009).

22. While impartiality is a principal concern of many judges in determining whether a juror is qualified, a juror may be dismissed even absent a showing of bias to a particular party. *See Cantu*, 229 F.3d at 550.

23. *See* Gibbins, *supra* note 12, at 713 (discussing the extent prosecutorial misconduct evades *Batson* violation enforcement).

24. *See* Frampton, *supra* note 2, at 796–97 (finding that, in jury trials from Mississippi's Fifth Judicial District from 1992 to 2017, judges initiated the "vast majority" of challenges for cause, disproportionately against Black jurors); *see also* Wright et al., *supra* note 1, at 1426–28 (citing felony

Part I of this Article traces the general history of the jury selection process, including the common law origins of challenges for cause and peremptory strikes. Next, it describes the history of racial discrimination in jury selection, namely the adoption of state statutes and court policies that limited the ability of Black Americans to even appear in a jury pool, nevertheless serve on a jury.

Part II dives deeper into the discriminatory features of the jury selection process.[25] Specifically, Part II will expand on how challenges for cause eliminate many, often Black, prospective jurors from service. Much of this analysis will reference the work of Professor Thomas Ward Frampton,[26] as his article on the discriminatory use of challenges for cause provides essential insight for assessing the viability of jury selection reforms.

Part III discusses the possible solutions to this problem. This analysis begins with framing the considerations and possible goals of an alternative jury selection process. In particular, the discussion analyzes solutions by focusing on the underlying issue in many criminal jury trials: prosecutors' undue advantage in shaping the final jury. The ultimate priority is assessing the possibility of creating equal power among both prosecutor and defendant in shaping the jury of a criminal trial.

I. HISTORY OF THE JURY SELECTION PROCESS

Like other facets of American law, English common law shaped much of the modern jury selection practices and objectives utilized in state and federal courts. Originally, jurors were permitted and expected to decide a case based on their knowledge and understanding of the facts.[27] This preference began to change around the fifteenth century as impartiality became the primary focus in seating a jury.[28] At least in criminal trials, English common law permitted a defendant a certain number of peremptory

trials in 2011 in North Carolina where judges removed nonwhite jurors at a higher rate than they did for white jurors).

25. The scholarship on the discriminatory use of peremptory strikes is extensive, but this Article will attempt to summarize it as succinctly as possible.

26. *See generally* Frampton, *supra* note 2.

27. *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 399 (1996).

28. *Id.*; *see also* C.J. Williams, *On the Origins of Numbers: Where Did the Number of Peremptory Strikes Come from and Why Is Origin Important?*, 39 AM. J. TRIAL ADVOC. 481, 487 (2016).

strikes.[29] Rooted in fairness, the rationale for the practice was 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."[30] However, many defendants did not exercise this right because they completely lacked knowledge of the availability of peremptory strikes or how they worked.[31] Some may also not have used peremptory strikes due to a fear of offending superiors or strangers seated in the jury pool.[32]

Instead of peremptory strikes, the Crown's "stand aside" powers primarily shaped the English common law system of jury selection. At trial, a prosecutor could pass over any juror without the need to show cause or provide reasoning.[33] In practice, this allowed an almost unlimited number of peremptory strikes, as the prosecution could sift through potential jurors to prevent anyone seen as unfavorable from serving on the jury.[34] A larger jury pool strengthened the Crown's advantage. It increased the possibility of finding twelve jurors favorable to the prosecution and limited the risk that overt use of the stand aside powers would exhaust the jury pool.[35]

By the founding of the American colonies, the right to a trial by jury was already deeply rooted in English law.[36] The framers also valued the right to trial by jury, adding it to the Constitution, the Sixth Amendment, and the Seventh Amendment.[37] Drawing from English common law practices, courts in America emphasized impartiality as the ideal

29. Williams, *supra* note 28, at 488 ("At common law in England, criminal defendants were allowed thirty-five peremptory strikes.").

30. 4 WILLIAM BLACKSTONE, COMMENTARIES *206.

31. *See* 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. CIV. RTS. & CIV. LIBERTIES 1, 13 (2020).

32. *See id.*

33. *Id.*; *see also* Williams, *supra* note 28, at 488.

34. A prosecutor could use the stand-aside powers up to exhaustion of the jury venire. If, after examining the remaining prospective jurors, a jury was not seated, then the Court would return the jurors. The prosecution could then only dismiss a juror after providing cause. *See* Anderson, *supra* note 30, at 13; *see also* Williams, *supra* note 28, at 488–89.

35. *See* R. Blake Brown, *Challenges for Cause, Stand Asides, and Peremptory Challenges in the Nineteenth Century*, 38 OSGOODE HALL L. J. 453, 463–65 (2000).

36. *See* Smith, *supra* note 27, at 421.

37. *See id.* at 425; *see also* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .").

characteristic in a potential juror.[38] The practice of peremptory strikes for defendants carried over from England,[39] eventually being codified by Congress for federal trials in the Crimes Act of 1790.[40] Initially, several states maintained the traditional "stand aside" powers for prosecutors.[41] Yet over time, the practice began to disappear in the United States as state and federal statutes granted peremptory strikes to the prosecution in criminal trials.[42]

The emphasis on peremptory strikes increased the significance of voir dire; the early stage of trial where the parties or court examine jurors to assess their views and determine any potential bias.[43] In a departure from English common law roots, voir dire in state and federal courts became a much more extensive process.[44] Voir dire was seen not only as a means of gauging impartiality to challenge for cause, but was also endorsed as a method of informing each side's peremptory challenges.[45] This split from English practice, which began to take shape around the mid-nineteenth century, is possibly attributable to the higher diversity in American jury venires as lowered property requirements increased the number of eligible jurors.[46] Not only were the requirements less strict, but land was cheaper.[47] Whereas English juries were mostly men of above-average wealth, an American jury could include a low-income, illiterate individual.[48]

Another factor was the high composition of immigrants with varying

38. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . .").

39. *See* Williams, *supra* note 28, at 494.

40. *See id.* at 495.

41. *Id.* at 491.

42. *Id.* at 492.

43. "Voir dire is the stage of the jury trial in which the court and/or parties examine prospective jurors with a goal of selecting an impartial group. . . . The voir dire examination affords the court and the parties an opportunity to evaluate the qualifications and suitability of the prospective jurors and to assist the parties in exercising challenges for cause and peremptory challenges." Stephen E. Arthur & Robert S. Hunter, FEDERAL TRIAL HANDBOOK: CRIMINAL § 15:12 (Law. Coop. Pub. eds., 4th Ed., 2023).

44. *See* Anderson, *supra* note 31, at 20.

45. *See id.* at 21–23.

46. *See id.* at 27–30 ("[V]enires were becoming more economically diverse as states relaxed traditional, property-based eligibility requirements for jury service. In contrast, England restricted jurors to those considered more respectable, such as people who held property. . . . English juries 'were certainly not composed of the poor or even men of average wealth after 1730,'. . . .").

47. *Id.* at 27.

48. *See id.* at 27 (quoting Daniel Blinka's description of jurors in pre-Revolutionary Virginia as being drawn from the "lower and middling orders" and "largely illiterate.").

cultural and religious backgrounds. This amplified concerns regarding impartiality, specifically whether a juror showed favoritism based on shared characteristics with the defendant.[49] As a result, lawyers developed jury selection strategies based on demographic stereotypes and perceived community rifts.[50] While the original divisions were primarily related to religion or national heritage, as jurors were almost always white, Christian men,[51] the strategic use of voir dire and peremptory challenges to shape the jury bore considerable relevance in later cases regarding the exclusion of Black Americans from jury service.[52]

II. DISCRIMINATION IN JURY SELECTION

While the American jury selection process allowed considerable control for the litigating parties in shaping the jury, Black people were already excluded through state statutes which limited jury service to white men.[53] Even in states without such explicit limitations, customs and prejudice prevented Black people from serving.[54] In 1880, the Supreme Court ruled outright prohibitions on jury service unconstitutional in *Strauder v. West Virginia*.[55] However, state courts continued their discriminatory selection practices into the twentieth century by creating vague standards for juror eligibility.[56] Similar practices continued in federal courts until 1968 when

49. *See id*. at 27–30.

50. *Id.* at 30.

51. *See infra*, note 53.

52. *See* Swain v. Alabama, 380 U.S. 202, 218–19, (1965) (contextualizing the history of jury selection in American trials while analyzing an Equal Protection Claim related to a prosecutor's discriminatory use of peremptory strikes) ("In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society. The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted.").

53. *See* Hoag, *supra* note 3, at 58–59 (clarifying that the "statutory standards in state courts often defined the standards for the federal courts located in [*sic*] those states," thus preventing Black people from serving on both courts); *see also* Anderson, *supra* note 31, at 44–45 ("In general, statutes, tax requirements, or – more often, by the turn of the century – sheriffs and jury commissioners effectively kept African Americans off venire lists.").

54. Hoag, *supra* note 3, at 58 n.12.

55. 100 U.S. 303, 309–11 (1880) (ruling West Virginia's laws limiting jury service to white men was a violation of the Fourteenth Amendment).

56. *See* Hoag, *supra* note 3, at 62–63; *see also* Frampton, *supra* note 2, at 809 n.125 (providing examples of state requirements that jurors be "honest," "upright," and "intelligent").

Congress passed the Jury Selection and Service Act.[57] The Supreme Court constitutionalized the idea that a jury pool be representative of a fair cross-section of the community seven years later in *Taylor v. Louisiana*,[58] and established the standard for violation of the fair cross-section right four years later in *Duren v. Missouri*.[59]

Although the decisions in each of the previous cases tore away at exclusionary practices, they only went so far as to enlarge the pool of prospective jurors, not necessarily increase the diversity of the jury itself.[60] The Court's opinion in *Taylor v. Louisiana* emphasized that a defendant is "not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community."[61] Despite these decisions, Black and other minority defendants were still left vulnerable to discrimination from the prosecutor's use of peremptory strikes.[62] That was until the Supreme Court's decision in *Batson v.*

57. *See* Frampton, *supra* note 2, at 809 ("But it was not until the Jury Selection and Service Act of 1968, which mandated random selection of prospective jurors from voter lists, that Congress finally abolished the practice in federal courts."); *see also* Hoag, *supra* note 3, at 71 ("Per statutory guidance, most officials rely on voter registration lists as the source for jury pools. . . . However, some appellate courts have indicated a willingness to question officials' reliance on voter registration lists if defendants can prove that such reliance regularly results in underrepresentation of a distinct group. This willingness is particularly prevalent in jurisdictions where voter registration is the exclusive source for jury pools. Notably, the JSSA allows officials to supplement with 'some other source or sources of names in addition to voter lists where necessary' to protect the fair cross-section right and to prevent discrimination in jury summons.").

58. *See* 419 U.S. 522, 526, 528 (1975).

59. *See* 439 U.S. 357, 364 (1979) ("In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.").

60. Additionally, underrepresentation in jury pools remains an issue for courts in the United States, as some policies meant to alleviate the difficulties of jury service inadvertently shape the demographics of a jury pool. *See* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 189 (2012) (referencing examples of counties limiting jury service to people living within a certain geographic radius of the courthouse as a cause of underrepresentation in the jury pool).

61. *Taylor*, 419 U.S. at 538 (citations omitted).

62. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 896–897 (1994). Prior to *Taylor* and *Duren*, the Supreme Court heard *Swain v. Alabama*, whereby a Black defendant argued that a prosecutor's use of peremptory challenges to remove all eligible Black jurors violated his Constitutional right of Equal Protection. *See* 380 U.S. 202, 209–11 (1965). The Supreme Court affirmed the conviction, placing a considerable evidentiary burden on defendants seeking to claim a violation of Equal Protection based on discriminant use of

Kentucky,[63] which ruled such a practice was unconstitutional.[64] The decision in *Batson* gave defendants at least some mechanism for challenging a prosecutor's intentional discrimination when exercising peremptory strikes.[65]

While the decision in *Batson* expanded the scope of Equal Protection, scholars and practitioners question the extent to which it did. One of the principal criticisms is the low burden prosecutors face when explaining their use of peremptory strikes, as almost any justification can be made no matter how far-fetched it may be.[66] Another claimed flaw with *Batson*'s framework is that defendants must prove intentional discrimination.[67] This requires showing that the prosecutor's subjective intent was to discriminate, *not* that the jury selection strategy produced a disparate impact.[68] Accusing a prosecutor of discriminatory bias is a heavy accusation some defense attorneys might not want to risk making.[69] Judges may be similarly apprehensive in finding such a violation occurred as well.[70]

Furthermore, the decision in *Batson* did not alter the Court's existing precedent in *Taylor v. Louisiana*, which limited the fair-cross-section analysis only to the composition of the jury venire.[71] Thus, the remedies for a defendant after proving a successful *Batson* violation are often insufficient or practically nonexistent. This typically includes either returning the struck

peremptory strikes. *See* Roberts, *supra* note 8, at 1366–67.

63. *See generally* 476 U.S. 79 (1986).

64. *Id.* at 89 ("Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that [B]lack jurors as a group will be unable impartially to consider the State's case against a [B]lack defendant.") (internal citations omitted).

65. *See Batson*, 476 U.S. at 96–98 (providing requirements to make a prima facie case of purposeful discrimination and the challenged party's burden to successfully refute).

66. *See* Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 719–20 (2018) (emphasizing a savvy prosecutor could "choose a justification that is not observable on the record . . . thereby making it impossible for trial judges, and later appellate judges, to disprove the justification.").

67. *See id.* at 720.

68. *See id*.

69. *See* Gibbins, *supra* note 12, at 724; *see also* Abel, *supra* note 66, at 720–21.

70. *See* Gibbins, *supra* note 12, at 724; *see also* Abel, *supra* note 66, at 720–21.

71. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975); *see also* Lockhart v. McCree, 476 U.S. 162, 173 (1986) ("We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.").

juror to the box or dismissing the current jurors and draw a new venire.[72] Whether the defendant benefits from either remedy is uncertain, because there is no guarantee the returned juror will vote for the defendant or, in cases where the court draws an entirely new venire, whether the jury pool is better for the defendant.[73]

Ironically, having a *Batson* challenge denied at the trial level may be more advantageous for the defendant. This is because a successful appeal of the denied *Batson* claim results in a reversal of the conviction, giving the defendant a second-chance at trial.[74] However, with either scenario, the same prosecutor found guilty of committing the *Batson* violation will almost certainly try the next case.[75] Defendants are somewhat protected against an overzealous prosecutor, as a historic pattern or record can be used to bolster a *Batson* challenge.[76] However, any protections are ultimately undermined since prosecutors themselves are rarely punished for their misconduct.[77] As a result, defendants are at the mercy of a prosecutor's decision-making, with few alternatives even in instances where discriminatory intent has been repeatedly established.

Nevertheless, examples of prosecutors using peremptory strikes in a discriminatory manner cannot fully explain minority underrepresentation on juries. New scholarship indicates that an equally, perhaps more pressing, problem is the role that challenges for cause have in disproportionately reducing Black jurors' participation.[78] Unlike peremptory strikes, which are limited to the specific number that a court grants to each party, either side can make as many challenges for cause as they wish.[79] While peremptory

72. *See* Abel, *supra* note 66, at 734.

73. *Id.*

74. *Id.* at 734–35.

75. *See, e.g.*, Flowers v. Mississippi, 588 U.S. 284, 305 (2019) ("Here, our review of the history of the prosecutor's peremptory strikes in Flowers' first four trial strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent."); *see also* Currie v. McDowell, 825 F.3d 603, 610–11 (9th Cir. 2016) ("In this instance, it is not only the same office, but the same prosecutor, who brings a history of *Batson* violations with him.").

76. *See, e.g.*, *Flowers*, 588 U.S. at 305; Miller-El v. Dretke, 545 U.S. 231, 244–45 (2005) (utilizing evidence of disparate questioning during voir dire as proof of improper motive).

77. *See* Angela J. Davis, *The American Prosecutor Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 37 (2008) (discussing the lack of sanctions or public reprimands levied on prosecutors, even with gross prosecutorial misconduct).

78. *See* Frampton, *supra* note 2, at 788–89.

79. *Id.* at 788 ("peremptory strikes are limited in number by statute; a party may raise challenges for cause against every single potential juror, should they wish.").

strikes can be used expansively, subject to the anti-discrimination limits previously mentioned, a challenge for cause requires demonstrating a "legally cognizable basis of partiality."[80]

This creates the separate question of what responses or qualities a potential juror may present that indicate a risk of impartiality warranting dismissal. The Supreme Court and jury doctrine offer only vague guidance that a juror should not be biased toward either party.[81] Even the process by which a challenge for cause is initiated can depend on the common practice of the judge or jurisdiction.[82] Thus, judges are left to their own intuition in deciding a juror's impartiality, and by extension, whether to dismiss for cause.[83] Just as a prosecutor's implicit or explicit biases shape their use of peremptory strikes, a judge's biases may influence their ruling on a challenge for cause.[84] This overlap between peremptory strikes and challenges for cause in shaping disproportionate representation on juries is easily seen in the Supreme Court's three most recent cases involving *Batson* violations.[85] In each case, challenges for cause eliminated the majority of the prospective Black jurors which—combined with the flexibility of peremptory strikes—allowed for the empaneling of a predominantly or all-white jury.[86]

In explaining the possible reasons why prosecutors and judges seek or

80. Swain v. Alabama, 380 U.S. 202, 220 (1965).

81. *See, e.g.*, Dov Fox, *Neuro-Voir Dire and the Architecture of Bias*, 65 HASTINGS L.J. 999, 1002 (2014) ("Jury doctrine says little, however, about what such impartiality requires beyond that jurors be 'free from any bias.'") (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887); *see also Scott* W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1176 (1995) ("The Court's opinions leave the concept of . . . impartiality murky."); *see also* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. U.L. REV. 329, 396 n.308 (1995) ("[C]ourts have been less than clear as to what is meant by the construct of impartiality.").

82. *See* Frampton, *supra* note 2, at 796 (referencing how, in Mississippi, trial judges often initiated challenges for cause and invited input from the parties, as opposed to Louisiana where the parties initiated most of the challenges for cause).

83. *See* 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, 156 (2010) (summarizing studies which found that hundreds of trial judges across the nation "rely heavily on intuitive faculties when deciding traditional problems from the bench.").

84. *See* Frampton, *supra* note 2, at 832 (emphasizing the two primary approaches to identifying impartiality lack effectiveness; "[S]elf-reporting appears to be (at best) meaningless, and rulings on challenges for cause may be skewed by judges' class, race, sex, and status biases.").

85. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228 (2019); Foster v. Chatman, 578 U.S. 488 (2016); Snyder v. Louisiana, 552 U.S. 472 (2008).

86. *See* Frampton, *supra* note 2, at 791.

approve challenges for cause unevenly among white and Black jurors, Thomas Frampton provides three theories.[87] First, that prosecutors and judges are acting in a race-neutral manner, but certain disqualifying beliefs are more prevalent among Black potential jurors.[88] Second, that prosecutors are acting with "mixed motives" because they associate Black jurors with being more likely to acquit the defendant and therefore seek to elicit disqualifying responses from Black jurors while ignoring white prospective jurors.[89] Third, the theory that judges are the main culprit: as they are much more receptive to challenges made by prosecutors against Black jurors, while being dismissive towards challenges for cause raised by defendants and/or against white jurors.[90]

Regardless of theory, the unavoidable fact is the Constitution provides no provision that reigns in the discriminatory application of challenges for cause. Neither the Sixth Amendment's fair cross section standard nor the Fourteenth Amendment's Equal Protection or Due Process Clauses provide adequate protection.[91] Even if a defendant successfully argues on appeal that a prospective juror was erroneously dismissed, the conviction will not be overturned unless the defendant can adequately challenge the impartiality of the replacement juror or jurors who convicted the defendant.[92] Like the high burden in proving a *Batson* violation, the standards for challenging an erroneous dismissal for cause are practically unfeasible for defendants, leaving them vulnerable to the implicit and explicit biases of both prosecutors and judges.

Ultimately, the impact of peremptory strikes and challenges for cause

87. *Id.* at 806–07.

88. *Id.*; *see also* Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 570 (2014) (analyzing the requirement jurors meet the death qualification for capital cases and its role in shaping the racial composition of the jury).

89. Frampton, *supra* note 2, at 806–07.

90. *Id.*

91. *See id.* at 808, 812–15.

92. *See id.* at 817; *see also* Ross v. Oklahoma, 487 U.S. 81, 86 (1988). The *Ross* decision places an additional hurdle on defendants in instances where a court erroneously denies a challenge for cause against a replacement juror. If a defendant were to subsequently use a peremptory strike on the biased replacement juror, the defendant waives the right to complain about an improperly denied challenge for cause on appeal.; *see also* United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) (clarifying that a defendant is not required to use peremptory strikes to cure a judge's error, but when a party cures such an error by using a peremptory strike, then there is no deprivation of any rule-based or constitutional right).

combine to create a jury that is much more uniform: whether it be in race, attitudes towards the law and law enforcement, or other characteristics. Instead of serving as a public safeguard against an obsessive prosecutor or an unfair judge, juries lacking minority representation may hold similar biased beliefs and could reinforce—not check—the state's power.[93] Furthermore, the jury's factfinding role suffers because a lack of diverse perspectives undermines the accuracy of factual determinations.[94] These results create negative consequences that implicate more than the validity of a specific trial result, but also undermine public faith in the validity of criminal trials and the entire legal system.[95] Even beyond this practical reason, the unfairness generated by the current structure of peremptory strikes and challenges for cause raises ethical consequences. Consider the case of Curtis Flowers, a man tried six times over the course of almost twenty years for a quadruple murder in the small town of Winona, Mississippi.[96] Each conviction was ultimately overturned on appeal due to the prosecutor's discriminatory use of peremptory strikes.[97] Absent any significant change, the risk remains that what happened to Curtis Flowers could happen again.

III. ALTERNATIVES

A. The Major Hurdles

In discussing the structure of a juror preference system for jury

93. *See* Frampton, *supra* note 2, at 824 ("But the distorting effects of challenges for cause extend to noncapital cases as well, wherever prospective jurors may harbor conscientious scruples against particular enforcement practices or the criminalization of certain conduct. . . . "); *see also* Levinson et. al., *supra* note 88, at 568 ("Our findings that the death qualification process results in jurors who are more racially biased, both implicitly and explicitly, suggest that jury selection is a location where racial bias operates.").

94. *See* Frampton, *supra* note 2, at 832 (". . . the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.").

95. *See id.* at 833 ("Allowing bias to infect the jury selection process 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law'; it 'create(s) the impression that the judicial system has acquiesced in suppressing full participation by one (group)' and that the 'deck has been stacked in favor of one side.'").

96. Flowers v. Mississippi, 588 U.S. 284, 287–88.

97. Frampton, *supra* note 2, at 799 n.48. Specifically, Flowers first three trials were overturned by the Mississippi Supreme Court. The fourth and fifth resulted in hung juries. The sixth trial was overturned by the Supreme Court in 2019.

selection, this note keeps two important observations in mind. First, the concept of impartiality as it is currently applied by courts may be an antiquated approach to jury selection, at least given its status as the primary factor in assessing a juror. Its origins date back to early common law trials where the scope of who qualified as a juror was narrower than it is today.[98] Data demonstrates that all jurors carry implicit biases shaped from their different lived experiences, and these biases can influence the outcome of a final verdict.[99] Even part of the logic behind peremptory strikes is that they allow the parties some flexibility for dismissing jurors based on suspicions of bias should a judge reject a dismissal for cause.[100] Asking judges to determine the acceptable range of bias required to remain impartial is an impossible task that, as this paper has indicated, already results in unfair outcomes.

Second, the structure of challenges for cause and peremptory strikes creates one driving incentive for both prosecutors and defendants: dismiss as many "unfavorable" jurors as possible. Both parties are only given limited information about each prospective juror, and while voir dire gives the opportunity for each party to learn more through questioning, the answers provided by a juror may be insufficient to overcome suspicions of bias.[101] Given the adversarial nature of trial, both parties may act on suspicions rooted in racial or other demographic stereotypes to place themselves in the best position at trial.[102]

98. *See* Hoag, *supra* note 3, at 58–59 (providing examples of jury service restrictions in early America).

99. *See* Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 531 (1978) ("All jurors' experiences have shaped their values and attitudes, and these, in turn, are likely to shape jurors' perceptions of the trial evidence and hence their votes. In this sense, 'prejudice' is not only ineradicable but often indistinguishable from the very values and attitudes of the community that we expect the jurors to bring to trial."); *see also* Frampton, *supra* note 2, at 831–32 (discussing flaws of approaches based on self-reporting to determine juror impartiality).

100. *See* Anderson, *supra* note 31, at 21–23.

101. *See* Anna Offit, *The Character of Jury Exclusion*, 106 MINN. L. REV. 2173, 2210–12 (2022) (discussing how attorneys lean on particular characteristics of jurors in assessing their responses to voir dire questions).

102. *See, e.g.*, Smith, *infra* note 116, at 530–31 (speaking from experience as a criminal defense attorney: "It is not that I believe that racial or demographic stereotypes are an accurate proxy for the attitudes and life experiences of all prospective jurors. I do not. It is that, absent a meaningful exploration of the latter, I am stuck with the former, and it would be foolhardy or worse not to at least consider the generalizations on which the stereotypes are based.").

B. Analyzing Possible Solutions

As previously mentioned, much of the scholarship on reforming jury selection centers on altering the use of peremptory strikes, either in expanding *Batson*'s protections or eliminating peremptory strikes altogether.[103] The efficacy and viability of these solutions is questionable considering how challenges for cause implicate the same concerns regarding racial disparities in jury selection.[104] It might be theoretically possible to ease the requirements for proving a *Batson* violation by, for example, requiring the prosecutor to provide more than just any race-neutral justification for exercising a peremptory strike. Conversely though, the decision to grant a challenge for cause is left to the judge's discretion.[105] Therefore, even if states limited judges to only allowing dismissals for cause, the success of such an approach depends on states both investing in initiatives to address judges' biases, and that those efforts actually create tangible, positive results.[106]

Another possibility would be to eliminate the prosecutor's use of peremptory strikes, but still allow the defendant to use them as a means of leveling the playing field.[107] This proposal may have merit since it would

103. *See generally* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R. – C.L. L. REV. 357 (2017); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R. – C.L. L. REV. 227 (1986); Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of* Batson, 45 U.C. DAVIS L. REV. 1359 (2012); C.J. Williams, *Striking Some Strikes: A Proposal for Reducing the Number of Peremptory Strikes*, 68 DRAKE L. REV. 789 (2020); Darby Gibbins, *Six Trials & Twenty-Three Years Later: Curtis Flowers and the Need for A More Expansive* Batson *Remedy*, 59 HOUS. L. REV. 713, 724 (2022) (discussing the extent prosecutorial misconduct evades *Batson* violation enforcement).

104. *Cf.* Frampton, *supra* note 2, at 788. This is not to say that eliminating peremptory strikes does nothing to increase the diversity of criminal trial juries. Rather, racial disparities will continue to persist due to challenges for cause. Furthermore, judges may be more willing to grant challenges for cause if peremptory strikes are unavailable to each party as an option to dismiss suspected biased jurors.

105. One study does suggest that judges, when made aware of a need to monitor their responses for the influence of implicit racial biases and are motivated to suppress that bias, are able to do so. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009). However, whether judges are able to accomplish this while working is unknown. The authors of the study question if such reflection is possible when faced with the pressures or distractions of court. *See id.* at 1225.

106. *See id.* at 1226–31 (proposing steps state criminal justice systems can take to reduce chances of biased decisions from judges in court including: exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom practices to minimize impact of unconscious bias).

107. *See* Anna Roberts, *Asymmetry As Fairness: Reversing A Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1538–44 (2015) (explaining how "asymmetry is a central component" of the justice system

minimize the advantage prosecutors have in successfully challenging jurors for cause and significantly curtail future instances of *Batson* violations.[108] However, such a solution is unlikely to succeed given the potential opposition from prosecutors,[109] and judicial apprehension in embracing an approach that places the two sides on possibly unequal footing.[110]

Even more unlikely is any proposal that eliminates both challenges for cause and peremptory strikes, thus taking away prosecutors' and defendants' ability to shape the jury. First, there are numerous instances in which dismissals for cause are necessary to protect a defendant's constitutional rights. For example, a juror should not be allowed to sit on a trial jury if they would react negatively towards the defendant for invoking the Fifth Amendment and refusing to testify.[111] Additionally, hardline views towards either side—such as presuming a defendant to be guilty or outright refusing to convict regardless of the evidence presented—would implicate the constitutional right to an impartial jury.[112]

Second, the idea is likely unpopular with both prosecutors and defendants. For prosecutors: not only would this proposal undercut their existing power over jury selection, especially since they see greater success in challenges for cause compared to defendants,[113] but it would also make reaching a guilty verdict much harder. If convictions must be unanimous, the presence of one holdout juror that would otherwise be screened out through a challenge for cause or peremptory strike could lead to a significant waste of prosecutorial time and resources.[114] Yet even if this approach to

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and, while compelling reasons exist for granting peremptory strikes to defendants, abolishing them for prosecutors holds theoretical and practical appeal).

108. *See id.* at 1541–44. Future *Batson* violations may occur in instances where a criminal defendant makes race-based peremptory challenges, otherwise known as a "reverse *Batson* challenge."; *see* Georgia v. McCollum, 505 U.S. 42, 59 (1992).

109. *See* Roberts, *supra* note 107, at 1538–44 (conceding that outright abolition of peremptory strikes would be unlikely to succeed, but measures to reduce the number of a prosecutor's peremptory strikes relative to the defendants would still be worthwhile).

110. *Cf.* Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1987) (rejecting idea that peremptory strikes should only be available for defendant as the criminal justice system requires that "the scales are to be evenly held" between the defendant and the prosecution).

111. *See* Frampton, *supra* note 2, at 824 (providing other instances in which defendant's challenges for cause serve as a check on government power).

112. *See* U.S. CONST. amend. VI.

113. *See*, e.g., Abel *supra* note 66, at 719–20.

114. However, when instances of holdout jurors arise, many trial courts often intervene during deliberations by questioning the holdout juror or jurors and may dismiss them even for trivial reasons.

jury selection places defendants in a relatively better position, it is reasonable to assume that they too would be apprehensive about it.

Like prosecutors, criminal defense lawyers appreciate the flexibility peremptory strikes provide in shaping the final jury.[115] Defendants also recognize that, through utilizing challenges for cause and peremptory strikes to shape the point-of-view of the trial jury, they are given at least some influence over the final verdict.[116] Asking defendants to abandon this control over the jury selection process may be perceived as too much of a risk when compared to what is at stake in the final verdict.[117]

C. Modest Proposals for Change

The possibility of overhauling the selection process to combat underrepresentation on final juries is, in all certainty, unfeasible. Motivated by the adversarial nature of trial and the objective of either fulfilling the interests of the state or protecting the freedom of their client, prosecutors and defense lawyers regularly act on biases (even if illegitimate or discriminatory) to ensure a successful verdict. Hoping for self-control or restraint is naïve, and without any change to the *Batson* doctrine or a reevaluation of the dismissal for cause standards by the Supreme Court, prosecutors and defense lawyers will continue to exercise whatever means to prevent "unfavorable" prospective jurors from serving.

If there is an avenue for change, the best hope is for judges to be cognizant of the way biases shape the jury selection process and take steps to minimize its impact. Judges can take steps to inform themselves of their implicit biases and the way it may influence their perception of impartiality. Data indicates that judges are capable of self-reflecting in this manner, thus

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See Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 585–91 (2007) (providing numerous instances of courts questioning holdout jurors almost to the point of outright coercion).

115. *See* Laurel Johnson, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide*, 5 U. DENV. CRIM. L. REV. 199, 211–12 (2015).

116. *See* Abbe Smith, "*Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 567 (1998) ("Criminal lawyers should seek same-race or same-sex jurors in certain cases not because they want jurors who are 'partial' to the defendant, but because they want jurors who are impartial. If a critical mass of jurors are the same race or same sex as the defendant, at least as to those jurors, unconscious racism or sexism does not play a significant role in deliberations.").

117. *See id.* at 542 (defending use of peremptory strikes by a defendant, even if discriminately, since defendant has an overwhelming interest in protecting their freedom).

being more consistent in assessing biases across a diverse set of jurors. [118] Critically analyzing a party's challenges for cause is especially important the more it appears that they are targeting a specific group of prospective jurors based on a shared characteristic, like race.

Another approach would be to focus on ensuring that the total number of dismissals from each side remains equal. State legislatures and Congress could alter the number of peremptory strikes allotted to each party based on the number of successful challenges for cause from the other.[119] Under this proposal, each side would start with a minimum number of peremptory strikes. If the other party is successful in arguing a challenge for cause, an additional peremptory strike is given to the other.

Some individuals, such as Justice Marshall in his *Batson* concurrence, express concern about the unequal allotment of peremptory strikes in a criminal trial.[120] While this may be true on the surface, the overarching goal is to maintain balance. A party that can skillfully advocate dismissing jurors for cause exerts more influence over jury selection. By risking the other side gaining an additional peremptory strike, parties may be disincentivized from initiating a challenge for cause. This could deter overzealous prosecutors or defense lawyers. Even more important, it would keep the number of jurors dismissed by either party equal, balancing the power for both sides in shaping the jury. There is no guarantee that this tactic will create any tangible impact on the diversity of trial juries, but it may be the most practical given the realities of the American criminal justice system.

CONCLUSION

Questions surrounding the qualification of trial jurors date back to English common law. Imported into America: the right to serve on a trial jury, like many other rights, was initially restricted to white, land-owning men.[121] Over time, legislatures removed these barriers by enacting laws which directly expanded the jury pool[122]. However, suspicions based on a certain individual's characteristics or general biases against a group

118. *See* Rachlinski et al., *supra* note 105, at 1221.
119. *See, e.g.*, Williams, *supra* note 28, at 502–09 (discussing role Congress and state legislatures have in setting the number of peremptory strikes for trials).
120. *See* Batson v. Kentucky, 476 U.S. 79, 107 (1986).
121. *See* Hoag, *supra* note 3, at 58–59.
122. *See* Frampton, *supra* note 2, at 809.

continue to shape the perception of who is "fit" to be a juror.

Nowhere is this issue more present than in the racial disparity of many criminal trial juries throughout the country. The Supreme Court, as far back as 1880, ruled unconstitutional the intentional exclusion of certain persons from jury service based on race.[123] When states continued to restrict Black individuals from serving on juries, the Supreme Court again stepped in by solidifying a defendant's right for the jury pool to be representative of a fair cross-section of the community.[124] Yet the fair cross section requirement only applied to the jury pool, not the final jury itself.[125] Thus, many defendants, especially those who are non-white, are often tried by juries that are disproportionately or exclusively white. While the Supreme Court's decision in *Batson v. Kentucky*[126] prevents a prosecutor from using peremptory strikes based on race, the enforcement mechanism to prevent such abuses provides little protection for defendants. Furthermore, no doctrine exists to check the abuse of challenges for cause, which play an arguably greater role in shaping the unequal racial representation of final juries.

Given the adversarial nature of trial, this bleak reality is somewhat expected. Prosecutors and defense lawyers want to place themselves in the best position for a favorable verdict, and that means seeking to dismiss supposedly unfavorable jurors. Determining who is favorable often relies on implicit biases or assumptions that, in many cases, produce a tangible difference by eliminating diverse perspectives which may impact the outcome of the case.[127]

Overhauling or significantly adjusting the current system of jury selection to combat these issues seems unlikely, and unless the Supreme Court expands *Batson* or utilizes another constitutional doctrine to promote diversity on juries, little may change. The best hope is for judges to recognize the way their position may influence or alter the balance of power at trial. Since neither side is limited in their challenges for cause and motions can be brought against any prospective juror, judges face the constant risk of possibly tipping the scales of justice towards one side. Indeed, evidence

123. Strauder v. West Virginia, 100 U.S. 303, 309–11 (1879).
124. Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Duren v. Missouri, 439 U.S. 357, 364 (1979).
125. *Taylor*, 419 U.S. at 538.
126. *Batson*, 476 U.S. at 86.
127. *See* Frampton, *supra* note 2, at 832.

demonstrates that prosecutors regularly benefit from the use of challenges for cause often to the detriment of defendants who fail to achieve a similar level of success.[128]

Judges should not only question whether the basis for suspected bias is valid, but also question the motivations of the party bringing the challenge for cause. Additionally, judges should be aware of the way in which their actions may undermine the diversity of the jury pool and adjust their standards for impartiality if they suspect that a party may be looking to challenge jurors based on a common characteristic, such as race. This proposal may be hollow without any enforcement mechanism or clear standard, but judges are capable of critically analyzing their decisions to limit the influence of bias.[129] State legislatures could also take initiative by adjusting the number of peremptory strikes. While eliminating or substantially reducing peremptory strikes may lack viability, creating a variable number based on the number of successful challenges for cause could avoid the usual apprehension from practitioners.

Selecting a jury is not an easy task, and judges may reasonably fail to consider structural problems when determining whether a specific juror should be dismissed for cause. However, given the lack of viability for larger reforms to the jury selection process, judges must recognize their unique role in ensuring fairness at trial. Even if attitudes toward peremptory strikes change, and only challenges for cause are allowed, judges will continue to hold power over the composition of the final jury. Unless they can recognize their implicit biases, the problem of disproportionate racial composition of juries, which has long impacted the American criminal justice system, will remain.

128. *See id*. at 792–98.
129. *See* Rachlinski et. al., *supra* note 105, at 1221.