
YALE LAW & POLICY REVIEW

Arresting *Batson*: How Striking Jurors Based on Arrest Records Violates *Batson*

*Vida B. Johnson**

INTRODUCTION.....	388
I. THE SYSTEMIC RACISM OF THE CRIMINAL JUSTICE SYSTEM	391
II. JURY SELECTION	395
A. <i>Investigation of Prospective Jurors</i>	399
III. <i>BATSON</i> AND ITS SHORTCOMINGS.....	401
IV. THE CONSTITUTIONALITY OF STRIKES BASED ON ARREST RECORDS	406
A. <i>Arguments in Favor of Questions and Investigations Regarding Prospective Juror’s Arrest Records</i>	406
B. <i>How Batson Relates to Questions and Investigations Regarding Arrests</i>	409
C. <i>Lower Courts Have Addressed the Issue of Arrests and Batson</i>	412
D. <i>Beyond Batson: Why Trial Courts Should Seek More Diverse Juries and How To Achieve this Goal</i>	415
CONCLUSION.....	417
APPENDIX	419

* Visiting Professor of Law, Georgetown University Law Center, Criminal Defense and Prisoner Advocacy Clinic and Criminal Justice Clinic. Many thanks to Jonathan Anderson, Keith Findley, Kim Thomas, Amber Baylor, Nina Chernoff, Richard Frankel and Robin Walker-Sterling. Special thanks to Emily Wilson and Carlton Powell for research help.

INTRODUCTION

The headline read: “Questions Arise over Criminal Background Searches of Jurors in D.C. Superior Court.”¹ The story was even more troubling than the headline. A prosecutor at the United States Attorney’s Office, arguably the country’s most respected prosecutors’ office, doubted that some African American prospective jurors were telling the truth when they denied or failed to answer questions about having been arrested during *voir dire* inquiry.² The prosecutor searched a law enforcement database and learned that some of the prospective jurors in fact did have arrest records.³ The prosecutor raised the issue with the trial judge and asked that the prospective jurors be stricken for cause for lying under oath.⁴

An inquiry from the trial judge revealed that the prosecutor had not searched the database for the arrest records of every prospective juror on the panel, but only for the African Americans.⁵ When asked by the judge about why she had only run the records of those particular jurors, the prosecutor responded that she had an “instinct” about some jurors and also gave an answer that she had run those jurors’ records because the jurors were life-long residents of the District of Columbia.⁶ In the rapidly gentrifying District of Columbia, large portions of the White residents are transplants from other jurisdictions, while many of African Americans are life-long residents.⁷ The prosecutor’s response was a thinly veiled admission that her suspicions were based on the jurors’ race.

Questions about a prospective juror’s arrests do not bear directly on his or her fitness as a juror. Many jurisdictions bar those with felony convictions from serving as jurors permanently or for some period of time.⁸ A handful of states bar individuals with misdemeanor convictions from serving on juries.⁹ Some states also bar citizens facing pending charges.¹⁰ The District of Columbia blocks only those with felony convictions in the last ten years from serving as

1. Keith L. Alexander, *Questions Arise Over Criminal Background Searches of Jurors in D.C. Superior Court*, WASH. POST (Dec. 8, 2013), http://www.washingtonpost.com/local/crime/questions-arise-over-criminal-background-searches-of-jurors-in-dc-superior-court/2013/12/08/fa612fec-4e13-11e3-be6b-d3d28122e6d4_story.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Sabrina Tavernise, *A Population Changes, Uneasily*, N.Y. TIMES (July 17, 2011), <http://www.nytimes.com/2011/07/18/us/18dc.html>.

8. See *infra* Appendix.

9. *Id.*

10. *Id.*

ARRESTING BATSON

jurors.¹¹ But no jurisdiction prevents those who have merely been *arrested* from serving as jurors, unless those particular charges are pending at the time of jury service.¹² Although arrests do not disqualify prospective jurors from serving, questions about arrests are routinely asked in *voir dire* all around the country.¹³ Even when prospective jurors are not asked about arrests, background checks easily reveal any adult arrests.¹⁴

While an Assistant United States Attorney who believes it to be unlikely for an African American life-long resident of the District of Columbia to have never been arrested suggests that she was acting on her own racial biases, her suspicions are also a symptom of a broader issue: the racially disparate impact of this country's discriminatory system of mass criminalization and incarceration. The prosecutor's efforts to check arrest records effectuated yet another negative impact of the racially unequal criminal justice system. But even the question asking prospective jurors about their arrest records and those of friends and family—common questions across jurisdictions—and the implicit approval of using arrest records as a basis for either ad hoc “for cause” strikes or peremptory strikes compound the racially disparate impact of our criminal justice system.¹⁵

A significantly higher percentage of people of color have arrest records due to the disproportionate number of stops, searches, and arrests of people of color.¹⁶ Black¹⁷ people are also more likely to have friends and family who are Black.¹⁸ As a result, Black jurors are more likely than White jurors to have friends and family who have been arrested. Judges and prosecutors then use the existence of prior arrests of the jurors or the jurors' friends or family to strike these prospective jurors, in effect producing juries whose racial compositions are whiter than that of the respective communities.

11. *Id.*

12. *Id.*

13. In the District of Columbia, the jurisdiction where I practice, judges routinely ask, “Have you, a close friend or family member been arrested, convicted, or a victim of a crime in the last ten years?” New Jersey's model criminal *voir dire* includes a question about whether the prospective juror, her “family member or close friend” has ever been “accused” of a crime. *Model Jury Selection Questions*, N.J. CTS. (2007), http://www.judiciary.state.nj.us/jury/std_jury_quest_criminal.pdf.

14. See Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

15. See *infra* Part III.

16. See *infra* Part I.

17. I will use the terms “African-American” and “Black” interchangeably throughout this Article.

18. Up to 75% of White Americans do not have non-White friends. *Race and Americans' Social Networks*, PUB. RELIGION RESEARCH INST. (Aug. 28, 2014), <http://publicreligion.org/research/2014/08/analysis-socialnetwork/>.

Almost thirty years ago, in *Batson v. Kentucky*,¹⁹ the United States Supreme Court held that prosecutors could not strike prospective jurors on account of the jurors' race. In the most technical sense, striking a juror because of an arrest record could be considered "race neutral." In practice, however, prosecutors use this reason to strike jurors to achieve the very end that *Batson* sought to prevent—a deliberately whiter jury. This Article explores whether, because of the racially disproportionate arrest rates of African Americans and Latinos²⁰ compared to Whites, using a peremptory strike on a juror who is a person of color because of his arrest record or that of his loved ones, is contrary to the Supreme Court's holding in *Batson*.

Prosecutors and private attorneys frequently investigate jurors' backgrounds. With limitations on *voir dire*, the amount of information learned in the courtroom is limited, and the parties frequently resort to stereotypes to employ strikes. Those parties with resources who are unwilling to simply rely on stereotypes now investigate jurors.²¹ Parties looking for race-neutral reasons to disqualify jurors of color also investigate jurors.²² Running a criminal background check of jurors is routine to those who investigate.²³

Even when prosecutors and private attorneys are not investigating jurors, standard *voir dire* questions posed by the parties and written questionnaires given to jurors before service begins include questions about whether the prospective juror or close friends and family have ever been charged with or arrested for a crime in a particular period of time, usually the past ten years.²⁴

19. 476 U.S. 79, 92-93 (1986).

20. While Latinos are discriminated against and have higher incidents of arrests than non-Hispanic Whites, throughout this Article I make comparisons between Whites and Blacks without discussing Latinos. This is because of a lack of statistical clarity about the effects discussed here as they apply to Latinos. In many instances Latinos are considered an ethnic group rather than a race. The United States Census, for example, groups Americans into five racial groups: "American Indian or Alaska Native," "Asian," "Black or African American," "Native Hawaiian or Other Pacific Islander," and "White." The census further divides those five groups into: "Hispanic or Latino" and "Not Hispanic or Latino" ethnic groups. *Hispanic Origin: Frequently Asked Questions*, U.S. CENSUS BUREAU, <http://www.census.gov/population/hispanic/about/faq.html>. Notwithstanding the unavailability of reliable data, I believe that the arguments I advance apply to Latinos as well as African Americans in most instances.

21. See Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U.L. REV. 1667, 1690 (2008). DecisionQuest, a jury trial consultant company, advertises Jury Profiling as one of the services it offers. *Trial Consulting & Research*, DECISIONQUEST, <http://www.decisionquest.com/Public/Services/TrialConsulting/index.cfm>.

22. See Alexander, *supra* note 1.

23. See *infra* Part III.

24. Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 33 CT. REV. 10, 11 (Spring 1999), <http://aja.ncsc.dni.us/courtrv/cr36->

ARRESTING BATSON

Despite *Batson*, discrimination by prosecutors in jury selection persists.²⁵ Because this type of discrimination can easily be masked with an excuse that on its face is race neutral, examining whether an excuse like a juror's arrest records is one that is truly race neutral is imperative. This Article will explore whether, because of the racially disproportionate arrest rates of African Americans and Latinos compared to Whites,²⁶ using a peremptory strike on a juror who is a person of color because of his arrest record or that of his loved ones, is contrary to the Supreme Court's holding in *Batson*. Part I examines how race affects the likelihood that a person will have an arrest record. Part II provides background regarding jury selection and Part III examines *Batson* and its progeny. Part IV discusses the constitutionality of strikes based on arrest records. This Article concludes with the common sense suggestion that questions about arrests during *voir dire* should be precluded, as should the practice of using a person's arrest record as the sole basis for the exercise of peremptory strikes.

I. THE SYSTEMIC RACISM OF THE CRIMINAL JUSTICE SYSTEM

The statistics demonstrating the racially disparate impacts of the criminal justice system are staggering. The disproportionate impact on people of color in the U.S. system is at every level—policing, arrests, prosecution, plea offers, trial outcomes, and sentencing outcomes.

People of color are far more likely to be arrested in this country than Whites. By the age 23, 49% of Black males and 44% of Latino males have been arrested compared to 38% of White males.²⁷ As of 2006, one in every 15 Black adult men was incarcerated compared to one in every 106 White men.²⁸

Whites and Blacks use and sell drugs at roughly the same rates, but Blacks, who are 12% of the population, account for 34% of those arrested for drug of-

1/CR36-1Mize.pdf (referring to a federal court in D.C. that asks, during *voir dire*, whether the prospective jurors, their close friends or close relatives have been charged with a crime in the last ten years).

25. See *infra* Part III.

26. Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence By Ages 18 and 23*, 60 CRIME & DELINQ. 471, 476-78 (2014).

27. *Id.*

28. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 6 (2008), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/report_s/sentencing_and_corrections/onein100pdf.pdf.

fenses.²⁹ For example, Blacks are more than three times more likely than their White counterparts to be arrested for simple marijuana possession.³⁰

Some of the blame can be placed on police practices. In 2009, more than half a million people were stopped by the police in New York City—87% of them were African American or Latino, whereas only 53% of the population of New York City was African American or Latino.³¹ In the same year, Philadelphia boasted an even higher per capita stop and frisk rate than New York with 253,276 stops in a city of only 1.5 million.³² 72.2% of those stopped were African-Americans, even though Blacks comprise just 44% of Philadelphia's population.³³ A study in Los Angeles revealed that Blacks were significantly more likely than Whites to be stopped and frisked, however, Blacks who were frisked and searched (and Latinos, who were also more likely to be stopped and searched) were actually less likely to have weapons, drugs, or other incriminating evidence on their persons than Whites who were stopped.³⁴ As of 2010, Black men are more than six times more likely to be incarcerated than White men in the United States.³⁵ That is up from the 1960s.³⁶

Overaggressive policing begins early in the lives of Black youth.³⁷ In New Orleans, almost 93% of children detained by police for curfew violations be-

-
29. MARC MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 4 (2009), http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf.
 30. AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 17 (June 2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-reli.pdf.
 31. Press Release, Ctr. for Const. Rts., New NYPD Data for 2009 Shows Significant Rise in Stop-and-Frisks: More Than Half Million New Yorkers Stopped Last Year (Feb. 17, 2010), <http://ccrjustice.org/newsroom/press-releases/new-nypd-data-2009-shows-significant-rise-stop-and-frisks%3A-more-half-million>.
 32. Erica Goode, *Philadelphia Defends Policy on Frisking, With Limits*, N.Y. TIMES (July 11, 2012), <http://www.nytimes.com/2012/07/12/us/stop-and-frisk-controls-praised-in-philadelphia.html>.
 33. Complaint at 21, *Bailey v. City of Philadelphia*, No. 2:2010-cv-05952 (E.D. Pa. Nov. 4, 2010), http://www.aclupa.org/download_file/view_inline/669/198/.
 34. IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 5-6, 25-26 (2008), <http://islandia.law.yale.edu/ayres/Ayres%20LAPD%20Report.pdf>.
 35. PEW RESEARCH CTR., KING'S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES 20 (Aug. 22, 2013), http://www.pewsocialtrends.org/files/2013/08/final_full_report_racial_disparities.pdf.
 36. *Id.*
 37. See Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 660-62 (2013).

ARRESTING BATSON

tween 2009-2012 were Black.³⁸ In Oakland, 78% of unfounded arrests were of Black children.³⁹ A Black boy is nine times more likely to be detained for a drug offense as a White boy charged with the same offense.⁴⁰ In 2008, children of color were 22% of the country's youth population, but children of color accounted for at least 43% of arrests for crimes against people and 35% of arrests for property crimes.⁴¹

Police are not the only institutional players at fault. Prosecutors also play a substantial role. In some instances once charged by prosecutors with a crime, Whites are more likely than Blacks to receive diversion than blacks, even those with the same criminal record.⁴² Blacks also receive worse plea deals from prosecutors than their White counterparts.⁴³ In Manhattan, recent statistics show that even for misdemeanor drug offenses, Blacks and Latinos are 19% more likely to receive a plea offer that requires imprisonment.⁴⁴ Prosecutors are then more likely to recommend longer periods of confinement for Black defendants than White defendants at sentencing, even when all else is equal.⁴⁵

-
38. Ramon Antonio Vargas, *New Orleans Curfew Data: 93 Percent of Curfew Arrestees Are Black*, TIMES-PICAYUNE (Mar. 28, 2013), http://www.nola.com/crime/index.ssf/2013/03/new_orleans_curfew_data_93_per.html.
39. BLACK ORGANIZING PROJECT ET AL., FROM REPORT CARD TO CRIMINAL RECORD: THE IMPACT OF POLICING OAKLAND'S YOUTH 15 (Aug. 2013), <http://www.publiccounsel.org/tools/assets/files/o436.pdf>.
40. Sterling, *supra* note 37, at 661.
41. CRYSTAL KNOLL & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, FACT SHEET: DELINQUENCY CASES IN JUVENILE COURT, 2008, at 2 (2011), <http://www.ojjdp.gov/pubs/236479.pdf>.
42. See Nancy Nicosia, John M. MacDonald & Jeremy Arkes, *Disparities in Criminal Court Referrals to Drug Treatment and Prison for Minority Men*, 103 AM. J. PUB. HEALTH 77, 79 (2013) ("Dispositions for diversion to drug treatment were significantly less common among blacks relative to whites."); Task Force on Race & the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 647 (2012) [hereinafter Task Force] (noting that, in King County, prosecutors are 75% less likely to recommend alternative sentences for Black defendants than for similarly situated White defendants).
43. See BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION & RACIAL JUSTICE PROGRAM, VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY: TECHNICAL REPORT 153 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf> ("[B]lack defendants are 10% more likely to receive the plea-to-the-charge offer than similarly-situated white defendants . . ."). "[D]efendants' race emerged as a statistically significant predictor of a custodial sentence offer . . ." *Id.* at 161. "Black defendants were 19% more likely . . . to receive a punitive sentence offer, while differences between Whites and Latinos, and between Whites and Asians were not statistically significant." *Id.*
44. *Id.* at 153, 161.
45. Task Force, *supra* note 42, at 648.

While prosecutors and police have largely been blamed for the racial inequities of our justice system, judges also contribute significantly to the disparities. Following conviction, whether for a felony or a misdemeanor, Blacks are more likely to get prison time as opposed to probation for the same charges and with the same criminal record.⁴⁶ In a Vera Institute study of Manhattan criminal courts, race was found to be a significant factor at every stage of prosecutions, from bail setting to plea offers to sentences received.⁴⁷ Blacks and Latinos received worse pleas and received more jail time than Whites and Asians.⁴⁸ Judges are more likely to sentence Black defendants to jail time than White and Latino defendants.⁴⁹

There is emerging literature that even defense attorneys suffer from biases against their clients of color.⁵⁰ While criminal defense attorneys perceive racism by other institutional players, they may suffer from a blind spot with respect to their own racism. Public defenders may have more unconscious racism, or implicit bias, than they may realize.⁵¹ This could lead, for example, to an attorney encouraging a guilty plea for a Black client that she might not recommend to a White client.

Given the above statistics, there is no question about the racial disparities in the criminal justice system.⁵² These disparities exist with respect to police contacts, arrests, prosecution, and sentences received. These disparities harm the individuals that they directly affect and come at a great price for the nation—a diminished view of the justice system and a racial divide between the way that Whites and people of color view our criminal justice system. Sixty-eight percent of Blacks do not believe that the courts treat Blacks fairly, while only 25% of

46. David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 368-370 (2012) (finding that Blacks in Cook County, Illinois, were more likely to be sentenced to jail or prison than Whites).

47. James McKinley, *Study Finds Racial Disparity In Criminal Prosecutions*, N.Y. TIMES (July 8, 2014), <http://www.nytimes.com/2014/07/09/nyregion/09race.html>; see also Task Force, *supra* note 42, at 628 (“Among felony drug offenders, black defendants were 62% more likely to be sentenced to prison than similarly situated white defendants.”).

48. McKinley, *supra* note 47.

49. *Id.*

50. See Andrea Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 761-62 (2012); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628 (2013).

51. See Lyon, *supra* note 50, at 755, 762.

52. For a fuller discussion on the topic, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

ARRESTING BATSON

Whites agree.⁵³ That a significant percentage of Americans perceive bias in our criminal justice system⁵⁴ should concern prosecutors and courts greatly.

Because of the way that jury selection takes place and because of the racial inequities in our criminal justice system, questioning prospective jurors about arrests will inevitably arm prosecutors who seek to discriminate with a basis to strike Black jurors. The subsequent strikes of Black jurors will only perpetuate these perceptions of the justice system in addition to leading to worse outcomes for Black defendants.

II. JURY SELECTION

Voir dire is a difficult process for the prospective juror. For almost all adult citizens, jury duty is an inconvenient burden: they are ordered to report during the work week and, if selected, may be required to remain for the completion of at least one trial, which can last from hours to weeks to months. Even the jury selection process frequently lasts hours and in some cases can last days or weeks.⁵⁵

Compensation for the prospective jurors' time, if any, is minimal.⁵⁶ This is time away from work, pay (for some), and family. In some jurisdictions, one

53. Frank Newport, *Gulf Grows in Black-White Views of U.S. Justice System Bias*, GALLUP (July 22, 2013), <http://www.gallup.com/poll/163610/gulf-grows-black-white-views-justice-system-bias.aspx>.

54. *Id.*

55. See, e.g., *Uttecht v. Brown*, 551 U.S. 1, 2 (2007) (“Here, 11 days of *voir dire* were devoted to determining whether potential jurors were death qualified.”); *Miller-El v. Dretke*, 545 U.S. 231, 275 (2005) (Thomas, J., dissenting) (“Jury selection in Miller-El’s trial took place over five weeks in February and March 1986.”); *Penry v. Johnson*, 532 U.S. 782, 801 (2001) (“*Voir dire* was a month-long process, during which approximately 90 prospective jurors were interviewed.”); *Press-Enter. Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 510 n.9 (1984) (“We cannot fail to observe that a *voir dire* process of [six weeks], in and of itself, undermines public confidence in the courts and the legal profession. The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused. Properly conducted it is inconceivable that the process could extend over such a period. We note, however, that in response to questions counsel stated that it is not unknown in California courts for jury selection to extend six months.”).

56. See Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC’Y REV. 601, 608 (2005) (noting jurors are paid “about \$12 per day in some locations”). Jurors in New York are entitled to \$40 per day of service. N.Y. ST. UNIFIED CT. SYS., JURY INFORMATION FOR EMPLOYERS 2 (2009), http://www.nyjuror.gov/pdfs/hb_ee.pdf. Jurors in D.C. Superior Court receive \$30 a day plus a \$4 travel stipend. *Getting Paid*, D.C. CTS., <http://www.dccourts.gov/internet/jurors/gettingpaid/main.jsf>.

can be called for petit jury duty in both state and federal court, as well as grand jury duty in both state and federal court, one without regard for the other.⁵⁷

At the courthouse, the people called for petit jury duty may wait a substantial period of time simply to find out if they need to report to a courtroom. The ones that are sent to a courtroom then participate in *voir dire*, in which prospective jurors may be questioned by the judge or the lawyers for the parties (in a criminal case, the prosecutor and the defense attorney).⁵⁸

Typically, the panel, or venire, includes far more prospective jurors than will ultimately sit on the jury.⁵⁹ For example, a panel of sixty prospective jurors may be called in order to ultimately create a jury of twelve jurors and two alternates. All of the prospective jurors are assessed for fitness to serve on the jury primarily through questioning of the prospective jurors in open court, where the other prospective jurors can hear the answers.⁶⁰ In some instances questions are posed to the entire venire while in other circumstances questions may be

57. See, e.g., MISS. CODE ANN. § 13-5-25 (2013):

Every citizen over sixty-five (65) years of age, and everyone who has served as a grand juror or as a petit juror in the trial of a litigated case within two (2) years, shall be exempt from service if the juror claims the privilege. No qualified juror shall be excluded because of any such reasons, but the same shall be a personal privilege to be claimed by any person selected for jury duty. Any citizen over sixty-five (65) years of age may claim this personal privilege outside of open court by providing the clerk of court with information that allows the clerk to determine the validity of the claim. Provided, however, that no person who has served as a grand juror or as a petit juror in a trial of a litigated case in one (1) court may claim the exemption in any other court where the juror may be called to serve.

J. DUKE THORNTON, TRIAL HANDBOOK FOR NEW MEXICO LAWYERS § 6:5 (1992) states:

Persons who have served as members of a petit jury panel or a grand jury in either state or federal court within the preceding 36 months shall be exempt from sitting or serving as jurors in any court of this state when they, at their option, request to be excused from service.

S.C. CODE ANN. § 14-7-850 (2000) provides:

No person is liable to be drawn and serve as a juror in any court more often than once every three calendar years and no person shall serve as a juror more than once every calendar year, but he is not exempt from serving on a jury in any other court in consequence of his having served before a magistrate.

58. For a description of jury selection, see *Swain v. Alabama*, 380 U.S. 202, 209-11 (1965). See also generally ANDREW FERGUSON, WHY JURY DUTY MATTERS (2013).

59. *Swain*, 380 U.S. at 210 (“In Talladega County the petit jury venire drawn in a criminal case numbers about 35 unless a capital offense is involved, in which case it numbers about 100.”).

60. Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1119 (1996).

ARRESTING BATSON

posed to prospective jurors individually.⁶¹ Before or on the day that they are summoned to appear, the venire members are sometimes given questionnaires⁶² containing questions to gauge their suitability for jury service. Depending on the jurisdiction, either the judge or the attorneys may conduct the *voir dire*.⁶³ Based on the answers that potential jurors give to the general questions or the questionnaires, the attorneys or judge may pose additional follow-up questions to individual jurors.

Many have complained that the *voir dire* process can feel like an invasion of privacy to jurors.⁶⁴ The questioning is often personal, in some instances revealing information some would not share with friends and family—questions

61. FERGUSON, *supra* note 58, at 29.

62. See *Skilling v. United States*, 561 U.S. 358, 431 (2010) (“[T]he District Court began the jury selection process by mailing screening questionnaires to 400 prospective jurors in November 2005. The completed questionnaires of the 283 respondents not excused for hardship dramatically illustrated the widespread impact of Enron’s collapse on the Houston community and confirmed the intense animosity of Houstonians toward Skilling and his codefendants.”); see also *Berghuis v. Smith*, 559 U.S. 314, 323 (2010) (“Smith also introduced the testimony of an expert in demographics and economics, who tied the underrepresentation to social and economic factors. In Kent County, the expert explained, these forces made African-Americans less likely than whites to receive or return juror-eligibility questionnaires, and more likely to assert a hardship excuse.”); *Uttecht v. Brown*, 551 U.S. 1, 2 (2007) (“Here, 11 days of *voir dire* were devoted to determining whether potential jurors were death qualified. During that phase, 11 of the jurors the defense challenged for cause were excused. The defense objected to 7 of the 12 jurors the State challenged for cause, and only 2 of those 7 were excused. Before deciding a contested challenge, the court allowed each side to explain its position and recall a potential juror. It also gave careful and measured explanations for its decisions. Before individual oral examination, the court distributed a questionnaire asking jurors to explain their attitudes toward the death penalty and explained that Brown was only eligible for death or life in prison without possibility of release or parole.”); *Duren v. Missouri*, 439 U.S. 357, 357 (1979) (“Under the challenged jury-selection system, before the jury wheel is filled women may claim exemption in response to a prominent notice on a jury-selection questionnaire, and, prior to the appearance of jurors for service, women are afforded an additional opportunity to decline service by returning the summons or by simply not reporting for jury duty.”).

63. Twenty-three states have predominantly or exclusively attorney-conducted *voir dire*. Nine states and the District of Columbia have predominant or exclusive judge-conducted *voir dire*. Eighteen states have judge and attorney-conducted *voir dire*. See HON. GREGORY E. MIZE, PAULA HANNAFORD-AGO & NICOLE WATERS, NAT’L CTR. FOR STATE COURTS & STATE JUSTICE INST., THE STATES-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 28 tbl.21 (2007), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ash>.

64. See generally Michael R. Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CAL. L. REV. 708 (1982).

about whether one has been the victim of sexual assault or other crimes, attitudes about the death penalty, the juror's prejudices against any groups, and other controversial topics. In some jurisdictions these questions are posed in front of the entire jury venire.⁶⁵ One legal observer has said that prospective jurors risk "personal humiliation, damage to reputation and public embarrassment resulting from having to answer probing personal questions."⁶⁶ Certainly, having to answer questions about prior arrests in a public courtroom can be an embarrassment to some prospective jurors.

This invasion of privacy is outweighed by our society's interest in fair trials. The entire *voir dire* process is aimed at identifying jurors who may have bias against a party.⁶⁷ This is especially important in criminal trials where a person's liberty is at stake—a juror with a bias against the defendant due to racial animus, for example, would need to be removed in order for the defendant to enjoy a fair trial. The parties in the trial can move to have prospective jurors removed, or struck "for cause," if they are unfit for jury service.⁶⁸ The parties get an unlimited number of strikes for cause because these strikes are reserved for jurors who are unfit for service, typically due to some sort of bias.⁶⁹

The prospective jurors who remain after "for cause" strikes can also be excluded through "peremptory" strikes exercised by the parties. Peremptory strikes are, by definition, arbitrary.⁷⁰ The parties may strike jurors—without first seeking approval from the trial court—for virtually any reason, except race⁷¹ and gender,⁷² limitations discussed in greater detail below. The number of peremptory strikes varies by jurisdiction and may also vary depending on the type of case. In federal criminal trials, for example, the defendant is permitted

65. See, e.g., *Hampton v. State*, 103 So.3d 98, 113 (Fla. 2012); *Bell v. State*, 263 P.3d 840, 842 (Kan. Ct. App. 2011).

66. Glover, *supra* note 64, at 712-13.

67. See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) ("The function of the challenge is . . . to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.").

68. *Connors v. United States*, 158 U.S. 408, 413 (1895) ("[S]uitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.").

69. RANDOLPH N. JONAKAIT, *AMERICAN JURY SYSTEM* 135 (2003) ("The attorneys can . . . challenge for cause any potential jury who they believe cannot be impartial."); *id.* at 139 ("Challenges for cause, because they help assure an impartial juror, are unlimited in number."); Janeen Kerper, *The Art and Ethics of Jury Selection*, 24 AM. J. TRIAL ADVOC. 1, 24 (2000) (footnote omitted) ("In all jurisdictions, challenges for cause are unlimited.").

70. *Peremptory*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

72. *J.E.B. v. Alabama*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (extending *Batson* to gender).

ARRESTING BATSON

ten strikes and the government is permitted six, while both sides have twenty strikes in a capital trial, but only three strikes in misdemeanor jury trials.⁷³

A. *Investigation of Prospective Jurors*

The invasive nature of the jury selection process is exacerbated by counsels' investigations of potential jurors beyond *voir dire*. In order to intelligently exercise peremptory strikes, and in some instances to successfully move to strike a prospective juror for cause, attorneys on both sides of a criminal case want information about the prospective jurors. The *voir dire* process in which the judge or the attorneys for both sides are allowed to question jurors in open court is the primary vehicle for access to this information. Prosecutors (and defendants with resources), however, also conduct additional investigation into prospective jurors, including hiring jury consultants or investigators with expertise in researching the backgrounds of prospective jurors.⁷⁴ This investigation is accomplished through numerous means. Parties do anything from "Googling,"⁷⁵ accessing IRS files,⁷⁶ obtaining credit reports,⁷⁷ searching property records,⁷⁸ and reviewing a juror's criminal record.⁷⁹

The use of arrest records—"rap sheets"—or law enforcement databases by prosecutors to investigate jurors is not rare. Prosecutors in Alaska,⁸⁰ California,⁸¹ Colorado,⁸² Louisiana,⁸³ Massachusetts,⁸⁴ Michigan,⁸⁵ Missouri,⁸⁶ New

73. FED. R. CRIM. P. 24(b).

74. Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 606-07 (2013).

75. *Id.* at 620.

76. *See, e.g.*, United States v. Costello, 255 F.2d 876, 882 (2d Cir. 1958).

77. *See, e.g.*, United States v. Falange, 426 F.2d 930, 932 (2d Cir. 1970).

78. *See, e.g.*, United States v. White, 78 F. Supp. 2d 1025, 1026 n.1 (D.S.D. 1999); Skaggs v. Parker, 27 F. Supp. 2d 952, 1001 (W.D. Ky. 1998); State v. Hobbs, 282 S.E.2d 258, 267 (W. Va. 1981); Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1690 (2008).

79. *See, e.g.*, Alexander, *supra* note 1; *see also* State v. Bessenecker, 404 N.W.2d 134, 136 (Iowa 1987).

80. *See* Tagala v. State, 812 P.2d 604, 611 (Alaska Ct. App. 1991).

81. *See* People v. Murtishaw, 29 Cal.3d 733, 765 (Cal. 1981).

82. *See* Losavio v. Mayber, 496 P.2d 1032, 1033-34 (Colo. 1972).

83. *See* Louisiana v. Knighten, 609 So.2d 950, 955-58 (La. Ct. App. 1992); *see also* Louisiana v. Dabney, 633 So.2d 1369, 1375-76 (La. Ct. App. 1994).

84. *See* Commonwealth v. Cousin, 873 N.E.2d 742, 745-46 (Mass. 2007).

85. *See* People v. Aldridge, 209 N.W.2d 796, 797-98 (Mich. Ct. App. 1973).

86. *See* State v. McMahan, 821 S.W.2d 110, 112-13 (Mo. Ct. App. 1991).

Hampshire,⁸⁷ New York,⁸⁸ Vermont,⁸⁹ Virginia,⁹⁰ and the District of Columbia⁹¹ have all admitted to participating in this practice. Only Iowa and New Jersey have limited the practice. In Iowa, the parties only have access to a prospective juror's criminal history with a court order after a showing of a reasonable belief that there might be information contained in the history relevant to jury selection.⁹² In New Jersey, a court held that, because of privacy concerns, prosecutors would not have access to the dates of birth for jurors that report for jury duty.⁹³ Nevertheless, this decision appears to allow prosecutors to search for arrest record information without using jurors' birth dates.

Even when conducted without regard to race, the government's investigation of jurors puts indigent defendants at a significant disadvantage. Public defenders and other court-appointed defense attorneys generally do not have the financial means for this type of investigation. The lawyer assigned to the case is usually the only one involved in the defense.⁹⁴ Public defender offices rarely have consultants or investigators to conduct outside research while the attorney handles *voir dire*. The lawyer must remain in the courtroom to conduct *voir dire* and cannot conduct a simultaneous investigation. Public defender offices usually lack support staff, and there is no one to send out to conduct interviews or perform Internet searches, and most defense attorneys do not have access to confidential law enforcement databases.⁹⁵ This is in contrast to prosecutors who can readily access this confidential information and also have the police at their disposal to conduct their investigations.

Defendants have challenged the government's use of venire members' arrest records during jury selection on the grounds that the use of the records violates state statutes about use of law enforcement databases or that the use of the records is unfair because the defense does not also have access to them.⁹⁶

87. See *State v. Goodale*, 740 A.2d 1026, 1029-30 (N.H. 1999).

88. See *People v. Burris*, 275 A.D.2d 793, 794-95 (N.Y. App. Div. 2000).

89. See *State v. Grega*, 721 A.2d 445, 450-51 (Vt. 1998).

90. See *Salmon v. Commonwealth*, 529 S.E.2d 815, 816 (Va. App. 2000).

91. See *Alexander*, *supra* note 1.

92. *State v. Bessenecker*, 404 N.W.2d 134 (Iowa 1987).

93. *In re Essex County Prosecutor's Office*, 46 A.3d 616 (N.J. Super. Ct. Law Div. 2012).

94. See David A. Simon, Note, *Equal Before the Law: Toward a Restoration of Gideon's Promise*, 43 HARV. C.R.-C.L. L. REV. 581, 586 (2008) ("Of the more than \$146.5 billion spent annually on criminal justice, over half is allocated to support the police officers and prosecutors who investigate and prosecute cases, while only about two to three percent goes towards indigent defense.").

95. FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT MANAGEMENT SYSTEMS (RMSS) AS THEY PERTAIN TO FBI PROGRAMS AND SYSTEMS (2010), <https://www.fbi.gov/about-us/cjis/law-enforcement-records-management-system>.

96. *State v. Goodale*, 740 A.2d 1026, 1029 (N.H. 1999); *State v. Grega*, 721 A.2d 445, 450 (Vt. 1998); *Tagala v. State*, 812 P.2d 604, 611 (Alaska Ct. App. 1991).

ARRESTING BATSON

III. *BATSON* AND ITS SHORTCOMINGS

In *Batson v. Kentucky*, the United States Supreme Court reaffirmed that prosecutors may not strike jurors simply because they are members of the defendant's race.⁹⁷ Prior Supreme Court precedent in *Swain v. Alabama*⁹⁸ and *Strauder v. West Virginia*⁹⁹ held in that the government violates due process when it purposefully excludes jurors of the same race as the defendant. Quoting *Strauder*, the Court in *Batson* wrote, "the very idea of a jury is a body. . . composed of the peers or equals of the person whose rights it is selected or summoned to determine. . . persons having the same legal status in society as that which he holds."¹⁰⁰

Batson, however, departed from the Court's prior cases and removed the almost impossible burden imposed by *Swain* to prove discrimination by prosecutors.¹⁰¹ In order to determine whether a *Batson* claim has merit, the judge must consider whether (1) the defense has made out a prima facie case that jurors were stricken by the government because of their race,¹⁰² (2) the prosecutor has race-neutral reasons for striking certain jurors of color,¹⁰³ and (3) whether the dismissal of those jurors was the result of purposeful discrimination.¹⁰⁴

Batson was later extended to prevent prosecutors from peremptorily striking Black jurors even where the defendant was White.¹⁰⁵ *Batson* has also been extended by the Court to prohibit racial discrimination in jury selection by defense counsel as well.¹⁰⁶ The Court has also prohibited juror strikes based on gender.¹⁰⁷

The reasoning of *Batson* goes beyond protecting criminal defendants to encompass safeguarding the reputation of our criminal justice system. As the Court explained, "[t]he harm from discriminatory jury selection extends be-

97. 476 U.S. 79 (1986).

98. *Swain v. Alabama*, 380 U.S. 202 (1965).

99. 100 U.S. 303 (1880).

100. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (quoting *Strauder*, 100 U.S. at 308).

101. In tracing the jurisprudence in the area, the Court wrote that the lower court's "interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny." *Id.* at 92-93.

102. *Id.* at 96.

103. Once a prima facie case is made, then the burden shifts to the government "to come forward with a neutral explanation for challenging black jurors." *Id.* at 97.

104. *Id.*

105. *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

106. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

107. *J.E.B. v. Alabama*, 511 U.S. 127, 149 (1994).

yond 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.”¹⁰⁸

Being free from racial discrimination during jury selection under *Batson* is distinct from the entitlement that jurors come from a “fair cross-section” of the community. The “fair cross section” term comes from the right to have the jury pool be drawn from a fair representation of the community, a jury of one’s peers.¹⁰⁹ That right comes from the Sixth Amendment right to a fair trial.¹¹⁰ Fair cross section claims address how citizens are called for jury duty. *Batson* derives from equal protection¹¹¹ and *Batson* claims only address the way peremptory strikes are employed.

There were high hopes for *Batson*’s significance. Commentators at the time described *Batson* as a “landmark” decision.¹¹² The Washington Post called the case one of “historic importance” and wrote of the expectation that the decision would strengthen “public confidence in the fairness of the criminal justice system.”¹¹³ A writer for the New York Times called the case one of the “most important criminal law rulings in years” that would “protect the rights of black defendants.”¹¹⁴

Despite initial optimism, *Batson* has not effectively ended discrimination by prosecutors in jury selection. One observer wrote:

Just as the legitimacy of our political system depends on equal suffrage, the court has repeatedly found that the credibility of our justice system depends on the fair treatment and full participation of all citizens. Nevertheless, there is perhaps no arena of public life where racial bias has been as broadly overlooked or casually tolerated as jury exclusion.¹¹⁵

108. *Batson*, 476 U.S. at 87.

109. *Holland v. Illinois*, 493 U.S. 474, 476-79 (1990).

110. *Id.* at 478; see also Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1863 (2015).

111. *Holland*, 493 U.S. at 476; see also Tetlow, *supra* note 110, at 1863.

112. E. R. Shipp, *Peremptory Jury Challenges Face New Tests*, N.Y. TIMES (Sept. 22, 1987), <http://www.nytimes.com/1987/09/22/nyregion/peremptory-jury-challenges-face-new-tests.html>.

113. *Impartial Jurors, Black and White*, WASH. POST (May 10, 1986), <https://www.washingtonpost.com/archive/politics/1986/05/10/impartial-jurors-black-and-white/18c3895b-4210-4c28-95b0-61578f5390eb>.

114. Stuart Taylor Jr., *High Court Limits Excluding Blacks As Jury Members*, N.Y. TIMES (May 1, 1986), <http://www.nytimes.com/1986/05/01/us/high-court-limits-excluding-blacks-as-jury-members.html>.

115. Dax-Devlon Ross, *Bias in the Box*, VQR (Fall 2014), <http://www.vqronline.org/reporting-articles/2014/10/bias-box>.

ARRESTING BATSON

One study found that the success rates of *Batson* claims by criminal defendants were “manifestly unimpressive,”¹¹⁶ with prosecutors more likely to prevail in bringing *Batson* claims than defendants.¹¹⁷ An examination of North Carolina criminal trials shows that blacks continue to be *more than twice as likely* as Whites to be successfully struck by prosecutors, even when controlling for other factors unrelated to race.¹¹⁸

Other data suggests that *Batson* has had no impact at all on the number or frequency of prosecutor strikes against Black jury venire members.¹¹⁹ In Jefferson Parish, Louisiana, “only 4% of jurors in post-*Batson* capital murder trials have been black,” despite a Black population of 23% according to the 2000 census.¹²⁰ Prosecutors in one Alabama county used more than 77% of their peremptory strikes in murder trials against African-Americans.¹²¹ The District Attorney’s office in Philadelphia, Pennsylvania struck 51% of the Black venire members in capital trials between 1981 and 1997.¹²²

There are a number of theories as to why *Batson* has failed. A significant barrier to a robust *Batson* doctrine is trial courts’ acceptance of facially race-neutral, but likely pre-textual, explanations by attorneys of their peremptory strikes.¹²³ Trial courts have upheld the removal of jurors for being renters, being single mothers, attending Black universities, being unemployed, looking nervous, speaking a foreign language, and other reasons that appear to be proxies for race.¹²⁴ Because of the *Batson* framework, unless purposeful discrimination can be proved, judges accept prosecutors’ explanations for striking jurors of color. Arrests, so far, have fallen into the category of acceptable reasons to strike prospective jurors.

116. Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 459 (1996).

117. *Id.* at 459 tbl.B-1.

118. Catherine 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, 1554 (2012).

119. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 73 (2001).

120. Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOL. 527, 530 (2008).

121. Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 520 (1994).

122. Baldus et al., *supra* note 119, at 53.

123. Grosso & O’Brien, *supra* note 118, at 1541 (“One possible reason *Batson* has been so ineffective is the ease with which parties can generate race-neutral explanations for challenged strike decisions.”).

124. Leonard Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 532-34 (1999).

Another theory as to *Batson's* feebleness is that *Batson* requires parties to make a *Batson* challenge in order to get relief, and defense attorneys may tolerate discriminatory strikes by prosecutors because they themselves plan to discriminate against White jurors.¹²⁵ Judges may not want to rule against a prosecutor for fear it will harm the prosecutor's professional reputation.¹²⁶ After all, a sustained *Batson* challenge constitutes a finding that the party using its peremptory challenge committed affirmative discrimination.¹²⁷ And there seems to be little doubt that most trial judges are unwilling to find a *Batson* violation; two legal scholars have written, "[n]o evidence of bias has been too blatant for state courts to ignore."¹²⁸

While *Batson* was an improvement over previous jurisprudence, the case has widely been criticized for not going far enough. Some scholars argue that *Batson* is a failure because of its focus on purposeful discrimination by prosecutors and its failure to address implicit biases in jury selection.¹²⁹ One legal scholar has said that *Batson* is a failure because the decision is not rooted in the Sixth Amendment right to an impartial jury but instead the Fourteenth Amendment guarantee of equal protection.¹³⁰

Another argument that has been advanced is that *Batson's* focus on color-blind jury selection was at the expense of an impartial jury.¹³¹ And to the extent that the Court in *Batson* was worried about the prospective juror's rights, there is no difference to the stricken Black juror between implicit or explicit bias that leads to the strike.

Because of these criticisms and because it is relatively easy for prosecutors to hide racially-motivated strikes as long as they can articulate a convincing race-neutral reason for the strike, many scholars have called for an overhaul of

125. See Baldus et al., *supra* note 119, at 83-84 ("It is more likely . . . that the two sides tolerate one another's discriminatory use of peremptories to reduce the risk that a successful retaliatory claim will be brought by the other side.").

126. Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1116 (2011).

127. *Id.* at 1102 ("In sum, reviewing courts based all eighteen reversals on virtually conclusive *proof* that the prosecutor was not telling the truth. Which is to say, a reviewing court's skepticism about proffered justifications that were far-fetched, tenuously connected to the case, strongly correlated with race, or irreducibly vague and ambiguous did not form the basis for granting the reversals.").

128. Stevenson & Friedman, *supra* note 121, at 523.

129. Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 4-5 (2014); see generally Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

130. Tetlow, *supra* note 110, at 1864-65.

131. Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1714 (2012).

ARRESTING BATSON

the peremptory strike¹³² or for the end of its use by prosecutors.¹³³ Even three Supreme Court justices have called for an end or reconsideration of the practice.¹³⁴ While fashionable in academia, this idea has no traction in practice. It seems that parties on both sides are unwilling to abandon the peremptory.¹³⁵

While the critique of *Batson* is substantial and legitimate, we must change the existing legal framework in order to address the troubling issue of discrimination in jury selection. Getting creative is important to try to make *Batson* effective. As discussed in greater detail below, this may be a good time to try new tactics. For better or worse, investigation of jurors is an increasingly popular technique used in jury selection. This tactic is used to either gather information about prospective jurors or identify “race-neutral” pretexts for striking jurors of color. One way to address this covert racial discrimination is to challenge, as violative of *Batson*, the use of strikes by prosecutors when they cite an African American or Latino juror’s prior arrest as a “race-neutral” basis for the strike. Delving into motivations behind reasons that are ostensibly “neutral” but disproportionately likely to implicate race may be just one way of addressing these concerns of some legal scholars and practitioners.

-
132. See, e.g., Jere W. Morehead, *When a Peremptory Challenge is No Longer Peremptory: Batson’s Unfortunate Failure to Eradicate Invidious Discrimination From Jury Selection*, 43 DEPAUL L. REV. 625 (1994); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994).
133. Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369 (2010); Abbe Smith, *A Call to Abolish Peremptory Challenges By Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163 (2014).
134. *Batson v. Kentucky*, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring) (“We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant’s peremptories as well.”); see also *Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) (“I continue to believe that we should reconsider . . . the peremptory challenge system as a whole.”); *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) (“I believe it necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.”).
135. Of 197 survey respondents, consisting of defense attorneys and prosecutors in almost equal numbers, only 2% thought that peremptory challenges should be eliminated. Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J. L. REFORM 981, 1009-10 (1996). “81% [of the lawyers surveyed] described peremptory challenges as having great value.” *Id.* at 1000.

IV. THE CONSTITUTIONALITY OF STRIKES BASED ON ARREST RECORDS

The statistics leave no question: Black and Latino prospective jurors are much more likely to have been arrested than White prospective jurors.¹³⁶ Allowing prosecutors, the judge, or any party, to ask prospective jurors whether they have ever been arrested will necessarily reveal a potential basis for peremptory strikes for a disproportionate number of Black and Latino prospective jurors.

Asking jurors about their arrest records or those of their close friends and relatives results in whiter juries via a number of mechanisms. First, a juror may be struck solely based on a prior arrest. Second, a juror who has been unfairly arrested likely has negative thoughts about police, and those thoughts may be articulated during individual *voir dire*, causing the juror to be subjected to a peremptory strike. Third, a juror may withhold information regarding his or her arrest record for many different reasons—including embarrassment about admitting to an arrest record in a public courtroom or confusion about the outcome of his or her case. If the prosecutor or judge finds out about this misrepresentation, they will likely strike the juror for cause.¹³⁷ Thus, allowing jurors to be questioned about arrests will result in fewer jurors of color because the answers will provide a basis for prosecution strikes.

While in the most technical sense striking a juror because of an arrest record could be “race neutral,” that strike can be used by prosecutors to achieve the very end that *Batson* sought to prevent—a deliberately whiter jury. Blacks and Latinos are far more likely to have been arrested than Whites. When prosecutors rely on nothing more than the existence of an arrest record as a basis for exercising peremptory strikes, judges’ acceptance of this explanation permits disproportionate exclusion of Blacks and Latinos from juries. In effect, a symptom of our racially unfair criminal justice system is used to perpetuate even greater racial disparities.

A. *Arguments in Favor of Questions and Investigations Regarding Prospective Juror’s Arrest Records*

Prosecutors are unlikely to admit that their goal in discovering the arrest records of potential jurors is to obtain whiter juries. Indeed these prosecutors may be unconsciously biased rather than carry racial animus. A number of recent studies suggest that this is true for many Americans.¹³⁸ Prosecutors, like

136. See *supra* Part I.

137. This is how it was uncovered that the prosecutor had run the records of the Black jurors in the case mentioned at the beginning of this Article. See Alexander, *supra* note 1.

138. Doctors have been found to discriminate in care given to Black patients. See Kevin A. Schulman et al., *The Effect of Race and Sex on Physicians’ Recommendations for Cardiac Catheterization*, 340 NEW ENG. J. MED. 618, 623 (1999). Blacks have been discriminated against in new car purchases. See Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 319

ARRESTING BATSON

most of the legal profession, are disproportionately White when compared to the population as a whole,¹³⁹ and therefore may be more likely to discriminate against Black jurors and defendants.¹⁴⁰

Rather than acknowledge their true motivations, prosecutors who strike Black jurors because of their race would likely argue that questioning prospective jurors about arrest records is potentially informative about the prospective jurors' attitudes about police officers—someone who has been arrested is more likely to have negative views of law enforcement. Some courts have found striking a juror because of his dislike of police to be a race-neutral reason under *Batson*.¹⁴¹

This argument, however, has a number of limitations. First, prosecutors can discover prospective jurors' biases against police officers through explicit questions about such biases, rather than questions or information about arrest records. In many jurisdictions, jurors are routinely asked if they have strong views about police officers.¹⁴² Second, while the police play some role in most

(1995). Blacks are discriminated against in being shown apartments. See OFFICE OF POL'Y DEV. & RESEARCH, DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at 39-43 (2013), http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012.pdf. Politicians racially discriminate in responding to constituent mail. See Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463, 468-72 (2011); Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), <http://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html>.

139. Although 13% of the United States population, Blacks make up under 5% of the nation's attorneys as of 2010. *QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited June 16, 2016); AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2012), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf. Eighty-six percent of federal prosecutors are White. Geoff Ward et al., *Does Racial Balance in Workforce Representation Yield Equal Justice? Race Relations of Sentencing in Federal Court Organizations*, 43 LAW & SOC'Y REV. 757, 767 tbl.1 (2009).

140. Ward et al., *supra* note 139, at 757.

141. "Hostility toward law enforcement can be a race-neutral reason for striking a prospective juror." *Ex parte Crews*, 797 So.2d 1119, 1121 (Ala. 2000) (citing *Stephens v. State*, 580 So.2d 11, 19 (Ala. Crim. App. 1990)) ("A hostile attitude toward law enforcement or dissatisfaction with the police has also been upheld as a sufficiently race-neutral explanation for the use of a peremptory challenge.").

142. A standard *voir dire* question in D.C., where I practice, is, "In this case there may be witnesses called who are law enforcement officers. Would anyone have difficulty following my instruction that they must not give any greater, or lesser weight to a witness merely because he or she is a police officer?" Pennsylvania asks a similar question as part of the state's standard *voir dire*. 234 PA. CODE § 632(H) (2014).

criminal trials, the credibility of police is only at issue in some cases.¹⁴³ Therefore, in many cases even if a prospective juror harbors some negative feelings towards the police, it is unlikely to affect the outcome of the trial. Third, even focusing on prospective jurors' negative feelings about the police is arguably unfair. As discussed above, Blacks are much more likely to have been discriminatorily arrested so it is very likely their thoughts towards law enforcement will be deservedly more negative. In a 2014 Gallup poll, Blacks in the United States had a "significantly lower level of confidence in the police" than Whites.¹⁴⁴ The experiences of individuals and their friends and family, as well as the statistics about unequal arrest rates,¹⁴⁵ no doubt contribute to these negative perceptions. It is unfair to exercise a peremptory strike because the police target communities of color. Fourth, excluding jurors who have had negative experiences with police defeats one of the purposes of a jury of "peers:" members of the community who will base their judgment on the experiences of the community.

In response, prosecutors may argue that jurors may not admit to negative feelings towards the police, and that questions about arrest records combined with searches of arrest records can reveal when a juror has provided an inaccurate answer. Prosecutors would likely argue that such jurors should be struck for cause because they are dishonest. In addressing a civil case where a juror failed to disclose information during *voir dire*, the Supreme Court stated, "the motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."¹⁴⁶

A juror who fails to disclose a police contact or arrest is not necessarily dishonest generally and may not deserve a for-cause strike. Embarrassment may play a significant role in answers. A juror may not want to admit to an arrest to strangers, or worse, to neighbors or co-workers who may be on the jury panel with them. In some jurisdictions, citizens may be asked about prior arrests in front of the entire venire.¹⁴⁷ Other jurors may believe that the arrest was sealed or expunged and need not be disclosed. Ultimately, questions about arrest records do little to establish the "honesty" of prospective jurors except in some narrow circumstances.

143. There are many criminal cases in which police officers are only peripheral witnesses. In many robbery, rape, burglary, homicide, and other violent crime cases, the credibility of police officers is not a central issue. Rather, the accuracy of the identification or the credibility of the eyewitness is more important.

144. Frank Newport, *Gallup Review: Black and White Attitudes Toward Police*, GALLUP (Aug. 20, 2014), <http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx>.

145. See *supra* Part I.

146. *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984).

147. *Bell v. State*, 263 P.3d 840, 842 (Kan. Ct. App. 2011); *Eley v. State*, 19 So.3d 124, 129 (Miss. Ct. App. 2009).

ARRESTING BATSON

B. *How Batson Relates to Questions and Investigations Regarding Arrests*

While the Supreme Court's holding in *Batson* was aimed at preventing racial discrimination in jury selection, some commentators have criticized the opinion for making it too easy for parties to engage in racially motivated peremptory strikes using farcical "race-neutral" explanations.¹⁴⁸ For example, in *Purkett v. Elem*, the prosecutor justified a pattern of strikes against African Americans by claiming that he struck one Black prospective juror because he had long hair and another because he had a goatee.¹⁴⁹ The Supreme Court sanctioned these "race-neutral" reasons even though the prosecutor's stated reasons for striking the Black prospective jurors bore no relationship to their ability to serve on the jury or on their potential views of the case. Although the Court in *Batson* suggested that explanations given in response to *Batson* challenges had to be "related to the particular case,"¹⁵⁰ that suggestion carried little weight for the Court in *Purkett v. Elem*.¹⁵¹

Purkett has been heavily criticized. One scholar has written that it "marked the final demise of the *Batson* doctrine into the rule of useless symbolism."¹⁵² As an acceptance of a dubious supposed race-neutral explanation for the strike of a Black juror by a prosecutor, *Purkett* seems to suggest that the Court would have little problem accepting the prior arrests of a juror as race-neutral. While hair length and facial hair have nothing to do with how one would view the facts of a criminal case, arrests by police could inform one's opinions about a criminal defendant.

Since *Purkett v. Elem*, however, the Court has applied a higher level of scrutiny to the purported reasons offered to justify the use of peremptory strikes.¹⁵³ In the 2005 decision, *Miller-El v. Dretke*, the Court compared the responses of Black jurors who were struck by the government with non-Black jurors who were not struck.¹⁵⁴ Trial prosecutors struck 10 out of the 11 Black jurors who had not been struck for cause.¹⁵⁵ The Court used "side-by-side comparisons" to juxtapose the prosecutor's reasons for striking some Black jurors with the infor-

148. Cavise, *supra* note 124, at 527-45.

149. 514 U.S. 765, 766 (1995).

150. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

151. Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)Use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1369 (2012).

152. Cavise, *supra* note 124, at 528.

153. John P. Bringewatt, Note, *Snyder v. Louisiana: Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283, 1286 (2010).

154. *Miller-El v. Dretke*, 545 U.S. 231 (2005).

155. *Id.* at 240-41.

mation known about the White jurors who were not struck.¹⁵⁶ The Court paid close attention to the *voir dire* transcript and noted that non-Black jurors were not questioned at all after offering the same perspective as Black jurors who prosecutors challenged.¹⁵⁷ The Court reversed the state court's ruling based on this comparison.¹⁵⁸

The *Miller-El* Court's lack of deference to the trial court's findings was a departure from *Purkett*, in which the trial court's views on the ostensibly "race-neutral" reasons proffered were easily accepted by the Court. The Court also took into consideration the history of discrimination within the prosecutor's office.¹⁵⁹ The *Miller-El* reversal followed the 2003 *Miller-El* remand that catalogued Texas's history of discrimination in jury selection.¹⁶⁰

In *Snyder v. Louisiana*, the Court found that a prosecutor's stated reasons for striking Black jurors in a capital case were actually pretexts for discrimination.¹⁶¹ The prosecutor struck all Black potential jurors with his peremptory challenges. The Court once again engaged in juror comparison. With respect to one of the excluded jurors, the prosecutor claimed he was striking a Black male college senior because of concerns that the student would be overextended due to his academic obligations, even after the judge had spoken to the dean at the college to ensure that the student's obligations would not interfere with his jury service.¹⁶² The Court compared the position of the college student who the prosecutor challenged with that of a White juror, not struck by the prosecution, whose wife had just had a hysterectomy.¹⁶³ In reversing the death sentence, the Court rejected the professed "race-neutral" explanation put forth by the prosecutor and accepted by the trial court.¹⁶⁴

The Court's willingness to engage in comparative juror analysis will be useful in uncovering purposeful discrimination. One legal scholar has stated, "*Miller-El v. Dretke* can be seen as a step toward a reaffirmation of the *Batson* principles."¹⁶⁵ Other commentators have opined that the *Miller-El* cases and *Snyder v. Louisiana*, viewed together, demonstrate an effort by the Court to inhibit racial discrimination in jury selection by looking deeper than the trial courts' ac-

156. *Id.* at 241.

157. *Id.* at 245.

158. *Id.* at 265.

159. *Id.* at 253.

160. *Miller-El v. Cockrell*, 537 U.S. 322, 346-47 (2003).

161. 552 U.S. 472, 485-86 (2008).

162. *Id.* at 481.

163. *Id.* at 484.

164. *Id.* at 473.

165. Bobby Marzine Harges, *Batson Challenges in Criminal Cases: After Snyder v. Louisiana, Is Substantial Deference to the Trial Judge Still Required?*, 19 B.U. PUB. INT. L.J. 193, 208 (2010).

ARRESTING BATSON

ceptance of the prosecutors' explanation of peremptory strikes.¹⁶⁶ In *Miller-El*, the Court discussed the significant harm to people of color when prosecutors pick juries based on race. The Court also noted that “the very integrity of the courts is jeopardized” when jurors of color are discriminated against.¹⁶⁷

In light of its concerns about the integrity of the judiciary, one might imagine that the Supreme Court would be equally skeptical if a prosecutor were to justify a pattern of peremptory strikes against African American prospective jurors based on arrest records, a practice that would have a racially disproportionate impact. Supreme Court precedent—from the era of *Purkett* and before the more recent *Miller-El* and *Snyder*—creates a significant obstacle to such a challenge.

In *Hernandez v. New York*, a case involving a Latino defendant, the prosecutor struck two bilingual jurors who were apparently Latino, on the basis that the jurors might not accept the interpreter's representations of the Spanish-speaking witnesses' testimony.¹⁶⁸ Although the Court was split, the majority voted to affirm the conviction, and held that a violation of the Equal Protection Clause requires a finding of discriminatory intent, not just racially disproportionate impact.¹⁶⁹ Justice Kennedy announced the judgment of the Court, joined by Chief Justice Rehnquist, Justice White, and Justice Souter. Justice Kennedy highlighted “the fundamental principle that ‘official action will not be held unconstitutional solely because it results in a racially disproportionate impact.’” Rather, that proof of “‘racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.’”¹⁷⁰ Justice Kennedy did not address the petitioner's argument that there was a high-correlation between Spanish-language ability and ethnicity in New York because the prosecutor had identified other aspects of the two jurors' specific responses and demeanor that caused him to doubt their willingness to adhere to the official interpretation of the Spanish-language testimony—reasons the trial court accepted in finding no discriminatory intent.¹⁷¹

Justice Kennedy acknowledged that the prosecutor's criterion for determining which prospective jurors would accept the official interpretation “might well result in the disproportionate removal of prospective Latino jurors,” but nevertheless concluded that such a “disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause.”¹⁷² Justice O'Connor, concurring, agreed that in order to demonstrate a violation

166. See Bringewatt, *supra* note 153, at 1301-04.

167. *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005).

168. 500 U.S. 352, 356 (1991).

169. *Id.* at 360.

170. *Id.* at 359-60 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)).

171. *Id.* at 360, 366-67.

172. *Id.* at 361.

of *Batson*, a defendant must show intentional discrimination, and that “disproportionate effects of state action are not sufficient to establish such a violation.”¹⁷³ Justice Blackmun, dissenting, argued that once a prima facie case has been established by a pattern of strikes against jurors of a particular race or gender, “[a]n avowed justification that has a significant disproportionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of discriminatory purpose.”¹⁷⁴

Hernandez significantly limits challenges to racial discrimination in jury selection. The Supreme Court has not clarified whether, in light of *Miller-El* and *Snyder*, it is now less inclined to accept explanations for peremptory strikes that point to nothing more than a fact about the jurors that is itself racially disproportionate. Indeed, in *Miller-El*, the Court overlooked the prosecutor’s professed “race-neutral” explanation about one juror’s brother having been arrested and convicted in order to find a *Batson* violation.¹⁷⁵ This might suggest that the Court does not take such a reason as particularly satisfactory. This fits in with the view taken by some that *Miller-El* and *Snyder* have “reshaped the holdings of *Hernandez* and *Purkett*.”¹⁷⁶

C. Lower Courts Have Addressed the Issue of Arrests and *Batson*

Lower courts have wrestled with the dismissal of prospective Black jurors based on their arrests or the arrest of family members. A federal district court in California recently considered whether the practice of striking jurors because of their arrests violated *Batson*. In *Sifuentes v. Brazelton*, a *Batson* claim was mounted based on nine peremptory strikes of African American jurors.¹⁷⁷ Several jurors were dismissed for cause for failing to disclose their criminal history on juror questionnaires.¹⁷⁸ While the court did find *Batson* violations with respect to two of the dismissed jurors, it also found that there was no evidence that their dismissal “was not racially neutral.”¹⁷⁹ While the court did conduct comparative juror analysis, it did not consider the fact that Black jurors are more likely to have been arrested than White jurors.

In 2004, the Sixth Circuit addressed a similar problem in *United States v. Beverly*.¹⁸⁰ The trial prosecutor struck the only remaining Black juror on the ba-

173. *Id.* at 372-73 (O’Connor, J., concurring).

174. *Id.* at 376 (Stevens, J., dissenting) (emphasis added).

175. *Miller-El v. Dretke*, 545 U.S. 231, 246, 266 (2005).

176. Harges, *supra* note 165, at 211.

177. 4 F. Supp. 3d 1181, 1193 (N.D. Cal. 2013).

178. *Id.* at 1223-24.

179. *Id.* at 1227.

180. 369 F.3d 516 (6th Cir. 2004).

ARRESTING BATSON

sis that she had a brother and nephew who had spent time in prison.¹⁸¹ The Sixth Circuit deferred to the district court and found that the prosecutor “gave [a] plausible and race-neutral explanation.”¹⁸²

The Missouri Court of Appeals encountered the issue in a 1994 case where the prosecutor used arrest records as a basis for peremptory strikes.¹⁸³ On appeal, the defendant alleged that the practice of using arrest records for peremptory challenges was used in a racially discriminatory way.¹⁸⁴ However, because the defense attorney did not make a *Batson* challenge at the trial level, the issue was not preserved, and the court of appeals did not reach the merits of the claim.¹⁸⁵

In *Devoil-El v. Goose*, a 1998 Eighth Circuit case, a prosecutor used all of his strikes to remove Black potential jurors.¹⁸⁶ The reasons proffered by the prosecutor for some strikes were that the jurors had a relative in jail or who had been charged with a crime.¹⁸⁷ The defendant argued that those reasons violated *Batson* because they had a disparate impact on African-Americans.¹⁸⁸ The court relied on *Hernandez*, holding that there was no showing of intent to discriminate and therefore there was no *Batson* violation.¹⁸⁹

In 1994, the Court of Appeals of Louisiana did place some restrictions on prosecutors’ use of arrest records of prospective jurors. The court held that a juror’s arrest was a race-neutral basis for a strike of a juror¹⁹⁰ but concluded that, if the arrest is the basis for a peremptory strike, the prosecutor must provide the defense with proof of that arrest,¹⁹¹ though more recent case law has done away with the proof requirement.¹⁹²

The South Carolina Court of Appeals found a *Batson* violation where a prosecutor struck two black jurors because they had previously been arrested in misdemeanor cases.¹⁹³ The prosecutor used four of his five strikes on black ju-

181. *Id.* at 527.

182. *Id.* at 517.

183. *Missouri v. Childs*, 876 S.W.2d 781 (Mo. App. E.D. 1994).

184. *Id.* at 783.

185. *Id.* at 784.

186. 160 F.3d 1184, 1186 (8th Cir. 1998).

187. *Id.*

188. *Id.*

189. *Id.* at 1187.

190. *Louisiana v. Dabney*, 633 So.2d 1369, 1375-76 (La. Ct. App. 1994).

191. *Id.*

192. *Louisiana v. Bender*, 152 So.3d 126, 130-31 (La. 2014).

193. *State v. Stewart*, 775 S.E.2d 416, 419-20 (S.C. Ct. App. 2015).

rors.¹⁹⁴ Trial counsel pointed out that prosecutors did not strike two white jurors who had previously been arrested, one of whom had actually been convicted.¹⁹⁵ Relying on *Miller-El*, the Court of Appeals found that prosecutors had “negated” their supposed race-neutral explanations when they failed to strike the similarly situated white jurors.¹⁹⁶ The Court of Appeals reversed the conviction because of the *Batson* violation.¹⁹⁷ The disparate impact argument does not appear to have been made.

These lower court decisions show that trial courts are clearly experiencing prosecutors using arrests as bases for strikes of African-American jurors during *voir dire*.¹⁹⁸ While no court has found a violation of *Batson* based on the use of arrest records *per se*, it has certainly piqued the interest of trial courts and appellate courts alike. The trial court in *Missouri v. Childs* stated

[I]n many cases the assistant Circuit Attorneys will go back to the office and run individuals who have appeared on the panel. It’s been my experience that in most instances they tend to be black persons, because the Circuit Attorney is trying to find reasons to sustain the striking of blacks on peremptory challenges.¹⁹⁹

Until more than a handful of appellate courts address this issue, trial courts will continue to narrowly apply *Batson*. Even when courts do perform comparative juror analysis, the courts fail to consider disparate impact because *Hernandez* tells them not to do so unless there is evidence of discriminatory intent. Ultimately some courts may find *Batson* violations so long as the prosecutor fails to strike White jurors with arrests or close associations with those who have been arrested. But for reasons discussed above, Whites are less likely to have prior arrests and less likely to have friends or family who have been arrested.²⁰⁰ This will mean that for the most part prosecutors will continue to be allowed to strike Black jurors and tell trial judges that they did so because of the jurors’ arrests and their affiliation with those who have been arrested unless this practice is ended.

194. *Id.* at 419.

195. *Id.* at 420.

196. *Id.* at 421.

197. *Id.*

198. See Alexander, *supra* note 1.

199. *Missouri v. Childs*, 876 S.W.2d 781, 783-84 (Mo. App. E.D. 1994).

200. Nevertheless, because there are more White jurors than Black jurors on most criminal jury panels and because of mass incarceration’s long reach, there is still a significant chance that there will be Whites on any particular panel who have been arrested or have family or friends who have been arrested.

ARRESTING BATSON

D. Beyond Batson: Why Trial Courts Should Seek More Diverse Juries and How To Achieve this Goal

The Court in *Batson* explicitly recognized one value that can be derived from juries that reflect the racial demographics of the community: “In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”²⁰¹

The importance of balanced racial representation on criminal juries goes beyond the important appearance-of-fairness issue identified in *Batson*. Because the criminal justice system focuses disproportionately on people of color, people of color are more likely to be critical of that system—including the police and prosecutors—when assessing whether the prosecution has satisfied its burden of proof in a particular case. On the other hand, White jurors are more likely to convict Black defendants. In a Duke study of Florida criminal trial records encompassing a decade of information, all-White juries in Florida were 16% more likely to convict Black defendants than White defendants.²⁰² Thus, racial inequalities continue to expand through the justice system. This problem is then exacerbated when African Americans and Latinos are excluded from serving on juries because of arrest records because African American and Latino defendants are more likely to be convicted by juries that do not contain jurors of color.²⁰³

Prosecutors have long recognized the importance of juries that reflect the racial makeup of the community and have long sought to ensure that juries in criminal cases are as White as possible. The Court first addressed the problem in *Strauder v. West Virginia*²⁰⁴ in the year 1879; and, even today, prosecutors continue to use peremptory strikes to rid juries of African-American jurors.²⁰⁵

Questions and investigations of prospective jurors’ arrest records are not the only cause of the racially disproportionate exclusion of African Americans and Latinos from juries.²⁰⁶ Individuals who are incarcerated or who have felony

201. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

202. Steve Hartsoe, *Study: All-White Jury Pools Convict Black Defendants 16 Percent More Often Than Whites*, DUKE TODAY (Apr. 17, 2012), <https://today.duke.edu/2012/04/jurystudy>.

203. *Id.*

204. 100 U.S. 303 (1879).

205. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf>.

206. Craig D. Frazier, *Study Finds Blacks and Latinos Are Underrepresented in Jury Pools*, NEW AMSTERDAM NEWS (Dec. 26, 2012), <http://amsterdamnews.com/news/2012/dec/26/study-find-blacks-and-latinos-are/> (reporting results of study showing that Blacks and Latinos are underrepresented as jurors in many New York jurisdictions); Editorial, *Why So Few Black Jurors?*, DETROIT FREE PRESS (June 3,

convictions are often barred from serving as jurors either permanently or for some period of time.²⁰⁷ In 2010, 25% of Black adults have felony convictions, while only just over 6% of the total adult non-African-American ex-felon population has been convicted of a crime.²⁰⁸ Between the higher rates of felony conviction and the higher rates of incarceration, there is a disproportionately high number of African Americans who are rendered unqualified for jury service. Allowing peremptory strikes based on mere arrests only compounds this serious problem of underrepresentation of blacks on juries.

Furthermore, juror rolls are usually derived from tax records,²⁰⁹ driver's licenses records,²¹⁰ and voter registrations²¹¹ in most jurisdictions. Driver's license records result in the exclusion of African Americans from panels of prospective jurors. An estimated 25% of African Americans lack any form of state identification,²¹² meaning they are less likely to be called for jury service based on state Department of Motor Vehicle records. Voter registration rolls are also affected by the disproportionate impact of the criminal justice system. The Sentencing Project estimates that almost 8% of Blacks are disenfranchised due to criminal convictions.²¹³

There are already fewer Black jurors called for *voir dire* than are representative of the population as a whole. The use of peremptory challenges based on arrest records against jurors who have not already been excluded based on the above factors only serves to perpetuate the underrepresentation of African Americans and Latinos on juries. Even if prosecutors do not explicitly violate *Batson* and the Equal Protection Clause when they rely on racially disproportionate factors like arrest records to exercise peremptory strikes, courts should not encourage this practice by permitting *voir dire* questions about arrest rec-

2012), <http://archive.freep.com/article/20120603/OPINION01/206030445/Editorial-Why-so-few-black-jurors> (stating that in the federal judicial district in which Detroit is located, only 10% of jurors reporting are Black, while Blacks make up 20% of the population).

207. See Alexander, *supra* note 1; see also *infra* Appendix.

208. Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948-2010*, at 7 (Working Paper, 2011), <http://paa2011.princeton.edu/papers/111687>.

209. See *State v. Hester*, 324 S.W.3d 1, 87-88 (Tenn. 2010).

210. See N.C. GEN. STAT. ANN. § 9.2 (1991); *State v. Addison*, 161 N.H. 300, 306-07 (Sup. Ct. 2010); *Gholston v. State*, 57 So.3d 178, 181 (Ala. Crim. App. 2010).

211. See, e.g., *United States v. Neighbors*, 590 F.3d 485, 491 (7th Cir. 2009); *United States v. Carmichael*, 560 F.3d 1270, 1279 (11th Cir. 2009); *Addison*, 161 N.H. at 307.

212. KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, CHALLENGE OF OBTAINING VOTER IDENTIFICATION 2 (2012), http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf.

213. *Felony Disenfranchisement*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=133> (last visited June 16, 2016).

ARRESTING BATSON

ords or turning a blind eye to prosecutors checking the arrest records of prospective jurors.

This Article advocates for trial and appellate courts to find that striking jurors of color based on arrests violates *Batson*. There are other solutions available at the trial level in the interim. Trial courts certainly have the discretion to preclude questioning about arrest records during *voir dire* and preclude the investigation of prospective jurors' arrest records.²¹⁴ Such questioning and investigation should be foreclosed in order to prevent—or at least limit—the deliberate use of this racially disproportionate factor during jury selection. This approach may appeal to judges as it would shorten the length of *voir dire*, as well as remove a justification for racially motivated strikes. Fair-minded judges, troubled by any type of racial discrimination, have no reason to allow questioning that unfairly exposes a disproportionate number of jurors of color to strikes that have no bearing on their fitness as jurors.

Defense attorneys can raise the issue of *voir dire* on arrests pre-trial in a motion in limine before jury selection begins. If granted, this motion would preclude prosecutors from questioning jurors about prior arrests. For the defense attorney, it also puts the focus on this issue and would preserve it for appeal if the judge denies the request and the prosecutor strikes jurors of color citing their arrest record. The issue would then be ready for an appellate review.

Another solution would be for individual jurisdictions to change court rules or enact statutes that ban questioning about arrests during *voir dire*. As many jurisdictions have “banned the box,” or prohibited employers from asking about arrests in initial hiring forms²¹⁵, interested parties could seek a change in local practice rules or create statutes that prohibit that kind of questioning in *voir dire*. This approach would serve the interest of justice by ensuring diverse juries, reflective of their communities.

CONCLUSION

Given that the goal of *voir dire* is to identify prospective jurors who cannot be fair,²¹⁶ a practice allowing otherwise fit Black and Latino jurors to be excluded from jury service calls into question the integrity of our criminal justice sys-

214. See *Aldridge v. United States*, 283 U.S. 308, 310 (1931) (recognizing the trial court's “broad discretion as to the questions to be asked” during the *voir dire* process). More recently, in *Skilling v. United States*, 561 U.S. 358, 386 (2010), the Court stated that “[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*.”

215. William Harless, ‘Ban the Box’ Laws Make Criminal Past Off-Limits, WALL ST. J. (Aug. 3, 2013), <http://www.wsj.com/articles/SB10001424127887323997004578640623464096406>.

216. See *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) (“*Voir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.”); see also *Aldridge*, 283 U.S. 308.

tem. *Voir dire* is largely at the discretion of the trial judge,²¹⁷ and there is no obstacle to trial courts precluding questioning about arrests. Without questioning about arrests and without investigation into jurors' arrest records, prior arrests would not be available as a basis for peremptory challenges or justifications for a pattern of strikes against jurors of a particular race. Given that many have called for an end or limitations to the use of peremptory challenges,²¹⁸ limiting the questions asked about arrest records is one way to narrow the potential racially disparate impact of peremptory challenges.

Allowing *voir dire* on the issue of prior arrests or arrests of loved ones unnecessarily injects race into the *voir dire* process in light of the unfortunate realities of our current criminal justice system. Given that an arrest by itself is not a for-cause basis for disqualification as a juror anywhere in the United States, it should not be offered as a race-neutral reason for the use of a peremptory strike, nor should courts or the parties inquire about it.

In cases where police credibility is a central issue, in order to uncover information about alleged biases against law enforcement, the trial judge may ask a more neutral question such as "Do any of you harbor such negative views about police or prosecutors that would hinder your ability to judge this case fairly?"²¹⁹ Should a juror raise an issue about an experience with an arrest, follow-up questions could be asked. A question along these lines is more appropriate since it will (1) provoke answers that directly demonstrate potential for bias and (2) identify people who have not been formally arrested but nevertheless harbor negative feelings about law enforcement. But jurors should not routinely be asked about arrests unless they themselves raise the issue. In addition to precluding preliminary questions about arrest records, trial courts should preclude prosecutors from reviewing the arrest records of prospective jurors.

Without action by judges and defense attorneys who can educate judges, African American and Latino jurors will continue to be unfairly excluded from jury service. Defendants of color will suffer as a result, in a system already working against them. *Batson* could have renewed meaning with an end to the practice of excluding Blacks and Latinos from jury service because of mere arrests.

217. See sources cited *supra* note 214.

218. See *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 864 (1997); Ogletree, *supra* note 132.

219. However, it is not at all clear that dismissing a juror because of negative opinions about police would be a basis for a challenge for cause in light of the many reasons that the police testimony can be called into question. In 2014, fifty-five New York Police Department officers had been sued ten or more times in the prior decade. Barry Paddock et al., *Detective is NYPD Most-Sued Cop, With 28 Lawsuits Filed Against Him Since 2006*, N.Y. DAILY NEWS (Feb. 16, 2014), <http://www.nydailynews.com/new-york/lawsuits-nypd-double-decade-costing-taxpayers-1b-article-1.1615919>; see also Aubrey Whelan, *90-Plus Arrests of D.C. Cops in Under 4 Years*, WASH. EXAMINER (Sept. 9, 2012), <http://www.washingtonexaminer.com/90-plus-arrests-of-d.c.-cops-in-under-4-years/article/2507386>.

ARRESTING BATSON

APPENDIX

JURISDICTION	RESTRICTIONS ON JURY SERVICE
Federal	Prohibits those with pending charges or any felony conviction. 28 U.S.C. § 1865(b)(5) (2000) (disqualifying from grand and petit juries anyone who “has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored”).
Alabama	Protects jury service for those who have “not lost the right to vote by conviction for any offense involving moral turpitude.” ALA. CODE § 12-16-60(a)(4) (2016). Allows challenges for cause if juror “has been convicted of a felony.” <i>Id.</i> 12-16-150(5). Also disqualifies those with pending felony charges, or charges for “an offense of the same character as that with which the defendant is charged.” <i>Id.</i> § 12-16-150(3).
Alaska	Disqualifies anyone who “has been convicted of a felony for which the person has not been unconditionally discharged,” ALASKA STAT. §§ 09.20.020(2), 33.30.241(b) (2015), which is defined as release from imprisonment, parole, and probation. <i>Id.</i> § 12.55.185(18).
Arizona	Suspends jury service “right” upon felony conviction. Ariz. Rev. Stat. Ann. § 13-904(A)(3) (2015). Felony convicts are disqualified from grand or petit jury service “unless [their] civil rights have been restored.” <i>Id.</i> § 21-201(3); <i>see</i> § 13-912(A) (restoring “automatically” first-time offenders’ civil rights after completion of sentence).
Arkansas	Disqualifies from grand or petit jury service those “who have been convicted of a felony and have not been pardoned” and those who are “not of good character or approved integrity,” are “lacking in sound judgment or reasonable information,” are “intemperate,” or are “not of good behavior.” ARK. CODE ANN. § 16-31-102(a)(4)-(5) (2016).

JURISDICTION	RESTRICTIONS ON JURY SERVICE
California	Disqualifies those “who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.” CAL. CIV. PROC. CODE § 203(a)(5) (2016).
Colorado	Disqualifies “prospective grand juror[s]” who have “previously been convicted of a felony” but not mentioning petit jurors. COLO. REV. STAT. § 13-71-105(3) (2015).
Connecticut	Disqualifies anyone who “has been convicted of a felony within the past seven years or is a defendant in a pending felony case or is in the custody of the Commissioner of Correction.” CONN. GEN. STAT. § 51-217(a)(2) (2015).
Delaware	Disqualifies “[c]onvicted felons who have not had their civil rights restored.” DEL. CODE ANN. tit. 10, § 4509(b)(6) (2016).
District of Columbia	Disqualifies felons for “not less than one year after the completion of the term of incarceration, probation, or parole.” D.C. CODE § 11-1906(b)(2)(B) (2016); <i>see also</i> JURY PLAN FOR THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA § 7 (2013) (requalifying felons for jury service ten years after “the completion of the juror’s incarceration, probation, supervised release or parole”).
Florida	Disqualifies those who have committed an “offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights.” FLA. STAT. § 40.013(1) (2015).
Georgia	Disqualifies “[a]ny individual who has been convicted of a felony in a state or federal court who has not had his or her civil rights restored.” GA. CODE ANN. § 15-12-60(c)(1) (2016); <i>see also</i> § 17-7-95(c) (specifying that conviction based on nolo contendere plea does not disqualify one from service).
Hawaii	Disqualifies those “convicted of a felony in a state or federal court and not pardoned.” HAW. REV. STAT. § 612-4(b)(2) (2015).
Idaho	Specifies suspension of civil rights during incarceration and restoration of “all civil rights that are not political” during parole or probation. IDAHO CODE ANN. § 18-310(1) (2016).

ARRESTING BATSON

JURISDICTION	RESTRICTIONS ON JURY SERVICE
Indiana	Disqualifies any person who “has had the right to vote revoked by reason of a felony conviction and the right has not been restored.” IND. CODE ANN. § 33-28-5-18(b)(5) (2016).
Iowa	Makes both civil and criminal jurors challengeable for cause for “[c]onviction of a felony.” IOWA CODE ANN. § 1.915(6)(a) (2015).
Kansas	Disqualifies any “person who has been convicted in any state or federal court of a felony” until he “has completed the terms of the authorized sentence.” KAN. STAT. ANN. § 21-6613(a)-(b) (2015). Further excuses anyone who “within 10 years immediately preceding” has been convicted or pleaded guilty to a felony. <i>Id.</i> § 43-158(c). In Kansas, a felon is not discharged from parole or probation until the prisoner review board issues him a certificate of discharge, which it cannot do until a year after the end of parole or probation. <i>Id.</i> § 22-3722.
Kentucky	Disqualifies one who “[h]as been previously convicted of a felony and has not been pardoned or received a restoration of civil rights.” KY. REV. STAT. ANN. § 29A.080(2)(e) (2015).
Louisiana	Disqualifies from criminal jury service one “convicted of a felony for which he has not been pardoned” or “under indictment for a felony.” LA. CODE CRIM. PROC. ANN. art. 401(A)(5) (2015).
Maryland	Excludes persons “convicted . . . of a crime punishable by imprisonment exceeding 6 months and received a sentence of imprisonment for more than 6 months” or “[h]as a charge pending . . . for a crime punishable by imprisonment exceeding 6 months.” MD. CODE ANN., CTS. & JUD. PROC. § 8-103(b)(4)-(5) (2016).
Massachusetts	Disqualifies one who “has been convicted of a felony within the past seven years or is a defendant in pending felony case or is in the custody of a correctional institution.” MASS. GEN. LAWS ANN. ch. 234A, § 4(7) (2016).
Mississippi	Qualifies for service only those who have not been convicted of a felony or the “unlawful sale of intoxicating liquors within a period of five years.” MISS. CODE ANN. §§ 13-5-1, 1-3-19 (2015).

JURISDICTION	RESTRICTIONS ON JURY SERVICE
Missouri	Disqualifies “[a]ny person who has been convicted of a felony, unless such person has been restored to his civil rights.” MO. REV. STAT. § 494.425(4) (2015). Persons convicted of a felony “shall be forever disqualified from serving as a juror.” <i>Id.</i> § 561.026(3).
Nebraska	Disqualifies “persons who have been convicted of a criminal offense punishable by imprisonment in a Department of Correctional Services adult correctional facility, when such conviction has not been set aside or a pardon issued.” NEB. REV. STAT. §§ 25-1601(1)(f) (2016); <i>see id.</i> § 29-112.
Nevada	Qualifies those “who ha[ve] not been convicted of treason, a felony, or other infamous crime.” NEV. REV. STAT. 6.010 (2015).
New Hampshire	States that “[a] juror shall not have been convicted of any felony unless the conviction has been annulled.” N.H. REV. STAT. ANN. § 500-A:7-a(V) (2016).
New Jersey	Requires that jurors “shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States.” N.J. STAT. ANN. § 2B:20-1(e) (2015).
New Mexico	Requires for eligibility that a person convicted of a felony complete “all conditions of the sentence imposed for the felony, including conditions for probation or parole.” N.M. STAT. ANN. § 38-5-1 (2015).
North Carolina	Qualifies persons who “have not been convicted of a felony . . . (or if convicted . . . have had their citizenship restored pursuant to law).” N.C. GEN. STAT. § 9-3 (2015). In North Carolina, civil rights are restored automatically upon conditional discharge from prison, parole, or probation. <i>Id.</i> § 13-1.
North Dakota	Disqualifies anyone who “[h]as lost the right to vote because of imprisonment in the penitentiary . . . or conviction of a criminal offense which by special provision of law disqualified the prospective juror for such service.” N.D. CENT. CODE § 27-09.1-08(2)(e) (2015).
Ohio	Declares a person convicted of a felony “incompetent to be . . . [a] juror.” OHIO REV. CODE ANN. § 2961.01(A)(1) (2015).

ARRESTING BATSON

JURISDICTION	RESTRICTIONS ON JURY SERVICE
Oklahoma	Disqualifies “[p]ersons who have been convicted of any felony” if not “fully restored to his or her civil rights.” OKLA. STAT. tit. 38, § 28(C)(5) (2015).
Oregon	Restricts criminal jury service to those not convicted of or who served sentences for a felony within the last fifteen years, or convicted of a “misdemeanor involving violence or dishonesty” within last five years. OR. CONST. art. I, § 45(1)(a)-(b) (2014).
Pennsylvania	Disqualifies one who “has been convicted of a crime punishable by imprisonment for more than one year and has not been granted a pardon or amnesty therefor.” 42 PA. CONS. STAT. ANN. § 4502(a)(3) (2015).
Rhode Island	Bars service from one “convicted of a felony. . . until completion of such felon’s sentence, served or suspended, and of parole or probation.” R.I. GEN. LAWS § 9-9-1.1(c) (2015).
South Dakota	Disqualifies “[a]ny person who has been convicted of a felony unless restored to civil rights.” S.D. CODIFIED LAWS § 16-13-10 (2016).
Tennessee	Disqualifies those “convicted of a felony or any other infamous offense in a court of competent jurisdiction,” as well as “[p]ersons convicted of perjury or subordination of perjury.” TENN. CODE ANN. § 22-1-102(1)-(2) (2015).
Texas	Disqualifies persons “convicted of misdemeanor theft or a felony.” TEX. GOV’T CODE ANN. § 62.102(8) (2015).
Utah	Disqualifies anyone “who has been convicted of a felony which has not been expunged.” UTAH CODE ANN. § 78B-1-105(2) (2015).
Vermont	Qualifies those who “ha[ve] not served a term of imprisonment in this state after conviction of a felony.” VT. STAT. ANN. tit. 4, § 962(a)(5) (2015).
Virginia	Disqualifies anyone “convicted of treason or a felony.” VA. CODE ANN. § 8.01-338(2) (2016).
Washington	Disqualifies anyone “convicted of a felony and has not had his or her civil rights restored.” WASH. REV. CODE ANN. § 2.36.070(5) (2015).

JURISDICTION	RESTRICTIONS ON JURY SERVICE
West Virginia	Disqualifies one “convicted of perjury, false swearing or any crime punishable by imprisonment in excess of one year under the applicable law of this state, another state or the United States.” W. VA. CODE § 52-1-8(b)(6) (2015).
Wisconsin	Disqualifies anyone who “has been convicted of a felony and has not had his or her civil rights restored,” WIS. STAT. ANN. § 756.02 (2015), where rights are restored upon completion of sentence. <i>Id.</i> § 304.078.
Wyoming	Disqualifies any “person who has been convicted of any felony” and not had rights restored. WYO. STAT. ANN. § 1-11-102 (2015).