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*Fourteenth Amendment — Equal Protection Clause —  
Batson Challenges — Flowers v. Mississippi*

The state’s authority to deliver justice is called into question when its officers are not or cannot be held accountable for violating the law.<sup>1</sup> Since the Supreme Court’s 1986 decision in *Batson v. Kentucky*,<sup>2</sup> it has overturned the convictions of four capital defendants on the basis of egregious racial discrimination in jury selection.<sup>3</sup> These cases, along with many others, demonstrate that prosecutorial misconduct in the form of discrimination in jury selection persists despite *Batson*’s call.<sup>4</sup> Prosecutorial misconduct undermines the constitutional guarantee of a fair trial, erodes the “legitimacy of substantive outcomes,” and reduces community confidence in the justice system.<sup>5</sup> Last Term, in *Flowers v. Mississippi*<sup>6</sup> (*Flowers VI*), the Supreme Court overturned the murder

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<sup>1</sup> Instances of this conflict are pervasive. See, e.g., Katie Benner, *Eric Garner’s Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), <https://nyti.ms/2k2SgS6> [<https://perma.cc/X5CH-ANYT>]; Alan Blinder, *New Orleans Prosecutors Accused of Using Fake Subpoenas*, N.Y. TIMES (Oct. 17, 2017), <https://nyti.ms/2zgxuQP> [<https://perma.cc/UX5Z-XBAH>]; Andrew Gawthorpe, Opinion, *The Cost of Kavanaugh’s Victory? The Legitimacy of the U.S. Supreme Court*, THE GUARDIAN (Oct. 7, 2018), <https://www.theguardian.com/commentis-free/2018/oct/07/brett-kavanaugh-victory-high-price-us-supreme-court-republicans> [<https://perma.cc/7NB9-6CGC>]; Michael Wines, *Prosecutors Had the Wrong Man. They Prosecuted Him Anyway*, N.Y. TIMES (Jan. 17, 2018), <https://nyti.ms/2EPEve2> [<https://perma.cc/3XWA-LZD8>].

<sup>2</sup> 476 U.S. 79 (1986). *Batson* held the consideration of race in the exercise of peremptory strikes to violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 89.

<sup>3</sup> See *Foster v. Chatman*, 136 S. Ct. 1737, 1742, 1754–55 (2016) (overturning based on the strikes of two black prospective jurors, “misrepresentations of the record, and the persistent focus on race in the prosecution’s file,” *id.* at 1754); *Snyder v. Louisiana*, 552 U.S. 472, 478–79, 482–83 (2008) (overturning based on the strike of a black juror for reasons found to be illogical, particularly in light of the acceptance of similarly situated white jurors, and a lack of support in the record for the strike based on juror demeanor); *Miller-El v. Dretke*, 545 U.S. 231, 240–46, 253, 266 (2005) (overturning based on a known county policy of excluding black jurors, shuffling the venire panel to exclude black jurors, differential questioning of black and white jurors, the raw number of struck black jurors, striking black jurors similarly situated to white seated jurors, and providing evolving reasons for said strikes that “reek[ed] of afterthought,” *id.* at 246). In each of the above cases Justice Thomas has been in dissent. See *Foster*, 136 S. Ct. at 1761 (Thomas, J., dissenting); *Snyder*, 552 U.S. at 486 (Thomas, J., dissenting); *Miller-El*, 545 U.S. at 274 (Thomas, J., dissenting). The fourth case is the subject of this Comment.

<sup>4</sup> See Camille A. Nelson, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1688–89 (2008); see also Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1102–05 (1994).

<sup>5</sup> Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 577 (2017); see *id.* at 576–77.

<sup>6</sup> 139 S. Ct. 2228 (2019). Throughout this Comment, trials and corresponding cases will be referred to by number: *Flowers I* refers to the first trial and *Flowers v. State (Flowers I)*, 773 So. 2d 309 (Miss. 2000) (en banc); *Flowers II* refers to the second trial and *Flowers v. State (Flowers II)*, 842 So. 2d 531 (Miss. 2003) (en banc); *Flowers III* refers to the third trial and *Flowers v. State (Flowers III)*, 947 So. 2d 910 (Miss. 2007) (en banc); *Flowers IV* refers to the fourth trial; *Flowers V* refers to the fifth trial; and *Flowers VI* refers to the sixth trial, *Flowers v. State (Flowers VI)*, 158 So. 3d 1009 (Miss. 2014) (en banc), *Flowers v. Mississippi (Flowers VI)*, 136 S. Ct. 2157 (2016)

conviction and capital sentence of its fourth criminal defendant, Curtis Flowers, because it found that the State had impermissibly discriminated on the basis of race in jury selection in Flowers's sixth trial.<sup>7</sup> It also held that the Mississippi Supreme Court had committed clear error when it found otherwise.<sup>8</sup> This case was about prosecutorial misconduct. Although the Court arrived at the right conclusion in *Flowers VI*, it has again missed an opportunity to address prosecutorial misconduct both at large and of this type in particular. Looking ahead, there remain few means to curtail it, and those that exist are weak.

On July 16, 1996, four people were murdered in Winona, Mississippi.<sup>9</sup> Winona is a small town in Montgomery County.<sup>10</sup> Its population was just under six thousand people in 1996.<sup>11</sup> The county is majority white,<sup>12</sup> but about fifty-three percent of Winona residents are black.<sup>13</sup> One of the victims was black and three were white.<sup>14</sup> Following weeks without news of any arrest, a family member of one of the deceased called for a conviction, local residents called city hall and pooled thirty thousand dollars as a reward, and the local paper ran the reward on its front page.<sup>15</sup> After six months of investigation, the State identified Curtis Flowers, a black man, as its sole suspect.<sup>16</sup> Since that day, District Attorney Doug Evans has tried Flowers for those murders six times.<sup>17</sup>

Across Flowers's first five trials Evans struck over eighty-five percent of black potential jurors.<sup>18</sup> In *Flowers I*, Evans eliminated all five black potential jurors.<sup>19</sup> In *Flowers II*, Evans struck five of five black potential jurors; one was seated due to the trial court's grant of a defense

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(mem.), *Flowers v. State (Flowers VI)*, 240 So. 3d 1082 (Miss. 2017) (en banc), *Flowers v. Mississippi (Flowers VI)*, 139 S. Ct. 451 (2018) (mem.), and *Flowers v. Mississippi (Flowers VI)*, 139 S. Ct. 2228 (2019).

<sup>7</sup> See *Flowers VI*, 139 S. Ct. at 2235.

<sup>8</sup> *Id.*

<sup>9</sup> *In the Dark: July 16, 1996*, APM REP., at 3:31 (May 1, 2018) (transcript available at <https://sonix.ai/resources/full-transcript-in-the-dark-s2-e1-july-16-1996> [<https://perma.cc/PUJ7-UR7V>]).

<sup>10</sup> *Flowers VI*, 139 S. Ct. at 2251 (Alito, J., concurring).

<sup>11</sup> Public Data, GOOGLE, [https://www.google.com/publicdata/explore?ds=kf7tgg1u0gude\\_&met\\_y=population&idim=sub\\_county:2880760&hl=en&dl=en](https://www.google.com/publicdata/explore?ds=kf7tgg1u0gude_&met_y=population&idim=sub_county:2880760&hl=en&dl=en) [<https://perma.cc/7T2N-D7P7>] (last updated Feb. 14, 2019). By 2017, the population was just over four thousand. *Id.*

<sup>12</sup> See *Flowers III*, 947 So. 2d 910, 936 (Miss. 2007) (en banc) (plurality opinion).

<sup>13</sup> *Flowers VI*, 139 S. Ct. at 2236.

<sup>14</sup> *Id.*

<sup>15</sup> See *In the Dark: July 16, 1996*, *supra* note 9, at 10:05, 11:55.

<sup>16</sup> *Id.* at 14:38; see *Flowers VI*, 139 S. Ct. at 2234.

<sup>17</sup> *Flowers VI*, 139 S. Ct. at 2234. Evans is white. *Id.* at 2236. His name appears nowhere in the opinion.

<sup>18</sup> See *Flowers VI*, 139 S. Ct. at 2236–37. At least thirty-six of forty-two black prospective jurors were struck. See *id.* (noting that the prosecution struck five of five in *Flowers I*, five of five in *Flowers II*, fifteen of sixteen in *Flowers III*, eleven of sixteen in *Flowers IV*, and the lack of information on prospective jurors' races in *Flowers V*).

<sup>19</sup> *Id.* at 2236.

*Batson* motion.<sup>20</sup> In *Flowers III*, Evans exercised all fifteen of the State's peremptory strikes on black potential jurors, seating one.<sup>21</sup> Each of these trials resulted in a conviction by a jury including one or fewer black jurors.<sup>22</sup> Each conviction was overturned by the Mississippi Supreme Court on the basis of prosecutorial misconduct.<sup>23</sup> In *Flowers IV*, Evans used all eleven of the State's peremptory strikes on black potential jurors, seating five.<sup>24</sup> Three black jurors served in *Flowers V*.<sup>25</sup> Trials four and five each resulted in mistrials as the juries were unable to arrive at unanimous verdicts.<sup>26</sup> Only where there were more black potential jurors than the State had peremptory strikes or the trial court granted a *Batson* challenge did a black juror serve.<sup>27</sup>

Flowers's sixth trial, which gave rise to the case before the Court last Term, was in 2010.<sup>28</sup> During jury selection, the State "asked an average of one question to each seated white juror," versus "29 questions to each struck black prospective juror."<sup>29</sup> "[T]he State accepted the first [black] juror, then exercised [five of its] six peremptory strikes . . . against [black jurors]."<sup>30</sup> On these facts, the trial court recognized a prima facie case of discrimination, but accepted the State's race-neutral explanations, which included knowing multiple defense witnesses and working at the same Walmart as the defendant's father.<sup>31</sup> The jury — made up of one black juror and eleven white jurors — convicted Flowers and sentenced him to death.<sup>32</sup>

On appeal, the Mississippi Supreme Court found all of Flowers's claims to be without merit and affirmed his convictions.<sup>33</sup> The court

<sup>20</sup> *Id.*

<sup>21</sup> *Flowers III*, 947 So. 2d 910, 916 (Miss. 2000) (en banc) (plurality opinion).

<sup>22</sup> See *Flowers I*, 773 So. 2d 309, 312, 317 (Miss. 2000) (en banc); *Flowers II*, 842 So. 2d 531, 535 (Miss. 2003) (en banc); *Flowers III*, 947 So. 2d at 916.

<sup>23</sup> See *Flowers I*, 773 So. 2d at 317 (finding the State's "improper[.] . . . trying [of] Flowers for all four murders during a trial for the murder of" only one victim, asking questions in bad faith that lacked factual basis, and making arguments on the basis of evidence that was never admitted sufficient to show that Flowers was denied a fair trial); *Flowers II*, 842 So. 2d at 538 (same); *Flowers III*, 947 So. 2d at 939 (plurality opinion) (reversing based on *Batson*).

<sup>24</sup> *Flowers VI*, 139 S. Ct. at 2237.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Oral Argument at 30:44, *Flowers VI*, 139 S. Ct. 2228 (2019) (No. 17-9572), <https://www.oyez.org/cases/2018/17-9572> [<https://perma.cc/2MY2-LUP8>]; see also *Flowers v. Mississippi*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/flowers-v-mississippi> [<https://perma.cc/8ENU-6SAK>].

<sup>28</sup> *Flowers VI*, 240 So. 3d 1009, 1023 (Miss. 2014) (en banc).

<sup>29</sup> *Flowers VI*, 139 S. Ct. at 2247.

<sup>30</sup> *Flowers VI*, 158 So. 3d at 1047.

<sup>31</sup> See *Flowers VI*, 139 S. Ct. at 2255 (Thomas, J., dissenting); *Flowers VI*, 158 So. 3d at 1047, 1049. Comparable reasons existed for seated white jurors. See *Flowers VI*, 158 So. 3d at 1049.

<sup>32</sup> *Flowers VI*, 139 S. Ct. at 2237.

<sup>33</sup> *Flowers VI*, 158 So. 3d at 1075.

agreed “overall” with Flowers’s claim that Evans employed racially disparate questioning;<sup>34</sup> however, it acknowledged that while “[d]isparate questioning is evidence of purposeful discrimination,” it “alone[] is not dispositive.”<sup>35</sup> With deference to the trial court, the court next found no evidence of discrimination in the differential questioning of black and white potential jurors about their relationships with defense witnesses.<sup>36</sup> Finally, in response to claims that the State “mischaracterized the voir dire responses” and responded differently to similar responses of white and black potential jurors, the court found the State’s proffered race-neutral reasons for striking each of the five black potential jurors not to be pretextual and thus that the trial court had not erred when it denied Flowers’s *Batson* challenge.<sup>37</sup> Three justices dissented, finding the errors occurring in the sixth trial to be “the same” as the errors that had been sufficient for the justices in *Flowers II* and *Flowers III* to reverse Flowers’s convictions.<sup>38</sup>

In 2016, the U.S. Supreme Court granted Flowers’s petition for writ of certiorari, vacated the decision of the Mississippi Supreme Court, and remanded the case for further consideration in light of *Foster v. Chatman*.<sup>39</sup> On remand, the Mississippi Supreme Court reviewed only the *Batson* issue, and, distinguishing Evans’s peremptory strikes against black potential jurors from those in *Foster*, again found that “no *Batson* violation” had occurred.<sup>40</sup> The Mississippi Supreme Court reinstated Flowers’s convictions and affirmed his sentence.<sup>41</sup> In 2018, the U.S.

<sup>34</sup> *Id.* at 1048. Racially disparate questioning typically consisted of the prosecution asking more questions to black potential jurors than to their white counterparts. *See id.* The sole exception was potential black juror Carolyn Wright, who was asked only three questions in individual voir dire. *Id.*

<sup>35</sup> *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003) and *Manning v. State*, 765 So. 2d 516, 520 (Miss. 2000) (en banc)).

<sup>36</sup> *See id.* at 1048–49. Of all the white potential jurors questioned, only one, Pamela Chesteen, knew multiple members of the Flowers family and, although she was not questioned about these relationships by the State, when questioned by the trial court she did say that those relationships would not “affect her ability to serve.” *Id.* at 1048. The State questioned “[s]everal” black potential jurors about their relationships with the Flowers family. *Id.* The one example provided by the court was Alexander Robinson, a black juror who was not questioned by the State about his relationship with Flowers’s brother, and was selected to serve on the jury. *Id.*

<sup>37</sup> *See id.* at 1049–57. Flowers further argued that he was denied a fair trial on the basis of a biased jury venire, supported by, inter alia, a claim that the arrest of two black jurors on perjury charges in his prior trials demonstrated racial bias and “escalated” tension, *id.* at 1060, and that local media coverage of the arrests likely added to that tension. *See id.* at 1058–62.

<sup>38</sup> *Id.* at 1083 (King, J., dissenting); *see id.* at 1076 (Dickinson, P.J., dissenting).

<sup>39</sup> 136 S. Ct. 1737 (2016); *Flowers VI*, 136 S. Ct. 2157, 2157 (2016) (mem.). Justices Alito and Thomas dissented from the remand, stating that the decision in “*Foster* did not change or clarify the *Batson* rule in any way.” *Id.* at 2158 (Alito, J., dissenting from the decision to grant, vacate, and remand).

<sup>40</sup> *Flowers VI*, 240 So. 3d 1082, 1092 (Miss. 2017) (en banc); *see id.* at 1124.

<sup>41</sup> *Id.* at 1092. Four justices dissented, three “find[ing] plain error in the prosecution’s mischaracterizations,” *id.* at 1153 (Waller, C.J., dissenting), and another arrangement of three for the same reason provided in *Flowers II* and *Flowers III*, further supported by *Foster*, *see id.* at 1153–54, 1159 (King, J., dissenting).

Supreme Court granted Flowers's second petition for writ of certiorari to address a singular question: whether the Mississippi Supreme Court erred in determining that discriminatory intent had not substantially motivated the State's use of peremptory strikes to eliminate black potential jurors.<sup>42</sup>

The U.S. Supreme Court reversed and remanded.<sup>43</sup> Writing for the Court, Justice Kavanaugh<sup>44</sup> held that the strike of black prospective juror Carolyn Wright in *Flowers VI* had been substantially motivated by discriminatory intent.<sup>45</sup> The majority opinion proclaimed to “break no new legal ground,”<sup>46</sup> noting that *Batson* “immediately revolutionized the jury selection process”<sup>47</sup> and put an end to the routine strike of black potential jurors in cases with black defendants.<sup>48</sup> The Court stated that applying *Batson* led it to find that, taken together, striking “41 of the 42 black prospective jurors” over the course of the six trials, striking “five of six” in the last trial, “engag[ing] in dramatically disparate questioning of black and white prospective jurors,” and “engag[ing] in disparate treatment of black and white prospective jurors” established clear error on the part of the trial court.<sup>49</sup> Once the Court found discriminatory intent by Evans in the case's history, a presumption of prejudice carried through each subsequent analysis, ultimately landing on a conclusion of pretext in the present case.<sup>50</sup>

Justice Alito wrote a brief concurrence.<sup>51</sup> In it he noted that *Flowers VI* was “a highly unusual case,”<sup>52</sup> and stated that were it not for its unique circumstances — namely the choice “for the case to be tried once again by the same prosecutor in Montgomery County”<sup>53</sup> — he would have affirmed the Mississippi Supreme Court's decision.<sup>54</sup>

Justice Thomas dissented.<sup>55</sup> His dissent objected to the very tool that *Batson* provides on appeal: vacating a conviction on the basis of state court error.<sup>56</sup> Justice Thomas argued that the Court “never should have

<sup>42</sup> See *Flowers VI*, 139 S. Ct. 451 (2018) (mem.).

<sup>43</sup> *Flowers VI*, 139 S. Ct. at 2235.

<sup>44</sup> This opinion was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan.

<sup>45</sup> *Flowers VI*, 139 S. Ct. at 2234–35 (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016)).

<sup>46</sup> *Id.* at 2235.

<sup>47</sup> *Id.* at 2242.

<sup>48</sup> See *id.* at 2242–43, 2251.

<sup>49</sup> *Id.* at 2251.

<sup>50</sup> See *id.* at 2246 (“The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case.”); see also *id.* at 2248, 2250.

<sup>51</sup> *Id.* at 2251 (Alito, J., concurring).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2252.

<sup>54</sup> *Id.* at 2251–52.

<sup>55</sup> *Id.* at 2252 (Thomas, J., dissenting). Justice Gorsuch joined in part.

<sup>56</sup> See *id.* at 2252–53.

taken th[e] case” because there was “no disagreement among the lower courts,” and asserted that “the Mississippi Supreme Court *did* consider the prosecutor’s history.”<sup>57</sup> He took issue with the majority’s reframing of the case and its application of the standard of review.<sup>58</sup> He speculated that the Court’s possible mistrust of southern courts and the media attention surrounding this case may have influenced the decision to grant certiorari.<sup>59</sup>

On the merits, Justice Thomas found “Flowers presented no evidence whatsoever of purposeful race discrimination.”<sup>60</sup> He discounted the majority’s statistical evidence of disparate questioning and accepted the race-neutral reasons proffered by the State for striking black potential jurors.<sup>61</sup> Justice Thomas chided the majority for presuming Evans’s racial motivations.<sup>62</sup> After concluding that there was no valid race discrimination in the present case, he then turned to the case’s history.<sup>63</sup> Here again, Justice Thomas disposed of any claim of racial bias, stating that forty-nine of the State’s fifty strikes were race neutral.<sup>64</sup>

Finally, Justice Thomas called into question the very premise of *Batson*, arguing that it has “forced equal protection principles” on a discretionary trial procedure and “blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.”<sup>65</sup> He challenged the premise that a defendant has standing to assert a *Batson* violation, as a defendant is not “entitled to a jury of any particular composition” and thus has not suffered any “legally cognizable injury.”<sup>66</sup> He urged the Court to return to a “pre-*Batson* understanding”<sup>67</sup> that allows race to be a consideration in peremptory challenges, and argued against the elimination of peremptory strikes.<sup>68</sup> Citing studies in support of his proposition, Justice Thomas stated: “The racial composition of a jury matters because racial biases, sympathies, and prejudices still exist.”<sup>69</sup>

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<sup>57</sup> *Id.* at 2253.

<sup>58</sup> *Id.* at 2266.

<sup>59</sup> *Id.* at 2254.

<sup>60</sup> *Id.* at 2255.

<sup>61</sup> *See id.* at 2261–63.

<sup>62</sup> *See id.* at 2265 n.9 (“I would not so blithely impute single-minded racism to others. Doing so cheapens actual cases of discrimination.”).

<sup>63</sup> *Id.* at 2266.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2269. Justice Gorsuch did not join this portion of the dissent. *Id.* at 2252.

<sup>66</sup> *Id.* at 2270 (quoting *Holland v. Illinois*, 493 U.S. 474, 483 (1990)).

<sup>67</sup> *Id.* at 2271.

<sup>68</sup> *See id.* at 2271–73 (“I would return to our pre-*Batson* understanding — that race matters in the courtroom — and thereby return to litigants one of the most important tools to combat prejudice in their cases.” *Id.* at 2271.). This is contrary to Justice Marshall’s bold stance in *Batson*, which called for the complete elimination of peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79, 102–03 (Marshall, J., concurring).

<sup>69</sup> *Flowers VI*, 139 S. Ct. at 2274 (Thomas, J., dissenting); *see id.* at n.13.

In closing, Justice Thomas reminded the Court of possibly the most consequential outcome of its decision: “The State is perfectly free to convict Curtis Flowers again.”<sup>70</sup>

In *Flowers VI*, Justice Kavanaugh exalted *Batson* for delivering the mechanism to eradicate discrimination in jury selection.<sup>71</sup> However, evidence shows<sup>72</sup> and this case exemplifies that it has not. As Justice Marshall predicted in his concurrence to the *Batson* decision, *Batson* is an ineffective tool for eradicating racial bias.<sup>73</sup> And though the Court’s application delivered the correct result in this case, it continues to overlook the need to address prosecutorial misconduct. Absent future action, the prospect of holding prosecutors accountable for even those constitutional violations that rise to the recognition of the Supreme Court is bleak. There exist no meaningful remedies to ensure that a guilty prosecutor does not violate the law again.

The Court in *Batson* held that the Constitution forbids prosecutors from striking “potential jurors solely on account of their race”<sup>74</sup> and set out a procedure for challenging bias in juror selection — the results of which can vary from a denial of the challenge to overturning an entire conviction on appeal.<sup>75</sup> Prior to *Batson*, defendants faced a “nearly insurmountable burden” to prove state discrimination in the exercise of peremptory strikes.<sup>76</sup> A defendant was required to show that the State had a practice of routinely eliminating black potential jurors such that

<sup>70</sup> *Id.* at 2274.

<sup>71</sup> *See id.* at 2241–43 (majority opinion). *But see* Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 YALE L.J. 187, 207 (1989) (“Courts . . . should go beyond *Batson* . . . to secure the rights of defendants, the excluded jurors, and the community and provide[] both fairness and the appearance of fairness, fundamental values in the American criminal justice system.” (footnotes omitted)).

<sup>72</sup> *See, e.g.*, 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) (documenting persistent racial bias in capital juries in Philadelphia after *Batson*); William J. Bowers et al., *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, 241–44 (2001) (documenting racial bias by capital jurors); *see also* Samuel R. Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3 U. PA. J. CONST. L. 283, 288–90 (2001) (summarizing studies).

<sup>73</sup> *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring) (“The decision . . . will not end the racial discrimination that peremptories inject into [jury selection].”).

<sup>74</sup> *Id.* at 89 (majority opinion).

<sup>75</sup> *See id.* at 99 n.24. *Batson*’s protections have since been extended to cover strikes that are based on gender or any race, that are initiated by criminal defendants, and that arise in civil cases. *Flowers VI*, 139 S. Ct. at 2243 (summarizing *Batson*’s progeny). While the Court in *Batson* provided lower courts a means to challenge bias, it was not prescriptive as to how each court must implement its holding. *Batson*, 476 U.S. at 99 n.24.

<sup>76</sup> Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 365 (1990) (“[Under the Court’s pre-*Batson* doctrine], only two cases succeeded in establishing a prima facie showing of discriminatory use of peremptory challenges by the prosecution.”); *see also Batson*, 476 U.S. at 92–93.

none was ever permitted to serve.<sup>77</sup> *Batson* allowed defendants to demonstrate bias based on their case alone.<sup>78</sup> Under *Batson*, the Supreme Court has recognized violations where side-by-side comparisons of black dismissed jurors and white seated jurors demonstrated that no rational difference other than race justified the strike.<sup>79</sup> It has also recognized violations where the proffered reason changes over time or is objectively false.<sup>80</sup>

Justice Kavanaugh, in *Flowers VI*, framed *Batson* as a revolutionary case for providing an effective means of eliminating discrimination in jury selection.<sup>81</sup> Throughout the opinion, he emphasized that the Court was only “enforc[ing] and reinforc[ing] *Batson* by applying it to [this case’s] extraordinary facts.”<sup>82</sup> Across *Flowers*’s five prior trials, the trial court and Mississippi Supreme Court did the same. In *Flowers II*, the trial court sustained a *Batson* challenge, finding the State to have proffered a reason for striking a black potential juror that was “a pretext for discrimination.”<sup>83</sup> In *Flowers III*, the Mississippi Supreme Court reversed *Flowers*’s murder conviction, finding the State to have again “engaged in racial[] discriminat[ion]” during jury selection.<sup>84</sup> Four justices agreed that the case presented “as strong a prima facie case of racial discrimination as [the court] ha[d] ever seen in the context of a *Batson* challenge”<sup>85</sup> and threatened to abolish peremptory challenges if the State did not stop “racially profiling jurors.”<sup>86</sup>

Evidence, however, does not support the assertion that *Batson* has eradicated discrimination in jury selection. Scholars have pointed out that there are very limited circumstances in which a *Batson* challenge is likely to prevail: where the “attorney admits to a racial motivation” or their explanation is obviously pretext.<sup>87</sup> The former is unlikely, not only

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<sup>77</sup> *Swain v. Alabama*, 380 U.S. 202, 223–24 (1965).

<sup>78</sup> *Batson*, 476 U.S. at 96.

<sup>79</sup> See *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (finding a *Batson* violation where proffered race-neutral reasons were logically implausible and the struck black juror was similarly situated to a seated white juror).

<sup>80</sup> See *Foster v. Chatman*, 136 S. Ct. 1737, 1749–51 (2016) (finding a *Batson* violation where the reasons the State provided for striking two black jurors were either “contradicted by the record,” *id.* at 1750, applied equally to accepted white jurors, or evolved over the course of litigation).

<sup>81</sup> *Flowers VI*, 139 S. Ct. at 2235, 2242.

<sup>82</sup> *Id.* at 2235, 2251.

<sup>83</sup> *Id.* at 2236.

<sup>84</sup> *Flowers III*, 947 So. 2d 910, 939 (Miss. 2007) (en banc) (plurality opinion).

<sup>85</sup> *Id.* at 935.

<sup>86</sup> *Id.* at 939. The fifth justice to join in the judgment found error only in the aggregate, considering the *Batson* issue cumulatively with other errors raised. See *id.* at 940–41 (Cobb, P.J., concurring in result only).

<sup>87</sup> 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, 1102 (2011); see also, e.g., Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502–03 (1996).

because a lawyer might be acting on implicit bias, but also because studies show that people are conditioned to provide neutral explanations for decisions they know to be influenced by their own biases.<sup>88</sup>

In *Flowers VI*, the Court refused to indicate how it weighed the four factors leading to its decision,<sup>89</sup> and thus did nothing to clarify the law or strengthen *Batson*. A future defendant who is tried only three times by Doug Evans might not see relief if only twenty-four of thirty minority prospective jurors are struck, even if all minority jurors were eliminated in the third trial. At oral argument, Justices Alito and Sotomayor pressed the State on why a single prosecutor had been allowed to try the case six times.<sup>90</sup> Counsel explained that in Mississippi a district attorney must request the state attorney general to assist or take over prosecution of a trial in order for the State to do so, and that Evans had not so requested in this case.<sup>91</sup> Had Evans successfully eliminated all but one minority person from each jury but asked the same number of questions to each potential juror, varying questions by juror to elucidate answers that would support strikes of only the minority jurors, *Flowers VI* might not have required a finding of purposeful discrimination.

In the rare event that a prosecutor is found to have committed a *Batson* violation, there are few available responses, and none have proven effective. Elections, for example, can be a powerful tool with an engaged electorate, but often fail to hold district attorneys accountable. A study published in 2010 found that over 80% of incumbent prosecutors run unopposed.<sup>92</sup> In 2018, the nationally acclaimed podcast *In the Dark* spent an entire season investigating the *Flowers* trials, unearthing evidence that casts doubt on the factual foundations of Flowers's convictions and on Evans's practices.<sup>93</sup> The following year, Doug Evans ran unopposed.<sup>94</sup>

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<sup>88</sup> See Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 47 (2006). Observing the insufficiency of *Batson* alone, in 2018 the Washington Supreme Court adopted a rule to "eliminat[e] both implicit and intentional racial bias in jury selection." *Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, ACLU OF WASH. (Apr. 9, 2018), <https://www.aclu-wa.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection> [<https://perma.cc/E6WP-4764>].

<sup>89</sup> *Flowers VI*, 139 S. Ct. at 2235 ("We need not and do not decide that any one of those four facts alone would require reversal.")

<sup>90</sup> Oral Argument, *supra* note 27, at 27:03, 51:40.

<sup>91</sup> *Id.* at 27:21.

<sup>92</sup> Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 807 & n.18 (2010) (basing findings on a survey of twelve states' prosecutorial elections between 1996 and 2008).

<sup>93</sup> See, e.g., Sarah Larson, *Why "In the Dark" May Be the Best Podcast of the Year*, NEW YORKER (June 1, 2018), <https://www.newyorker.com/culture/podcast-dept/why-in-the-dark-may-be-the-best-podcast-of-the-year> [<https://perma.cc/EUM3-NUF5>]; *In the Dark: July 16, 1996*, *supra* note 9.

<sup>94</sup> Alissa Zhu, *Who Is Doug Evans, the Mississippi District Attorney Who Tried Curtis Flowers Six Times?*, CLARION-LEDGER (June 21, 2019, 9:53 AM), <https://www.clarionledger.com/>

Further, where elections have been effective at unseating disfavored public officials, it has often been the case that those officials were seen as “soft” rather than “tough on crime” like Evans.<sup>95</sup> Professional sanctions are similarly ineffective remedies for prosecutorial misconduct because they are often politically and strategically disadvantageous to those in the best position to file a claim.<sup>96</sup> In Mississippi, sanctions are not widely publicized and a prosecutor “found to have engaged in intentional and unconstitutional racial discrimination in jury selection . . . would not necessarily face any form of professional discipline.”<sup>97</sup> Private action offers no better resolution. Absolute immunity protects prosecutors from civil suits for monetary compensation when their unlawful conduct is related to “initiating a prosecution” or “presenting the State’s case.”<sup>98</sup>

Where there is a right, our system of justice promises a remedy.<sup>99</sup> When the heralded remedy does not redress the wrong, it cannot not be considered a remedy, and the Constitution as well as the legitimacy of our justice system requires more. The history of *Flowers* demonstrates how a prosecutor may easily evade *Batson*; but even where one is found to have violated it, there exist no meaningful remedies to ensure that the guilty prosecutor does not violate the law again. Overturning convictions is insufficient deterrence. In order to preserve community confidence in the fairness of the justice system and uphold defendants’ right to a fair trial, stronger remedies for prosecutorial misconduct are required.

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story/news/2019/03/21/doug-evans-mississippi-winona-district-attorney-curtis-flowers/3227830002 [https://perma.cc/CG33-ZKL5].

<sup>95</sup> See, e.g., RACHEL BARKOW, PRISONERS OF POLITICS 6 (2019); Recent Election, *Sexual Assault Law — Judicial Recall — California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369, 1371–72 (2019); Wallace Turner, *California’s Chief Justice Is Facing a Recall Move*, N.Y. TIMES (Nov. 15, 1982), <https://nyti.ms/29KJy1U> [https://perma.cc/3BD9-65YS]. That said, several so-called “progressive prosecutors” have ridden the wave of a growing criminal justice reform movement into district attorney offices across the country in recent years, unseating their “punitive . . . predecessors.” Taylor Pendergrass & Janos Marton, *How Progressive Prosecutors Can Transform the Criminal Justice System*, BOS. GLOBE (July 15, 2019, 5:00 AM), <https://www.bostonglobe.com/opinion/2019/07/15/how-progressive-prosecutors-can-transform-criminal-justice-sytem/ecA7BqJNfN5T2JAXJTvzLK/story.html> [https://perma.cc/2CFC-D0TL]. While this demonstrates the potential for positive prosecutorial change at the ballot box, many remain critical of these prosecutors’ ability to deliver the transformative change the system needs. *Id.*; see also Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 750 (2018).

<sup>96</sup> David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 210–11 (2011), <https://www.yalelawjournal.org/forum/the-myth-of-prosecutorial-accountability-after-connick-v-thompson-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct> [https://perma.cc/62W6-YW4M]; see also Parker Yesko, *Why Don’t Prosecutors Get Disciplined?*, APM REP. (Sept. 18, 2018), <https://www.apmreports.org/story/2018/09/18/why-dont-prosecutors-get-disciplined> [https://perma.cc/FQ8K-YPBT].

<sup>97</sup> Yesko, *supra* note 96.

<sup>98</sup> *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

<sup>99</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).