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Criminal Law—The Call for an Adequate Remedy: The Lack of Deterrence and Judicial Consequences for Prosecutors who Habitually Violate Batson

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CRIMINAL LAW—THE CALL FOR AN ADEQUATE REMEDY: THE LACK OF DETERRENCE AND JUDICIAL CONSEQUENCES FOR PROSECUTORS WHO HABITUALLY VIOLATE *BATSON*

I. INTRODUCTION

For over twenty-two years, from 1997 to 2019, the State of Mississippi put Curtis Flowers, a man accused of capital murder, through a series of unfortunate events.[1] Three conviction reversals and two hung juries led Flowers to a sixth trial, which he subsequently appealed to the Supreme Court of the United States.[2] During the first four trials, the State exercised its peremptory challenges to exclude "as many black prospective jurors as possible."[3] The fifth trial ended in a hung jury that led to a sixth trial.[4] With the sixth trial ending in Flowers's conviction, the Supreme Court of the United States addressed whether the State violated *Batson*[5] in employing peremptory challenges against black prospective jurors.[6] The Court concluded that the State had in fact violated *Batson*, and it therefore reversed the judgment of the Supreme Court of Mississippi.[7]

Through all six trials, Doug Evans served as the state prosecutor.[8] Following the Court's ruling, Evans was found to have committed prosecutorial misconduct and *Batson* violations throughout four of the six trials.[9] Even with these offenses, however, the Mississippi trial court did not impose any penalties on Evans, nor did the Supreme Court of the United States scold Evans by name in its opinion.[10] Flowers's unfortunate case is only one example of many demonstrating the ineffective procedure established in *Batson* to end racial discrimination in jury selection.[11] This ineffectiveness is due in part to *Batson*'s sole inquiry of whether there was purposeful dis-

1. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2236 (2019).
2. *Id*. at 2235.
3. *Id.* at 2246.
4. *Id.* at 2235.
5. Batson v. Kentucky, 476 U.S. 79 (1986).
6. *Flowers*, 139 S. Ct. at 2235.
7. *See id*.
8. Curtis Gilbert et al., *Reversed: Curtis Flowers Wins Appeal at U.S. Supreme Court*, APM REPORTS (June 21, 2019), https://www.apmreports.org/story/2019/06/21/curtis-flowers-wins-scotus-appeal.
9. *See Flowers*, 139 S. Ct. at 2234–35.
10. *See* Gilbert et al., *supra* note 8.
11. *See infra* Part III.

crimination.[12] Further, as the procedure and law currently stand, there are no consequences that deter *Batson* violators from becoming repeat discrimination offenders, such as Evans in *Flowers*.[13]

Flowers presents a clear example of how *Batson* cannot fully eradicate racial discrimination in jury selection.[14] The *Batson* procedure does not provide a deterrent for prosecutors who regularly exclude black prospective jurors.[15] The *Flowers* Court ultimately reached the proper judgment, but the Court did not resolve the common practice of prosecutors employing racial discrimination in jury selection within state trial courts.[16] To fight this issue, this note proposes that courts impose consequences such as sanctions and disqualification from participation in retrial on prosecutors who are shown to exclude minorities from jury service repeatedly.[17]

To support this proposition, Part II of this note will detail the evolution of the law used to combat racial discrimination in jury selection. Part III provides evidence that racially discriminatory practices by prosecutors are still prevalent today. Part III further explains why the application of *Batson* is insufficient to eradicate racial discrimination in jury selection. Part IV of this note argues that courts should impose penalties on prosecutors who repeatedly exclude black prospective jurors to (1) promote the interest of justice and equal protection and (2) maintain the integrity of the legal profession as outlined in the Model Rules of Professional Conduct. Part IV of this note also argues that eliminating peremptory challenges is a radical and irrational remedy.

II. THE HISTORICAL STEPS TO COMBAT RACIAL DISCRIMINATION IN THE JUDICIAL SYSTEM

The Fourteenth Amendment to the Constitution of the United States was the first step on a long road to equality under the law for black citi-

12. *See* Batson v. Kentucky, 476 U.S. 79, 93 (1986); *id.* at 105 (Marshall, J., concurring).

13. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 45–46 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf ("One of the most vexing aspects of the continuing problem of racial discrimination in jury selection is impunity. In most cases where a court finds that a prosecutor intentionally has engaged in racial discrimination while selecting a jury, the prosecutor suffers no adverse consequences." (emphasis omitted))

14. *See Flowers*, 139 S. Ct. at 2235–36; *Batson*, 476 U.S. at 105 (Marshall, J., concurring).

15. *See Batson*, 476 U.S. at 102–07 (Marshall, J., concurring).

16. *See Flowers*, 139 S. Ct. at 2235.

17. *See* EQUAL JUSTICE INITIATIVE, *supra* note 13, at 45 (arguing that "prosecutors who are found to have engaged in" racial discrimination during jury selection "should be disqualified from participation in . . . retrial" and be subject to fines or other penalties).

zens.[18] Although the amendment provided legal protection against discrimination, eradicating discrimination in the judicial system was troublesome.[19] Since the ratification of the Fourteenth Amendment, the Supreme Court of the United States has struggled with finding a proper procedure to promote the principles of the amendment without interfering with the adversarial process.[20]

A. Post-Civil War

For United States citizens, serving on a jury, similar to voting, is both a duty and a privilege.[21] In protecting these privileges, the Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[22] The ratification of the Fourteenth Amendment, however, did not end the long-term fight for civil rights by minority groups, especially the right to sit on a jury.[23] In addition to the protections provided in the Constitution, the Civil Rights Act of 1875 provides that "[n]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude."[24] Even with the law on their side, minorities were still often not afforded a true opportunity to participate in juries.[25]

B. Swain and Batson

The 1965 case, *Swain v. Alabama*, was the Supreme Court's first ruling on the issue of racial discrimination in jury selection in the twentieth century.[26] In *Swain*, the defendant was convicted of a capital offense and sentenced to death in Talladega, Alabama.[27] For more than a decade, no black juror had served on a jury in Talladega County.[28] On appeal, Swain argued that the prosecutor's striking of all six qualified black prospective jurors was

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18. *See* U.S. CONST. amend. XIV.
19. *See* EQUAL JUSTICE INITIATIVE, *supra* note 13, at 9–10.
20. *See id.* at 9–13.
21. *See Flowers*, 139 S. Ct. at 2238.
22. U.S. CONST. amend. XIV.
23. *See Flowers*, 139 S. Ct. at 2238–39; *see also* Strauder v. West Virginia, 100 U.S. 303, 304 (1879).
24. 18 U.S.C. § 243 (2018); EQUAL JUSTICE INITIATIVE, *supra* note 13, at 9.
25. *See* EQUAL JUSTICE INITIATIVE, *supra* note 13, at 9–10.
26. *See id.* at 12.
27. *Flowers*, 139 S. Ct. at 2240.
28. *Id.*

unconstitutional under *Strauder v. West Virginia*.[29] The Supreme Court rejected the defendant's argument.[30] The Court held that a defendant can demonstrate racial discrimination by providing evidence that the State systematically employed peremptory challenges so no black juror could ever serve on a jury.[31] Over twenty years later, the Court overruled this incredibly high standard.[32]

Overruling *Swain* in part, *Batson* held that a defendant may present a prima facie showing of purposeful racial discrimination in jury selection by relying on the facts in his own case.[33] *Batson* found that the *Swain* evidentiary standard was too harsh.[34] The Court held that a defendant must show "relevant facts [that] give[] rise to an inference of discriminatory purpose."[35] Relevant facts may include evidence concerning purposeful racial discrimination in his case or proof that a particular jurisdiction has a history of systemic discrimination.[36] The procedure has not changed since this 1986 decision.[37]

III. IMPLICATIONS OF *BATSON*

Since *Batson*, the issue of racial discrimination in jury selection continues to be litigated, and statistics show that some jurisdictions have a history of striking black jurors.[38] As discussed *supra*, *Flowers v. Mississippi* demonstrates one prosecutor's habitual misuse of peremptory challenges for a discriminatory purpose.[39] This case, as detailed below, is only one of many.

A. *Flowers v. Mississippi*

Flowers is a black male whom the State of Mississippi charged with the murder of four people in Winona in 1996.[40] "Three of the four victims [in

29. *Id.* (referring to Strauder v. West Virginia, 100 U.S. 303 (1880)).
30. *Id.*
31. *Id.*
32. *See* Batson v. Kentucky, 476 U.S. 79 (1986).
33. *Id.* at 93, 95.
34. *Id.* at 92–93.
35. *Id.* at 93–94.
36. *See id.* at 94–95.
37. *See generally* Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) ("[W]e break no new legal ground. We simply enforce and reinforce *Batson* . . . .").
38. *See* EQUAL JUSTICE INITIATIVE, *supra* note 13, at 5–7.
39. *See supra* Part I.
40. *Flowers*, 139 S. Ct. at 2234. Winona was a small town with a population of about 5000 people. *Id.* at 2236. The racial make-up of the town is about fifty-three percent black and about forty-six percent white. *Id.*

the case] were white."[41] Flowers was tried six separate times before a jury for murder, and, as discussed *supra*, Evans represented the State in all six trials.[42] In the first trial, the jury convicted Flowers, but the Supreme Court of Mississippi reversed the conviction due to "numerous instances of prosecutorial misconduct."[43] There were thirty-six prospective jurors—five black and thirty-one white.[44] "The State exercised . . . twelve peremptory strikes," and of the twelve, "it used five of them to strike [all] five qualified black prospective jurors."[45] "Flowers objected, arguing under *Batson* that the State" employed its peremptory strikes for purposeful racial discrimination.[46] "The trial court rejected the *Batson* challenge."[47] On appeal, the Supreme Court of Mississippi did not reach Flowers's *Batson* argument because the court reversed on prosecutorial misconduct.[48]

In the second trial, the trial court found that the prosecutor discriminated on the basis of race in the peremptory challenge of a black juror.[49] Five of the venirepersons were black, and twenty-five were white.[50] The State once "again used its strikes against all five black prospective jurors."[51] The defense made a *Batson* challenge, and "the trial court determined that the State's asserted reason for one of the strikes was a pretext for discrimination."[52] The State provided a false allegation that the juror was "inattentive" and "nodding off during jury selection."[53] That black juror sat with eleven white jurors.[54] The jury convicted Flowers, but the Supreme Court of Mississippi again ruled Evans committed prosecutorial misconduct and reversed Flowers's conviction.[55]

In the third trial, the jury convicted Flowers once again.[56] During voir dire, seventeen black jurors and twenty-eight white jurors made up the potential jury pool, totaling forty-five prospective jurors.[57] The State struck one of the black prospective jurors for cause, leaving sixteen black venireper-

41. *Id.*
42. *Id*.
43. *Id*. (quoting Flowers v. State, 773 So. 2d 309, 327 (2000)).
44. *Flowers*, 139 S. Ct. at 2236.
45. *See id.*
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Flowers*, 139 S. Ct. at 2236.
51. *Id.*
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Flowers*, 139 S. Ct. at 2237.
57. *Id.* at 2236.

sons.[58] The State used all fifteen of its peremptory strikes against the black prospective jurors.[59] Flowers again asserted a *Batson* violation, but the trial court ruled the State did not "discriminate[] on the basis of race."[60] The jury "consisted of eleven white jurors and one black juror" because the State used all of its peremptory strikes.[61] "On appeal, the Supreme Court of Mississippi . . . again reversed, concluding that the State had again violated *Batson*. . . ."[62]

Flowers' fourth and fifth trials ended in mistrials due to hung juries.[63] The fourth trial had thirty-six prospective jurors—sixteen black and twenty white.[64] The State exercised eleven peremptory strikes, using all eleven against black venirepersons.[65] Because the State ran out of peremptory challenges, however, "[t]he seated jury consisted of seven white jurors and five black jurors."[66] Racial information about the prospective jurors participating in voir dire for the fifth trial was not available.[67] The racial information of the final jury panel was provided—three black jurors sat for trial.[68]

During the sixth trial, the jury convicted and sentenced Flowers to death.[69] There were twenty-six prospective jurors—six black and twenty white.[70] During voir dire, the State struck five of the six black prospective jurors.[71] Flowers argued that the State employed its peremptory challenges with discriminatory intent.[72] The trial court rejected Flower's argument, "conclud[ing] that the State had offered race-neutral reasons for each . . . strike[]."[73] On appeal, Flowers renewed his argument that the State violated *Batson* in exercising peremptory strikes against black prospective jurors, but the Supreme Court of Mississippi agreed with the trial court.[74] Flowers petitioned to the Supreme Court of the United States, and the Court vacated the judgment and remanded for a decision consistent with the holding in *Foster v. Chatman*.[75] In a five-to-four decision, the Supreme Court of Mississippi

58. *Id*.
59. *Id*.
60. *Id*. at 2236–37.
61. *See id*. at 2237.
62. *Flowers*, 139 S. Ct. at 2237.
63. *Id.*
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Flowers*, 139 S. Ct. at 2237.
69. *Id.*
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Flowers*, 139 S. Ct. at 2237.
75. *Id.* (referring to Foster v. Chatman, 136 S. Ct. 1737 (2016)).

reaffirmed Flowers's conviction.[76] Flowers once again appealed to the Supreme Court of the United States.[77]

In its final review, the Supreme Court of the United States applied the principles in *Batson* for four reasons.[78] First, the history from Flowers's six trials created an inference of discriminatory intent.[79] Second, in the sixth trial, the prosecutor's use of peremptory strikes against five of the six black prospective jurors supported an inference of discrimination.[80] Third, the gross disparity in questioning of black and white jurors at the sixth trial was evidence of racially discriminatory intent.[81] Last, the prosecutor's proffered reason for striking black juror, Carolyn Wright, suggested discriminatory intent because the prosecutor accepted other similarly-situated white jurors.[82] Following this finding of a *Batson* violation, the Supreme Court reversed the conviction and remanded for new trial.[83]

B. Recent Cases of *Batson* Violators

While *Flowers* presents a set of extraordinary facts, several cases support that racial discrimination in jury selection is far from eradicated in this country.[84] Some cases even provide historical evidence of discrimination by the State in a specific jurisdiction, just like *Flowers*.[85] A comparable case to *Flowers* that displays racial discrimination is *Miller-El v. Dretke*.[86]

1. Miller-El v. Dretke

Texas charged Thomas Miller-El with capital murder for shooting and killing a Holiday Inn employee in late 1985 during a robbery in Dallas, Tex-

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76. *Id*. at 2238.
77. *See id.*
78. *See id*. at 2244.
79. *Id*. at 2245–46.
80. *Flowers,* 139 S. Ct. at 2246.
81. *Id.* at 2246–47.
82. *Id.* at 2248–51.
83. *Id.* at 2251.
84. *See generally, e.g.*, Foster v. Chatman, 136 S. Ct. 1737, 1742–43 (2016) (holding that a Georgia prosecutor violated Batson when he struck four qualified black jurors); Purkett v. Elem, 514 U.S. 765, 777–78 (1995) (Stevens, J., dissenting) ("The Court's unnecessary tolerance of silly, fantastic, and implausible explanations . . . demeans the importance of the values vindicated by our decision in *Batson*."); Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1410 (2018) ("Our analysis shows that prosecutors in North Carolina—a state with demographics and legal institutions similar to those in many other states—excluded nonwhite jurors about twice as often as . . . white jurors.").
85. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231 (2005).
86. *Id.*

as.[87] During jury selection, the prosecutors used peremptory strikes against ten of eleven qualified black prospective jurors.[88] Miller-El objected, claiming that the Dallas County District Attorney's Office had a history of employing peremptory challenges to strike black jurors, rendering the strikes in Miller-El's case illegitimate.[89] Because the trial was before *Batson*, the trial court denied Miller-El's request for a new jury because he did not meet his burden under *Swain*, the controlling law at the time.[90] The jury convicted Miller-El and sentenced him to death.[91] Miller-El appealed.[92]

The Supreme Court of the United States decided *Batson* while the appeal was pending, so the Texas Court of Criminal Appeals remanded the matter to the trial court in light of the *Batson* decision.[93] The trial court once again found no demonstration of the prosecutors striking black jurors because of race, and the Texas Court of Criminal Appeals affirmed.[94] Ultimately, the Supreme Court of the United States granted certiorari following the United States Court of Appeals for the Fifth Circuit's rejection of Miller-El's *Batson* claim under 28 U.S.C. § 2254.[95]

The Court applied an almost identical analysis as in *Flowers*.[96] The Court evaluated the disparity between white and black jurors selected—in this case, the prosecutor employed peremptory strikes to exclude ninety-one percent of the eligible black prospective jurors.[97] It applied the side-by-side comparison of black and white venire panelists who are similarly situated.[98] It also criticized the prosecutor's mischaracterizations of a qualified black prospective juror.[99]

The primary similarity to *Flowers*, however, is the evidence supporting a prosecutorial trend of discrimination against black prospective jurors in voir dire.[100] The prosecutors employed a procedure in Texas known as the jury shuffle to exclude black jurors.[101] In Texas's criminal procedure, "either side may literally reshuffle the cards bearing panel members' names, thus

87. *Id.* at 235–36.
88. *Id.* at 240–41 (citing Miller-El v. Cockrell, 537 U.S. 322, 331 (2003)).
89. *Id.* at 236.
90. *See id.*
91. *Miller-El*, 545 U.S. at 236.
92. *See id.*
93. *Id.*
94. *Id.* at 236–37.
95. *Id.* at 237.
96. *See id.* at 240–53.
97. *Miller-El*, 545 U.S. at 240–41 (citing Miller-El v. Cockrell, 537 U.S. 322, 342 (2003)).
98. *See id.* at 241–52.
99. *Id.* at 242–44.
100. *See id.* at 253.
101. *See id.* at 253–55.

rearranging the order in which members of a venire panel are seated and reached for questioning."[102] Once the new order is established, the venire members who are "not questioned by the end of the week are dismissed," causing those seated in the back to have a higher probability of dismissal from voir dire.[103]

Last, the evidence of an explicit discriminatory policy of the Dallas County District Attorney's Office was the smoking gun.[104] A Dallas County district judge testified that during his time working in the District Attorney's Office from the late 1950s to the early 1960s, "'his superior warned him'" that permitting any blacks on the jury would cost him his job.[105] "[A]nother Dallas County district judge and former assistant district attorney [of the office] from 1976 to 1978 [also] testified that he believed" there was an office policy of excluding black citizens from serving on juries.[106] To further support the judges' testimonies, the defense presented evidence of adoption of "a formal policy to exclude minorities from jury service."[107] Cases such as *Flowers* and *Miller-El* highlight that racial discrimination in jury selection is not just a coincidence or sporadic occurrence, but rather a "common and flagrant" practice.[108]

2. Foster v. Chatman

In *Foster v. Chatman*, the nature of the racial discrimination in jury selection was not as systematic as in *Miller-El* but was nonetheless obvious.[109] Timothy Foster confessed to killing a seventy-nine-year-old woman in Rome, Georgia.[110] During voir dire, the State employed peremptory challenges to strike all four black prospective jurors.[111] Subsequently, the jury convicted Foster for capital murder and sentenced him to death.[112] "The trial court . . . rejected Foster's *Batson* claim."[113]

During the state habeas proceeding, the court admitted a series of documents from the State's file into evidence.[114] These documents included four copies of the jury venire list with black prospective jurors highlighted in

102. *Id.* at 253.
103. *Miller-El*, 545 U.S. at 253.
104. *See id.* at 263.
105. *Id.* at 264 (quoting Miller-El v. Cockrell, 537 U.S. 322, 334 (2003)).
106. *Id.*
107. *Id.* (quoting Miller-El v. Cockrell, 537 U.S. 322, 335 (2003)).
108. *See Batson*, 476 U.S. at 103 (Marshall, J., concurring).
109. *See generally* Foster v. Chatman, 136 S. Ct. 1737 (2016).
110. *Id.* at 1743.
111. *Id.* at 1742.
112. *Id.*
113. *Id.*
114. *Id.* at 1743–44.

green and a "legend . . . indicat[ing] that the green highlighting 'represents Blacks.'"[115] The court also admitted handwritten documents with notations such as "*NO*. No *Black* Church," listing all the black prospective jurors under "definite NO's," and labeling a few black potential jurors "B#1," "B#2," and "B#3."[116] Even with evidence of this notation, the Supreme Court of Georgia rejected Foster's *Batson* argument.[117]

The Supreme Court of the United States reversed the Supreme Court of Georgia's decision, finding that "the prosecution's file plainly demonstrate[d] a concerted effort to keep black prospective jurors off the jury."[118] As suggested by the Court's language, the prosecution's conduct in this case was a team effort and likely resulted from office culture.[119] Although Foster did not introduce historic evidence, the prosecution acted deliberately and intentionally.[120]

3. Racial Discrimination Beyond the South

Although the cases presented originated in the South, the misuse of peremptory challenges to strike black jurors is not limited to southern jurisdictions.[121] In January 2019, the American Civil Liberties Union filed an amicus brief on behalf of a California prisoner whom an all-white jury convicted and sentenced to death.[122] With the first trial resulting in a hung jury, the prosecutor struck all prospective black jurors in both proceedings—three in the first trial and four in the second.[123] The prosecutor reasoned that the jurors' acceptance of the O.J. Simpson verdict was the basis for striking; however, the State did not strike non-black jurors for also accepting the O.J. Simpson verdict.[124] Another example of this practice in a non-southern jurisdiction is *Purkett v. Elem*.[125] In this situation, a Missouri prosecutor used

115. *Foster*, 136 S. Ct. at 1744.
116. *Id.*
117. *Id.* at 1745.
118. *Id.* at 1755.
119. *See id.* at 1744, 1755.
120. *See id.* at 1744.
121. *See* Jim Craig, *Fighting Racism in Jury Selection*, RODERICK & SOLANGE MACARTHUR JUST. CTR. (June 27, 2019), https://www.macarthurjustice.org/blog/fighting-racism-in-jury-selection/ ("This evil [of racially based jury selection practices] isn't limited to courts in the South"); s*ee generally also, e.g.*, Purkett v. Elem, 514 U.S. 765, 766 (1995); Brief Amici Curiae of the ACLU, the ACLU of Southern California, and the Roderick and Solange MacArthur Justice Center, in Support of Petitioner at 2, Smith v. California, 139 S. Ct. 2774 (2019) (No. 18-7094), 2019 WL 315285, at *2 [hereinafter *Amici Curiae Brief*].
122. *See Amici Curiae Brief*, *supra* note 121, at 2, 2019 WL 315285, at *2.
123. *Id.* at 4–5, 2019 WL 315285, at *4–*5.
124. *Id.* at 5, 2019 WL 315285, at *5.
125. 514 U.S. 765, 766 (1995) (per curiam).

peremptory challenges to strike two black men.[126] The prosecutor's basis for striking the two men was their hair and facial hair.[127] Although these two examples are pebbles in a large pond, they provide evidence that racial discrimination in jury selection is not a southern issue but a national one.[128]

C. Jurisdictions with Historical Discrimination

Some jurisdictions have a record of racial discrimination in jury selection. In Houston County, Alabama, from 2005 to 2009, prosecutors used peremptory strikes to exclude eighty percent of the black qualified prospective jurors in death penalty cases.[129] In Dallas County, Alabama, the prosecutor's office used 157 of 199 peremptory strikes to eliminate black prospective jurors in twelve reported cases since *Batson*.[130] In Louisiana, both the Caddo Parish and the Jefferson Parish District Attorney's Offices have a history of significant disparities in the use of peremptory challenges against white and black venire members.[131] In Jefferson Parish, prosecutors struck black prospective jurors "at more than three times the rate" of white prospective jurors between 1994 and 2002.[132] In Caddo Parish between 2003 and 2012, some individual prosecutors struck black prospective jurors four to five times more often than prospective jurors who were not black.[133] Prosecutors in the Chattahoochee Judicial Circuit in Georgia used eighty-three percent of their peremptory strikes against blacks in the years before and after *Batson*.[134] These statistics further support that racially discriminatory peremptory challenges are not isolated incidents, but rather a calculated strategy in some jurisdictions.[135]

126. *Id.*
127. *Id.*
128. *See* Craig, *supra* note 121.
129. EQUAL JUSTICE INITIATIVE, *supra* note 13, at 14.
130. *Id.*
131. *See* URSULA NOYE, REPRIEVE. AUSTL., BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE CADDO PARISH DISTRICT ATTORNEY'S OFFICE 2 (2015), http://www.criiasupr.org/multimedia/documents/Blackstrikes%20Caddo%20Parish%20August%202015.pdf; *see also* RICHARD BOURKE ET AL., LA. CRISIS ASSISTANCE CTR., BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 1 (2003), https://capitalpunishmentincontext.org/files/resources/race/BlackStrikes.pdf.
132. BOURKE, *supra* note 131, at 7.
133. NOYE, *supra* note 131, at 2, 11.
134. EQUAL JUSTICE INITIATIVE, *supra* note 13, at 14.
135. *See id.* at 6.

IV. CREATING AN ADEQUATE REMEDY

As discussed *supra*, it is evident that racial discrimination in jury selection is far from eradicated.[136] Thirty-five years removed from the *Batson* decision, defendants still have the potential of facing all-white juries as a result of the unlawful and discriminatory use of peremptory challenges.[137] *Batson* does not quite hit the mark, so other remedies must be explored to eradicate the improper use of peremptory challenges.

A. How *Batson* Falls Short

Concurring in the *Batson* decision, Justice Thurgood Marshall predicted the trend exhibited in *Flowers* more than thirty years prior.[138] He recognized that the discriminatory use of peremptory challenges "ha[d] become both common and flagrant."[139] Justice Marshall further predicted that simply changing the evidentiary standard for a prima facie case of purposeful racial discrimination would not eliminate racial discrimination from the jury-selection process.[140] He argued that prosecutors can offer any race-neutral reason for employing a peremptory challenge, and "trial courts are ill equipped to second-guess those reasons."[141] Although he agreed with the majority opinion, Justice Marshall suggested going a step further by creating an adequate remedy to eradicate racial discrimination.[142]

The majority "d[id] not share" in Justice Marshall's skepticism.[143] The majority instead contended that prosecutors would "fulfill their duty to exercise their challenges only for legitimate purposes" and trusted in the supervision of the trial court judges during voir dire.[144] The majority believed that the standard adopted in *Batson* would ensure that a State did not employ peremptory challenges to strike black jurors on the basis of race.[145] *Flowers*, a case beginning only about ten years after *Batson*, however, supports Justice Marshall's contention that *Batson* was not sufficient to eliminate racial discrimination in jury selection.[146] The three main reasons the *Batson* procedure falls short are 1) the acceptance of any race-neutral reason to overcome

136. *See supra* Part III.
137. *See Amici Curiae Brief*, *supra* note 121, at 2, 2019 WL 315285, at *2.
138. *See* Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).
139. *Id.* at 103.
140. *See id.* at 105.
141. *Id.* at 106.
142. *See id.* at 105.
143. *Id.* at 99 n.22.
144. *Batson*, 476 U.S. at 99 n.22.
145. *See id.*
146. *See id.* at 102–03; *see generally* Flowers v. Mississippi, 139 S. Ct. 2228, 2234–38 (2019).

Batson challenges; 2) the lack of remedy for the violation; and 3) the inability to resolve the ongoing community impact.

1. Any Race-Neutral Reason Is Acceptable

When a defendant provides sufficient evidence to support a prima facie case under *Batson*, the burden shifts to the prosecutor to provide a race-neutral reason for the State's peremptory strikes against minorities.[147] As Justice Marshall predicted, this burden over the course of time has conditioned prosecutors simply to learn how to play the game.[148] Prosecutors have attempted a myriad of race-neutral reasons for employing peremptory strikes and are successful in the trial courts.[149] In an Illinois case, the judge listed several race-neutral explanations that have been successful in state trial courts.[150] These include but are not limited to: "too old," "too young," "single," "over-educated," "renter," "lack of family contact," "juror lived alone," "unemployed spouse," and hair style.[151]

2. Inadequate Remedy for the Violation

Another issue is the *Batson* holding does not go far enough to provide "a remedy adequate to eliminate [] discrimination."[152] As evident in *Flowers*, the risk of re-trying a case is not a strong enough deterrent to eradicate racial discrimination from jury selection.[153] Flowers was tried six times, and the prosecutor employed peremptory challenges to strike black jurors in four out of those six trials.[154] Jurisdictions, such as Dallas County, Alabama, have a history of excluding blacks from juries.[155] Unfortunately, these common occurrences several years after *Batson* prove that the holding was not the deterrent that the *Batson* Court hoped for.[156]

Contrary to the *Batson* Court's assertion, it is also evident in *Flowers* that the State has not always upheld its duty to employ peremptory challenges for legitimate purposes.[157] To their dismay, defendants who fall vic-

147. *See Batson*, 476 U.S. at 93–94.
148. *See id.* at 106; *see also* Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1706 (2006).
149. *See* People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996).
150. *Id*.
151. *Id.*
152. *Batson*, 476 U.S. at 105 (Marshall, J., concurring).
153. *See generally* Flowers v. Mississippi, 139 S. Ct. 2228, 2234–35 (2019).
154. *See id.*
155. EQUAL JUSTICE INITIATIVE, *supra* note 13, at 14.
156. *See Batson*, 476 U.S. at 99 n.22.
157. *See Flowers*, 139 S. Ct. at 2234–35; *see also Batson*, 476 U.S. at 99 n.22.

tim to these unlawful acts usually pay the price.[158] Although Mississippi dismissed the charges against him, Flowers spent twenty-three years "locked in a box."[159] The facts of Flowers's case only demonstrate that *Batson* fails to provide an adequate remedy for such a severe constitutional violation.[160]

3. Unable to Resolve Ongoing Community Impact

A component that is sometimes forgotten is how racial discrimination in jury selection affects the community at large.[161] Justice Powell stated that "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'"[162] This does not apply only to defendants, but to prospective black jurors as well.[163] Discriminatory peremptory challenges lead citizens to question the fairness of our country's justice system.[164]

B. What Kind of Remedy

It is clear that the *Batson* procedure is not a catch all in addressing discriminatory peremptory challenges. As Justice Marshall suggested, a more adequate remedy is necessary.[165] The majority in the *Batson* decision suggested two possible options: 1) discharge the venire and select a new petit jury, or 2) reinstate the improperly challenged juror.[166] Viewing the Court's suggestion as a default rule rather than a mandate, some states even tried enacting their own remedies.[167] Justice Marshall believed an adequate reme-

158. *See* EQUAL JUSTICE INITIATIVE, *supra* note 13, at 13.

159. Jason Slotkin, *After 6 Trials, Prosecutors Drop Charges Against Curtis Flowers*, NPR (Sept. 5, 2020, 5:01 PM), https://www.npr.org/2020/09/05/910061573/after-6-trials-prosecutors-drop-charges-against-curtis-flowers ("I am finally free from the injustice that left me locked in a box for nearly twenty three years . . . ."); *see* Rick Rojas, *After 6 Murder Trials and 23 Years, Curtis Flowers Is Granted Bail*, N.Y. TIMES (Dec. 16, 2019), https://www.nytimes.com/2019/12/16/us/curtis-flowers-murder.html.

160. *See Flowers*, 139 S. Ct. at 2234–35.

161. *See* Nancy S. Marder, Foster v. Chatman*: A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1185 (2017).

162. *Batson*, 478 U.S. at 87–88 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)) (alteration in original).

163. *Id.* at 87; Marder, *supra* note 161, at 1185.

164. *Batson*, 478 U.S. at 87; Marder, *supra* note 161, at 1191.

165. *See Batson*, 478 U.S. at 105 (Marshall, J., concurring).

166. *See id.* at 99 n.24 (majority opinion).

167. *See* Marder, *supra* note 161, at 1176–80 (analyzing the short-lived North Carolina Racial Justice Act of 2009 which provided the remedy of taking the death penalty "off the table" for capital cases and allowed defendants to prove that race was "a significant factor" in jury selection); *see also* Jason Mazzone, Batson *Remedies*, 97 IOWA L. REV. 1613, 1624–25 (2012).

dy must deter racial discrimination in the criminal justice system.[168] Two remedies that focus on this goal are sanctions and the disqualification from participation in re-trial.[169]

1. Sanctions

Very few states employ sanctions as a remedy in criminal proceedings, but that does not make them any less effective.[170] Comparatively, in the Federal Rules of Civil Procedure, Rule 11 outlines the procedure for the issuance of sanctions.[171] Rule 11 was enacted to encourage "lawyers [to] act more responsibly to the court."[172] In efforts to achieve that goal, subdivision (c) was drafted as a deterrent from irresponsible behavior by attorneys.[173] The Advisory Committee viewed monetary sanctions as a penalty for lawyers who violated Rule 11(b).[174]

Prosecutors, like civil litigators, are responsible to the courts.[175] Courts have no reason to believe that monetary sanctions in civil litigation would not also be an effective deterrent in a criminal trial. Some states, like California, seem to agree and have expanded their civil procedure sanction rule to criminal trials.[176] The Supreme Court of California has also supported the use of monetary sanctions as a remedy for *Batson* violations in some situations.[177] As discussed *supra*, the remedy should deter and eliminate racial discrimination in jury selection.[178] Imposing sanctions on prosecutors who repeatedly employ racially discriminatory peremptory challenges can be an adequate remedy.

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168. *See Batson*, 476 U.S. at 103 (Marshall, J., concurring) ("That goal can be accomplished only by eliminating peremptory challenges entirely.")

169. *See* EQUAL JUSTICE INITIATIVE, *supra* note 13, at 45.

170. *See, e.g.*, People v. Muhammad, 133 Cal. Rptr. 2d 308, 317–19 (Cal. Ct. App. 2003) (discussing sanctions in the context of improper peremptory challenges under California law).

171. FED. R. CIV. P. 11(c).

172. GEORGENE M. VAIRO, AMERICAN BAR ASSOCIATION, RULE 11 SANCTIONS § 1.03 (2004).

173. *See* FED. R. CIV. P. 11(c)(4).

174. FED. R. CIV. P. 11(b)–(c) advisory committee's note to 1993 amendment.

175. *See Criminal Justice Standards for the Prosecution Function*, A.B.A. (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/#:~:text=(a)%20The%20prosecutor%20should%20act,defendant%2C%20victims%2C%20and%20witnesses ("The prosecutor is . . . an officer of the court.").

176. *See* People v. Muhammad, 133 Cal. Rptr. 2d 308, 317 (Cal. Ct. App. 2003) (citing People v. Tabb, 279 Cal. Rptr. 480 (Cal. Ct. App. 1991)).

177. *See* Mazzone, *supra* note 167, at 1624–25.

178. *See* Batson v. Kentucky, 476 U.S. 79, 105 (1986); People v. Johnson, 765 N.Y.S.2d 199, 201 (Sup. Ct. 2003) ("Since the goal of *Batson* is the elimination of racial discrimination in jury selection, it is counterproductive to fail to sanction purposeful discrimination in jury selection by forfeiting the disputed challenge.").

In practice, this remedy will act as an extra step to *Batson*. Initially, the defendant must show a prima facie case of purposeful discrimination as held in *Batson*.[179] To employ sanctions as a remedy, the defendant must allege that the prosecutor has demonstrated a history of racial discrimination in jury selection. Facts demonstrating a history of discrimination include the exclusion of a racial group from jury selection over an extended period of time,[180] office policies that promote the use of racially discriminatory peremptory challenges,[181] previous findings of *Batson* violations in earlier trials,[182] and any other proof of systemic exclusion of a particular racial group.[183] If a defendant does not allege facts to infer a discriminatory history, the court may not issue monetary sanctions. If the court finds a *Batson* violation, similar to in civil proceedings, a defendant may move for the imposition of monetary sanctions or the court itself may issue monetary sanctions as an adequate remedy.

2. Disqualification from Participation in the Re-trial

In *Swain v. Alabama*, the Court acknowledged that a State's "purposeful or deliberate" exclusion of blacks from jury selection due to their race violates the Equal Protection Clause of the Fourteenth Amendment.[184] The key words are "purposeful" and "deliberate." Because the employment of peremptory challenges for a racially discriminatory purpose is no accident, a prosecutor who uses this strategy should not reap the benefits of preparing for re-trial.[185] That same prosecutor, if given the opportunity, may employ the same discriminatory strategy but simply try to use different discriminatory tactics. To eradicate the implicit advantage of re-trial, appellate courts should issue the disqualification of *Batson* violators in the new trial.

As an example, the prosecutor in *Flowers* used five of his six peremptory challenges in the sixth trial against five black prospective jurors, "leav-

179. *Batson*, 476 U.S. at 93–94.

180. *See id.* at 94.

181. *See* Miller-El v. Dretke, 545 U.S. 231, 264 (2005) (quoting Miller-El v. Cockrell, 537 U.S. 322, 334–35 (2003)).

182. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2246 (2019).

183. *See Batson*, 476 U.S. at 93–95.

184. *Id.* at 84 (quoting Swain v. Alabama, 380 U.S. 202, 203–04 (1965)).

185. *Cf.* People v. Willis, 43 P.3d 130, 137 (Cal. 2002) ("[S]ituations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial. Under such circumstances, and with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve.").

ing one black juror to sit on the jury."[186] As the *Flowers* Court recognized, however, precedent views every racially motived peremptory strike as a constitutional violation.[187] It is simply unjust to subject a defendant to the same prosecutor who demonstrated discriminatory intent due to the nature of the violation and the purposeful nature of the act. As the *Flowers* Court emphasized, "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many."[188] Now, imagine if Evans was disqualified from participating in the fourth trial.[189] The likelihood of there being a sixth trial becomes slimmer because Evans could not continue his purposeful and deliberate acts of discrimination.

C. Reasons for Imposing These Remedies

The remedies previously discussed not only serve as a deterrent to future misuse of peremptory challenges but, more importantly, promote key principles of this country's criminal justice system. Sanctions and disqualifications from participation in re-trial 1) promote the interest of justice in criminal trials and 2) protect the integrity of the legal profession.

1. To Promote the Interest of Justice in Criminal Trials

Rule 33 of the Federal Rules of Criminal Procedure provides when a motion for a new trial may be granted.[190] A court may "vacate a[] judgment and grant a new trial" is when "the interest of justice so requires."[191] The *Batson* Court has also suggested this as a remedy.[192] As previously discussed, the threat of a new trial is an inadequate remedy. What good is having a new trial if the same wrongdoing can occur?

Prosecutors bear the burden of representing two interests: the state and justice.[193] Justice, however, does not exclusively relate to convictions.[194] To promote the interest of justice in criminal trials, prosecutors must refrain from using racially discriminatory peremptory challenges.[195] A prosecutor must recognize that justice is not exclusively for the victim.[196] It is for the

186. *Flowers*, 139 U.S. at 2237.
187. *See id.* at 2242.
188. *Id.* at 2241.
189. *See generally id.* at 2236–37.
190. *See* FED. R. CRIM. P. 33(a).
191. *Id.*
192. *See* Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986).
193. Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1571 (2012).
194. *See id.*
195. *See Batson*, 476 U.S. at 86–87.
196. *See id.* at 87.

juror who seeks to fulfill his or her civic duty.[197] It is for the defendant who is entitled to a fair and impartial jury of his or her peers.[198] It is for the community members who trust their government officials to execute and protect the principles and laws of our country.[199] When evaluating all those affected by racially discriminatory peremptory challenges, judges should be persuaded to create a remedy to match the severity of the violation.

2. To Protect the Integrity of the Legal Profession

In 2005, the American Bar Association (ABA) adopted the Principles for Juries and Jury Trials as a set of standards for litigators and judges.[200] ABA Principle 11 states that "courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury."[201] Principle 11 further rejects the use of peremptory challenges to dismiss a juror for unconstitutional reasons.[202] The principle outlines the steps in addressing a *Batson* challenge.[203]

Additionally, the principle provides that in a case where a party employed a peremptory challenge in a constitutionally impermissible manner, a "court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate."[204] Essentially, the ABA suggests that the courts have discretion in determining the appropriate remedy within ABA's professional standards.[205] Trial courts should employ this discretion in protecting the integrity of the legal field while ensuring the assembly of a fair and impartial jury.

D. Preserving the Peremptory Challenge

Peremptory challenges have a long history dating back to Roman times.[206] Congress adopted its peremptory challenge procedure from English

197. *See* Marder, *supra* note 161, at 1185.
198. *Id.*
199. *Id.*
200. ABA, PRINCIPLES FOR JURIES AND JURY TRIALS (2005), https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf.
201. *Id.* at 13.
202. *Id.* at 15.
203. *See id.* at 15–16.
204. *Id.* at 16.
205. *See id.*
206. Richard Gabriel, *Understanding Bias: Preserving Peremptory Challenges, Preventing Their Discriminatory Use, and Providing Fairer and More Impartial Juries*, CIV. JURY PROJECT AT NYU SCH. OF L., https://civiljuryproject.law.nyu.edu/understanding-bias-preserving-peremptory-challenges-preventing-their-discriminatory-use-and-providing-fairer-and-more-impartial-juries/ (last visited Jan. 4, 2020).

common law.[207] Although England has long abandoned its use of peremptory challenges, peremptory challenges continue to be a topic of debate in our country.[208] In Justice Marshall's concurrence in *Batson*, he asserted that the only way to eliminate racial discrimination from jury selection was the eradication of peremptory challenges.[209] Although this is a viable solution, peremptory challenges do serve a purpose, known as jury impartiality, in the adversarial process.[210]

Jury impartiality serves two purposes.[211] First, it allows attorneys, both prosecutors and defense counsel, to have an "arbitrary prerogative" to strike a juror who is perceived to have a prejudice.[212] Second, a peremptory challenge can protect a defendant from the results of a failed challenge for cause.[213] These purposes of jury impartiality cannot be ignored when deciding whether to modify or ban this crucial aspect of criminal procedure. The elimination of peremptory challenges may not embody the spirit of jury impartiality granted by the Sixth Amendment.[214]

Jury impartiality is not the only concern. Richard Gabriel, an advisor for the Civil Jury Project at New York University School of Law, contended that to eliminate racial discrimination in jury selection, the processes must be revised, not the rules.[215] Although this would require much time, research, and a huge overhaul of the voir dire process, a successful change will salvage peremptory challenges while steering litigants away from using generalizations to predict juror's potential biases.[216]

It is not the peremptory challenges themselves that are unlawful. It is how they are employed. Eradication of peremptory challenges will eliminate their use as a racially discriminatory tool, but it will also deprive those law-abiding attorneys of the challenges' benefits.[217] Peremptory challenges have become a huge part of the United States' adversarial system by providing attorneys the opportunity to play an active role in picking their fact finder.[218]

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207. *See* Swain v. Alabama, 380 U.S. 202, 214 (1965).

208. *See* Gabriel, *supra* note 206.

209. Batson v. Kentucky, 476 U.S. 79, 102–03 (1986).

210. *See* Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 377; *see also* Juli Vyverberg, *The Peremptory Challenge: Substance Worth Preserving?*, 43 DRAKE L. REV. 435, 435 (1994).

211. Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 11 (2014).

212. *Id.*

213. *Id.*

214. *See* U.S. CONST. amend. VI; *see also* Vyverberg, *supra* note 210, at 435.

215. *See* Gabriel, *supra* note 206.

216. *See id.* (asserting that further research and understanding of bias is necessary to implement effective change to the voir dire process).

217. *See id.*

218. *See* Morrison, *supra* note 211, at 11.

Banning the use of peremptory challenges is simply too harsh of remedy and should only be considered after exhausting other options.

V. CONCLUSION

Although *Flowers* was an extreme set of circumstances, it was not an isolated case of racial discrimination in jury selection.[219] *Batson* provides the process for addressing discriminatory intent in voir dire, but it falls short of providing an adequate remedy.[220] An adequate remedy will deter *Batson* violators from committing the violation again and encourage lawful and professional conduct during voir dire.[221] Sanctions and disqualification from participation in the re-trial will achieve these goals while preserving the benefits of peremptory challenges.[222] Justice and the integrity of the legal profession demand change in the country's criminal justice system, and it begins with changing the culture of prosecution.

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219. *See supra* Part III.
220. *See supra* Part IV.
221. *See id*.
222. *See id*.

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