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ESSAY: Injustice in Black and White: Eliminating Prosecutors' Peremptory Strikes in Interracial Death Penalty Cases

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Injustice in Black and White

ELIMINATING PROSECUTORS' PEREMPTORY STRIKES IN INTERRACIAL DEATH PENALTY CASES

Daniel Hatoum[†]

INTRODUCTION

In 1990, Clarence Lee Brandley, a black death row inmate, proved he was innocent.[1] Nearly a decade earlier, Brandley was part of a group of janitors who discovered the body of Cheryl Dee Fergeson, a sixteen-year-old white volleyball player, after she had been raped and murdered.[2] The main suspects became the janitors, all of whom were white, except Brandley.[3] During the initial interview, police said to the janitors: "One of you . . . is going to hang for this," and then, turning to Brandley, added, "[s]ince you're the n[——]r, you're elected."[4] Further, police were instructed to conduct a quick and sloppy investigation, so students could return to school.[5] Police arrested Brandley without any evidence directly linking him to the crime.[6]

The town, Conroe, Texas, was predominantly white, "and the number of blacks who showed up on jury panels . . . were

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[†] Civil Rights Fellow for the law firm Fried, Frank. Harris, Shriver & Jacobson. I'm grateful to the encouragement of my mentors, such as Ranjana Natarajan, Denise Gilman, and Chris Roberts, who have always encouraged me to fight injustice wherever I see it. I would also like to thank my former professor, Jeffrey Abramson—who had to put up with me as *both* an undergraduate and a law student—as conversations with him were integral in coming up with this idea. Further, I'm grateful to Fried Frank for encouraging me to draft this essay and pursue my passion for civil rights. Finally, I'm grateful to the Brooklyn Law Review's staff, whose tireless work made this project possible.

[1] WILLIAM WEBB, WRONGFULLY ACCUSED: 15 PEOPLE SENTENCED TO PRISON FOR A CRIME THEY DIDN'T COMMIT 26 (2013).

[2] *Id.* at 24.

[3] *Id.*

[4] MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 121 (1992).

[5] *See id.*

[6] *See id.* at 121–22 (indicating the other janitors were not arrested because they corroborated each other's stories, and that Brandley was implicated in the crime only by "inconclusive circumstantial evidence"); WEBB, *supra* note 1, at 24 ("Brandley was arrested and charged with rape and murder because he was the only janitor who couldn't provide an alibi, not because there was evidence.").

routinely struck from trial."[7] As a result, local lawyers could recall only one black person, who was also a police officer, ever serving on a criminal jury in Conroe's County, Montgomery.[8] Brandley faced an all-white jury.[9] The defense attorney speculated that Brandley's testimony may have "alienated the jury" by contradicting white witnesses.[10] Brandley's first trial, however, ended with a hung jury, with only one holdout.[11] During and after deliberations, this holdout was subject to a series of racial slurs, threats, and calls because he refused to convict Brandley.[12] In jury selection for the second trial, the prosecution used its peremptory strikes to eliminate all potential non-white jury members,[13] and on little more than the questionable and self-interested testimony of the other janitors, Brandley was sentenced to death.[14]

Years later, after fellow janitors came forth to contradict the state's witnesses,[15] and after further evidentiary review revealed that the evidence that could have exonerated him had been destroyed, Brandley was released, having now proved his innocence in order to earn exoneration.[16] "The presiding judge wrote a stinging condemnation of the procedures used in Brandley's case, and stated that '[t]he court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution of him.'"[17]

Brandley's case is only one example of a common problem: the color of a defendant's skin has a substantial effect on whether the defendant will be sentenced to death.[18]

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[7] RADELET, BEDAU & PUTNAM, *supra* note 4, at 122.

[8] *Id.*

[9] *Id.* at 124.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 125.

[14] *Id.* at 124–25.

[15] Peter Applebome, *7 Years Later, Hope for Texas Death Row Inmate*, N.Y. TIMES (Mar. 22, 1987), https://www.nytimes.com/1987/03/22/us/7-years-later-hope-for-texas-death-row-inmate.html [https://perma.cc/3R26-FXNM].

[16] *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-and-death-penalty-assessing-danger-mistaken-executions [https://perma.cc/8H2D-LRNG].

[17] *Id.*

[18] Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFO. CTR. (1998), https://deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#Black%20Defendants%20and%20the%20Race%20of%20the%20Victims [https://perma.cc/CN7M-SPQF]; *see also* U.S. GEN. ACCOUNTING OFF., GAO-GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990), https://www.gao.gov/assets/220/212180.pdf [https://perma.cc/8GNT-LMQ7] (finding a "remarkably consistent" pattern of racial disparities in capital sentencing throughout the country).

Specifically, a black defendant is much more likely to be sentenced to the death penalty if the defendant is black, and the victim is non-black.[19] One reason this happens is because of the systematic prevention of black citizens from serving on juries.[20] A forceful tool that is used to deny black citizens the opportunity to serve on juries is the peremptory strike.[21] Technically, the Supreme Court held in *Batson v. Kentucky* that a racial use of peremptory strikes is unconstitutional under the Equal Protection Clause,[22] and established a three-part test to determine and prevent peremptory strikes that were utilized with the purpose of striking a potential juror because of his or her race.[23]

As this essay will document, however, *Batson* has failed to act as a total deterrent to striking black jurors, and "it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place."[24] And while the Court has steadfastly stuck to *Batson* in the equal protection context,[25] "death is different"[26] and should be treated differently in an effort to guarantee that a person's skin color is not a deciding factor in their execution—especially in light of a defendant's Sixth Amendment right to a fair trial.[27] Considering the inability to prevent racially charged peremptory strikes, even under *Batson*, and the seriousness of the death penalty, prosecutors' peremptory strikes should be eliminated in death penalty cases where the victim and the defendant are different races, in order to ameliorate the manifestation of racial discrimination.

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[19] Dieter, *supra* note 18, at 5.

[20] *See* Tanya E. Coke, *Lady Justice May Be Blind, but Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 350–51 (1994) (acknowledging that race affects the perspectives of the people in the jury and their view of the evidence in a way that puts minorities at a disadvantage if they are underrepresented on the jury pool).

[21] Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012) (recognizing substantial disparity in the use of peremptory strikes on racial minorities).

[22] Batson v. Kentucky, 476 U.S. 79, 89 (1986), *modified*, Powers v. Ohio, 499 U.S. 400, 402 (1991).

[23] *See id.* at 90–96.

[24] Grosso & O'Brien, *supra* note 21, at 1533.

[25] Stephen B. Bright & Katherine Chamblee, *Litigating Race Discrimination: Under* Batson v. Kentucky, 32 CRIM. JUST. 10, 10–11 (2017) (describing the continued relevance of *Batson v. Kentucky*).

[26] *See* Raoul G. Cantero & Robert M. Kline, *Death Is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4, 12–13 (2009) (discussing that the finality and severity of the death penalty compared to other punishments); Steven Z. Kaplan, *Why Death Is Different: Minnesota's Experiment with Capital Punishment*, 30 WM. MITCHELL L. REV. 1113, 1115–16 (2004) (reviewing JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA (2003)) (arguing that the death penalty is different in part because of its history tied to lynching).

[27] U.S. CONST. amend. VI.

This essay proceeds in the following four parts. Part I briefly explains the system of peremptory strikes. Then, Part II outlines the problem of rampant racial discrimination in the application of the death penalty. Part III further argues that the denial of black jurors from serving is a prime cause, while also suggesting that the cause of this problem is peremptory strike use. Part IV argues that eliminating peremptory strikes falls neatly within our current legal framework of constitutional jurisprudence, and therefore courts can adopt this rule without the passage of a formal law by the legislature. For a host of reasons, including that defendants' very lives are at stake, courts have often viewed death differently than other punishments. Further, because a special procedure also applies in interracial capital cases under *Turner v. Murray* in order to ensure a defendant's right to a fair trial, courts are justified in eliminating prosecutors' peremptory strikes in interracial death penalty cases, even while courts in other cases may still allow the use of peremptory strikes.

I. PEREMPTORY STRIKES

A. The General Usage of Peremptory Strikes

A trial in the American jury system begins with a process called voir dire, or jury selection.[28] The purpose of this process is to ensure that a jury is selected that will uphold the defendant's right to a fair trial.[29] A large pool of citizens is summoned to participate in this process.[30] In capital trials in Texas, for example, two hundred people or more are called in initially.[31] From this group, twelve will eventually be selected to serve on the jury.[32]

In the state system, where the vast majority of capital cases are pursued,[33] jury selection is predominantly conducted

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[28] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 35.17 (West 2009) (describing jury selection in Texas); *Voir Dire and Jury Selection*, JUDICIAL EDUC. CTR., http://jec.unm.edu/education/online-training/stalking-tutorial/voir-dire-and-jury-selection [https://perma.cc/9HBT-7NY8] (describing voir dire, selecting the jury and the questioning of potential jurors).

[29] *See* Sellers v. Burrowes, 642 S.E.2d 145, 148 (Ga. Ct. App. 2007).

[30] *See* Stephen Gustitis, *Jury Selection in Texas Capital Murder Cases*, GUSTITIS LAW (Jan. 8, 2013), http://www.gustitislaw.com/death-penalty/jury-selection-in-texas-capital-murder-cases [https://perma.cc/4RMY-B4BX].

[31] *Id.*

[32] *See* TEX. GOV'T CODE ANN. § 62.201 (West 1985).

[33] *See* Mark Berman, *The Justice Dept. Is Seeking Its First Federal Death Sentences Under Sessions and Expects More to Follow*, WASH. POST (Jan. 9, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/01/09/the-justice-department-is-seeking-its-first-federal-death-sentences-under-sessions-and-expects-more-to-follow/?utm_term=.b2306b91f76e [https://perma.cc/6DE7-HQ8R].

by the attorneys that are arguing the case.[34] The attorneys ask the potential jurors questions in order to tease out any biases the jurors might have.[35] If a juror is unable to objectively weigh the evidence due to a bias, one of the sides would ask that the juror be struck for "cause."[36] Lawyers have an unlimited number of strikes for cause, provided the lawyer can show a particular bias of a potential juror.[37] Further, attorneys and judges in capital trials can ask jurors about their willingness to impose the death penalty.[38] A juror who, for moral or other reasons, is unable to sentence someone to the death penalty will be struck by the court.[39] This process of striking for cause because of the inability of a juror to sentence someone to death is known as "death qualification,"[40] and it can only benefit the prosecution. Again, this type of strike is unlimited.[41]

After all of this is over, lawyers can then decide to use peremptory strikes.[42] Peremptory strikes are discretionary strikes that attorneys use to prevent *any* potential juror from serving on the panel, within constitutional limits.[43] In capital cases, an attorney may have twelve or more of these discretionary strikes, depending on the state in which the case is tried.[44] Technically, under the *Batson v. Kentucky* doctrine,

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[34] *See* Kenneth M. Mogill & William R. Nixon, Jr., *A Practical Primer on Jury Selection*, 65 MICH. B.J. 52, 52 (1986) ("Direct questioning of individual venire persons by attorneys, and the use of open-ended questions, are essential tools for effective voir dire.").

[35] *Id.* at 53.

[36] *Id.*

[37] Elliott Wilcox, *How to Increase Your Number of Peremptory Strikes During Jury Selection*, TRIAL THEATER (2016), http://www.trialtheater.com/jury-selection/double-your-jury-selection-challenges.htm [https://perma.cc/RZ3H-NZN6]; *see also* Christina Marinakis, *Maximizing Cause Strikes: How Do I Get Jurors to Say They Can't Be Fair?*, LITIGATION INSIGHTS (Feb. 9, 2017), http://litigationinsights.com/jurors/maximizing-cause-strikes-admit-jurors-cant-be-fair/ [https://perma.cc/3QWR-F33H] (discussing elicitation of bias from prospective jurors).

[38] George D. Knapp, Note, *Death Qualification and the Right to an Impartial Jury Under the State Constitution: Capital Jury Selection in Utah After* State v. Young, 1995 UTAH L. REV. 625, 625 (1995); *see also* Stanton D. Krauss, *Death-Qualification After* Wainwright v. Witt*: The Issues in* Gray v. Mississippi, 65 WASH. U. L. QUART. 507, 507 (1987) (discussing that judges have the power to remove a juror if that juror is opposed to the death penalty).

[39] *See* Knapp, *supra* note 38, at 625.

[40] *Id.*

[41] *See id.* (describing death qualification as a form of strike "for cause").

[42] Mogill & Nixon, *supra* note 34, at 54 (indicating that parties are given peremptory strikes for use during jury selection); *see also* 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, 40 (2001).

[43] *See* Keith A. Ward, Comment, *"The Only Thing in the Middle of the Road Is a Dead Skunk and a Yellow Stripe": Peremptory Challenges—Take 'Em or Leave 'Em*, 26 TEX. TECH L. REV. 1361, 1361–62 (1995).

[44] *See, e.g.*, GA. CODE ANN. § 15-12-165 (2011) (allowing up to fifteen peremptory strikes in a capital case in Georgia); LA. CODE CRIM. PROC. ANN. art. 799 (1985) (allowing up to

neither the prosecutor, nor the defense, can use those peremptory strikes in order to strike a potential juror because of that juror's race.[45] *Batson* established a three-part test for determining whether a prosecutor utilized peremptory strikes to exclude a juror on the basis of race.[46] First, the defendant must present a prima facie case that the prosecutor is purposefully discriminating.[47] In order to do so, the defendant can point to the people the prosecutor struck, and the surrounding circumstances of the case.[48]

Once the defendant has raised a *prima facie* case, the burden then shifts to the prosecutor to provide a race-neutral reason for the strike.[49] The threshold a prosecutor must meet is quite low.[50] Prosecutors need not even provide "an explanation that is persuasive, or even plausible."[51] Thus, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[52] Finally, in the third step, the judge will decide whether this proffered reason is mere pretext or tied to the potential juror's race.[53] Thus, peremptory strikes are a well-established part of our jury selection process.

B. The Trouble with Peremptory Strikes

Since its conception, *Batson* has been heavily criticized as ineffective, especially by the only Supreme Court Justice at the time who was also an experienced trial attorney,[54] Justice Thurgood Marshall.[55] Justice Marshall felt that the *Batson* framework would "not end the racial discrimination that peremptories inject into the jury-selection process."[56] Justice Marshall had two chief complaints with the *Batson* framework. "First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so

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twelve peremptory strikes in a capital case in Louisiana); TEX. CODE CRIM. PROC. ANN. art. 35.15 (1991) (allowing up to fifteen peremptory challenges in a capital case in Texas).

[45] Batson v. Kentucky, 476 U.S. 79, 84–87 (1986).

[46] *Id.* at 96–98.

[47] *Id.* at 96–97.

[48] *Id.* at 96–97.

[49] *Id.* at 97.

[50] Purkett v. Elem, 514 U.S. 765, 767–68 (1995).

[51] *Id.* at 767–68.

[52] *Id.* at 768 (internal citations omitted).

[53] *See id.* at 768–69.

[54] *Thurgood Marshall: 2009 Inductee*, TRIAL LAWYER HALL OF FAME, http://www.triallawyerhalloffame.org/inductees/thurgood-marshall/ [https://perma.cc/4PCC-NF7Z].

[55] Batson v. Kentucky, 476 U.S. 79, 105–08 (1986) (Marshall, J., concurring).

[56] *Id.* at 102–03.

flagrant as to establish a prima facie case."[57] Since the burden falls on the defendant to present the evidence of the prima facie case, "[p]rosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level."[58] Justice Marshall felt that this "'acceptable' level" would be easy to attain if, after strikes for cause, there were only a few black jurors left, depriving the defense of the argument that many jurors were struck because of the color of their skin.[59]

"Second, when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives."[60] Justice Marshall remarked that it would be easy for a prosecutor to present a race-neutral reason, but it would be hard for the courts to be able to differentiate when that reason was real, or mere pretext.[61] Justice Marshall elaborated:

> "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically.[62]

These problems allow peremptory strike use to become a conscious or subconscious tool to inject racial bias into proceedings—especially in those instances when racial bias would give the prosecution a strategic advantage.

II. EMPIRICAL DATA REGARDING THE INTERSECTIONS OF RACE, THE DEATH PENALTY, AND PEREMPTORY STRIKES

A. Black Citizens Are More Likely to Be Sentenced to the Death Penalty Than White Citizens

Black citizens make up a disproportionate number of those sentenced to the death penalty.[63] For example, "[i]n Oklahoma and Missouri, black Americans are overrepresented on death row by nearly a factor of four."[64] Even in Georgia, which

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[57] *Id.* at 105.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 106.
[62] *Id.* (alteration in original) (internal citation omitted).
[63] *See* Matt Ford, *Racism and the Execution Chamber*, ATLANTIC (June 23, 2014), http://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081 [https://perma.cc/K9YQ-7CNC].
[64] *Id.*

has a much larger black population, black citizens are overrepresented on death row based on their proportion to the population, with 48% of defendants on death row being black, compared to 30% of the general population.[65] "In Louisiana, . . . blacks are roughly one-third of the population but more than two-thirds of the state's death-row inmates."[66] Overall, "[t]he national death-row population is roughly 42[%] black, while the U.S. population overall is only 13.6[%] black."[67]

While the bare numbers seem to be enough to demonstrate that the color of one's skin has an effect on the chances of being sentenced to the death penalty, the reality seems to be more complicated. The biggest factor actually seems to be a combination of the race of the defendant *and* the race of the victim,[68] as shown by the fact that "more than three-quarters of victims of death-row defendants executed since 1976 were white."[69] This is the argument made by the famous Baldus study, conducted by David Baldus and his colleagues, as discussed in *McCleskey v. Kemp*.[70]

In the Baldus study, researchers "examine[d] over 2,000 murder cases that occurred in Georgia during the 1970's."[71] When Baldus "divided the cases according to the *combination* of the race of the defendant and the race of the victim" he found a larger disparity.[72] Specifically, "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims."[73] One reason the Baldus study is so significant is that Baldus controlled for "230 variables that could have explained the disparity on nonracial grounds," and even after considering nonracial variables, the study concluded that black defendants who were convicted of killing white victims were far

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] John H. Blume et al., *Post*-McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1776 (1998).

[69] Ford, *supra* note 63.

[70] *See* McCleskey v. Kemp, 481 U.S. 279, 286 (1987). Professor David Baldus was a faculty member of the University of Iowa who conducted numerous studies on race and the death penalty. One of his most famous studies was the center of the *McCleskey* case, which is different than the study discussed *infra*, Section II.B. Adam Liptak, *David C. Baldus, 75, Dies; Studied Race and the Law*, N.Y. TIMES (June 14, 2011), https://www.nytimes.com/2011/06/15/us/15baldus.html [https://perma.cc/XW37-VL5B].

[71] *McCleskey*, 481 U.S. at 286.

[72] *Id.* (emphasis added).

[73] *Id.*

more likely to receive the death penalty.[74] Despite the clear and convincing empirical data presented in the Baldus study, the Supreme Court in *McCleskey* nevertheless found it insufficient to overturn the defendant's death sentence.[75]

While the Baldus study is certainly eye-opening, it has faced criticism. For purposes of this essay, there are two critiques worth addressing. One is that the study, originally conducted in 1983, is no longer current and, as a result, may not be accurate today. A second is that the study only discusses cases in Georgia,[76] so the results may vary across other states. Baldus and other authors, however, have since published more recent studies from other states, and have proven that the trend holds across time and geography.[77] Thus, the race of the defendant affects whether that defendant will be sentenced to death, especially when the defendant is a racial minority and the victim is white.

B. The Lack of Minorities on Juries Accounts for the Increased Likelihood That Minorities Will Be Sentenced to the Death Penalty—Especially for the Death of White Victims

One major factor that has contributed to the increased sentencing of black defendants, especially when the victim is white, is that black jurors have been denied from serving on juries.[78] One of the methods that has been used to deny black citizens from becoming jurors is peremptory strikes.[79] While there is no aggregate data from across the country, there are several consistent empirical examples. For example, in 2017, over a quarter of the citizens of Houston County, Alabama were

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[74] *Id.* at 287.

[75] *Id.*

[76] *Id.* at 286.

[77] *See, e.g.*, David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1425, 1441–42, 1447, 1449 (2004) (discussing several studies that address the race of the victim); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 838 (2008) (indicating race of the defendant *and* race of the victim matter); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1, 8, 40 (2005) (discussing disparities in death penalty sentencing in California based on the victim's race).

[78] *See generally* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010) [hereinafter EJI], https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/D3VC-E8Z4] (discussing the exclusion of black jurors throughout the course of history to the modern day).

[79] *See id.*

black.[80] Yet, "half of [the capital] juries were all-white and the remainder had only a single black member."[81] This is because "prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service."[82]

Another specific example from a county that has a high population of black citizens is the Caddo Parish of Louisiana, where the adult population is made up of 44.2% black citizens.[83] Absent a pattern of exclusion, "one would expect juries with [two] or fewer black members to occur in only 10.1% of trials. In Caddo, *22%* of trials have [two] or fewer black jurors."[84] Further, based on the population, there should have been "an average of 5.3 black jurors per twelve person jury."[85] Instead, the study found that only "an average of 3.86 jurors per jury were black."[86] The researchers were able to track strikes in order to produce the following data and table:[87]

Race	Accepted	Struck	TOTAL
Black	1570 (54%)	1338 (46%)	2908
Not Black	4580 (85%)	830 (15%)	5410
TOTAL	6150	2168	8318

Thus, the researchers found that the race of the potential jury panelist correlated highly with whether a peremptory strike would be utilized against that panelist.[88] The chance that the disparity is unrelated to the race of prospective jurors is less than one in ten thousand.[89] This provides further evidence that black citizens are being excluded from juries.

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[80] *See U.S. Census Bureau Quick Facts: United States; Houston County, Alabama*, U.S. CENSUS BUREAU (July 1, 2017), http://www.census.gov/quickfacts/table/PST045215/00,01069 [https://perma.cc/6VH8-EA45].

[81] EJI, *supra* note 78, at 14.

[82] *Id.*

[83] Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office*, REPRIEVE AUSTRALIA 7 (Aug. 2015), https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf [https://perma.cc/QS4C-AZUZ].

[84] *Id.* at 10 (emphasis added) (footnote omitted).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 8.

[88] *Id.* at 8–9.

[89] *Id.*

Even more compelling evidence was presented by a study that observed peremptory strikes in 173 capital cases in North Carolina.[90] The authors concluded that "[p]rosecutors exercised peremptory challenges at a significantly higher rate against black venire[91] members than against all other venire members."[92] Further, "prosecutors struck 52.6% (636/1,208) of eligible black venire members, compared to only 25.7% (1,592/6,185) of all other eligible venire members."[93] One judge commenting on this study exclaimed that "[t]he probability of this disparity occurring in a race-neutral jury selection process is less than one in 10 trillion."[94]

There are also two studies that control for various race-neutral factors that may have affected the decision to strike, allowing researchers to rule out alternative explanations.[95] Those studies observed Philadelphia and Dallas County, Texas.[96]The Philadelphia study, co-authored by David Baldus, analyzed "317 capital murder cases tried by jury in Philadelphia between 1981 and 1997."[97] Baldus controlled non-racial factors, including the age and gender of the potential jury members.[98] In doing so, Baldus found that prosecutors favored striking black venire members, but they did so in *interracial* cases where the victim was non-black and the defendant was black.[99] Baldus also concluded that "[f]or the prosecutorial decisions, the *only* factor with a stronger effect than venire member race was an expressed concern about imposing a death sentence."[100]

Recognizing the significance of Baldus's study, journalists with the Dallas Morning News utilized Baldus's method to observe peremptory strikes in Dallas County, Texas in 2002.[101] These cases were non-capital, but it allowed the

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[90] *See generally* Grosso & O'Brien, *supra* note 21 (studying peremptory strikes in capital cases in North Carolina).

[91] The "venire" is the full group of people who are called into court to select the jury from. Sherilyn Streicker, *Jury Selection in the Criminal Process*, NOLO, https://www.nolo.com/legal-encyclopedia/jury-selection-criminal-cases.html [https://perma.cc/R94A-CY9S].

[92] *See* Grosso & O'Brien*, supra* note 21, at 1548.

[93] *Id.*

[94] Adam Liptak, *Exclusion of Blacks from Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), http://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html [https://perma.cc/FY2S-44VP].

[95] *See* Baldus et al., *supra* note 42, at 3; Grosso & O'Brien, *supra* note 21, at 1539.

[96] *See* Baldus et al., *supra* note 42, at 3; Grosso & O'Brien, *supra* note 21, at 1539. Baldus also authored the Georgia study discussed by the Supreme Court in *McCleskey*. *See supra* notes 70–75 and accompanying text.

[97] Baldus et al., *supra* note 42, at 10.

[98] *See id.* at 167.

[99] *See id.* at 56.

[100] *Id.* at 69 (emphasis added).

[101] Grosso & O'Brien, *supra* note 21, at 1539.

journalists to pull from a large amount of cases for a shorter period of time.[102] The journalists, controlling for non-racial factors, "found that prosecutors 'excluded eligible [black venire members] from juries at more than twice the rate they rejected eligible whites.'"[103] "The journalists concluded that 'being black was the most important personal trait affecting which jurors prosecutors rejected.'"[104]

Additionally, the absence of black jurors has an effect on whether a black defendant will be sentenced to the death penalty.[105] "A 2004 study by the Capital Jury Project found that in cases with a black defendant and a white victim, having one or more black male jurors drastically lowered the chances of a death sentence."[106] David Baldus arrived at a similar conclusion in the study of Philadelphia trials, noting "that predominantly black juries (ones with five or more blacks) were less likely to impose death sentences than were juries with four or fewer black jurors."[107] Thus, empirical analysis concludes that striking potential black jurors gives prosecutors a strategic advantage when attempting to convict a black defendant who killed a white victim.[108]

C. Inferences Drawn from Empirical Data

It can be inferred from these statistical studies and analysis that Justice Marshall's criticisms of the *Batson* framework were correct, and that this is especially true for interracial capital cases. First, as the studies above show, it is easy for a prosecutor to strike black jurors, even with the *Batson* framework, as long as he or she provides a race-neutral reason.[109] For example:

> Here are some reasons prosecutors have offered for excluding blacks from juries: They were young or old, single or divorced, religious or not, failed to make eye contact, lived in a poor part of town, had served in the military, had a hyphenated last name, displayed bad posture, were sullen, disrespectful or talkative, had long hair, wore a beard.[110]

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[102] *Id.* at 1539–40 (noting that "381 non-capital felony trials . . . during the first ten months of 2002" were examined).

[103] *Id.* at 1540.

[104] *Id.*

[105] *See* William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 191–92 (2001).

[106] Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), http://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors [https://perma.cc/8KAG-HBNB].

[107] Baldus et al., *supra* note 42, at 124.

[108] Edelman, *supra* note 106.

[109] *See supra* Sections II.A–B.

[110] Liptak, *supra* note 94.

Further, the substantial amount of empirical analysis refutes the argument that black jurors are not on capital trials because black jurors are statistically less likely to support the death penalty.[111] This is for two reasons. First, the use of peremptory strikes happens *after* the death qualification process.[112] The research tracked the use of peremptory strikes, and thus, the researchers were able to control for that factor.[113] Second, even the studies that tracked non-capital felony cases, which do not include death qualification, demonstrate that black jurors are not serving on juries[114] because of peremptory strikes. This shows that black jurors are disappearing from juries for other reasons that are not death qualification. Instead, we may infer that capital trials are merely subject to the same race problem that is present in all felony trials,[115] but in capital trials, the problem becomes much more serious during sentencing.[116]

Opponents of this position could argue that since *Batson* fails to prevent either the prosecution or the defense from striking on the basis of race, defense attorneys can equalize race on the jury by utilizing peremptory strikes to strike jurors that are the opposite race of the defendant. However, the fact that black jurors are less likely to make it through death qualification refutes that argument against eliminating prosecutors' peremptory strikes. Opponents can find support in Baldus's study, since Baldus indicates that defense attorneys also seem to use their peremptory strikes on jurors in racially biased ways.[117] If fewer black jurors are making it through death qualification, however, it will be harder for defense attorneys to mitigate racially charged peremptory strikes by the prosecution, because the pool of black jurors will already be reduced in size compared to the pool of white jurors.[118] Additionally, in the jurisdictions where black defendants are more frequently sentenced to the death penalty, such as Louisiana or Alabama, the

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[111] *Contra* J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1110 (2014) (indicating that black citizens are more likely to be opposed to the death penalty than white citizens, and thus, not end up on capital trial juries).

[112] *See* Baldus et al., *supra* note 42, at 40.

[113] *See id.* at 47 (indicating that researchers only looked at the number of strikes used against those that were "strike-eligible," meaning the only way they could be struck from the jury is with a peremptory strike).

[114] *See supra* notes 101–104 and accompanying text.

[115] For discussion on why this essay chooses to focus on purely capital trials, *see infra* Part III.

[116] *See* Turner v. Murray, 476 U.S. 28, 33–34 (1986) (indicating that questions of race become more serious in capital trials than in non-capital felony trials).

[117] Baldus et al., *supra* note 42, at 72.

[118] *See* Sullivan, *supra* note 111, at 1110, 1134 (presenting evidence that black jurors are more likely to be opposed to the death penalty, and thus, not meet death qualification).

typical jury venire itself has an underrepresentation of potential black jurors.[119] Again, this would make it more difficult for defense attorneys to just cancel out racially charged strikes by prosecutors.

The existence of death qualification presents additional reasons for adopting the proposal of eliminating prosecutors' peremptory strikes in interracial capital cases. The presence of death qualifications means that prosecutors attain an advantage against defense attorneys, since prosecutors now have another means to strike for cause that in no way help the defense.[120] This proposal would help balance the scales by substantially increasing the possibility that black jurors serve on juries. Accordingly, the presence of death qualification favors eliminating prosecutors' peremptory strikes in interracial capital cases.

D. Prosecutors' Strategic Advantages of Striking Black Jurors in Interracial Capital Cases, Where the Defendant is Black and the Victim is White

Prosecutors have a strategic advantage when fewer black jurors are present on the jury because a deficiency of black jurors diminishes juror empathy towards a black defendant.[121] In interracial cases, empathy plays a bigger role than in other cases, because a white jury would more likely empathize with a white victim, and not with a black defendant, while the inverse is also true.[122] Although "there has been a decline in . . . demonstration of . . . prejudice and endorsement of explicitly racist beliefs," the strategic advantage for prosecutors still persists due to more subdued forms of bias.[123]

One possible explanation for the continued evidence of racial prejudice in jury proceedings is that overt acts of racism are merely being subdued into forms of micro-aggressions that affect

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[119] *See, e.g.*, Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 50–52 (1994) (noting cases from southern states that discuss the lack of minority representation among jury venire members); Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 320 (2005) (discussing the lack of cross-sectional equal representation among jury venire members in Texas); *see also* ELIZABETH DAVIS & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 251430, CAPITAL PUNISHMENT, 2016 at 2–4 (2018), https://www.bjs.gov/content/pub/pdf/cp16sb.pdf [https://perma.cc/D9RD-34PW].

[120] *See* Kimberly Tibbetts, Note, *Qualified to Convict:* State v. Griffin *and the Constitutionality of Death-Qualified Juries in Connecticut*, 22 QLR 359, 363 (2003) (indicating that juries subject to death qualification are more conviction prone).

[121] *See* Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 901 (1996).

[122] *See id.*

[123] Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 208 (2001).

juror decision making at trial.[124] For example, "[t]oday, many [w]hites [may] express their anti-[b]lack sentiment . . . . through opposition to social policies designed to facilitate equality, such as affirmative action. . . . [or] through the endorsement of statements such as '[b]lacks are getting too demanding in their push for equal rights.'"[125] So while it seems like our society has moved past overtly negative racial sentiments, in reality, these attitudes are hidden and play out in trials.[126] This explanation, however, does not display the whole picture for several reasons. First, it assumes that the white members of juries will hold racially charged viewpoints, whereas some white jurors may sincerely hold no ill will towards black citizens. Second, this explanation does not account for the disparity present in *interracial* cases. If black defendants were always harmed by the attitudes of white jurors, then the race of the victim would not matter.

Instead, the full explanation for racial imbalances is likely a combination of overt biases and implicit in-group behaviors.[127] One important form of implicit bias in the sentencing context is that a person is more likely to place themselves in the shoes of someone of their own race, and will experience more difficulty doing so for someone of another race.[128] This bias can be referred to as "racial empathy." Another would be implicating biases that cast the person in a negative racial stereotype.[129]

Forms of implicit bias are not overt choices, but ones that happen without jurors even being aware that the phenomenon is happening.[130] Further, this implicit bias is likely always present.[131] This would prejudice a white defendant in an interracial capital case with an all-black jury, in the same way as a black defendant in an interracial capital case with an all-white jury. Thus, by playing off of the existence of this implicit bias, having interracial juries in interracial cases ensures empathy for the defendant *and* the victim.

While some may argue that racial empathy is bad in all instances, since it means race has an effect on the proceeding,

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[124] *Id.* at 208–09.

[125] *Id.*

[126] *See id.* at 208–09.

[127] *See* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC IRVINE L. REV. 843, 860 (2015). An in-group is a group that someone psychologically identifies as being a member of, and therefore, in-group behavior is behavior derived from that feeling of belonging to that group vs. another group.

[128] *See* Linder, *supra* note 121, at 888; Lee, *supra* note 127, at 860.

[129] *See* Claudia Dreifus, *Perceptions of Race at a Glance*, N.Y. TIMES (Jan. 5. 2015), https://www.nytimes.com/2015/01/06/science/a-macarthur-grant-winner-tries-to-unearth-biases-to-aid-criminal-justice.html [https://perma.cc/69CD-YB4B].

[130] *See* Lee, *supra* note 127, at 860.

[131] *See id.*

such empathy could be a good thing because it could lead to more careful deliberation of the evidence.[132] Typically, this comes in the form of one group being "more receptive . . . to mitigating evidence," and therefore, presenting arguments to other jurors about the importance of accepting the mitigating evidence.[133] Further, the Supreme Court has pointed out that careful deliberation is even more important in capital cases because of the highly subjective nature of mitigating evidence.[134] Juries can use mitigating evidence to decide, even when a defendant is guilty of a capital offense, that the defendant should not be sentenced to the death penalty because of *mitigating* circumstances, which lessen either the seriousness of the crime, or the seriousness of the culpability of the crime.[135]

The existence of racial biases continues to underscore the major problem: the modern application of the death penalty has a race problem since a combination of the race of the defendant and the race of the victim leads to a higher possibility of a death sentence. This problem is caused by the denial of black jurors from serving on death penalty cases through the use of peremptory strikes. Accordingly, eliminating this barrier will ameliorate this problem.

III. ELIMINATING PROSECUTORS' PEREMPTORY STRIKES FITS WITHIN EXISTING CONSTITUTIONAL JURISPRUDENCE

Armed with this empirical knowledge, legislatures could change the way their respective states conduct peremptory strikes. The elimination of peremptory strikes, however, fits neatly within current constitutional jurisprudence, and based on precedent, courts would be acting within their power to eliminate the use of prosecutors' peremptory strikes in interracial capital trials. Specifically, courts can utilize the Sixth and Fourteenth Amendment right to a fair trial to abolish peremptory strikes.[136]

Those who would argue that the solution should be found in the Fourteenth Amendment's guarantee of equal protection

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[132] Christopher M. Bellas, "I Feel Your Pain": How Juror Empathy Effects Death Penalty Verdicts 63 (2010) (unpublished Ph.D. dissertation, Kent State University). https://etd.ohiolink.edu/pg_10?0::NO:10:P10_ACCESSION_NUM:kent1276566375#abstract-files [https://perma.cc/XQD6-3SY7].

[133] *Id.*

[134] *See* Turner v. Murray, 476 U.S. 28, 33–35 (1986) (discussing the major role racial biases can play in jurors considering mitigating evidence).

[135] *Mitigation in Capital Cases*, CAPITAL PUNISHMENT IN CONTEXT, https://capitalpunishmentincontext.org/issues/mitigation [https://perma.cc/7DAR-GKQG] (describing mitigation in the capital punishment context).

[136] *See* U.S. CONST. amends. VI, XIV.

are mistaken. Those with this idea may argue that since peremptory strikes are utilized to strike minority jurors, it would therefore seem intuitive that a challenge be brought under the Equal Protection Clause of the Fourteenth Amendment. Yet, the Supreme Court has already rejected the idea that the system of peremptory strikes must be eliminated as a matter of equal protection.[137] Even with Justice Marshall asking the Court to eliminate strikes under equal protection, the Court refused to do so.[138] Thus, *Batson* already forecloses the possibility of an equal protection challenge.

On the other hand, the *Batson* ruling also makes it clear that peremptory strikes can be subject to constitutional attacks.[139] Specifically, in *Batson*, the Supreme Court recognized that under the Equal Protection Clause, a defendant would have to show that intentional discrimination infected the defendant's trial.[140] An onerous requirement is not necessary, however. This essay's proposal does not fit within equal protection jurisprudence, because this essay attempts to invalidate an entire method of procedure. Therefore, instead of bringing a challenge under the Equal Protection Clause, litigants should bring a challenge under the right to fair trial guarantees of the Sixth and Fourteenth Amendments.

A. Eliminating Peremptory Strikes Under Sixth and Fourteenth Amendment Jurisprudence

Under the Sixth and Fourteenth Amendments, the Supreme Court has held that certain procedures for picking a jury in interracial capital cases lead to such a high risk of race infecting the deliberations that for *every* interracial capital case, the jury selection procedure must be designed differently than in other trials, in order to ensure a fair trial.[141] In other words, it must be different because "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."[142] The case supporting this idea is *Turner v. Murray*.[143] To fully understand that case, however, we must first understand the Supreme Court's opinion in *Ristaino v. Ross*.

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[137] *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) (amending procedure for peremptory strikes, but not eliminating the practice).

[138] *See id.* at 102–03 (Marshall, J., concurring).

[139] *See id.* at 95–96 (majority opinion).

[140] *Id.* at 95–96.

[141] Turner v. Murray, 476 U.S. 28, 33–37 (1986).

[142] *Id.* at 35.

[143] *Id.* at 28.

In *Ristaino*, a black defendant was tried and convicted of, *inter alia*, "robbery . . . [and] assault, and battery by means of a dangerous weapon" against a white victim.[144] Note that none of these offenses are capital crimes.[145] The defendant in *Ristaino* attempted to ask a question at jury selection about racial prejudices held by the potential jury panelists.[146] The record indicated that the only particularity warranting such in the case was that the defendant was black and that the victim was white.[147] The trial judge found such reasoning uncompelling, and refused to allow that question to be presented to the jury.[148] After he was convicted, the defendant attacked the fact that racial attitudes were not discussed during voir dire, arguing that the defendant's right to fair trial entitled him to ask jurors about their views on race.[149] While the Court acknowledged that under *special circumstances*, a judge may be required by the Constitution to ask jurors about their attitude towards race,[150] the Court stated that a case where the *only* special circumstance is that the defendant is black and the victim is white is not enough to create constitutional concerns requiring special procedure.[151]

Turning to *Turner v. Murray*, the prosecution sought the death penalty against a black defendant for killing a white victim in connection to a robbery.[152] During the jury selection, the defendant requested that a question be submitted to the jury asking the panelists about their views on race.[153] The trial judge, saying that the Supreme Court and the Constitution do not require such a question, refused to present the question on racial attitudes to the jury.[154] In subsequent appeals and habeas petitions, the United States Court of Appeals for the Fourth Circuit agreed, holding that the Supreme Court's decision in *Ristaino v. Ross*[155] found that such a question was not necessary, even in interracial cases, and thus, the judge did not err by refusing to allow a question about racial attitudes to be presented

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144 Ristaino v. Ross, 424 U.S. 589, 589–90 (1976).

145 *See id.* (not discussing capital punishment, which indicates that these crimes were not capital).

146 *Id.* at 590.

147 *Id.* at 591.

148 *Id.*

149 *Id.* at 593.

150 *Id.*; *see also* Ham v. South Carolina, 409 U.S. 524, 525–27 (1973) (holding that a case involving a civil rights activist, who is claiming he is being maliciously prosecuted because of his involvement in the black civil rights movement, presents special circumstances that require a judge to interrogate jurors about racial prejudice).

151 *See Ristaino*, 424 U.S. at 597–98.

152 *See* Turner v. Murray, 476 U.S. 28, 29 (1986).

153 *See id.* at 30–31.

154 *Id.* at 31.

155 *Ristaino*, 424 U.S. at 589.

to potential jurors.[156] Perhaps the lower courts cannot be blamed for this conclusion because under *Ristaino*, *Turner* seems like a straightforward case, since it has nearly identical facts.[157]

Yet, the Supreme Court reversed the Fourth Circuit in *Turner*, and recognized that "[w]hat sets this case [*Turner*] apart from *Ristaino*, however, is that in addition to petitioner's being accused of a crime against a white victim, the crime charged was a *capital offense*."[158] This led the Court to come out in the other direction, and to require that the trial court apply a special procedure that was not afforded to the defendant in *Ristaino*.[159] In other words, *every* interracial *capital* case contains special factors that require special procedure in order to guarantee a fair trial. The Court elaborated further, saying that because *Turner* was a capital case, "the jury [was] called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'"[160] Such a subjective judgment presents a high chance of racial discrimination entering the picture, and so special procedures should be in place.[161]

There are two specific ways this subjective judgment takes form. First, the jury has to take into account future dangerousness.[162] This requires the jury to consider whether the defendant is a person with such a propensity for violence, such that the best way to deter future violence is for the defendant to die.[163] The Court recognized that this is a highly personal analysis that easily invites racial attitudes to affect each juror's decision.[164] Second, jurors are asked to consider mitigating evidence.[165] As discussed earlier, mitigating evidence varies substantially, but all mitigating evidence shares the characteristic of being open to the subjective judgment of the juror.[166] The Court was concerned that, without a special procedure, explicit or implicit biases would affect the proceedings.[167] The Supreme Court recognized that because capital trials are different from other trials, the mere fact that a capital case is interracial means that the Constitution *requires*

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156 *Turner*, 476 U.S. at 31–33.

157 *Id.* at 33.

158 *Id.* (emphasis added).

159 *See id.*

160 *Id.* at 33–34 (quoting Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985) (internal quotation marks omitted)).

161 *See id.* at 33–34.

162 *See id.* at 34.

163 *See id.*

164 *Id.* at 35.

165 *Id.*

166 *See id.*

167 *See id.* at 35.

a different procedure than other cases—a procedure with eyes wide open to the race of the defendant and the victim.[168]

There are striking similarities between the proposal espoused by this essay and what the Supreme Court required in *Turner*. First, this essay advocates for a special procedure in only interracial capital cases[169]—a class of cases that the Supreme Court in *Turner* recognized as presenting "special circumstances." Specifically, the Court is concerned that the stakes are too high in a capital case to even risk racial prejudice influencing the verdict.[170] Similarly, this essay is concerned that peremptory strikes create the very risk of racial prejudice the Supreme Court sought to ameliorate in *Turner*. As the studies above demonstrate, black defendants who are accused of killing white victims are far more likely to receive the death penalty.[171] One reason for this is because peremptory strikes in interracial cases have denied black jurors the ability to empathize with defendants, and thus, provide argument in jury deliberations that could cancel out implicit in-group thinking or explicit racial animus. This also explains the disproportionate rate of death sentences for black defendants.[172]

B. The Need to Extend Turner

While eliminating peremptory strikes may seem like it goes further than what the Supreme Court required in *Turner*, the empirical analysis above also shows that it is necessary to go this far. *Turner* demonstrates that, when stripped of the rhetoric, the main question to ask about procedure is whether that procedure is unfair because it risks racial prejudice, thereby stacking the deck against the defendant. As the above discussion demonstrates,[173] that is precisely what prosecutors' peremptory strikes have been doing in interracial capital cases. Therefore, since the risk of racial discrimination is clear, under the Sixth and Fourteenth Amendments, courts should eliminate prosecutors' peremptory strikes in interracial capital cases.

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[168] *Id.* at 36–37.

[169] While this essay chooses to discuss the issues of racial prejudice in relation to black defendants who are accused of committing crimes against white victims, the analysis may apply across to instances at any time when prosecutors have the ability to use peremptory strikes to strike minority jurors. Future research should observe the effects on other racial minority groups, such as Latino Americans.

[170] *Turner*, 476 U.S. at 37.

[171] *See supra* Part II.

[172] *See supra* Section II.A. (describing how black defendants are overrepresented on death row).

[173] *See supra* Section II.B. (describing how prosecutors have used peremptory strikes to disproportionally strike jurors that are the same race as the defendant).

Opponents of this view may argue that such a rule does not square with our modern equal protection jurisprudence. These opponents will argue that our Constitution preaches color blindness.[174] Yet, the procedure advocated by this essay instructs a court to look at the race of the defendant and the victim in order to determine whether the special procedure should be utilized. Opponents would say this is a problem because it may lead to unequal treatment of black and white defendants, and that this is inconsistent with color blindness jurisprudence.

Proponents, however, would indicate that the procedure advocated here does not provide for special treatment of one race against another. Instead, the procedure advocated by this essay would also extend to a white defendant who killed a black victim, or any other variance of interracial capital case,[175] or any other permutation of the theory. Further, proponents of this essay may point out that *Turner* already demonstrated that in this context, race is so important that a judge cannot merely ignore race entirely.[176] Thus, the Supreme Court recognized, that far from contradicting the Constitution, taking race into account is actually mandated by the Constitution's guarantee of a fair trial.[177] Therefore, this position is consistent with constitutional notions of fairness, even though it has eyes wide open to race.

C. "Death is Different"[178] Under Turner *and Other Constitutional Precedent*

Finally, *Turner* is part of a body of jurisprudence that commands peremptory strikes only be taken away from prosecutors, known as "death is different" jurisprudence.[179] In criminal law, the American legal system already applies a higher standard of evidence than a civil trial and presumption of innocence in every case because the stakes are high for a

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[174] *See* Bell v. Maryland, 378 U.S. 226, 287–88 (1964) (Goldberg, J., concurring) ("Such a view [that racial discrimination is permitted] does not do justice to a Constitution which is color blind . . . ."); Pagan v. Dubois, 884 F. Supp. 25, 27 (D. Mass. 1995) ("The Equal Protection Clause of the United States Constitution requires that the law be color blind and that no preference nor discrimination be based on race, religion, gender or ethnicity.").

[175] And while the research discussed focuses on black defendants with white victims, the concepts of implicit bias could extend to any permutation of an interracial case. *See* Linder, *supra* note 121, at 888.

[176] *See Turner*, 476 U.S. at 35–37 (adopting a proposal for inter-racial capital cases that is race conscious).

[177] *Id.* at 36.

[178] United States v. Taveras, 424 F. Supp. 2d 446, 457 (E.D.N.Y. 2006), *aff'd in part sub nom.* United States v. Pepin, 514 F.3d 193 (2d Cir. 2008) ("The proposition that 'death is different' is central to the [Supreme] Court's death penalty jurisprudence.").

[179] *Id.*

criminal defendant.[180] In every criminal case, the defendant is at risk of losing his or her liberty, and the importance of this interest requires procedure in favor of the defendant.[181] But "death is different" jurisprudence recognizes that the stakes are even higher, because it is not the defendant's liberty, but his or her very life on the line.[182] Thus, this body of jurisprudence argues that the death penalty "require[s] *extraordinary* procedural protection against error."[183]

One reason for the need for additional procedures is that the finality of the death penalty makes it irreversible if carried out erroneously.[184] Additionally, the death penalty is the most severe punishment.[185] Finally,

> In the words of Justice Stevens, the death sentence "is the one punishment that cannot be prescribed by a rule of law as judges normally understand rules," but is instead an ethical judgment expressing the conscience of the community as to whether "an individual has lost his moral entitlement to live."[186]

Taken together, the finality, severity, and morality arguments indicate that a defendant needs additional procedural safeguards, such as the procedural safeguard proffered here.

Finally, peremptory strikes should only be removed from the prosecution, because the Sixth Amendment right to a fair trial does not extend to the state.[187] Nowhere is the right to a fair trial—one that the defendant holds alone—more important than in a capital case.[188] Thus, the law dictates that this procedural safeguard inhibit prosecutors' peremptory strikes only.

CONCLUSION

The United States' current application of the death penalty has a race problem, whereby black defendants are far more likely to be sent to death row. One reason this problem exists is because of the denial of black jurors from serving on juries in which a black defendant has allegedly killed a white victim. The way in which these black jurors are denied from

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[180] *See* Taylor v. Kentucky, 436 U.S. 478, 486 n.13 (1978).

[181] *See* Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

[182] *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[183] Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 (2004) (emphasis added) (citations omitted).

[184] *Id.* at 118.

[185] *Id.* at 118–19.

[186] *Id.* at 119 (quoting Spaziano v. Florida, 468 U.S. 447, 468–69 (1984) (Stevens, J., concurring in part and dissenting in part)).

[187] *See In re* Kansas City Star Co., 143 F.R.D. 223, 228 (W.D. Mo. 1992).

[188] *See id.*

serving on the jury is through prosecutors' use of peremptory strikes. As a result, the justice system is denied jurors' empathy towards defendants, while the trial may be infected with racial preferences for the victim—the result of which is less careful deliberations. Yet, careful deliberations are especially important in capital cases—so much so that the Supreme Court has already held that under the right to a fair trial, courts must apply special procedures in order to prevent the risk of racial prejudice affecting interracial capital cases.[189] Therefore, considering the risk posed under the right to a fair trial, prosecutors' peremptory strikes should be eliminated.

Perhaps, if such procedure had existed at the time Clarence Lee Brandley was charged on thin evidence, Brandley would never have been convicted. The prosecution would have been unable to peremptorily strike the black jurors, and Brandley would have benefited from the empathy that black jurors could have demonstrated. And the color of Brandley's skin would not have played a role in his death sentence.

[189] Turner v. Murray, 476 U.S. 28, 36–37 (1986).