Re-thinking *Batson* in Light of *Flowers*: An Effort to Cure a 35-Year Problem of Prosecutorial Misconduct

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Introduction

In June 2019, the Supreme Court reversed the murder conviction of Curtis Flowers by a 7-2 vote.[1] He was previously tried six times for the same alleged murder, each case led by the same state prosecutor.[2] Flowers' case made its way through Mississippi state and appellate courts, until he finally found himself sitting before the nine Justices of the Supreme Court. Justice Kavanaugh, writing for the Court, emphasized the fact that the decision "[broke] no new legal ground. We simply enforce and reinforce *Batson* by applying to the extraordinary facts of this case."[3] Mr. Flowers' case represents a 35-year history of prosecutorial abuse, often resulting in wrongful convictions and costly retrials.

Batson v. Kentucky, the seminal case on the issue of race-based juror strikes, held that prosecutors are prohibited from peremptorily striking potential jurors on the basis of race.[4] Not only did the Court state that the Equal Protection Clause forbids juror challenges solely on the basis of race, but it also held that a defendant can establish a prima facie case of purposeful discrimination in jury selection solely on the basis of the "prosecutor's exercise of peremptory challenges at the defendant's trial."[5] Since *Batson*, however, lawyers have continued to evade the holding of the case, and have employed numerous pretextual questions and tactics to make race a factor when choosing jurors. There is an ever-expanding hole in our criminal justice system, in which prosecutors have circuitously navigated their way around this Supreme Court ruling to deny colored defendants a full and fair trial by intentionally putting together a jury pool more likely to vote against the defendant, solely on the basis of his race.

In order for criminal trials in the United States to truly afford the defendant a full and fair trial by his people, prosecutors must be prohibited from disguising their racial motivations behind the veil of pretextual questioning. This Note

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1. Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (2019).
2. *Id.* at 2234.
3. *Id.* at 2235.
4. Batson v. Kentucky, 476 U.S. 79, 79–80 (1986).
5. *Id.* at 96.

addresses the widespread ethical issues that result when attorneys exercise unconstitutional peremptory strikes, in violation of *Batson v. Kentucky*. Part I will address the basic premise of jury selection and describe the Supreme Court's holding in *Batson v. Kentucky*. Then, Part II will address a plethora of ways in which prosecutors across states have avoided and worked around *Batson*, and the resulting effect these circuitous efforts have had on criminal trials. Finally, Part III suggests that an amendment to the *Model Rules of Professional Conduct* is an insufficient resolution and instead provides that blind jury selection offers a more appropriate remedy to the issue.

I. BACKGROUND

A. THE BASICS OF *VOIR DIRE*

During *voir dire*, or jury selection, lawyers for both sides are allowed to conduct a preliminary examination and questioning of prospective jurors, all of whom have been randomly selected, in order to create a twelve-person jury (in the federal system) for the upcoming trial.[6] Lawyers are allowed two methods by which to dismiss potential jurors: for cause and peremptorily.[7] A "for cause" strike allows either lawyer to dismiss a juror whom they believe to be prejudiced towards the case through some conflict of interest. Lawyers are allowed an unlimited number of "for cause" strikes, but each request must be considered and approved by the judge.[8] A "peremptory" strike, of which each lawyer has a limited number to use, permits a lawyer to dismiss a potential juror without having to state a reason.[9]

It is first important to understand the reasoning and rationale behind the Supreme Court's decision in *Batson*, and then address the issue of why *Batson* has proven to be rather ineffective, despite the fact that both the Supreme Court and *Model Rules of Professional Conduct* have explicitly prohibited discrimination on the basis of race. Finally, a discussion of the studies conducted in the post-*Batson* era will illustrate the prevalence of racial disparities in jury boxes today and the effect this has had on the accused and on the criminal justice system as a whole.

B. THE *BATSON* DECISION

The facts in *Batson* closely mirror those in *Flowers*, though Batson did not have to endure as many re-trials as Flowers did.[10] Batson, an African-American man from Kentucky, stood trial for second-degree burglary and receipt of stolen

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6. *How Courts Work*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/ [https://perma.cc.DMV7-CZ5A].

7. *Id.*

8. *Id.*

9. *Id.*

10. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (2019).

goods.[11] Before the trial, during *voir dire*, the prosecutor peremptorily struck all four African-American juror candidates, and the resulting jury was composed solely of white jurors.[12] The jury ultimately convicted him on both charges.[13] On appeal, the Supreme Court reversed and remanded his conviction:

> Purposeful racial discrimination in selection of the venire violates a defendant's rights to equal protection because it denies him the protection that a trial by jury is intended to secure. . . Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.[14]

The Court described the harm resulting from discriminatory practices as "extend[ing] beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[15]

The Court later went on to say that the competence of a juror "ultimately depends on an assessment of individual qualifications and ability [to] impartially. . . consider evidence presented at trial," rather than such qualities as his race, gender, origin, or religion.[16] For a defendant to meet his burden of proof in alleging an Equal Protection Clause violation, he must show "that the totality of relevant facts gives rise to an inference of discriminatory purpose."[17] The defendant can establish his *prima facie* case in a number of ways and is not limited simply to showing evidence of a repeated and inexplicable absence of members of his race from the jury.[18] The Supreme Court "found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn," and that jury pool was chosen through discriminatory practices.[19]

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11. *Batson*, 476 U.S. at 82.
12. *Id*. at 83.
13. *Id*.
14. *Id*. at 86–89; *see also* Martin v. Texas, 200 U.S. 316, 321 (1906) (holding that defendants have a right to be tried by a jury that was chosen through nondiscriminatory means).
15. *Batson*, 476 U.S. at 87.
16. *Batson*, 476 U.S. at 87; *see also* Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding "that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party").
17. *Batson*, 476 U.S. at 94 (citing Washington v. Davis, 426 U.S. 229, 239–42 (1976)).
18. *Batson*, 476 U.S. at 95.
19. *Id*.

If the defendant has met this burden, the State must then provide an adequate explanation—one that is not rooted in racial discrimination—for the strike.[20] In other words, "the State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'"[21] The State will to fail to meet "this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties."[22]

The *Batson* decision overturned an earlier holding in *Swain v. Alabama*, which several lower courts interpreted as requiring "proof of repeated striking of blacks over a number of cases [as] necessary to establish a violation of the Equal Protection Clause."[23] The *Swain* decision "placed on defendants a crippling burden of proof" and was deemed to be inconsistent with established principles of making *prima facie* claims of discrimination under the Equal Protection Clause.[24]

Batson, however, required that the defendant and the excluded juror be of the same race, in order for the defendant to have an actionable claim of discrimination. In 1991, the Court in *Powers v. Ohio* discarded this requirement, and held that the white defendant had standing to challenge the prosecutor's actions in striking seven African-American jurors.[25]

II. PROBLEMS POST-*BATSON*: WORKING AROUND THE HOLDING

A. WIDESPREAD USE OF PRE-TEXTUAL EXCUSES

Despite the rather straightforward holding in *Batson*, its application has been far from simple. Its narrow holding has been ineffective in abrogating racial discrimination in the courtroom and has instead opened the door to a slew of rampant racism. Since *Batson* only prohibits prosecutors from striking *solely* on the basis of race, prosecutors have been able to routinely strike minority jurors by providing absurd explanations as pre-textual covers.

The issue created by the limited scope of the *Batson* decision is not about the mere usage of pretextual strikes. Of course, if a prosecutor puts forth genuine concerns about a juror's capability to serve—one who happens to be of a minority race—there should be no doubt about the constitutionality of this dismissal. Rather, the issue presented addresses the poor judgment of courts in accepting such preposterous explanations for such strikes. Trial court judges have been, and continue to be, far too willing to accept explanations for strikes that are so highly irregular that they cannot be rooted in anything else but racial discrimination.

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20. *Id*. at 94.

21. *Batson*, 476 U.S. at 94 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

22. *Batson*, 476 U.S. at 94.

23. *Batson*, 476 U.S. at 92–93; Swain v. Alabama, 38 U.S. 202 (1965); *see also* U.S. v. Jenkins, 701 F.2d 850, 859–60 (10th Cir. 1983); U.S. v. Pearson, 448 F.2d 1207, 1213–18 (5th Cir. 1971).

24. *Batson*, 476 U.S. at 92–93.

25. Powers v. Ohio, 499 U.S. 400, 406 (1991).

In his *Batson* concurrence, Justice Marshall explicitly noted his fear that prosecutors could easily avoid liability by simply providing an alternative, race-neutral explanation and trial courts would be "ill equipped to second-guess those reasons."[26] Justice Marshall's fears have indeed been realized, as prosecutors have continued to prevent African-Americans from sitting on juries by asserting pretextual reasons to disguise racially charged strikes, and courts have been more than willing to accept these less than satisfactory cover-ups.

In *Lynn v. Alabama*, an African-American defendant was tried and convicted for murder by a jury from which all African-American jurors were struck.[27] Ironically, however, the prosecutor chose to *peremptorily* strike the African-American jurors, rather than using his for-cause strikes, which are used to dismiss jurors who display prejudicial or biased tendencies towards either party.[28] When asked to defend his reasons for striking these jurors, the prosecutor offered as explanations "the fact that one venireperson's husband was related to the defendant; another one had been prosecuted several times by the district attorney in the case; another worked with the co-defendant's father; and two others lived in the same neighborhood as the defendant's grandmother and aunt."[29] Moreover, the prosecutor never once asked "these potential jurors whether they *actually* knew anyone involved in the trial" during *voir dire*.[30] Had he instead chosen to strike these jurors for cause, there would be little debate about his rationale, as it can be inferred that jurors who live in close proximity to the defendant and his family may be biased in the defendant's favor. Yet, the prosecutor declined to do so, and as the dissent notes, the trial court's failure to remedy this error led to a rather obvious *Batson* violation.[31] A further inquiry reveals that Gammage Road, the area in which the jurors and defendant's family lived, was "populated primarily by people of color" and the prosecutor even admitted to his awareness of Gammage Road's demographic.[32] The prosecutor's use of residence as an *ex post facto* pretext to hide his use of race was a covert *Batson* violation.

The following cases further expose a number of instances in which courts have allowed prosecutors to strike potential jurors based on race, without adequate, alternative reasons. In *United States v. Clemmons*, the prosecutor struck a potential juror with the last name "Das" because the prosecutor only *believed* Das was Indian, by nature of his last name.[33] Moreover, the prosecutor stated that Das was "'probably Hindu in religion. . .[and] Hindus tend. . .to have feelings a good

26. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).
27. Ex parte Lynn, 543 So. 2d 709, 711 (Ala. 1988).
28. *Id.*
29. *Id.*
30. Lynn v. Alabama, 493 U.S. 945, 947 (1989) (Marshall, J., dissenting).
31. *Id.*
32. *Id.*
33. 829 F.2d 1153, 1156 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).

bit different from ours about all sorts of things[.]'"[34] The prosecutor did not actually know whether Das was actually Indian or Hindu.[35] In *United States v. Payne*, the prosecutor struck two African-American jurors in a trial for an African-American defendant because the jurors were associated with the NAACP and the Black Caucus.[36] By accepting the prosecutor's proffered reasons, the Sixth Circuit "ignore[d] the fact that membership in these groups strongly correlates with race."[37] The aforementioned cases are only a few examples in which it is clear how Justice Marshall's fears have been realized.

B. IMPERMISSIBLE USES OF SUBJECTIVE IMPRESSIONS

Perhaps most undermining to the *Batson* holding are the cases in which prosecutors strike minority jurors solely on the basis of their own subjective impressions. For example, in *Barfield v. Orange County*, the prosecutor struck the two African-American women from the jury pool, arguing that one juror "was looking at me, and looking at my client, and looking at the Defendant's table with an expression that conveyed to me some hostility, and it was my gut feeling, based on her facial expression that she was likely to not be fair and impartial[.]"[38]

Similarly, in Louisiana, a prosecutor was allowed to strike a prospective African-American juror because he had the "look of a drug dealer."[39] In Mississippi, another juror was dismissed for being inattentive and having "dyed-red hair."[40] In accepting this so-called race-neutral reason, the trial court held:

> The court would not have accepted [inattentiveness] until there was a reference to the way she dyed her hair red, and I guess gave some idea to the State that she was out of sync with society or something. . . I'm not saying it was a right or wrong conclusion, but the State evidently felt that was, that she was a little different.[41]

And in Tennessee, yet another African-American woman was dismissed "because she wore a large hat and sunglasses in the courtroom[.]"[42]

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34. *Id.*

35. *Id.* at 1157.

36. 962 F.2d 1128, 1233 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 306 (1992).

37. Andres G. Gordon, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, FORDHAM L. REV. 685, 703–04 (1993).

38. Barfield v. Orange County, 911 F.2d 644, 646 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2263 (1991).

39. State v. Crawford, 873 So. 2d 768, 776 (La. Ct. App. 2004).

40. Jackson v. State, 5 So. 3d 1144, 1149 (Miss. Ct. App. 2008).

41. *Jackson*, 5 So. 3d at 1149.

42. State v. Tyler, No. M2005-00500-CCA-R3Cd, 2006 WL 264631, at *8 (Tenn. Crim. App. Feb. 1, 2006); *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE, Aug. 2010, at 23, https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/ZJF8-CP5N].

C. THE "O.J. SIMPSON STRATEGY"

The aforementioned problems have not abated with time. Today, a new technique, dubbed "the O.J. strategy" has spread through California courtrooms, where prosecutors begin by asking jurors how they feel about the O.J. Simpson's acquittal in his murder trial.[43] They then dismiss African-American jurors who advocated support for the Simpson acquittal, without overtly stating race as the basis for the strike.[44] Instead, prosecutors have offered alternate reasons including "reservations about the death penalty, one juror's casual clothing, and the similarities in evidence against Simpson and [defendant]."[45] Prosecutors in a California case also denied their racial motives by justifying removal of black jurors because "they seemed skeptical of. . . DNA evidence."[46]

It is not difficult, however, to see through the thin veil between the O.J. Simpson case and the use of racial criteria in modern-day jury selection. The Simpson case was one rooted in deep racial tensions, as a largely African-American jury acquitted an African-American man standing trial for the murder of two white victims at a time where racial tensions ran high in Southern California. It seems as though questions about support or disdain towards Simpson's acquittal are exactly the kinds of questions *Batson* sought to prohibit. Yet, these questions continue to be permitted in the courtroom, as they hide behind varying disguises of "race-neutral" questioning, even when courts have explicitly accepted proffered reasons as non-violative of *Batson* because they are "cultural prox[ies] stereotypically associated with African-Americans."[47] Other frequent excuses are "unemployment, lack of substantial income, insufficient education, and relatives with criminal records."[48] While these excuses often lack merit in and of themselves, such iconoclastic beliefs further diminish *Batson's* purported purpose because insufficient education, low employment rates, and high presence of criminal activity are more often present in minority neighborhoods, further alienating minority jurors.[49]

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43. Bob Egelko & Megan Cassidy, *'O.J. strategy': Lawyers say prosecutors ask about guilt to cull black jurors*, S.F. CHRONICLE (Nov. 4, 2018), https://www.sfchronicle.com/news/article/The-O-J-strategy-Prosecutors-accused-of-13358509.php?psid=olyG3 [https://perma.cc/5WLG-UFM4].

44. *Id.*

45. *Id.*

46. *Id.*

47. Clayton v. State, 797 S.E.2d 639, 644 (Ga. Ct. App. 2017) (permitting a strike of an African-American juror because he had a set of gold teeth).

48. Gordon, *supra* note 37, at 704; *see* United States v. Hinojosa, 958 F.2d 624, 631–32 (5th Cir. 1992) (allowing strikes of three African-American jurors on the basis of insufficient education); United States v. Johnson, 941 F.2d 1102, 1109 (10th Cir. 1991) (upholding strikes of African-American juror whose brother was once convicted).

49. Gordon, *supra* note 37, at 704; *see also* United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987) (noting that the prosecutor struck a low-income juror for fear that his economic status would cause bias towards the African-American defendant, without offering any proof that the defendant was also of poor economic status); Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 45–46 (1988).

D. STATISTICAL EVIDENCE OF DISCRIMINATION

Batson's failure to provide a shield for covert racism in courtrooms has led to severe consequences. Studies show that the use of peremptory strikes to eliminate African-American jurors is systematic, especially in capital cases and serious felony cases.[50]

The evidence is particularly salient in southern states. For example, in Houston County, Alabama, prosecutors used peremptory strikes to exclude eighty percent of the qualified African-American jurors in death penalty cases from 2005 to 2009.[51] Thus, half of the resulting juries were all-white, trying capital cases in a county that is twenty-seven percent African-American.[52] In twelve cases decided post-*Batson* in Dallas County, Alabama, prosecutors have used 157 of 199 peremptory strikes on African-American jurors.[53] Seventy-six percent of qualified African-American jurors were struck in cases where the death penalty was imposed.[54]

In 2003, it was revealed that prosecutors in Jefferson Parish County, Louisiana "strike African-American prospective jurors at more than three times the rate that they strike white prospective jurors" in felony cases.[55] Even more shockingly, in stark contrast to the standard of jury unanimity in criminal conviction used across the country, Louisiana used to allow juries to convict without unanimity, requiring only ten jurors to agree to convict.[56] Even when African-American jurors somehow find themselves in the jury box, their representation was vastly diluted "because only the votes of white jurors [were] necessary to convict, even though Jefferson Parish is 23 percent black."[57] In Georgia, prosecutors in the Chattahoochee Judicial Circuit "used 83% of their peremptory strikes against African Americans, who make up 34% of the circuit's population. As a result, six black defendants have been tried by all-white juries."[58]

Research has shown that "all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives."[59] All white-juries are also

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50. *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE, Aug. 2010, at 14, https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [[https://perma.cc/ZJF8-CP5N].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE, Aug. 2010, at 14, https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/ZJF8-CP5N].

56. *Id.* Note that on April 20, 2020, the Supreme Court issued its decision in Ramos v. Louisiana, 590 U.S. ___ (2020), holding that the Sixth Amendment's requirement of unanimous jury verdicts in criminal convictions is selectively incorporated against the states, overruling its prior decision in Apodaca v. Oregon, 406 U.S. 404 (1972). Louisiana and Oregon were the only two states affected by this decision.

57. *Id.*

58. *Id.*

59. *Id.* at 40.

more likely to "decide on punishment during guilt/innocent deliberations, before they have heard any mitigation evidence" even though separate deliberations are required—one deciding guilt and one deciding sentencing.[60]

In 2006 Samuel Sommers, a researcher at Tufts University, conducted a study, which "utilize[d] a mock jury paradigm to examine the processes through which racial diversity influences group decision making."[61] He comparatively studied the effects of decision-making between "racially heterogeneous and homogeneous 6-person mock juries,"[62] and his results only bolstered the issue presented.

Among other findings, Sommers concluded:

> [I]n strictly demographic terms, the presence of Black group members translated into fewer guilty votes before deliberations. . .Racial composition also had clear effects on deliberation content, supporting the prediction that diversity would lead to broader information exchange. . .One of the ways in which White participants' performance varied by group composition was that they made fewer inaccurate statements when in diverse versus all-White groups, despite the fact that they actually contributed more information when deliberating in a diverse-setting.[63]

In simpler terms, the study found the heterogeneous juries were less likely to believe the defendant was guilty than all-white groups.[64] A number of justifications have been provided in support of these findings, most predominantly that white jurors who knew they would have to justify their choices to African-American jurors were more likely to thoroughly consider and analyze their decisions.[65]

III. ADDRESSING SOLUTIONS

The *Batson* court set out to accomplish a noble, but daunting task. However, as demonstrated, its objectives have largely been undermined. Despite the efforts of numerous lawyers and scholars to address the issue, the problem remains persistent. One proposed cure is an amendment to the *Model Rules of Professional Conduct*. This section addresses the insufficiencies of that argument and instead offers a different solution: blind jury selection.

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60. *Id.*; *see also* William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1532 (2004) (providing similar findings about the increased discussion of mitigating factors in a heterogeneous jury).

61. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. PERSONALITY AND SOC. PSYCHOL. 597, 600 (2006).

62. *Id.*

63. *Id.* at 606–07.

64. *Id.* at 607.

65. *Id.*

A. AMENDING THE *MODEL RULES OF PROFESSIONAL CONDUCT* IS NOT SUFFICIENT

Simply amending the *Model Rules of Professional Conduct* to make more explicit the proscribed comment will not suffice. Under the current *Model Rules*, there is already a rule in place addressing the role of discriminatory racial selection in the court room. Rule 8.4(g) reads:

> It is professional misconduct for a lawyer to. . . engage in conduct that the lawyers 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.[66]

Quite literally, Rule 8.4(g) purports to prohibit the exact same conduct that *Batson* addresses, and the accompanying comment also rightly allows for strikes against jurors of color, as long as there is a valid additional reason for doing so.[67] The comment to the rule reads: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)."[68]

Yet, despite efforts to further codify the *Batson* holding, both the rule and the comment have proven to be futile. Further amending the rule to explicitly state that such actions would be violations of a Supreme Court decision or detailing possible punishments does not seem to be a viable solution. If lawyers can circumvent a Supreme Court decision, binding on every jurisdiction in the country, it is illogical to assume that a proposed template, not fully adopted in any jurisdiction, can achieve the desired results.

B. THE PROPOSED SOLUTION: BLIND JURY SELECTION

In order to realize the goals of *Batson* and the *Model Rules of Professional Conduct*, an alternative solution is to implement a "blind" jury selection process. To combat this issue, counsel for both parties during *voir dire* should be prohibited from seeing the potential jury pool, while also continuing to enforce the ban on racially charged questions. This solution targets the underlying principle of *Batson* and Model Rule 8.4(g) while also eliminating a number of the pretextual problems that have been described in the aforementioned cases.

C. LOGISTICS

Perhaps the most difficult aspect of implementing this solution is the question of *how* blind jury selection can be accomplished. Some suggestions include conducting the *voir dire* process through written responses, phones, or closed-circuit

66. MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2018).
67. MODEL RULES R. 8.4 cmt. 5.
68. *Id.*

televisions systems—similar to testifying in camera, but more akin to a two-way mirror. Of course, it is likely that the entire process would still need to be conducted in the courtroom, so the judge can be present.

Written responses and phone calls are not likely to be well-received, as the cost and burden on both the judicial system and the jurors is high. A closed-circuit system would arguably be the best method, as it would require the least amount of change from the pre-existing system. Jurors would still come in large groups and be instructed by the judge as to their roles and expectations throughout the process. Parties and counsel for both sides, however, would be placed in a separate room with a closed-circuit system, where the courtroom (including the judge and potential jury pool) could see them, but the parties could not see the jury pool. In *Maryland v. Craig*, the Supreme Court found no Confrontation Clause violation where the young victim of rape was allowed to testify through a closed-circuit system to avoid facing her assailant.[69] While the primary motive in *Craig* was to protect the young victim and ensure that she was able to properly testify, an analogous argument could be made in the blind jury process to allow such a system in order to protect the rights of the defendant and ensure that he receives a fair trial and an impartial jury.

Of course, with any of these logistical suggestions, it remains entirely possible that prosecutors will still strike simply on the basis of how someone sounds or how they write their answers to certain questions. At least, however, these prosecutors will find much greater difficulty in concocting a pretextual reason as to why they chose to strike certain jurors.

D. THE PRESUMPTIVE EFFECT OF THE RULE

At a basic level, this solution would combat problems like those raised in *Barfield v. Orange County*. In *Barfield*, the prosecutor would not have been able to strike the potential African-American juror because of the way she was "looking at [him] . . . it was [the prosecutor's] gut feeling, based on her facial expression that she was not likely to be fair and impartial[.]"[70] For more complicated cases—*United States v. Alvarado*, for example—this solution would force prosecutors to ask *all* jurors the same questions, without regard to their race, ethnicity, religion, or other factors.[71] In *Alvarado*, if the prosecutor truly was concerned with dismissing *all* jurors who had children of similar age to that of the defendant's for fear of bias, then a blind jury selection process would force the prosecutor to ask and strike all jurors who answered in the affirmative to his question about children. It would prevent the prosecutor from striking only African-American or minority jurors, and defending his racially charged actions to the judge on the grounds of unfair prejudice.

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69. Maryland v. Craig, 497 U.S. 836, 836–37 (1990).
70. Barfield v. Orange County, 911 F.2d 644, 646 (11th Cir. 1990).
71. *See* United States v. Alvarado, 951 F.2d 22, 24–26 (2d Cir. 1991).

One might say that the solution still poses trouble in cases where prosecutors can continue to circumvent the issue by asking questions that garner answers typically associated with one's race.[72] In these cases, while a blind selection process would require the prosecutor to ask all jurors about factors such as education level, criminal record, and income, these factors correlate closely with race and thus continue to single out minority jurors. Or, alternatively, this solution might continue to pose a problem with prosecutors who use the "O.J. strategy."

However, while it may be an underlying purpose, the goal of *Batson* is not to have a consistently diverse jury at each and every trial; rather, the goal is to prevent prosecutors from specifically targeting minority jurors in an effort to obtain a conviction against a defendant of the same race. So, while this proposed solution may still keep African-American citizens off juries in certain trials, it would nonetheless further the goal of Batson by hindering the use of pretextual strikes—prosecutors will be forced to uniformly strike jurors of all races who display certain tendencies (for example, low-income) or, prosecutors will have to refrain from using such factors as grounds for strike for fear of losing all potential jurors or having no legitimate pretextual cover-up.

E. POTENTIAL PROBLEMS

Admittedly, as with any radical change to a pre-existing system, this solution will likely face backlash. While many other countries utilize a jury system similar to that of the United States, none have implemented a similar blind system such as this. This Note does not address the wide breadth of issues one might consider regarding a blind jury selection process, but rather addresses the largest source of criticism: a defendant's ability to facially confront those who will be deciding his fate.

A trial by the people is inherent in the American justice system, and critics of this solution might challenge the fact that hiding jurors behind a screen or phone line would invalidate that purpose. Critics might even turn to the text of the Sixth Amendment itself, which states that "the accused shall enjoy the right to a. . . public trial, by an impartial jury. . . [and] to be confronted with the witnesses against him."[73] The last clause is widely referred to as the Confrontation Clause, which gives *criminal defendants* the right to face and cross-examine adverse witnesses in a criminal trial. While a blind jury would materially enhance the showing of an impartial jury, it might run afoul of the Confrontation Clause. Though the

72. *See, e.g.*, United States v. Hinojosa, 958 F.2d 624, 631–32 (5th Cir. 1992) (allowing strikes of three African-American jurors on the basis of insufficient education); United States v. Johnson, 941 F.2d 1102, 1109 (10th Cir. 1991) (upholding strikes of African-American juror whose brother was once convicted); United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987) (involving a prosecutor who struck a low-income juror for fear that his economic status would cause bias towards the African-American defendant, without offering any proof that the defendant was also of poor economic status).

73. U.S. Const. amend. VI.

Confrontation Clause is strictly limited and applied to testifying witnesses, one might argue that a blind jury process could implicate similar concerns.[74]

The appropriate response warrants a consideration of when this right is triggered—the right belongs solely to the defendant, who is by no means prohibited from confronting his peers, especially when said peers are the ones who will ultimately be deciding his guilt or innocence.[75] The Court has not yet issued an explicit holding as to whether the Confrontation Clause applies in pre-trial settings, but it has indicated in its opinions that the right is limited to the trial itself.[76] Even at trial, the Court has held that the Confrontation Clause does not provide an *absolute* right to face-to-face confrontation.[77] Rather, the purpose of the Confrontation Clause is to "ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding."[78] If anything, this proposed solution is aimed solely at ensuring such reliability so that the defendant is allowed a fair trial.

Moreover, even though the Confrontation Clause is a defendant-focused rule, there is an argument to be made that the *Batson* rule should run both ways: if prosecutors cannot strike jurors because of how they look, neither should defendants. By viewing the larger pool of potential jurors before the trial, the only benefit the defendant (and his counsel) receives is to strike jurors on the basis of their looks—perhaps based on how sympathetic they appear, or whether they look warmer rather than austere. True impartiality can only be achieved if neither side is able to curate a jury pool based on looks—rather, the only information that is important in determining potential bias or hardship, both grounds for strikes, can be determined through a blind process. Then, when the jury is present at trial, the defendant will have the full opportunity to face his peers, and likewise, the jury pool will have a full chance to view the defendant, listen to him, and make an educated decision about the issues of the case.

Again, there are a number of other viable solutions that have not yet been addressed. These include, but are not limited to, more stringent punishment for prosecutors, more incentive for defendants who have had to suffer through multiple retrials due to *Batson* violations, and more judicial oversight in the jury selection process. All of these solutions stand on their own merits and have great potential to remedy the *Batson* issue. This Note simply proposes that, given the

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74. *Id.* (the plain text of the amendment reads "the accused shall enjoy the right. . . to be confronted with the *witnesses* against him") (emphasis added).

75. *Id.* ("the *accused* shall enjoy the right. . .") (emphasis added).

76. *See* Christine Holst, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, U. ILL. L. REV, 1599, 1608 (2010); *see also* Kentucky v. Stincer, 482 U.S. 730, 732–33 (1987) (declining to rule on the specific issue of whether the Confrontation Clause applies to pre-trial procedures, but finding that a defendant's Confrontation Clause right was not violated when he was barred from a pre-trial hearing regarding the competency to testify of two children).

77. Maryland v. Craig, 497 U.S. 836, 836–37 (1990).

78. *Id.* at 837.

rampant and widespread nature of the issue, perhaps a more radical and unique solution is called for.

CONCLUSION

The aforementioned problems invoke complicated topics from a wide variety of fields, including but not limited to legal theory, sociology, and psychology. Our criminal justice system strives to achieve an inherent level of fairness for all defendants, which admittedly, is often not possible. Similarly, with the *Batson* issue, it cannot readily be said that race will *never* be a factor in jury selection, nor can it be said for certain that prosecutors will not find a way to slip the race question in, even under a blind jury selection process. However, the precedent and case law over the past 35 years have made it abundantly clear that at the very least, *some* change is needed if the justice system hopes to keep *Batson* intact, as the Supreme Court intended it.

Courts across the country, at both a federal and state level, have side-stepped the rather straightforward holding, thus allowing lawyers to impose their own judgment for what a "winning" jury should look like, rather than what an "impartial" jury should look like. The tactics used have continued to deviate wildly, and judges have made it a habit to turn a blind eye to such deliberate violations of law.

A blind jury selection process, while difficult to implement in its own respects, would significantly abate the problems of the most blatant *Batson* violations: striking jurors solely on how they look, how they talk, and how they appear. Moreover, even if prosecutors still manage to put forth race-based questions to the potential jury pool, this solution would force prosecutors to strike jurors of all colors on the same basis, rather than using pretextual excuses to not-so-subtly dismiss particular jurors.