

# Race-Conscious Jury Selection

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*Among the central issues in scholarship on the American jury is the effect of Batson v. Kentucky (1986) on discriminatory empanelment. Empirical legal research has confirmed that despite the promise of the Batson doctrine, both peremptory strikes and challenges for cause remain tools of racial exclusion. But these studies, based on post facto interviews, transcript analysis, and quantitative methods offer little insight into Batson's critical impact on real-time decision-making and strategy in voir dire. If we increasingly know what kinds of juries are produced in the post-Batson world, we know very little about how they are produced.*

*This Article addresses this problem with data derived from a five-year field study of Assistant U.S. Attorneys. Through interviews and participant observation during jury selection proceedings, it provides an unprecedented empirical perspective on how Batson has made race central to the ways prosecutors perceive, pick, and strike jurors. Rather than diminishing race's influence on voir dire, Batson has made it an essential consideration for prosecutors concerned with their in-court performance and professional reputations.*

*This race-conscious approach to jury selection has arisen in part due to a clear doctrinal shift in courts' analyses of juror questioning and striking. This shift has expanded the scope of judicial inquiry during the adjudication of Batson challenges from scrutiny of individual "neutral" rationales for juror dismissals to a more robust comparative juror analysis. My empirical findings indicate that there is a meaningful connection between this latter approach and the incorporation of antidiscrimination norms into prosecutorial approaches to voir dire. Having identified and described this link, it becomes possible to*

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*perform a deeper audit of the Batson framework, and suggest, as this Article does, that with reform and expansion to address well-documented limitations, it may serve to narrow the gap between juries as they are and juries as the Constitution would have them be.*

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#### I. INTRODUCTION

In the U.S. criminal justice system, laypeople are the first to be judged.<sup>1</sup> These are the citizens summoned for jury service and subject to a preliminary period of questioning referred to as voir dire.<sup>2</sup> After learning about these people’s professional and personal backgrounds, judges and lawyers can dismiss them from the jury pool through challenges “for cause” or peremptory strikes.<sup>3</sup> Examining both kinds of challenges, empirical legal scholars have

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<sup>1</sup> See GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT’L CTRS. FOR STATE COURTS & STATE JUSTICE INST., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 13 (Apr. 2007).

<sup>2</sup> *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986) (“Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, counsel also may seek to learn which members of the pool served on juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice. Of course, counsel’s effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.”) (citation omitted).

<sup>3</sup> 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, 1411–12 (2018).

documented significant opportunities for abuse, as lawyers may exercise their discretion to prejudicially empanel non-representative juries.<sup>4</sup>

Trial attorneys and judges eager to identify and remedy the exclusionary use of peremptory challenges, in particular, have relied on the approach articulated by *Batson v. Kentucky*, 476 U.S. 79 (1986), which prohibits the dismissal of jurors based on membership in a protected class.<sup>5</sup> This antidiscrimination framework strives toward “race-neutral” jury selection<sup>6</sup> by addressing racial animus, characterized by the use of peremptory strikes to disproportionately empanel White jurors.<sup>7</sup> In an innovative move, *Batson* permitted judges to scrutinize prosecutors’ rationales for striking jurors in the context of a single trial.<sup>8</sup> It also furnished lawyers with a new tool—the *Batson* challenge—that could be directed toward an adversary who used strikes to exclude jurors based on race.<sup>9</sup>

Critics of the *Batson* framework rightly highlight its limited capacity to identify and deter prosecutors who are “of a mind to discriminate . . . .”<sup>10</sup> When asked to account for a peremptory strike decision after a *Batson* challenge, a prosecutor could very well choose to conceal prejudicial motives by offering pretextual or post-hoc rationales for her decision.<sup>11</sup> Without the means to

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<sup>4</sup> See, e.g., *id.* at 1411.

<sup>5</sup> See *infra* Part II.

<sup>6</sup> See *Batson*, 476 U.S. at 96–97 (noting that while the State must respond to a challenge of impermissible discrimination with a “neutral explanation for challenging black jurors” this rationale does not have to rise to the level of justifying a cause challenge).

<sup>7</sup> See Barbara O’Brien, Catherine M. Grosso & Abijah P. Taylor, *Examining Jurors: Applying Conversation Analysis to Voir Dire in Capital Cases, a First Look*, 107 J. CRIM. L. & CRIMINOLOGY 687, 689–91 (2017) (noting that “[t]he *Batson* regime suffers from a major design flaw as it was intended to counter intentional discrimination”).

<sup>8</sup> *Batson*, 476 U.S. at 96.

<sup>9</sup> *Batson* articulated a three-step test for adjudicating suspected race-based exclusion. First, following defense counsel’s *Batson* challenge, a trial court judge would determine whether a prima facie case of discrimination had been made, by proving the juror belonged to a protected class and determining whether all “relevant circumstances” of the strike raised an inference of impermissible discrimination. *Id.* at 96–97. Subject to this finding, the burden would shift to the State to provide a “neutral explanation” for challenging Black prospective jurors. *Id.* at 97. The trial court ended the inquiry by determining whether the defendant had established purposeful discrimination, thus supporting a *Batson* violation. *Id.* at 98.

<sup>10</sup> See Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 72 (2009); *infra* Part IV.A.

<sup>11</sup> Prosecutors’ practice of referencing a lengthy list of rationales for a peremptory challenge has been referred to as taking a “laundry list” approach, which some courts explicitly treat with disfavor. See, e.g., *People v. Smith*, 417 P.3d 662, 681 (Cal. 2018), *cert. denied*, 139 S. Ct. 2774 (2019) (noting that this technique “carries a significant danger: that the trial court will take a short-cut in its determination of the prosecutor’s credibility, picking one plausible item from the list and summarily accepting it without considering whether the prosecutor’s explanation as a whole, including offered reasons that are implausible or unsupported by the prospective juror’s questionnaire and voir dire, indicates a pretextual justification”) (citing *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016)).

definitively test the veracity of their strike rationales, *Batson*'s "race neutral" aspiration, by these accounts, is impracticable.<sup>12</sup>

In the decades since *Batson*, courts have continued to formally eschew the explicit reference to race in evaluations of prospective jurors.<sup>13</sup> Notwithstanding the opinion's rhetoric of neutrality, the adjudication of *Batson* violations relies heavily on documentation of prospective jurors' racial (or gender) identities, which are used to determine whether lawyers' questioning styles and strike decisions are prejudicial.<sup>14</sup> This documentation is perceived to be particularly useful when judges are confronted with prospective jurors of different races and genders who nevertheless express similar views. Here, judges can use this record to determine whether lawyers have subjected all such jurors to the same kind of scrutiny and questioning.<sup>15</sup> If, *ceteris paribus*, race appears to correlate with the disproportionate exclusion or empanelment of certain groups, lawyers risk the confirmation of a violation, opening a pathway for appeal.<sup>16</sup>

There is nonetheless empirical evidence suggesting that despite its limitations, *Batson* is in fact changing lawyers' jury selection strategies.<sup>17</sup> A qualitative case study from the Midwest, for example, revealed that while most attorneys rely on race, gender, and class stereotypes during jury selection, *Batson* has led to increased awareness of the importance of seeking an inclusive jury.<sup>18</sup> In this context, as in the case study examined in the current Article, reforming voir dire to achieve race-neutral jury selection has kept race at the forefront of lawyers' thinking.<sup>19</sup> What remains to be seen is whether a more conscientious approach to peremptory challenges can serve as a corrective to the significant racial disparities produced through the exercise of cause challenges, which reinforce inequality legally, and in plain sight.<sup>20</sup>

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<sup>12</sup> See, e.g., 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); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160–61 (2005).

<sup>13</sup> This includes contexts in which a defendant's exercise of a peremptory challenge was aimed at enhancing the representativeness of her jury. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) ("Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination."). Justice O'Connor also argued that peremptory challenges (based on gender, rather than race) be exercised against the government only. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring).

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part II. B.

<sup>16</sup> *Infra* Part II. B.

<sup>17</sup> See Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 363 (2005).

<sup>18</sup> See *id.* at 369–70.

<sup>19</sup> See *id.* at 389.

<sup>20</sup> See, e.g., Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 790–91 (2020) (arguing that most racial exclusion in the jury selection process occurred through the exercise of cause challenges).

The limited data on *Batson*'s impact on prosecutorial decision-making and strategy in part reflects methodology. Empirical research on *Batson* has typically used qualitative interviews,<sup>21</sup> transcript analysis,<sup>22</sup> and quantitative analyses of federal and state court documents<sup>23</sup> to describe prosecutors' strike patterns and the demographics of empaneled juries. These have contributed invaluable insight into the kinds of juries that are common post-*Batson*. But lacking data on in-court behavior and discourse, the burgeoning scholarship in this area has largely overlooked the effects of *Batson*'s antidiscrimination doctrine on "the quotidian reality of voir dire practice."<sup>24</sup> Most critically, while we know that *Batson* affects prosecutors' decision-making,<sup>25</sup> we have little data on how prosecutors integrate antidiscrimination norms into their jury selection strategies in real time.<sup>26</sup> This is a significant object of legal study; understanding how the *Batson* framework works—or does not work—with respect to race opens the door to not only improving the doctrine but extending it to address other forms of discrimination.

That is the focus of this Article, which draws on an original, five-year field study to examine *Batson*'s impact on prosecutorial decision-making. The study consisted of participant observation in twenty-six jury selection proceedings and semi-structured interviews with 133 Assistant U.S. Attorneys.<sup>27</sup> A central finding that emerges from this data is that prosecutors' selection criteria, questioning, and dismissal of jurors reflect acute self-consciousness.<sup>28</sup> This is a self-consciousness that stems from concern about the possibility that their peremptory strike decisions will raise inferences of purposeful racial discrimination that they will be unprepared to rebut or dispel.<sup>29</sup> Prosecutors' concern not to be perceived as biased motivated many of them to exercise

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<sup>21</sup> See Zalman & Tsoudis, *supra* note 17, at 363.

<sup>22</sup> See O'Brien et al., *supra* note 7, at 691–92.

<sup>23</sup> See, e.g., Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 448–49 (1996); Wright et al., *supra* note 3, at 1407.

<sup>24</sup> Zalman & Tsoudis, *supra* note 17, at 369.

<sup>25</sup> See *id.*

<sup>26</sup> See, e.g., Shaun L. Gabbidon, Leslie K. Kowal, Kareem L. Jordan, Jennifer L. Roberts & Nancy Vincenzi, *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59, 67 (2008).

Future research should include first-hand observations of the jury selection process. Such observations can further inform the dynamics of jury selection. Future research might also include interviews of judges and attorneys regarding their sense of the use and/or abuse of peremptory challenges. Insider perspectives such as these are likely to also yield important insights.

*Id.*

<sup>27</sup> Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071, 1084 (2019).

<sup>28</sup> See *infra* Part III.B.

<sup>29</sup> See *infra* Part III.B.

peremptory challenges with an eye toward maintaining others' perceptions of their integrity.<sup>30</sup>

Part II offers critical context that shows how the Supreme Court's emphasis on effectuating "race-neutral" jury selection inevitably necessitated the heightening of race-consciousness to enable meaningful scrutiny of lawyers' voir dire practices. Parts II.A. and II.B. examine the two most common modes of assessing prosecutors' motivations for striking jurors on appeal: comparative voir dire analysis and comparative strike analysis. The former considers whether a lawyer engages in the substantive and uniform questioning of all prospective jurors in the course of jury selection proceedings.<sup>31</sup> Comparative strike analysis revisits prosecutors' contemporaneous or post-hoc rationales for peremptorily striking jurors to determine whether their reasoning is disparately invoked or functions as pretexts for illegal discrimination.<sup>32</sup> This section shows that given the law and practice of *Batson*, lawyers seeking to prepare for or rebut potential challenges are functionally compelled to consider and document a juror's race and gender, among other attributes. It argues that the now common approach to assessing lawyers' motivations through comparative evaluations of questioning patterns and strike decisions has, as a practical matter, required the doctrine to dispense with the rhetoric of "neutrality" characteristic of early formulations of the *Batson* framework.

Part III offers an original empirical examination of *Batson*'s impact on prosecutors' attitudes toward the jury selection process and assessments of prospective jurors. Part III.B.1 demonstrates the salience of race in prosecutors' preparation for and strategy during voir dire. III.B.2 provides evidence of the antidiscrimination law's deterrent impact on prosecutors concerned with the reputational harm and social stigma associated with an adjudicated *Batson* violation. Further, it describes the mechanisms that account for *Batson*'s continuing limitations.

Part IV considers current reform efforts. Drawing on the empirical and doctrinal discussions of the previous sections, Part IV.A. reviews dominant critiques of the *Batson* doctrine that focus on its underuse, underenforcement, and inadequate remedies in overt cases of racial exclusion on the part of prosecutors. Part IV.B. then proposes directions for future reform of the jury selection process. The Article concludes that studies of prosecutorial decision-making during voir dire are key to meaningfully assessing both the limitations and potential of antidiscrimination laws seeking to alter the discretionary decisions of legal actors.

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<sup>30</sup> See *infra* Part III.B.1.

<sup>31</sup> See *infra* Part II.B.

<sup>32</sup> See *infra* note 55 and accompanying text.

## II. THE LAW OF RACE-CONSCIOUS JURY SELECTION

In principle, an American citizen has the right to serve on a jury regardless of race, national origin, or gender.<sup>33</sup> In practice, demographic characteristics have, for decades, been used by lawyers to shape juries to their advantage.<sup>34</sup> Most legal scholars and commentators agree that this violates the normative aspiration and constitutional protections afforded to the laypeople who participate in the legal system as an entailment of citizenship.<sup>35</sup> In that vein, Justice Powell, writing for the majority in *Batson*, declared that “public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”<sup>36</sup> More recently, Justice Kavanaugh wrote for the majority in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), that apart from voting, “serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.”<sup>37</sup> In the wake of “decades of all-white juries convicting black defendants,” he stated, the unbiased assessment of prospective jurors is key to assuring the “confidence of the community and the fairness of the criminal justice system . . . .”<sup>38</sup>

Efforts to empanel inclusive juries, however, face several practical hurdles. First, there is the problem of ensuring that the individuals summoned to court for jury service—and those who respond to their summonses—reflect the demographic diversity of their communities.<sup>39</sup> Underinclusive jury lists, such as

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<sup>33</sup> See PRINCIPLES FOR JURIES & JURY TRIALS princ. 2.B (AM. BAR. ASS’N 2016) (“Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, gender expression, or any other factor that discriminates against a cognizable group in the jurisdiction . . . .”).

<sup>34</sup> See, e.g., Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1627 (2018).

<sup>35</sup> See generally JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (Harvard Univ. Press 2000) (1994).

<sup>36</sup> *Batson v. Kentucky*, 476 U.S. 79, 98–99 (1986) (noting that despite the “important position” of peremptory challenges, they can be “used to discriminate against black jurors”).

<sup>37</sup> *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991)).

<sup>38</sup> Transcript of Oral Argument on Behalf of the Respondent at 54, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (No. 17-9572).

<sup>39</sup> Legal scholars and empirical researchers have noted the extent to which Black, Native American and Latinx prospective jurors are more likely to have unstable employment, greater residential mobility, and greater financial hardship—all of which can affect one’s ability to report to court in response to a jury summons. See Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AM. BAR ASS’N (Sept. 1, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences> [<https://perma.cc/Y8WB-ANKK>] (citing Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System* 35 SEATTLE U. L. REV. 623, 651 (2012) (“African-Americans, Native-Americans and Latinos are more

those generated from lists of registered voters, as well as material barriers to participation, can lead to significant attrition before jury selection is underway.<sup>40</sup>

Second, there is the issue of excusal. In general, judges have discretion to dismiss prospective jurors “for cause” based on concerns about jurors’ fairness and impartiality that are put on the record.<sup>41</sup> In addition, jurors are often excused due to various hardships posed by jury service, including lost income and caretaking responsibilities.<sup>42</sup>

Finally, during the last phase of the jury selection process, lawyers can use an allotted number of peremptory challenges to dismiss jurors for reasons they do not disclose and need not justify.<sup>43</sup> The lack of transparency and absence of a disclosure requirement related to peremptory challenges has made lawyers’ discretion to exercise them a subject of intense scrutiny, since these challenges can be used to target and exclude protected groups on prohibited grounds.<sup>44</sup> The need for clear legal guidance and enforcement is obvious: Though lawyers need not provide justifications, every strike decision has an explicit or implicit one, and some—based on race or gender for example—are illegal.<sup>45</sup>

In its 1986 opinion, the U.S. Supreme Court established a now famous—albeit controversial—framework for identifying and remediating race-based jury exclusion.<sup>46</sup> First, the defendant needed to prove that she was a member of a recognized racial group, and that the government used a peremptory challenge to excuse a potential juror on account of this shared identity.<sup>47</sup> If a trial court judge determined that such an allegation rose to the level of a “prima facie” case of discrimination, she could then ask the offending party to state the reasons for challenging the juror in question.<sup>48</sup> In the event that the judge was not satisfied that an explanation offered was sincere, or worried it was a pretext for race-

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likely to be economically disadvantaged, have unstable employment, experience more family disruptions, and have more residential mobility.”)).

<sup>40</sup> See Mary R. Rose, Shari Seidman Diamond & Marc A. Musick, *Selected to Serve: An Analysis of Lifetime Jury Participation*, 9 J. EMPIRICAL LEGAL STUD. 33, 35 (2012) (noting in their study that jury participation is contingent on receiving and responding to the receipt of a jury duty summons).

<sup>41</sup> See, 47 AM. JUR. 2D *Jury* § 193 (2020).

<sup>42</sup> See HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* 64–65 (1993) (noting that factors that are likely to lead to prospective jurors’ excusal include: “(1) economic hardship; (2) lack of child care; (3) age; (4) the distance traveled and transportation; and (5) illness”).

<sup>43</sup> In federal felony trials, federal prosecutors can excuse six prospective jurors using peremptory challenges, and defense counsel, ten. FED. R. CRIM. P. 24(b)(2).

<sup>44</sup> See Wright et al., *supra* note 3, at 1413.

<sup>45</sup> *Id.* at 1412.

<sup>46</sup> *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986).

<sup>47</sup> *Id.* at 96.

<sup>48</sup> See Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1589 (2012).



based exclusion, the peremptory challenge could be denied and the juror reseated if still available to serve.<sup>49</sup>

*Batson* gave judges discretion to assess prosecutors' motivations based on "relevant circumstances."<sup>50</sup> Assessment was meant, above all, to determine whether prosecutors had been "neutral" with respect to race during voir dire.<sup>51</sup> In practice, determining neutrality as part of adjudicating a potential *Batson* violation would involve imputing rationales to lawyers based on limited evidence.<sup>52</sup>

Left unresolved was the question of whether lawyers could—or should—explicitly consider race as grounds for empaneling jurors. Could attorneys bring racial identifications of prospective jurors to peremptory strike decisions in *service* of antidiscrimination law and norms of inclusivity? And should prosecutors and defense attorneys be in the business of classifying prospective jurors on the basis of their perceived race?

Subsequent cases have implicitly resolved these questions in the affirmative. Federal and state cases following *Batson* demonstrated that bringing consideration of race to assessments of jurors was not only a functional necessity but the only practical means of raising an effective *Batson* challenge in the first place.<sup>53</sup> To understand why, one must look at comparative strike analysis, the prevailing approach to assessing the propriety of peremptory challenges under *Batson*.<sup>54</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Batson*, 476 U.S. at 96.

<sup>51</sup> See, e.g., Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1824–25 (1993) (noting the adverse effects of *Batson*'s colorblind test).

<sup>52</sup> See *Batson*, 476 U.S. at 98 (noting that the prosecutor must counter a defendant's successful prima facie case of discrimination with a "neutral explanation related to the particular case to be tried"); see also Shari Seidman Diamond, Leslie Ellis & Elisabeth Schmidt, *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J.L. & PUB. POL'Y 77, 77 (1997) (noting the extent to which juries are an institution constituted by "citizens who view themselves and who should be viewed by others as color-blind and gender-neutral").

<sup>53</sup> Compare *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) ("[T]he use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."), with *People v. Winbush*, 387 P.3d 1187, 1219–23 (Cal. 2017) (adopting the race-conscious comparative juror analysis of *Miller-El* but nonetheless holding that the prosecution satisfied all *Batson* criteria).

<sup>54</sup> See, e.g., *People v. Gutierrez*, 395 P.3d 186, 207 (Cal. 2017) (Liu, J., concurring) (stating that in conducting a "searching review of the record," courts must "assess the credibility of reasons given for a strike by drawing inferences from . . . 'circumstantial . . . evidence of intent' . . . including comparative juror analysis") (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016)).

### A. Comparative Strike Analysis

Comparative juror analysis consists of two main lines of evaluating circumstantial evidence during voir dire.<sup>55</sup> The first involves looking at evidence of differential striking, exemplified in instances where a “lawyer’s explanation for a strike is equally applicable to jurors of a different race who have not been stricken . . . .”<sup>56</sup> The second line focuses on “meaningful voir dire” with respect to a particular prospective juror—such as voir dire that focuses on a juror’s willingness to fairly assess evidence.<sup>57</sup>

The U.S. Supreme Court’s 2005 opinion in *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005), was among the first to highlight the problem of disparate striking—that is, the disproportionate striking of jurors who otherwise shared relevant characteristics with empaneled jurors.<sup>58</sup> Justice Souter argued in his majority opinion that “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [prospective juror] who is permitted to serve,” that was evidence “tending to prove purposeful discrimination.”<sup>59</sup> The Court went on to examine the circumstances of Black prospective jurors’ dismissals in detail.<sup>60</sup> In one such case the Court noted prosecutors’ vehement objection to a Black prospective juror’s recognition that a capital defendant could be rehabilitated and thus refrain from committing future crimes, despite taking no action to strike White prospective jurors who expressed similar views.<sup>61</sup> Likewise, the Court highlighted the prosecutors’ decision to dismiss a juror on the basis of his feelings about the death penalty while failing to object to White prospective jurors who felt similarly.<sup>62</sup> Taken together, the prosecutors’ excusal and empanelment of Black and White jurors with “similar views” were cited as compelling evidence of racial discrimination,

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<sup>55</sup> See David Hittner, David J. Beck & Eric J.R. Nichols, *Showing of Pretext*, in 4 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 36:78 (Robert L. Haig ed., 4th ed. 2020).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Miller-El II*, 545 U.S. at 241.

<sup>59</sup> *Id.* This is not to suggest that potential jurors subject to comparative analysis needed to be “identical in every respect” to prompt an inference of pretext. See, e.g., *People v. Beauvais*, 2017 CO 34, ¶ 56 (“A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.”) (quoting *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 247 n.6 (2005)). But see *United States v. Novaton*, 271 F.3d 968, 1004 (11th Cir. 2001) (holding that a prosecutor’s failure to strike similarly situated jurors is not pretextual “where there are relevant differences between the struck jurors and the comparator jurors”).

<sup>60</sup> *Miller-El II*, 545 U.S. at 241–52.

<sup>61</sup> *Id.* at 244.

<sup>62</sup> *Id.* at 248.

helping to legitimate comparative strike analysis as a technique for uncovering illegal exclusion.<sup>63</sup>

In May 2016, the U.S. Supreme Court reiterated the necessity of comparative strike analysis.<sup>64</sup> The case involved a Black defendant who was indicted and tried for murdering an elderly White woman in Georgia.<sup>65</sup> During jury selection, the lead prosecutor, District Attorney Stephen Lanier, and his partner, Assistant District Attorney Douglas Pullen, used peremptory challenges to strike all four of the Black prospective jurors in the venire.<sup>66</sup> The judge rejected defense counsel's objections to these challenges under *Batson* after the prosecutors offered reasons for the strikes that did not explicitly mention race.<sup>67</sup> Foster was sentenced to death.<sup>68</sup> The defense attorneys then renewed Foster's *Batson* claim, which was dismissed after an evidentiary hearing.<sup>69</sup>

The matter might have been settled there when something unusual happened. After seeking a writ of habeas corpus, Foster gained access to Lanier and Pullen's case file under the Georgia Open Records Act.<sup>70</sup> The contents of the file, which were enumerated in the Supreme Court's opinion, formed the basis of a damning critique of Lanier who was named forty-six times in a thirteen-page majority opinion that blasted his approach to jury selection.<sup>71</sup> The Court held that Lanier's purportedly "race-neutral" rationales for using peremptory strikes to remove the four Black prospective jurors in the venire were inconsistent, contradictory, and misrepresented the trial record.<sup>72</sup>

Rather than focus on the all-White jury that *resulted* from Lanier and Pullen's peremptory strikes, the opinion engaged in the imaginative exercise of re-narrating the trial team's decision-making process during the 1987 prosecution.<sup>73</sup> Drawing on contemporaneous notes from the trial team's case file, the Court assembled evidence of Lanier's intention to strike Black jurors despite his claims to the contrary.<sup>74</sup> In so doing, the Court reinforced the value—if not necessity—of generating enough demographic data about prospective jurors to assess disparities in strike decisions.<sup>75</sup>

The Court sent an unambiguous message to prosecutors and defense attorneys in the process: Label and keep track of jurors' racial identities, genders

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<sup>63</sup> *Id.* at 252.

<sup>64</sup> *See Foster v. Chatman*, 136 S. Ct. 1737, 1748–54 (2016).

<sup>65</sup> *See id.* at 1742–43.

<sup>66</sup> *Id.*

<sup>67</sup> *See Foster v. State*, 374 S.E.2d 188, 192 (Ga. 1988), *rev'd denial of habeas corpus sub nom. Foster v. Chatman*, 136 S. Ct. 1737 (2016).

<sup>68</sup> *Foster v. Chatman*, 136 S. Ct. at 1743.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1743–44, 1747.

<sup>71</sup> *See generally id.*

<sup>72</sup> *Id.* at 1749–54.

<sup>73</sup> *See id.* at 1748–54.

<sup>74</sup> *Foster v. Chatman*, 136 S. Ct. at 1754–55.

<sup>75</sup> *See id.*

and religious beliefs.<sup>76</sup> Classify jurors, in other words, on the basis of the very characteristics that might be used to exclude them.<sup>77</sup> Identifying a juror's race was understood to be a fundamental prerequisite to proving racism.<sup>78</sup> The opinion thus set the stage for the rise of a new, race-conscious approach to evaluating lawyers' assessments of jurors.

This approach emerged in full force in the Court's analysis of Lanier and Pullen's rationales for dismissing a prospective juror named Marilyn Garrett.<sup>79</sup> Writing for the majority, Justice Roberts first reproduced the "laundry list" of reasons Lanier offered for striking Garrett.<sup>80</sup> He then noted that although these rationales seemed reasonable "[o]n their face," they were based on "misrepresentations."<sup>81</sup> One lie the Court highlighted was Lanier's suggestion that he identified Garrett as a "questionable" juror on the day she was excused, and only dismissed her after comparing her to a juror with the last name Blackmon—adding, in brackets, that Blackmon was White.<sup>82</sup> Citing notes in Lanier's case file, the Court rejected his claim that striking Garrett had been a "last-minute race neutral decision."<sup>83</sup> In fact, the trial team had put Garrett's name on a list of prospective jurors they intended to strike, which they labeled as jurors who were "definite NO's."<sup>84</sup> The Court's reproduction of these notes and annotations of voir dire documents was accompanied by acknowledgment that the first five names prosecutors put on their strike list were those of Black jurors.<sup>85</sup> Only the sixth prospective juror on this list was White.<sup>86</sup>

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<sup>76</sup> *But see* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C. L. L. REV. 357, 359 (2017) ("*Foster*, the anomalous case in which prosecutors documented their consideration of race during jury selection, provided a forum for the Court to proclaim its commitment to racial equality, without being forced to confront the flaws in the *Batson* regime . . .").

<sup>77</sup> *Cf.* *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically.")

<sup>78</sup> *See Foster v. Chatman*, 136 S. Ct. at 1748 ("Despite questions about the background of particular notes [in the prosecutor's file], we cannot accept the State's invitation to blind ourselves to their existence. We have 'made it clear that in considering a *Batson* objection . . . all of the circumstances that bear upon the issue of racial animosity must be consulted.") (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)); *see also* Nancy S. Marder, *Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1153 (2017) ("Although the two prosecutors gave many reasons each time they removed an African-American prospective juror from the jury, the one reason they were careful not to give was race.")

<sup>79</sup> *See Foster v. Chatman*, 136 S. Ct. at 1748.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1749.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1749–50.

<sup>85</sup> *Foster v. Chatman*, 136 S. Ct. 1737, 1750 (2016).

<sup>86</sup> *Id.*

The decision also relied on records of each prospective juror's race to discredit other rationales Lanier advanced for Garrett's dismissal.<sup>87</sup> Though Lanier highlighted the fact that Garrett was divorced, Justice Roberts noted that Lanier had failed to strike three White jurors who were also divorced.<sup>88</sup> And though Lanier claimed he was concerned that Garrett was too young, a review of the trial records revealed that he did not strike eight young White jurors—including a twenty-one-year-old who was later empaneled.<sup>89</sup> Finally, though Lanier claimed he struck Garrett because of the prospective juror's close proximity to the victim's neighborhood, Justice Roberts observed Lanier's failure to strike a White juror who gave an answer during voir dire that was "practically the same."<sup>90</sup> Each of the Court's illustrative cases highlighted the racial identities of jurors who had not been stricken.<sup>91</sup>

Race was also at the center of Chief Justice Roberts's analysis of Lanier's dismissal of a prospective juror named Eddie Hood.<sup>92</sup> In rejecting Lanier's concern about the similar ages of Hood's son and the defendant, for example, the Court noted that Lanier accepted two jurors with similarly-aged sons who were White.<sup>93</sup> Justice Roberts's rejection of Lanier's assertion that Hood was "slow" and "confused" when answering voir dire questions also rested on comparative disregard of White jurors' commensurate responses.<sup>94</sup> In a similar vein, the Court's observation that Lanier empaneled a juror who worked at the same hospital as the spouse of a Black juror who was dismissed for his connection to the hospital revealed the hollowness of the prosecutor's later claim that because the hospital served "mentally ill people" those associated with it would be "more sympathetic to the underdog."<sup>95</sup> In this case, as in *Miller-El II*, the Court's analysis rested on the premise that a lawyer who struck Black jurors while empaneling White jurors with similar characteristics acted with racial animus.<sup>96</sup> A prerequisite to this argument was the need to distinguish and note the names of Black and White prospective jurors.<sup>97</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1750–51.

<sup>90</sup> *Id.* at 1751 (emphasis added).

<sup>91</sup> *Foster v. Chatman*, 136 S. Ct. 1737, 1753–54 (2016).

<sup>92</sup> *Id.* at 1754.

<sup>93</sup> *Id.* at 1752.

<sup>94</sup> *Id.* at 1753–54.

<sup>95</sup> *Id.* at 1754.

<sup>96</sup> See Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957, 1972 (2016) (remarking on the history of comparative juror analysis from *Miller-El I* and *Miller-El II* to *Foster v. Chatman*).

<sup>97</sup> See Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 748 (2018) ("[Comparative juror analysis] is akin to multivariable regression analysis; litigants attempt to show that the two jurors being compared are largely similar except for one salient characteristic: race.").

Three years after *Foster*, the Court decided *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), which only reinforced the centrality of the methodical documentation of prospective juror demographic characteristics to effectively challenging and rebutting illegal excusals.<sup>98</sup> As a precursor to engaging in comparative juror analysis, the explicit collection of information related to a prospective juror's race and gender offered an organizing framework for Justice Kavanaugh's opinion.<sup>99</sup> First, the Court noted that the 156 citizens who were summoned to court for jury selection that day roughly resembled the demographic makeup of the surrounding county.<sup>100</sup> Rather than retroactively investigate and identify the race of each prospective juror, the Court and others who have since studied the case relied on the trial court clerk's explicit assignment of racial information to each prospective juror.<sup>101</sup> White women, Black women, White men, and Black men were identified as "WF," "BF," "WM," and "BM," respectively.<sup>102</sup>

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<sup>98</sup> See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2246–48 (2019).

<sup>99</sup> See, e.g., *id.* at 2237 (noting that there was "no available racial information" related to the prospective jurors questioned as part of voir dire in *Flowers*'s fifth trial other than that the empaneled jury included "nine white jurors and three black jurors").

<sup>100</sup> Will Craft, *How Did Curtis Flowers End Up with a Nearly All-White Jury?*, APM REP. (June 5, 2018), <https://features.apmreports.org/in-the-dark/curtis-flowers-trial-six-jury-selection> [<https://perma.cc/U8NU-L2QA>] (noting that of the 156 Montgomery County residents who reported for jury service in *Curtis Flowers*'s sixth trial, sixty-six were African American and eighty-eight were White).

<sup>101</sup> See, e.g., *Flowers v. State*, 158 So. 3d 1009, 1047 (Miss. 2014) (subsequent history omitted).

<sup>102</sup> See *infra* Figures 1 & 2.

Figure 1: Portion of Clerk's Copy of Jury List from Curtis Flowers's Sixth Trial<sup>103</sup>

[REDACTED] *Clerk's Copy*  
*excused - present*  
 STATE OF MISSISSIPPI  
 V.  
 CURTIS GIOVANNI FLOWERS  
 CAUSE NO. 2003-0071CR  
*1/stricken for cause on 6/7/10*

*Roll call 6/2/10*  
*6/8/10*

JURY LIST

No.	Old #	Name		
1	1 WF	2. [REDACTED]	P	P <i>6/9/10 12</i>
	2 WF	5. [REDACTED]	P	<i>Dismissed</i>
	3 WF	6. [REDACTED]	P	<i>All present</i>
	4 WF	11. [REDACTED]		<i>excused 6/8/10 on 6/8</i>
	5 WF	16. [REDACTED]	P	<i>excused 6/8/10</i>
	6 BM	17. [REDACTED]	P	<i>excused 6/8/10</i>
	7 WF	22. [REDACTED]		
	8 BM	25. [REDACTED]	P	P
	9 WF	26. [REDACTED]		
	10 WF	28. [REDACTED]		
	11 WF	41. [REDACTED]		
	12 WF	42. [REDACTED]	P	P
	13 BM	44. [REDACTED]		
	14 BF	45. [REDACTED]	P	P <i>dismissed 6/10/10</i>
	15 BF	49. [REDACTED]		
	16 BM	51. [REDACTED]		
	17 WF	52. [REDACTED]	P	P <i>dismissed 6/10/10</i>
	18 WF	53. [REDACTED]	P	P
	19 WF	54. [REDACTED]		

<sup>103</sup> This document is on file with the author and was generated by Will Craft, a data reporter and analyst of American Public Media, which reported on the case. Figure 1 is presented in excerpted form to protect the privacy of the prospective jurors whose names were listed.

Marking has been added to this figure by author to indicate where the court clerk has included notations which reference the gender and race of prospective jurors. Identifying information has been redacted.

Circuit courts have likewise taken up comparative strike analysis, with some viewing the approach as a critical tool for adjudicating *Batson* challenges.<sup>104</sup> Other courts have identified comparative juror analysis as an available—but not mandatory—technique of evaluation for trial court judges.<sup>105</sup> Recognizing the novelty of this approach, some circuits have given the benefit of the doubt to prosecutors who claim that their views of prospective jurors were mistaken at the time of trial.<sup>106</sup>

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<sup>104</sup> See, e.g., *Currie v. McDowell*, 825 F.3d 603, 612 (9th Cir. 2016) (“[C]omparative juror analysis strongly suggests [prosecutor’s] concern was pretextual,” because “[f]ive of the non-black panelists who ended up being sworn jurors displayed the same pattern in answering these two questions” as the Black juror who was stricken—a “pattern” that was in the record but that “neither the district court nor the state court mentioned.”); *United States v. Taylor*, 636 F.3d 901, 905–06 (7th Cir. 2011) (vacating and remanding where the trial court accepted the prosecutor’s seven additional reasons beyond her response during voir dire as to why she struck a Black juror when a White juror was similarly situated, as the “government’s reliance on these additional reasons raises the specter of pretext”); *Reed v. Quarterman*, 555 F.3d 364, 378 (5th Cir. 2009) (“Osby’s voir dire testimony, when compared to the testimony of non-black jurors who gave similar responses, demonstrates that the reasons the State came up with to justify its strike of Osby,” a prospective black juror, “are spurious.”); *id.* at 380–81 (“Thus, the comparative analysis demonstrates what was really going on: the prosecution used its peremptory challenges to ensure that African-Americans would not serve on Reed’s jury.”); *Lewis v. Lewis*, 321 F.3d 824, 832 (9th Cir. 2003) (“[A] comparative analysis of [the struck juror] with empaneled jurors reveals that a finding of pretext was warranted.”); *United States v. Williams*, 264 F.3d 561, 572 (5th Cir. 2001) (“[I]n circumstances where the Government’s reason is fantastic or inconsistent with its treatment of similar non-minority jurors, we may have a basis for reversal.”); *State v. Curry*, 447 P.3d 7, 15 (Or. Ct. App. 2019) (holding that the prosecutor’s race-neutral explanation—that the Black juror was a young, unemployed college student—applied with equal force to two White, young, unemployed college students whom the prosecutor did not challenge), *adhered to on reconsideration* 302 Or. App. 640 (Or. Ct. App. 2020).

<sup>105</sup> See *Chamberlin v. Fisher*, 885 F.3d 832, 838–39 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2773 (2019); *McDaniels v. Kirkland*, 813 F.3d 770, 776 (9th Cir. 2015) (“*Batson*’s third step ‘may include a comparative analysis of the jury voir dire and the jury questionnaires of all venire members.’”) (quoting *Green v. LaMarque*, 532 F.3d 1028, 1030 (9th Cir. 2008)) (subsequent history omitted); *id.* at 776 (“*Batson* itself neither engaged in nor required comparative juror analysis.”).

<sup>106</sup> See, e.g., *Jamerson v. Runnels*, 713 F.3d 1218, 1230–31 (9th Cir. 2013) (“Juror # 4241 cannot properly be classified as similarly situated to Juror # 0970 because the prosecutor was unaware of his sister’s conviction. . . . Failure to strike [Juror # 4241], therefore, cannot be considered evidence of a discriminatory purpose.”); *Williams*, 264 F.3d at 572 (denying petitioner’s *Batson* claim because, even if the stricken Black juror didn’t live in the petitioner’s same voting district or ward, the defense conceded “this fact was not known at the time of jury selection and the Government maintains that it believed the venireperson resided in Defendant’s district”); *Hosch v. State*, 155 So. 3d 1048, 1071–72 (Ala. Crim. App. 2013) (“The record also does not indicate that the prosecutor’s reason for not questioning or striking L.T. was anything other than an honest, mistaken belief regarding L.T.’s feelings about the death penalty as expressed on her juror questionnaire.”); *Lee v. State*, 898 So. 2d 790, 815–16 (Ala. Crim. App. 2001) (finding no discriminatory striking where the prosecution did not strike a White juror who on her questionnaire expressed opposition to the death penalty, but struck two Black jurors because they opposed the death



Comparative strike analysis has also been deployed in state court, though to idiosyncratic ends.<sup>107</sup> In some cases, arbitrary and poorly supported distinctions have been drawn between Black and White prospective jurors subject to peremptory strikes.<sup>108</sup> In one such California case, the court upheld the strike of a Black juror, who stated on her juror questionnaire that she “would hesitate to convict on the word of one witness alone,” despite the fact that two White jurors with the same questionnaire responses were seated.<sup>109</sup> A judge in North Carolina drew a similarly incredible distinction between a Black pharmaceutical engineer and White electrical engineer out of concern the former might unfairly interpret forensic evidence despite the government’s stated intention not to introduce such evidence.<sup>110</sup>

The possibility of searching—or comparative—juror analysis, has been accompanied by efforts to explicitly compile demographic information about prospective jurors.<sup>111</sup> In some cases, lawyers have memorialized the importance of creating a documentary basis for this analysis in the form of formal professional guidance, as seen in the case of a federal prosecutor in California who wrote:

Particularly important is developing a record sufficient to support a comparative juror analysis regarding selective questioning of jurors and selective striking of jurors on the basis of the proffered race-neutral rationale. This may provide the best means of demonstrating that a proffered race-neutral rationale is not related to the facts and issues of the case to be tried and rests instead on misplaced assumptions that actually demonstrate group bias.<sup>112</sup>

Here, despite recognition of the “delicate” nature of this directive, an attorney saw the value of such record-keeping to the adjudication of *Batson*

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penalty, even if the record showed the Black jurors did not oppose the death penalty) (subsequent history omitted).

<sup>107</sup> See 1 NAT’L JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES app. 4B (Elisabeth Semel ed., 2020 ed. 1979) (discussing the diversity of approaches and inconsistent application of comparative juror analysis by trial judges and state courts).

<sup>108</sup> See, e.g., *Briggs v. Grounds*, 682 F.3d 1165, 1182, 1185 (9th Cir. 2012) (Berzon, J., dissenting).

<sup>109</sup> *Id.* at 1185; cf. *Woolf v. State*, 220 So. 3d 338, 366, 368 (Ala. Crim. App. 2014) (finding the stricken Black juror and the two empaneled White jurors were not similarly situated, even though they all had “similar reservations” about the death penalty, because the White jurors “did not appear to have the emotional opposition to the death penalty” of the Black juror who, according to the prosecution and without comment from the petitioner’s counsel, was “screaming [that she didn’t] believe in the death penalty”) (alteration in original).

<sup>110</sup> See *United States v. Carr*, No. 4:19-CR-11-FL-1, 2020 WL 254875, at \*1, \*3 (E.D.N.C. Jan. 15, 2020).

<sup>111</sup> See, e.g., George S. Cardona & Angela J. Davis, *Inside the Box*, L.A. LAW., Oct. 2008, at 30–31.

<sup>112</sup> *Id.* at 30.

challenges on appeal.<sup>113</sup> The practical necessity of this orientation toward voir dire offers a point of departure for more granular empirical attention to the interplay between antidiscrimination law and everyday legal practice. Law and society scholars engage in ethnographic studies of legal actors' language use, strategy, and professional ethics. For this reason, they are uniquely positioned to deepen our understanding of the everyday ways that doctrine shapes legal practice.<sup>114</sup>

### B. *Comparative Voir Dire Analysis*

A lawyers' failure to meaningfully question prospective jurors during voir dire, coupled with her differential questioning or dismissal of prospective jurors based on race, raise inferences of discriminatory intent.<sup>115</sup> The U.S. Supreme Court's *Miller-El v. Cockrell*, 537 U.S. 322 (2003), referred to as "*Miller-El I*," addressed this preliminary problem of disparate treatment, encompassing lawyers' questioning throughout voir dire.<sup>116</sup> The case involved claims of jury exclusion in a capital murder case in which the defendant was prosecuted for the murder of a hotel employee during the robbery of a Holiday Inn in Dallas, Texas.<sup>117</sup> Jury selection took place over a five-week period beginning in

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<sup>113</sup> See *id.* at 28.

<sup>114</sup> See, e.g., GREGORY M. MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL 5 (2001) (delineating the focus of the research as an examination of the way that "linguistic processes of persuasion participate in the ongoing construction and contestation of legal reality"); ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 3-5 (2007); JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 2-6 (John M. Conley & Lynn Mather eds., 2008); RICHARD ASHBY WILSON, INCITEMENT ON TRIAL: PROSECUTING INTERNATIONAL SPEECH CRIMES 126-31 (Cambridge Univ. Press ed., 2017).

<sup>115</sup> See, e.g., *Currie v. McDowell*, 825 F.3d 603, 613 (9th Cir. 2016) (finding the prosecutor had an opportunity to ask the stricken juror about an inconsistency in voir dire, "[b]ut he did not"); *Reed v. Quarterman*, 555 F.3d 364, 377 (5th Cir. 2009) (finding the State's contention that it "generally disfavored healthcare workers in cases involving medical evidence" to be pretextual, because the prosecutor "did not ask [the juror] anything about her background as a health care professional or the type of patients she saw"). Courts have noted the inappropriateness of drawing adverse inferences about attorneys' motivations in cases in which judges, rather than lawyers, carry out the questioning of prospective jurors. See, e.g., *Jamerson v. Runnels*, 713 F.3d 1218, 1230 (9th Cir. 2013) (referencing *Miller-El II* and "finding that a prosecutor's failure to question a juror further was evidence of a discriminatory motive *where the prosecutor was personally questioning the jurors at length during voir dire*") (citation omitted).

<sup>116</sup> See generally *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003) (subsequent history omitted).

<sup>117</sup> *Id.* at 327-28.

February of 1986.<sup>118</sup> The trial preceded the Court's *Batson* decision.<sup>119</sup> The Texas Court of Criminal Appeals opinion, however, did not.<sup>120</sup>

Among the issues raised in the petitioner's writ of habeas corpus in federal district court was the prosecutor's conduct during voir dire.<sup>121</sup> Specifically, a "comparative analysis of the venire members" demonstrated that prospective jurors faced different questions depending on their race.<sup>122</sup> Black jurors were given a "detailed description of the mechanics of an execution in Texas" before they were asked to describe their feelings about capital punishment.<sup>123</sup> By contrast, only 6% of White prospective jurors were given the same preface before prosecutors inquired about their views on the death penalty.<sup>124</sup> Instead, White prospective jurors were invited to share their view of capital punishment in general terms before indicating whether they felt they could render a fair verdict in the case before them.<sup>125</sup>

But the complaint went further. The prosecutors in *Miller-El I* were also accused of engaging in a more overtly disparate questioning strategy by eliciting information about jurors' willingness to impose mandatory minimum sentences, which could be grounds for a cause challenge under Texas law at the time.<sup>126</sup> Where prosecutors informed 94% of White prospective jurors of the statutory minimum prison sentence before inquiring about their willingness to impose such a sentence, most Black prospective jurors were asked leading questions that prompted them to volunteer steeper sentences that resulted in their dismissal.<sup>127</sup> In this manner, prosecutors were able to selectively elicit objectionable responses from Black jurors while securing the continued participation of White jurors—a technique that had more commonly been deployed by defense attorneys to identify pro-government prospective jurors with retributivist leanings.<sup>128</sup>

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<sup>118</sup> *Id.* at 328.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See id.* at 331.

<sup>122</sup> *Miller-El I*, 537 U.S. at 331–32.

<sup>123</sup> *Id.* at 332 (including 53% of Black prospective jurors—or eight out of fifteen jurors).

<sup>124</sup> *Id.* at 332.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 332–33 (citing *Huffman v. State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part sub nom.* *Huffman v. Beto*, 408 U.S. 936 (1972)).

<sup>127</sup> *Id.* at 333. An example of such a leading question on the part of a prosecutor took the form of alerting a prospective juror that the maximum sentence for the crime of murder was life imprisonment, before asking: "Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?" *Id.* (citation omitted). Then, the prosecutor said by way of follow-up: "Again, we're not talking about self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about the knowing [murder] . . ." *Id.* (citation omitted).

<sup>128</sup> *See Miller-El I*, 537 U.S. at 333 ("This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here.").

The problems of disparate questioning and lack of meaningful voir dire persist, reflected by their presence in *Flowers v. Mississippi*, the most recent *Batson* case before the U.S. Supreme Court.<sup>129</sup> In this case, a prosecutor selectively obtained prejudicial information from prospective jurors by shifting his style of questioning.<sup>130</sup> This included, for example, adding “tag questions” such as, “You’d agree with that, wouldn’t you?” to influence their responses.<sup>131</sup> Justice Elena Kagan drew attention to this practice during the case’s oral argument.<sup>132</sup>

In addition to highlighting disparities in the number of questions asked of Black and White prospective jurors in the sixth trial of the now-exonerated defendant, Curtis Flowers, Justice Kagan commented that such questions were “targeted” to precipitate the dismissal of particular jurors.<sup>133</sup> Questioning related to the death penalty was of central concern.<sup>134</sup> Where prosecutors had tried to rehabilitate White prospective jurors who were ambivalent about the death penalty, they questioned Black prospective jurors in a manner that more readily prompted objectionable responses that warranted their excusal.<sup>135</sup> Questions posed to White jurors, for example, might be phrased, “Well, if the law required you to do it, you could follow the law, couldn’t you?”—leading to an affirmative response.<sup>136</sup> Black prospective jurors, Justice Kagan argued, faced questions like, “[I]t would be really hard for you to apply the death penalty then, wouldn’t it?”<sup>137</sup> Disparate questioning in this context amounted to a “record for striking Black jurors” and empaneling White jurors.<sup>138</sup>

State courts, including those in Alabama, Florida, and Texas, have engaged in comparative voir dire analysis to root out pretextual rationales for peremptory challenges.<sup>139</sup> And courts in some cases have held that in the absence of lines of questioning addressing meaningful sources of bias or conflicts of interest, such as working for an organization that had been prosecuted by the District Attorney’s Office, prosecutors can be presumed to have eliminated a juror on non-race-neutral grounds.<sup>140</sup> Likewise, the Texas Court of Criminal Appeals has

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<sup>129</sup> See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235, 2244, 2248–49 (2019).

<sup>130</sup> See *id.* at 2246–47.

<sup>131</sup> See Roger W. Shuy, *How a Judge’s Voir Dire Can Teach a Jury What to Say*, 6 DISCOURSE & SOC’Y 207, 207–08 (1995) (describing the practice of question tagging and discussing how questions can be intended to have independent answers and yet be influenced by other means).

<sup>132</sup> See Transcript of Oral Argument on Behalf of the Petitioner at 27–28, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (No. 17-9572).

<sup>133</sup> Transcript of Oral Argument on Behalf of the Respondent, *supra* note 38, at 50.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 50–51.

<sup>136</sup> *Id.* at 50.

<sup>137</sup> *Id.* at 51.

<sup>138</sup> *Id.* at 51.

<sup>139</sup> See Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 491–92 (1998).

<sup>140</sup> See, e.g., *Ex parte Nguyen*, 751 So. 2d 1224, 1227–28 (Ala. 1999).

held that the State's reliance on a "generalized 'impression' or 'experience'" as a basis for striking a juror who was not subject to fulsome voir dire may be grounds for inferring pretext.<sup>141</sup> Where lawyers directed the same questions to all jurors, or to diverse subgroups of prospective jurors, state trial courts have not found *Batson* violations based on disparate questioning.<sup>142</sup>

Interdisciplinary legal scholars who have analyzed trial transcripts to describe the effects of disparate questioning have highlighted jurors' eagerness to offer responses that they believe are expected of them.<sup>143</sup> These studies reinforce the commonsense insight that the structure of questions influences the substance of jurors' answers.<sup>144</sup> One such study of twelve capital trials in North Carolina, for example, demonstrated the level of control lawyers exercised over the length and content of juror responses depending on whether questions were phrased in an open-ended manner and contained affective utterances, such as expressions of concern or reassurance.<sup>145</sup>

The U.S. Supreme Court's now-dominant approaches to adjudicating *Batson* violations help explain some of the key empirical findings from Part III of this Article. They signal, for example, that prosecutors should consider the style and substance of all of the questions posed to prospective jurors, recognizing the potential need to defend or initiate comparative analyses of their own.<sup>146</sup> This feature of judicial *Batson* analysis has significant implications for the approximately three-quarters of federal courts and one-third of state courts that permit attorney involvement in the questioning of prospective jurors.<sup>147</sup>

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<sup>141</sup> See *Tennyson v. State*, No. PD-0304-18, 2018 WL 6332331, at \*4 (Tex. Crim. App. Dec. 5, 2018) (Alcala, J., dissenting from refusing discretionary review) ("The State's lack of questioning to gain a complete understanding of how its stated reasons would affect a prospective juror's ability to render judgment . . . strengthens the inference that its reasons were not genuine.").

<sup>142</sup> See, e.g., *Barksdale v. Dunn*, No. 3:08-CV-327-WKW, 2018 WL 6731175, at \*89 n.318 (M.D. Ala. Dec. 21, 2018) (no discriminatory questioning was found where "the prosecutor's questions were addressed to the entire panel of twelve venire members or to subgroups of each panel that included multiple venire members of both genders," so that "there was very little opportunity for discriminatory questioning during voir dire at Petitioner's capital murder trial") (emphasis added) (subsequent history omitted).

<sup>143</sup> See, e.g., Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 J. EMPIRICAL LEGAL STUD. 515, 519–20 (2019).

<sup>144</sup> See, e.g., *id.* at 535, 539–40.

<sup>145</sup> *Id.* at 533–34. Among the affective utterances coded by the researchers were "concern"; "reassures" or "optimism"; "self-disclosure" by attorney; "empathy"; "laughs or tells jokes"; and "criticism of . . . others." *Id.* at 533.

<sup>146</sup> See Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, JUDGES' J., Winter 2008, at 7 ("When voir dire is led by attorneys, prospective jurors are significantly more likely to be questioned individually for long periods of time, possibly on matters unrelated to the issues likely to arise at trial.").

<sup>147</sup> *Id.* at 8 tbl.1 (documenting results of a fifty-state survey in 2007 showing that in state court 25.9% of jury selection proceedings were exclusively or predominantly managed by judges, and 19.4% involved the equal participation of judges and lawyers; in federal court,

### III. THE PRACTICE OF RACE-CONSCIOUS JURY SELECTION

To remedy unconstitutional exclusion during jury selection, the *Batson* doctrine permits lawyers to challenge the peremptory strikes of adversaries who dismiss jurors on the basis of race or racial stereotypes.<sup>148</sup> These challenges work backward from the demographics of dismissed jurors, or empaneled juries, to impute prejudicial and therefore actionable motivations to lawyers accused of wrongdoing.<sup>149</sup> The *Batson* framework thus represents a post-hoc solution to glaring instances of misconduct, eschewing alternative approaches, such as those that focus on prosecutorial ethics and professional responsibility.<sup>150</sup> Alongside this retrospective orientation toward discerning illegal bias, scholarly critiques and empirical studies of jury exclusion have also sought to illuminate the concealed motives and prejudice of actors through analyses that work backward from strike patterns and seated-jury demographics.<sup>151</sup>

These studies reveal the ease and frequency with which prosecutors rely on pretextual rationales for dismissing jurors.<sup>152</sup> These pretextual rationales include prosecutors' claims that otherwise eligible prospective jurors are unsuitable due to their inattentiveness, lack of education, occupations, residence in particular neighborhoods, or appearances.<sup>153</sup> Citing each of these attributes, prosecutors have been able to defend the rationales for their peremptory strike decisions on the grounds that they were "race-neutral," despite their targeted removal of prospective jurors of color.<sup>154</sup>

While of critical importance, these studies reinforce the caricature of unscrupulous and cynical prosecutors we see in some narratives of prosecutorial

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jury selection proceedings were exclusively or predominantly managed by judges in 69.6% of trials and by judges and lawyers equally in 13.6% of trials).

<sup>148</sup> See *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986); *supra* note 9 (outlining the three-step test that follows a *Batson* challenge).

<sup>149</sup> See *Batson*, 476 U.S. at 96–98.

<sup>150</sup> See Johnson, *supra* note 139, at 487, 500 ("What then does the Court offer to guide the ethical prosecutor and trial judge? Silence.").

<sup>151</sup> See, e.g., *id.* at 502–03 (providing an "egregious example" of a prosecutor that struck a juror because she had blonde hair, explaining, "It's been my personal experience that if somebody is not cognizant of their own reality and existence and want blonde hair, and they are a black woman, I don't want them on my jury").

<sup>152</sup> See *id.* at 492–93.

<sup>153</sup> See Marder, *supra* note 48, at 1590; see also EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4, 6 (Aug. 2010), <https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> [https://perma.cc/F2AN-5QUV].

<sup>154</sup> See, e.g., Marder, *supra* note 48, at 1590–91 ("[A]s long as [the prosecutors] gave a reason that did not explicitly involve race, the judge usually found it to be race neutral."); see also, e.g., EQUAL JUST. INITIATIVE, *supra* note 153, at 6.

power<sup>155</sup> and the inequities of the criminal justice system.<sup>156</sup> Though this attention is well-founded and likely underinclusive of instances of misconduct, it does not reflect the totality of prosecutorial practice, or attitudes, toward the jury system.<sup>157</sup> A more holistic picture can only emerge when empirical legal scholars analyze the routine and unceremonious everyday work of prosecutors who try to conscientiously carry out their work while considering their professional and personal goals.<sup>158</sup> Research on, and alongside, these lawyers offers unparalleled insight into how antidiscrimination norms actually inform—or fail to inform—prosecutorial decision-making and strategy when empanelling juries.<sup>159</sup> This section offers a window into this vital and understudied dimension of voir dire. It highlights the links between the evaluation of prospective jurors, anxiety about *Batson* violations, and the common construal of these violations as referenda on a prosecutor’s character and integrity.<sup>160</sup>

### A. Methods

The empirical analysis that follows is based on an extended field study of Assistant U.S. Attorneys between 2013 and 2017.<sup>161</sup> The broader project of which it is a part examined prosecutors’ attitudes toward jurors at a time when jury trials are statistically in decline.<sup>162</sup> This study, supported by the National Science Foundation,<sup>163</sup> included my participation in twenty-six federal jury

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<sup>155</sup> See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176, 177 (2019) (discussing the pervasiveness of generalized claims about prosecutorial power, the conflation of “power” with “discretion,” and arguing that “[c]onclusory statements about unchecked prosecutorial power and discretion are ubiquitous and uncontroversial”); Johnson, *supra* note 139, at 500 (emphasizing the importance of focusing critiques of *Batson* on ethical guidance that can be offered to prosecutors at the trial court level, where there is little clarity on how to “uphold the Constitution and seek justice” in light of the Supreme Court’s failure in this arena).

<sup>156</sup> See Bellin, *supra* note 155, at 179.

<sup>157</sup> See *id.* at 174 (“[T]oday’s prosecutorial-power rhetoric is, upon close examination, frustratingly incoherent.”).

<sup>158</sup> See Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 838 (2018) (reviewing JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION* (2017)) (noting that close engagement includes “think[ing] more deeply about prosecutors’ role in the criminal justice system and the nature of their power”).

<sup>159</sup> *Id.* at 857 (“Strip away the hype, and prosecutors most resemble ‘worker bees’ toiling in the criminal justice system, not wizards bending it to their will.”) (citing PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 109 (2009)).

<sup>160</sup> See Johnson, *supra* note 139, at 507.

<sup>161</sup> Offit, *supra* note 27, at 1084.

<sup>162</sup> See *id.* at 1074–75.

<sup>163</sup> See generally Anna Crindell Offit, *Making the Case for Jurors: An Ethnographic Study of U.S. Prosecutors* (Apr. 2018) (unpublished Ph.D. dissertation, Princeton University) (on file with Princeton University).

selection proceedings<sup>164</sup> and semi-structured interviews with 133 Assistant U.S. Attorneys.<sup>165</sup> Prosecutors faced *Batson* challenges in four of the jury selection proceedings observed, and, in one case, challenged defense counsel.<sup>166</sup>

Though the interviewees and prosecutions discussed are anonymized, the cases encompassed a sample of prosecutions during the research period—including human trafficking, healthcare fraud, public corruption, rape, child pornography, narcotics trafficking, carjacking, bank robbery, and capital murder, among others.<sup>167</sup> I selected a federal office as a case study because of its practice of summoning jurors from a combination of rural and urban counties with socio-economically and racially heterogeneous populations and because of its varied caseload.<sup>168</sup>

As a case study based on a non-random sample in a single geographic location, it is fair to question the generalizability of this project. My response is twofold. First, toward shedding empirical light on broader phenomena, this study draws its strength from its capacity to build upon other empirical legal and doctrinal scholarship. It is through this that a more fulsome understanding of *Batson*'s impact in general emerges. Second, this study is less concerned with trends than it is with mechanisms and processes. I am keen to gain perspective on the ways in which *Batson* has affected prosecutorial decision-making and strategy. This creates an avenue for future research which might confirm or contest the validity of these findings more broadly.

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<sup>164</sup> See generally *id.* (discussing numerous jury selection proceedings between 2014 and 2017). To the extent that quotations appear in this Article, they have been modified. Their purpose is to tease out formulations that emerged as generalizable and representative of prosecutors who grappled with similar strategic and ethical concerns in preparing for jury selection.

<sup>165</sup> See generally *id.* (I refer to Assistant U.S. Attorneys, federal prosecutors, and prosecutors interchangeably reflecting the colloquial usage of my interviewees. The interviewees of this study worked in both the Criminal and Civil Divisions of the U.S. Attorney's Office.) A central tenet of participant observation is its commitment to learning about research subjects' experiences and opinions by engaging in work alongside them. My objective in gathering data about prosecutors' jury selection practices was to understand and accurately record decisions they made in their own words and from their own point of view. If the findings of this study provide little evidence of overt racial animus among prosecutors, it is because I did not observe such animus during the research period. This does not disconfirm the findings of studies that argue that American legal proceedings are plagued by systemic racism. Rather, it suggests that a critical challenge for empirical legal scholars is illuminating the perpetuation of racial discrimination and exclusion in the absence even as legal actors strive for greater equity and inclusion.

<sup>166</sup> See generally *id.* None of these challenges resulted in an adjudicated *Batson* violation.

<sup>167</sup> *Id.* at xvii.

<sup>168</sup> See Anna Offit, *Peer Review: Navigating Uncertainty in the United States Jury System*, 6 U.C. IRVINE L. REV. 169, 204–06 (2016); Offit, *supra* note 27, at 1088; *supra* note 2 and accompanying text.



With few exceptions,<sup>169</sup> studies of jury selection consider the demographics of empaneled juries rather than address lawyers' decision-making processes in real time.<sup>170</sup> Building on legal scholarship on jury selection that has relied on interviews with attorneys<sup>171</sup> and former jurors,<sup>172</sup> and part-quantitative part-qualitative evaluations of attorneys' on-the-record conversations during voir dire,<sup>173</sup> this Part examines prosecutors' jury selection strategies based on their off-transcript discussions of peremptory strike decisions. In so doing, it highlights unstudied aspects of prosecutors' decision-making during jury selection.<sup>174</sup>

## B. Findings

Prosecutors' accounts of their experiences anticipating and navigating *Batson* challenges revealed the centrality of racial information to their assessments of jurors.<sup>175</sup> There was consensus among the prosecutors I interviewed and observed that jurors' attitudes toward cases were inherently unpredictable.<sup>176</sup> Prosecutors lamented the lack of useful information elicited from jurors during voir dire and recognized that regardless of their own efforts, jury verdicts in criminal cases could be idiosyncratic.<sup>177</sup> It was therefore little comfort that judges in the district routinely delineated the scope of relevant questioning themselves and often posed questions to prospective jurors without opportunities for attorney-led follow-up.<sup>178</sup> These (generally standardized) scripts were supplemented by case-specific questions submitted by the attorneys followed by sidebar questioning that was vetted and often guided by the

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<sup>169</sup> See, e.g., Grosso & O'Brien, *supra* note 143, at 516; Offit, *supra* note 168, at 170–71; Zalman & Tsoudis, *supra* note 17, at 368–69.

<sup>170</sup> See generally ABRAMSON, *supra* note 35 (examining the relationship between juries and democratic justice).

<sup>171</sup> See Zalman & Tsoudis, *supra* note 17, at 169.

<sup>172</sup> See generally ROBIN CONLEY, CONFRONTING THE DEATH PENALTY: HOW LANGUAGE INFLUENCES JURORS IN CAPITAL CASES (Roger W. Shuy et al. eds., 2016) (recounting jurors' experiences in court).

<sup>173</sup> See generally Grosso & O'Brien, *supra* note 143 (focusing on attorneys' methods of gathering information in voir dire).

<sup>174</sup> See Candace McCoy, *Prosecution*, in THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 682 (Michael Tonry ed., 2011); ANN SOUTHWORTH & CATHERINE L. FISK, THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE 357 (2d ed. 2014).

<sup>175</sup> See, e.g., Interviews with BD, BQ & DL, AUSAs (2013–2017).

<sup>176</sup> See, e.g., Interview with BQ, AUSA (2013–2017) (likening the process of discerning prospective jurors' responses to reading tea leaves); Interview with CG, AUSA (2013–2017) (referring to the jury selection process as “way out of your control”).

<sup>177</sup> As Preet Bharara, former U.S. Attorney for the Southern District of New York, put it: “Once the case goes to twelve ordinary Americans, anything can happen.” PREET BHARARA, DOING JUSTICE: A PROSECUTOR'S THOUGHTS ON CRIME, PUNISHMENT AND THE RULE OF LAW 279 (2019).

<sup>178</sup> Offit, *supra* note 163, at 88–89.

judge.<sup>179</sup> As a result, prosecutors found themselves assessing the strangers who reported for jury service on the basis of scanty information,<sup>180</sup> aided by largely routinized, yes-or-no questions.<sup>181</sup> Variations in individual judges' management of jury selection made the process only more uncertain.<sup>182</sup> Although judge-led voir dire is more common in federal court, judges are actively involved in state voir dire nearly 50% of the time.<sup>183</sup>

Outside the courtroom, prosecutors discovered—through Continuing Legal Education (CLE) trainings, meetings with supervisors, and the accounts of colleagues—that *Batson* challenges were among the most significant disputes one could face during jury selection.<sup>184</sup> Such challenges became a risk, prosecutors learned, if they excused Black or female prospective jurors from their venires.<sup>185</sup> Though uncommon in practice,<sup>186</sup> the adjudication of *Batson* challenges represented a frequent source of anxiety for the attorneys in this study.<sup>187</sup> This anxiety imprinted itself on their approaches to jury selection.<sup>188</sup>

### 1. Making Race Salient

“Everything you do is being scrutinized,” a prosecutor said during a break in jury selection proceedings one day.<sup>189</sup> “When you’re in court it’s exhausting . . . the pressure is so intense.”<sup>190</sup> Prosecutors readily and repeatedly shared experiences to this effect, revealing their sensitivity to jurors’, judges’, and even opposing counsel’s seemingly limitless attention to their speech,

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<sup>179</sup> See Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 931 (2015) (noting that voir dire in federal court most commonly consists of judge-led voir dire).

<sup>180</sup> See, e.g., Interviews with AD, AW, BB, BJ, BP, BQ, BT, CA, CF, CG, CX, DH, DN & DO, AUSAs (2013–2017) (characterizing voir dire in federal court as a “low information” environment for assessing prospective jurors).

<sup>181</sup> In the district that is the subject of this analysis, standardized jury selection questions included those pertaining to prospective jurors’ counties of residence, occupations, the occupations of family members living in their households, impressions of/contact with law enforcement agents, education levels, news outlets, and hobbies, among other questions. Offit, *supra* note 163, at 89.

<sup>182</sup> See e.g., Interviews with AD & BW, AUSAs (2013–2017).

<sup>183</sup> Mize & Hannaford-Agor, *supra* note 146, at 8 tbl.1 (noting that voir dire is exclusively or predominantly led by judges 69.6% of the time in federal court; in state court, voir dire is exclusively or predominantly led by judges 25.9% of the time and led by judges and lawyers equally in 19.4% of cases).

<sup>184</sup> See e.g., Interviews with AO & AY, AUSAs (2013–2017).

<sup>185</sup> See e.g., Interviews with EN & EO, AUSAs (2013–2017).

<sup>186</sup> Of the twenty-six jury selection proceedings I observed, four of them involved adjudicated *Batson* challenges.

<sup>187</sup> See e.g., Interviews with AL & AX, AUSAs (2013–2017).

<sup>188</sup> See e.g., Interviews with AY & BQ, AUSAs (2013–2017).

<sup>189</sup> Interview with AW, AUSA (2013–2017).

<sup>190</sup> See *id.*

behavior, and appearances.<sup>191</sup> Prosecutors were especially concerned about how their decisions to excuse particular jurors might affect others' perceptions of their motivations, biases, and trustworthiness.<sup>192</sup>

In some cases, prosecutors addressed this anxiety by refraining from using peremptory challenges altogether.<sup>193</sup> Instead, these prosecutors embraced an inclusive jury selection strategy—referred to by some as the “first twelve in the box” approach.<sup>194</sup> According to this logic,<sup>195</sup> prospective jurors' responses were viewed as irrelevant; from a juror's perspective, prosecutors thought, one critical test of the strength of a prosecutor's case was her willingness to empanel *any* eligible juror.<sup>196</sup> This was an approach that prosecutors perceived as conveying confidence in their cases while eliminating the possibility of having assessments of jurors scrutinized.<sup>197</sup>

Beyond the decision to exercise peremptory challenges in the first place, prosecutors registered concern when discussing the scrutiny they might receive for particular strike decisions.<sup>198</sup> Some prosecutors I spoke with were explicitly trained to understand they had a legal responsibility to keep considerations of race, gender, and (to a more ambiguous extent) religious affiliation out of their assessments of jurors.<sup>199</sup> Yet, in a low information environment,<sup>200</sup> the very characteristics that prosecutors were not permitted to consider became essential heuristics for record-keeping and discussions of prospective jurors.<sup>201</sup> In other

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<sup>191</sup> See, e.g., Interview with BW, AUSA (2013–2017) (describing a juror who told him at the conclusion of a trial that he should consider wearing socks that matched the color of his shirts).

<sup>192</sup> See, e.g., Interview with DL, AUSA (2013–2017).

<sup>193</sup> See Interview with CW, AUSA (2013–2017).

<sup>194</sup> See *id.* (likening the jury selection process to a “crapshoot”); see also Offit, *supra* note 168, at 178 (citing Interview with CH, AUSA (2013–2017) (commenting that the only outlier in preparation for a criminal case is the opinion of jurors: “We don't walk into court unless we know we have all the evidence . . . [T]he only variable—the only outlier—is the jury. You never know what a jury's going to care about”).

<sup>195</sup> See Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1144 (2003) (discussing the analogous context of prosecutorial exercises of discretion in charging decisions aimed at facilitating the re-trial of civil rights cases). A limitation of the instrumentalism that is part of explicitly “dispassionate and objective” approaches to discriminating litigants (or jurors) is its “lack[ of] candor” which “risks unfairness” to all. *Id.*

<sup>196</sup> See, e.g., Interviews with CN & CW, AUSAs (2013–2017).

<sup>197</sup> See, e.g., Interviews with AK & CD, AUSAs (2013–2017).

<sup>198</sup> See, e.g., Interview with DR, AUSA (2013–2017).

<sup>199</sup> This explicit training came in the form of a Continuing Legal Education presentation shortly before the start of the research period and produced written materials that were circulated throughout the office and available for retrieval through an online resource bank.

<sup>200</sup> See Offit, *supra* note 168, at 172 (noting prosecutors' consensus that due to broad judicial discretion to limit the quantity and substance of questions posed to jurors, limited information could be gleaned through the jury selection process).

<sup>201</sup> See, e.g., Interview with DN, AUSA (2013–2017).

words, inferences about jury psychology often rested on small aspects of jurors' identities.<sup>202</sup>

Still, though dependent on these heuristics, some prosecutors were so concerned that a *Batson* challenge would effectively brand them as racist in court that they developed fulsome lists of jurors' responses that could be used to justify disqualification.<sup>203</sup> This way, if prosecutors were later questioned about their decisions to peremptorily strike jurors, they would have unobjectionable explanations at hand.<sup>204</sup> A goal in taking notes on jurors, as one prosecutor explained it, was to "make sure you kept a good enough record so that if you got a challenge two years later on appeal you could say I didn't strike that person because of race or gender, but here are six facts I wrote down on paper that say why I didn't like a person."<sup>205</sup>

Other prosecutors felt that considerations of race were best avoided because they might obscure information about jurors that was more relevant to the case under consideration.<sup>206</sup> Once, a prosecutor shared an account of a case in which his trial partner was fixated on the possibility of a *Batson* challenge during their discussions about jury selection.<sup>207</sup> Both opposed striking one potential juror but for two very different reasons.<sup>208</sup> One prosecutor liked the fact that the juror was a nurse who likely possessed the expertise to "call bullshit" on the defendant, a doctor, and draw on her professional experience to substantiate her views.<sup>209</sup> By contrast, the trial partner felt the juror should not be stricken because she was a Hispanic woman who might empathize with the defendant.<sup>210</sup> For the second lawyer, the nurse's empanelment would not only be important to defense counsel because of her knowledge and perspective, but might precipitate a *Batson* challenge following her dismissal.<sup>211</sup>

If prosecutors feared being the target of a challenge, many also felt uneasy about targeting others.<sup>212</sup> One civil division prosecutor, who defended a federal agency in an employment discrimination case, for example, considered challenging the plaintiff for dismissing a Hispanic man from the jury pool.<sup>213</sup> He ultimately decided against it.<sup>214</sup> "If I had challenged him," the prosecutor recalled, "[the plaintiff] could have come up with a non-discriminatory reason—but would I offend the jury? Would they hear this? They *shouldn't* hear this—

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<sup>202</sup> See, e.g., Interview with BD, AUSA (2013–2017).

<sup>203</sup> Interviews with BV, DC, DE & DN, AUSAs (2013–2017).

<sup>204</sup> See, e.g., Interview with DR, AUSA (2013–2017).

<sup>205</sup> Interview with BV, AUSA (2013–2017).

<sup>206</sup> See, e.g., Interview with CM, AUSA (2013–2017).

<sup>207</sup> Interview with BG, AUSA (2013–2017).

<sup>208</sup> *Id.*

<sup>209</sup> See I-13 Participation in jury selection proceedings with DV & AD, AUSAs (2013–2017).

<sup>210</sup> Interview with BG, AUSA (2013–2017).

<sup>211</sup> *Id.*

<sup>212</sup> See, e.g., Interview with AY, AUSA (2013–2017).

<sup>213</sup> Interview with CV, AUSA (2013–2017).

<sup>214</sup> *Id.*

but who knows. And maybe the judge would not be happy with plaintiff's counsel."<sup>215</sup> In this case, the prosecutor viewed the process of raising a *Batson* challenge as so uncertain and unpredictable that he worried about the effect of such a challenge on the rest of the venire.<sup>216</sup>

Prosecutors' personal experiences of prejudice and racism also influenced the way they exercised *Batson* challenges in response to defense counsel's conduct.<sup>217</sup> One lawyer noted, for example, that as a prosecutor of color he was sensitive to the inclusivity of jury selection proceedings.<sup>218</sup> He explained that there were not many Black federal practitioners in the district.<sup>219</sup> As a result, he said he was all the more "cognizant of whether I use my strikes or they use theirs against people of color."<sup>220</sup> For this prosecutor, attention to the racial identities of colleagues, adversaries, and jurors permeated his experience practicing law.<sup>221</sup> He thus valued the opportunity *Batson* afforded him to hold defense attorneys accountable if he perceived them to use exclusionary tactics to influence the demographics of a jury panel.<sup>222</sup>

Other prosecutors refrained from striking prospective jurors out of concern that even an unfounded *Batson* challenge could be a source of acute embarrassment and discomfort.<sup>223</sup> Fear of being labeled as racist was a significant deterrent for such prosecutors, who chose to direct their attention to other aspects of trial preparation.<sup>224</sup> In some cases, concern about being viewed as racist prompted prosecutors to avoid challenging jurors altogether.<sup>225</sup> One prosecutor described leaving an office-wide CLE presentation on jury selection feeling so "scared" she might be challenged for dismissing a juror for "legal and appropriate" reasons that she did not want to risk confrontation.<sup>226</sup> She was therefore reluctant to challenge jurors at all.<sup>227</sup> Another prosecutor's self-consciousness left her feeling limited to striking White jurors when faced with a predominantly White venire.<sup>228</sup>

Prosecutors' self-conscious attention to the gender of prospective jurors, also prohibited under *Batson*, exhibited similar patterns.<sup>229</sup> On some occasions, prosecutors' concerns about the personal and reputational stakes of potential

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *See, e.g.*, Interview with AN, AUSA (2013–2017).

<sup>218</sup> Interview with CW, AUSA (2013–2017).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *See, e.g.*, Interview with CP, AUSA (2013–2017).

<sup>224</sup> *See, e.g.*, Interview with DN, AUSA (2013–2017).

<sup>225</sup> *Id.*

<sup>226</sup> *See* Interview with AO, AUSA (2013–2017).

<sup>227</sup> *See id.*

<sup>228</sup> *See* Interviews with CR & DK, AUSAs (2013–2017).

<sup>229</sup> *See, e.g.*, Interview with EO, AUSA (2013–2017).

*Batson* challenges led them to err on the side of deliberately excusing women.<sup>230</sup> This was true, for example, of a rape case I observed.<sup>231</sup> Concerned that all of the prospective jurors on their strike list were men, the trial team eagerly revisited the notes they had taken during voir dire in the hope of identifying women they could plausibly excuse.<sup>232</sup> They discovered that one female prospective juror had referred to herself as “kooky” and “out there”—and another noted that her daughter had been a victim of sexual assault.<sup>233</sup> Though both women had insisted that they could serve as fair and impartial jurors, the prosecutors decided to remove them rather than face a potential *Batson* challenge.<sup>234</sup> If not for their *Batson*-related concerns, a prosecutor explained, they would unquestionably have seated these prospective jurors, since neither of them had identified grounds for excusal at first glance.<sup>235</sup>

This approach, however, was not shared by all. Other prosecutors were skeptical of assessments that took a juror’s gender into account.<sup>236</sup> In some cases, their views stemmed from past trial experiences.<sup>237</sup> Citing a case in which a female plaintiff with breast cancer sued the government, for example, a Civil Division prosecutor explained that his “knee-jerk” reaction had been to avoid empaneling female jurors on the theory they might sympathize with the plaintiff.<sup>238</sup> Conversations with colleagues, however, convinced him that his intuitions were off-base under the circumstances.<sup>239</sup> He explained that others who had tried these types of cases felt they did “better” with female jurors, because women expected other women to “take some responsibility and look out for themselves” to a greater extent than a male juror would.<sup>240</sup> He therefore attributed his sense of the irrelevance of gender considerations to colleagues’ case experiences rather than concern about *Batson*.<sup>241</sup>

Another dominant explanation that prosecutors offered for considering the race or gender of a prospective juror was a strategic one: Recording these characteristics was essential to defending oneself in the adjudication of the second step of a *Batson* challenge, should it arise.<sup>242</sup> Prosecutors worried that if they *failed* to explicitly assign racial identities to jurors, they might unwittingly

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<sup>230</sup> See, e.g., Interview with BD, AUSA (2013–2017).

<sup>231</sup> See, e.g., Interviews with EN & EO, AUSAs (2013–2017).

<sup>232</sup> *Id.*

<sup>233</sup> See I-11 Participation in jury selection proceedings with DP & DQ, AUSAs (2013–2017).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See, e.g., Interviews with BB & BS, AUSAs (2013–2017).

<sup>237</sup> See Interview with BB, AUSA (2013–2017).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> See Melilli, *supra* note 23, at 447 (“The procedure for these challenges requires that the lawyer specify the reasons for the challenge, and that the trial judge ultimately rule upon the legitimacy of the challenge.”).

break the law if their decisions were challenged.<sup>243</sup> And the same might be true of judges whose anticipation of a possible appeal led them to pay special attention to—and often record—the racial identities of jurors they excused from their courtrooms.<sup>244</sup>

Despite succumbing to supervisors' and colleagues' pressure to preemptively classify prospective jurors along racial lines, some prosecutors still commented on the paradox of feeling analytically dependent on the very characteristics they were not legally meant to consider.<sup>245</sup> One prosecutor explained that “from a policy standpoint,” *Batson* reinforced the classifications it was designed to eliminate: “It’s supposed to prevent you from taking race into account,” he said, “but in fact makes you think of it more.”<sup>246</sup>

In this vein, several prosecutors noted that their familiarity with *Batson* made them only more attuned to race during jury selection.<sup>247</sup> Since jurors were not asked to share their own racial identities, these designations involved guesswork.<sup>248</sup> In many cases, prosecutors perceived a prospective juror’s race as ambiguous.<sup>249</sup> During jury selection proceedings in one case, for example, a prosecutor asked a colleague whether to identify a particular juror as Dominican.<sup>250</sup> In another case, a prosecutor commented that she was trying to locate references to a prospective juror who she recalled identifying as Hispanic.<sup>251</sup> The challenge of confidently assigning broad racial categories was compounded for prosecutors by the fact that some prospective jurors identified themselves as biracial.<sup>252</sup>

During jury selection in one criminal case, a prosecutor and her colleague disagreed about the appropriateness of recording racial information about prospective jurors.<sup>253</sup> The lead prosecutor insisted, like many of her colleagues, that it was essential to “keep track of race” as a *Batson* challenge contingency plan.<sup>254</sup> And in cases that involved written jury questionnaires, racial identities

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<sup>243</sup> See, e.g., Interviews with AC & DL, AUSAs (2013–2017).

<sup>244</sup> See, e.g., Interview with AM, AUSA (2013–2017); see also Interview with AI, AUSA (2013–2017) (noting that a judge assigned racial identities to each prospective juror on record during the adjudication of a *Batson* challenge).

<sup>245</sup> See Interview with AM, AUSA (2013–2017).

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., Interviews with AM & DL, AUSAs (2013–2017).

<sup>248</sup> *Id.*

<sup>249</sup> See, e.g., Interview with BQ, AUSA (2013–2017).

<sup>250</sup> See I-2 Participation in jury selection proceedings with AL & AX, AUSAs (2013–2017).

<sup>251</sup> See I-7 Participation in jury selection proceedings with BF, AUSA (2013–2017).

<sup>252</sup> See Emily Rose Margolis, *Color as a Batson Class in California*, 106 CALIF. L. REV. 2067, 2086–88 (2018) (noting the growing rate of biracial identification and the benefit that would be conferred by recognizing “color” rather than race as a class for the purposes of antidiscrimination law).

<sup>253</sup> Interviews with CR, DL & DN, AUSAs (2013–2017).

<sup>254</sup> See I-7 Participation in jury selection proceedings with BF, AUSA (2013–2017); see also Interviews with CR, DL & DN, AUSAs (2013–2017).

were sometimes associated with jurors in hindsight, after their follow-up questioning was complete.<sup>255</sup> After sharing a favorable assessment of a retired government employee whose questionnaire she reviewed, for example, a prosecutor flagged for her colleague that the juror was Black.<sup>256</sup> Another person who a prosecutor identified as a “favorite” potential juror was then identified as Black as well; in the event the prosecutor was accused of harboring racial animus in deciding to excuse one Black prospective juror, it was important to her that another Black juror be empaneled.<sup>257</sup>

In jury selection proceedings that involved questionnaires that trial teams could review and discuss in advance, the presumed racial identities of prospective jurors were appended to lists of issues flagged for follow-up in case these jurors were subject to future peremptory strikes.<sup>258</sup> In one case, a trial team struggled with the fact that a Black prospective juror commented during jury selection that she did not find children to be reliable witnesses.<sup>259</sup> After a supervisor told the trial team to anticipate a *Batson* challenge after striking any person of color, the juror’s responses to a number of other questions were revisited cautiously.<sup>260</sup> The trial team worried that even a legitimate source of concern about the juror at issue might not withstand a future *Batson* challenge and wondered if the juror’s troubling responses to other questions would aid their defense of such challenges.<sup>261</sup> Exasperated by this exercise, a member of the trial team lamented the fact that race should factor into their deliberations at all.<sup>262</sup> His colleague, however, urged caution, recognizing the seriousness of a challenge by defense counsel.<sup>263</sup>

Time and again, prosecutors found themselves weighing problematic juror responses against the possibility of a *Batson* challenge that would lead to the public and humiliating scrutiny of sufficiently thoughtful rationales for juror dismissals.<sup>264</sup> Overall, the empirical data here suggest two things. First, *Batson* affects trial processes, decision-making, and activities like note-taking by pushing prosecutors to consider whether questioning, striking, and justifications align with antidiscrimination principles.

Second, the efficacy of the *Batson* challenge is in large part a function of the perceived costs involved. On the one hand, prosecutors consider their in-court, case-specific reputations: Winning a case before a jury is much easier if

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<sup>255</sup> See, e.g., Interview with AY, AUSA (2013–2017).

<sup>256</sup> *Id.*

<sup>257</sup> See I-7 Participation in jury selection proceedings with BF, AUSA (2013–2017).

<sup>258</sup> See, e.g., Interview with AI, AUSA (2013–2017).

<sup>259</sup> See, e.g., Interviews with DN & EN, AUSAs (2013–2017).

<sup>260</sup> I-13 Participation in jury selection proceedings with DV & AD, AUSAs (2013–2017).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> See, e.g., Interview with BQ, AUSA (2013–2017).



the jury does not think you are racist or sexist.<sup>265</sup> On the other hand, prosecutors consider their professional reputations.<sup>266</sup> Beyond instrumental concern about the possibility of later appeal, the negative valence of racism and sexism in American society at-large, coupled with public scrutiny of exclusion at the hands of prosecutors, heightened Assistant U.S. Attorneys' desire to avoid patterns of professional behavior indicative of animus toward particular groups. A challenge, it seemed to many, was not just a procedural issue—it was a personal one.<sup>267</sup>

## 2. Race-Conscious Inclusion

To avoid the stigma associated with an accusation of harboring racial bias, a number of federal prosecutors made a concerted effort to empanel Black jurors and challenge White jurors whenever possible.<sup>268</sup> As a matter of intra-unit policy, one prosecutor recalled being told by a supervisor that if there was one Black prospective juror in the venire, prosecutors should refrain from excusing him or her in the absence of extenuating circumstances.<sup>269</sup> It struck this prosecutor as strange that his colleagues' approaches to jury selection appeared to necessitate racial distinctions rather than erase them.<sup>270</sup>

This strategy sometimes resulted in the empanelment of jurors whose responses during voir dire worried prosecutors.<sup>271</sup> This included a juror who later left the courtroom in the middle of a bank robbery trial without explanation.<sup>272</sup> In another case, it involved seating a juror who denied having negative feelings toward a law enforcement officer who killed a member of his family—a response the trial team found implausible.<sup>273</sup> For others, the race-consciousness introduced by concern about *Batson* challenges led them to seek Black jurors in prosecutions of Black defendants.<sup>274</sup>

A related consequence of this race-conscious orientation was prosecutors' willingness to dismiss otherwise eligible White prospective jurors who did not raise concern during jury selection.<sup>275</sup> This was true, for example, in the case of a man who commented during one-on-one questioning that he worried a prosecutor could manipulate a cooperating witness.<sup>276</sup> Here, the trial team

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<sup>265</sup> See, e.g., Interview with AG, AUSA (2013–2017).

<sup>266</sup> See, e.g., Interview with DH, AUSA (2013–2017).

<sup>267</sup> I-17 Participation in jury selection proceedings with AL & AX, AUSAs (2013–2017).

<sup>268</sup> I-12 Participation in jury selection proceedings with AI & AV, AUSAs (2013–2017).

<sup>269</sup> Interviews with CM & CP, AUSAs (2013–2017).

<sup>270</sup> *Id.*

<sup>271</sup> I-10 Participation in jury selection proceedings with EP & BI, AUSAs (2013–2017).

<sup>272</sup> Interview with CR, AUSA (2013–2017).

<sup>273</sup> Interview with DK, AUSA (2013–2017).

<sup>274</sup> I-9 Participation in jury selection proceedings with EO & EN, AUSAs (2013–2017); I-10 Participation in jury selection proceedings with EP & BI, AUSAs (2013–2017).

<sup>275</sup> See, e.g., Interview with CM, AUSA (2013–2017).

<sup>276</sup> I-10 Participation in jury selection proceedings with EP & BI, AUSAs (2013–2017).

expressed no qualms about quickly moving the juror “up” its strike list—noting defense counsel would be indifferent if the trial team “struck a White guy.”<sup>277</sup>

Prosecutors also explicitly referenced prospective jurors’ racial identities when revisiting notes to confirm they had been “consistent” in the way they discussed “analogous” jurors.<sup>278</sup> This included flagging Black and White jurors who said during voir dire that they had voted to acquit defendants in past cases to ensure that commensurate follow-up questions were asked of them.<sup>279</sup>

In some cases, prosecutors’ self-consciousness about potential *Batson* challenges prompted useful scrutiny of their own biases and preconceptions. Once, thinking about gender, a prosecutor said she regularly considered a prospective juror’s “gender combined with age.”<sup>280</sup> She worried that in cases with a “thirty to thirty-five-year-old male defendant of any race,” a young female juror might feel attracted to him and unduly sympathetic.<sup>281</sup> She explained that such defendants could appear to be the “strong, silent type—he’s a little risqué and a little interesting[,] and he’s a little cute sitting there.”<sup>282</sup> Under these circumstances, striking young women felt necessary to the prosecutor.<sup>283</sup> Other female prosecutors excused women from juries out of concern that such jurors might feel judgmental or competitive with them.<sup>284</sup> Where some prosecutors embraced *Batson*’s deterrent effect on impermissible considerations, others acknowledged the continuing impact of gender stereotypes on their thinking.<sup>285</sup>

Concern about potential *Batson* challenges also led prosecutors to consider whether race-based jury exclusion might be exacerbated by excusing jurors for having characteristics that could be viewed as “proxies” for race.<sup>286</sup> Prosecutors worried, for example, about the implications of a routine question that was asked of jurors in federal court related to whether they owned or rented their homes.<sup>287</sup> It struck some prosecutors as problematic that colleagues viewed homeowners as more likely than renters to condemn criminal activity that might adversely affect the value of their property and quality of their lives—suggesting they had a more significant stake in the safety of their communities.<sup>288</sup> If jurors’ responses to this question led to the dismissal of one or two Hispanic prospective jurors, one prosecutor explained, he expected to hear defense counsel accuse

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<sup>277</sup> I-10 Participation in jury selection proceedings with EP & BI, AUSAs (2013–2017).

<sup>278</sup> See, e.g., I-36 Participation in jury selection proceedings with DL, AUSA (2013–2017).

<sup>279</sup> *Id.*

<sup>280</sup> Interview with BD, AUSA (2013–2017).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> See I-34 Participation in jury selection proceedings with AI, AV & AV, AUSAs (2013–2017); see also Interview with BO, AUSA (2013–2017).

<sup>285</sup> See, e.g., Interview with DN, AUSA (2013–2017).

<sup>286</sup> See, e.g., Interview with CE, AUSA (2013–2017).

<sup>287</sup> Cf. Interview with DD, AUSA (2013–2017).

<sup>288</sup> See, e.g., Interview with BD, AUSA (2013–2017).

him of “coming up with excuses” to empanel White jurors who were more likely to own their apartments or houses.<sup>289</sup> Another prosecutor struggled with his inclination to empanel jurors who said they trusted police officers in light of his understanding of the relationship between race, mass incarceration, and resultant skepticism about law enforcement.<sup>290</sup> Everything he “knew from data and statistics,” he explained, he was not “allowed to consider and take into account.”<sup>291</sup>

During jury selection proceedings in a white-collar case, defense attorneys challenged prosecutors for dismissing an unemployed female juror who stated that she “did not have hobbies” and could not remember the name of the company for which her mother manufactured goods in a factory.<sup>292</sup> The defense attorney argued that the prosecutors’ actual cause for concern was the juror’s ethnic background.<sup>293</sup> The government’s stated rationales, in his view, functioned as a pretext for a characteristic that could not be considered.<sup>294</sup> Because *Batson* did not protect against exclusion on the basis of socio-economic status, the prospective juror’s low-wage job and lack of discretionary time fueled a challenge on the grounds that she had actually been dismissed because of her race.<sup>295</sup> Though numerous jurors presented themselves as unemployed, underemployed, or subject to low-wage, unpredictable work schedules, racial considerations—and not those related to socio-economic status—remained dominant in prosecutors’ preparation and discussion.<sup>296</sup>

In some cases, prosecutors’ apprehension about potential challenges led them to misapply the law by preempting judges’ determinations of prima facie cases of discrimination with rationales for their peremptory strikes.<sup>297</sup> Though the adjudication of a *Batson* challenge proceeded in three steps, with prosecutors only offering explanations for strikes after judges had determined a case for discrimination had effectively been made, the gap between law and practice was in full display during jury selection.<sup>298</sup> Prosecutors were sometimes so distressed by *Batson* challenges that they rushed to offer “neutral” reasons for their strikes before district court judges had determined that the first of *Batson*’s three steps had been satisfied.<sup>299</sup> One prosecutor speculated that her colleagues’

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<sup>289</sup> Interview with CM, AUSA (2013–2017).

<sup>290</sup> *Id.*

<sup>291</sup> Interview with CP, AUSA (2013–2017).

<sup>292</sup> I-17 Participation in jury selection proceedings with AL & AX, AUSAs (2013–2017).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> I-42 Participation in jury selection proceedings with AY & BQ, AUSAs (2013–2017).

<sup>298</sup> *Id.*

<sup>299</sup> I-17 Participation in jury selection proceedings with AL & AX, AUSAs (2013–2017); I-31 Participation in jury selection proceedings with CD, AUSA (2013–2017); I-20 Participation in jury selection proceedings with DL & DT, AUSAs (2013–2017).

eagerness to prematurely offer reasons for dismissing jurors stemmed from the unsettling experience of having their integrity questioned.<sup>300</sup> When “called a racist,” she explained, a prosecutor instinctively felt compelled to defend herself.<sup>301</sup> Other prosecutors noted feeling “indignant” and “emotional” when challenged.<sup>302</sup>

Prosecutors’ consideration of prospective jurors’ racial identities had concrete effects on how they empaneled juries, though not in a uniform or predictable manner. For some, attention to race expressed itself in the inclusion of supplemental voir dire questions designed to root out prejudicial views among prospective jurors.<sup>303</sup> Though judges and defense attorneys did not always honor these requests, nearly all of the prosecutors I interviewed who prepared for voir dire in criminal cases requested that jurors be asked whether they had personal feelings about members of any ethnic or racial group (or some variation) that would make it difficult for them to be fair.<sup>304</sup> Under these circumstances, and citing *Batson*, a prosecutor expressed frustration that jury selection—which was supposed to be “race-neutral”—nonetheless featured an explicit question about race.<sup>305</sup> “Internally I wanted to fight it,” the prosecutor said, “but I took a step back and we ultimately let the judge ask the question.”<sup>306</sup> He thus resigned himself to this counterintuitive mode of inquiry, acknowledging that he would not want to see a defendant convicted on the basis of a juror’s prejudice rather than on the strength of the case.<sup>307</sup>

Other prosecutors welcomed the opportunity to discuss racial issues in the open. One prosecutor, for example, said that to the extent that antidiscrimination norms were reinforced during voir dire, jurors might be less likely to tolerate racist sentiments that could arise during their deliberations.<sup>308</sup> Still others were eager to elicit evidence of jurors’ prejudicial thinking toward prosecutors.<sup>309</sup> Since lawyers were no less vulnerable to racist ideation, prosecutors worried they might be targets of discrimination themselves.<sup>310</sup> When a prospective juror responded affirmatively to a question about racial prejudice, for example, a prosecutor was shocked: “Is she serious? She’s got to be kidding. Well that isn’t good for me. The judge excused her because she doesn’t like Black people!”<sup>311</sup> In another case, a prosecutor’s observation that a prospective juror immigrated

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<sup>300</sup> See, e.g., Interview with DL, AUSA (2013–2017).

<sup>301</sup> I-9 Participation in jury selection proceedings with EO & EN, AUSAs (2013–2017); I-10 Participation in jury selection proceedings with EP & BI, AUSAs (2013–2017).

<sup>302</sup> Interview with CM, AUSA (2013–2017).

<sup>303</sup> See, e.g., Interview with AN, AUSA (2013–2017).

<sup>304</sup> See generally Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843 (2015).

<sup>305</sup> Interview with CW, AUSA (2013–2017).

<sup>306</sup> *Id.*

<sup>307</sup> Interview with CW, AUSA (2013–2017).

<sup>308</sup> Interview with BN, AUSA (2013–2017).

<sup>309</sup> Interviews with AN & CW, AUSAs (2013).

<sup>310</sup> *Id.*

<sup>311</sup> Interviews with DT & AN, AUSAs (2013–2017).

from China precipitated a joking comment from a member of the trial team that, as a Chinese American prosecutor, he felt confident “his people” would be loyal to him.<sup>312</sup>

These findings, on the link between race-consciousness and professional and personal considerations, corroborate conclusions drawn elsewhere. One interview-based study, for example, noted the extent to which prosecutors internalized anti-racist norms in their approaches to voir dire<sup>313</sup> and that even the *possibility* of a *Batson* challenge had an “educating effect” on lawyers’ thinking.<sup>314</sup> These authors also highlighted the stigmatizing potential of the law, describing one prosecutor’s “depth of feelings on the issue” in the following terms:

[A] prosecutor reported being so upset at a lengthy *Batson* hearing out of the jury’s presence as to ask, “Judge, are you going to brand me as a racist because I exercised a peremptory?” and was mildly rebuked by the court. (Resp. #49, Pros.) “I try not to—not just because of *Batson*—I try not to let race influence my decision about jurors.” (Resp. #13, Pros.) One defense attorney did not recall a prosecutor ever removing an African American juror on voir dire. (Resp. #12, Crim. Def.)<sup>315</sup>

This Article, which draws together interview and observational data, shows what this “educating” effect entails and compels in practice. The evidence indicates an explicit link between considering *Batson* (challenges, violations) and a race-conscious approach to jury selection. This race-conscious approach animates various behaviors, including the scrupulous collection of demographic data and decisions to empanel some jurors over others. At the same time, one cannot rule out the possibility that race-consciousness has allowed some prosecutors, who aim to discriminate, to engage in exclusionary empanelment, albeit with the cover afforded by an apparent sensitivity to inclusivity.

In any case, empirical legal research on criminal jury selection reveals the striking extent to which *Batson* features as a key element in the calculus for striking or not striking jurors. To understand why this is, however, requires that one consider the actual adjudication of *Batson* violations. If prosecutors are making race central to their evaluations of jurors, it is, as we have seen, because of the dominant techniques courts use to determine if a juror has been the victim of race-based exclusion.

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<sup>312</sup>I-42 Participation in jury selection proceedings with AY & BQ, AUSAs (2013–2017).

<sup>313</sup>See Zalman & Tsoudis, *supra* note 17, at 369–71.

<sup>314</sup>*Id.* at 389. The authors of this study interviewed both criminal and civil litigators for a sample that included attorneys drawn from forty-four trials that took place during consecutive months during the late 1990s. *Id.* at 187.

<sup>315</sup>*Id.* at 369.

#### IV. BRINGING EMPIRICAL INSIGHTS TO *BATSON* REFORM

The story of *Batson* has been one of expansion—a fact that is at times underappreciated in scholarship that focuses primarily on the framework’s limitations.<sup>316</sup> From its roots in the criminal trial, the *Batson* framework has been extended to civil trials<sup>317</sup> and to defense counsel.<sup>318</sup> There has also been an expansion of the demographic groups afforded protection against discriminatory empanelment. In addition to exclusion based on race, dismissal based on gender<sup>319</sup> and ethnicity<sup>320</sup> is now also prohibited.<sup>321</sup>

Yet, as a burgeoning empirical literature shows, the struggle to bring our jury system into alignment with its constitutional blueprint remains unfinished.<sup>322</sup> The diversity of American jury pools often does not translate to diverse, representative juries.<sup>323</sup> This is a problem that requires attention and continued reform.

##### A. *Persistence of the Problem*

Judges and prosecutors disproportionately excuse Black jurors, while defense attorneys disproportionately excuse White jurors.<sup>324</sup> The persistence of this pattern has led some legal scholars and practitioners to accept not only that

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<sup>316</sup> See, e.g., Marder, *supra* note 48, at 1589–92.

<sup>317</sup> See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (holding that the race-based exclusion of prospective jurors is impermissible in civil trials).

<sup>318</sup> See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

<sup>319</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that challenging a prospective juror on the basis of that juror’s gender is unconstitutional).

<sup>320</sup> See *Hernandez v. New York*, 500 U.S. 352, 371–72 (1991) (Kennedy, J., plurality opinion) (expanding *Batson* protections to discrimination against Hispanic and Latino prospective jurors—referred to interchangeably in the opinion).

<sup>321</sup> Depending on one’s jurisdiction, exclusion on the basis of sexual orientation or religious affiliation may also be prohibited. See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014) (holding that *Batson* protects against discrimination based on the sexual orientation of a prospective juror). For a discussion of state cases prohibiting the exclusion of prospective jurors based on religion, see generally Caroline R. Krivacka & Paul D. Krivacka, *Use of Peremptory Challenges to Exclude Persons from Criminal Jury Based on Religious Affiliation—Post-Batson State Cases*, 63 A.L.R. 5th 375 (1998).

<sup>322</sup> See *infra* Part IV.A.

<sup>323</sup> See *infra* Part IV.A.

<sup>324</sup> Wright et al., *supra* note 3, at 1426 (documenting, in a North Carolina state court case study, that judges and prosecutors removed nonwhite jurors at higher rates than they removed White jurors). They also noted that “defense attorneys *nearly* rebalanced the levels of jury service among races by removing more jurors than the judges or the prosecutors did and by using their peremptory challenges more often against White jurors than they did against black and other nonwhite jurors.” *Id.*

race-neutrality is an unattainable mandate, but that race-based exclusion is an inescapable feature of legal strategy in the criminal justice system.<sup>325</sup>

This conclusion is founded on mounting evidence of continued juror discrimination and the perpetuation of exclusionary practices aimed at empaneling disproportionately White juries.<sup>326</sup> This evidence is furnished in various ways. One approach elucidates patterns of racial bias in prosecutors' peremptory strike decisions by examining the demographics of stricken and empaneled juries.<sup>327</sup> This research relies on mixed methods.<sup>328</sup> In one case, for instance, scholars used publicly available court data, transcript analysis, and interviews with former jurors to uncover the persistence of jury exclusion in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee.<sup>329</sup> Strikingly, the study found that between 2005 and 2009, prosecutors used peremptory challenges to remove 80% of qualified Black prospective jurors from capital case venires in Houston County, Alabama.<sup>330</sup> In Jefferson County, Louisiana, prosecutors struck Black prospective jurors from panels more than three times as often as they struck White prospective jurors in 2003.<sup>331</sup>

Comparable strike patterns have been found in North Carolina. For example, a study of prosecutors' peremptory strikes in capital cases between 1990 and 2010 revealed that prosecutors removed 52.6% of eligible Black jurors

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<sup>325</sup> See, e.g., *Flowers v. Mississippi*, 139 S.Ct. 2228, 2271 (2019) (Thomas, J., dissenting) (“[He] would return to [the Court’s] pre-*Batson* understanding—that race matters in the courtroom—and thereby return to litigants one of the most important tools to combat prejudice in their cases.”); see also Abbe Smith, “Nice Work If You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 *FORDHAM L. REV.* 523, 528–31 (1998) (defending the ability of defense attorneys to consider the racial makeup of the jury as one, among other, strategic considerations aimed at zealously advocating for their clients).

<sup>326</sup> See Marder, *supra* note 48, at 1588–91 (arguing that among *Batson*’s shortcomings, lawyers are able to circumvent *Batson* challenges by offering false or pretextual rationales for excusing jurors, trial judges are reluctant to find that *Batson* has been violated, and appellate courts are deferential to trial courts when reviewing challenges).

<sup>327</sup> See, e.g., Wright et al., *supra* note 3, at 1423–29.

<sup>328</sup> Compare *id.* at 1425–29 (utilizing primarily data analysis), with EQUAL JUST. INITIATIVE, *supra* note 153, at 28 (combining data analysis with interviews to examine the impact of exclusion).

<sup>329</sup> See generally EQUAL JUST. INITIATIVE, *supra* note 153. In the case of Florida, research has also examined the relationship between the racial composition of juries and trial outcomes between 2000 and 2010. See Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 *Q.J. ECON.* 1017, 1019, 1032–40 (2012).

<sup>330</sup> EQUAL JUST. INITIATIVE, *supra* note 153, at 14.

<sup>331</sup> Two non-capital studies analyze single parishes in Louisiana: Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 *LA. L. REV.* 361, 387 (2012) (analyzing Jefferson Parish, Louisiana), and URSULA NOYE, REPRIEVE AUSTL., *BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE CADDO PARISH DISTRICT ATTORNEY’S OFFICE 9* (Aug. 2015), <http://www.criiasupr.org/multimedia/documents/Blackstrikes%20Caddo%20Parish%20August%202015.pdf> [<https://perma.cc/SHA5-EY5M>].

and only 25.7% of other eligible jurors.<sup>332</sup> In a different case study of non-capital felony trials in North Carolina, researchers demonstrated that although Black prospective jurors constituted approximately one third of the venire, prosecutors used 60% of their peremptory strikes to remove them.<sup>333</sup>

It is critical to note that while much research has been done in the American South, these patterns are not geographically isolated. Other studies have arrived at similar conclusions with respect to jury selection practices in Los Angeles County (California), Maricopa County (Arizona), the Bronx (New York), Washington, D.C.,<sup>334</sup> and North Carolina.<sup>335</sup> Further, the pattern is not restricted to state courts. In fact, the aforementioned findings are consistent with those of a recent review of every race-based *Batson* challenge in federal court between 2000 and 2009.<sup>336</sup>

Explanations for the persistence of race-based exclusion have focused on the ease with which prosecutors motivated by racial animus can use the cover afforded by peremptory challenges to engage in exclusionary voir dire practices.<sup>337</sup> This is made possible, in part, by limited guidance on how to draw the line between “neutral” and pretextual rationales for excusing jurors if an attorney’s reasoning appears to be accurate and consistently applied to others in a jury pool.<sup>338</sup> Increasingly, it is clear that whatever the virtues of peremptory challenges, which permit lawyers to react to “unaccountable prejudices” based

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<sup>332</sup> Pollitt & Warren, *supra* note 96, at 1963–64.

<sup>333</sup> Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 698–99 (1999) (presenting an empirical case study of jury selection in a North Carolina county).

<sup>334</sup> See Jee-Yeon K. Lehmann & Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences* 9 (June 27, 2013) (unpublished manuscript) (available at [https://www.uh.edu/~jlehman2/papers/lehmann\\_smith\\_jurycomposition.pdf](https://www.uh.edu/~jlehman2/papers/lehmann_smith_jurycomposition.pdf) [<https://perma.cc/853N-BKPT>]).

<sup>335</sup> See Rose, *supra* note 333, at 699 (analyzing non-capital felony criminal jury trials in North Carolina and finding that prosecutors and defense attorneys were more likely to strike African American and White jurors, respectively). See generally Wright et al., *supra* note 3.

<sup>336</sup> Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare more than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092, 1102 (2011) (finding that “in a broad array of cases, as exemplified by *Hamilton* and *Cook*, attorneys articulate and judges accept ‘race-neutral’ explanations for peremptory strikes that either highly correlate with race or are silly, trivial, or irrelevant to the case”).

<sup>337</sup> See, e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234–35 (2019) (holding that Mississippi District Attorney Doug Evans purposefully excluded Black prospective jurors during voir dire in the capital prosecution of a Black defendant); Marder, *supra* note 48, at 1588–91 (noting the ease with which prosecutors can justify the disparate exclusion of Black prospective jurors during voir dire).

<sup>338</sup> See Melilli, *supra* note 23, at 489 (noting the extent to which peremptory strike rationales such as assertions that prospective jurors are “‘timid,’ create an ‘unfavorable impression,’ ‘answered no voir dire questions,’ are ‘assertive,’ are ‘liberal or lenient,’ are ‘eager to serve’ or are ‘emotional’” are subjective assessments that would be unlikely to justify a cause challenge).



on even “bare looks and gestures,”<sup>339</sup> they afford lawyers a form of opaque discretion that makes them susceptible to abuse.<sup>340</sup>

As this shows, empirical scholarship has established that the *Batson* framework is not immune to exploitation by lawyers.<sup>341</sup> An additional constraint is imposed by the low frequency with which *Batson* challenges prevail at trial<sup>342</sup> and on appeal.<sup>343</sup> One study of U.S. court of appeals cases between 2002 and 2010, for example, found that prosecutors attempted to strike Black prospective jurors in close to 90% of the 184 cases examined.<sup>344</sup> The study also found that those who appealed the discriminatory use of preemptory strikes succeeded in their challenges in only 12.3% of cases.<sup>345</sup> Litigants tended to prevail only when there was clear evidence that Black jurors who were stricken shared characteristics in common with White jurors who were empaneled—necessitating the comparative juror analysis described in Part II.<sup>346</sup>

Empirical legal research has largely confirmed Justice Marshall’s prediction that the *Batson* doctrine would do little, as a procedural matter, to nullify the prejudicial potential of preemptory challenges.<sup>347</sup> Yet ethnographic research alongside federal prosecutors demonstrates that *Batson*’s impact on legal

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<sup>339</sup> *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)).

<sup>340</sup> *See J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 129 (1994) (prohibiting sex-based discrimination during jury selection); *Batson v. Kentucky*, 476 U.S. 79, 83, 86 (1986) (prohibiting race-based discrimination during jury selection).

<sup>341</sup> *See, e.g., Bellin & Semitsu, supra* note 336, at 1102; *Rose, supra* note 333, at 699; *Wright et al., supra* note 3, at 1425–29.

<sup>342</sup> *See, e.g., Pollitt & Warren, supra* note 332, at 1959 (showing that in the three decades after *Batson* was decided, the North Carolina Supreme Court never found that the challenge of a minority juror was discriminatory); *see also* Eric N. Einhorn, Note, *Batson v. Kentucky and J.E.B. v. Alabama ex rel. T.B.: Is the Preemptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 189–94 (1994) (noting that of 113 cases addressing this issue, federal appellate courts found race-neutral explanations under *Batson* sufficient in all but five cases). In practice, appellate courts usually deferred to trial court judges’ rulings on claims of jury exclusion. *Id.* at 189.

<sup>343</sup> *See Marder, supra* note 48, at 1593 (noting the Seventh Circuit’s practice of deferring to the district court judge in an overwhelming majority of *Batson* appeals between 1986 and 2005).

<sup>344</sup> *Gabbidon et al., supra* note 26, at 63; *see, e.g., United States v. Petras*, 879 F.3d 155, 163 (5th Cir. 2018) (referencing *United States v. Williams*, 264 F.3d 561, 572 (5th Cir. 2001)) (“Because the trial judge is better able to consider and evaluate the [shared characteristics], this is precisely the situation in which we defer to the court’s well-considered factual determination.”); *see also Bellin & Semitsu, supra* note 336, at 1105–06 (describing the ease with which one prosecutor provided a combination of race-neutral explanations for striking a potential Black juror).

<sup>345</sup> *Gabbidon et al., supra* note 26, at 64.

<sup>346</sup> *Id.* at 66.

<sup>347</sup> *See Batson v. Kentucky*, 476 U.S. 79, 102–103 (1986) (arguing that the only way to rid the jury system of race-based discrimination is to abolish the preemptory challenge).

strategy and ethics is understated in the literature.<sup>348</sup> There is also mounting evidence that the peremptory challenge's impact on jury demographics is overstated.<sup>349</sup> Though ably critiqued, the *Batson* framework can, and should, be reformed to deter race-based exclusion. Already, progress is being made.

### B. Directions for Reform

Concern about the impact of attorney bias on voir dire has begun to spur state-level reform aimed at easing the burden faced by those who raise *Batson* challenges. The most significant and decisive step toward strengthening *Batson*'s effectiveness as a remedy for exclusion was implemented by the Supreme Court of Washington in *State v. Jefferson*, 429 P.3d 467 (2018), an attempted murder, assault, and gun possession prosecution.<sup>350</sup> During voir dire in this case, the state used a peremptory strike to remove the single remaining Black prospective juror—"Juror 10"—on the grounds that the juror i) felt jury selection was a waste of time, ii) was familiar with the film "12 Angry Men," and iii) indicated that extraneous information entered deliberations while serving as a juror in the past.<sup>351</sup> As part of the third step of the *Batson* test, the court held that the trial court was not "clearly erroneous" in finding these rationales "race-neutral" and therefore not indicative of purposeful discrimination on the part of the state.<sup>352</sup>

But the court was dissatisfied. Citing *Batson*'s documented limitations,<sup>353</sup> including those noted in the last section, *Jefferson* adopted a new rule (General Rule 37 or GR37) and framework for discerning litigant bias.<sup>354</sup> Among the innovations of GR37 was the substitution of subjective assessments of purposeful discrimination for consideration of how an "objective observer could view race or ethnicity as a factor in the use of the peremptory challenge" during the adjudication of a *Batson* challenge.<sup>355</sup> Moreover, the objective observer imagined by the rule would be someone trained in the prevalence of "implicit,

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<sup>348</sup> See, e.g., Laura I. Appleman, *Reports of Batson's Death Have Been Greatly Exaggerated: How the Batson Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607, 608 (2005).

<sup>349</sup> See Craft, *supra* note 100; see also Frampton, *supra* note 20, at 788.

<sup>350</sup> See generally *State v. Jefferson*, 429 P.3d 467 (Wash. 2018).

<sup>351</sup> *Id.* at 471.

<sup>352</sup> *Id.* at 472.

<sup>353</sup> See, e.g., *City of Seattle v. Erickson*, 398 P.3d 1124, 1131 (Wash. 2017); *State v. Saintcalle*, 309 P.3d 326, 334–36 (Wash. 2013) (subsequent history omitted).

<sup>354</sup> *Jefferson*, 429 P.3d at 479. GR37 was the product of the collaborative labor of a Workgroup convened by the Supreme Court of Washington, drawing on input from the American Civil Liberties Union (ACLU) and Washington Association of the Prosecuting Attorney (WAPA). See PROPOSED NEW GR 37 JURY SELECTION WORKGROUP, FINAL REPORT (Feb. 2018), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf> [<https://perma.cc/29CU-FYUN>] [hereinafter WORKGROUP FINAL REPORT].

<sup>355</sup> WASH. CT. GEN. R. 37(e) (emphasis added).

unconscious, and institutional” bias, able to look beneath the surface of apparently neutral strike rationales.<sup>356</sup>

Though GR37 did not apply to *Jefferson*’s prosecution, it came into effect during the case’s appeal.<sup>357</sup> Applying the rule’s new and objective evaluative criteria for detecting illegal discrimination, the Supreme Court held that an observer *could* find that the “neutral” reasons advanced for Juror 10’s removal raised an “inference of explicit bias.”<sup>358</sup> Following *Jefferson*, GR37 was applied in a Washington State case in which a juror alleged that she was taunted by fellow jurors during deliberations for being the sole hold-out in a homicide prosecution on account of her race.<sup>359</sup> In asserting that the trial court failed to conduct an appropriate inquiry into the juror’s allegations of “differential treatment,” the Court reasoned that the nature of implicit bias was such that plausible “neutral” explanations could always be offered, demanding the more searching inquiry that would come from an evidentiary hearing before deciding whether to grant the defendant’s motion for a new trial.<sup>360</sup> Building on GR37’s expansion of judges’ evidentiary resources for ruling on *Batson* challenges, courts in California,<sup>361</sup> Oregon,<sup>362</sup> and Connecticut<sup>363</sup> may follow suit in their own assessments of the doctrine.

Another significant contribution of GR37 is its delineation of characteristics and dispositions that prosecutors are prohibited from referencing as grounds for strikes due to their historical association with racial exclusion.<sup>364</sup> This includes, for example, prospective jurors’ impressions of—or past contact with—law enforcement officers.<sup>365</sup> Recognizing the empirical reality of Black citizens’ disparate treatment by the criminal justice system, the Supreme Court of Massachusetts took the similarly novel step of ruling that even in the cause

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<sup>356</sup> *Id.* at 37(f) (“For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”).

<sup>357</sup> *State v. Jefferson*, 429 P.3d 467, 478 (Wash. 2018).

<sup>358</sup> *Id.* at 480 (noting that the reasons advanced for striking Juror 10 “lack[ed] support in the record” and “reflect[ed] differential treatment of the sole African-American juror, and hence, they ‘could’ support an inference of implicit bias”).

<sup>359</sup> *State v. Berhe*, 444 P.3d 1172, 1176, 1178 (Wash. 2019) (vacating the trial court’s order denying defendant’s motion for a new trial and remanding, because the trial court failed to adequately conduct and oversee an inquiry into the allegation that racial bias was a factor in the jury’s verdict).

<sup>360</sup> *Id.* at 1182 (“When determining whether there has been a prima facie showing of implicit racial bias, courts cannot base their decisions on whether there are equally plausible, race-neutral explanations. There will almost always be equally plausible, race-neutral explanations because that is precisely how implicit racial bias operates.”).

<sup>361</sup> *See, e.g., People v. Bryant*, 253 Cal. Rptr. 3d 289, 306–07 (Cal. Ct. App. 2019) (Humes, P.J., concurring).

<sup>362</sup> *See, e.g., State v. Curry*, 447 P.3d 7, 10, 14 (Or. Ct. App. 2019), *adhered to on reconsideration* 302 Or. App. 640 (Or. Ct. App. 2020).

<sup>363</sup> *See, e.g., State v. Holmes*, 221 A.3d 407, 430 (Conn. 2019).

<sup>364</sup> *See* WASH. CT. GEN. R. 37(h).

<sup>365</sup> *See id.*

challenge phase of jury selection proceedings, a judge cannot expect jurors to abandon attitudes toward law enforcement officers born of their life experience.<sup>366</sup>

Courts that have adopted GR37 have emphasized the personal and professional difficulty faced by the lawyer accused of purposeful (and illegal) discrimination.<sup>367</sup> The adoption of a “could view” standard, in contrast, “softens the accusatory edge of the objection” by permitting a judge to deny a party’s peremptory challenge without suggesting that illegal racial considerations motivated the offending strike.<sup>368</sup>

The rule also encourages parties to object to suspect peremptory strikes—and thus deliberate about the circumstances of an otherwise eligible juror’s dismissal—before the stricken juror is definitively excused from service.<sup>369</sup> This recognition of social discrimination as a dynamic and, indeed, reversible practice in the context of jury selection empowers judges to not only deter juror exclusion through post-hoc rulings for which there may be limited remedies,<sup>370</sup> but to rectify injustice in real time.

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<sup>366</sup> See *Commonwealth v. Williams*, 116 N.E.3d 609, 617 (Mass. 2019) (“[A] prospective juror may not be excused for cause merely because he or she believes that African-American males receive disparate treatment in the criminal justice system.”).

<sup>367</sup> See WORKGROUP FINAL REPORT, *supra* note 354, at app. 2 (arguing that to endorse a “purposeful discrimination” standard such as that advanced by *Batson* is tantamount to “compel[ling] a judge to endorse ‘an accusation of deceit or racism’ in order to sustain a challenge to a peremptory strike”) (quoting *State v. Saintcalle*, 309 P.3d 326, 338 (Wash. 2013)).

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 4.

<sup>370</sup> See *State v. Gilmore*, 511 A.2d 1150, 1166–69 (N.J. 1986) (in which the Supreme Court of New Jersey offered a single, bright-line remedy for juror exclusion that entailed dismissing all remaining jurors in the venire and summoning a new group so that the jury selection process could begin again). This approach was criticized and modified in New Jersey by *State v. Andrews*, 78 A.3d 971, 978–79 (N.J. 2013), which provided a series of available *Batson* remedies. In addition to allowing the parties to restart the jury selection process, judges could allow an offending party to forfeit one or more peremptory challenges, grant the offended party additional peremptory challenges, or return wrongfully excused citizens to the jury box. *Id.* at 980–84. Finding this more flexible approach to remediating *Batson* violations compelling, some state and district courts have begun following suit in the interest of offering judges freedom and discretion to address jury exclusion in the context of particular proceedings. See, e.g., *Moore v. Schweitzer*, No. 3:17-CV-22, 2017 WL 386832, at \*3 (S.D. Ohio Jan. 27, 2017) (concluding that “a bright line, while perhaps helpful to trial courts, is not appropriate under *Batson* and its progeny”) (subsequent history omitted); *State v. Urrea*, 421 P.3d 153, 156 (Ariz. 2018) (“From *Batson*’s language we derive three inferences. First, in declining to express which option was ‘more appropriate,’ the Court implied that either was ‘appropriate.’ Second, the appropriate remedy may depend on the circumstances of a ‘particular case.’ Finally, the restoration option contemplates that the wrongfully excluded jurors will be ‘reinstated on the venire.’”) (citations omitted); *State v. Moore*, 30 N.E.3d 988, 996 (Ohio Ct. App. 2015) (concluding that “it was within the trial court’s discretion to determine, based on the circumstances before it, whether the peremptory challenge that was invalidated under *Batson* was forfeited or, alternatively, the State could re-exercise the challenge, provided that it does not exercise it in a discriminatory fashion”).

In light of the findings presented in Part III of this article, GR37 is likely to impact prosecutors' behavior and decision-making during jury selection in unpredictable ways.<sup>371</sup> Prosecutors concerned primarily with the stigma associated with an adjudicated violation, for example, will be faced with a new tension. On the one hand, GR37's prohibition of certain stereotypes of racist origin may lead to a greater number of *Batson* challenges surviving the doctrine's "third step"; rationales once understood as "neutral" or plausibly innocuous, as in the *Jefferson* case, may be deemed racist under the new rule.<sup>372</sup> Prosecutors who view the rarity of successful *Batson* challenges as reason to question their relevance may alter their behavior if an effect of GR37 is to make challenges more prevalent and easily won. This development could amplify *Batson*'s deterrent potential by bringing the stakes of violations into view.

The rule's reference to "implicit, institutional, and unconscious"<sup>373</sup> bias may nevertheless undercut *Batson*'s deterrent effect on those lawyers primarily concerned with the professional and reputational harm of a challenge.<sup>374</sup> To the extent that conceptions of bias as "implicit" or "unconscious" absolve individuals of feeling responsible for the disparate effects of their conduct,<sup>375</sup> the doctrine's tone of moral condemnation may be blunted. This could diminish the likelihood that a lawyer thinks about her strike decisions in racialized or gendered terms with the aim of empaneling representative juries.

As inquiries into prosecutors' actual or apparent motivations for striking jurors continue to face scrutiny along comparative lines, *Batson* adjudication may bring another welcome, if unintended, consequence. To an increasing extent, judges will need to be watchful of their own rationales for excusing jurors during the "cause challenge" phase of jury selection proceedings. Insofar as troubling experiences with law enforcement index race, for example, they will no longer offer an irreproachable basis for a juror's dismissal. The result will be more juries composed of individuals whose life experiences reflect that of a broader and more diverse public.

Overall, for a rule such as GR37 to chart a path forward for *Batson*, it must be tethered to the empirical reality of prosecutorial decision-making and practice. Effective antidiscrimination law governing the jury system does not necessitate the erasure of race from jury selection<sup>376</sup>—and in fact, striving to

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<sup>371</sup> See Annie Sloan, "What to Do about *Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection, 108 CALIF. L. REV. 233, 255 (2020).

<sup>372</sup> *Id.* at 254, 259.

<sup>373</sup> WASH. CT. GEN. R. 37(f).

<sup>374</sup> Sloan, *supra* note 371, at 236, 259.

<sup>375</sup> Tryon P. Woods, *The Implicit Bias of Implicit Bias Theory*, 10 DREXEL L. REV. 631, 641–42 (2018) (critiquing implicit bias theory as rooted in the notion that racist ideation is the product of an erroneous cognitive process for which White people can be absolved, rather than "situated in the historically entrenched hierarchy of racial regime").

<sup>376</sup> Among the "best practices" suggested, but ultimately not endorsed by the GR37 Workgroup, were measures that sought to prevent attorneys from learning or inquiring about a prospective juror's race. See WORKGROUP FINAL REPORT, *supra* note 356, at app. 2.

achieve this erasure in practice risks privileging superficial changes over much-needed structural transformation.<sup>377</sup>

Building on advances already reflected in the adoption of GR37, it is instructive to consider novel reforms that will propel the *Batson* doctrine forward. The previously described link between prosecutors' perceptions of the *Batson* challenge and their race-conscious effort to empanel inclusive juries suggests several reforms that might strengthen and enhance the current framework's deterrent impact and potential.

First, building on GR37, courts should emphasize that various non-racial experiences and characteristics nevertheless function as proxies for race and may constitute illegitimate grounds for striking and dismissing potential jurors. One example, previously mentioned, is past contact with—and negative impressions of—the criminal justice system.<sup>378</sup> Though some lawyers would contend that these experiences inhibit a juror's ability to assess evidence fairly, a growing scholarly consensus asserts that making this a legitimate basis for disqualifying or striking jurors will result in discriminatory empanelment.<sup>379</sup> By highlighting this link, courts can push prosecutors to avoid integrating such information into their decision-making and strategy during jury selection. This is a reform that should extend to both cause and peremptory challenges of jurors and prohibit automatic excusal. Further, it should cover, among other things, prospective jurors with past arrests<sup>380</sup> or criminal convictions<sup>381</sup> in the absence of meaningful judge-led voir dire on these subjects. Prosecutors should know that striking for certain ostensibly “race-neutral” reasons might nevertheless constitute race-based exclusion.

Second, the prevalence of race-conscious jury selection suggests that an objective standard should govern judges' assessments of the motivations behind for cause excusal and peremptory strikes. The adoption of such a standard would relieve judges of having to impute racial animus to lawyers based on their personal understanding of what constitutes an illegitimate juror strike. In so doing, an objective standard would likely de-personalize the adjudicative process and encourage judges, who might otherwise feel uneasy about relying on their own

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<sup>377</sup> See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988) (“Yet the attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people.”).

<sup>378</sup> See WASH. CT. GEN. R. 37(h).

<sup>379</sup> See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 602 (2013).

<sup>380</sup> See Vida B. Johnson, *Arresting *Batson*: How Striking Jurors Based on Arrest Records Violates *Batson**, 34 YALE L. & POL'Y REV. 387, 389 (2016) (noting that “[a] significantly higher percentage of people of color have arrest records due to the disproportionate number of stops, searches, and arrests of people of color”).

<sup>381</sup> See Roberts, *supra* note 379, at 634 (proposing the abandonment of “automatic exclusions based solely on a potential juror’s criminal record” in the absence of evidence of bias).

intuitions, to find *Batson* violations. This development would force lawyers to orient their race-consciousness not toward their own or judges' idiosyncratic applications of *Batson* but toward an objective legal standard.

Third, and finally, my empirical findings reinforce the importance of instructing prospective jurors that they have a constitutional right to participate as jurors free from racial—or other forms—of exclusion. In addition to reiterating *Batson*'s normative vision of the value of representative juries for defendants and lay citizens alike, an instruction would put prosecutors on notice that their questioning strategies and stated reasons for strikes might face the scrutiny of an informed public, as well as of their adversaries or presiding judge. By creating more-informed jurors, we can expand the capacity of ordinary people to play an active part in safeguarding the norms of fairness and equality that should animate our criminal legal system.

## V. CONCLUSION

From its inception, the United States' justice system has had to contend with deleterious forms of discrimination that inhibit meaningful progress toward the realization of its constitutional principles. One such principle is a criminal defendant's right to an impartial jury of her peers.<sup>382</sup> The *Batson* line of cases has established a framework that attempts to remedy the longstanding problem of race-based exclusion. But its effects, at least on the demographic make-up of juries, is mixed. Having failed to displace race-based exclusion entirely, it is fair to question what its impact and import are for contemporary legal practice.

This Article, drawing on data from an extensive field study, suggests the need for a shift in perspective from outcomes to processes, from juries to jury selection, from quantitative indicators to decision-making and strategy. Doing so sheds new empirical light on the complex interplay between antidiscrimination doctrine and legal practice. There has been a clear doctrinal shift in courts' analyses of juror questioning and striking, expanding the scope of judicial inquiry during the adjudication of *Batson* challenges from scrutiny of individual "neutral" rationales for juror dismissals to a more robust form of comparative juror assessment.<sup>383</sup> My empirical findings indicate that there is a meaningful connection between this latter approach and a host of race-conscious prosecutorial behaviors during voir dire. With this link in mind, it becomes possible to perform a deeper audit of the *Batson* doctrine and develop reforms that would advance the critical process of narrowing the gap between juries as they are and juries as the Constitution would have them be.

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<sup>382</sup> U.S. CONST. amend. VI.

<sup>383</sup> See generally *State v. Holmes*, 221 A.3d 407 (Conn. 2019); *People v. Bryant*, 253 Cal. Rptr. 3d 289 (Cal. Ct. App. 2019); *State v. Curry*, 447 P.3d 7 (Or. Ct. App. 2019).