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The Batson Challenge: Evidence, Court Opacity, and Discrimination Before the Supreme Court

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The *Batson* Challenge: Evidence, Court Opacity, and Discrimination Before the Supreme Court

Kaitlyn Filip†

Abstract

Research shows that *Batson v. Kentucky* has been largely toothless in terms of creating diverse juries and that the presence of jurors of color, in the event that they are included, can be the difference between acquittal and conviction or, in capital trials, life and death. *Batson* fails to uproot the legacy of white supremacist logics embedded in the criminal legal system, as evidenced through patterns and practices of race-based discrimination in the selection of jurors. The use of *Batson* challenges for creating more equitable trials for defendants of color is greatly contested by scholars. This Article reexamines *Batson* as an evidentiary question and argues that the logic of *Batson*—and the cases that follow—structurally limits courts in a way that reaffirms discriminatory patterns rather than alleviating them.

This Article examines *Batson* and the 2019 case *Flowers v. Mississippi,* focusing how the Supreme Court constructs the evidentiary standard for establishing discriminatory intent in striking potential jurors. I develop the concept of "court opacity," arguing that although the courts are meant to be theoretically public spaces, they are in fact deeply closed off, thus underscoring the impossibility of establishing intent. *Flowers* is illustrative of both our understanding of how systemic discrimination works as well as an example of how the Supreme Court forecloses even that remote option. Using racial bias in jury selection as a case study, I call for increased court transparency in the collection and publication of court data in order to alleviate some of the structural burdens on establishing discrimination.

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Introduction

A. The Tardy Furniture Murders

On July 16, 1996, four people, three of whom were white, were murdered in a furniture store (Tardy Furniture) in Winona, Mississippi, where a Black man, Curtis Flowers, had worked for four days over the preceding month.[1] The state claimed that Flowers killed the people in Tardy Furniture as revenge for being fired—that he broke into a car, stole a gun, and walked to Tardy where he killed four people and then walked back home.[2] There were no witnesses, the physical evidence did not directly connect to Flowers in particular, and Flowers claimed that he had an alibi and had not, in fact, been fired at all.[3] He was arrested and tried, where the jury deliberated for only sixty-six minutes before sentencing him to death.[4]

Although the case drew substantial attention in Winona, Mississippi, at the time because of the number of victims, the respectability of the establishment (it was on the "good side" of town), and the delay between murder and arrest, this is not a particularly noteworthy case.[5] Black men are regularly arrested for gun violence or in connection to harms against white people without substantial evidence.[6] If anything, it was the existence of a trial that was strange, as approximately 94% of state felony convictions are the result of plea bargains.[7] In addition, there are several state-controlled off-ramps following an arrest that offer alternatives to a full trial.[8]

What made Curtis Flowers's case remarkable is that he went to trial for the same crime five additional times following this initial

1. Flowers v. Mississippi, 139 S. Ct. 2228, 2232 (2019); In the Dark, *S2 E1: July 16, 1996,* APM REPS. (May 1, 2018), https://www.apmreports.org/episode/2018/05/01/in-the-dark-s2e1 [https://perma.cc/2S2U-QBSN] [hereinafter *Episode 1: July 16, 1996*].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Samuel R. Gross, Maurice Possley, Ken Otterbourg, Klara Stephens, Jessica Weinstock Paredes & Barbara O'Brien, *Race and Wrongful Convictions in the United States: 2022*, NAT'L REGISTRY EXONERATIONS (Sept. 2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf [https://perma.cc/G7Y5-N88M].

7. *The Truth About Trials*, MARSHALL PROJECT https://www.themarshallproject.org/2020/11/04/the-truth-about-trials [https://perma.cc/9ZQG-ALNK].

8. *Id.*

sentencing.[9] After the first trial—and the two subsequent ones—the Mississippi Supreme Court overturned his conviction based on prosecutorial misconduct.[10] Trials four and five never reached a verdict: the jury was deadlocked.[11] The sixth trial resulted in a conviction, this time upheld by the Mississippi Supreme Court but ultimately reversed by the Supreme Court of the United States.[12] At each re-trial, the prosecutor (the same each time, Doug Evans) was able to decide whether or not to re-try the case.[13] Although there is no national accounting for this phenomenon, it is generally agreed to be incredibly rare, and even unheard of, at this stage.[14] When it does happen, it is often for instances such as trials four and five, where the jury has not reached a verdict.[15]

Even stranger than the sheer volume of trials, Flowers's conviction was repeatedly overturned for the same issue: racial bias on the part of the prosecutor in *voir dire,* i.e., jury selection.[16] This process, in theory, is supposed to be selected on race-neutral grounds: the 1986 Supreme Court case *Batson v. Kentucky* grants a right of action for one party (often the defense) to challenge another party's decision-making in jury selection.[17] The presumptive logic here rests in part on the idea that the right to serve on a jury is a fundamental right that cannot be denied on the basis of race.[18] *Batson v. Kentucky* introduced a protective mechanism for parties to enforce that right. This right is, to the best of our collective legal knowledge, generally believed to have overwhelmingly failed to address the problem of bias in the criminal courtroom, and it certainly does not function to uproot biased jurors.[19] Few criminal

9. *Episode 1: July 16, 1996, supra* note 1.

10. Flowers v. Mississippi, 139 S. Ct. 2228, 2232 (2019).

11. *Id*.

12. *Id*.

13. In the Dark, *S2 E7: The Trials of Curtis Flowers,* APM REPS. (June 5, 2018), https://www.apmreports.org/episode/2018/06/05/in-the-dark-s2e7 [https://perma.cc/A4D2-JUZD] [hereinafter *Episode 7: The Trials of Curtis Flowers*].

14. *See id.*; In the Dark, *S2 E8: The D.A.,* APM REPS. (June 12, 2018), https://www.apmreports.org/episode/2018/06/12/in-the-dark-s2e8 [https://perma.cc/C4VN-75D6] [hereinafter *Episode 8: The D.A.*].

15. Parker Yesko, *How Can Someone Be Tried Six Times for the Same Crime?,* APM REPS. (May 1, 2018), https://www.apmreports.org/story/2018/05/01/how-can-someone-be-tried-six-times-for-the-same-crime [https://perma.cc/TG3G-R5GL].

16. Flowers v. Mississippi, 139 S. Ct. 2228, 2232 (2019).

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

18. *Id*.

19. Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818–19 (1993); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462–64 (1996); Tania Tetlow,

cases go to trial and, of overall challenges to peremptory strikes, few are *Batson* challenges. Many of those are unsuccessful, in part because of the extreme difficulty in establishing the intentional racial animus of the prosecutor in their decision-making.[20] Few appellate cases even cite *Batson v. Kentucky*, other than those that ultimately made it to the Supreme Court for the purpose of clarifying that initial decision, suggesting that it is an infrequent recourse for defendants in appealing convictions.

Flowers's case becomes more remarkable because it was extensively covered during the appellate process following the sixth trial (and fourth conviction) by reporters for the second season of a true crime podcast for American Public Media, *In the Dark*.[21] The podcast, hosted by Madeleine Baran, covered the facts of the Flowers case over the course of twenty hour-long episodes.[22] During their investigation the *In the Dark* team delved deep into the *Batson* challenge issue that instigated most of the re-trials, spending a considerable amount of time on the particulars of the prosecutor's behavior in the case[23] Baran and her team went in person to examine transcripts of criminal jury trials in central Mississippi over twenty-six years.[24] Baran found that the prosecutor on the Flowers case, Doug Evans, when he was the lead prosecutor over those years, had a history of striking Black jurors at a much higher rate than white jurors.[25]

Solving Batson, 56 WM. & MARY L. REV. 1859, 1859 (2014); Tania Tetlow, *Why* Batson *Misses the Point*, 97 IOWA L. REV. 1713, 1714 (2012); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 503 (1999).

20. Melilli, *supra* note 19; Cavise, *supra* note 19, at 530–32.

21. *Episode 1: July 16, 1996*, *supra* note 1.

22. *Id.*

23. *Id.*; *Episode 7: The Trials of Curtis Flowers*; *Episode 8: The D.A.*; In the Dark, *S2 E11: The End*, APM REPS. (July 3, 2018), https://www.apmreports.org/episode/2018/07/03/in-the-dark-s2e11 [https://perma.cc/6SEU-3JEL] [hereinafter *Episode 11: The End*]; In the Dark, *S2 E12: Before the Court*, APM REPS. (Mar. 19, 2019), https://www.apmreports.org/episode/2019/03/19/in-the-dark-s2e12 [https://perma.cc/9MRJ-KA26] [hereinafter *Episode 12: Before the Court*]; In the Dark, *S2 E13: Oral Arguments*, APM REPS. (Mar. 26, 2019), https://www.apmreports.org/episode/2019/03/26/in-the-dark-s2e13 [https://perma.cc/B4A8-RHCL] [hereinafter *Episode 13: Oral Arguments*]; In the Dark, *S2 E14: The Decision*, APM REPS. (June 21, 2019), https://www.apmreports.org/episode/2019/06/21/curtis-flowers-wins-scotus-appeal [https://perma.cc/D7AM-LQDL] [hereinafter *Episode 14: The Decision*].

24. *Episode 8: The D.A.*; Will Craft, *Mississippi D.A. Doug Evans Has Long History of Striking Black People from Juries*, APM REPS. (June 12, 2018), https://features.apmreports.org/in-the-dark/mississippi-da-doug-evans-striking-black-people-from-juries/ [https://perma.cc/88UF-VRCB].

25. *Id.* His office struck Black people from juries at about 4.5 times the rate it

This extensive data work, collecting information on 6,700 jurors in 225 trials, was not used by the Supreme Court in *Flowers v. Mississippi* to establish the grounds for the vacating of the conviction in the sixth and (so far) final trial of Curtis Flowers.[26] The Supreme Court in *Flowers* instead heard the *Batson* issue only as it appeared in that case. Although this case was an opportunity to clarify thirty-three years of cases on racial bias in jury selection and to determine if patterns and practice of discrimination over a prosecutor's entire career can be used to establish plausible discrimination in a particular instance against a particular juror or criminal defendant, the Supreme Court did not take that opportunity. However, *Flowers* is still fundamentally a case about how respondents are able to prove discrimination and the types of evidence available for that purpose.

Because of the extraordinary nature of the case, and the work of investigative journalists in bringing it before the Supreme Court in the first place, it is also a test case on how court transparency could plausibly work. *Flowers v. Mississippi* serves as an example of unique, unprecedented, and irreplicable data access making a difference in a court case on what is, ultimately, a civil rights issue. The story told through the Supreme Court cases on racial discrimination in jury selection between *Batson v. Kentucky*, in 1986, and *Flowers v. Mississippi*, in 2019, is ultimately a story of the role court data management plays in racial equity and access to justice.

In this Article, I do two things. First, I argue that the way the Supreme Court handles discrimination in jury selection between *Batson v. Kentucky* and *Flowers v. Mississippi* is ultimately a depiction of failed opportunity. I do a close reading of the cases in what I call the *Batson* case trajectory, focusing on the 'Third Step' to argue that the logic of the Supreme Court's standards for proving discrimination ultimately rests on a failure to uproot the discrimination embedded within the system. That is, I contribute to the scholarship on the failure of *Batson* to produce equitable criminal jury trials, while also arguing that the failure of the Supreme Court to actually overturn prior cases leads to a reform-logic shift in discrimination law that ultimately preserves discrimination rather than rooting it out.

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struck white people, striking 50% of eligible Black jurors compared to 11% of eligible white jurors.

26. Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019) (describing the four categories of evidence that the Supreme Court balanced in its decision, all of which are sourced from Flowers's various trials).

Second, I argue that the reform-logic shift to evidentiary standards for proving discriminatory intent, rather than to solving systemic discrimination, underscores a fundamental problem of what I call 'court opacity.' I argue that the court system, despite being theoretically public and open, is closed in practice. This closure, rather than being protective of privacy rights, is instead a source of tremendous inequity within the court system. In this instance, even when the courts are supposedly meant to alleviate discrimination within the system, the nature of court opacity meaningfully constrains that process to limit court equity. That is, representational interventions such as *Batson v. Kentucky* purportedly meant to relieve racial animus within the system are constrained by the system's own closure. Here, I will look specifically at how the Supreme Court handles historical systemic data about bias in jury selection, and how the shifting standards discussed above work with a presupposition that open courts are not possible. What the Court in *Batson* calls insurmountable as a data production burden and reifies in *Flowers* is only insurmountable through its own construction. Yet, this logic undergirds the very failures embedded in the *Batson* case trajectory.

In this Article, I use the *Batson* case trajectory as a case study to analyze how discrimination law is constrained from two directions: by embedded bad prior decisions from the Court and the Court's reliance on constrained data production as a functional normality of the system.

B. Rights, Juries, and the Public

In this Article, I argue that *Batson v. Kentucky* is a case in which the Supreme Court affirmatively, though narrowly, grants a particular right to criminal defendants: a jury that is not *explicitly* and deliberately chosen on the basis of race. *Batson* does not guarantee a right to a jury that does not use racial bias in their decision-making; the Supreme Court does not, in fact, ever touch on that issue.[27] *Batson* does not guarantee the idea of a jury of one's

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27. Scholarship on the issue of racial bias in jury decision-making is thin, as most jury decision-making scholarship focuses exclusively on the jury's ability to understand instructions. *See, e.g.*, Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818–19 (1993); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462–64 (1996); Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1859 (2014); Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1714 (2012); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the*

peers. *Batson* does not guarantee racially proportionate representation on juries; that is, the Supreme Court does not require that the racial demographics of juries represent the racial demographics of the county where the case is being heard.[28] All *Batson* does guarantee is that jurors should not be deliberately excluded from service on the basis of race and, more importantly, confirm that race-based exclusion from service on a jury is a constitutional violation sufficient to overturn a conviction should the defense be capable of establishing that this has happened.[29] This logic rests largely on the idea that jurors have a constitutionally protected right to serve and cannot, per the Fourteenth Amendment, be excluded from service on the basis of race.[30]

Furthermore, *Batson* is largely irrelevant to most criminal cases. The life cycle of a criminal case, beginning at arrest, offers numerous off-ramps on the path to a jury trial, with prosecutorial discretion in charging and plea bargaining having the largest impact on circumventing jury trials. Although we lack robust statistics on the exact proportion of arrests that result in criminal jury trials, it is estimated that as little as 2% of criminal cases are jury trials.[31] Within those cases that do involve a jury, procedural issues with the composition of the jury are infrequently cited. Even then, racial bias is not always the driving factor as *Batson* has been broadly interpreted to include gender.[32]

As an affirmative granting of rights, *Batson* is, on its face, already extremely limited. It covers only a small proportion of ways in which jury trials can result in discrimination for defendants, jury trials themselves comprising only a small proportion of ways in which criminal procedure more broadly can result in discrimination for defendants. For example, people of color are more likely to be

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Challenge of Discrimination in Jury Selection, 1999 WIS. L. REV. 501, 503 (1999).

28. Holland v. Illinois, 493 U.S. 474, 480 (1990) ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does).").

29. Batson v. Kentucky, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed.").

30. *Id*. at 88 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

31. Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 31–32 (2017) (providing statistics on criminal jury trials for the four largest U.S. states (Texas, California, Florida, and Pennsylvania) over four years).

32. Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019) (citing J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127 (1994)).

arrested and charged than white people.[33] Both prosecutorial discretion and selective application of statutory provisions seem to result in discriminatory treatment for defendants of color.[34] Studies show that sentencing is often more favorable to white criminal defendants.[35] Furthermore, as I mentioned above, *Batson* does not protect against discriminatory treatment from the jury, just discriminatory treatment of the jury; jurors themselves are still allowed to make decisions based on racial animus.

I emphasize that *Batson* is a very small piece of the criminal defense puzzle not only to contextualize the case itself as non-revolutionary for defendants' rights, but also to show the scope of the mechanism that I discuss in this Article. The *Batson* story, as I tell it, culminates in one man being released from prison after substantial additional intervention from a team of investigative journalists and an unprecedented volume of evidence from prior trials of the same case. This story colors the scope and implications of the opacity/transparency argument. Transparency itself does not resolve inequities in the court but can offer opportunities to do better, more precise advocacy without substantial outside intervention. Here, justice within the criminal legal system relied on hours of manual work from journalists for a negligible result.

Viewing *Batson* as a case study emphasizes how, although knowledge limitations—opacity—necessarily constrain representative interventions, transparency is insufficient for radical criminal legal systems change or even minimal reform. I argue that transparency offers more opportunities for intervention, particularly if that transparency can be normalized and made widespread. In the *Flowers* story, a modicum of transparency—a very small amount of data—is contingent on the affirmative advocacy of investigative journalists. Public access to court information ought to be a normal feature of the criminal legal system that facilitates justice, rather than something contingent a third-party advocate.

My use of this case study rests on an important fundamental assumption: the criminal defendant is a part of the public that, I argue, is unfairly denied access to court information. In this Article,

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33. Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/blog/2020/07/27/disparities/ [https://perma.cc/TWX7-MDE8].

34. *Id.*

35. ASHLEY NELLIS, SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 14 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/556F-8SXA].

I resist the Supreme Court's move in *Batson* to shift the rights framing from the defendant to the juror. Instead, I emphasize a way of thinking about the right of the defendant not solely as a defendant but also an ordinary citizen. This Article puts two different types of Constitutional rights in conversation: the rights afforded to the public, in general, as pertaining to the courts; and the rights afforded to the criminal defendant, in particular, as pertaining to a specific case. I argue that, in cases like *Batson* and *Flowers*, these Constitutional protections are best understood as entwined. As I argue throughout this Article for mass availability of criminal jury trial transcripts, I acknowledge that the average citizen who is unconnected to the legal system is unlikely to pursue them. Still, my aim here is, in part, to collapse the distinction between 'citizen' (or 'public') and 'defendant.'

Finally, the *Batson* story is an epistemological and evidentiary story of criminal defense that takes many of the ordinary markers or tropes of crime stories and reworks them. Kat Albrecht and I argue elsewhere that the true crime podcast landscape is dominated by narratives of guilt and innocence.[36] Furthermore, we argue that these stories are tied to depictions of cases as ordinary or extraordinary in a way that reifies the idea of a normally functioning criminal legal system.[37] In other words, true crime stories often tie narratives of innocence with narratives of a break from the ordinary functioning of the legal system, ultimately suggesting that the mechanisms by which the criminal legal system convicts and incarcerates are ordinarily fair, just, or accurate. In this Article, I look at how those stories are enacted through criminal procedure and then retold in the public sphere.

This Article begins in Part I with a discussion of how current scholarship understands and talks about *Batson v. Kentucky* and other cases on discrimination and jury selection. Part II outlines *Batson v. Kentucky* itself, closely analyzing the case to better understand how discrimination law functions before the Court in this particular instance. Part II(B) examines the Step Three cases that follow *Batson*, whereby the defense must respond to the prosecution's non-discriminatory reason for a strike by establishing discriminatory intent. I dissect the logic of the rebuttal and argue that emphasizing the evidentiary burden re-entrenches

36. Kat Albrecht & Kaitlyn Filip, *The Serial Effect*, 53 N.M. L. REV. 29, 49–67 (2023) (arguing that narratives of guilt or innocence as perpetuated by true crime media can have a salient impact on criminal legal proceedings, including systemically disadvantaging the defense).

37. *Id.*

discrimination within the system. Part III then turns to *Flowers v. Mississippi* as the most recent case on racial discrimination in jury selection. Here, I argue that the specter of court opacity haunts discrimination law. I examine how the Court continuously moves the goal post on the idea of having a history of discriminatory behavior in the record and ask what that means for the availability of particular arguments before the Court. Finally, I conclude by unpacking court opacity more broadly and return to the media coverage of *Flowers v. Mississippi* to look at the relationship between knowledge and publicity.

I. Literature Review: Rhetorical and Legal Academic Interventions on the Supreme Court

In this Article, I conduct a content analysis of a series of cases from *Batson v. Kentucky* to *Flowers v. Mississippi* concerning the Supreme Court's internal conversations about racial discrimination in jury selection. In doing so, I consider the Supreme Court's internal conversations across time and examine the impact of those conversations on arguments before the Court. Furthermore, I consider the role of cultural discourse—particularly popular media and journalism—on the Supreme Court's reasoning and argumentative potential. This analysis follows two existent strands of law and rhetoric scholarship. First, there exists a wealth of work on the internal conversations of the Supreme Court in particular. Although most of this work does not involve conversations wherein the same material case is being reexamined (not an entirely uncommon activity for the Court) a lot of this work still draws on patterns over time. Second, I engage with law and rhetoric scholarship focusing on the role of the media in the court system.

Rhetoric scholars have looked at some of the body of what I would call "the discrimination cases." These are Supreme Court cases involving a matter that directly affects a group on the basis of "race, color, religion, sex, or national origin" or ability status.[38] Much of this work operates under the analytical assumption that the work of a Supreme Court opinion in these cases is to grant or confer rights, and that this work is often done rhetorically.[39]

38. *See generally* Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (1964) (outlining the categories—inclusive of sexual orientation and gender identity as "on the basis of sex"—under which the Supreme Court has heard discrimination cases outside those pertaining to ability per the Americans with Disabilities Act); Americans with Disabilities Act, 42 U.S.C. § 12102 (1990) (defining disability, inclusive of pregnancy).

39. *See* Gibson, *infra* note 47; *but see* Cmiel, *infra* note 59 (finding that the discrimination cases are fundamentally not rights-granting).

Instead, I take a substantially zoomed out, sociological view of the text of Supreme Court opinions, looking at how those cases come to appear before the Court, who the other actors are, and what the social and political impact of those opinions is or could be (when possible).

Gerald N. Rosenberg argues that it is difficult to impossible to generate substantial reform through litigation.[40] In his book, he responds to a common assumption that even unsuccessful litigation can be used to advance a cause through publicity and specifically points to *Brown* and *Roe* as case studies.[41] He argues that the scholarly emphasis on *Brown* underemphasizes the work of the civil rights movement and that abortion activists have overemphasized *Roe* at the expense of mobilization.[42] That is, he argues that a good deal of prior thinking overemphasizes the Supreme Court's role in social change while underemphasizing the role of on-the-ground practitioners and movements. Although scholars have responded with empirical evidence that supports the idea that a favorable Supreme Court decision can change hearts and minds with respect to particular groups, this response does not undermine the presupposition that judicial opinions are responsive to changing perceptions rather than the driving force behind them.[43] These studies also suggest that these changing social beliefs are more indicative of an individual's thoughts and feelings about the Supreme Court rather than their own mobilization over the rights at stake in the opinion.[44]

I take as my analytical starting point the idea that the Supreme Court is not a rights-granting institution and is responsive to existing mobilization. This is not to say that the Supreme Court is on "the right side of history" or is in agreement with any particular political mobilization but, rather, to reinforce the idea that the Supreme Court can only take what is put before it through the lower courts and appellate process. It does not announce rights but, instead, engages with existing discourse about those rights. As

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40. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 6–8 (2d ed. 2008).

41. *Id.*

42. *Id.* at 39–41, 201.

43. *See, e.g.,* Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCH. SCI. 1334, 1339–41 (2017) (finding that a Supreme Court ruling had an impact on individual's perception of social norms in support of marriage equality but not necessarily on their personal feelings about gay marriage or gay people).

44. *Id.*

such, my orientation to the discourse of the Supreme Court specifically deemphasizes its words as necessarily politically impactful. This diverges from much of the existent scholarship in rhetoric which does emphasize the language of opinions as *doing*.

Katie Gibson, for example, studies—primarily through Justice Ruth Bader Ginsburg's dissents on abortion cases—how Justice Ginsburg "has boldly challenged the traditional boundaries of legal language to make way for a feminist jurisprudence and more democratic rule of law."[45] Ginsburg's dissents, Gibson argues, carve out a new space within the Supreme Court for thinking about women.[46] Gibson argues elsewhere that "Justice Ginsburg's judicial rhetoric is transformative: it articulates an alternative framework for reproductive rights, and it shifts the language of the law to legitimate voices, experiences, and rights of groups traditionally excluded by the rhetoric of the law."[47] Although I disagree with Gibson's emphasis on the dissent as a transformative mechanism because of the inherent lack of meaningful stickiness in the language of the dissent as well as the sociological failure to account for how those ideas get to the Supreme Court in the first place, her work is illustrative with respect to how internal conversations within opinions work.

For example, she writes, "Justice Ginsburg's dissent exposes the law as an instrument of patriarchy and disrupts the myth of neutrality central to the judicial opinion genre."[48] That is, Justice Ginsburg's dissents show partiality (and emotion) within judicial conversations. I argue that the dissent is not politically transformative from a rights-preserving perspective as Gibson otherwise argues. However, this idea that the dissent sheds light on aspects of the majority opinion that are not otherwise available within that primary text is methodologically instructive for me. That is, although she writes that the dissent is an opportunity for Justice Ginsburg to "paint the majority opinion as outmoded and out of step with a more progressive and more just version of women" as a way of "open[ing] up a space for taking the material experiences of women seriously" in a way that strikes me as an overblown reading of the potential of dissent, Gibson still illustrates how the

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45. KATIE L. GIBSON, RUTH BADER GINSBURG'S LEGACY OF DISSENT: FEMINIST RHETORIC AND THE LAW 2 (2018).

46. *Id.* at 16–17.

47. Katie L. Gibson, *In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent*, 35 WOMEN'S STUD. COMMC'N 123, 124 (2012).

48. *Id.* at 126.

dissent demonstrates alternative arguments before the court.[49] Dissents in particular are meaningful spaces for understanding what the Court could have held. I disagree that these alternative arguments are *transformative*, but both concurrences and dissents offer insight into alternative outcomes. I take this understanding about potential alternatives as guiding.

Similarly, Peter Odell Campbell, in reading *Lawrence v. Texas*, situates the majority opinion within the options inherent in the Fourteenth Amendment. Campbell argues that, "Kennedy's choice to foreground the Due Process Clause rather than the Equal Protection Clause of the Fourteenth Amendment as the basis for the majority's opinion has the potential to realize a constitutional legal doctrine . . . that is more consistent with radical queer politics than the foregrounding of the Equal Protection Clause in other recent favorable decisions in gay and lesbian civil rights cases."[50] That is, Campbell argues that the Court's use of Due Process rather than Equal Protection in their argument allows for a more solid foundation for future marriage cases.[51] The emphasis on the logic of queer futurity again, to me, overemphasizes the world-building power of the Supreme Court. However, Campbell's methodological perspective vis-à-vis understanding options and opportunities for the Court embedded in their own opinions is illustrative.[52] Campbell brilliantly emphasizes building new paths within the law when the Court has closed off standard ones. That is, Campbell emphasizes the creative potential of alternative arguments in the face of entrenched problems.

The tendency of law and rhetoric scholars to examine the work of one particular justice as a speaker is not limited to Justice Ginsburg. Catherine Langford writes that Justice Antonin Scalia "was an opportunistic textualist and that textualism is as rhetorical as any other form of judicial interpretation, contrary to Scalia's advocacy of textual interpretation as the form of constitutional interpretation closest to the Constitution's original meaning and least vulnerable to political influence."[53] Functionally, in tracing Justice Scalia's own work, Langford finds internal inconsistency with his stated articulation of his personal jurisprudential

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49. *Id.* at 127, 132.

50. Peter Odell Campbell, *The Procedural Queer: Substantive Due Process,* Lawrence v. Texas*, and Queer Rhetorical Futures*, 98 Q.J. SPEECH 203, 204 (2012).

51. *Id.* at 217.

52. *Id.* at 208.

53. CATHERINE LANGFORD, SCALIA V. SCALIA: OPPORTUNISTIC TEXTUALISM IN CONSTITUTIONAL INTERPRETATION 8 (2017).

methodology.[54] Reading how his work varies across time and circumstance for Langford gives insight into how *textualism* functions.[55] Here, I take this as guiding for both the methodological principle of reading the Court across texts (although with less value placed on authorship) as well as a beacon on the Court's own unreliability as narrators of their own decision-making. This latter point is important as, here, I am often suspect of the Court's own articulation of the relationship between their stated aims and ideology: this comes to a head as I unpack their internal inconsistency with the relationship to precedent in the *Batson* trajectory.

Timothy Barouch gives specific insight into this jurisprudential narration through what he calls "novelization" while articulating the publicness of the Court.[56] In conversation with Robert Asen, Robert Hariman, and John Lucaites on the performative nature of citizenship, Barouch synthesizes the relationship between narrative and democracy.[57] He writes, "The narrative's stock characters, common themes, tropic structures, and reversals comprise a forum through which deep social conflicts are staged and resolved because of the novel's ability to maintain a relationship with contemporary times . . . . As a sociopolitical practice, novelization maintains a connection to democratization."[58] The articulation of narrative structures across cases revolving around the same material issues helps articulate how those material issues matter, while granting overall insight into the Court.

Importantly, I consider the work of the Supreme Court as not a rights-granting authority but, rather, as the leading word on how the law is meant to organize the lives of ordinary people as well as how the law organizes itself. Speaking on popular political speech, Kenneth Cmiel argues that "[t]he kind of rhetoric we get in our presidential elections says much more about ourselves than we care to admit. It is one indication of the way we have organized our lives."[59] Political speech is meaningful, in part, because it grants insight into other aspects of daily life. More importantly, Marianne

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54. *Id.*

55. *Id.* at 7.

56. TIMOTHY BAROUCH, THE CHILD BEFORE THE COURT: JUDGMENT, CITIZENSHIP, AND THE CONSTITUTION 12-13 (2021).

57. *Id.* at 6.

58. *Id.* at 13.

59. KENNETH CMIEL, DEMOCRATIC ELOQUENCE: THE FIGHT OVER POPULAR SPEECH IN NINETEENTH-CENTURY AMERICA 16 (1990).

Constable argues that "[l]aw structures what can be said in court and elsewhere, safeguarding some statements from particular interpretations and prohibiting others from being repeated or even presented."[60] Constable underscores the importance of the definitional work of the Supreme Court for First Amendment law, but this idea is broadly transferable.[61] The idea that law about speech structures speech works analogously to law that is not first and foremost about speech: in this Article, I will argue that law governing procedure also governs the arguments that can be made before the courts, even when not directly regulating those speech acts. I use Constable to think about procedure as a system of regulating court speech.

Although the nature of media and the law has rapidly shifted in the twenty-first century, rhetorical scholarship helps us understand the idea of the trial in public. Robert A. Ferguson, for example, identifies a tension with the public trial and a fair trial due to the nature of sometime akin to spectacle.[62] Robert Hariman captures the tension between publicity and legitimacy, writing, "Although recognizing the persuasive dynamics of popular trials is an important step toward fully understanding their nature and significance, it also seems to work against us, for the more a trial appears to be a scene or product of public controversy and rhetorical artistry, the less legitimate it appears."[63] The concept of the popular trial as a site of enacted social knowledge, public discourse, and constituted by social agreements demonstrates the contextual nature of the trial.

Beyond rhetoric scholarship, newsworthiness social science research tends to focus on what makes a trial, crime, or harm newsworthy. Often less interested in the narrative construction of particular cases and their place in society, newsworthiness scholarship takes the social construction of the news itself as the object of analysis.[64] Scholars of crime and newsworthiness emphasize the way that the construction of the news matters

60. MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 10 (2014).

61. *Id.*

62. ROBERT A. FERGUSON. THE TRIAL IN AMERICAN LIFE xii (2007).

63. POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 3 (Robert Hariman ed., 1990).

64. *See generally* MICHAEL SCHUDSON, THE SOCIOLOGY OF NEWS (2011) (arguing that news is a social institution shaped by economics, technology, politics, culture, and organizational structures); MARK FISHMAN, MANUFACTURING THE NEWS (1980) (arguing, using a 1976 crime wave against elderly New Yorkers as a case study, that the news is, in fact, socially constructed—reporters, he argued, did not fabricate the news, but gave it form).

because of its relationship to stereotyping.[65] Here, I am less interested in what makes the news and more in the narrative after-effects of a case becoming news, but this scholarship points to the overall limitations of relying on newsworthiness for procedural justice, as I discuss in the conclusion of this Article.

Critical race scholars identify some of the major structural problems within discrimination law. Kimberle Crenshaw identifies a "definitional tension in antidiscrimination law, which attempts to distinguish equality as process from equality as result" which is "more productively characterized as a conflict between the stated goals of antidiscrimination law."[66] This definitional tension functionally over-emphasizes the process as ameliorative to racism and, when paired with the fact that racism is a central underpinning of American society, "antidiscrimination discourse is fundamentally ambiguous and can accommodate conservative as well as liberal views of race and equality."[67] Crenshaw helpfully delineates the ways in which purportedly anti-discrimination law functions to uphold the status quo and focuses directly on building a productive response to the built-in failures of discrimination law.[68] This emphasis on the tension between procedural and uprooting systemic discrimination informs my own interpretation of the reform-mindedness of the Supreme Court that I discuss in the next section.

In this Article, I first look more closely at how a particular piece of discrimination law was built through a set of Supreme Court opinions: The development of *Batson v. Kentucky* is situated

65. *See generally* Melissa Hickman Barlow, David E. Barlow & Theodore G. Chiricos, *Economic Conditions and Ideologies of Crime in the Media: A Content Analysis of Crime News*, 41 CRIME & DELINQUENCY 3 (1995) (exploring the relationship between media portrayals of crime and real conditions); John G. Boulahanis & Martha J. Heltsley, *Perceived Fears: The Reporting Patterns of Juvenile Homicide in Chicago Newspapers*, 15 CRIM. JUST. POL'Y REV. 132 (2004) (arguing that individuals who receive crime information from newspapers report higher levels of fear of crime); Franklin D. Gilliam Jr., Shanto Iyengar, Adam Simon & Oliver Wright, *Crime in Black and White: The Violent, Scary World of Local News*, 1 HARV. INT'L J. PRESS/POL. 6 (1996) (arguing that local news depicts crime as violent and non-white); Susan B. Sorenson, Julie G, Manz & Richard A. Berk, *News Media Coverage and the Epidemiology of Homicide*, 88 AM. J. PUB. HEALTH 1510 (1998) (arguing that some homicides are more newsworthy than others); Esther Thorson, *The Reporting of Crime and Violence in the Los Angeles Times: Is There a Public Health Perspective?*, 6 J. HEALTH COMMC'N 169 (2001) (showing that stereotyping of crime and violence are strongly present in the L.A. Times).

66. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 12 GERMAN L.J. 247, 249–50 (2011).

67. *Id.* at 249.

68. *Id.* at 284.

within a broader internal conversation about discrimination law that the Court is having concurrently, but emphasizes the ways in which this particular conversation about jury selection becomes, via the rhetorical moves of the Court across a series of cases, an entrenchment of the idea that some degree of discrimination within court proceedings is to be expected. The punchline of *Batson v. Kentucky*, I argue following Crenshaw but emphasizing the rhetorical work of the opinions, is ultimately that procedural safeguards are not meant to eradicate discrimination or racial animus but to preserve the integrity of the process in the face of legitimate claims concerning racial animus. I argue that the Court refuses to uproot its own history of allowing discriminatory procedure and engages in protectionist discourse that ultimately makes *Batson* a story about sufficiently proving that there is *enough* discrimination to warrant intervention.

In the final portion of this Article, I argue that *Flowers v. Mississippi*, as the most recent case in the *Batson* case trajectory, grants substantial insight into how this move toward sufficient proof works with the opacity problem of the courts to substantially limit the ability of an individual defendant to establish discrimination. In other words, *Flowers* is exemplary of how the Court entrenches discrimination from two sides: first, by moving the goal posts on the conversation vis-à-vis uprooting discrimination and, second, by carefully safe-guarding the information they claim that a defendant could use in order to do so in their own case.

A. Legal and Empirical Scholarship on Jury Selection and Discrimination

Although *Flowers v. Mississippi* is a recent case that the Supreme Court purports to be relatively minor, it has received some scholarly attention. To date, most work on the case itself has been from law student notes and comments which may be more immediately responsive to recent cases.[69] In a Harvard Law Review

69. *See generally* Darby Gibbins, *Six Trials & Twenty-Three Years Later: Curtis Flowers and the Need for a More Expansive* Batson *Remedy*, 59 HOUS. L. REV. 713 (2022) (arguing that Flowers's situation is illustrative of the toothlessness of *Batson* in preventing and remedying discriminatory selection processes, particularly when those are repeated); Anuva Ganapathi, *Re-Thinking* Batson *in Light of* Flowers: *An Effort to Cure a 35-Year Problem of Prosecutorial Misconduct*, 33 GEO. J. LEGAL ETHICS 503 (2020) (arguing that Evan's repeated misconduct is an ethical problem and that ought to be remedied through the Model Rules of Professional Conduct); Eric Hatfield, *Six Wrongs Take Away a Right: The Odyssey of Curtis Flowers and the Prosecutorial Misconduct That Caused It*, 47 S.U. L. REV. 347 (2020) (arguing that

issue unpacking recent Supreme Court opinions, Dorothy Roberts wrote on the case immediately following the Court's decision. Roberts reads the opinion in terms of the relationship between the Fourteenth Amendment and carceral punishment, reading the Court's logic as an explicit rejection of an abolitionist approach.[70]

Roberts argues that the Court in *Flowers* shifts the focus from white supremacy broadly to something much smaller and simpler, writing:

> Missing from the Court's opinion is any discussion of the white supremacist logic behind keeping black people off juries, including the reason why West Virginia enacted the 1873 law at issue in *Strauder* allowing only white people to be jurors, and why prosecutors so routinely and relentlessly exclude black jurors from capital trials of black defendants.[71]

The Court, she argues, does not adequately engage with either the logics of its own case law or with *why* this particular mode of discrimination is a recurrent problem.[72] The Court does not go back and look at how *Swain* and *Strauder* happened. She elaborates:

> Justice [Brett] Kavanaugh recognize[d] that all-white juries are problematic, but characterized the problem as the harm that individual rogue prosecutors inflict on individual black citizens whom they wrongfully exclude from juries. This formulation ignores the way all-white juries have historically functioned as a legal institution to perpetuate racial subordination.[73]

Simply, Roberts argues that *Flowers* centers the discriminatory harm to the juror over the discriminatory harm to the defendant, both on the basis of race.[74]

As Roberts clarifies, the prosecution has an easier time convicting Black defendants, particularly in capital trials, when the jury is entirely or predominantly white.[75] She writes:

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prosecutorial misconduct must be remedied, here through state action).

70. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 10–11 (2019).

71. *Id*. at 96.

72. *Id.*

73. *Id*. at 96–97.

74. *Id.*

75. *Id*. at 97 (citing William J. Bowers, Benjamin D. Steiner & Maria Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PENN. J. CONST. L. 171, 259 (2001); citing Douglas L. Colbert, *Challenging the Challenges*, 76 CORNELL L. REV. 1, 110–13 (1990); citing James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 909–10 (2004); citing Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616–49 (1985)). In Flowers' own four trials, a Black juror was the "lone holdout" responsible for the mistrial. Garrett Epps, *A Racial Pattern So Obvious, Even the Supreme Court Might See It*, ATLANTIC (Mar. 18, 2019), https://www.theatlantic.com/ideas/archive/2019/03/flowers-v-mississippi-

> By misidentifying the relationship between jury selection and white supremacy, the Court in *Flowers* went off track. Justice Kavanaugh's opinion did nothing to invalidate all-white juries as violations of the Fourteenth Amendment's antislavery ideals. To the contrary, Justice Kavanaugh made it clear that the Court's aim was the opposite – to maintain the current jury selection system.[76]

Again, Roberts argues that the emphasis of the Court is nowhere near uprooting white supremacy but, instead, on something akin to making the structures that uphold it more palatable: this is the function of moving the focus from discrimination against defendant to discrimination against juror.[77] In the next section, I argue that an analogous problem is baked into *Batson* itself (to reappear in *Flowers*) in its focus on proving discriminatory intent rather than impact. Roberts names this phenomenon an anti-abolitionist method, and understanding her logic here is central to my own reading of the case trajectory as fundamentally reifying discriminatory structures, logics, and substance.[78] Furthermore, the language of abolition that Roberts uses helpfully elucidates the problem of doctrinal preservation that I discuss in the next section.

There has been a wealth of scholarship on *Batson* itself since the opinion was issued in 1986.[79] Empirical work has had two

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jurors-removed-because-race/585094/ [https://perma.cc/HD2H-SX3F].

76. *Id*. at 98.

77. *Id*.

78. *Id*. at 99.

79. *See generally* Payton Pope, *Black Lives Matter in the Jury Box: Abolishing the Peremptory Strike*, 74 FLA. L. REV. 671 (2022) (arguing that as a racial justice issue, the peremptory strike ought to be abolished alongside an expansion of the strike for cause); Ela A. Leshem, *Jury Selection as Election: A New Framework for Peremptory Strikes*, 128 YALE L. J. 2356 (2019) (arguing that peremptory strikes ought to be abolished in favor of for cause strikes); Jordan Benson, *Stricken: The Need for Positive Statutory Law to Prevent Discriminatory Peremptory Strikes of Disabled Jurors*, 103 CORNELL L. REV. 437 (2018) (arguing that *Batson* should be expanded to account for discriminatory strikes on the basis of ability); Jeanette E. Watson, *Do Non-Discriminatory Peremptory Strikes Really Exist, or is a Juror's Right to Sit on a Jury Denied When the Court Allows the Use of Peremptory Strikes*, 17 TEX. WESLEYAN L. REV. 371 (2011) (emphasizing that peremptories are problematic with respect to the rights of jurors and ought to be abolished to protect their rights); Mattie Johnstone & Joshua M. Zachariah, *Peremptory Challenges and Racial Discrimination: The Effects of* Miller-El v. Cockrell, 17 GEO J. LEGAL ETHICS 863 (2004) (analyzing the impact of *Miller-El* and arguing that discriminatory strikes are also a professional ethics issue); Susan Hightower, *Sex and the Peremptory Strike: An Empirical Analysis of* J.E.B. v. Alabama's *First Five Years*, 52 STAN. L. REV. 895 (2000) (arguing that the expansion of *Batson* to include gender has itself also been fundamentally toothless); Tracy M.Y. Choy, *Branding Neutral Explanations Pretextual Under* Batson v. Kentucky: *An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577 (1997) (arguing that all courts should use all relevant factors in determining whether the legitimate non-

separate threads: first, the impact of racial bias on the juries themselves (or, in other words, the impact of mixed-race juries on jury decision-making) and, second, the remaining prevalence of bias in the selection process following *Batson*. I now discuss each of those strands in turn while emphasizing the methodologies of these strands of scholarship in order to clarify the basis for our current understanding of court functioning post-*Batson*.

To the first point, scholars are in agreement that racially homogenous (meaning entirely white) juries lead to worse outcomes for defendants, particularly defendants of color. William J. Bowers, Benjamin D. Steiner, and Marla Sandys conducted interviews with 1,155 jurors across 340 capital trials and analyzed the racial identity of the jurors in relation to the outcomes of the cases they participated in.[80] They find that white jurors are more likely to recommend capital punishment and are more likely to see a Black defendant as dangerous.[81] This work situates both the life or death stakes of homogenous juries as well as the logic behind individual jurors' decision-making.

Using a data set of felony trials in Florida between 2000 and 2010, Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson found that juries of all-white jurors are much more likely to convict Black defendants than juries with even one Black juror.[82] As they note, their data set was difficult to produce because few courts maintain records identifying jury members' races or jury pools, and most states exclude this type of data from public records requests.[83]

Finally, Jacinta M. Gau identifies steps within the jury-selection process whereby most non-white jurors are lost: noting that most happen from the procedures through which jurors are pulled from the general population, rather than the voir dire process.[84] Further, she found that prosecutors disproportionately used peremptory strikes against Black jurors and that defense attorneys did so against white jurors.[85] Neither Gau's study nor the

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discriminatory reason offered by the prosecution is pretextual).

80. Bowers, *supra* note 75, at 189–90.

81. *Id*. at 241–44.

82. Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1017 (2012).

83. *Id*. at 1026.

84. Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Jurors*, 39 J. CRIME & JUST. 75, 84 (2016).

85. *Id*. She notes that this mirror's the results of Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425 (2009).

Diamond et al. study she cites consider the availability of Black jurors for defense attorneys to strike. Although Gau acknowledges that most of the prospective Black jurors are lost before venire, both studies only note correlation between race of struck jurors and side of the V. For example, when Justice Clarence Thomas in oral arguments in *Flowers* questioned the defense's striking of only white jurors, Justice Sonia Sotomayor responded that the defense did not have any Black jurors upon which to exercise peremptories because the prosecution had already struck every Black juror.[86] This necessarily colors the reading of the homogeneity of the use of strikes against white jurors even without considering, to return to Roberts's point above, the role of white supremacy in disparate use of strikes. Notably, Gau's data was collected by public defenders because, again, the courts do not otherwise collect this information.[87]

Given the difficulty in getting pertinent court data, the general empirical analysis of the post-*Batson* state of discrimination in jury selection is less prevalent, less general, and less widespread than might be anticipated. Bruce E. Barrett presents a statistical model for establishing the neutrality of strikes, accounting for the back-and-forth nature of the strikes.[88] Daniel R. Pollitt and Brittany P. Warren looked at cases decided by the Supreme Court of North Carolina on the issue, noting that none, at the time of publication, have ever been successful.[89] Notably, they focused their analysis on the success of published appellate decisions where the data is readily available and, often, on the record with respect to the racial breakdown of the venire members.

Following Justices Thurgood Marshall and Stephen Breyer, multiple legal scholars make the argument that peremptory strikes in general are bad, usually because they definitionally perpetuate discrimination within the process. Some scholars suggest that peremptories can be saved or modified to be less discriminatory, though it is not always clear how these solutions would maintain a distinction between peremptories and for cause strikes.[90] Others

86. Oral Argument at 53:28, Flowers v. Mississippi, 139 3. Ct. 2228 (2019) (No. 17-9572), https://www.oyez.org/cases/2018/17-9572 [https://perma.cc/LGL9-5BWB].

87. Gau, *supra* note 84, at 79.

88. Bruce E. Barrett, *Detecting Bias in Jury Selection*, 61 AM. STATISTICIAN 296, 296 (2007).

89. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1957 (2016).

90. *See generally*, Daniel Hatoum, *Injustice in Black and White: Eliminating Prosecutors' Peremptory Strikes in Interracial Death Penalty Cases*, 84 BROOK. L.

are more definitive, arguing that peremptory strikes are bad as a matter of course. For example, Douglas L. Colbert argues that peremptory strikes are unconstitutional from a Thirteenth Amendment perspective because one of the Amendment's "primary objectives was to assure equal justice and universal freedom for African-American people" and that this is applicable to both the Black defendant and the Black juror.[91] From the opposite perspective, Elaine A. Carlson argues that peremptory strikes are functionally dead and that for-cause strikes ought to be expanded to remediate their limitations.[92] Carlson promotes parties' control over the jury composition process and argues against balancing that with Constitutionally protected rights.[93] Still, it is telling that peremptory strikes in their current form are dissatisfying from a racial justice perspective and a perspective of wishing to discriminate against jurors.

Finally, scholars have used *Batson* as a case study in systemic procedural discrimination in the criminal legal system. Melynda J. Price describes *Batson* proceedings as a "ritual," "a process that serves as an active affirmation of the non-discriminatory selection of juries. The law requires judges and legal counsel to act out this process in dramatic fashion as a way of communicating that race is not a factor in peremptory challenges. In this very same action, courts can ignore the unconstitutional use of race in peremptory challenges."[94] Price bases this depiction of *Batson* proceedings on the relative infrequency of their success, which then render the non-discriminatory reason proffered by the prosecution more culturally legitimate through this ritualization.[95] Price specifically urges for the end of peremptories in capital cases because of their ultimate life or death stakes for Black defendants.[96]

REV. 165 (2018) (arguing that peremptories should not be allowed in the limited case of death penalty cases); Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357 (2017) (arguing for a hybrid model between peremptories and for-cause challenges, requiring ex ante justification without a conclusive showing of bias).

91. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 7–8 (1990–1991).

92. Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 1003–04 (1994).

93. *Id.*

94. Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 77 (2009).

95. *Id.*

96. *Id.* at 107.

Scholars rarely argue for the abolition of peremptory strikes entirely, though some Supreme Court justices themselves do so, and instead offer remediation options to make peremptory strikes function better, despite scholarship indicating that the system is inherently broken.[97] Some argue that the contemporary jury selection process—far from being fixed by *Batson*—is fundamentally broken in favor of overt racial discrimination.[98] Finally, Michael J. Klarman and Thomas Ward Frampton both use *Batson* as a case study for understanding contemporary criminal procedure as Jim Crow jurisprudence with the policy punchline unstated.[99]

In the following section, I specifically synthesize Price and Roberts to look at the discursive trajectory of post-*Batson* Supreme Court cases dealing with race-based jury discrimination. In unpacking these cases' rhetorical logic, I am guided by Price and Roberts's theoretical perspectives on peremptory strikes.

II. The Story of the *Batson* Case Trajectory: A Dialogue on Knowledge and Equal Protection

In his concurrence in *Batson v. Kentucky*, Justice Byron White writes, "Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid."[100]

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97. *See generally* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561 (2012) (arguing that *Batson* doctrine might function differently—more equitably—were the claims to be litigated by the struck jurors themselves); 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 (2011) (arguing that the *Batson* framework ought to be modified to better capture less overt forms of discrimination from the prosecution); Robin Charlow, *Tolerating Deception and Discrimination after* Batson, 50 STAN. L. REV. 9 (1997) (arguing that ethical sanctions for attorneys might be a viable option for ameliorating the toothlessness of *Batson*).

98. *See generally*, Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020) (arguing that *for cause* strikes are also racially discriminatory but that the Supreme Court has functionally given them a pass by focusing on peremptories); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (arguing, prior to the *Batson* decision, that there is a widespread tendency for white jurors to convict Black defendants).

99. *See generally,* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018) (arguing that the Jim Crow jury never fell and that this is indicative of the use of race as a salient factor in the selection of jurors); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (arguing, too, that the Jim Crow jury never fell—that *Batson* did not have a meaningful impact on the use of race in jury selection).

100. Batson v. Kentucky, 476 U.S. 79, 102 (1986).

Although I disagree with the latter half of Justice White's remarks, the remainder of this Article spells out the prescience of his predictions. Yet, depending on which of the seven *Batson* opinions (five opinions, two dissents) you cite, *Batson* was either the beginning of a jurisprudential conversation on the role of peremptory strikes in criminal jury trials, the continuation of a conversation previously established, or the full upheaval of an entire prior system of belief.

Although the conversation resulting from *Batson* emphasizes the opinion's lack of total clarity, I take it as a clear and concise starting point of a new era in peremptory strike law and discourse. This is not controversial.[101] My novel argument here is in reconfiguring the *Batson* case trajectory— a series of cases from 1986 with *Batson v. Kentucky* to 2019 with *Flowers v. Mississippi*— as an explicit conversation about the role of knowledge and evidence in Equal Protection discrimination claims, a conversation that can be seen through the theoretical lens of court opacity.

The *Batson* case trajectory offers a clear insight into the mechanics of court opacity in relation to Equal Protection Clause discrimination claims and, I argue, shows the Court affirmatively thinking through the ability and capacity of various actors to make arguments based on evidentiary burdens. These cases are: *Batson v. Kentucky*, *Miller-El v. Dretke*, *Snyder v. Louisiana*, *Foster v. Chatman*, and *Flowers v. Mississippi*.[102] Although the Supreme Court has subsequently heard additional cases pertaining to the contours of *Batson*—specifically on the questions of expanding it to civil trials and on expanding it sex-based dismissal[103]—my analysis focuses on clarifying the contours of the race decision in criminal trials by highlighting the evidentiary conversation in that specific terrain. This analysis proceeds in three parts: first, it discusses the terrain as established in *Batson*; second, it analyzes the Court's

101. *See, e.g.*, Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818–19 (1993); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462–64 (1996); Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1859 (2014); Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1714 (2012); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 503 (1999).

102. Batson v. Kentucky, 476 U.S. 79 (1986); Miller-El v. Dretke, 545 U.S. 231 (2005); Snyder v. Louisiana, 552 U.S. 472 (2008); Foster v. Chatman, 578 U.S. 488 (2016); Flowers v. Mississippi, 139 S. Ct. 2228 (2019).

103. *See, e.g.*, Edmonson v. Leesville Concrete Company, 500 U.S. 614 (1991) (expanding *Batson*'s logic to civil trials); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (expanding *Batson*'s logic to sex-based challenges).

back and forth in the middle cases; and, finally, it examines the current terrain as reestablished in *Flowers*.

A. Batson v. Kentucky: Setting the Stage

As mentioned above, there are seven different opinions within *Batson* itself: the opinion, four separate concurrences, and two separate dissents.[104] Even within the opinion, there is a rich, discursive terrain and no clear single answer. Of course, the majority opinion is legally guiding. And as a practical matter, I do not often attribute particular importance to concurrences or dissents because they are not controlling law. Here, however, I will discuss Chief Justice Burger's dissent because of his overall contributions to the conversation about evidentiary burdens, and the concurrences' insight into possible alternatives.

The Court, in the majority opinion written by Justice Lewis Powell, claims to be reexamining *Swain v. Alabama* via *Strauder v. West Virginia*.[105] They are, they argue, reexamining *Swain* with respect to "[t]he evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury."[106] The majority frequently insists that their opinion that day was not a complete overhaul of established precedent[107]—a point Chief Justice Burger spends a great deal of time on in his dissent, extolling the importance of *stare decisis*.[108] However, this presumptive move to emphasize the evidentiary burden required to establish racial animus is, in fact, a fairly radical departure from precedent.

The Court's insistence that they are merely reexamining the evidentiary burden of *Swain*[109] is partially nonsense rhetoric and partially deeply salient. The Supreme Court—composed of an almost entirely distinct set of Justices between the cases—previously held in *Swain* that the State had not systemically discriminated against Black jurors and that even if it had, that such discrimination would not be a Constitutional violation.[110] So *Batson*, by holding that the State's intentional systemic

104. *Batson*, 476 U.S 79.
105. *Id*. at 90.
106. *Id*. at 82.
107. *See id*. at 93–96.
108. *See id*. at 112 (Burger, J., dissenting).
109. *Id*. at 98.
110. Swain v. Alabama, 380 U.S. 202, 226–27 (1965).

discrimination was an Equal Protection violation[111] does meaningfully differ from and overturn *Swain*'s holding. Still, Justice Powell's majority explicitly states that it is reaffirming *Swain*.[112]

This rhetorical distancing from the fact of an overturn is not atypical Supreme Court language. As Chief Justice Warren Burger addresses in his dissent, the Court has a vested interest in *stare decisis* both because of its own prior writing on the issue of precedent but also, as scholars argue, because consistency legitimates the Court, particularly over time.[113] However, what happens in *Batson* is, as Burger again points out in his dissent, a discussion that is not about what unconstitutional discrimination looks like within the criminal legal system but, instead, a conversation about the evidentiary burden of proving that discrimination.[114] In the interest of consistency, of an opinion that is not facially a radical departure from a relatively recent case, of distinguishing rather than demolishing, the Court in *Batson* begins to build out evidentiary standards.

This is why the Court turns to *Strauder*. *Strauder* is actually not a case about explicitly peremptory strikes and, instead, examines the Constitutionality of a law in West Virginia that explicitly states that only white people are allowed to serve on juries.[115] The Court held in *Strauder* in 1879 that this law is an Equal Protection violation.[116] The Court in *Batson* uses this case to insist upon the facially true idea that discrimination against jurors on the basis of race is unconstitutional per the Equal Protection Clause of the 14th Amendment.[117] However, this is a meaningfully distinct type of discrimination: the Court in *Strauder* does not, in contrast to *Batson*, parse methods for excluding Black jurors, merely that it cannot be done unilaterally. The use of peremptory strikes is a fairly surgically precise mode of excluding jurors, compared to the blunt instrument of explicitly discriminatory

111. *Batson*, 476 U.S. at 99.

112. *Id*. at 82.

113. *See e.g.*, *Stare Indecisis?: A Panel of Experts at Harvard Law School Examine the Supreme Court's Fidelity to Past Precedents in the Wake of the Precedent-Busting Term*, HARV. L. TODAY (Oct. 5, 2022), https://hls.harvard.edu/today/does-overturning-precedent-undermine-the-supreme-courts-legitimacy/ [https://perma.cc/W4U9-P4JD] (discussing the relationship between reliance on precedent – real or rhetorical – and perceived legitimacy of the Supreme Court).

114. *See Batson*, 476 U.S. at 126 (discussing burdens of proof under the majority view).

115. Strauder v. West Virginia, 100 U.S. 303 (1879).

116. *Id.* at 311–12.

117. *Batson*, 476 U.S. at 85–86.

legislation. This difference is made even more apparent by the existence of *Swain*, a much more closely analogous case. Turning instead to *Strauder* to legitimize the logic of *Batson* is something of a leap.

This is, again, not an uncommon type of logical leap for the Supreme Court because of their reliance on *stare decisis* to guide normative decision-making. A good deal of Supreme Court cases that reevaluate (overturn) a prior decision end up creating these types of logical holes. Here, the majority opinion's sleight of hand—looking at how discrimination is proven rather than if peremptory strikes are (potentially or always) discriminatory—becomes a profoundly important discursive minefield. What has been used in the cover-up to protect *stare decisis* becomes the new problem of the law generally: here, the failure to radically address peremptory strikes directly shifts the conversation to how we parse good strikes from bad strikes.

Justice Marshall's concurrence and Justice William Rehnquist's dissent both point to this problem. Justice Rehnquist, dissenting, writes, "The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges."[118] Rehnquist emphasizes that what is special about peremptories is that they are not questioned for legitimacy, unlike for-cause challenges. His logic is a bit strange in the contemporary discrimination jurisprudence that follows from the work in the majority opinion and other contemporaneous and future civil rights cases because he is functionally arguing that because peremptories are by nature discretionary, they do not need to be constitutionally legitimate (non-discriminatory).

But that is, in fact, as Justice Marshall argues in his concurrence, the actual logic of peremptories: a peremptory strike definitionally, prior to the writing of the majority opinion, does not require the striking party to give a reason for their challenge of a juror.[119] A for-cause challenge (unlimited in number per trial) requires the affirmative statement of a legitimate, non-discriminatory reason up front; peremptories (limited in number per trial) capture everything else.[120] Justice Marshall rhetorically

118. *Id.* at 138.

119. *See id.* at 105–06 (discussing the ease of striking a juror and the potential bias at play).

120. *Id.*

takes for granted that peremptories are necessarily discriminatory: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."[121] Justice Marshall centers his logic on eradicating discrimination and argues that, in order to do so, peremptories must not be a feature of the criminal legal system.[122]

But the majority opinion, in contrast, does not take a stance on the role of discrimination within the criminal legal system. It does not actually weigh in on the wholesale functioning of peremptories or the stakes of discriminating against jurors (instead relying on the logic of *Strauder* as obfuscation). Other scholars emphasize that this leaves discrimination baked into the system at a moment of opportunity for excising it, had they followed Justice Marshall's recommendations or overturned *Swain* entirely. I argue instead that in shifting the jurisprudential language from the mechanics of strikes to the mechanics of differentiating between good strikes and bad (the evidentiary standards of establishing discrimination), the majority opinion actually invents a new avenue for discrimination.[123] That is, the Supreme Court creates a new unequal playing field: this time, the unequal burden rests on the ability to establish the State's motives here, through evidence.

In failing to excise the discrimination baked into the peremptory challenge process (and reaffirmed through *Swain*), the Supreme Court shifted the focus away from the moral blameworthiness of systemic discrimination and onto the problem of how to measure if that discrimination is, in fact, sufficiently unconstitutional. This introduces a knowledge problem that the Supreme Court, per Justice White's prescient concurrence, has spent decades attempting to clarify. I argue that there exists a substantial body of parallel discrimination cases being clarified concurrently—the way that *Batson* shifts the problem from discrimination to evidence is not unique in the Supreme Court—and that the Supreme Court is grappling with this thematic

121. *Id.* at 102–03.

122. *Id.* at 107.

123. *See generally* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020) (arguing that for-cause strikes are also racially discriminatory but that the Supreme Court has functionally given them a pass by focusing on peremptories); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (arguing, prior to the *Batson* decision, that there is a widespread tendency for white jurors to convict Black defendants).

problem throughout various civil rights cases.[124] I focus here on *Batson* and peremptory challenges in order to take a deep look at that pattern in this specific context.

B. The Intermediary Cases: The Batson Third Step

The Supreme Court outlines a three-step burden-shifting framework for determining the legitimacy of a *Batson* challenge: first, the defense has the burden of showing an inference of discrimination; second, the burden shifts to the prosecution to put forth a race-neutral (legitimate, non-discriminatory) reason for the strike; and, third, the burden shifts back to the defense to establish that the proffered reason is pretextual and that the discrimination is, in fact, purposeful.[125] Since 1986, the Court has returned to this process several times in order to clarify those steps. In this section, I focus on the cases that focus on Step Three, the process of establishing purposeful discrimination or rebutting the State's purportedly race-neutral reasoning.

In a Step One case, *Johnson v. California*, Justice Stevens for the majority gives insight into why I am focusing on Step Three:

> Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination.[126]

Step One is conceptualized as a relatively low structural barrier to arguing discrimination and is consistently reaffirmed as such by the Supreme Court. Whether or not it consistently works as such in practice is not knowable because of the general structures around *Batson* that I will discuss later in this Article. However, the Supreme Court does not have a real conversation about it: as it granted certiorari on the first step, primarily in the early 2000s, it was exclusively to reaffirm the simplicity of the step, clarifying attendant issues rather than the step itself.[127]

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124. The Court in *Batson* begins to define how a party can establish a prima facie case of discrimination (with some theoretical keys to refuting rebuttals), which is a dominant theme in cases interpreting the Civil Rights Act of 1964.

125. *Batson*, 476 U.S. at 93–94.

126. Johnson v. California, 545 U.S. 162, 170 (2005).

127. For example, *Johnson v. California* focuses more on the rights of states to clarify the standard, and *Rice v. Collins* focuses on res judicata. The Court clarifies

Furthermore, as Justice John Paul Stevens emphasizes, the three-step framework involves differential relationships to evidence. The first step does not involve a conversation around proof the way that the third step does: generally, it is sufficient to pass Step One to allege only that Black jurors were struck at an abnormal rate or in contrast to similarly situated white jurors.[128] The thirty years of clarification of *Batson* that center on the third step often involve the majority in those cases getting extremely surgically precise about what evidence the defense may or may not use in order to establish discrimination.

I argue that this is where the opacity issue comes to the fore. In the above section, I argued that the Supreme Court's work in shifting the conversation from one of eradicating discrimination to one of proving discrimination set the tone for the problem that eventually becomes catastrophic by *Flowers*. In this section, I argue that the intermediary cases I discuss here are marked by a conversation – often explicitly – about what the defense must do in order to establish intentional discrimination from the prosecution. I argue that these cases appear to be broadly permissive; in fact, Justice Thomas's dissents throughout the cases tell a consistent story that the Court has been overly permissive in considering too much evidence from the defense and, even as I disagree with his overall aims, this is not an extraordinary claim about the various majority opinions. The amount of evidence to be considered becomes the battleground in the intermediary cases, which underscores how the Court continues having a conversation that is fully adjacent to, rather than directly about, discrimination in practice.

However, in viewing the cases as a collection—and then, in the next section, through *Flowers*—the permissibility of evidence comes with an asterisk: the Supreme Court allows for the trial judge to consider evidence in the extraordinary event that it exists. I argue that each of the overly permissible pieces of evidence that the Supreme Court allows is unlikely to actually be available to the defense in practice. This is not because the State is not engaging in intentional discrimination, but instead because the defense lacks actual practicable avenues for meeting the invisible burden of the third step as the Court narrows the scope of what that could look like, even though they appear permissive.

The third step is inherently problematic. In his concurrence to *Miller-El*, echoing Justice Marshall's concerns in *Batson*, Justice

different contours, but the overall stakes remain roughly the same.

128. *Johnson*, 545 U.S. at 170.

Breyer blames this on the problems intrinsic to "the inherently subjective reasons that underlie use of a peremptory challenge."[129] *Miller-El v. Dretke*, *Foster v. Chatman*,[130] and *Snyder v. Louisiana*[131] each consider the Third Step and, as such, begin to clarify the parameters of persuasion. I argue that these cases begin to build expectations around the types of evidence that can be considered to establish this intent because they structure the ability to prove intentional discrimination.

The *Miller-El* Court draws on an age discrimination in employment case, *Reeves v. Sanderson Plumbing Co.*, to establish that the defense can draw on comparative juror analysis in order to rebut the State's facially race neutral reason.[132] This means that Courts may allow the defense to use comparators—in this case, jurors who are similarly situated but for the identity category in question (here: race)—in order to establish racial animus. Importantly, the evidence that the Court is considering in this case is entirely intrinsic to the single trial in question. In his dissent, Justice Thomas clarifies the totality of the evidence has not been properly introduced by the defense.[133] Although the procedural admissibility of that evidence is apparently up for debate, the intentionality of the State was determinable through the context of the single trial.

This is an important through line in the *Batson* Step Three cases: the defense may prove that the prosecution acted with intentional racial animus to discriminate via their behavior at and papers pertaining to the trial in question. The Court considers functionally similar evidence in *Snyder v. Louisiana*: using transcript evidence of the voir dire in order to establish if the prosecution questioned Black and white jurors differently.[134] *Foster v. Chatman* similarly considers particularly obvious and egregious behavior by the prosecution: a set of documents from the district attorney's office that explicitly sorted jurors by race, including memos delineating a strategy for picking a single Black juror to avoid striking (presumably in order to avoid striking *all* of the available Black jurors and, consequently, defeating the problem of comparators).[135]

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129. Miller-El v. Dretke, 545 U.S. 231, 267 (2005).
130. Foster v. Chatman, 578 U.S. 488 (2016).
131. Snyder v. Louisiana, 552 U.S. 472 (2008).
132. *Miller-El,* 545 U.S. at 241.
133. *Id.* at 291.
134. *Snyder,* 552 U.S. at 479.
135. *Foster*, 578 U.S. at 513.

This is consistent with how the Supreme Court generally establishes burdens of proof for discrimination cases in the latter half of the twentieth century and early twenty-first century. The burden shifting framework—from articulating harm, to offering a legitimate non-discriminatory reason, to establishing that the reason is pretextual—follows, often directly, many of the Title VII cases being decided roughly contemporaneously. In the matter of proving discrimination, the Supreme Court is surprisingly internally consistent.

However, the Supreme Court's engagement with discrimination law is not as a rights-granting institution but, instead, can be considered pedagogical. These rulings articulate the types of behaviors the State is forbidden from engaging in if the State wishes to cleanly escape an unfavorable ruling on a *Batson* challenge. These cases teach prosecutors how to avoid claims of discrimination by narrowly defining the behaviors that the Court will consider problematic in evaluating their selection.

Furthermore, the Court takes as a given that the defense will be able to access the information necessary to establish Step Three after Step Two. Returning to Justice Stevens's opinion in *Johnson v. California* on Step One, "Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated."[136] That is, the Court does not consider that Step Three may not be capable of being established given the information available to the defense. More cynically, the Court does not seem to care about capturing all discrimination so much as capturing discrimination that is provable within a certain set of constraints.

In the rest of this Article, I will unpack this argument, establishing that as the Court defines the contours of proving a *Batson* violation, they narrow the scope of arguments available to the defense to establish that prosecutorial discrimination was intentional by pushing prosecutorial action into the dark, outside of the behaviors described in the intermediary cases. As discrimination becomes less overt, the ability to prove that, particularly through the materials directly pertaining to trial, becomes increasingly difficult. I argue, through *Flowers v. Mississippi*, that the Supreme Court has pushed the possibility of

136. Johnson v. California, 545 U.S. 162, 170 (2005).

proving a relatively simple procedural misstep behind a hefty informational paywall.

III. What We Can Know About Prosecutors: The Stakes of *Flowers v. Mississippi*

In *Flowers*, the Supreme Court walks a fragile line; the case is haunted by both prosecutor Doug Evan's history of discriminatory practices and by the case's high-profile nature in and surrounding the Winona, Mississippi area.[137] Although the majority opinion is incredibly careful in asserting that the Court does not break new ground in the *Batson* trajectory and, instead, applies its own prior rulings to "the extraordinary facts of this case," the extraordinary facts of this case necessarily make it a benchmark case in understanding what history and publicity mean from an evidentiary perspective.[138]

As I have argued in the previous section, the intervening *Batson* Step Three cases substantially narrow the universe of available mechanisms for establishing discrimination.[139] Price argues that the cultural impact of this shift is to render the lack of outcome itself satisfactory.[140] Here, I argue that in *Flowers*, the Supreme Court concludes its journey of normalizing the *Batson* question as one about evidence rather than discrimination and narrows the defense's ability to prove that discrimination occurred. By analyzing the oral arguments and the opinions of the case, I argue that the Supreme Court narrows the funnel even further, compressing the ability to establish discrimination to almost nothing.

A. The Oral Arguments: On History

Supreme Court oral arguments take an hour, and each side has approximately thirty minutes to present their case and receive questions and comments from the Justices. Justices interrupt the flow of an attorney's argument to ask questions.[141] Some scholars suggest that how Justices generally interact with attorneys during

137. Kat Albrecht & Kaitlyn Filip, *supra* note 36.

138. Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).

139. *See supra* Section II.B.

140. Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 77 (2009).

141. Timothy R. Johnson, Ryan C. Block, & Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOY. L. REV. 331 (2009); Tonja Jacobi & Matthew Sag, *Taking Laughter Seriously at the Supreme Court*, 72 VAND. L. REV. 1423 (2019).

arguments can be predictive of case outcomes.[142] Some suggest that the quality of oral arguments is relevant to predicting the outcome of cases while others argue that Justices tend to vote along party lines regardless of the quality of an individual attorney's argumentation.[143] Here, I focus not on the predictive capacity of argumentation but rather on the themes prevalent in the arguments as indicative of some aspect of the Supreme Court's line of reasoning.

In the presentation of her oral argument in *Flowers*, Professor Sheri Lynn Johnson, Flowers's attorney, emphasizes the singular strike by the prosecution of prospective juror Carolyn Wright.[144] She emphasizes that Doug Evans, in response to the defense, made a number of false statements about his reasoning for moving to exclude Wright.[145] Johnson emphasizes the particular facts of this case in a way the Justices largely ignore, except for a question from Justice Elena Kagan to Mississippi Special Assistant Attorney General Jason Davis in his arguments.[146]

Instead of emphasizing the particular facts of the case, the Justices ask extensively about the role of history. The discussion of history is, within the oral arguments and, as I will argue, within the opinion itself, incredibly slippery and ill-defined. Although the Justices sought to adopt a clear definition of 'history' for precedential purposes, no clear definition or scope of 'history' was presented during the oral arguments.

Justices Samuel Alito and John Roberts each offer boundaries around 'history,' but not ones that are consistent or particularly clear. Justice Alito asks Johnson, given the troubling history of this case, what outcome she would recommend if the Court were to

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142. Maron W. Sorenson, *Asking Versus Telling: The Supreme Court's Strategic Use of Questions and Statements During Oral Arguments*, 76 POL. RSCH. Q. 1559 (2023); Bryce J. Dietrich, Ryan D. Enos & Maya Sen, *Emotional Arousal Predicts Voting on the U.S. Supreme Court*, 27 POL. ANALYSIS 237 (2019); Daniel M. Katz, Michael J. Bommarito II & Josh Blackman, *Crowdsourcing Accurately and Robustly Predicts Supreme Court Decisions* (Dec. 11, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3085710 [https://perma.cc/5PSY-U6KT]; Linda Greenhouse, *Press Room Predictions*, 2 PERSP. ON POL. 781 (2004).

143. Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006) (arguing that the quality of arguments does have a predictive capacity for determining outcomes of Supreme Court cases).

144. Oral Argument at 3:54, Flowers v. Mississippi, 139 3. Ct. 2228 (2019) (No. 17-9572), https://www.oyez.org/cases/2018/17-9572 [https://perma.cc/LGL9-5BWB] [hereinafter Oral Argument].

145. *Id.* at 2:21.

146. *Id.* at 35:54.

disregard everything about the case prior to the trial.[147] Johnson responds that the evidence, even without *Flowers IV*, is still clear and convincing as in the *Batson* cases, as "this Court has demanded a sensitive inquiry into all of the circumstances that prove racial discrimination."[148] Here, Justice Alito asks if history includes the case beyond the present trial, and Johnson says yes, per the *Batson* precedent.[149] Together, they stay relatively close to the facts of the Tardy Furniture murders.

Justice Roberts, on the other hand, gives unique insight into a potentially much larger scope for 'history' by asking how far back the Court must look: "If the prosecutor had one *Batson* violation in his 30-year career, 20 years ago, is that something that should be brought out and pertinent in the assessment of the current *Batson* challenges?"[150] Justice Roberts dramatically shrinks and distances Doug Evans's history of established *Batson* violations: even within the *Flowers* history itself, he had two additional violations verified by the Mississippi Supreme Court between 1996 and 2019.[151] Justice Roberts asks Johnson to stop fighting the hypothetical when she reiterates the extraordinary nature of the case, in order to develop a general rule for all cases moving forward, not just on a particular case as extreme as this one.[152] Although smaller in scope, this line of inquiry uniquely considers the prosecutor's career outside of the facts of the case before it.

Johnson responds that the established rule for Step Three in a *Batson* analysis is that every factor that bears upon the analysis is relevant, although the strength or weakness of that relevance may vary based on the factors that Justice Roberts mentions.[153] This is interesting because of its ultimate lack of specificity. Within this discussion between Justice Roberts and Johnson, the definition of 'history' becomes increasingly murky as the interlocutors disagree on how closely to engage with facts of the case.

For the prosecution, Davis opens by saying, "The history in this case is troubling, but the history is confined to this case."[154] This is especially unclear: Justice Kavanaugh and Justice Breyer both seem to interpret this opening statement as a call to limiting

147. *Id.* at 3:09.
148. *Id.* at 3:27.
149. *Id.*
150. *Id.* at 14:42.
151. *Id.* at 42:29.
152. *Id.* at 15:50.
153. *Id.* at 16:51.
154. *Id.* at 25:54.

the legal definition of 'history' to the single trial. Justice Kavanaugh replies that you cannot take the history out of the case, noting that Doug Evans struck forty-one Black jurors and only one white juror.[155] This is the only instance during the oral arguments where we know with some certainty that the line of questioning is about 'history' vis-à-vis the *Flowers* cases and only the *Flowers* cases. Elsewhere, as described, the Court floats hypotheticals and tries, without specificity, to define 'history' as something more expansive than the history of *Flowers I-V*.

This is noteworthy because the history the Supreme Court has before it is not, in fact, only Doug Evans's behavior in the *Flowers VI* trial. Amicus briefs from the Magnolia Bar Association and the NAACP Legal Defense Fund both describe Evans's history beyond the case—specifically the American Public Media statistical evidence from Evans's office from 1992 to 2017—as well as Winona's general history of denying equal rights.[156] Although Flowers' own brief and oral arguments stayed with the facts of the particular case, arguing only for the inclusion of the facts of *Flowers I-V*, the broader history of Evans' office was available to them and, as Justice Thomas writes in his dissent, haunts the case.[157] Evans's office was found to have struck Black jurors at 4.4 times the rate it struck white jurors between 1992 and 2017, striking 50% of eligible Black jurors compared to 11% of eligible white jurors.[158] The APM data showed that, even when controlling for other purportedly race-neutral factors, Evans's office still struck Black jurors more frequently.[159]

The Court, in oral arguments, definitively does not touch this data. Both Johnson and Davis continuously redirect the Court back to the facts of the case, staying as closely to *Flowers VI* as the Court will allow.[160] Still, the available data casts a troubling shadow over the line of argumentation before the Court and this becomes even more salient within the opinions themselves.

155. *Id.* at 27:33.

156. Brief for NAACP Legal Defense Fund & Educational Fund, Inc. as Amici Curiae Supporting Petitioner, Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (No. 17-9572); Brief for Magnolia Bar Association, Mississippi Center for Justice & Innocence Project New Orleans as Amici Curiae Supporting Petitioner, Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (No. 17-9572).

157. *Flowers*, 139 S. Ct. at 2252–74 (Thomas, J., dissenting).

158. *Id.*

159. *Id.*

160. *See generally* Oral Argument.

B. The Text of *Flowers* and the Problems of History and Transparency

Despite the Court's insistence that it broke no new ground with the *Flowers* opinion, it is actually doing something particularly strange when contextualized within the broader scope of the *Batson* trajectory: it is revisiting the requirements of *Swain* and asking if those requirements can now be considered a possibility.[161] Justice Kavanaugh wrote in *Flowers* that the Court in *Batson* rejected their own articulation in *Swain* that the defendant must demonstrate a history of racially discriminatory strikes.[162] I have argued above that this is a strange reading of *Swain* because it is *Batson* itself which considers the *necessity* of a historical argument, whereas *Swain* considers the *sufficiency* of a historical argument.[163] Here, Justice Kavanaugh wrote that the Court held in *Batson* that the need to establish a history of discrimination in order to establish intent in a particular case is "an 'insurmountable' burden."[164]

The insurmountable burden cited by Justice Kavanaugh is a mere footnote in *Batson* that specifically references the difficulty of establishing a history of bad peremptory challenges because of the problem of record-keeping. The Court wrote in full, "In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable."[165] That is, the burden of producing patterns of discrimination would vary between jurisdictions, contingent on the record-keeping work of individual jurisdictions. For some, this would be insurmountable. This is the only instance in the *Batson* trajectory where the Court articulated the logistics of the practical difficulty of establishing a pattern of discriminatory strikes. In the rest of the Supreme Court's reasoning, this insurmountable burden was taken for granted and left unexplained. Here, too, the Court relegated it to a footnote: the most unexamined of assumptions undergirding the case as a whole.

Even in this footnote in *Batson*, the logistics are insufficiently unpacked and, more importantly, the implications for the appellate

161. *Flowers*, 139 S. Ct. at 2235.

162. *Id.* at 2241.

163. Swain, the petitioner, established that there had been no Black jurors in the county in nearly fifteen years. The Court held that this was not sufficient to establish a Fourteenth Amendment violation because of a relatively narrow reading of the purpose of the peremptory strike. Swain v. Alabama, 380 U.S. 202, 221–23 (1965).

164. *Flowers*, 139 S. Ct. at 2241 (citing Batson v. Kentucky, 476 U.S. 79, 92 n.17 (1986)).

165. *Batson*, 476 U.S. at 92 n.17 (citing People v. Wheeler, 583 P.2d 748, 767–68 (Cal. 1978)).

structure upon which the logic of *Batson* implicitly relies are left unsaid. In *Batson*, the Supreme Court acknowledged that the lower courts do not always have court records that reflect jurors' race and that they do not always transcribe *voir dire* proceedings.[166] A transcript is an official court record, certified to be a verbatim account of proceedings that transpired in court, that must be taken by a court reporter. Transcripts can be a vital part of the appellate process but there is no universal legal requirement that all cases have a court reporter—or even a recording of the proceedings—or that the transcript be complete. There is no cohesion on the maintenance and availability of these records across the country.[167]

In the literature review, I discussed studies that relied upon appellate records in order to establish the effectiveness of *Batson* in lower courts.[168] What has been unduly prohibitive for scholarship has been understanding the universe of potential challenges.[169] Fully understanding the insurmountable burden of the often non-existent and usually inaccessible court record is not presently possible: we actually do not currently know, broadly, the patterns of prosecutorial behavior with respect to jury selection in cases that have not been appealed *for that reason*.

In *In the Dark*, APM Reports did a full analysis of court records in a single county in Mississippi to better understand prosecutor Doug Evans's behavior between 1992 and 2017.[170] Under the current system of court records management, Will Craft with APM Reports described that the process of manually collecting and analyzing race data from 225 trials over 25 years took them a full year to analyze and collect.[171] He wrote:

> There is no complete record of trials at the district court level so the first step we took was to create a complete list of all trials for the Fifth Circuit Court District. Through a combination of records requests and by going page-by-page through hand-written docket books at each of the eight courthouses in the

166. *Id.*

167. *See generally* Kat Albrecht & Kaitlyn Filip, *Public Records Aren't Public: Systemic Barriers to Measuring Court Functioning & Equity*, 113 J. CRIM. L. & CRIMINOLOGY 1 (2023) (conducting a national survey of county clerk offices on the availability and cost of criminal court transcripts and finding tremendous variation in both cost and availability to laypeople).

168. *See* Gau, *supra* note 84, at 79–80; Pollitt & Warren, *supra* note 89, at 1957–58; Barrett, *supra* note 88, at 296.

169. *See* Albrecht & Filip, *supra* note 167; Frampton, *supra* note 98.

170. Craft, *supra* note 24.

171. WILL CRAFT, APM REPS., PEREMPTORY STRIKES IN MISSISSIPPI'S FIFTH CIRCUIT COURT DISTRICT 2, https://features.apmreports.org/files/peremptory_strike_methodology.pdf [https://perma.cc/TNY4-VR4R].

district, we created a list of 418 trials from 1992 to 2017.[172]

It is unclear if APM Reports had any costs imposed by the courts for records requests, but often laypeople or scholars would at this juncture.[173]

Three APM Reports journalists went to courthouses, the Mississippi Department of History and Archives, and the Mississippi Supreme Court Archives to digitize court files and transcripts where available because those files are often still maintained as paper records if they are maintained at all.[174] They then manually coded the digital records for the venire, a record of the peremptory strikes written down either by the judge or court reporter, the race of each venire member as written down by either the judge or the court reporter (in the margins), the list of all selected jurors, and a transcript of the *voir dire* where available.[175]

The resultant analysis of Doug Evans's history of racial discrimination in jury selection followed a year of intense, team-based archival work. This Article walked through the process undertaken by APM Reports to fully underscore how difficult, time intensive, and potentially expensive that process can be. Footnote 17 truly undersells the insurmountable burden of the data problem here. In *Swain*, the disparity had been obvious: there had been no Black jurors serving in Talladega County in fifteen years. In that case, a history needed only be established by looking at who had (or had not) served on a jury—a much easier records question, though still one that would require extensive investigation.

In most cases, as discussed above, the discrimination becomes more subtle: prosecutors strategically pick a single Black juror or run out of strikes before they can clear all available Black venire members. This means that the process must be more closely examined to even begin to understand a potential pattern. The Supreme Court maintains that showing this pattern is not necessary: it is distinctively plausible that these types of patterns could routinely show up in the prosecutorial record were each case to have a team of diligent investigative journalists uncovering that prosecutor's pattern. However, not only is that beyond the reasonable scope of an ordinary appeals process, the *Batson* trajectory does not ever make clear that this would be considered.

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172. *Id.* at 3.
173. *See* Albrecht & Filip, *supra* note 167, at 10–11.
174. CRAFT, *supra* note 171, at 3.
175. *Id.* at 3–4.

That is, the Court in *Flowers* simply reiterated that a petitioner need not establish a history of discrimination outside of the case.[176] Justice Kavanaugh wrote:

> *Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination. Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed.[177]

And yet *Flowers* does, in fact, seem to preclude defendants from using exactly the kind of historical evidence that *Swain* seemed to require at a minimum, since *Swain* required a broader historical record.[178] Justice Kavanaugh's definition of "historical evidence" is slippery here: he simultaneously means evidence pertaining to the case and beyond the case. In discussing Flowers as a defendant, he is using "historical evidence" in a way that is not otherwise possible: the expanded universe of Flowers's own case is distinctively non-normative.

What the Court did in *Flowers* was rule on the option of using the historical record of multiple trials of the same defendant as functionally analogous to using the historical record of all trials tried by the same prosecutor in the same county, even though both sets of data are uniquely *available* to Flowers. The question of that data being an insurmountable burden is irrelevant here because Flowers surmounted it.[179] Just as the common understanding of *Batson* moved the harm suffered from the defendant to the juror, here, the Court similarly foreclosed the definition of who had done the harm and when. The insurmountable burden of compiling a historical record is actually irrelevant in *Flowers* because Curtis Flowers had a unique, utterly unprecedented record that would likely not occur again. The Court, therefore, did not directly rule on how the historical record should be considered in determining discriminatory intent in jury selection, even as they stated over and over that the functional idea of a historical record was something that they could possibly consider.[180]

There are three problems here: first, the Court's ever-shifting relationship to its own opinion in both *Swain* and *Batson* that makes statistical data a massive evidentiary question mark in the

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176. Flowers v. Mississippi, 139 S. Ct. 2228, 2245 (2019).
177. *Id.*
178. Swain v. Alabama, 380 U.S. 202, 205–09 (1965).
179. *Flowers*, 139 S. Ct. at 2245.
180. *Id.*

establishment of discrimination; second, the Court's primary assumption about the individual nature of a single case is divorced from evidence; and, third, the Court's unfettered acceptance of its own culture of failing to collect, store, and produce data pertinent to its own proceedings. This Article has largely discussed problem one and will elaborate upon problem two and expand upon problem three in the following sections.

i. On Evidence: The Court's N=1 Problem

I argue that an inherently contradictory feature of the United States legal system is that the law simultaneously overemphasizes precedent while deemphasizing context. This means that a legal understanding of a case is driven by its relationship to other cases, but only sometimes. By this I mean that one of the fundamental tenets of legal argumentation is that the court considers the facts before it and only the facts before it. One of the ways in which knowledge and transparency works in the courts is through, mostly evidentiary, decisions about what can be heard or what must be excluded.

The law, specifically discrimination law, does not yet broadly account for systemic comparisons.[181] Although some lower courts are beginning to hear statistical evidence in relation to particular causes of action—such as the Racial Justice Act in California[182]—generally, the law does not allow for an understanding of this type of contextualization. For the most part, the statistical story of how the law treats differently situated groups does not matter.

This maps onto a fundamental analytical problem of discrimination law: the law is set up to understand disparate treatment rather than disparate impact. Policies and practices that do not explicitly discriminate are often legal regardless of whether they *actually* do not discriminate. For example, the law considers standardized test scores to be a race-neutral factor in college admissions decisions even though considering those alone tends to result in an over-admission of white applicants due to systemic factors that allow for white students to have better resources to perform better on such tests.[183]

181. *See, e.g.*, *Flowers*, 139 S. Ct. at 2241 ("[T]he *Batson* Court held that a criminal defendant could show 'purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*.'" (citing Batson v. Kentucky, 476 U.S. 79, 96 (1986))).

182. CAL. PENAL CODE § 745 (West 2024).

183. Uma Mazyck Jayakumar & Ibram X. Kendi, *'Race Neutral' is the New 'Separate but Equal'*, ATLANTIC (June 29, 2023), https://www.theatlantic.com/ideas/archive/2023/06/supreme-court-affirmative-

Here, this is an important consideration because of the way that the law is structurally set up to ignore histories. The way the Supreme Court structurally pushes that discussion outside of the realm of the possible within *Flowers* is non-normative but the overall reluctance of the courts to consider history beyond the case before it is, in fact, an ordinary functioning of the courts. Although the totality of this issue is beyond the scope of this Article, it is worth mentioning here because it underscores the overall reluctance to use statistical data beyond the present record. That is, the Court's reluctance to consider data being so deeply enshrined in its ordinary functioning makes the laissez-faire attitude of *Batson* Footnote 17 unremarkable: that the data problems of the courts are a fundamental assumption of the functioning of the courts is unsurprising when one considers that this is a standard point of view of the United States legal system.

ii. Accepting Footnote 17: Considerations on Transparency and Privacy

The Court's implicit acceptance of the logic of Footnote 17 in *Batson* reveals a new layer to the problem of how discrimination law works. The procedural logic discussed above suggests a court system that is fundamentally predicated on not uprooting its own prior history of discrimination and, instead, retrenching that. Data access underscores that lack of interest and, furthermore, acts as a protective mechanism against self-critique that is never, in fact, actually weighed against any other intervening interests.

The theoretical consideration in the openness of courts is typically expressed in an overriding public interest versus an individual's interest in privacy. Publicity is a guiding legal principle Constitutionally derived from the First and Sixth Amendments, a democratic value, and a fundamental principle of the public sphere.[184] Legal actors routinely respond to that fundamental

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action-race-neutral-admissions/674565/ [https://perma.cc/5XVE-ZRDW]; Lauren Camera, *Test-Only Admissions Would Make Colleges More White, More Wealthy*, U.S. NEWS (June 24, 2019), https://www.usnews.com/news/education-news/articles/2019-06-24/test-only-admissions-would-make-colleges-more-white-more-wealthy [https://perma.cc/ZYR8-PA99] ("[A] test-only admissions policy would increase the share of white students at top colleges from 66% to 75%, and the combined share of black and Latino students would decrease from 19% to 11%. The share of Asian students would fall slightly, from 11% to 10%.").

184. *See* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (holding that criminal trials must be open to the public); *see also* Associated Press v. U.S., 326 U.S. 1 (1945) (holding that anticompetitive behavior by news organizations affected the First Amendment by affecting the ability of the public to receive information from multiple sources); *see also* U.S. CONST. amend. VI. & amend. I.

presupposition with arguments in favor of opacity or, at least, limiting a general right to publicity. Prosecutors argue against *Brady* requirements to share information, often exercising discretion under *Brady* by citing an overriding interest in public safety or even unilaterally determining that the information in question is not sufficiently important.[185] Judges, following the Federal Rules of Evidence, routinely exclude evidence from proceedings in the interest of preserving fairness.[186] Furthermore, the Supreme Court, in delineating the very principle of court publicity has explicitly named situations in which the public is not entitled to full information about a trial: namely, in the case of child abuse, whereby the victim cannot meaningfully consent to the implied waived privacy of a public trial.[187] The discourses around both publicity and opacity often center on notions of equity and fairness as a potential overriding interest.

Footnote 17 is not subject to a balancing test. The Court does not grapple with the issue of whether automatically constraining the collection of data at the trial court level is met with an overriding public interest in the name of privacy. Theoretically, the rejoinder could be, particularly in 1986, that the production and maintenance of comprehensive public records for every jury selection process would be unduly expensive for the courts for ultimately little material value for the public. However, policy experts broadly disagree, even when accounting for courthouses that contemporaneously maintain their records via paper (such as in Cook County). Injustice Watch reported in 2018, for example, that court recording in Cook County eviction courts is a major access to justice issue: that the lack of court reporters or digital recording equipment "has serious repercussions, largely preventing effective appeals of eviction rulings and making it nearly impossible to hold judges accountable."[188] And, while the issue is more salient in civil

185. *See* Brady v. Maryland, 373 U.S. 83 (1963) (holding that the prosecution has an affirmative pre-trial duty under the Constitution to disclose exculpatory evidence); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138 (2012); *see generally* JULILLY KOHLER-HAUSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA (2017) (discussing the impact of "tough on crime" rhetoric on punishment generally).

186. *See* FED. R. EVID. 403.

187. Stephen E. Smith. *What's In a Name? Strict Scrutiny and the Right to a Public Trial*, 57 IDAHO L. REV. 447, 463–64 (2021).

188. Olivia Stovicek and Mari Cohen, *Failure to Record Cook County Eviction Court Hearings Leaves Tenants Vulnerable,* INJUSTICE WATCH (Apr. 25, 2018), https://www.injusticewatch.org/civil-courts/housing/2018/failure-to-record-cook-county-eviction-court-hearings-leaves-tenants-vulnerable/ [https://perma.cc/5FTT-

courts where there is substantially less reporting and record-keeping overall than in criminal courts, the issues of leveling the playing field and creating a record for appeal are equally salient in criminal courts.

Notably, this analysis fails to account for how, in the case of a criminal defendant, the interests being balanced should necessarily be the defendant's own: considering an overriding public interest versus an overriding interest in privacy. A good analysis would consider a criminal defendant's interest in not having their name publicly associated with ongoing proceedings, although I have argued elsewhere that the maintenance and production of court data is not sufficient to influence the cottage industry of exploitation of individuals involved in the criminal legal system, alongside the rights of the criminal defendant not just as a criminal defendant but as a member of the public.[189] In other words, there are constitutionally-imposed rights to criminal defendants, but here, the production and maintenance of court records and data is not just about the ability of a defendant to have a record for appeal but for the public—which includes criminal defendants writ large—to understand the systemic functioning of the criminal courts. Critics may argue that the general public does not have reason to care about their rights as an individual to study, know, or understand the patterns of individual prosecutors in individual jurisdictions and that advocating for such collection and preservation of data is unduly burdensome given the overriding lack of personal interest. While it may be true that an individual without any attachment to the criminal legal system might not have any personal interest in better understanding the systemic functioning of the courts, the ability to contextualize an individual case can be helpful for defendants who are also members of the public, particularly as lower courts become increasingly amenable to considering statistical data.

The Court also does not deal with this in *Batson* Footnote 17 or elsewhere. Not only does it fail to do a good analysis of the

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QYDA]; *see also The Case for Recording Devices in Cook County Eviction Courts*, CHI. APPLESEED CTR. FOR FAIR CTS. (July 2016), https://www.chicagoappleseed.org/wp-content/uploads/2018/04/July-2016-Case-for-Recording-Devices-Formatted-1.pdf [https://perma.cc/3PQ8-4FW4].

189. Kaitlyn Filip & Kat Albrecht, *Regulating Harms: Tensions Between Data Privacy and Data Transparency*, 8 J. REGUL. COMPLIANCE 115 (2022) (arguing that oftentimes public records and data is available on a for-pay model to interested third parties and is always available to the state or courts, creating an overall power discrepancy between criminal defendants and the state that keeping court data secret does not ameliorate and, in fact, exacerbates).

balanced interests in the case of record-keeping, it fails to do any analysis at all. Keeping the focus on the *Batson* problem, the Court's entire analysis across the case trajectory from 1986 to 2019 rests on an assumption that access to broad court data on jury selection is insurmountable. The passive voice at play in this articulation of the problem of accessing broad court data shifts focus from the actors responsible for making that data fundamentally and insurmountably inaccessible: resting on the idea that systemic data about the jury selection patterns of particular prosecutors is "insurmountable" suggests that this is simply how the system must be and that change is impossible.

What is worse is that the Court in *Flowers* holds on to that idea of it being insurmountable. Justice Kavanaugh not only reifies the idea in Footnote 17 that court data cannot be accessed because it is routinely not collected, he makes that idea central to the text in *Flowers*, articulating it as a holding in the main text of *Batson*.[190] *Flowers* as a case holds the keys to undoing the fundamental problems of *Batson*: that it is toothless, that it shifts attention from the defendant to the juror, that it reifies the logic of discrimination rather than undoing it. Because the case is so extraordinary, the Court had the opportunity to leverage its extraordinary set of facts to comment on patterns of racial discrimination in jury selection. Instead, they functionally narrowed the definition of history from *Swain*: they say that *Swain*'s burden is insurmountable because of the impossibility of obtaining broad statistical data about particular jurisdictions and, yet, they refuse to consider the broad statistical data about Winona, Mississippi available to them.

Flowers's team likely kept the definition narrow because of its own interest in winning in this particular case. However, the Court need not have, once again, failed to alter their own milquetoast anti-discrimination logic: "[W]e break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case."[191] Instead of taking the extraordinary facts—and the unique contemporary digital and media circumstances that brought those extraordinary facts to public light—as an opportunity to rethink the use of public data in these cases, the court avoided the question all together.

190. Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019) (citing Batson v. Kentucky, 476 U.S. 79, 92 n.17 (1986)).

191. *Id*. at 2235.

Conclusion: Opacity, Discrimination, and The Popular Trial

Given the Supreme Court's own history in the *Batson* trajectory that I have identified here, I would not have expected the Court to do something radical in *Flowers*. As previously described, the Court's relationship to its own history is ironically too entrenched to adequately consider the role of history and context in the cases before it. The Court doing something fundamentally conservative vis-à-vis race and rights is a predictable outcome, particularly in light of all of the scholarship discussed above. Still, what makes *Flowers* particularly unique, I argue, is its context and the way in which the Court had the opportunity to make a different choice but, instead, re-entrenched their own discriminatory logic once again.

I want to return here to *In the Dark* season 2. In May 2018, American Public Media began reporting on the Curtis Flowers cases as a follow-up to their 2016 reporting on the Jacob Wetterling case (a story about the abduction of a young child in 1989). The podcast unexpectedly spanned nearly two and a half years of active airing, concluding in October 2020 with an episode in conversation with Flowers himself.[192] Much has been made of the role of the podcast *Serial* and its involvement in the Adnan Syed case, with reporters generally asserting the importance of the podcast for the administration of justice in Syed's appeals.[193] While one function of contemporary true crime, particularly when driven by journalists, can be in a reexamination of a case, it is worth noting here one more reason why Flowers is extraordinary.

First, I want to take a moment to discuss *Serial* as a comparator. *Serial*'s first season covers the investigation into the murder of high school student Hae Min Lee and the subsequent arrest and conviction of her ex-boyfriend Adnan Syed for that murder.[194] Throughout the course of the season, host Sarah Koenig routinely questions whether she believes that Syed is guilty or innocent, a standard question in the true crime space that became a site of tremendous discourse for fans of the podcast.[195] I have

192. In the Dark, *Season 2, Episode 20: Curtis Flowers* (Oct. 14, 2020), https://www.apmreports.org/episode/2020/10/14/in-the-dark-s2e20 [https://perma.cc/7BHQ-WYQ6].

193. *See* Lindsey A. Sherrill, *The "Serial Effect" and the True Crime Podcast Ecosystem*, 16 JOURNALISM PRAC. 1473, 1486 (2022).

194. *'Serial': Season 1*, N.Y. TIMES (Sept. 20, 2022), https://www.nytimes.com/2022/09/20/podcasts/serial-adnan-syed.html [https://perma.cc/K4QC-PTYV].

195. Hanna Rosin, *The Real Secret of* Serial, SLATE (Oct. 23, 2014),

argued elsewhere that *Serial* is predominantly a show about the idea of guilt or innocence, which means that it rests on the fundamental assumption that the system is only interesting as a means of analysis when it gets that guilt or innocence question wrong.[196] Basically, *Serial* is a variant of an innocence project: Koenig looks into the procedural missteps of the case because of doubts around the outcome of the case.

Along the way, Koenig reports on substantial procedural missteps.[197] She discusses how the police failed to investigate several open avenues, Syed's defense counsel was unusually ineffective, and that the conviction relied upon evidence that should not hold up.[198] As others have discussed, barring the level of negligence exhibited by Syed's attorney, this is a fairly normal set of facts about criminal trials in the United States: the police often set their sights on a particular suspect and do not deviate despite available alternative stories and evidence at trial need not be scientifically reliable. What is unusual about the Adnan Syed case is that the cultural impact of the podcast contributed to a general public understanding of Syed having experienced injustice at the hands of the system. As of this writing, Syed has been released from prison in light of a reexamination of the procedural unfairness.[199] Still, *Serial* did not create any evidence or data or participate in the emancipation of Adnan Syed, even as its cultural impact on the public perception of the case did likely contribute to his release.

What is unique about Curtis Flowers's case, however, is the investigative work of APM. *In the Dark* does not ever weigh in on whether or not Curtis Flowers may have killed four people in Tardy Furniture on July 16, 1996. *In the Dark* also does not take the position that the system was uniquely unjust to Curtis Flowers. In fact, the podcast balances a perspective on the strange circumstances of his trials with the idea that a great deal of the procedural injustice enacted is a routine part of doing business in the criminal legal system. *In the Dark* seeks to contextualize Flowers's case as one of many, operating on the assumption that an

https://www.slate.com/articles/arts/culturebox/2014/10/serial_podcast_and_storytelling_does_sarah_koenig_think_adnan_syed_is_innocent.html [https://perma.cc/AAM4-ZPCD].

196. *See generally* Albrecht & Filip, *supra* note 36.

197. *See id.* at 56.

198. *Id.* at 44.

199. Brian Witte, *Adnan Syed's Murder Conviction on Hold for Now, as Maryland Supreme Court Considers Appeal*, AP NEWS (May 25, 2023), https://apnews.com/article/adnan-syed-appeal-serial-maryland-549a9607b24abcd1d1ea4fc6c69f2db3 [https://perma.cc/XE9F-RKK5].

ordinary part of the criminal legal system involves mistreatment of Black defendants.

In the Dark likely had less of an impact on the release of Curtis Flowers than *Serial* had on the release of Adnan Syed because of the extraordinary facts of the Flowers procedural history evidenced by the Supreme Court's discussions. However, *In the Dark* is an extraordinary example of the relationship between journalism and the law. Here, the impact of the podcast as media is actually not likely changing hearts and minds or uncovering overlooked innocence. Instead, *In the Dark* functions as a set of resources otherwise completely unavailable to a single criminal defendant. I have described above the year-long process through which APM produced an unprecedented amount of contextual data about prosecutor Doug Evans. In many ways, this data is otherwise impossible because of the structural functioning of the courts. Still, here, it exists.

In his dissent in *Flowers*, Justice Thomas takes issue with the narrativization of the case: from the procedural posture before the Supreme Court to the media attention, to the majority's understanding of how statistical data tells a story, to Flowers's story as an "entertaining melodrama."[200] Justice Thomas writes, "[P]erhaps the Court granted certiorari because the case has received a fair amount of media attention," critiquing the relationship between law and the media.[201] He states that the Court giving attention to cases with massive amounts of media attention will only exacerbate the problems of publicity and "undermine the fairness of criminal trials."[202] Conversely, I argue that this case is, in fact, one in which as part of the media coverage the drama of Flowers's situation is de-emphasized.

To conclude, what I argue that Justice Thomas gets right in his dissent, although we fundamentally disagree, is that we ought to revisit the relationship between widespread media attention and justice and that the majority fundamentally drops the ball on its understanding of statistical evidence. An individual's freedom should not rest on the dogged pursuit of pertinent statistical data by third parties, but, I argue, the answer to that potential inequity is not to foreclose the use of statistical data as an argument in jury (and other) discrimination cases. Instead, the Supreme Court ought to revisit *Batson* Footnote 17 in light of the deeply embedded legacy

200. *Flowers*, 139 S. Ct. at 2266 (Thomas, J., dissenting).
201. *Id*. at 2254.
202. *Id*. (naming the problems of publicity as: influencing public opinion (including that of potential jurors) and discouraging witness testimony).

of *Swain* and make the courts more transparent so that this—and other—data can be more easily utilized. The standard is only insurmountable insofar as we allow courts to fail to maintain and produce public records.