Batson Fails Again: How the Resurgence of Black Lives Matter Highlights the Ease of Bypassing the Race-Neutral Requirement and Proposed Modifications to Refine the Standard

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"When Black people today declare, 'Black Lives Matter' in the face of race-based killings by police and vigilantes, their voices echo Sojourner Truth asking, 'Ain't I a Woman' in the face of chattel slavery and Black protesters declaring, 'I am a Man' in the face of a racial caste system . . . ."[1]

I. INTRODUCTION

Racism seeps into the process of jury selection—legally referred to as voir dire.[2] A century of case law has proven this fact.[3] Voir dire is a component of every American's Sixth and Fourteenth Amendment rights, by which a person may "enjoy the right to a speedy and public trial, by an impartial jury" and may not be deprived "of life, liberty, or property, without due process of law."[4] Through voir dire, the trial judge and attorneys determine which potential jurors will eventually decide the outcome of a trial.[5] Trial judges, using their discretion, decide the parameters of questioning prospective jurors to create an impartial and

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1. Andrew Karpan, *When Can a Juror Say Black Lives Matter?*, LAW360 (Aug. 9, 2020, 8:02 PM), https://www.law360.com/access-to-justice/articles/1299398/when-can-a-juror-say-black-lives-matter-?nl_pk=d4d1b6d1-e90e-457b-b8c8-3714b4237afa&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice [https://perma.cc/9PBL-ULTF].

2. *See infra* Section II.B (providing historical and present-day examples of racial discrimination in voir dire).

3. *See* Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 2-3 (1988) (noting *Strauder* first Supreme Court case to confront racial discrimination in jury selection); *see also* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding statute permitting only white male participation in jury duty unconstitutional).

4. *See* U.S. CONST. amend. VI (inscribing right to impartial jury); *id.* amend. XIV § 1 (specifying right to due process); *see also* United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000) (noting Equal Protection Clause prohibits juror exclusion based on race or ethnic origin).

5. *See* FED. R. CRIM. P. 24 (delineating examination of prospective criminal trial jurors); 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3(a) (4th ed. 2019) (noting trial court does not contravene Constitution by rejecting attorney-conducted voir dire). Although voir dire occurs in both criminal and civil trials, this Note will focus on criminal trials. *See infra* Part III.

fair jury.[6] Through peremptory challenges, the prosecution and defense may strike a potential juror from consideration for no stated reason.[7]

In *Peters v. Kiff*,[8] the United States Supreme Court held that the Equal Protection and Due Process Clauses protect against arbitrary juror exclusion, regardless of whether the juror and defendant are of different races.[9] Later, in *Batson v. Kentucky*,[10] the Court held that a party cannot strike a potential juror from duty solely because the juror and defendant share the same race.[11] In the landmark decision, the Court pushed this notion further by establishing a three-part test to determine whether a peremptory challenge is racially based and therefore violates the Equal Protection Clause.[12]

While *Batson* laid the standard for nondiscriminatory voir dire, attorneys still strike potential jurors based on their race.[13] Prosecutors, in particular, successfully remove jurors for racial and ethnic purposes behind facially neutral justifications.[14] For example, after the resurgence of the Black Lives Matter (BLM) social justice movement following the murder of George Floyd, prosecutors have

6. *See* LAFAVE ET AL., *supra* note 5, § 22.3(a) (explaining importance of trial judges' discretion when determining questions allowed in voir dire); *see also* United States v. Smith, 919 F.3d 825, 835 (4th Cir. 2019) (holding judge entitled to broad discretion in assessing possible juror bias).

7. *See* FED. R. CRIM. P. 24 (specifying quantity of permitted peremptory challenges in capital, misdemeanor, and felony cases); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 1 (2014) (defining peremptory challenge). While a peremptory challenge does not require cause for removing a prospective juror from serving, in a challenge for cause, an attorney must explain why the prospective juror is biased; the judge will ultimately rule on the for-cause strike. *See* Morrison, *supra*, at 9 (explaining difference between peremptory strikes and strikes for cause).

8. 407 U.S. 493 (1972).

9. *See id.* at 502-03 (noting arbitrary jury selection increases probability of bias); *see also* U.S. CONST. amend. XIV § 1 (delineating Due Process Clause); Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding peremptory strike possibly discriminatory under Equal Protection Clause even if juror different race).

10. 476 U.S. 79 (1986).

11. *See id.* at 84-85 (holding racial discrimination unconstitutional in jury selection).

12. *See id.* at 93-98 (explaining test). Under *Batson*, a defendant can establish a prima facie case of a discriminatory peremptory strike "on proof that members of the defendant's race were substantially underrepresented on the venire." *See id.* at 95. The Court, upon explaining the new test, clarified that a prosecutor may not rebut a defendant's prima facie case of racial discrimination by claiming Black jurors are biased in favor of a Black defendant, and therefore removal is necessary. *See id.* at 97, 100 (remanding to trial court to determine if prima facie case of discrimination existed). Through the incorporation doctrine, the constitutional principles that make up the basis of *Batson* apply to both federal and state courts. *See id.* at 99 n.24 (noting *Batson* holding necessitated implementation by both state and federal trial courts).

13. *See Powers*, 499 U.S. at 416 (noting obligation of courts to enforce prohibition on discriminatory juror selection); Foster v. Chatman, 578 U.S. 488, 513-14 (2016) (holding strike of two Black jurors unconstitutional).

14. *See* Conner v. State, 327 P.3d 503, 510-11 (Nev. 2014) (concluding State's arguments for juror removal pretext for discrimination). The prosecution in *Conner* used six of nine peremptory strikes on racial minorities, providing similar nondiscriminatory reasons for each strike. *See id.* at 507-08 (describing Conner's argument strikes displayed pattern of racial discrimination). In explaining the strikes, the prosecution contended that every stricken juror either presented an inability to determine a situation where the death penalty should apply or switched opinions on the death penalty from what the juror originally wrote on their questionnaire. *See id.* at 508 (presenting race-neutral reasons for striking six Black prospective jurors). On appeal, the State provided new justification for removing the sixth juror, which the court noted "reek[ed] of afterthought." *See id.* at 510 (quoting Miller-El v. Dretke, 545 U.S. 231, 246 (2005)) (justifying removal by arguing prospective juror would influence others because of experience with law enforcement).

incorporated seemingly race-neutral, BLM-related inquiries into juror questioning, causing further removal of jurors based on their race.[15] BLM is a social justice movement created in response to police brutality with the mission to eradicate white supremacy.[16] BLM originated from a now globally recognized hashtag, #BlackLivesMatter, sparked in 2013 from the acquittal of George Zimmerman in the case of Trayvon Martin's murder.[17] In 2020, the movement surged again after a police officer murdered George Floyd, triggering the largest protests in U.S. history; BLM became a household name as a significant advocate and facilitator of these demonstrations.[18]

This Note first explores the history of voir dire in both federal and state criminal trials, investigating how prosecutors use peremptory challenges in a manner that ultimately prevents the Black community from serving on juries.[19] Then, it describes the standard for determining whether a peremptory challenge is founded in discrimination.[20] This Note argues prosecutors used the revival of the BLM movement to create a new "race-neutral" avenue to disproportionately exclude racial and ethnic minorities from jury duty.[21] Finally, this Note contends that detection of implicit bias in voir dire is essential to protect against this new route of discrimination.[22] In light of changed understandings of implicit bias and its effects, this Note concludes with proposed modifications to the *Batson* standard to further eliminate racial discrimination in voir dire.[23]

15. *See* Cooper v. State, 432 P.3d 202, 206-07 (Nev. 2018) (holding question regarding BLM opinions unrelated to facts and therefore discriminatory); *see also* Karpan, *supra* note 1 (discussing questions posed in jury selection relating to feelings about BLM). In a California homicide case, prosecutors conflated a potential juror's support for the BLM movement, expressed in her questionnaire, with possible encouragement toward damaging property. *See* Karpan, *supra* note 1 (explaining case with BLM inserted into voir dire).

16. *See About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ [https://perma.cc/WS2W-DKCU] [hereinafter *About* BLM] (describing focus of movement).

17. *See Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory/ [https://perma.cc/2GUP-QJNA] (providing history of BLM movement); *see also* Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1094-95 (2018) (detailing Trayvon Martin case and birth of BLM movement).

18. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/PS4E-2BLN] (explaining BLM's role in George Floyd protests); Brakkton Booker et al., *Violence Erupts as Outrage over George Floyd's Death Spills into a New Week*, NPR (June 1, 2020, 1:30 AM), https://www.npr.org/2020/06/01/866472832/violence-escalates-as-protests-over-george-floyd-death-continue [https://perma.cc/PP6Z-6AF3] (presenting national reach of protests).

19. *See infra* Section II.A (detailing jury selection within Constitution).

20. *See infra* Section II.B.2 (describing elements of *Batson* challenge and expansions).

21. *See infra* Sections II.C-D (describing implicit bias in voir dire and mitigation efforts). This Note will focus on prosecutors' usage of peremptory challenges; challenges by defendants are beyond its scope. *See id.*

22. *See infra* Section III.A (explaining awareness of implicit biases essential for impartial jury selection).

23. *See infra* Section III.B (suggesting alterations to each step of *Batson* test).

II. HISTORY

A. The Unwritten Right to Voir Dire and Peremptory Challenges

1. Voir Dire from 30,000 Feet

Through the Fifth and Sixth Amendments, the United States Constitution grants criminal defendants due process rights, including the right to a trial by an impartial jury.[24] Jurors listen to the evidence presented and draw conclusions on the facts throughout a trial; these "fact-finders" make up the jury, which ultimately determines innocence or guilt in most criminal cases.[25] The group of prospective jurors is called a venire, and the Constitution requires that it represent a fair cross-section of the community where the crime took place.[26] To establish a violation of this Sixth Amendment right, a defendant must prove three things: the excluded juror belongs to a distinctive group in the community, this group's representation in the venire was not a fair and reasonable reflection of their representation in the community, and the underrepresentation resulted from systematic exclusion during jury selection.[27] The Sixth Amendment right to trial requires an impartial jury which, in turn, creates a right to nondiscriminatory voir dire.[28]

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24. *See* U.S. CONST. amend. V (delineating due process rights for criminal defendants); *id.* amend. VI (providing right to trial by impartial jury); *see also* WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 289 (James Appleton Morgan ed., 2d ed. 1878) (specifying constitutional right to jury trial).

25. *See How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jury_role/ [https://perma.cc/3D66-7FYG] (explaining role of fact finder); *Learn About Jury Service*, U.S. CTS., https://www.uscourts.gov/services-forms/jury-service/learn-about-jury-service [https://perma.cc/W56L-BXEW] (defining juror).

26. *See* U.S. CONST. amend. VI (guaranteeing trial by jurors residing in district of crime's occurrence); Berghuis v. Smith, 559 U.S. 314, 314 (2010) (explaining test to determine whether violation of Sixth Amendment's fair cross-section requirement took place).

27. *See* Duren v. Missouri, 439 U.S. 357, 364 (1979) (listing three elements). Duren challenged a statute allowing women who requested an automatic exemption to be removed from jury duty. *See id.* at 360 (explaining statute). Women had two opportunities to avoid jury duty—by claiming an exemption on the jury selection questionnaire, and again before juror appearance by returning the summons or not attending service altogether. *See id.* at 361-62 (indicating women's options for avoiding jury service). Arguing his point, Duren noted the county's population consisted of 54% adult women. *See id.* at 362. Nevertheless, the jury at Duren's trial was comprised of all men, selected from a venire of forty-eight men and five women. *See id.* at 363. The Court held this underrepresentation of women violated the fair cross-section requirement. *See id.* at 370. The Court further noted that the domestic obligations of women are not sufficient justification for their exclusion. *See id.* at 369 (noting exemptions do not substantiate underrepresentation of women).

28. *See* Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding Sixth Amendment right to impartial jury creates right to adequate voir dire). A jury originally convicted Morgan of first-degree murder and imposed the death penalty. *Id.* at 722 (stating Morgan's conviction and sentence). Illinois law mandates one jury carry out a death penalty trial in two phases. *Id.* at 721. In the first, the jury must determine if the defendant is guilty of first-degree murder. *Id.* (explaining first phase of two-part death penalty trial). The same jury then determines whether any "aggravating and mitigating factors" exist and, if any are present, takes them into consideration in the sentence; a unanimous decision for the death penalty requires the court to sentence the defendant to death. *See id.* at 721-22 (explaining two-stage jury system and listing five nonexclusive mitigating factors). During the trial court's voir dire, the judge asked each venire member generally about their ability to make determinations

Voir dire is a French phrase meaning "to speak the truth," and the process achieves the overall goal of obtaining an impartial and fair jury by identifying, and therein allowing attorneys and judges to remove, those who display prejudice or an inability to serve.[29] Conducting voir dire requires multiple steps, starting with gathering a pool of prospective jurors from governmental records.[30] Any person acting as a juror in a federal trial must meet the following specific statutory requirements: be at least eighteen years of age and a U.S. citizen living in the respective district for one year; proficiently read, write, speak, and understand English; not have a mental or physical ailment preventing satisfactory jury service; and not have either a charge pending or conviction for a crime punishable with a sentence of more than one year, unless the individual's civil rights have been restored.[31] State legislatures create their own statutes delineating juror qualifications, typically containing similar requirements in regard to age, residency, and English abilities.[32]

Once the jury panel has been established, each juror faces a two-step questioning process.[33] In the first step, the court determines each potential juror's statutory qualifications.[34] These requirements include ensuring a juror understands and speaks English, and has the capacity to judge impartially.[35] In the second step, the judge determines any biases or prejudices of each venire

impartially and fairly. *See id.* at 722-24 (noting trial judge asked jurors if they would not impose death penalty under any circumstance). The court, however, did not ask a specific question requested by the defense attorney: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *See id.* at 723 (quoting proposed voir dire question). While the state supreme court affirmed, the Supreme Court of the United States held inadequate voir dire took place, reasoning that a juror who would automatically impose the death sentence on a person found guilty is not acting impartially. *See id.* at 725, 729, 735 (concluding adequate voir dire constitutional right).

29. *See* U.S. CONST. amend. VI (prescribing right to impartial jury); ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL §§ 5:1 n.1, 5:3 (2021) (defining and explaining public policy goal of voir dire); *see also* LAFAVE ET AL., *supra* note 5, § 22.3(a) (noting lesser goal of voir dire to instruct jurors on case and create rapport).

30. *See* LARSEN, *supra* note 29, § 5:2 (describing how venire members obtained). Once the pool of prospective jurors is selected, the court swears them in prior to questioning. *See id.* (delineating order of swearing in); LAFAVE ET AL., *supra* note 5, § 22.3(f) (explaining oaths both prospective and selected jurors take). The venire takes an oath to respond honestly to questioning, and the final jury takes another to promise to determine a fair verdict. *See* LAFAVE ET AL., *supra* note 5, § 22.3(f) (noting in federal courts, oath requirement not found in "court rule, statute, or [c]onstitutional text"); *see also How Courts Work*, *supra* note 25 (explaining court clerk swears in final jury); *Learn About Jury Service*, *supra* note 25 (noting State selects jury pool from voter registration and drivers license lists in most states).

31. *See* 28 U.S.C. § 1865(b) (stating requirements to serve in jury).

32. *See, e.g.*, MICH. COMP. LAWS § 600.1307a (2021) (setting forth qualifications for service, including being eighteen years old and English communication abilities); MASS. GEN. LAWS ch. 234A, § 4 (2022) (providing juror disqualification criteria); WIS. STAT. § 756.02 (2020) (preventing convicted felons without restored civil rights from serving, similar to federal requirements).

33. *See* LARSEN, *supra* note 29, § 5:2 (listing two steps of venire questioning).

34. *See id.* (noting statutory qualifications determined before investigation into potential bias); 28 U.S.C. § 1865(b) (listing statutory requirements).

35. *See* 28 U.S.C. § 1865(b) (specifying mandatory juror requirements).

member.[36] The attorneys and judge present the venire with questions intended to determine a prospective juror's fitness to serve.[37]

During voir dire, the court, along with the attorneys, learn about jurors' ideologies and experiences by reviewing juror questionnaires, orally questioning the venire, or sometimes both.[38] In state courts, this process varies widely by jurisdiction, with some states allowing complete attorney-conducted voir dire, and other states allowing little to no attorney participation.[39] Where a statute does not provide a right to attorney-conducted voir dire, an attorney may move to request the court to allow attorney participation.[40] In judge-conducted voir dire, the court may receive proposed questions from the attorneys and decide whether to present them to the venire.[41] Studies show that voir dire carried out by judges prevents attorneys from using jury selection as a strategy to devise pretextual reasons for excluding jurors based on race and reduces time attorneys may waste asking trivial questions.[42] A downside to judge-conducted voir dire, however, is that potential jurors may not respond as candidly to questions judges pose, because jurors may view judges as superior, as opposed to attorneys, whom they may consider closer to equals.[43]

Regardless of who conducts the questioning, courts retain broad discretion regarding how voir dire proceeds, including the type and scope of inquiry.[44] For

36. *See* LARSEN, *supra* note 29, § 5:2 (listing two steps of venire questioning); *see also* LAFAVE ET AL., *supra* note 5, § 22.3(a) (explaining challenge for cause and peremptory challenge).

37. *See* LARSEN, *supra* note 29, § 5:1 (analogizing elimination of venire members to game of dodgeball). If the venire are players in the dodgeball game, the questions the judge and attorneys pose are the balls thrown at them. *See id.* If a venire member responds to a question unfavorably, they may be removed for cause or through a peremptory challenge and are effectively eliminated from the game. *See id.* At the end of voir dire, those venire members remaining "standing" ultimately create the jury. *See id.*

38. *See* United States v. Smith, 919 F.3d 825, 835 (4th Cir. 2019) (noting trial judge may construct questions for venire); *see also* United States v. Fastow, 292 F. Supp. 2d 914, 921 (S.D. Tex. 2003) (holding combination of questionnaire and subsequent, individual juror questioning creates acceptable voir dire method).

39. *See* Ted A. Donner & Patrick Bernard, *Attorney or Judge Conducted Voir Dire*, *in* 2 LISA BLUE & ROBERT B. HIRSCHHORN, BLUE'S GUIDE TO JURY SELECTION app. I (2020) (delineating voir dire methods for all fifty states). For example, although generally considered a poor example of how to conduct voir dire, attorneys in New York are solely responsible for conducting voir dire, with a trial judge supervising only if one of the attorneys so requests. *See id.* § D, app. § 32 (describing role of court to determine time limits and method to choose or exclude jurors). In contrast, in Idaho, the court conducts criminal voir dire and attorneys subsequently chime in only after the trial judge has presented initial questions. *See id.* app. § 12 (explaining role of judge and attorneys in Idaho's voir dire process).

40. *See id.* § E (noting attorney's responsibility to convince judge of benefit of attorney-conducted voir dire). An attorney's request to the judge should include set time limitations and a showing that the questions posed will be relevant to the case. *See id.* (explaining contents of motion to conduct voir dire).

41. *See id.* § A (noting judges may reject proposed questions even if attorney deemed them important).

42. *See id.* §§ A, E (describing benefits of judge-conducted voir dire).

43. *See* Donner & Bernard, *supra* note 39, § B (presenting evidence prospective juror response may differ based on person asking question). Studies have concluded that when presented with questions by a judge, venire members provide answers they think the judge wants, rather than their own feelings. *See id.* § C (explaining reciprocity effect in terms of voir dire).

44. *See id.* § A (describing spectrum of judge's power to control voir dire). Appellate courts give deference to trial courts' determinations on appellate review because the trial judge observed and participated in the entire

example, a court may decline to include specific questions an attorney submits, so long as other inquiries convey the substance of those questions to the jury.[45] This discretion is not all-encompassing; there are three restrictions the court must abide by during voir dire, and acting contrary to these restrictions triggers an investigation if either party challenges a particular excluded question.[46] First, the court's discretion does not extend to precluding questions related to the basic rights of a defendant.[47] For example, at an attorney's request, the court must ask jurors about their understanding of elements of the crime charged and the burden of proof—beyond a reasonable doubt—in a trial.[48] Second, the court must not prevent either party from discerning potential racial biases of the prospective jurors in certain scenarios: issues in the conduct of the trial concern race or ethnicity, it is an interracial death penalty case, or the defendant accused of a violent crime requests such an inquiry and there is a "reasonable possibility" racial prejudice influenced the jury (i.e., where the defendant and victim are a different race

case. *See id.* (calling trial judge "trier of fact"); Arizona v. Washington, 434 U.S. 497, 513-14 (1978) (providing reasons why special consideration given to trial court determination of juror bias). The Supreme Court stated the trial court is in the better position to make determinations during voir dire than an appellate panel because the trial court listened to jurors during voir dire and scrutinized any nonverbal reactions during the trial. *See Arizona*, 434 U.S. at 514 (clarifying trial judge's assessment does not terminate inquiry into potential bias). In another case, a trial judge acted within his discretion when denying a mistrial after he determined all venire members who showed bias and inability to be impartial were removed from serving. *See* United States v. Smith, 919 F.3d 825, 835 (4th Cir. 2019) (affirming trial court). The Fourth Circuit reasoned the trial judge acted appropriately by questioning the venire about bias and removing those whose answers or demeanor insinuated an inability to act impartially. *See id.* (noting remaining jurors only those who assured trial judge of their fairness); *see also* 2 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 387 (4th ed. 2020) (providing precedent delineating judge's limitations); Romualdo P. Eclavea, Annotation, *Voir Dire Examination of Prospective Jurors Under Rule 24(a) of Federal Rules of Criminal Procedure*, 28 A.L.R. Fed. 1st Art. 2(a) (1976) (stating trial court maintains consideration of scope and specific questions during examination); LAFAVE ET AL., *supra* note 5, § 22.3(a) (noting trial judge may place time restrictions on prospective juror questioning). When the facts of a case result in an "exceptional circumstance," the appellate court may proceed with its analysis without giving deference to the trial court. *See* Bethea v. Commonwealth, 831 S.E.2d 670, 690 (Va. 2019) (explaining exceptional circumstance existed because reason behind trial court's decision deemed "unequivocally false").

45. *See* Hamling v. United States, 418 U.S. 87, 139-40 (1974) (holding court possesses ability to present proper questions to venire). The Court in *Hamling* went one step further by also stating a court may permissibly alter questions attorneys submit if the questions are alike. *See id.* (concluding trial judge within discretion to ask attorney's questions in altered or consolidated form); Philip S. Carchman, Admin. Off. of the Cts., Dir. 21-06, *Approved Jury Selection Standards, Including Model Voir Dire Questions* 10-15, N.J. CTS. (Dec. 11, 2006), https://www.njcourts.gov/attorneys/assets/directives/dir_21_06.pdf?c=x6U [https://perma.cc/68HV-QEG8] (listing sample criminal trial voir dire questions allowed in New Jersey). Model juror questions include asking about a possible inability to sit for the duration of the trial; familiarity with any of the attorneys, defendant(s), or potential witnesses; previous experience participating on a jury or in a criminal trial in any capacity; history as a victim of a crime; opinions on trustworthiness of law enforcement; and biographical information about the venire member. *See* Carchman, *supra* (providing model question usage mandated in both criminal and civil trials).

46. *See* LAFAVE ET AL., *supra* note 5, § 22.3(a) (listing improper uses of court discretion); *supra* notes 38-41 and accompanying text (providing examples of limits to trial judge discretion).

47. *See* LAFAVE ET AL., *supra* note 5, § 22.3(a) n.17 (specifying court must allow questioning regarding defendant's presumption of innocence and burden of proof).

48. *See* State v. Hall, 616 So. 2d 664, 669 (La. 1993) (stressing judge improperly prevented defense counsel from clarifying juror understanding after prosecution read legal definitions).

or ethnicity).[49] Finally, a court may not prevent the parties from asking questions meant to reveal jurors' opinions toward the death penalty in capital cases.[50]

2. For-Cause Strikes and Peremptory Challenges

The court may strike a juror "for cause" if evidence shows prejudice or establishes a conflict of interest.[51] Trial judges dismissing a prospective juror for cause must be convinced that the juror at issue threatens the overall goal of creating a fair and impartial jury.[52] In determining whether the prospective juror will ultimately serve, the trial judge must consider the entire testimony presented, not merely a specific selection of the juror's responses.[53] Courts agree that the Constitution does not provide the defendant the right to challenge most portions of the voir dire proceedings.[54] Defendants have the right to be present during

49. *See* LAFAVE ET AL., *supra* note 5, § 22.3(a) (noting Constitution compels questions on racial bias upon defendant's request in some capital cases); Rosales-Lopez v. United States, 451 U.S. 182, 191 (1981) (describing circumstances where failure to honor inquiry into racial or ethnic prejudice constitutes reversible error). Prior to his appeal, a jury found Rosales-Lopez, of Mexican descent, guilty of attempting to illegally bring undocumented immigrants into the United States. *See Rosales-Lopez*, 451 U.S. at 185 (explaining Rosales-Lopez's federal conviction). During voir dire, although the judge probed the venire about bias against undocumented people, he refused to ask a specific question Rosales-Lopez's counsel requested about potential prejudice against Mexicans. *See id.* at 186-87 (noting court of appeals affirmed trial judge's decision when Rosales-Lopez challenged voir dire implementation). The Supreme Court affirmed, explaining that a reversible error exists when a judge refuses the defendant's requested question about racial and ethnic bias, and there is a possibility said prejudice would influence the jury's evaluation of the evidence. *See id.* at 192-93 (explaining Court's reasoning and stating case presented no constitutional issue or "special circumstances").

50. *See* LAFAVE ET AL., *supra* note 5, § 22.3(a) (noting restriction invalid because of defendant's investigative rights to uncover juror views on death penalty).

51. *See How Courts Work*, *supra* note 25 (describing jury selection process). A legitimate reason to dismiss a juror for prejudice occurs if the prospective juror is related to a member of one party or works for a company that is part of the litigation. *See id.* (explaining when prospective juror removed for potential prejudice).

52. *See* WRIGHT & MILLER, *supra* note 44, § 382 (explaining on review, appellate courts reverse determination if trial court showed "clear abuse of discretion"); 28 U.S.C. § 1865(b) (listing prerequisites for prospective jurors); LAFAVE ET AL., *supra* note 5, § 22.3(a) (stating challenger's burden to convince judge of venire member's inability to act impartially).

53. *See* State v. Washington, 187 So. 3d 71, 74 (La. Ct. App. 2016) (holding judge cannot review cherry-picked responses to determine whether to strike for cause). The court noted that even a noticeable disposition that a juror may lean one way or another does not automatically result in a strike for cause. *See id.* (explaining standard to remove juror for cause). Instead, the prospective juror must participate in further questioning; if they do not present signs of impartiality and fairness, a trial judge is within their discretion to remove the person from the panel. *See id.* (clarifying standard for exercising for-cause strike); State v. Henderson, 135 So. 3d 36, 44 (La. Ct. App. 2013) (noting venire member still removed when claiming ability for impartial judgment if facts prove otherwise). In *Henderson*, a potential juror responded to the defense's questioning, stating she was likelier to give more credit to law enforcement's testimony than a lay person's because her husband was in that profession. *See Henderson*, 135 So. 3d at 44 (describing voir dire of specific juror). Nevertheless, she confirmed she would not retain said belief "every single time," which the trial judge determined was sufficient to deny a strike for cause. *See id.* (explaining why judge did not remove prospective juror from jury). The appellate court agreed with this ruling and held the trial judge did not abuse their discretion. *See id.* (stating holding of court).

54. *See, e.g.*, United States *ex rel.* Etherly v. Davis, 836 F. Supp. 2d 641, 647-48 (N.D. Ill. 2011) (holding criminal defendants possess no right to request specific questions if overall voir dire fair); State v. Wamala, 972 A.2d 1071, 1080 (N.H. 2009) (holding defendant retains no right to carry out voir dire in specific manner); People v. Ramos, 101 P.3d 478, 492 (Cal. 2004) (holding no constitutional right to preferred voir dire methodology).

voir dire, however, and may inquire about a venire member's potential racial bias against them.[55] On appeal, reviewing courts employ an abuse of discretion standard to determine whether a trial court improperly permitted a for-cause strike.[56]

Voir dire is essential to determine how many, and against whom, peremptory challenges are used.[57] Depending on their responses during voir dire, attorneys will remove prospective jurors they do not want participating on the jury.[58] Attorneys often use for-cause challenges to remove jurors for bias.[59] Distinct from strikes for cause, attorneys may use peremptory challenges when a mere insinuation of prejudice occurs, or where an attorney believes a juror is more likely to rule for the opposing side because of their background.[60] While a peremptory challenge, by definition, requires no cause to remove a member of the venire, an

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The court in *Ramos* reasoned a defendant cannot request a specific manner to conduct voir dire, provided the method that is ultimately chosen results in an impartial jury. *See Ramos*, 101 P.3d at 492, 512 (explaining right to voir dire simply "means to achieve the end of an impartial jury").

55. *See* Kater v. Maloney, 459 F.3d 56, 66 (1st Cir. 2006) (holding defendant retains right to present question to uncover potential racial bias); Commonwealth v. Hunsberger, 58 A.3d 32, 37 (Pa. 2012) (affirming defendant's right to attend any stage of criminal proceeding); *see also* LARSEN, *supra* note 29, § 5:5 (presenting case law delineating limits of defendants' right to participate in voir dire). Defendants, however, may waive this right. *See* LARSEN, *supra* note 29, § 5:5 (noting defendant must explicitly confirm decision to waive voir dire rights); United States v. Gayles, 1 F.3d 735, 738 (8th Cir. 1993) (holding selection of jury without defendant present not error). In one case, the appellant, Gayles, appealed the trial judge's confirmation of the jury because Gayles was on a lunch recess and not present. *See Gayles*, 1 F.3d at 738 (presenting issue in case). Nevertheless, because Gayles was present for the actual questioning and reading of the juror names, the appellate court found no error. *See id.* (explaining court's reasoning). *But see* United States v. Alikpo, 944 F.2d 206, 208-11 (5th Cir. 1991) (holding judge erred conducting most jury selection without Alikpo when right not expressly waived).

56. *See* Zia Shadows, L.L.C. v. City of Las Cruces, 829 F.3d 1232, 1243 (10th Cir. 2016) (stating standard of review). *Zia Shadows* put this standard of review into practice when the Tenth Circuit reviewed a district court's denial to strike a juror for cause. *See id.* (describing issue on appeal). The juror was a city employee, so Zia Shadows, L.L.C. argued the juror would have difficulty siding against their employer due to implied bias. *See id.* (explaining Zia Shadows, L.L.C.'s reason for seeking for-cause strike). The court subsequently explained implied bias as assumed bias that comes to light when a juror is connected to the trial in some way, even if the juror believes they can judge impartially. *See id.* at 1244 (defining implied bias). The court used the abuse of discretion standard upon review, noting "great deference" is given to the district court because the trial judge can best evaluate the juror. *See id.* at 1243 (explaining abuse of discretion standard). The court eventually affirmed the district court, reasoning a juror is not barred from serving when they are a government employee, and their employer is a party. *See id.* at 1244 (stating holding and reasoning of court).

57. *See* LAFAVE ET AL., *supra* note 5, § 22.3(a) (noting prosecution and defense attempt to remove prospective jurors showing favoritism to opposing side).

58. *See* Isabel Bilotta et al., *How Subtle Bias Infects the Law*, 15 ANN. REV. L. & SOC. SCI. 227, 235 (2019) (discussing attorneys' reasoning for exercising peremptory strike). While both prosecutors and defense attorneys should strive for a neutral jury, in reality strikes are used to create a jury sympathetic to one's side. *See id.* (explaining attorneys' focus in voir dire on self-interest).

59. *See* WRIGHT & MILLER, *supra* note 44, § 382 (noting purpose of removal of impartial jurors to eliminate express or implied bias). While used less today, peremptory challenges were traditionally separated from challenges for cause that, when timely brought forth, remove those who do not meet the juror statutory requirements. *See id.* (noting statutory requirements waived if not challenged); *see also* 28 U.S.C. § 1865(b) (delineating qualifications for service).

60. *See* LAFAVE ET AL., *supra* note 5, § 22.3(a) (explaining nuance between strike for cause and peremptory strike).

attorney may not seek to have a juror removed for a discriminatory purpose—such as the juror's race, gender, age, or disability.[61]

The type of case determines the allotted number of peremptory challenges, which may differ between the prosecution and defense.[62] For example, the Federal Rules of Criminal Procedure indicate that capital cases allow the largest number of peremptory challenges at twenty, while felonies with a lesser sentence allocate six challenges to the prosecution and ten to the defense.[63] In misdemeanors with punishments ranging from a fine to imprisonment of one year or less, both sides have three peremptory challenges.[64] The trial court may allow further challenges for cases with multiple defendants.[65] In state courts, the statutory process for exercising a peremptory challenge may differ by jurisdiction, and where no statute delineates the process, the method defaults to the court's discretion.[66] For instance, the court may choose the order in which the attorneys present their challenges and whether attorneys present these challenges to the larger panel or individually to each potential juror.[67] An opposing attorney can confront the peremptory strikes through *Batson* challenges that assert a prospective juror was removed for a discriminatory or biased reason.[68] The trial judge will then determine whether the strike was founded in racial discrimination.[69]

B. Race and Voir Dire

1. Courts' Historic Handling of Race During Voir Dire

The Supreme Court first addressed racial discrimination within jury selection in 1879 in *Strauder v. West Virginia*, where the Court held that a West Virginia

61. *See* Ted A. Donner, *Peremptory Challenges and Implicit Bias: Inherent Conflicts in How the Justice System Struggles with Racism*, *in* BLUE & HIRSCHHORN, *supra* note 39, app. K § D (noting peremptory challenges improper when attorneys use them for discriminatory purpose); *see also* Swain v. Alabama, 380 U.S. 202, 211 (1965) (explaining peremptory challenge), *overruled on other grounds by* Batson v. Kentucky, 476 U.S. 79 (1986). The *Swain* Court noted that a peremptory challenge does not require a reason or cause for exercising, yet still accomplishes the ultimate purpose of completing voir dire with a fair and impartial jury. *See Swain*, 380 U.S. at 211-12 (explaining ultimate purpose of peremptory strike).

62. *See* FED. R. CRIM. P. 24(b) (specifying number of peremptory challenges for each case and potential sentence).

63. *See id.* at 24(b)(1)–(2) (noting allotted peremptory challenges in death penalty cases).

64. *See id.* at 24(b)(3) (providing allotted peremptory challenges in misdemeanors).

65. *See id.* at 24(b) (describing circumstance which may change number of peremptory challenges).

66. *See* WRIGHT & MILLER, *supra* note 44, § 387 (recognizing other courts have upheld distinct methods to conduct voir dire).

67. *See id.* (explaining parties may provide written challenges contemporaneously or by turn). A state may choose to have attorneys present their challenges contemporaneously, creating the issue that both attorneys may choose to strike the same venire member. *See id.* (noting disadvantage of simultaneously exercising challenges). Alternatively, a state may abide by the method that one attorney presents their challenges before the other, or alternate in another manner the court determines. *See id.* (noting additional order of presenting peremptory challenges).

68. *See* Donner, *supra* note 61, § F (noting attorney's ability to challenge peremptory strike).

69. *See id.* § G (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995)) (explaining final step in *Batson* test); Batson v. Kentucky, 476 U.S. 79, 96-97 (1986) (specifying court should "consider all relevant factors").

statute preventing any Black man from acting as a juror was unconstitutional under the Fourteenth Amendment.[70] The Court questioned how white defendants were allowed the opportunity to a trial judged by people of their own race, whereas Strauder, a Black man, was automatically denied that right and subjected to discrimination.[71] During voir dire of his trial, only white males were eligible to serve and made up the entire jury.[72] The majority further opined that the inception of the Fourteenth Amendment comprehensively protected emancipated people from racial discrimination by creating rights and immunities, specifically freedom from unequal legal treatment.[73] While this result brought the promise of change, states simply altered statutes to avoid explicitly excluding Black jurors and implemented other, more discrete forms of maintaining all-white juries.[74] In one scheme, prominent citizens recommended jurors for service to jury commissioners.[75] Another tactic included printing prospective Black jurors' names on differently colored paper than white prospective jurors; whoever completed the "random" draw of the venire would then avoid those names.[76]

Case law has also defined what questions about race and ethnicity the Constitution permits during voir dire.[77] Courts have grappled with the intersection of voir dire and the Fourteenth Amendment, at times perpetuating unequal representation of Black citizens and other minorities on juries.[78] For example, in *United States v. Barnes*,[79] fifteen defendants—fourteen of whom were Black, and one Hispanic—were charged with conspiracy to violate federal narcotics

70. *See* Strauder v. West Virginia, 100 U.S. 303, 309 (1879) (noting statute denied Black men equal protection rights); *see also* Peters v. Kiff, 407 U.S. 493, 506-07 (1972) (noting discrimination present when Black jurors removed from jury service on case with white defendant). *But see* United States *ex rel.* Jackson v. Brady, 133 F.2d 476, 480 (4th Cir. 1943) (stating absence of Black jurors insufficient to show racial discrimination).

71. *See Strauder*, 100 U.S. at 304 (stating issue before Court).

72. *See id.* (describing racial discrimination Strauder endured).

73. *See id.* at 310 (explaining rights and immunity afforded through Fourteenth Amendment). The Court explained states may discriminate during jury selection based on gender, citizenship status, age, and educational level. *See id.* (listing acceptable reasons to limit potential jurors).

74. *See* EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 9-10 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/2V58-HLSJ] (explaining ploys to maintain racial discrimination in jury selection).

75. *See id.* at 10 (describing "key man system").

76. *See id.* (arguing methods to remove Black prospective jurors defied Constitution). Qualifications for jurors like intelligence and having high morals appeared valid on their face, yet in practice their ultimate purpose was to prevent Black jurors from serving. *See id.* (concluding *Strauder* rule often and easily side-stepped). As Black citizens fought for jury diversity, white southerners threatened to return to lynching if the persistence continued, claiming trial by an all-white jury was better than lynching. *See id.* (explaining perspective of some white citizens regarding racial composition of juries).

77. *See* Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 665-81 (2004) (presenting case law discussing limits to voir dire questioning).

78. *See id.* at 669-70 (discussing voir dire questions resulting in racially nondiverse juries); *see also* Bethea v. Commonwealth, 831 S.E.2d 670, 690 (Va. 2019) (Powell, J., dissenting) (disagreeing with majority and explaining peremptory strike of two Black prospective jurors discriminatory); People v. Silas, 284 Cal. Rptr. 3d 48, 90 (Ct. App. 2021) (reversing lower court for allowing prosecutor's questions and ultimately removing Black jurors based on responses).

79. 604 F.2d 121 (2d Cir. 1979).

laws.[80] The trial judge rejected the defense counsel's proposed questions about prospective jurors' race and ethnicity, a choice the Court of Appeals for the Second Circuit ultimately affirmed.[81] Eleven defendants appealed, arguing that the district court denied their due process rights because it did not disclose the empaneled jurors' identities or ethnicities and conducted voir dire restrictively.[82] The court concluded that Barnes and his co-defendants still experienced a fair trial because the racial and ethnic demographic information did not relate to the main issues of the case—narcotics trafficking and use of firearms.[83] Nevertheless, the trial court's inquiries into the jurors' attitudes toward Black people uncovered suspected prejudice.[84]

2. Enter Batson *and the Three-Part Test*

Over a century passed before the Supreme Court revisited the *Strauder* issue in *Batson*, conceding that courts needed a better framework for identifying uses of race-related peremptory challenges.[85] The Court devised a three-part analysis to determine if a peremptory challenge was race-related, and therefore unconstitutional.[86] First, defendants must demonstrate a prima facie case of intentional discrimination.[87] Defendants demonstrate their prima facie case by showing that they belong to the same clearly identifiable racial group as the dismissed venire member; they may provide additional evidence by presenting prosecutor's questions or usage of peremptory challenges establishing a pattern of striking certain venire members.[88]

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80. *See id.* at 131, 134 (describing demographic characteristics of defendants).

81. *See id.* at 137 (noting circuit court holding).

82. *See id.* at 133 (presenting Barnes's reason for appeal).

83. *See Barnes*, 604 F.2d at 137, 140 (describing court's reasoning).

84. *See id.* at 140 (providing additional reasoning court presented).

85. *See* Batson v. Kentucky, 476 U.S. 79, 92-93 (1986) (confirming problem existed regarding discrimination in jury selection).

86. *See id.* at 96-98 (delineating elements which establish discrimination). In *Batson,* the Court addressed Batson's—a Black man—appeal of his conviction for second-degree burglary and receipt of stolen items. *See id.* at 82 (listing counts for conviction). During voir dire and after using up all his challenges for cause, the prosecutor used the remaining peremptory challenges to remove all the Black prospective jurors, thus creating an all-white jury. *See id.* at 82-83 (explaining State's peremptory challenges). The Court famously held that while Batson had no right to be tried by a jury comprised in whole, or even partially, by Black people, there exists a constitutional right to voir dire that does not use racially discriminatory tactics. *See id.* at 85-86 (explaining holding and reasoning); *see also* Walker v. State, 823 So. 2d 557, 562 (Miss. Ct. App. 2002) (holding jury wholly comprised of one race insufficient for *Batson* challenge). The appellate court in *Walker* clarified that *Batson* is breached when discrimination is the foundation of a peremptory challenge, not when all jurors identify as the same racial group. *See Walker*, 823 So. 2d at 562 (clarifying standard).

87. *See Batson*, 476 U.S. at 96 (noting prima facie case may rely fully on evidence of prosecutor's peremptory challenge).

88. *See id.* (explaining first step in proving prima facie case of discrimination). In addition to the mandated evidence, defendants may bolster their case by including additional relevant facts, such as the attorney's pattern of striking jurors of a certain race or showcasing questions the State proposed during voir dire examination. *See id.* at 97 (providing illustrative examples showing inference of discrimination); State v. Quick, 462 S.E.2d 186, 189 (N.C. 1995) (listing factors determining whether defendant established prima facie case for discrimination).

Second, if the defendant successfully makes their prima facie showing, the burden shifts to the State to provide a race-neutral explanation for the peremptory challenge.[89] Such explanations, however, need not be "persuasive, or even plausible."[90] In other words, explanations that fall short of a "plausible" standard are still, by default, considered race-neutral.[91] Courts have established that acceptable race-neutral reasons for striking a prospective juror include, but are not limited to: a potential juror's adverse feelings toward law enforcement, acquittal in a previous case, prior conviction, and disapproval of the death penalty.[92] In the final step, the trial court determines whether the race-neutral reason was merely

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> Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against [African-Americans] such that it tends to establish a pattern of strikes against [African-Americans] in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike [African-American] jurors in a single case, and the State's acceptance rate of potential [African-American] jurors.

Quick, 462 S.E.2d at 189; *accord* State v. Campbell, 846 S.E.2d 804, 808 (N.C. Ct. App. 2020) (following *Quick*). If the prosecution freely offers reasons for using its peremptory strikes prior to a determination of the defendant's prima facie case, the first step is rendered moot. *See Campbell*, 846 S.E.2d at 809 (noting court determines whether reasons discriminatory afterwards).

89. *See Batson*, 476 U.S. at 97 (clarifying State cannot claim assumption of juror bias favoring defendant for peremptory challenge). The Court further noted that the State claiming it used peremptory challenges in good faith is insufficient to rebut the prima facie case. *See id.* at 98. The State must present a relevant neutral explanation for its challenge. *See id.* (noting failure to provide neutral reasoning violates Equal Protection Clause).

90. *See* Purkett v. Elem, 514 U.S. 765, 768 (1995) (explaining even illogical race-neutral reasons do not necessarily violate Equal Protection Clause). In *Purkett*, the Court accepted the prosecutor's reasons for excluding a Black juror—having "unkempt hair, a mustache and a beard"—as race-neutral. *See id.* at 769 (holding peremptory challenge nondiscriminatory and prosecution met burden under *Batson* test).

91. *See* Hernandez v. New York, 500 U.S. 352, 360 (1991) (clarifying step two of *Batson* test).

92. *See* United States v. Crawford, 413 F.3d 873, 875 (8th Cir. 2005) (holding negative opinions toward law enforcement and prior conviction appropriate reasons for removal); United States v. Mitchell, 502 F.3d 931, 951 (9th Cir. 2007); *see also* LAFAVE ET AL., *supra* note 5, § 22.3(a) (noting parties allowed to inquire about views of death penalty to expose biased jurors). During Crawford's trial, the government used peremptory challenges to strike the only two Native Americans in the venire. *See Crawford*, 413 F.3d at 874 (arguing Fourteenth Amendment violated). On appeal, Crawford, also a Native American, argued the trial court erred in denying his *Batson* challenges on the strikes, which he claimed were race based. *See id.* (stating Crawford's argument). The Court of Appeals for the Eighth Circuit held the prosecution struck both jurors for race-neutral reasons. *See id.* at 875 (holding district court did not commit clear error when allowing prosecution's peremptory strikes). The prosecution claimed to strike one of these prospective jurors because her brother-in-law was prosecuted for a crime and because she had heard of the defendant. *See id.* (explaining race-neutral reason for striking juror). The prosecution similarly removed the other prospective juror because of their previous conviction for driving while intoxicated and a concern that they were biased against law enforcement. *See id.* (noting prospective juror's possible disdain for law enforcement may lead to skipping jury service); *see also Mitchell*, 502 F.3d at 957-58 (holding prospective juror's acquittal in prior case valid reason to strike). *But see* Smith v. State, 797 So. 2d 503, 519-20 (Ala. Crim. App. 2000) (holding approval of death penalty insufficient to remove juror).

a pretext for discrimination.[93] On appeal, courts use clear error as the standard of review when examining the trial court's finding on a *Batson* challenge.[94]

Batson's greatest success reversing verdicts came just after the ruling, when some prosecutors still provided undisguised racially based explanations for exercising peremptory challenges.[95] Experts now consider *Batson*'s impact on reducing racial discrimination in jury selection to be, at best, underwhelming.[96] Specifically, experts deem the three-step test difficult to satisfy because courts accept a multitude of race-neutral explanations for removing a prospective juror that may nonetheless be pretextual.[97] Further, the party challenging a peremptory

93. *See* Batson v. Kentucky, 476 U.S. 79, 98 (1986) (describing last element in determining whether removal race-neutral); Flowers v. Mississippi, 139 S. Ct. 2228, 2248-51 (2019) (holding trial court failed by determining prosecutor's reasons for striking juror nondiscriminatory). Flowers, a Black man, appeared before the Supreme Court, appealing the conviction in his sixth trial for the murder of four people. *See Flowers*, 139 S. Ct. at 2234 (providing background of six previous trials, including four convictions). In all six trials, the same prosecutor led the State's case. *Id.* The Court reversed, quantifying four reasons for the decision, including across all six trials, the State removed forty-one out of forty-two prospective Black jurors with peremptory challenges. *Id.* at 2235. In the most recent trial, the State used peremptory challenges to strike five of six Black prospective jurors, questioned Black and white prospective jurors disparately, and after the questioning, the State struck a Black prospective juror who was similarly situated to white prospective jurors not removed by the State. *See id.* (clarifying one single fact not dispositive; totality of facts shows clear error of trial court).

94. *See Flowers*, 139 S. Ct. at 2251 (holding Mississippi trial court clearly erred and *Batson* test violated); State v. Meeks, 495 S.W.3d 168, 172 (Mo. 2016) (en banc) (denoting standard of review for *Batson* challenge). In *Meeks*, the appellate court found a clear error in the trial judge's determination not to uphold the *Batson* challenge when deciding the prosecutor provided a race-neutral reason for using the peremptory challenge. *See Meeks*, 495 S.W.3d at 173 (providing court holding). The prosecutor in *Meeks* only had one remaining peremptory strike, yet there were two jurors she wanted removed—one white woman and one Black woman. *See id.* at 174 (explaining attorney's dilemma). Even though the prosecutor claimed she struck the Black juror because she expected the defense to strike the white juror, the appellate court noted this did not actually provide a reason for striking the Black juror and did not explain the choice. *See id.* at 175 (concluding prosecution did not provide valid reason for using peremptory strike). Further, courts generally agree that the rule laid out in *Batson* also includes challenges against white prospective jurors. *See* Daniel Edwards, *The Evolving Debate Over* Batson*'s Procedures for Peremptory Challenges*, NAT'L ASS'N OF ATT'YS GEN. (Apr. 14, 2020), https://www.naag.org/civil-law/attorney-general-journal/the-evolving-debate-over-batsons-procedures-for-peremptory-challenges/ [https://perma.cc/247P-K6WE] (clarifying *Batson* challenge not specific to communities of color).

95. *See* EQUAL JUST. INITIATIVE, *supra* note 74, at 20 (noting *Batson* not applied retroactively); *see also* Katelyn Lowery, *Jury Selection with Jack McMahon All 1 Hour and 1 Minute*, YOUTUBE (Apr. 6, 2015), https://www.youtube.com/watch?v=Ag2I-L3mqsQ [https://perma.cc/S8VP-S9WV] (training attorneys to overcome *Batson* challenges). Following the *Batson* decision in 1986, Philadelphia assistant district attorney Jack McMahon provided a one-hour training video about jury selection, dedicating the last minutes to explain how to strike Black prospective jurors in such a way to overcome a *Batson* challenge. *See* Lowery, *supra*, at 55:10 (advising attorneys to jot down race-neutral reasons in case challenge brought forth). He recommended attorneys continue asking a Black prospective juror questions until the attorney could articulate a reason for removing the juror that is not based on race. *See id.* at 45:54 (suggesting attorneys seek older Black men or Black people with low education to serve).

96. *See Panelists Call* Batson *a Failure, Offer Solutions*, A.B.A. (2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/march-2017/panelists-call—i-batson—i—a-failure—offer-solutions/ [https://perma.cc/R3NF-JT8C] (opining failure of *Batson* test caused by difficulty proving discriminatory intent).

97. *See* Shaila Dewan, *Study Finds Blacks Blocked from Southern Juries*, N.Y. TIMES (June 1, 2010), https://www.nytimes.com/2010/06/02/us/02jury.html [https://perma.cc/Z5YU-UB77] (explaining proving

strike bears the burden of proving intentional discrimination, leaving room for courts to speculate on a race-neutral reason that may not exist.[98] For example, prosecutors have successfully struck Black prospective jurors for sleeping during a break, not making friends with other jurors, "look[ing] like a drug dealer," crossing their arms during voir dire, being "morbidly obese," having braids and long pink fingernails, and "shuck[ing] and jiv[ing]" while walking.[99] An additional contributor to *Batson*'s lack of success relates to the deferential treatment given to trial courts.[100] On review, an appellate court strongly defers to the trial court's determinations of fact and credibility, making reversals uncommon.[101] Further, where a trial judge rejects a *Batson* challenge and the court record lacks specificity regarding the prosecutor's justification, the appellate court cannot proceed to steps two and three of the *Batson* test to resolve the dispute.[102]

Studies investigating the issue of discrimination and voir dire conclude that, while constitutionally required, most juries in practice are not a fair cross-section of the community.[103] One study investigated the racial composition and "whitening" of juries in two counties from 2013 to 2014 in an undisclosed state in the southeastern United States.[104] The racial and ethnic composition of one county was 49.5% white, and the other 43.6% white.[105] Although both counties contained a large number of racial and ethnic minorities, the results showed an overrepresentation of white citizens as jurors compared to the population

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intentional discrimination "high bar"); *Panelists Call* Batson *a Failure, Offer Solutions*, *supra* note 96 (providing insight into *Batson*'s failure from attorneys, professors, and judges); EQUAL JUST. INITIATIVE, *supra* note 74, at 15 (contending race-neutral burden "exceedingly low"); JURY SELECTION TASK FORCE, STATE OF CONN. JUD. BRANCH, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 19 (2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf [https://perma.cc/4U5U-NGV6] (noting judges hesitant to question attorneys about discrimination, particularly attorneys who appear often before judge).

98. *See* ELISABETH SEMEL ET AL., BERKELEY L. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX 10 (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/A4R2-YTSB] (noting any new reason for striking juror deemed "highly suspect" when original explanation failed test); EQUAL JUST. INITIATIVE, *supra* note 74, at 22-23 (arguing in Tennessee, "near-total deference" afforded to prosecutors in response to defendants' *Batson* claims); *see also* Serr & Maney, *supra* note 3, at 41-42 (claiming requirement of prima facie showing before prosecution explains race-neutral reasons protects peremptory challenges).

99. *See* SEMEL ET AL., *supra* note 98, at 16-17 (outlining examples of prosecutors striking Black jurors for their demeanor and appearance); EQUAL JUST. INITIATIVE, *supra* note 74, at 18 (presenting accepted race-neutral reasons for removing Black jurors).

100. *See* JURY SELECTION TASK FORCE, *supra* note 97, at 19 (articulating criticisms of *Batson*).

101. *See id.* (acknowledging *Batson* fails to prevent bias in jury selection).

102. *See* Cooper v. State, 432 P.3d 202, 206 (Nev. 2018) (stating "judicial speculation" to decipher State's race-neutral reason contrary to *Batson* goals).

103. *See* U.S. CONST. amend. VI (creating right to impartial jury); Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries*, 39 J. CRIME & JUST. 75, 75 (2016) (calling out constitutional violation in traditional jury composition).

104. *See* Gau, *supra* note 103, at 79 (theorizing inadequate methods to obtain jury pool caused "whitening," and discriminatory peremptory challenges compound problem).

105. *Id.* at 80.

demographics.[106] Almost a quarter of the cases (24%) had juries where five of six people were white, and an all-white jury decided 13.1% of cases.[107]

While statistics comparing the racial and ethnic composition of juries before and after *Batson* do not exist, studies have shown that throughout Alabama, Georgia, Louisiana, Mississippi, and South Carolina, systemic discrimination filters into jury selection through prosecutors' disproportionate striking of Black jurors.[108] In Caddo Parish, Louisiana, researchers analyzed 332 cases and over 8,000 juror outcomes between 2003 and 2012, finding that prosecutors struck Black prospective jurors three times more than non-Black jurors.[109] The study found that, "when presented with an otherwise qualified [B]lack juror," the State used a peremptory strike to remove them 46% of the time.[110] On the other hand, when the prospective juror was not Black, the State removed them only 15% of the time.[111] Comparing against census data from 2010, investigators further evaluated 224 trials consisting of twelve-person juries out of the total 332 cases, noting the adult Black population of Caddo Parish at the time was 44.2% of the total population.[112] Based on county demographics, a twelve-person jury would be expected to include an average of 5.3 Black jurors—on average, only 3.86 jurors were Black.[113] Further, only about 10% of juries were expected to have two or fewer Black jurors, however 22% of juries had this makeup.[114]

In California, law students conducted a study examining 683 California appellate court opinions from 2006 to 2018, evaluating attorneys' peremptory strikes that the opposing party challenged.[115] In about 70% of these cases, prosecutors used their peremptory strikes to remove Black prospective jurors from service.[116] Of these, only eighteen were successful *Batson* claims; the California Courts of Appeal further remanded three cases back to the trial court for a

106. *See id.* at 80, 84 (providing breakdown of racial composition). In the county with a 49.5% white population, 66.1% of jurors were white; the county with a 43.6% white population had 60.0% white jurors. *Id.* at 80 (reiterating overrepresentation of whites).

107. *Id.* at 83. The study concludes that the standard jury consists of mostly or entirely white jurors; when a minority is present, they are typically the "token" minority. *See id.* (specifying two-thirds of defendants tried by juries where minorities underrepresented and cannot "meaningfully impact" decisions).

108. *See* EQUAL JUST. INITIATIVE, *supra* note 74, at 24-27 (presenting studies finding unmitigated racial discrimination in voir dire).

109. *See* URSULA NOYE, BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE CADDO PARISH DISTRICT ATTORNEY'S OFFICE 2, 5, 8 (2015), https://web.archive.org/web/20150906113041/http://www.blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf [https://perma.cc/2LMG-RNAH] (specifying rate of prosecutor's challenges analyzed alongside race of removed or accepted jurors).

110. *Id.* at 8 (detailing of 2,908 total Black prospective jurors, 1,570 accepted and 1,338 removed).

111. *Id.* (indicating of 5,410 total non-Black prospective jurors, 4,580 accepted and 830 struck from serving).

112. *Id.* at 10.

113. NOYE, *supra* note 109, at 10.

114. *Id.*

115. *See* SEMEL ET AL., *supra* note 98, at 13 (explaining research question).

116. *See id.* (noting white jurors removed in less than 1% of cases). Of the total 683 cases reviewed, defense attorneys made *Batson* claims against prosecutors' strikes in 98.0% of cases, whereas prosecutors challenged defense strikes in 1.7% of cases. *See id.* (providing *Batson* allegation breakdown by prosecution and defense).

rehearing on the motion.[117] Despite the *Batson* holding, problems with racial discrimination throughout the voir dire process remain.[118]

C. Implicit Bias in the Legal Field

Current understandings of implicit bias reveal another deficiency in the *Batson* test, specifically how bias leads to discrimination and exclusion of Black jurors if unchecked.[119] Attorneys are compelled to adhere to specific codes of conduct, which include not engaging in any type of racially discriminatory behavior.[120] Nevertheless, bias exists in both everyday life and in the legal field, and most lawyers are not immune from holding their own biases.[121] The difference between explicit and implicit bias is the individual's awareness of their own biases.[122] The former exists when a person consciously acknowledges and understands their bias; the latter, when subconscious thoughts impact someone's actions.[123] One example of implicit bias includes believing racial minority jurors

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117. *See id.* at 24 (noting appellate courts found slightly more *Batson* errors than California Supreme Court). Expanding the dates to 1989–2019, the study found that out of the 145 *Batson* cases the California Supreme Court heard, it found error in only three cases. *See id.* at 23 (calling California Supreme Court's *Batson* record "abysmal").

118. *See* Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. (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/4MXM-9QQA] (stating lack of jury diversity country-wide issue). U.S. District Judge Victoria Roberts remarked: "Unless you are totally blind, a judge cannot help but realize that when 100 people come into court for jury selection that there are one or two, or none, who are visible minorities." *Id.*

119. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (describing unconscious biases attorneys and judges hold); SEMEL ET AL., *supra* note 98, at 47 (explaining how attorney-training guides teach lawyers to rely on biases during jury selection); Press Release, ACLU, Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury [https://perma.cc/T7GQ-2B4Y] [hereinafter ACLU] (adopting new rule to combat implicit bias in voir dire).

120. *See* Edwards, *supra* note 94 (presenting nationwide strategies to both officially recognize and mitigate implicit bias); *see also* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 1983) (delineating causes of lawyer misconduct).

> It is professional misconduct for a lawyer to: . . .
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

MODEL RULES OF PRO. CONDUCT r. 8.4(g); *see* Donner, *supra* note 61, § H (confirming even post-*Batson*, racism finds its way into courtrooms).

121. *See* Donner, *supra* note 61, § E (describing propensity for bias).

122. *See id.* (providing overview of attorney implicit bias).

123. *See id.* (theorizing courts intend to refer to implicit and explicit bias when discussing implied bias); Joanna Fox, *Voir Dire and Implicit Bias in the Federal Courts*, FED. LAW., July–Aug. 2019, at 6, 6 (explaining implicit biases can impact people's decisions). While prospective juror questioning may appear innocent and

are more likely to acquit a fellow minority defendant.[124] Another is internalizing the stereotype that racial and ethnic minorities have unfavorable views toward law enforcement.[125]

While implicit biases are not inherently negative—they allow people to formulate patterns about the world around them—attorneys acting on these biases in the courtroom is problematic.[126] Jury selection training materials condition attorneys to trust their gut instinct and draw conclusions about a potential juror based on their dress, demeanor, body language, and interactions with others.[127] Focusing on these traits disproportionately excludes racial and ethnic minorities from serving; thus, researchers argue these guides perpetuate reliance on implicit biases in the quest to find the "ideal juror."[128]

In his *Batson* concurrence, Justice Thurgood Marshall was the first to predict the inevitable downfall of the test, in part because he believed both attorneys' and judges' unconscious biases would continue the cycle of racial discrimination

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neutral on its face, courts regularly discover certain questions are pretextual for race-based discrimination. *See* Foster v. Chatman, 578 U.S. 488, 489-90, 535 (2016) (noting prosecution did not strike white jurors for similar reasons Black jurors struck). The prosecution in *Foster* presented a litany of supposed race-neutral reasons for ultimately striking all Black prospective jurors, such as divorced marital status, appearance of nervousness during questioning, and eyes cast downward during voir dire. *See id.* at 500-01 (listing prosecutor's reasons for using peremptory strike on jurors). Nevertheless, the Court weighed more heavily the fact the State wrote the words "definite NO's" next to the names of the only Black prospective jurors. *See id.* at 513 (providing reasoning for Court's ruling); Bilotta et al., *supra* note 58, at 235 (noting *Batson* ruling, preventing juror removal for race, often ignored in practice). To overcome a *Batson* challenge, an attorney must provide a race-neutral reason for using the peremptory strike. *See* Bilotta et al., *supra* note 58, at 235. Judges, however, are often satisfied with most reasons. *See id.* (noting ease of overcoming *Batson* challenge); *see also* Conner v. State, 327 P.3d 503, 510-11 (Nev. 2014) (explaining "disparate treatment of similarly situated venire members" evidence of pretext for discrimination). Conner appealed a guilty verdict for sexual assault and first-degree murder, contending the district court erred in overruling a *Batson* challenge in response to the removal of a Black prospective juror. *See Conner*, 327 P.3d at 505, 507 (providing Conner's reason for appeal). The Supreme Court of Nevada agreed and reversed the decision, holding that the prosecution carried out racial discrimination upon striking the Black prospective juror. *See id.* at 510-11 (stating court's holding and reasoning); *see also* LARSEN, *supra* note 29, § 5:1 (noting individual lawyers' goal for voir dire to create jury biased in favor of client); ACLU, *supra* note 119 (describing implicit biases in attorney questioning of venire).

124. *See* Bilotta et al., *supra* note 58, at 235 (providing example of implicit bias).

125. *See id.* (noting attorneys' freedom in jury selection allows implicit bias to affect juror selection). The issue of race in jury selection is so pervasive that it even presents itself in various forms of media, such as through song. *See generally* Michele Cheng, *Voir Dire (To Speak the Truth)* (2018), https://escholarship.org/content/qt0098x1wb/qt0098x1wb.pdf [https://perma.cc/2SJ2-M4B8] (displaying musical score and lyrics). In her musical composition, Michele Cheng creates a story that follows a black bear through his journey in the criminal justice system, zeroing in on the procedure behind voir dire. *See id.* (describing storyline). The script covers not only the litany of excuses potential jurors offer to avoid jury duty, but also touches on the nit-picky nature of attorney questioning and race, as the police and prosecutors are depicted as polar bears. *See id.* (addressing racial issues arising during voir dire).

126. *See* Donner, *supra* note 61, § H (differentiating between holding bias and acting on bias); SEMEL ET AL., *supra* note 98, at 47 (explaining purpose of unconscious thinking).

127. *See* SEMEL ET AL., *supra* note 98, at 47 (specifying prosecutors advised to note aggressive and confrontational body language); EQUAL JUST. INITIATIVE, *supra* note 74, at 16 (describing additional examples of training encouraging discrimination).

128. *See* SEMEL ET AL., *supra* note 98, at 46 (noting trainings do not discuss unconscious biases).

during voir dire.[129] Since then, experts agree implicit bias presents a significant challenge to effective voir dire.[130] Understanding unconscious stereotypes is particularly important because the third step of the *Batson* test requires a judge to determine whether a question or reason for striking a juror was merely a pretext for racial discrimination.[131] In theory, a pretextual reason for striking a juror based on race would lead to a *Batson* violation, yet determining whether an explanation is a cover up is an incredibly difficult task, especially when judges carry their own implicit biases.[132]

States and the legal community have worked to create racially and ethnically diverse juries by mitigating both implicit bias and the disproportionate dismissal of venire members of color.[133] Scholars agree that racially diverse juries perform their duties better than all-white juries.[134] For instance, research shows heterogeneous juries take more time discussing a case's intricacies, scrutinize more evidence, and even analyze evidence more accurately—thereby committing

129. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (claiming most attorneys and judges cannot conquer their own racism). Justice Marshall concluded his opinion in *Batson* by asserting discrimination can only end with the complete abolition of peremptory challenges in criminal cases. *See id.* at 107 (agreeing peremptory challenges founded in racial discrimination violate equal protection).

130. *See* Donner, *supra* note 61, § D (noting problem with resolving issue of implicit bias).

131. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019) (noting last step of *Baston* test requires judges to analyze reason for peremptory strikes); Edwards, *supra* note 94 (clarifying Court's interpretation of legitimate reasons to strike jurors); Donner, *supra* note 61, § D (quoting judge who denotes importance of recognizing own implicit bias).

132. *See* Serr & Maney, *supra* note 3, at 16 (discussing prosecutors' ease in creating race-neutral reason for strike); *Batson*, 476 U.S. at 105-06 (Marshall, J., concurring) (recognizing trial judge's role of uncovering prosecutor's true motives challenging).

133. *See* Bilotta et al., *supra* note 58, at 236 (specifying diverse juries consider evidence and deliberate decisions more carefully than white juries); *see also* Sarah Q. Simmons, *Litigators Beware: Implicit Bias*, ADVOCATE, Mar.–Apr. 2016, at 35, 36 (2016) (outlining strategies to combat implicit biases). Negative ideas about people of a certain race are not fixed and can be overcome by surrounding oneself with people from those groups and understanding the biases informing those negative mental constructions. *See* Simmons, *supra* (describing how to mitigate implicit biases by recognizing and challenging one's own biases). Further, the American Bar Association (ABA) offers implicit bias education and training at no cost. *See Toolkits & Projects*, A.B.A., https://www.americanbar.org/groups/diversity/resources/toolkits/ [https://perma.cc/7PNF-EXQL] (providing implicit bias tests, educational videos, and toolkits to address and reduce biases). The ABA website includes a link to Implicit Association Tests, which contain various tests that shed light on a person's age, skin-tone, gender, religion, and racial biases. *See id.* (providing link to tests); *Preliminary Information*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html [https://perma.cc/E96C-NU54] (providing access to tests measuring person's preferences in specific areas).

134. *See* Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (describing importance of racially diverse jury).

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id.; *see* Bilotta et al., *supra* note 58, at 236 (describing benefits of including racial minorities on juries).

fewer errors.[135] Additionally, a group with differing life experiences and societal interactions is more open-minded to other perspectives, particularly when discussing controversial issues involving race.[136] To mitigate biases, in a state-led approach, California has required that the mandatory continuing legal education (MCLE) requirement incorporate implicit, explicit, and systematic bias training relevant to the legal system starting in 2022.[137]

Washington already acted on this issue in 2018, when the Washington Supreme Court became the first to implement rules outlawing peremptory challenges based on "implicit, institutional, and unconscious biases."[138] When one party objects to the other's peremptory challenge, the court deliberates using the perspective of an "objective observer"—someone who is aware of the historical removal of prospective jurors for discriminatory reasons.[139] If the objective observer could find race or ethnicity was a factor in the peremptory strike, the court will deny the removal.[140] Effectively restructuring the *Batson* test, the Washington Supreme Court further removed even the temptation of questioning and challenges based on bias by creating a list of previously accepted race-neutral reasons that are presumptively invalid, such as living in a high-crime neighborhood and receiving state benefits—a move that others in the legal community are recommending their courts implement as well.[141]

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135. *See* Bilotta et al., *supra* note 58, at 236 (noting diverse jury decreases tendency attorney and judge will make stereotypical allegations).

136. *See id.* (reiterating how heterogeneous juries can reduce bias); EQUAL JUST. INITIATIVE, *supra* note 74, at 40-41 (indicating diverse juries "avoid presumptions of guilt"); Joshi & Kline, *supra* note 118 (emphasizing importance of jurors with "different racial identities").

137. CAL. BUS. & PROF. CODE § 6070.5 (West 2021) (providing portion of training will include strategies to self-reflect and address one's own biases).

138. WASH. GEN. R. 37 (overviewing strategy to reduce implicit bias in courts).

> (e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

Id.; *see* Sonali Chakravarti, *The Chauvin Trial's Jury Wasn't Like Other Juries*, ATLANTIC (Apr. 28, 2021), https://www.theatlantic.com/ideas/archive/2021/04/what-was-different-time/618735/ [https://perma.cc/7ZDN-W5XE] (explaining judges in Washington must now assess potential discrimination through eyes of "objective observer").

139. WASH. GEN. R. 37 (defining objective observer). 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." *Id.*

140. *Id.*

141. *See id.* (listing seven presumptively invalid reasons for striking jurors); Annie Sloan, Note, *"What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 233 (2020) (explaining Washington Supreme Court overhauled *Batson* test); SEMEL ET AL., *supra* note 98, x-xi (providing recommended list of unacceptable reasons). To reduce historically discriminatory reasons for exclusion in voir dire, proposed presumptively invalid questions include employment status; place of residence; multilingualism; collection of state benefits; and "dress, attire, or personal appearance that is historically associated

D. Black Lives Matter in Jury Selection

An additional concern related to implicit bias is the incorporation of BLM questions asked in voir dire; implicit bias may lead prosecutors to remove a prospective juror that supports BLM because of an association with anti-law-enforcement attitudes.[142] The sociopolitical movement BLM advocates for Black people by working toward eliminating white supremacy and creating infrastructure to combat police brutality against Black lives.[143] This global movement started as "a love letter to Black people," written in the form of Facebook posts as an outlet for one of the founders to discuss her feelings regarding the acquittal of George Zimmerman in the murder of Trayvon Martin.[144] The social media posts dubbed the movement, and eventual organization, #BlackLivesMatter.[145] Although present for years, BLM did not gain traction immediately; its reach exploded to a new level on June 6, 2020, when about 500,000 demonstrators gathered across the United States to protest the murder of George Floyd.[146]

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with a prospective juror's race, ethnicity." *See* SEMEL ET AL., *supra* note 98, x-xi (opining recommendation will decrease biases during voir dire).

142. *See* Hassan Kanu, *Court Recognizes Implicit Bias in Nixing Juror for Supporting Black Lives Matter*, REUTERS (Sept. 22, 2021, 2:03 PM), https://www.reuters.com/legal/legalindustry/court-recognizes-implicit-bias-nixing-juror-supporting-black-lives-matter-2021-09-22/ [https://perma.cc/HVP9-6K3G] (describing cases where prosecutors suggest nonwhite BLM supporters incapable of deliberating impartially); Goodwin v. Commonwealth, 834 S.E.2d 487, 498 (Va. Ct. App. 2019) (affirming court's decision not to strike jurors for cause). Goodwin, convicted of attacking someone during a white supremacist rally he attended, appealed the court's decision not to strike four prospective jurors who knew of, attended, or had friends who participated in counter-protests. *See Goodwin*, 834 S.E.2d at 488-91 (providing Goodwin's reasons for requesting for-cause strike). Each juror confirmed their ability to put aside their personal experiences and opinions and stated they could deliberate fairly and impartially, responses the court found credible. *See id.* at 489-91 (detailing prospective jurors' responses when asked about potential bias).

143. *See About* BLM, *supra* note 16 (specifying civil rights goals of movement turned organization); Chase, *supra* note 17, at 1096 (noting first major purposes of BLM to publicize racial inequity and violence).

144. *See Herstory*, *supra* note 17 (describing birth of BLM movement); *see also* Chase, *supra* note 17, at 1092-93, 1095 (specifying issues surrounding Trayvon Martin murder). In 2012, George Zimmerman called 911 to report a suspicious person in his neighborhood—Trayvon Martin, a seventeen-year-old Black male. *See* Chase, *supra* note 17, at 1092-93 (describing facts of case). Although emergency services pressed Zimmerman to stay in his vehicle, he did not follow the command and shot and killed Martin. *See id.* at 1093. Eventually, Zimmerman received a second-degree murder charge, but the jury returned a not guilty verdict in 2013. *See id.* at 1093-94 (stating charge and acquittal). Alicia Garza, one of BLM's founders, wrote social media posts following this verdict, voicing anger and announcing that Black lives matter, the eventual name of the now global organization; she categorized the posts as a love letter to Black people. *See id.* at 1094-95 (explaining backstory of phrase "Black Lives Matter").

145. *See* Chase, *supra* note 17, at 1095 (noting organization's title began on Facebook); *see also Herstory*, *supra* note 17 (explaining meaning behind phrase "Black Lives Matter").

146. *See* Buchanan et al., *supra* note 18 (stating recent protests largest movement in U.S. history); Booker et al., *supra* note 18 (describing aftermath of George Floyd murder). Floyd, a Black man, died after a white police officer pinned Floyd's neck with his knee for almost nine minutes. *See* Booker et al., *supra* note 18 (detailing Floyd's death); Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), https://nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/32W4-PJ4U] (specifying police officer's race). Over 17,000 National Guard troops across the country assembled in response to the national outrage over Floyd's death and police brutality overall. *See* Booker et al., *supra* note 18 (describing violence, ignored curfews, and police response to protests resulted in activation of National Guard). The

Between fifteen million and twenty-six million people reportedly protested from May 26 to June 28 of 2020, demanding an end to police brutality and racism, with BLM at the center.[147]

The BLM movement has influenced the entire nation, including the court system.[148] During voir dire, prosecutors have introduced BLM-movement questions regarding favorability toward activism and the movement as a method to disqualify jurors in a way that may appear facially race-neutral.[149] While research has not yet provided definitive insight into the relationship between questioning about BLM during voir dire and implicit bias, racial justice advocates argue that asking these questions draws anti-law-enforcement conclusions and is a form of racial bias.[150] More specifically, asking these questions "is tantamount to interrogating [jurors'] Blackness."[151] The issue is especially notable in cases where jurors of different races answer the same questions and are "similarly situated," yet prosecutors only strike Black jurors from serving.[152]

In one case, *Cooper v. State*, a Black man appealed his conviction of battery and child abuse, neglect, or endangerment.[153] Cooper argued his Fourteenth Amendment equal protection rights were violated in part when the Nevada

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demonstrations occurred nationally, with some protestors looting and setting fires, and police responding with rubber bullets and tear gas. *See id.* (explaining mayhem of demonstrations).

147. *See* Buchanan et al., *supra* note 18 (presenting statistics for crowd turnout in specific protests). BLM did not overtly manage the demonstrations but acted as a major backer, promoter, and source of information. *See id.* (explaining role of BLM in national protests).

148. *See About* BLM, *supra* note 16 (describing reach of BLM); Buchanan et al., *supra* note 18 (presenting national reach of BLM protests); Jorge Fitz-Gibbon, *Black Lives Matter Movement a Focus in Derek Chauvin Jury Selection*, N.Y. POST (Mar. 11, 2021, 9:45 AM), https://nypost.com/2021/03/09/black-lives-matter-a-focus-in-derek-chauvin-jury-selection/ [https://perma.cc/NQ9U-8VBW] (noting subject of BLM highly relevant to trial of George Floyd's killer).

149. *See* Fitz-Gibbon, *supra* note 148 (providing examples of BLM questions presented during jury selection); Alison Frankel, *Why Is Diversity So Important? Read Orrick's Amicus Brief on Jurors and #BLM*, REUTERS (Aug. 4, 2020, 4:52 PM), https://www.reuters.com/article/legal-us-otc-blm/why-is-diversity-so-important-read-orricks-amicus-brief-on-jurors-and-blm-idUSKCN2502QP [https://perma.cc/5AYE-PS6H] (describing one prospective juror's experience responding to BLM questions during voir dire); Karpan, *supra* note 1 (discussing questioning of BLM to Black prospective juror and juror's subsequent removal); *cf.* United States v. Sheffler, No. 19-CR-30067, 2021 WL 5184319, at *1-6 (C.D. Ill. Nov. 8, 2021) (reviewing co-defendant's proposed voir dire questions about healthcare, race, BLM, Blue Lives Matter, and religion).

150. *See* Bilotta et al., *supra* note 58, at 235 (presenting broad research on voir dire and racial bias); Karpan, *supra* note 1 (detailing specific instances of prosecutor questioning venire members about BLM involvement).

151. *See* Karpan, *supra* note 1 (including statements from MacArthur Justice Institute lawyer who cowrote appellate brief in *Silas*).

152. *See* Conner v. State, 327 P.3d 503, 510-11 (Nev. 2014) (calling out prosecution's removal of Black juror when three non-Black jurors with similar views remained); Miller-El v. Dretke, 545 U.S. 231, 241 (2005) (explaining prosecutor's differing questioning of Black and non-Black venire members, ultimately determining racial discrimination present); Flowers v. Mississippi, 139 S. Ct. 2228, 2250 (2019) (noting prosecution disparately questioned white and Black prospective jurors, striking almost every Black venire member); Foster v. Chatman, 578 U.S. 488, 505 (2016) (presenting "compelling" evidence of intentional discrimination when prosecution unconcerned about similarly situated white jurors).

153. *See* Cooper v. State, 432 P.3d 202, 203 (Nev. 2018) (enumerating convictions).

prosecutor questioned the venire on their feelings toward BLM.[154] This, coupled with the State's use of peremptory challenges to remove the majority of the Black venire members, substantiated Cooper's argument of discriminatory intent.[155] The trial court did not find a prima facie showing of discrimination in Cooper's *Batson* challenge and therefore did not proceed to steps two and three of the test.[156] The Nevada Supreme Court, however, reversed the conviction and remanded the case.[157] The court explained that the prosecution's irrelevant question to the jury about opinions toward BLM, combined with its disproportionate removal of Black venire members, warranted an inference of discriminatory intent.[158]

In *State v. Gresham*,[159] the prosecutor used a peremptory strike to remove a Black prospective juror after asking them about their participation in BLM protests.[160] Although the trial judge denied two for-cause removal requests, they allowed the State to remove the juror with a peremptory strike, denying Gresham's objection under *Batson*.[161] Upon a determination of guilt, Gresham appealed and argued the trial court erred in denying his challenge to the juror's exclusion, an argument the appeals court ultimately rejected.[162] The Court of Appeals of Minnesota determined the trial court erred in rejecting Gresham's prima facie *Batson* claim of discrimination because the questions were racially charged, and thus displayed an inference of discriminatory intent.[163] As it

154. *See id.* at 203, 206 (noting question accomplished little to identify impartial jurors' ability to appropriately apply law).

155. *See id.* at 207 (specifying State used 40% of peremptory challenges to remove 67% of Black venire members).

156. *See id.* at 202, 206 (reiterating inability to proceed to steps two and three of *Batson* test on appeal).

157. *See Cooper*, 432 P.3d at 204 (stating district court clearly erred in finding lack of prima facie showing).

158. *See id.* at 206-07 (explaining court's reasoning); *see also* State v. Campbell, 846 S.E.2d 804, 809 (N.C. Ct. App. 2020) (holding trial court's ruling of no prima facie showing of discrimination proper). In *Campbell*, the appellate court held the State's peremptory strikes did not contain discriminatory undertones. *See Campbell*, 846 S.E.2d at 811 (stating peremptory challenges not founded in racial discrimination). The appellate court explained no racial discrimination occurred because, while the State used three of its four peremptory challenges to remove Black venire members, insufficient evidence existed pertaining to the acceptance rate of potential Black jurors, demographics of the finalized jury, the victim's race, and the race of key witnesses. *See id.* at 810-11 (describing court's reasoning); *see also* Commonwealth v. Williams, 116 N.E.3d 609, 613 (Mass. 2019) (noting juror's difficulty setting aside personal beliefs insufficient for dismissal). The court held the trial judge's removal of a potential juror who stated during voir dire that "the justice system is rigged against African-American males" did not cause prejudice because the juror was replaced by another who was fair and impartial, and thus it did not deprive the defendant of a jury whose demographic represented the community. *See Williams*, 116 N.E.3d at 612, 619-20 (affirming conviction due to lack of prejudice but noting voir dire incomplete).

159. No. A15-1691, 2016 WL 7338718 (Minn. Ct. App. Dec. 19, 2016).

160. *See id.* at *1. The State tried Gresham for both first-degree murder and attempted first-degree murder. *See id.* (listing charges). During the voir dire process, the prosecutor questioned a Black prospective juror about her participation in BLM events after failing to remove her for cause. *See id.* (describing State's two failed attempts to remove juror for cause). Specifically, the prosecutor asked, "[H]ave you participated in any of the Black Lives Matters kind of marches and stuff like that here?" *Id.*

161. *See id.* (arguing strike violated Gresham's Fourteenth Amendment rights).

162. *See id.* at *1, *7 (affirming trial court's decision).

163. *See Gresham*, 2016 WL 7338718, at *2 (presenting prosecution's line of questioning).

analyzed steps two and three of the *Batson* test, however, the court affirmed the convictions of murder and held that the questioning focused holistically on opinions of the criminal justice system and was not the result of racial bias and discrimination.[164]

In *State v. Campbell*, the prosecution admitted to removing a Black prospective juror in part because of its concern regarding her affiliation with BLM at her university.[165] The State described this apprehension, explaining its uncertainty whether the juror's leadership role in BLM "would have any implied unstated issues that may arise due to either law enforcement, the State, or other concerns we may have."[166] The appellate court found no error in the trial court's *Batson* rejection, seemingly by default, because the defense counsel declined to have a recorded jury selection and provided insufficient detail for thorough appellate review.[167]

III. ANALYSIS

A. Black Lives Matter Questions Are Pretextual Discrimination

A growing number of prosecutors are using BLM questioning in voir dire to prove a juror's inability to deliberate impartially, arguing that because of a Black person's involvement in demonstrations and agreement with BLM goals, the court should preclude them from serving.[168] In the courtroom, this is discrimination cloaked under a "race-neutral" avenue, thus side-stepping *Batson* challenges.[169] The prosecution in *Campbell* improperly exercised a peremptory strike when it openly discriminated against a prospective juror who disclosed her leadership position in her school's BLM activities.[170] Ironically, the State justified that the leadership could possibly result in implicit bias against law enforcement, but did not recognize its own bias in striking her.[171]

164. *See id.* at *4 (stating court's holding).

165. *See* State v. Campbell, 846 S.E.2d 804, 807 (N.C. Ct. App. 2020) (admitting reason for removing juror included role in BLM at university).

166. *See id.* at 804, 807 (quoting prosecution's reasoning for using peremptory strike on Black prospective juror). The appellate court affirmed, holding the defendant did not prove their prima facie case of discrimination. *See id.* at 813 (discussing hesitancy to claim Campbell met burden in step one of *Batson* test).

167. *See id.* at 811-12 (urging defense attorneys to obtain transcript of jury selection in anticipation of *Batson* challenge).

168. *See id.* at 807 (describing prosecutor's BLM questioning); Fitz-Gibbon, *supra* note 148 (presenting BLM questions asked during voir dire); Karpan, *supra* note 1 (discussing prosecutor's conflation of BLM support with vandalism).

169. *See* Karpan, *supra* note 1 (arguing BLM voir dire questioning constitutes form of discrimination).

170. *See Campbell*, 846 S.E.2d at 807 (confirming juror removed, in part, for leadership hosting BLM activities).

171. *See* State v. Campbell, 846 S.E.2d 804, 807 (N.C. Ct. App. 2020) (explaining prospective juror may possess implied biases).

In another case, *People v. Silas*, the prosecution questioned a prospective juror, Crishala Reed, for her affiliation with BLM.[172] During voir dire for the homicide trial, prosecutors conflated her support for BLM with encouragement for destruction of property, even though she denounced damaging others' belongings.[173] While Reed asserted her ability to deliberate impartially, the prosecution inappropriately struck her using a peremptory challenge, with the trial court refusing to acknowledge the obviously racially motivated questioning that Reed, a Black woman, endured.[174] The court further condoned prosecutors' usage of BLM affiliation as a successful race-neutral justification when it rejected the defendant's *Batson* challenge.[175]

Cooper remains the primary example of a judge noting the biases associated with invoking BLM in voir dire when the court held that the defendant did, in fact, prove a prima facie case of racial discrimination in its *Batson* claim.[176] Conversely, the Court of Appeals of Minnesota decided *Gresham* incorrectly, setting dangerous precedent for cases where a defendant challenges a peremptory strike due to voir dire questions related to BLM.[177] Prosecutors asked the prospective jurors in both *Cooper* and *Gresham* about their affiliation and interest in the BLM movement, a question both courts acknowledged had clear racial overtones.[178] While both Cooper and Gresham faced violent crime charges, neither regarding law enforcement, only the court in *Cooper* called out the minimal relevance the question had with respect to the facts of the case, a point the *Gresham* court missed.[179] Voir dire requires attorneys to ask pertinent questions, and the BLM

172. *See* People v. Silas, 284 Cal. Rptr. 3d 48, 55 (Ct. App. 2021) (noting trial court permitted peremptory strike of juror who expressed support for BLM); Frankel, *supra* note 149 (presenting case where voir dire included BLM questions).

173. *See* Frankel, *supra* note 149 (describing prosecution's probing of attitudes toward BLM). The prosecution first asked Reed, "[y]our support for Black Lives Matter, do you agree or do you disagree with that type of behavior, that is, destroying other people's property?" *Id.* The prosecution then unsuccessfully attempted to remove Reed for cause, arguing it is well documented that BLM protests consist of "open rioting where private property was damaged." *See id.* (associating Reed's opinions toward BLM with damaging property).

174. *See id.* (confirming potential juror struck from serving).

175. *See id.* (claiming Reed's removal due to her BLM support amounts to racial discrimination). On appeal, however, the appellate court properly remanded the case, reasoning the prosecution's explanation the prospective juror was hostile "should not have been credited." *Silas*, 284 Cal. Rptr. at 55 (remanding case for new trial).

176. *See* Cooper v. State, 432 P.3d 202, 207 (Nev. 2018) (holding evidence Cooper brought forth supported inference of discrimination).

177. *See* State v. Gresham, No. A15-1691, 2016 WL 7338718, at *1 (Minn. Ct. App. Dec. 19, 2016) (holding peremptory challenge did not violate Fourteenth Amendment); *see also* State v. Campbell, 846 S.E.2d 804, 805 (N.C. Ct. App. 2020) (holding prima facie case in *Batson* challenge not proven); Frankel, *supra* note 149 (describing Black prospective juror's removal after judge found no racially discriminatory reason for removal).

178. *See Cooper*, 432 P.3d at 206 (stating question had "race-based implications"); *Gresham*, 2016 WL 7338718, at *1, *4 (conceding questions had "racial overtones").

179. *See Gresham*, 2016 WL 7338718, at *1 (describing facts of case); *Cooper*, 432 P.3d at 206 (stating BLM question did not relate to facts of case). Defendants in both *Cooper* and *Gresham* faced violent-crime charges, the former with battery and child abuse, and the latter with first-degree murder and attempted first-degree murder. *See Cooper*, 432 P.3d at 203 (describing Cooper's charges); *Gresham*, 2016 WL 7338718, at *1 (specifying conviction).

question was not relevant in the *Gresham* case, presenting yet another example of bias seeping into the process of jury selection—precisely what *Batson* attempted to prevent.[180] Further, when the *Gresham* court proceeded to steps two and three of the *Batson* test, it highlighted the standard that the prosecution's race-neutral explanation did not need to be plausible as long as discriminatory intent was not evident; this low standard allows for implicit bias to further seep into the voir dire process.[181]

In *Batson*, the Court sought a way to protect Fourteenth Amendment equal protection rights.[182] Nevertheless, as Justice Marshall's prediction echoes, case after case chips away at the right to participate in a jury regardless of race.[183] Failure to enforce this constitutional right means defendants must unfairly wait, sometimes losing out on decades of freedom, to retry a case founded in racial discrimination.[184] *Batson* has proven insufficient at preventing inappropriate, irrelevant questions about BLM; these questions add to the slew of allegedly race-neutral reasons courts have accepted, ultimately watering down *Batson*'s intended positive impact.[185] While *Batson*, in its time, was a worthwhile start at addressing the problem of racial discrimination in the courtroom, it leaves much to be desired in terms of impact—acknowledging and combating implicit biases is a major step forward to obtaining long-lasting results.[186]

B. Revising the Batson *Standard to Create Constitutionally Sound Voir Dire that Acknowledges Implicit Bias*

Implicit biases pose problematic threats to voir dire when they reveal themselves at the start of a trial through racially charged juror questioning.[187] Attorneys and judges are rarely challenged to confront their implicit biases in a field

180. *See Gresham*, 2016 WL 7338718, at *1 (presenting facts of case, none of which involve BLM); Donner & Bernard, *supra* note 39, § E (stating questions should relate to facts of case); Batson v. Kentucky, 476 U.S. 79, 97 (1986).

181. *See Gresham*, 2016 WL 7338718, at *3; *see also Cooper*, 432 P.3d at 206-07 (exposing disingenuous reasons to include BLM questions in voir dire); Frankel, *supra* note 149 (arguing BLM proponents not "lawless" and can serve on juries effectively).

182. *See Batson*, 476 U.S. at 97.

183. *See id.* at 102-03 (Marshall, J., concurring) (stressing Equal Protection Clause prohibits discrimination based on race).

184. *See* Edwards, *supra* note 94 (providing examples of cases requiring many years to resolve). In *Flowers*, twenty-three years passed between the murder and the Supreme Court's decision; in *Foster,* this waiting period was thirty years. *See id.* (noting length of time to retry case creates "insurmountable obstacle").

185. *See supra* notes 97-99 and accompanying text (presenting evidence showing laundry list of race-neutral reasons courts accept for prospective juror removal); Frankel, *supra* note 149 (describing cases where racial implications found in BLM questioning); Cooper v. State, 432 P.3d 202, 206 (Nev. 2018) (calling BLM question asked during voir dire irrelevant).

186. *See Panelists Call* Batson *a Failure, Offer Solutions*, *supra* note 96 (describing how *Batson* falls short reducing implicit bias in courtroom).

187. *See* Donner, *supra* note 61, § D (explaining problems associated with attorneys' implicit biases); State v. Campbell, 846 S.E.2d 804, 807 (N.C. Ct. App. 2020) (explaining association of BLM with antagonistic feelings toward law enforcement).

that strives to achieve fairness and justice.[188] While for-cause strikes mandate an attorney prove to the judge there is a threat to impartiality, the use of peremptory challenges requires no reason, therefore allowing implicit bias to easily enter the process.[189] Unconscious behavior often influences pretext, leading attorneys to make decisions without realizing bias drives their actions, making it all the more difficult to fix.[190] If research shows a diverse jury performs better, and this type of deliberation and care is precisely what the Sixth Amendment demands through the right to a fair trial by an impartial jury of defendant's peers, then it is imperative to acknowledge these biases.[191]

A problem this layered requires multi-faceted solutions; the narrative that a Black BLM supporter is automatically anti-law-enforcement must give way to an understanding that they can analyze and deliberate impartially despite life experiences and affiliations.[192] Courts are at the forefront of initiating change by filtering the types of questions presented to the jury; questions about BLM, which are inherently race-based, can only stand up to *Batson* scrutiny if they are related to the issues of the case.[193] If unrelated, this type of questioning becomes an inappropriate manifestation of implicit bias, opening the door for prosecutors to read into a prospective juror's response and create assumptions regarding their views on the law and its enforcement.[194] During voir dire, courts should follow a standard similar to *Cooper*, where the court noted, "the [BLM] question did not examine an issue apparent in this case, and the State fail[ed] to credibly explain how this question helped expose whether a prospective juror could 'consider and decide the facts impartially and conscientiously apply the law.'"[195] If the BLM organization or police violence are not material issues or facts in the case, the

188. *See* Donner, *supra* note 61, § D (noting attorneys' conduct of professional responsibility); Fox, *supra* note 123, at 6 (stating difficulty of addressing one's own implicit biases).

189. *See* LAFAVE ET AL., *supra* note 5, § 22.3(a) (explaining peremptory challenges used to remove jurors "merely suspected of being biased"); Dewan, *supra* note 97 (presenting case law proving peremptory challenges used to carry out racial discrimination).

190. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (describing problem of implicit biases). Justice Marshall further stated: "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." *Id.*

191. *See supra* notes 134-36 and accompanying text (emphasizing importance of diverse juries); Bilotta et al., *supra* note 58, at 236 (explaining acknowledgment of bias imperative to reducing bias); *see also supra* note 28 and accompanying text (describing Sixth Amendment right to impartial jury).

192. *See* SEMEL ET AL., *supra* note 98, at 44 (describing Court's disdain toward using jurors belonging to certain group "as a proxy for impartiality").

193. *See Batson*, 476 U.S. at 89 (reiterating peremptory challenges must respect Equal Protection Clause of Fourteenth Amendment); Cooper v. State, 432 P.3d 202, 206 (Nev. 2018) (remarking irrelevancy of BLM question to issues in case); Frankel, *supra* note 149 (arguing approval of movement linked with race).

194. *See* Chakravarti, *supra* note 138 (stating prosecutor did not believe prospective juror's response "credible" when she disagreed with damaging property).

195. *Cooper*, 432 P.3d at 206 (quoting Johnson v. State, 148 P.3d 767, 774 (Nev. 2006)).

questioning is irrelevant; courts should presume discriminatory intent and thus prohibit the questions for violating the Constitution.[196]

State legislators, when implementing approaches to combat implicit bias, should consider how a lack of empirical studies compounds the issue, and functioning methods to confront and overcome implicit bias are almost nonexistent.[197] Because one of the major ways to combat implicit bias is to understand and acknowledge it, states must implement mandatory training for legal professionals.[198] Similar to the MCLE requirement California mandated, training should include a focus on biases regarding "race, ethnicity, gender identity, sexual orientation, [and] socioeconomic status" and strategies to reduce them.[199] Finally, where education and training leave gaps, courts and lawmakers must create rules to further locate and eliminate opportunities for prosecutors to remove prospective jurors discriminatorily.[200]

To that end, the *Batson* test cannot remain unmodified, and implicit bias—in part—informs how courts and lawmakers should address its modifications.[201] The requirement in step one, that a defendant must establish a prima facie case of *purposeful* discrimination, is too large of a hurdle to effectively serve the test's overall purpose.[202] Instead, using the "objective observer" standard the Washington Supreme Court introduced, judges can determine if *any* discrimination took place, intentional or otherwise.[203] Contrary to the purposeful discrimination requirement, this perspective change considers the effects of implicit biases in disproportionately striking jurors, ultimately creating a fairer jury by tackling various avenues that can lead to discrimination.[204]

Step two, which requires the striking party to defend their removal with a race-neutral reason, has gained consensus among legal experts and the courts

196. *See id.* (dismissing voir dire question for irrelevance to case issues); United States v. Barnes, 604 F.2d 121, 140 (2d Cir. 1979) (rejecting voir dire questions unrelated to main issues of case); Donner & Bernard, *supra* note 39, § E (noting importance of relevant questioning).

197. *See* Donner, *supra* note 61, § H (stating most judges not educated on implicit bias); United States v. Sheffler, No. 19-CR-30067, 2021 WL 5184319, at *4 (C.D. Ill. Nov. 8, 2021) (prohibiting BLM questions from entering voir dire). The court declined to ask the prospective jurors about their awareness of and views on BLM, Blue Lives Matter, and Defund the Police because the movements were irrelevant to the facts of the case, and out of concern that the inquiries "would only tend to prolong voir dire and promote confusion among prospective jurors as to how those topics might relate to this case." *See Sheffler*, 2021 WL 5184319, at *5. The charges against the defendants were "deprivation of civil rights, conspiracy, obstruction or falsification of a document, and obstruction by misleading conduct." *Id.* at *2.

198. *See* Simmons, *supra* note 133, at 36 (emphasizing importance of acknowledging biases).

199. *See* CAL. BUS. & PROF. CODE § 6070.5 (West 2021) (delineating specifics of bias-reducing training).

200. *See* ACLU, *supra* note 119 (describing new Washington rule condemning implicit bias and racially charged questions in voir dire).

201. *See id.* (explaining how understanding implicit bias pivotal to create rule); WASH. GEN. R. 37 (delineating new court rule aimed at preventing implicit bias from entering jury selection).

202. *See* Sloan, *supra* note 141, at 235 (noting *Batson* failures in step one of test).

203. *See id.* (confirming discrimination can bypass first step if caused by implicit bias).

204. WASH. GEN. R. 37 (stating objective observer considers how implicit, unconscious, and intentional biases historically impacted juror removal).

themselves as a low bar to pass.[205] A key alteration to the *Batson* test that will thereby adjust peremptory challenges is eliminating historically accepted "race-neutral" reasons for exercising peremptory challenges that disproportionately remove Black people.[206] Court committees or legislatures should enumerate and deem unacceptable specific reasons that in the past were considered race-neutral, but ultimately impact the Black community unequally.[207]

In step three, judges, who have their own implicit biases, determine whether the race-neutral reason was a pretext for discrimination; judges may potentially allow a peremptory strike in situations where the spirit of *Batson* would say no.[208] In this final step, regardless of the judge's decision, courts should provide in-depth reasoning for their decision.[209] The appellate courts, which must defer to trial courts, can then analyze and arrive at more accurate decisions based on additional facts.[210]

IV. CONCLUSION

Voir dire is an essential part of the criminal justice system: it sets the stage—and even potentially changes the outcome—of a criminal trial. Peremptory challenges provide the opportunity to skew the final jury, especially in cases with a Black defendant, where the prosecutor believes their case benefits from an all-white jury. Attempts to create a racially and ethnically homogenous jury offend the Constitution and also contradict both public preference and the functionality of juries, which support diverse juries. While the *Batson* test was designed to combat explicit biases, it ignores current learning about implicit bias, leaving a major problem undetected and unaddressed. This form of bias comes out through the inclusion of irrelevant BLM-focused questions presented to prospective jurors, who are nonetheless removed from serving despite attesting to their ability to deliberate impartially. As it stands, *Batson* cannot complete its goal of reducing discriminatory voir dire. The risk of accepting implicit bias through BLM questions is too great, and attorneys cannot continue unchecked. Nevertheless,

205. *See* People v. Silas, 284 Cal. Rptr. 3d 48, 85 (Ct. App. 2021) (explaining precedent creates low bar to succeed in step two); Sloan, *supra* note 141, at 235 (declaring major reason of *Batson* failure lies in easy race-neutral justification in step two).

206. *See* WASH. GEN. R. 37 (listing now-prohibited reasons to remove prospective juror); Sloan, *supra* note 141, at 236 (explaining Washington Supreme Court's decision to prohibit certain previously accepted race-neutral reasons for juror removal).

207. WASH. GEN. R. 37(h)–(i) (listing presumptively invalid reasons to exercise peremptory strike); SEMEL ET AL., *supra* note 98, at 16-17 (describing accepted reasons for striking Black jurors, seeped in stereotypes).

208. *See* SEMEL ET AL., *supra* note 98, v (presenting studies' findings).

209. *See* WASH. GEN. R. 37 (requiring courts to provide explanations of their reasoning in record); Cooper v. State, 432 P.3d 202, 205-06 (Nev. 2018) (criticizing court's lack of recordkeeping); State v. Campbell, 846 S.E.2d 804, 813 (N.C. Ct. App. 2020) (Hampson, J., concurring in part, dissenting in part) (suggesting trial courts make determinations of fact when analyzing *Batson* challenges to ease appellate review); Kanu, *supra* note 142 (noting discrepancies between prosecutor's claims and court transcript).

210. *See Campbell*, 846 S.E.2d at 812-13 (Hampson, J., concurring in part, dissenting in part) (stating courts must defer to trial court on review even when minimal information provided).

systemic change is possible, and the court systems and legislatures hold significant power to create impactful improvements in the form of training, limiting BLM questioning, and *Batson* modifications.