ABOLISHING PEREMPTORY CHALLENGES: A FAIR PRICE TO PAY FOR JUST JURY SELECTION

ABSTRACT

This Comment addresses the opportunity to abolish peremptory challenges in Colorado. A recap of the history of racism and inequality in the United States provides context for a discussion about the present state of this society in terms of fairness within our criminal legal system. This Comment discusses the widely recognized need for remediation of racial discrimination and bias rooted throughout the criminal punishment process but acutely exemplified by jury selection in that setting. An exploration of a recent attempt by the Supreme Court of Colorado's Rules of Criminal Procedure Committee to catalyze a revision to the state's Rule of Criminal Procedure 24 reveals that, while the measure would advance the cause of racial justice, it would not go far enough. This Comment argues that Colorado should be the second state in the country to prohibit the use of peremptory challenges to ensure the promise of the Sixth Amendment guarantee that defendants will be tried by an impartial jury of their peers.

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INTRODUCTION

"To build a better Colorado for all, our criminal justice system should promote public safety, reduce crime, and treat every individual with fairness, equality, and dignity in every interaction and at all stages."[1]

—Governor of Colorado, Jared Polis

The United States continues to reel from the ill effects of centuries-long chattel slavery. Understandably, this tragic period of racial injustice has recently boiled over into "potentially . . . the largest protest movement in [U.S.] history."[2] This most recent iteration of the social justice movement is unconventional in many ways,[3] including showing a greater desire to look for solutions outside our current systems and institutions. Nevertheless, there is still a need to recognize opportunities for change within the systems presently in place as we seek to upend the racism inherent therein. And while the dire consequences of this abhorrent practice pervade all aspects of our society, our criminal punishment system uniquely and prominently features its remnants. To echo just one voice among many, a significant proponent of criminal justice reform, the American Civil Liberties Union (ACLU), posits that part of the solution to the unfair treatment of Black people is to improve the criminal legal system by assessing its utility via close scrutiny and "racial impact analysis."[4]

One particularly insidious example of chattel slavery's reverberations in the criminal punishment system is the manifestation of racial bias and discrimination in criminal jury selection. It is well-documented that state and local officials have overtly and covertly excluded people of color from juries since the Fourteenth and Fifteenth Amendments to the U.S. Constitution legally sanctioned their participation.[5] It was not until the landmark *Batson*[6] case in 1986—where the Supreme Court formally held that parties could not use peremptory strikes to eliminate potential jurors based on race—that the law offered a defendant any hope of countering prosecutors' attempts to exclude persons of color from their jury.[7]

However, *Batson* is underwhelming where curbing racial bias and discrimination during jury selection are concerned. *Batson* focuses solely on explicit bias—it is silent on implicit bias—and even when a defendant

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1. Moe Clark, *A Wave of New Criminal Justice Laws Were Enacted in Colorado. Here Are the Big Takeaways.*, COLO. NEWSLINE (July 12, 2021, 5:00 AM), https://coloradonewsline.com/2021/07/12/a-wave-of-new-criminal-justice-laws-were-enacted-in-colorado-here-are-the-big-takeaways/.

2. Adam Serwer, *The New Reconstruction*, ATL. (Oct. 2020), https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475/.

3. Eugene Daniels, *The New Social Justice Movement Feels Different. That's Because It Is.*, POLITICO (July 17, 2020, 6:27 PM), https://www.politico.com/news/2020/07/17/black-lives-matter-social-racial-justice-368436.

4. *Solutions*, ACLU, https://www.aclu.org/other/solutions (last visited Dec. 3, 2021).

5. EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION 11, 15 (2021) [hereinafter RACE AND THE JURY].

6. Batson v. Kentucky, 476 U.S. 79 (1986).

7. *Id.* at 87–89.

alleges explicit bias, it allows prosecutors an easy route to explain that bias away.[8] Namely, when a defendant raises a claim alleging that a prosecutor has used a peremptory strike to eliminate a juror because of the juror's race, a prosecutor can offer a non-race-related reason for striking the juror.[9] Judges can deem the reason legitimate and allow the strike; they typically do. After all, there is little difficulty in crafting a superficially plausible race-neutral explanation for excusing a juror. For example, a prosecutor may posit that a Black prospective juror appeared nervous as pretext for striking that person.[10] This process can lead to prosecutors striking all jurors of color in violation, I argue, of the Equal Protection Clause. The practical effect is that defendants lose the opportunity to be tried by an impartial cross-section of society, resulting in convictions based on animus instead of proof beyond a reasonable doubt. Those convictions can carry irreversibly dire sentences—including *death*.[11] *Batson* has left much to be desired.

In April 2021, to quell the racial bias baked into criminal jury selection in Colorado, the Rules of Criminal Procedure Committee proposed an amendment to the Colorado Rules of Criminal Procedure.[12] This rule change would have improved jury selection in four ways. First, it would have lowered the *Batson* standard to an "objective observer" standard, allowing for at least the possibility of a challenge based on implicit bias. Second, it would have made it more difficult for prosecutors to provide a race-neutral pretext for explicit bias. Third, the amendment would have presumptively invalidated a host of other previously accepted race-adjacent reasons for strikes. Lastly, the rule would have required either the judge or opposing counsel to substantiate a claim that a prospective juror's conduct is strike-worthy. These additions would have made inroads toward ensuring that cloaked, racially motivated peremptory strikes are rejected.

However, the Colorado Supreme Court unanimously rejected the proposal.[13] While this is unfortunate in the short term, it creates space for a more robust and effective solution. This Comment argues that Colorado should abolish all peremptory challenges. There are three reasons for doing so. First, prosecutors have used them to exclude jurors of color since the Jim Crow era and continue to do so. Second, the Constitution does not guarantee or even mention the peremptory challenge. Third, for several

8. *See id.* at 89.

9. *See id.*

10. Jennifer K. Robbennolt & Matthew Taskin, *Jury Selection, Peremptory Challenges and Discrimination*, 40 JUD. NOTEBOOK 18, 18 (2009) (discussing the United States Supreme Court's application of *Batson* to the facts of *Snyder v. Louisiana* where the prosecution struck five Black people from a jury venire for pretextual reasons).

11. Richa Bijlani, Note, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. REV. 1499, 1511 (2022).

12. Thy Vo, *Racial Discrimination Still Exists in Jury Selection. Colorado's Supreme Court Rejected a Proposal Meant to Fix That.*, COLO. SUN (July 21, 2021, 3:43 AM), https://coloradosun.com/2021/07/21/racism-jury-selection-colorado-supreme-court/.

13. *Id.*

reasons, peremptory challenges waste valuable resources of courts and other stakeholders.

I. BACKGROUND

"Slavery fostered bigotry and racial discrimination from which we have yet to fully recover."[14]

To understand the role that race plays in criminal jury selection in the United States, it is imperative to frame the issue in light of the history of the origins of race—and subsequent racism—in this nation, as well as how those troubled beginnings have enduring consequences. The United States perpetuated chattel slavery by engaging for centuries in the Transatlantic Slave Trade, which enshrined Black people as "inferior" and condemned them to lifelong forced labor.[15]

In fact, even after the U.S. government formally abolished slavery, Black people were subject to a scheme of discriminatory laws[16] designed to criminalize their very existence and lease them post-conviction to private industries.[17] In this vein, free Black people in the aftermath of slavery often saw themselves convicted of "crimes" without a trial, thus ensuring the deprivation of their constitutionally guaranteed right to due process.[18] Sadly, in many instances, the sentence for those convictions was even harsher than convict-leasing, as Black people—particularly Black men accused of crimes against white people—were often publicly lynched without so much as an investigation.[19] After slavery and throughout Reconstruction, the Jim Crow era, and today, Black people[20] have been "burdened with a presumption of guilt and dangerousness that is evident in myriad ways."[21]

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14. EQUAL JUST. INITIATIVE, SLAVERY IN AMERICA: THE MONTGOMERY SLAVE TRADE 79 (2018).

15. *See id.* at 9, 12–13.

16. EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 38 (2020) [hereinafter RECONSTRUCTION IN AMERICA] (discussing Black Codes that criminalized vagrancy and loitering for newly freed, former slaves).

17. Prior to the Civil War, because slaveholders retained the authority to punish their property, Black people rarely—if ever—encountered the formal criminal legal system, which applied to white people only. Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865–1890*, 30 SOC. PROBS. 555, 555 (1983). Postbellum, states enacted "Black Codes" that criminalized Black people in circumstances we understand today to be legally permissible such as homelessness and absence from work. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 28 (Greg Ruggeiro ed., 2003). The states then leased imprisoned Black people to various industries including—but certainly not limited to—factories, mining, railroads, and roadway paving. *See id.* at 34; DEATH AND OTHER PENALTIES: PHILOSOPHY IN A TIME OF MASS INCARCERATION 51–52 (Geoffrey Adelsberg, Lisa Guenther, & Scott Zeman eds., 2015).

18. RECONSTRUCTION IN AMERICA, *supra* note 16, at 76.

19. *Id.*

20. Racism is not uniquely aimed at Black people, and while other minority groups in the United States are significantly affected by racial discrimination, this paper focuses on racism in the context of Black people to maintain a reasonably narrow scope.

21. EQUAL JUST. INITIATIVE, SEGREGATION IN AMERICA 5 (2018) [hereinafter SEGREGATION IN AMERICA].

Recently, the United States has experienced an unprecedented "racial reckoning."[22] In 2020, the nation witnessed a uniformed police officer murder George Floyd at a convenience store, which is widely seen as the catalyst for significant social unrest aimed at repairing systems of racial injustice.[23] However, the tragic killing of George Floyd by the very authority sworn to "serve and protect" him was only one of many similar grave injustices inflicted upon Black people in the last several years.[24] Highlighting that truth is the early 2021 estimate that police in the United States had shot and killed no less than 135 *unarmed* Black people over the course of the preceding five years.[25] Colorado has been no exception to the pervasive racial injustice that has pervaded the rest of the United States. Recently—and perhaps most illustratively—police killed Elijah McClain, a twenty-three-year-old Black man living in Aurora, Colorado, while he was walking home from a convenience store.[26]

Much of the disparate treatment that Black people face manifests as injustices experienced during engagement with the criminal punishment system.[27] Racism is inherent throughout the totality of a Black person's involvement with the system, even "*before* the first contact . . . through pleas, conviction, incarceration, release, and beyond."[28] As a result, despite Black people comprising only 13.4% of the national population, they are the fatal victims of 22% of police shootings, nearly half of all wrongful conviction exonerations, and more than one-third of those sentenced to

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22. *See* ASHLEY QUARCOO & MEDINA HUSAKOVIĆ, RACIAL RECKONING IN THE UNITED STATES: EXPANDING AND INNOVATING ON THE GLOBAL TRANSITIONAL JUSTICE EXPERIENCE 7–8 (2021).

23. *Id.* at 7–8.

24. While there have been numerous instances in recent history of police in the United States killing unarmed Black people, racial injustice spans the gamut of society. *See* Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns; Patrisse Cullors, *'Black Lives Matter' Is About More than the Police*, ACLU (June 23, 2020), https://www.aclu.org/news/criminal-law-reform/black-lives-matter-is-about-more-than-the-police/. Notably, and by no means all-inclusively, Black people experience inequality in wealth, employment, income, education, healthcare, and access to the political process. *Resources to Understand America's Long History of Injustice and Inequality*, WASH. POST (Oct. 9, 2020), https://www.washingtonpost.com/nation/2020/06/08/understanding-racism-inequality-america/.

25. Thompson, *supra* note 24.

26. Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Jan. 18, 2022), https://www.nytimes.com/article/who-was-elijah-mcclain.html. A little over four months after police and paramedics killed Elijah, Colorado's Attorney General initiated a grand jury investigation into his death. *Colorado Attorney General's Office Opens Grand Jury Investigation Concerning Elijah McClain*, COLO. ATT'Y GEN. (Jan. 8, 2021), https://coag.gov/press-releases/1-8-20/. Nearly a year later, that grand jury indicted the police and paramedics it had been investigating. *Elijah McClain Death: Officers, Medics Appear Before Judge After Grand Jury Indictment*, CBS NEWS (Nov. 1, 2021, 11:37 AM), https://denver.cbslocal.com/2021/11/01/elijah-mcclain-aurora-police-medics-indictment-charges/. Relatedly, only two weeks later, the City of Aurora settled a federal civil rights suit with Elijah's family for $15,000,000—the largest police-related wrongful death settlement in the City of Aurora's history. *Aurora Agrees to Pay $15 Million in Elijah McClain Case; Largest Police Related Settlement in City, Colorado History*, CBS NEWS (Nov. 17, 2021, 11:59 PM), https://denver.cbslocal.com/2021/11/17/elijah-mcclain-settlement-city-aurora-family/.

27. *See* Shasta N. Inman, *Racial Disparities in Criminal Justice*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/ (last visited Dec. 3, 2022).

28. *Id.* (emphasis added).

death and executed.[29] In Colorado, while encompassing less than one-twentieth of the population, Black people account for almost one-fifth of those incarcerated in the state.[30] Moreover, Colorado is seven times more likely to sentence Black people to jail or prison than it is to sentence white people to the same.[31]

Numerous events transpire before a conviction, including a suspect encountering police, police arresting a suspect, the state charging the individual, and attorneys negotiating plea agreements.[32] Empirical studies continue to illuminate racial disparities at every stage of the criminal legal process.[33] These aspects of the punishment system are ripe opportunities for significant reform. But until those much-needed reforms are enacted—and while Black people are continuously presumed guilty, overpoliced, disproportionately charged, and offered comparatively dismal pleas—jury selection is a critical juncture before trial during which constitutionally protected rights must be protected.[34] In many instances, a representative jury may be the last—and perhaps the only—hope a Black person has for the insertion of fairness and equity in the criminal legal process before trial.[35]

The U.S. Constitution guarantees a criminal defendant the right to trial by an impartial jury.[36] The Supreme Court has held that this means there is a constitutional guarantee that the jury represents a "cross-section of the community" from which it is drawn.[37] A jury in a criminal trial is an essential safeguard against arbitrary power, leveraging the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor . . . or biased response of a judge."[38] Further, in criminal trials, a jury can prevent government oppression of the accused and assure a fair and equitable result.[39] In reinforcing the criticality of impartiality, the Supreme Court has held that the partiality of a single juror

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29. *Id.*

30. Forest Wilson, *New Report Highlights Racial Disparity in Colorado's Booming Prison Population*, COLO. INDEP. (Sep. 14, 2018), https://www.coloradoindependent.com/2018/09/14/aclu-prison-reform-racial-disparity/.

31. *Id.*

32. *See What Is the Sequence of Events in the Criminal Justice System?*, BUREAU OF JUST. STATS. (June 3, 2021), https://bjs.ojp.gov/justice-system.

33. *See, e.g.*, THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 2 (2018); Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#Policing; Drew Desilver, Michael Lipka, & Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, PEW RSCH. CTR. (Jun. 3, 2020), https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/.

34. Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 98 (2021).

35. *See* RACE AND THE JURY, *supra* note 5, at 21.

36. U.S. CONST. amend. VI.

37. People v. Wheeler, 583 P.2d 748, 754 (Cal. 1978).

38. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

39. 47 AM. JUR. 2D *Jury* § 2, Westlaw (database updated Nov. 2022).

will give rise to a Sixth Amendment violation.[40] More practically, when a jury is impartial (i.e., does not allow its biases to influence its judgment), it supports "the legal system's search for truth" and bolsters "the integrity of the [trial's] results."[41] There is no question, then, that a partial jury is antithetical to the justice our judicial system seeks to produce.[42] Thus, given the paramount importance of juror impartiality, a jurisprudence developed throughout the twentieth century around prosecutorial discrimination during jury selection in an attempt to eradicate racial bias.[43]

That evolution led to the landmark case of *Batson v. Kentucky*.[44] In the original case, prosecutors in a Black man's criminal trial "used [] peremptory challenges to strike all four" potential Black jurors, ensuring an all-white jury.[45] The Court was confronted with the question of whether the state of Kentucky had discriminatorily selected the jury in violation of the Black man's Fourteenth Amendment right to equal protection.[46] Reasoning that the Fourteenth Amendment's Equal Protection Clause prevented the State from excluding members of a defendant's race from a jury venire *because* of their race, the Court held that the State's purposeful discrimination was a constitutional violation.[47]

To arrive at that holding, the Court invoked a three-prong approach.[48] As the first part of the Court's methodology, it laid out three steps to establishing a prima facie case that a prosecutor's use of peremptory challenges involved purposeful discrimination.[49] First, a defendant must demonstrate their membership in "a cognizable racial group" and that a prosecutor used peremptory challenges to exclude members of the defendant's race from the jury.[50] Second, a defendant may rely on the indisputable fact that peremptory challenges, as a practice, allow discriminators to discriminate.[51] Third, a defendant must show—based on facts derived from the first two steps and any further relevant circumstances—that a prosecutor's reliance on that practice raises an inference that they removed a potential juror because of their race.[52] The next step in the process shifts the burden to the prosecution to explain their peremptory challenge by

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40. Lindsey Y. Rogers, Comment, *Rule 606(B) and the Sixth Amendment: The Impracticalities of a Structural Conflict*, 6 WAKE FOREST J.L. & POL'Y 19, 22 (2015); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

41. Edward S. Adams & Christian J. Lane, *Constructing a Jury that Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. Rev. 703, 709–10 (1998).

42. *Id.*

43. *See* RACE AND THE JURY, *supra* note 5, at 16–17.

44. 476 U.S. 79 (1986).

45. *Id.* at 83.

46. *Id.* at 82, 95.

47. *Id.* at 96–100.

48. *Id.* at 96–98.

49. *Id.* at 96.

50. *Id.*

51. *Id.*

52. *Id.*

providing a race-neutral reason.[53] Lastly, the judge must decide whether the defendant has shown purposeful discrimination.[54]

In explaining the reverberating nature of discrimination in jury selection, the Court concluded, "The harm . . . extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.[55] Selection procedures that purposefully exclude [B]lack persons from juries undermine public confidence in the fairness of our system of justice."[56] *Batson*, then, was the Court's attempt at counteracting *intentional* racial discrimination in jury selection.[57]

The truth in the aftermath of *Batson* is harsh. Prosecutors continue to exclude Black jurors disproportionately, and it appears the motive is to empanel disproportionately white juries.[58] Essentially, *Batson* fails to adequately protect against both explicit and implicit racial bias during jury selection. This is due, at least in part, to the high bar that *Batson* established in requiring a defendant to prove that prosecutors have intentionally discriminated based on race when striking a juror.[59] Further, when a defendant raises a *Batson* challenge, prosecutors are afforded the opportunity to support their use of a peremptory strike with pretextual, supposedly race-neutral reasoning.[60] Because *Batson* failed to fully heal racial discrimination in jury selection, states have been left to perform emergency surgery to save the protection owed to defendants.[61]

II. ATTEMPTS AT REFORM

Since *Batson*, several states, including California, Kansas, Iowa, Arizona, Oregon, and Connecticut, have considered how to fill the cracks in the framework that case created.[62] In 2018, Washington enacted a new criminal procedure rule governing peremptory challenges with the purpose of addressing implicit bias and discrimination during jury selection.[63]

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53. *Id.* at 97.
54. *Id.* at 98.
55. *Id.* at 87.
56. *Id.*
57. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1535 (2012).
58. Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO STATE L.J. 201, 238–39 (2021).
59. *See* Jigar Chotalia & Richard Martinez, *Limitations of the Batson Analysis in Addressing Racial Bias in Jury Selection*, 46 J. AM. ACAD. PSYCHIATRY L. 533, 533 (2018).
60. *See* Offit, *supra* note 58, at 240–41.
61. *See Batson*, 476 U.S. at 103 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."); *see also* RACE AND THE JURY, *supra* note 5, at 77–84.
62. Rachel Simon, *Effectuating an Impartial Jury of One's Peers: Why Washington Has More Work to Do to Achieve Peremptory Challenge Reform*, 19 SEATTLE J. SOC. JUST. 201, 232 (2020).
63. *Id.* at 201.

Within a couple years of the Washington rule taking effect, Colorado began to explore shoring up *Batson*.[64] However, despite the Supreme Court of Colorado considering a proposal similar to Washington's rule, Colorado has yet to settle on an answer.

A. The State of the Law in Washington

Washington is perhaps the most noteworthy example of state-level criminal procedure reform around peremptory challenges in recent history. Since *Batson*, Washington courts had relied on the Court's three-prong test[65] when assessing whether prosecutorial discrimination during jury selection was intentional.[66] However, in 2016, the Washington Supreme Court published for public comment an ACLU-furnished proposal to adopt a new peremptory challenge rule for jury selection "meant to protect Washington jury trials from unconscious, or institutional bias in the empanelment of juries" and "employ[] a test that utilizes an objective-observer standard."[67]

The initial version of the proposed rule was known as General Rule 36,[68] but by the time the Washington Supreme Court formed a working group to investigate and aggregate stakeholder perspectives and interests on the proposed rule, a different version of the rule was enacted.[69] Thus, the peremptory challenge rule was subsequently named General Rule 37.[70] After two years of consideration, the Washington Supreme Court adopted General Rule 37 in April 2018.[71] The express intent of the new rule was to "eliminate the unfair exclusion of potential jurors based on race or ethnicity."[72] The rule itself effectively mandates that if a 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."[73] Importantly, the rule does not require courts to find *intentional*

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64. Memorandum from Kevin McGreevy, Member, Colo. Crim. Rules Comm., to Judge John Daily, Chair, Colo. Crim. Rules Comm. 1 (Oct. 9, 2020) (on file with the Colorado Criminal Rules Committee) [hereinafter McGreevy Memorandum 1].

65. *Batson* lays out a three-pronged approach to determining whether a peremptory challenge unconstitutionally discriminates based on race; all three prongs must be satisfied. *Batson*, 476 U.S. at 96–98. First, a defendant must make a prima facie showing that the prosecutor struck the juror based on race. *Id.* Second, the prosecutor must proffer a race "neutral" reason for striking the juror. *Id.* at 97–98. Third, the court decides whether the defendant proved that the discrimination was intentional. *Id.* at 98.

66. State v. Saintcalle, 309 P.3d 326, 339 (Wash. 2013).

67. *See GR 9 Cover Sheet*, WASH. COURTS, https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537 (last visited Dec. 6, 2022).

68. WASH. COURTS, PROPOSED NEW GR 37—JURY SELECTION WORKGROUP 1 (2018).

69. *Id.*

70. *Id.*

71. *See* Simon, *supra* note 62, at 228.

72. *GR 37 Jury Selection*, WASH. COURTS, https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf (last visited Dec. 6, 2022).

73. 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE, CRIMINAL PRACTICE & PROCEDURE § 4111 (3d ed.), Westlaw (database updated Oct. 2021).

discrimination, and implicit bias is sufficient to deny a peremptory challenge.[74]

Since adopting the rule, spectators have posited that while General Rule 37 advances the aim of *Batson*, there is still work to be done to fully achieve its promise.[75] There have been at least two cases where defendants in Washington have won a new trial on appeal based on General Rule 37.[76] But in both cases, the judge did not sustain the defendant's objection at trial, highlighting the rule's inefficiency.[77]

In *State v. Lahman*,[78] the prosecution used a peremptory challenge to remove a juror with an Asian last name.[79] The defendant objected under General Rule 37.[80] The trial judge initially granted the defendant's objection but later recanted, reasoning that "age and lack of experience were valid race-neutral reasons for the State's peremptory challenge."[81] Upon de novo review, the Court of Appeals of Washington reversed the trial court's ruling and remanded after finding that the prosecutor's focus on the juror's "youth and lack of life experiences [objectively] played into at least some improper stereotypes about Asian Americans . . . ."[82]

Similarly, in *State v. Listoe*,[83] the trial judge denied the defendant's objection to the State's exercise of a peremptory challenge to exclude the only Black juror on the venire.[84] The trial court in *Listoe* explained that because his answer to a question during voir dire could be objectively viewed as his inability to follow the law, the prosecutor had a legitimate non-race-based reason for the peremptory challenge.[85] As the Court of Appeals of Washington had done in *Lahman*, that court again found upon de novo review that the State improperly struck the Black juror because "[a]n objective observer aware of implicit bias could view race as a factor in the State's exercise of the peremptory challenge . . . ."[86]

In cases where General Rule 37 has been used to object to the State's peremptory challenge, trial courts have misconstrued the rule and wrongly determined that "persuasive race-neutral reason[s] existed justifying the State's use of [a] peremptory challenge."[87] And a race-neutral rationale does not necessarily preclude an objective observer from believing that the

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74. *Id.*
75. *See* Simon, *supra* note 62, at 244–49.
76. *See* State v. Lahman, 488 P.3d 881, 887 (Wash. Ct. App. 2021); State v. Listoe, 475 P.3d 534, 544 (Wash. Ct. App. 2020).
77. *See Lahman*, 488 P.3d at 887; *Listoe*, 475 P.3d at 544.
78. 488 P.3d at 881.
79. *Id.* at 882.
80. *Id.* at 883.
81. *Id.*
82. *Id.* at 886–87.
83. 475 P.3d 534 (Wash. Ct. App. 2020).
84. *Id.* at 538–39.
85. *Id.*
86. *Id.* at 539–40.
87. *See Lahman*, 488 P.3d at 887; *Listoe*, 475 P.3d at 539.

decision was race-based. While Washington has demonstrated some modicum of progress in reducing racial bias in jury selection, General Rule 37 "and *similar* court rules will only be the start of what is needed to actually address the inequities in jury selection and inherent biases that exist throughout the criminal justice system."[88]

B. The State of the Law in Colorado

Criminal jury selection in Colorado is governed by Colorado Rules of Criminal Procedure Rule 24 (Rule 24).[89] The rule lays out—among other trial-related governance—the number of peremptory challenges afforded to each party, the ability of a court to grant additional peremptory challenges to either side for good cause, and the protocol associated with use of peremptory challenges.[90] It neither includes any acknowledgment of racial bias in jury selection nor makes any attempt to quell it.[91]

In June 2020, the justices of the Supreme Court of Colorado sent a letter to the officers and employees of the state's judicial branch.[92] The justices wrote the letter in response to events that had unfolded in the state and across the nation related to social and racial injustice.[93] In the letter, the justices pledged to redouble their efforts to ensure their decisions were bias-free.[94] Accordingly, the justices invited officers and employees of the judiciary to join them in addressing "the issues confronting [the] Black community and thus [the] community as a whole."[95]

Shortly thereafter, in October 2020, with an eye on addressing the inadequacies in the state's criminal jury trial rules—and in response to the justices' invitation—an attorney belonging to the Colorado Criminal Rules Committee requested that the committee's chair consider amending Rule 24.[96] The request offered an initial draft of the proposed rule change.[97] The change was to add a fifth paragraph to Rule 24(d), which emulated Washington's General Rule 37.[98]

Eventually, the committee cast a vote on a revised version of the proposed Rule 24(d)(5).[99] The language of the amended Rule 24 was as follows:

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88. Simon, *supra* note 62, at 248 (emphasis added).
89. COLO. R. CRIM. P. 24.
90. COLO. R. CRIM. P. 24(d).
91. COLO. R. CRIM. P. 24.
92. *See* Letter from the Sup. Ct. of Colo., to Judicial Officers and Employees, Jud. Branch (June 11, 2020) (on file with the Supreme Court of Colorado).
93. *Id.*
94. *Id.*
95. *Id.*
96. McGreevy Memorandum 1, *supra* note 64.
97. *Id.*
98. *Id.*
99. Memorandum from Kevin McGreevy on behalf of the Rules of Crim. Proc. Comm. to Colo. Sup. Ct. (Mar. 5, 2021) (on file with the Colorado Criminal Rules Committee).

(5) **Improper Bias**: The unfair exclusion of potential jurors based on race or ethnicity is prohibited.

(A) **Objection**. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless the objecting party shows that new information is discovered.

(B) **Response**. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons for the peremptory challenge.

(C) **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.

(D) **Circumstances Considered**. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in comparison to other prospective jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason given to explain the peremptory challenge might be disproportionately associated with race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case or in past cases.

(E) **Reasons Presumptively Invalid**. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

> (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
>
> (iii) having a close relationship with people who have been stopped by law enforcement, arrested, or convicted of a crime;
>
> (iv) living in a high-crime neighborhood;
>
> (v) having a child outside of marriage;
>
> (vi) receiving state benefits; and
>
> (vii) not being a native English speaker.
>
> (F) **Reliance on Conduct**. The following reasons for peremptory challenges have also historically been associated with improper discrimination in jury selection: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties during *voir dire* so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.[100]

In January 2021, the committee cast its vote, which resulted in a recommendation for the Supreme Court of Colorado to adopt the change.[101] While most of the committee voted to propose the amendment, support was by no means won in a landslide fashion.[102] The final tally was seven members in support of the rule change,[103] with five members voting against it.[104]

The committee's majority members drafted a memorandum to the Supreme Court of Colorado that explained the rationale underpinning their support for the proposed rule change. The March 2021 memorandum included three accompanying reasons for their backing of the revised rule.[105] First, the majority argued the updated rule would bolster public confidence in Colorado's judiciary because the rule would confront implicit bias therein.[106] Second, they contended that the amendment would offer an effective framework for confronting implicit bias during jury selection,

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100. *Id.*
101. *Id.*
102. *See id.*
103. *Id.* (one committee member was unable to vote but expressed support for the recommendation via email).
104. *Id.*
105. *Id.*
106. *Id.*

which *Batson* does not address.[107] Third, the majority asserted that Colorado would likely achieve an increase in persons of color performing jury service because Washington had accomplished that result after enacting a substantially similar rule.[108]

Similarly, members of the committee who were in the minority advocated against adoption of the rule change in a memorandum to the justices just four days later.[109] The minority report explained that the proposed change should be rejected outright, but if the justices were to adopt a change, the new rule should differ from the one proposed.[110] The minority argued that because rules of criminal procedure are inappropriate mechanisms to state "aspirations, goals, or values" and evidence regarding the effect of implicit bias is absent, the justices should reject the rule altogether.[111] Alternatively, should the justices have decided to implement a change to Rule 24, the minority argued that the proposed amendment should be modified in two areas.[112] First, they specified that subparagraph (d)(5)(E) should not include "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling" as a presumptively invalid reason for striking a juror with a peremptory challenge.[113] The minority's view was that this was a legitimate reason for a prosecutor to strike a juror.[114] Second, the minority advanced the opinion that subparagraph (d)(5)(C) should be revised to remove "an objective observer could view" in favor of, "[i]f the court determines that race or ethnicity was a significant factor . . . ."[115] In suggesting this modification, the minority sought to make the court the fact finder as opposed to a "hypothetical 'objective observer.'"[116]

Perhaps most interestingly, the minority report concluded by positing that, in addition to the previous arguments, both of its authors[117] agreed that "the only way to guarantee that jury selection serves its intended purpose" was to eliminate peremptory challenges completely.[118] The minority conceded that jury selection is significantly flawed and noted that even

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107. *Id.*
108. *Id.*
109. *See* Memorandum from Hon. Morris B. Hoffman & Robert M. Russel on Proposed Rule of Crim. Proc. 24(d) to Justice Carlos A. Samour, Sup. Ct. Liaison Justs. of the Colo. Sup. Ct. 1 (Mar. 9, 2021) (on file with the Colorado Criminal Rules Committee).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. The minority report, which represents the position of the five committee members opposed to the proposed rule change, was authored by the Honorable Morris B. Hoffman and Robert M. Russel. *Id.* The authors expressed in the minority report their jointly held view—that abolishing peremptory challenges is preferable to the proposed amendment to Rule 24—and acknowledge that this perspective is not reflective of the entire minority or the majority of criminal practitioners. *Id.*
118. *Id.*

Washington Supreme Court Chief Justice Steven Gonzalez endorses eliminating peremptory challenges.[119] In criticizing the proposed amendment in favor of abolishing peremptory challenges, the minority report lamented that the altered Rule 24 would "only make the selection process longer, more cumbersome, less even-handed, and no more likely to ensure either diversity or impartiality."[120]

Ultimately, the Supreme Court of Colorado unanimously rejected the proposed change to Rule 24.[121] The court's liaison to the committee, Justice Carlos Samour Jr., explained in an email to the committee members that the court was open to considering a similar proposal in the future should it have greater consensus.[122] This was apparently a recognition of racial bias and discrimination in the state's judiciary and an invitation to continue the exploration of criminal trial reform in Colorado.

Today, Coloradans are left with the *Batson* standard, which does not address "implicit or unconscious bias" and therefore elicits reluctance from judges who are loathe to "challenge attorneys on their reasoning."[123] As mentioned previously, this gaping void is fertile ground for exploitation by prosecutors seeking to eliminate potential jurors for race-based reasons, thereby depriving defendants of their constitutional right to trial by a fair and impartial jury.[124] This reality begs the question: how do we solve the problem?

III. ABOLISHING PEREMPTORY CHALLENGES IN COLORADO

There is a common theme across the jurisprudence and criminal procedure rulemaking of eliminating racial discrimination and bias from jury selection.[125] Since *Batson*, many who have acknowledged the vice grip that racism has on jury selection are convinced that mere alterations to how attorneys use peremptory challenges are insufficient, and peremptory challenges must be abandoned.[126] Recently, Arizona recognized the vulnerability of peremptory challenges to partiality and became the first state in the nation to eliminate peremptory challenges, effective in early 2022.[127] Chief Justice Robert Brutinel, of the Arizona Supreme Court, said as much when explaining that the court's rationale for disallowing peremptory challenges is that doing so "will reduce the opportunity for misuse of the

119. *Id.*
120. *Id.*
121. Vo, *supra* note 12.
122. *Id.*
123. *Id.*
124. Offit, *supra* note 58, at 238–39.
125. *See* Batson v. Kentucky, 476 U.S. 79, 102–08 (1986) (Marshall, J., concurring); Miller-El v. Dretke, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring); State v. Saintcalle, 309 P.3d 326, 347–48 (Wash. 2013) (González, J., concurring).
126. *See Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); *Miller-El*, 545 U.S. at 266–73 (Breyer, J., concurring); *Saintcalle*, 309 P.3d at 347–48 (González, J., concurring).
127. Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021, 12:52 PM), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/.

jury selection process and will improve jury participation and fairness."[128] In the aftermath of a rejected proposal to change Rule 24, Colorado has an opportunity to join Arizona on the right side of history in abolishing peremptory challenges.

A. Prosecutors Have Used the Peremptory Challenge to Exclude Jurors of Color Since the Jim Crow Era

The Jim Crow era succeeded Reconstruction, which followed chattel slavery, and was characterized by the perpetuation of Black inferiority where the law was used to "establish an apartheid society that relegated Black Americans to second-class citizenship and economic exploitation."[129] Prior to Jim Crow, the criminal legal system explicitly prevented Black people from serving as jurors during slavery, and it both patently and latently excluded Black Americans by other means during Reconstruction.[130] Of course, during chattel slavery, Black people were considered property and had no legal right to participate in the democratic process by serving as jurors.[131] After emancipation, states required various qualifications that Black people most often could not meet, such as the means to pay poll taxes, ownership of property, evidence of sufficient education, and proof of residence.[132]

As the nation slowly progressed and Black people began to serve more frequently as jurors in the early part of the twentieth century, prosecutors began to "turn to the peremptory challenge to eliminate the new [B]lack faces appearing for jury duty."[133] Well over 100 years after the start of Jim Crow, this practice has continued and persists even today.[134] Studies have shown that prosecutors have leveraged the power of peremptory challenges to prevent qualified Black people from serving as jurors much more frequently than other eligible potential jurors.[135] One study conducted in the late 2000s revealed that in Houston County, Alabama, prosecutors of capital cases struck *80%* of qualified Black potential jurors.[136] Another similar study, conducted over two decades beginning in 1990, illustrates the juxtaposition between the proportion of Black jurors and prospective jurors of other races struck by prosecutors.[137] In that study, prosecutors were shown to have struck more than half of eligible Black

128. Brenna Goth, *Arizona Bans Use of Peremptory Strikes in State Jury Trials*, BL (Aug. 30, 2021, 5:01 PM), https://news.bloomberglaw.com/us-law-week/arizona-bans-use-of-peremptory-strikes-in-state-jury-trials.

129. SEGREGATION IN AMERICA, *supra* note 21, at 10.

130. Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 828–29 (1997).

131. RACE AND THE JURY, *supra* note 5, at 11.

132. *See* Hoffman, *supra* note 130, at 828–29.

133. *Id.*

134. *See* RACE AND THE JURY, *supra* note 5, at 16, 46.

135. *See* Offit, *supra* note 58, at 239.

136. *Id.*

137. *See id.* at 239–40.

potential jurors while only removing a quarter of other qualified potential jurors.[138]

For at least a century, peremptory challenges have been abused in a manner that has been detrimental to defendants of color—especially Black defendants.[139] In using peremptory challenges nefariously, prosecutors ensure that jury selections "frequently result in all-white juries trying [B]lack defendants even when a substantial number of [B]lack[] [jurors] had been present on the panel."[140]

B. There Is No Constitutional Support for the Peremptory Challenge

Unlike trial itself, juror impartiality, and defendants' confrontation of witnesses against them, there is no enshrinement of the peremptory challenge in the Constitution.[141] In fact, while the right to a jury trial was debated during the constitutional ratification process, there was no discussion of either peremptory or for-cause challenges.[142] In all of the documented discussions throughout the ratification debates, there is not a single reference to even the concept of peremptory challenge.[143]

It is also important to note that the peremptory challenge is an antiquated remnant of the Roman system, which the United States adopted from England.[144] The peremptory challenge was rarely used in England over the many centuries it existed in English common law, and in 1989, England abolished the peremptory challenge.[145] The peremptory challenge appeared well before the Constitution enshrined the right to an *impartial* jury.[146] Thus, its architects did not design it in consideration of a system where bias is supposed to be nonexistent.[147] The very nature of peremptory challenges—that they invite an attorney to dismiss a juror without cause—may actually run counter to the right to an impartial jury guaranteed by the Sixth Amendment.[148]

C. Peremptory Challenges Waste Limited Resources

Lengthy peremptory challenges during voir dire—which are unnecessary because for-cause challenges are designed to ensure that potential jurors who demonstrate bias are excused—cost litigants and taxpayers a significant amount of money and time.[149] In extreme cases, attorneys who

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138. *Id.*
139. *See* Hoffman, *supra* note 130, at 829.
140. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1656 (1985).
141. Stilson v. United States, 250 U.S. 583, 586 (1919).
142. Hoffman, *supra* note 130, at 823–24.
143. *See id.* at 825.
144. *Id.* at 814, 823.
145. *Id.* at 821–22.
146. *See id.* at 871.
147. *See id.*
148. *See id.* at 867, 869–70.
149. *See* Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMPAR. L.J. 507, 519 (1997).

do not demonstrate high efficiency in utilizing peremptory challenges have spent several *months* soliciting responses from prospective jurors during the selection process.[150] Meanwhile, parties are paying attorneys exorbitant hourly fees, and courts are dedicating scarce resources to host these fishing expeditions.[151] The ends do not justify the means where peremptory challenges remain in use because attorneys aggregate power from them, they are used for purposes other than rooting out bias, and the for-cause challenge is already at the court's disposal to safeguard a defendant's Sixth Amendment right to an impartial jury.[152]

1. Attorneys Are Loathe to Concede the Power Vested in Them by Peremptory Challenges

Trial attorneys, in their role as officers of the court and representatives of client and stakeholder interests, are beholden to the procedures and authority of the court.[153] But over the last two centuries, the judiciary has ceded some control to attorneys around voir dire during jury selection.[154] Understandably, attorneys—for both the prosecution and defense—will happily accept and wield any influence granted to them in conducting their professional responsibilities.

Peremptory challenges are an area seen as "part of a trend of increased power in the courtroom relative to the judge."[155] While some attorneys find peremptory challenges an essential tool and others simply find them enjoyable to execute, it would appear that virtually no litigation attorney would willingly give them up.[156] Interestingly, it is no secret that "[t]he foremost reason that peremptory challenges have survived" is because trial attorneys enjoy peremptory strikes.[157] However, if the purpose of jury selection is to empanel a group representing a cross-section of the community that is impartial concerning the defendant, then keeping peremptory challenges to satisfy the whims of trial attorneys is a poor motivation and insufficient to justify the required resources in an already overburdened system, let alone the risk that peremptory challenges will reflect racial biases.

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150. *See id.* at 517.
151. *See id.* at 517, 519.
152. *See* April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 26 (2020); Chase & Graffy, *supra* note 149, at 509–10; Daniel Edwards, *The Evolving Debate Over Batson's Procedures for Peremptory Challenges*, NAT'L ASS'N ATT'YS GEN. (Apr. 14, 2020), https://www.naag.org/attorney-general-journal/the-evolving-debate-over-batsons-procedures-for-peremptory-challenges/.
153. *See Officer of the Court*, NOLO'S PLAIN-ENGLISH LAW DICTIONARY (1st ed. 2009).
154. *See* Anderson, *supra* note 152, at 25–26.
155. *Id.* at 25.
156. *See* Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 25 (2014).
157. *Id.*

2. Prosecutors and Defense Attorneys Exclude Prospective Jurors Who Benefit the Adversary—Not Only Jurors Who Cannot Be Impartial

As part of an attorney's trial strategy, a contemporary custom is to use peremptory challenges to remove jurors who are biased against their client and keep jurors who are likely to be supportive of their client's interest.[158] This very clearly flies in the face of the Constitution's mandate that defendants will be tried by an impartial jury because instead of removing partial jurors, attorneys are focused on stacking the deck in favor of their client.[159] Indeed, lawyers have exploited peremptory challenges for hundreds of years, "play[ing] on stereotypes, allegiances, prejudices, and distrust to maximize their chances of winning."[160]

This is true of many practitioners who rely on seemingly arbitrary stereotypes—such as ethnicity, occupation, religion, and political persuasion—to remove potential jurors from the venire whom the attorney sees as unlikely to support their interest.[161] These capricious characteristics are often derived from limited interactions, and while they are not always race-based, they are discriminatory and rightly would "not rise to a level of challenge for cause."[162] Because peremptory challenges can be—and often are—used to discriminate against jurors for reasons other than their ability to be impartial, they are inappropriate, and courts should make them unavailable to lawyers. The cost significantly outweighs the benefit where strategy, not ensuring impartiality, is the reason for retaining peremptory strikes.

Moreover, the power dynamic of peremptory challenges is asymmetric, as those strikes do more to bolster the prosecution than aid defense attorneys whose clients' liberty hangs in the balance. This imbalance exists because, broadly, prosecutors strike numerical minorities, whereas defense attorneys usually gain a benefit by striking white people who are the numerical majority or plurality. Thus, with relatively few peremptory strikes, a prosecutor can ensure an all-white jury. It is much more difficult—if not outright impossible—for a defense attorney to seat an all-minority jury. They simply do not receive enough peremptory challenges to strike all members of the numerical majority. Therefore, defense attorneys who would be giving up a procedure of minimal utility that empowers the prosecution and is ripe for abuse should rationally support abolishing peremptory strikes. A showing of good faith by defense attorneys in rejecting peremptory challenges could go a long way in compelling prosecutors to follow suit in abandoning a nefarious tool, the primary value of which is

158. Chase & Graffy, *supra* note 149, at 511.
159. *See id.* at 519.
160. Anderson, *supra* note 152, at 59.
161. *Id.* at 32.
162. Laurel Johnson, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide*, 5 U. DENV. CRIM. L. REV. 199, 209 (2015).

derived from pretextual smokescreens camouflaging bias and discrimination.

3. Courts Already Allow a Virtually Unlimited Number of Challenges for Cause

For-cause challenges, when granted by a trial court judge, dismiss a would-be juror who lacks the necessary qualifications to serve, is impliedly biased, or possesses an actual bias.[163] While peremptory challenges are discriminatorily used to eliminate potential jurors based on race—which is "simply unrelated to a potential juror's fitness to be fair and impartial during the trial and deliberations"[164]—for-cause challenges are the only challenges necessary to eliminate biased jurors, thereby ensuring a constitutionally required impartial jury.

Conveniently, there is no limit to the number of for-cause challenges a party can raise at trial.[165] And while attorneys must meet a high bar for a judge to grant a for-cause challenge, that is in part because courts are aware that peremptory challenges are available.[166] It follows that if peremptory challenges are abolished, attorneys will advance for-cause challenges more frequently, and judges will ultimately grant them accordingly. However, in the only state that has abolished peremptory challenges to date—Arizona—the for-cause challenge requirements remained as rigorous as they were pre-abolishment.[167] Given this sustained lofty bar, perhaps the Arizona State Bar Association's recommendation to expand voir dire[168] is a necessary complement to abolishing peremptory challenges. This measure would presumably ensure that attorneys could adequately perform the necessary inquiry into a prospective juror's propensity to be impartial—and gather the evidence required to meet the for-cause challenge standard if such evidence exists.

Given that there is a suitable method (that with tweaks could be even more effective) of dismissing biased prospective jurors, removing an easily exploitable alternative approach will save all stakeholders invaluable time and will allow litigants, attorneys, and courts to appropriately reallocate economic resources.

163. Edwards, *supra* note 152.
164. *Id.*
165. Chase & Graffy, *supra* note 149, at 509.
166. *Id.*
167. *Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021)*, 135 HARV. L. REV. 2243, 2246 (2022) (discussing the drawbacks of abolishing peremptory challenges).
168. *Id.*

CONCLUSION

"For me, something must be seriously wrong if a practice as widespread and time-honored as the peremptory challenge is to be discarded. Something is seriously wrong."[169]

—District Court Judge, Second Judicial District (Denver), State of Colorado, Morris B. Hoffman

Colorado has an opportunity to not only be on the right side of history, but to be an early adopter in that endeavor should it move to abolish peremptory challenges. There is no question that this country—to include the state of Colorado—has a tragic history inextricably tied to chattel slavery. The consequences of the nation's propagation of racism built on mythical fabrications of the inferiority of Black people and the superiority of white people have yielded concrete consequences that we have a responsibility to not only address but resolve.

Racism manifests itself in our criminal legal system, and the resultant discrimination is blatant in the exercise of peremptory strikes during jury selection. Not only does our allowance of arbitrary removal of prospective jurors preclude adherence to the Sixth Amendment right to an impartial jury trial, but it perpetuates the sentiment that Black people are less than. It is well-established that prosecutors have struck jurors of color with peremptory challenges since the Jim Crow era. It is also uncontroverted that there is no constitutional basis or requirement for the often-abused peremptory challenge. And by now, it should be readily apparent that peremptory challenges are a tremendous waste of time and money.

For good reason, the Supreme Court of Colorado refused to implement a suggested change to Rule of Criminal Procedure 24. It was an earnest gesture, but it did not cut to the cold heart of the issue: racism. Because it is so widely accepted that *Batson* was a band-aid placed over a gaping wound, it is past time to cut away the decayed flesh that is the peremptory challenge to save the judiciary body. Consider abolishment the scalpel.

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169. Hoffman, *supra* note 130, at 811.

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