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Peremptory Challenges: Preserving An Unequal Allocation and the Potential Promise of Progressive Prosecution

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COMMENTS

PEREMPTORY CHALLENGES: PRESERVING AN UNEQUAL ALLOCATION AND THE POTENTIAL PROMISE OF PROGRESSIVE PROSECUTION

Savanna R. Leak*

In the United States, the relative allocation of peremptory challenges afforded to the defense and prosecution is at once in a state of paralysis and flux. The federal system maintains an unequal allocation of peremptory challenges between the defense and prosecution in noncapital offenses, while many states have moved toward equalization of the number of peremptory challenges afforded to each side over the last few decades. Currently, only five states and the federal system have retained an allocation of peremptory challenges that affords the defense a greater number of peremptory challenges in noncapital offenses. Further, only nine states and the federal system maintain an unequal allocation of peremptory challenges in any capacity. This inconsistency strikes a chord fundamental to the fairness of our justice system, especially in light of the Supreme Court's failure to eliminate the discriminatory exercise of the peremptory challenge in Batson. This Comment argues that, at this time, the federal system and remaining states should not move toward equalizing the number of peremptory challenges afforded to the defense and prosecution because allocating a greater number of peremptory challenges to the defense best serves theoretical fairness in the justice system, including maintaining the community's perception the justice system's fairness. Additionally,

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allocating a greater number of peremptory challenges to the defense serves actual fairness by reducing opportunities for prosecutors to use peremptory challenges in a discriminatory manner. Finally, this Comment takes the novel approach of considering how the “progressive prosecution” movement may justify movement toward equalization in the future, by shifting the community’s perception of fairness and by increasing actual fairness in the exercise of peremptory challenges.

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INTRODUCTION

The peremptory challenge, though not constitutionally guaranteed, has long been considered essential in ensuring that the accused is tried before an impartial jury, a right guaranteed to the accused under the Sixth

Amendment.¹ At the same time, the history of peremptory challenges demonstrates their potential for abuse, as lawyers, and particularly prosecutors, have used peremptory challenges to strike jurors on the basis of race and sex.² Despite general agreement in the legal community regarding the importance of peremptory challenges and the need for oversight in how the prosecution and defense use them, the federal system and the states do not reach consensus on whether the defense should be afforded a greater number of peremptory challenges than the prosecution, or whether the two sides should have an equal number.

Instead, the relative allocation of peremptory challenges to the defense and prosecution is at once in a state of paralysis and flux. Since the Federal Rules of Criminal Procedure were promulgated in 1946, the federal system has maintained an unequal allocation of peremptory challenges that affords a greater number of peremptory challenges to the defense than the prosecution in noncapital cases, despite repeated legislative attempts to equalize the number of peremptory challenges.³ However, legislative proposals at the state level to equalize the number of peremptory challenges for each side have been successful. Currently, only nine states maintain an

¹ See *Proposed Amendments to The Federal Rules of Criminal Procedure: Hearing Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 95th Cong. 54 (1977) [hereinafter *Hearing*] (statement of Richard L. Thornburg, Acting Deputy Att’y Gen.) (“Although nothing in the Constitution requires the Congress or the State to permit any peremptory challenges, nonetheless, the challenge, by virtue of its roots in English common law and its persistent use in this country dating from colonial to modern times in both the Federal and State criminal justice systems, has become established as a vital and necessary part of trial by jury.”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed”); C.J. Williams, *On the Origins of Numbers: Where Did the Number of Peremptory Strikes Come from and Why Is Origin Important?*, 39 AM. J. TRIAL ADVOC. 481, 483 (2016).

² See Williams, *supra* note 1, at 483 (“Peremptory strikes are viewed as problematic and fraught with potential for abuse, but at the same time recognized as critical to seating fair and impartial juries.”).

³ FED. R. CRIM. P. 24(b). The Federal Rules of Criminal Procedure currently allocate a greater number of peremptory challenges to the defense than the prosecution in noncapital felonies and an equal number of peremptory challenges to both sides in capital cases. *Id.* The most significant proposal to amend the Federal Rules to allocate an equal number of peremptory challenges to the prosecution and defense in noncapital cases occurred in 1977, but was rejected by the Judiciary Committee after three days of oral testimony by members of the legal community. See *Hearing*, *supra* note 1. This Comment does not focus on the distinction between capital and noncapital cases but rather focuses on the general resistance at the federal level to equalization in contrast to the trend among states toward equalization.

unequal allocation of peremptory challenges to some degree,⁴ and only five states afford a greater number of peremptory challenges to the defense than the prosecution in noncapital offenses.⁵ This is a substantially different picture than in the mid-twentieth century, when twenty states allocated a greater number of peremptory challenges to the defense for at least some offenses.⁶ The stark contrast between the federal system's resistance to

⁴ States adopt varying practices with respect to the peremptory challenge; some states afford a greater number of peremptory challenges for certain categories of felonies, but not others. *See, e.g.*, N.J. R. GEN. APP. R. 1:8-3(d) (citing N.J. STAT. ANN. § 2C:21-1 (West 2020)) (allocating twelve peremptory challenges to the State and twenty peremptory challenges to the defense “upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A § 2C:21-1b, or perjury,” and allocating both the State and the defense ten peremptory challenges “in other criminal actions”).

⁵ ARK. CODE ANN. § 16-33-305 (West 2020) (allocating ten peremptory challenges to the State and twelve peremptory challenges to the defense in prosecutions for capital murder and allocating six peremptory challenges to the State and eight to the defense in prosecutions for all other felonies); DEL. R. CRIM. P. SUPER. CT. 24 (allocating twelve peremptory challenges to the State and twenty peremptory challenges to the defense in capital cases, and allocating six peremptory challenges to both the State and defense in noncapital cases); MD. CODE ANN. CRIM. LAW § 4-313 (West 2020) (allocating the defense twelve and the State ten peremptory challenges in capital cases, the defense ten and the prosecution five in felonies carrying a sentence of at least twenty years, and four to each side in “other noncapital felonies”); MINN. R. CRIM. P. 26.02(6) (2020) (allocating nine peremptory challenges to the State and fifteen peremptory challenges to the defense in cases punishable by life imprisonment, and allocating three peremptory challenges to the state and five to the defense for any other offense); N.H. REV. STAT. ANN. § 606:3 (2020) (allocating twenty peremptory challenges to the defense in capital murder trials, fifteen in first degree murder trials, and three in any other case; and allocating ten challenges to the State in capital murder trials, fifteen in first degree murder trials, and three in any other case); N.J. R. GEN. APP. R. 1:8-3(d) (citing N.J. STAT. ANN. § 2C:21-1 (West 2020)) (allocating twelve peremptory challenges to the State and twenty peremptory challenges to the defense “upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. § 2C:21-1b, or perjury,” and allocating both the State and the defense ten peremptory challenges “in other criminal actions”); N.M. R. CRIM. P. DIST. CT. 5-606 (allocating sixteen peremptory challenges to the State and twenty-four to the defense if the offense charged is punishable by death, eight peremptory challenges to the State and twelve to the defense if the offense charged is punishable by life imprisonment, and three peremptory challenges to the State and five to the defense in all other cases); S.C. CODE ANN. § 14-9-200 (2020) (allocating three peremptory challenges to the State and five to the defense in all felony cases); W. VA. R. CRIM. P. 24(b)(1) (allocating two peremptory challenges to the State and six to the defense in offenses punishable by imprisonment for more than one year).

⁶ Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1536 n.223 (2015). Until the 1970s, twenty states maintained an unequal

equalizing the number of peremptory challenges for noncapital cases and the states' widespread adoption of equalization is surprising, if not troubling. The peremptory challenge is an important component of jury selection.⁷ After jurors have been questioned and both the prosecution and defense have made challenges for cause, both sides may use their respective peremptory challenges to strike prospective jurors without providing a reason for the strike.⁸ Accordingly, peremptory challenges serve as a kind of safety net at the end of jury selection, whereby parties can eliminate jurors they suspect might be biased or partial to the other side but who do not qualify for a challenge for cause.⁹

However, many in the legal community consider peremptory challenges to be “fraught with potential for abuse” due to the subjective and potentially discriminatory nature of eliminating jurors without being required to provide an explanation.¹⁰ In 1986, the Supreme Court addressed this concern in *Batson v. Kentucky*.¹¹ The *Batson* decision prohibited prosecutors from using peremptory challenges to strike potential jurors solely based on race, requiring them to give a neutral reason for any strike.¹² The *Batson* prohibition was later extended to the defense's use of peremptory challenges and to discriminatory use of the peremptory challenge to strike jurors on the basis of sex.¹³ Despite *Batson*, however, abuse of the peremptory challenge

allocation of peremptory challenges in some form. These states included Alabama, Alaska, Arkansas, Delaware, Georgia, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, and West Virginia. *Id.*; see also *id.* at 1537 n.225 (“Since the 1970s, asymmetry has been abandoned in Alabama, Alaska, Georgia, Kentucky, Maine, Michigan, Missouri, Nebraska, North Carolina, Oregon, and Tennessee.”).

⁷ Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 230 (1986).

⁸ *Id.* at 228.

⁹ *Id.* at 227, 230; see also Roberts, *supra* note 6, at 1512 n.67.

¹⁰ Williams, *supra* note 1, at 483.

¹¹ 476 U.S. 79, 79–80 (1986).

¹² *Id.* at 93–98. The Court established a three-step test to determine whether the prosecution exercised a peremptory challenge for a discriminatory reason. *Id.* *Batson*'s first step “requires the objecting party to establish a ‘prima facie case of purposeful discrimination.’” Step two shifts the burden to the party attempting to exercise the peremptory to give neutral reasons that are “related to the particular case to be tried”; step three “requires the trial judge to decide whether the reasons are pretextual.” Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1697 (2006) (citation omitted).

¹³ See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson*'s prohibition to apply to defendants' discriminatory use of the peremptory challenge); *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994) (extending *Batson*'s prohibition on discriminatory use of peremptory challenges to challenges based on gender).

is not an ancient relic, and the *Batson* test is generally considered to be insufficient to rein in discriminatory use of the peremptory challenge, particularly by the prosecution.¹⁴ A recent and poignant example of prosecutorial abuse of the peremptory challenge is the 2019 Supreme Court case, *Flowers v. Mississippi*, where the Court found extraordinary evidence of discriminatory intent by the prosecution in its use of peremptory challenges.¹⁵ For these reasons, legislators, judges, and the academic community have long considered how peremptory challenge procedures may safeguard and balance the interests of defendants, victims, and the community, and better promote the fair administration of justice. Some have even called for the abolition of the peremptory challenge altogether.¹⁶

Given the importance of the peremptory challenge as well as its potential for abuse, the legal community should take note of states' substantial departure from the federal system and consider which approach better serves fairness in our criminal justice system. One might be skeptical about the importance of the relative allocation of peremptory challenges at either the federal or state level, as the difference might involve only a handful of peremptory challenges that may or may not have a noticeable impact on the outcome of a trial. But this is a naïve view. Even one peremptory

¹⁴ See, e.g., Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 1 (2014) (“[T]he *Batson* regime has proved spectacularly unsuccessful. It has not ended racial discrimination in jury selection”); Jere W. Morehead, *When a Peremptory Challenge is No Longer Peremptory: Batson’s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 633 (1994) (“Despite the *Batson* rule’s noble purpose, it cannot prevent clever lawyers from using peremptory challenges to strike potential jurors based upon impermissible rationales so long as they pretend to use other, permissible bases.”); Scott W. Howe, *Deselecting Biased Juries*, 2015 UTAH L. REV. 289, 293 (2015) (“[The] *Batson* doctrine does not adequately regulate [peremptory challenges].”).

¹⁵ See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2245 (2019). *Flowers* is the most recent Supreme Court decision to consider *Batson* violations. The case is exceptional for several reasons, including that *Flowers* was tried for the same series of murders six times. In *Flowers*, *Flowers* appealed his sixth trial conviction, claiming that the lead prosecutor, Doug Evans, had used his peremptory challenges in a discriminatory manner to strike five black prospective jurors. *Id.* In November 2019, the NAACP and other organizations filed a class-action suit against Evans, alleging that he and other prosecutors in his office had struck black jurors 4.4 times more frequently than white jurors. Mihir Zaveri, *White Prosecutor, Doug Evans, Asks to Recuse Himself from Curtis Flowers Case*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/us/doug-evans-curtis-flowers.html> [<https://perma.cc/ZQ2U-PRBW>]. Evans later asked to recuse himself from *Flowers*’s ongoing case. *Id.*

¹⁶ See, e.g., *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring) (“The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.”); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 370–71 (1992); Marder, *supra* note 12, at 1714.

challenge provides potential for abuse on the basis of race or sex and may be “critical to seating fair and impartial juries.”¹⁷ And the defendant’s and community’s perception of the justice system may depend on the relative allocation of peremptory challenges. Accordingly, the legal community should monitor changes and trends in this area closely and consider whether an unequal or equal number of peremptory challenges for the prosecution and defense best serves the justice system.¹⁸

Arguments for and against equalizing at the federal and state level have in large part centered on theoretical and practical notions of “fairness.”¹⁹ For the purposes of this Comment, theoretical fairness encompasses arguments focused on the relative “rights” and “interests” of the defendants, victims of crime, and the community in an impartial jury, as well as how the community perceives the justice system.²⁰ Practical, or “actual” fairness encompasses arguments considering empirical data on the parties’ abuse of peremptory challenges in jury selection. This Comment argues that the states’ trend toward equalization of the number of peremptory challenges allocated to the prosecution and defense is unwise because an unequal allocation best serves both notions of fairness, considering the arguments highlighted in the debates over the relative allocation of peremptory challenges throughout its history and the practical use of the peremptory challenge today. If, however, an equal number of peremptory challenges for each side is a worthy goal—a question explored further *infra*—this Comment argues that the progressive prosecution movement may justify equalizing the number of peremptory challenges between the prosecution and defense in the future.

¹⁷ Williams, *supra* note 1, at 483.

¹⁸ *Id.* at 510–11 (“Whether each side receives the same number of peremptory strikes is a vital issue. Most state legislatures afford each side the same number of peremptory strikes in criminal cases, while the federal rules grant defendants more peremptory strikes in felony cases, but not in capital or misdemeanor cases.”).

¹⁹ See Roberts, *supra* note 6, at 1538–41; see also Note, *Judging the Prosecution*, 119 HARV. L. REV. 2121, 2131 (2006) (discussing peremptory challenges in the context of “two related considerations: the extent to which [criminal] process is perceived as being fair and just, and the extent to which [criminal] process is actually fair and just”). Though the author discusses abolition of the peremptory challenge, this framework is helpful for categorizing arguments regarding the proper allocation of peremptory challenges between the prosecution and defense as well.

²⁰ Theoretical fairness includes, for example, arguments made by proponents of the Victim Rights Bill of 1995, which sought to equalize the number of peremptory challenges for noncapital federal felony offenses in order to protect victims’ rights relative to the defendant. See, e.g., Victim Rights and Domestic Violence Prevention Act of 1995, S. 1483, 104th Cong. (1st Sess. 1995); see also 141 CONG. REC. 38275–77 (1995) (statement of Sen. Kyl).

The notion that the states should maintain an unequal allocation of peremptory challenges is not new in legal scholarship.²¹ However, this Comment explores anew the bases for various allocations, which have shifted over time. Further, it takes a novel approach in considering how the progressive prosecution movement may shape the proper allocation of peremptory challenges and perhaps even justify the current shift toward equal allocation of peremptory challenges. Part I discusses the origins of the peremptory challenge and justifications for equal and unequal allocation of peremptory challenges. It considers the English roots of the peremptory challenge, the adoption of the peremptory challenge in the United States, the legislative history surrounding Rule 24 of the Federal Rules of Criminal Procedure—which governs the allocation of peremptory challenges—and state legislative history. Part II discusses the justifications for the right of both the prosecution and the defense to the peremptory challenge, considering arguments from legislative history and relevant case law, including *Batson* and its progeny. Part III discusses whether the trend toward equalization is wise, considering the justifications provided in Parts I and II. Finally, Part IV examines how progressive prosecution may change the current landscape of fairness in the peremptory challenge context to warrant an equal number of peremptory challenges for both sides.

I. JUSTIFICATIONS FOR FEDERAL AND STATE ALLOCATIONS OF THE PEREMPTORY CHALLENGE

Peremptory challenges are limited in number, set in the federal system by the Federal Rules of Criminal Procedure and in the states by statute.²²

²¹ Scholars who have considered the proper relative allocation of peremptory challenges include Anna Roberts, Katherine Goldwasser, Richard Friedman, and C.J. Williams. For their perspectives, see, respectively, Roberts, *supra* note 6, at 1538–39 (“[A]symmetry [in the allocation of peremptory challenges] does not equate to unfairness and, indeed, has been a foundational component of efforts to create a fair criminal justice system [A]n asymmetrical allocation of peremptory challenges offers particular opportunities with respect to the difficulties of the *Batson* doctrine.”); Katherine Goldwasser, *Limiting a Criminal Defendant’s Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 808 (1989) (considering whether *Batson*-like restrictions should apply symmetrically to the defense as it does to the prosecution); Richard D. Friedman, *An Asymmetrical Approach to the Problem of Peremptories?*, 28 CRIM. L. BULL. 507, 507 (1992) (considering the relative importance of peremptory challenges to the defense and prosecution and considering asymmetry in the allocation of peremptory challenges to both sides); Williams, *supra* note 1, at 481 (reviewing the bases for various allocations of peremptory challenges in the United States over time and arguing that the proper allocation must be determined through empirical study).

²² Coburn R. Beck, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 964 n.27 (1998).

Currently, the allocation of peremptory challenges varies between the federal government and among the states. In the federal system, Rule 24(b) of the Federal Rules of Criminal Procedure dictates the number of peremptory challenges allocated to the defense and prosecution in criminal cases.²³ The numbers vary by severity of the offense.²⁴ In capital cases, the defense and prosecution are each allocated twenty peremptory challenges.²⁵ In noncapital felony cases, the defense is allocated ten peremptory challenges and the prosecution is allocated six.²⁶ By contrast, most states allocate an equal number of peremptory challenges to the defense and prosecution in both capital cases and noncapital cases, with the absolute number of peremptory challenges increasing with the severity of the offense.²⁷

Some states, however, allocate an unequal number of peremptory challenges to the prosecution and defense, granting a greater number of peremptory challenges to the defense than the prosecution. Even among these states, the peremptory challenge allocation varies. Minnesota, for example, grants a greater number of peremptory challenges to the defense than the prosecution in cases involving life sentences and noncapital felonies,²⁸ while Delaware grants a greater number of peremptory challenges to the defense than the prosecution in capital cases, but an equal number of peremptory challenges to both parties in noncapital felonies.²⁹ Maryland, on the other hand, maintains a sort of hybrid system of allocation: the state allocates a greater number of peremptory challenges to the defense for capital felonies and for noncapital felonies that carry a sentence of twenty years or more, but it allocates an equal number of peremptory challenges to the state and defense in other noncapital felonies.³⁰

This Part traces the historical development of the peremptory challenge and highlights justifications for the relative allocation of peremptory challenges between the prosecution and the defense in the federal system and among the states. The origins of the peremptory challenge demonstrate an early concern with the relative allocation of peremptory challenges between the prosecution and defense. Further, legislative history surrounding proposed amendments to the Federal Rules and to state legislation demonstrates that proponents and opponents of equalization have primarily

²³ FED. R. CRIM. P. 24(b).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* This Comment does not examine peremptory challenges in misdemeanor cases.

²⁷ Roberts, *supra* note 6, at 1535; *see also supra* note 5.

²⁸ MINN. R. CRIM. PROC. 26.02(6) (2020).

²⁹ DEL. R. CRIM. P. SUPER. CT. 24(b).

³⁰ MD. CODE ANN. CTS. & JUD. PROC. § 8-420 (West 2020).

focused on the notion of “fairness” in considering the proper allocation of peremptory challenges between the prosecution and the defense.

A. HISTORY OF THE PEREMPTORY CHALLENGE ALLOCATION: FROM ENGLAND TO THE UNITED STATES

Since the fourteenth century, jurists have viewed the peremptory challenge’s role in trial procedure with profound respect.³¹ Additionally, lawmakers historically appeared more concerned with the *relative* allocation of peremptory challenges—and the relative importance of the peremptory challenge as to the defense and the prosecution—than the absolute number of peremptory challenges.³² In England, peremptory challenges can be traced back to medieval times.³³ Initially, the Crown had an unlimited number of peremptory challenges, which served as a symbol of the absolute power or “infallib[ility]” of the monarchy.³⁴ In 1305, however, Parliament eliminated the Crown’s peremptory challenge in a step toward democratization, noting that a jury “selected by the Crown was ‘obnoxious to justice.’”³⁵

Although the Crown’s right to the peremptory challenge was technically eliminated, the Crown soon began to exercise its power to “stand aside” jurors. This practice allowed the Crown to strike jurors in much the same way the peremptory challenge did.³⁶ The stand aside involved a prosecutor initially assigning a potential juror a challenge for cause without explanation.³⁷ The court then instructed that juror to stand aside until all

³¹ See Morrison, *supra* note 14, at 10; Marder, *supra* note 12, at 1692 (“There are both powerful historical and practical reasons for preserving the peremptory challenge. Justice Stevens has [a] deep respect for history . . . [which] might lead him to maintain the peremptory [challenge] . . .”).

³² See Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT’L & COMP. L. REV. 201, 207–08 (1993). Early changes in the allocation of peremptory challenges involved shifting or overhauling the allocation of peremptory challenges to increase or decrease the power of the government as to the defense, as well as promoting “the appearance of fairness to the accused.” *Id.* at 208–211; see also Williams, *supra* note 1, at 505–07 (suggesting that while the absolute number of peremptory challenges, historically, seems to lack logic or coherence, legislators’ concern with the relative number of peremptory challenges is reflected in legislative history).

³³ Heinz, *supra* note 32, at 207.

³⁴ Alexa B. Moeller, *Has the “Last Petal” Fallen?: Beauty of the Modern Jury Trial and the Beast Known as the Peremptory Challenge*, 63 S.D. L. REV. 193, 196 (2018) (citation omitted).

³⁵ Heinz, *supra* note 32, at 208.

³⁶ *Id.* at 209.

³⁷ *Id.*

venire members had been examined by the defense and prosecution.³⁸ Only once the “stood aside” juror was called again would the prosecutor have to prove the challenge for cause.³⁹ Simply put, the government could have prospective jurors stand aside from jury selection and pass over that juror to the next before showing cause for removing them.⁴⁰ The court only seated a stood aside juror thereafter if, after questioning remaining jurors, a jury could not be seated without him.⁴¹

The lawmakers who created the stand aside in England did so with the perception that juries would be “too defense-oriented,” likely believing that jurists could “conduct[] trials fairly, even though the Crown controlled jury selection.”⁴² According to one scholar, the creation of the stand aside “marks the beginning of a conflict between confidence in the fairness of the prosecutor as an officer of the court versus a suspicion of placing too much power in the prosecutor as representative of the sovereign.”⁴³ Nonetheless, the decision to allocate no peremptory challenges to the Crown and an unlimited number to the defense was symbolically significant, leading English jurists to consider the peremptory challenge a “*defendant’s* privilege.”⁴⁴ After 1305, only defendants were permitted to exercise peremptory challenges.⁴⁵ By 1530, parliament set a fixed number of peremptory challenges for the defense: defendants were allocated thirty-five peremptory challenges for cases involving high treason and twenty challenges in all other cases.⁴⁶

B. ADOPTION OF THE PEREMPTORY CHALLENGE IN THE UNITED STATES

Peremptory challenge practices in the United States initially mirrored the English common law.⁴⁷ At the time of the United States’ founding, defendants were given thirty-five peremptory challenges in cases of treason and twenty peremptory challenges in cases of murder or other felonies.⁴⁸ The prosecution was able to stand aside jurors, but it was not able to exercise any

³⁸ *Id.*

³⁹ Williams, *supra* note 1, at 489.

⁴⁰ *Id.* at 488–89.

⁴¹ *Id.* at 489.

⁴² Heinz, *supra* note 32, at 210.

⁴³ *Id.* at 210–11.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 211.

⁴⁷ See Williams, *supra* note 1, at 502.

⁴⁸ See *id.*

peremptory challenges.⁴⁹ Although the Framers considered adding a constitutional guarantee to the peremptory challenge, “they decided this right was implicit in a defendant’s right to an impartial jury.”⁵⁰ Instead, the Constitution granted to the defendant only the right to trial by an impartial jury under the Sixth Amendment, leaving peremptory challenges to be established at common law or by Congress.⁵¹

In 1790, Congress passed an act implementing the first peremptory challenge allocation.⁵² That act granted the defense thirty-five peremptory challenges in cases involving treason and twenty challenges in all other capital cases.⁵³ Following the English tradition, Congress allocated no peremptory challenges to the prosecution.⁵⁴ In 1865, however, Congress passed a second federal statute allocating “a small number of peremptory challenges to the prosecution” and a greater number to the defense.⁵⁵

Congress continued to modify the absolute number of peremptory challenges allocated to the defense and prosecution over time. In 1872, Congress allocated the defense twenty peremptory challenges and the prosecution five peremptory challenges in capital cases.⁵⁶ For any other felony, the defendant was entitled to ten peremptory challenges and the government was entitled to three.⁵⁷ However, “there is nothing in the legislative history” of the Act that implemented the change explaining why these particular numbers were chosen.⁵⁸ Then, in 1911, Congress increased the number of peremptory challenges allocated to the prosecution to six in capital cases, maintaining twenty peremptory challenges for the defense.⁵⁹ Again, legislative history does not provide the reasoning behind this change.⁶⁰

⁴⁹ *Id.*

⁵⁰ Moeller, *supra* note 34, at 197.

⁵¹ *Stilson v. United States*, 250 U.S. 583, 585–86 (1919); *see also* Williams, *supra* note 1, at 504 (citation omitted).

⁵² Williams, *supra* note 1, at 504.

⁵³ *Id.* (citing 1 Stat. 119 § 30 (1790)).

⁵⁴ *Id.* at 495.

⁵⁵ Roberts, *supra* note 6, at 1534; *see also* Williams, *supra* note 1, at 504–05. Prior to the passage of the second statute, certain states had allowed the prosecution to exercise the “stand asides” employed by the Crown in England, but the practice received substantial criticism and was mostly given up with the 1865 statute. *See id.* at 491–94.

⁵⁶ Williams, *supra* note 1, at 505.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

Peremptory challenges in the state context followed a similar trajectory at first. After the country's founding, states began to codify peremptory challenges in criminal trials.⁶¹ They typically allocated fewer peremptory strikes to the prosecution than to the defendant.⁶² Some states refused to allocate any peremptory challenges to the prosecution, allowing the prosecution to raise only for-cause challenges.⁶³ Over time, however, state courts reduced the absolute number of peremptory challenges adopted from the English system.⁶⁴ At the same time, state governments began to increase the number of peremptory challenges allocated to the prosecution and started to move toward an equalization of the number of peremptory challenges allocated to the prosecution and the defense.⁶⁵ Scholar Anna Roberts notes that between 1854 and 1939, twenty-seven states moved from an unequal allocation of peremptory challenges to an equal number of peremptory challenges.⁶⁶

C. THE FEDERAL RULES OF CRIMINAL PROCEDURE

In 1946, the first version of the Federal Rules of Criminal Procedure was promulgated, and the allocation of peremptory challenges set at that time has not changed. The Rules provide the defense and prosecution with an equal number of peremptory challenges in capital cases and the defense with a greater number of peremptory challenges than the prosecution in noncapital felony cases.⁶⁷ Notably, the first draft, which was proposed in 1941, allocated an equal number of peremptory challenges to the prosecution and the defense.⁶⁸ The second draft, proposed a year later, maintained an equal

⁶¹ *Id.* at 503.

⁶² April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 STAN. J. C.R. & C.L. 1, 18–19 (2020) (“Although state procedures were hardly uniform, in general they reduced prosecutorial power in picking the jury, as compared either with common law procedures or with the challenges most states afforded defendants.”).

⁶³ *Id.* at 19, 19 n.118.

⁶⁴ Williams, *supra* note 1, at 502–03.

⁶⁵ *Id.*

⁶⁶ Roberts, *supra* note 6, at 1536 n.224. These states included Rhode Island, Colorado, Illinois, Massachusetts, Mississippi, Idaho, Iowa, Nevada, Florida, Vermont, Texas, Pennsylvania, Connecticut, South Dakota, Wisconsin, Virginia, Washington, Montana, California, North Dakota, Ohio, Louisiana, Arizona, Hawaii, Kansas, Wyoming, and New York. *Id.*

⁶⁷ FED R. CRIM. P. 24(b); Roberts, *supra* note 6, at 1534.

⁶⁸ During the drafting of the Rules jurists debated the allocation of peremptory challenges to the defense and prosecution, and the proposed equal allocation was ultimately rejected. Roberts, *supra* note 6, at 1534. In 1941, an advisory committee began drafting the Federal

number of peremptory challenges for each side—twenty challenges in treason and capital offenses and six challenges in noncapital felonies.⁶⁹ The defense was jointly allocated ten peremptory challenges in noncapital felony cases if multiple defendants were to be tried.⁷⁰

The Advisory Committee received many proposals regarding the relative allocation of peremptory challenges throughout the drafting process.⁷¹ For example, in considering the Second Preliminary Draft in 1944, a representative for the Bar Committee for the Western District of Tennessee argued that a defendant should always be allocated a greater number of challenges than the government because “[t]he jury comes to know the government attorneys better than the attorney for the defendant, as the latter appears only in part of the cases,” and “the defendant’s attorney does not have the means to investigate the background of prospective jurors, and so must rely more on hunches than the government.”⁷² One United States Attorney argued that the government “could not object to the equalization of challenges,” but that the government had not felt disadvantaged in the past by the defendant’s greater number of challenges.⁷³ Yet another individual argued that in cases of treason or capital offenses, the defendant should have twenty peremptory challenges and the government should have six peremptory challenges, but for all other offenses, the defense and government should both be allocated six peremptory challenges.⁷⁴ Ultimately, the Advisory Committee settled on the current rule in its Final Report of the Advisory Committee of June 1944.⁷⁵ In capital cases the defense and prosecution would each be allocated twenty challenges.⁷⁶ For noncapital offenses, the government would have six challenges, but the defendant or defendants together would have ten.⁷⁷ “If there was more than

Rules of Criminal Procedure. Lester B. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 44–45 (1962). The first draft of Rule 24—at the time, Rule 47—“was modeled quite closely on Rule 47 of the Federal Rules of Civil Procedure . . .” *Id.* See First Preliminary Draft of Fed. R. Crim. P. 47 (1941). The draft of criminal Rule 47 provided that “[t]he number of peremptory challenges which will be permitted to the defendant . . . and the number which shall be permitted to the attorney for the government shall be the same.” Orfield, *supra* note 68, at 44–45; see also Second Preliminary Draft of Fed. R. Crim. P. 47 (1942).

⁶⁹ Orfield, *supra* note 68, at 45.

⁷⁰ *Id.*

⁷¹ *Id.* at 44–45.

⁷² *Id.* at 52.

⁷³ *Id.* at 48–49.

⁷⁴ *Id.* at 53.

⁷⁵ *Id.*

⁷⁶ *Id.* at 43; see also FED. R. CRIM. P. advisory committee’s final report on Published Drafts of the Rules at p. 47 (1944).

⁷⁷ *Id.* at 53.

one defendant the court might allow additional challenges.”⁷⁸ “The Supreme Court adopted this draft without any change.”⁷⁹

Another major call for reform in the federal system came in 1977, when the House Judiciary Committee reviewed a bill to amend Rule 24.⁸⁰ The bill sought to equalize and reduce the number of challenges afforded the prosecution and the defense.⁸¹ The debate regarding the change focused on “whether the proposed changes in [R]ule 24(b) are compatible with the [S]ixth [A]mendment right of the accused to an impartial jury” and would be wise, given practical use of the peremptory challenges by both parties.⁸² A substantial amount of testimony in opposition focused on the historical allocation of peremptory challenges, the greater interest of the defense than the prosecution in the outcome of a criminal case, and the practical advantage that would be afforded to the prosecution if the number of peremptory challenges were to be equalized.⁸³

Multiple constituents argued that a reduced number of peremptory challenges would not be sufficient to “enable the defendant to achieve a jury free of bias against the accused.”⁸⁴ Jay Schulman of the National Jury Project cited the 1790 act of Congress allocating to the defense “a favorable ratio of four to one over the Government in capital cases” and the 1911 act allocating to the defense a favorable ratio of two to one in felony cases.⁸⁵ Schulman also pointed to practical evidence that it was “the U.S. Attorney who is most likely to eliminate people from a particular group” whereas the defense was “more likely to take jurors from whence they come and to operate on whim or caprice.”⁸⁶ He further pointed to research demonstrating that a substantial portion of the community believed an indictment was “tantamount to guilt,” citing surveys conducted by the National Jury Project.⁸⁷ His testimony implied that the “advantages” to the defense of the presumption of innocence and the government’s higher burden of proof would not be enough to eliminate the risk that the community might view an indictment as indicative of guilt.⁸⁸ Accordingly, those advantages to the defense would not be

⁷⁸ *Id.*

⁷⁹ *Id.* at 53–54.

⁸⁰ *See Hearing, supra* note 1, at 1.

⁸¹ *Id.* at 57 (statement of Deputy Att’y Gen. Richard L. Thornburgh).

⁸² *Id.* at 3.

⁸³ *See id.* at 3–5.

⁸⁴ *Id.* at 3.

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 9.

⁸⁷ *Id.* at 3.

⁸⁸ *Id.* at 3, 6.

sufficient to warrant allocating an equal number of peremptory challenges to the prosecution and defense. As another member of the American Bar Association argued more simply, “The defendant is the one that goes off to jail.”⁸⁹ This sentiment was echoed by another testifier, who explained that while the right to the peremptory challenge is important to both the government and the defendant, it is more important to the defendant because the defendant is “personally involved in the result of the trial.”⁹⁰

On the other hand, supporters of the amendment argued that the prosecution has an equal right to an impartial jury. For example, the standing Attorney General argued that the government, as the representative of the public, “is entitled no less than the defendant to a fair trial;” for this reason, he argued it was “appropriate to permit both the Government and the defendant to exercise, at least initially as a matter of right, an equal number of peremptory challenges.”⁹¹ He stated, “[T]he inequality that exists . . . is not justifiable in terms of any apparent policy embodied in the rule itself.”⁹² Ultimately, however, the amendment was rejected.⁹³ The Judiciary Committee explained that it would be “unwise” to reduce the number of peremptory challenges allocated to each side because testimony demonstrated that prosecutors used peremptory challenges to systematically exclude classes of people more often than the defense.⁹⁴

In 1995, proponents of the Victim Rights and Domestic Violence Prevention Act unsuccessfully sought to amend the Federal Rules and equalize the number of peremptory challenges between the defense and prosecution for noncapital felony offenses.⁹⁵ The goal of the bill was to “strengthen the rights of domestic violence victims in Federal court and hopefully set a standard for the individual states to emulate.”⁹⁶ With respect to the peremptory challenge, proponents of the bill sought to “level [the] playing field” between the defendant and the victim.⁹⁷ Proponents explained, “Violence in our society leaves law-abiding citizens feeling defenseless Federal law currently gives the defense more chances than the prosecution to reject a potential juror. [This] bill protects the right of victims to an impartial

⁸⁹ *Id.* at 134.

⁹⁰ *Id.* at 216.

⁹¹ *Id.* at 57.

⁹² *Id.* at 57–58.

⁹³ *Id.* at 278.

⁹⁴ *Id.*

⁹⁵ Victim Rights and Domestic Violence Prevention Act of 1995, S. 1483, 104th Cong. (1st Sess. 1995); *see also* 141 CONG. REC. 38275–77 (1995) (statement of Sen. Kyl).

⁹⁶ 141 CONG. REC. 38275–77 (1995) (statement of Sen. Kyl).

⁹⁷ 141 CONG. REC. 12796–97 (1995) (statement of Sen. DeWine).

jury by giving both sides the same number of peremptory challenges.”⁹⁸ A similar argument was made by another proponent of the Victim Rights Bill. The proponent stated, “[W]e should give victims an impartial trial, jury, and a fair shake. To do that, I think we need to give both the prosecution and the defense simply the same number of peremptory challenges. It only seems right, and it only seems fair.”⁹⁹

D. STATE ALLOCATIONS OF PEREMPTORY CHALLENGES

States that amended their peremptory challenge rules to provide for equality between the prosecution and defense have also done so on the basis of victims’ rights, arguing that there is no justification for granting the defense an advantage in the selection of an impartial jury, and also on the logic of saving courts time and resources.¹⁰⁰ As scholar Anna Roberts explains, “State legislators and members of the executive admit to ignorance about the historical picture and bafflement about the current need for [an unequal allocation of peremptory challenges].”¹⁰¹ In particular, states have proven more open to victims’ rights arguments, as advocates have successfully argued that victims’ rights warrant an equal allocation of peremptory challenges to the defense and prosecution, whereas victims’ rights justifications have failed at the federal level. For example, Oregon adopted equality of peremptory challenges pursuant to its Crime Victims’ Bill of Rights.¹⁰² The Bill relied on the notion that “victims of crime are entitled to fair and impartial treatment in our criminal justice system” to justify an equal allocation of peremptory challenges.¹⁰³ Further, in Georgia, another state that adopted an equal allocation of peremptory challenges, a member of the legislature explained that a system that granted the defense a

⁹⁸ 141 CONG. REC. 38275–77 (1995) (statement of Sen. Kyl).

⁹⁹ 141 CONG. REC. 12796–97 (1995) (statement of Sen. DeWine).

¹⁰⁰ See Roberts, *supra* note 6, at 1538 (“Efforts to equalize the allocation of peremptory challenges are explained on the basis that there is no apparent justification—other than attempting to give an unfair advantage to the defense—for maintaining asymmetry.”). Roberts also explains,

On the issue of rights . . . the notion that constitutional rights are accorded to the defendant, and not to either the prosecution or the alleged victim, is frequently obscured. One does not have to look further than the discussions about moving toward symmetrical allocation of peremptory challenges to see examples of a notion that rights not only exist on both sides but also are equal on both sides.

Id. at 1547. This argument is present in the victims’ rights supporters’ claims. *Id.* at 1547–48.

¹⁰¹ *Id.* at 1538 (citation omitted).

¹⁰² *Id.* at 1548.

¹⁰³ *Id.*

greater number of peremptory challenges than the prosecution gave “more rights to the defendant than to the victim.”¹⁰⁴

Multiple states that maintain an unequal allocation of peremptory challenges have considered reforming the number and allocation of peremptory challenges as well. One example is the State of New Jersey. Currently, the state allocates the defense twenty peremptory challenges and the prosecution twelve peremptory challenges in cases where a defendant is charged with offenses carrying more serious penalties, such as murder, sexual assault, and arson.¹⁰⁵ For “other criminal actions,” the defense and the state are each entitled to ten peremptory challenges.¹⁰⁶ In 2000, New Jersey assembly members introduced Bill A727 for review by the legislature, which sought to equalize the number of peremptory challenges in the “serious crimes” listed above, and to reduce the absolute number of peremptory challenges allocated to both sides.¹⁰⁷ The Bill proposed that the state and the defense would each receive eight peremptory challenges if the defendant was tried alone and six per defendant if defendants were tried jointly.¹⁰⁸ The purpose proffered for the Bill was to “reduce the number of peremptory challenges afforded the prosecution and defense in order to reduce the disparity between the two sides and to decrease the delay in the progress of these criminal cases.”¹⁰⁹ However, the Bill never progressed past the New Jersey Assembly’s Judiciary Committee.¹¹⁰

In 2005, the Special Supreme Court Committee on Peremptory Challenges and Jury Voir Dire produced a report to the Supreme Court of New Jersey recommending changes to peremptory challenges and voir dire.¹¹¹ The Committee recommended eliminating the distinction between “serious” offenses and other offenses, and reducing the absolute number of peremptory challenges afforded to both parties.¹¹² However, the Committee emphasized that there should continue to be a greater number of peremptory challenges allocated to the defense compared to the prosecution.¹¹³ The

¹⁰⁴ *Id.* at 1547–48.

¹⁰⁵ N.J. R. GEN. APP, R. 1:8-3(d); N.J. STAT. ANN. 2C:21-1 (West 2020).

¹⁰⁶ *Id.*

¹⁰⁷ S. A727, 209th Leg., 2000 Sess. (N.J. 2000).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ S. A727, 209th Leg., 2000 Sess. (N.J. 2000) (LEXIS) (on file with JCLC).

¹¹¹ N.J. SPEC. COMM. ON PEREMPTORY CHALLENGES AND VOIR DIRE, REPORT OF THE SPECIAL SUPREME COURT COMMITTEE ON PEREMPTORY CHALLENGES AND JURY VOIR DIRE (2005), https://njcourts.gov/notices/reports/peremptory_voirdire.pdf [<https://perma.cc/CAG2-R58S>].

¹¹² *Id.* at 3, 7.

¹¹³ *Id.* at 52–53.

Committee, echoing arguments against equalizing peremptory challenges at the federal level, explained that despite significant changes in the criminal justice system, “there remains some residual advantage to the State in a criminal trial.”¹¹⁴ Therefore, “in recognition that the right to trial is a right possessed by the criminal defendant,” the Committee concluded that the defense should have a greater number of peremptory challenges than the state.¹¹⁵ However, as noted above, the state today only maintains an unequal allocation of the number of peremptory challenges between the prosecution and defense for the more serious offenses listed above and not in “other criminal felony” cases, despite the fact that in its recommendation, the Committee suggested an unequal allocation of eight peremptory challenges to the defense and six peremptory challenges to the state in *all* criminal cases.¹¹⁶ Currently, the state allocates ten peremptory challenges to each side in “other criminal” felonies.¹¹⁷

II. JUSTIFICATIONS FOR THE DEFENSE AND PROSECUTORIAL PEREMPTORY CHALLENGE

In the United States, judges and scholars have defended the peremptory challenge as instrumental in seating an impartial jury, a right guaranteed by the U.S. Constitution, despite the fact that the peremptory challenge itself is not constitutionally granted to either the defense or the prosecution.¹¹⁸ However, acknowledgement that the peremptory challenge may be used unfairly or discriminatorily is almost as old as the peremptory challenge itself, as evidenced by the 1305 decision in England to eliminate the Crown’s right to the peremptory challenge.¹¹⁹ Thus, consideration of whether peremptory challenges should be allocated to the prosecution *at all* is warranted. This Part will consider the various justifications for both the defense and prosecutorial right to the peremptory challenge, as well as *Batson*’s impact on these justifications.

¹¹⁴ *Id.* With respect to changes in the criminal justice system, the Committee referenced the “provision of counsel for indigent defendants,” shifting societal attitudes, and the “expansion of the jury pool.”

¹¹⁵ *Id.* at 53.

¹¹⁶ *Id.* at 50–52.

¹¹⁷ N.J. R. GEN. APP. R. 1:8-3(d); N.J. STAT. ANN. 2C:21-1 (West 2020).

¹¹⁸ *See supra* Part I.

¹¹⁹ *See Heinz, supra* note 32, at 208.

A. THE DEFENSE AND PROSECUTORIAL PEREMPTORY CHALLENGE

The Sixth Amendment guarantees to the accused the right to trial by an impartial jury.¹²⁰ Although not itself constitutionally guaranteed, the peremptory challenge has long been viewed as a guarantor of this right, and therefore an important, if not indispensable, facet of trial procedure.¹²¹

The notion that a defendant has a right to the peremptory challenge is more deeply ingrained in the psyche of American jurists than the prosecution's right to the peremptory challenge; however, the right of both parties to use this tool is commonly accepted.¹²² As discussed, when the practice began in the United States, peremptory challenges were granted only to the defendant.¹²³ Since then, most jurists have staunchly supported the defendant's right to the peremptory challenge. For example, in its 1965 decision *Swain v. Alabama*,¹²⁴ the Supreme Court noted the peremptory challenge's historic significance, describing it as "one of the most important of the rights secured to the accused."¹²⁵ Further, the dissent in *Swain* stated: "[H]ow necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice"¹²⁶ Jurists who opposed an equal number of peremptory challenges during debate surrounding the 1977 proposed amendment to the Federal Rules of Criminal Procedure invoked similar sentiments.¹²⁷

However, in other decisions, the Supreme Court has made clear that the state also maintains an important interest in this tool. In its 1887 *Hayes v. Missouri* decision, for example, the Supreme Court explained, "The public prosecutor may have the strongest reasons to distrust the character of a juror offered . . . and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his

¹²⁰ U.S. CONST. amend. VI.

¹²¹ *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) ("Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge."); see also Goldwasser, *supra* note 18, at 827; Williams, *supra* note 1, at 483 ("Peremptory strikes are . . . recognized as critical to seating fair and impartial juries.").

¹²² See, e.g., Friedman, *supra* note 21, at 513, 510 (noting that "[p]rosecutors' peremptories stand on weaker ground than do the accused's" and that "historical background suggests . . . [that] . . . [peremptories] exist principally for the benefit of criminal defendants").

¹²³ See *supra* Section I.B.

¹²⁴ 380 U.S. 202 (1965).

¹²⁵ *Id.* at 219 (internal quotation marks omitted); see also Marder, *supra* note 12, at 1692.

¹²⁶ *Swain*, 380 U.S. at 242.

¹²⁷ See, e.g., *Hearing*, *supra* note 1, at 3–4 (statement of Jay Schulman).

being accepted.”¹²⁸ Additional decisions have highlighted the same point. For example, in *Commonwealth v. Soares*, the Massachusetts Supreme Judicial Court noted: “While we have highlighted a defendant’s right to be protected from the improper use of peremptory challenges, we recognize the Commonwealth’s interest in prosecutions that are tried before the tribunal which the Constitution regards as most likely to produce a fair result.”¹²⁹ That court held that the prosecution was “equally to be entitled to a representative jury, unimpaired by improper exercise of peremptory challenges by the defense.”¹³⁰ States’ reform of the peremptory challenge based on the victims’ rights bills discussed above also support this view.

B. *BATSON*, ITS PROGENY, AND ITS FAILURES

The Supreme Court has recognized that abuse of the peremptory challenge, particularly by prosecutors, disserves defendants, the broader community, and the justice system as a whole. In *Batson v. Kentucky*, the Supreme Court held that prosecutors’ use of the peremptory challenge to exclude jurors on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment.¹³¹ In that case, the Court lowered the incredibly high burden *Swain v. Alabama* placed on the defendant to prove that the prosecution had discriminatorily used its peremptory challenges.¹³² The Court in *Batson* articulated a three-part test—a defendant could make a prima facie showing of discrimination by demonstrating that: (1) he was a member of a distinct racial group; (2) the prosecutor used his peremptory challenges to remove venire members of the defendant’s race; and (3) the evidence raised an inference of discrimination by the prosecutor.¹³³ *Batson*’s prohibition has been extended to prohibit discriminatory use of peremptory challenges by the defense and to prohibit discriminatory use of the peremptory challenges to strike jurors on the basis of gender.¹³⁴

Unfortunately, many scholars and jurists argue that *Batson* and its progeny do little in practice to prevent the discriminatory use of peremptory challenges, due to the high evidentiary burden placed on a party claiming a

¹²⁸ 120 U.S. 68, 70 (1887).

¹²⁹ 387 N.E.2d 499, 517 n.35 (Mass. 1979) (internal quotation marks omitted).

¹³⁰ *Id.*; see *infra* Part I.C.

¹³¹ 476 U.S. 79, 84 (1986); see also Morehead, *supra* note 14, at 629.

¹³² *Batson*, 476 U.S. at 92–93.

¹³³ See *id.* at 96.

¹³⁴ See *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994) (extending *Batson*’s prohibition on discriminatory use of peremptory challenges to challenges based on gender); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson*’s prohibition to apply to defendants’ discriminatory use of the peremptory challenge).

Batson violation and the ease with which a party can concoct a race-neutral, nondiscriminatory reason for striking a potential juror.¹³⁵ As one justice argued in his dissent in *Commonwealth v. Hardcastle*, the *Batson* prohibition on race-based peremptory challenges is “effectively nullified by evidentiary requirements that virtually insulate a prosecutor’s use of the peremptory challenge to exclude jurors.”¹³⁶ Once a party brings a *Batson* challenge, the challenged party must “develop a record in voir dire to defend the peremptory challenges used against a claim of discrimination” while the challenging party must develop a “similar record to argue that the peremptory challenges were racially motivated.”¹³⁷ Then, a *Batson* challenge requires a court to “sift through counsel’s words for patterns or pretexts of discrimination.”¹³⁸ Additionally, once a *Batson* challenge is made against a lawyer, the lawyer need only provide a neutral reason for striking the juror.¹³⁹ This is an easy bar to meet, as “lawyers [can] offer absurd pretexts for their discriminatory use of peremptory challenges and, in doing so, evade *Batson*’s protections.”¹⁴⁰

Researchers considering North Carolina’s *Batson* record over the past three decades have echoed this concern.¹⁴¹ Tellingly, “in all the 114 North Carolina appellate *Batson* cases involving minority jurors decided on the merits since 1986, the courts have never found a substantive *Batson* violation where a prosecutor has managed to articulate even one reason, however fantastic, for the peremptory challenge.”¹⁴² The researchers also cited orders issued by North Carolina Judge Gregory Weeks in 2012 as further evidence demonstrating “the regularity with which North Carolina prosecutors offer pretextual reasons for [discriminatory] peremptory strikes,” which were often “thinly-disguised.”¹⁴³ For example, prosecutors might provide neutral reasons for their challenges such as “lack of eye contact, air of defiance, arms folded, leaning away from questioner, and evasive.”¹⁴⁴ Additionally, many appellate courts are deferential to trial courts in reviewing *Batson* challenges,

¹³⁵ Morehead, *supra* note 14, at 633–34.

¹³⁶ 546 A.2d 1101, 1113 (Pa. 1988) (Nix, C.J., dissenting); *id.* at 634.

¹³⁷ *Id.* at 636.

¹³⁸ *People v. Bolling*, 591 N.E.2d 1136, 1142 (N.Y. 1992) (Bellacosa, J., concurring); *see also* Roberts, *supra* note 6, at 1511.

¹³⁹ *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

¹⁴⁰ Roberts, *supra* note 6, at 1512.

¹⁴¹ *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957, 1963 (2016).

¹⁴² *Id.*

¹⁴³ *Id.* at 1980.

¹⁴⁴ *Id.* (internal quotation marks omitted).

meaning that failures of trial courts to “adequately [] police peremptory challenges” are often left undisturbed.¹⁴⁵

In light of *Batson*’s failures, scholars have suggested a number of approaches to prevent discriminatory abuse of the peremptory challenge. These include substantially limiting the absolute number of peremptory challenges, as well as the more drastic approaches of abolishing the peremptory challenge for the prosecution or abolishing the peremptory challenge entirely.¹⁴⁶ Despite these proposals, the right of both parties to use peremptory challenges seems to be guaranteed, at least for now. One scholar cites the 2005 ABA *Principles for Juries and Jury Trials* as an example of “lawyers’ unwavering support for the peremptory challenge” for both parties.¹⁴⁷ While the ABA’s proposal was “cutting-edge in many ways” with respect to jury procedure, it largely “preserve[d] the status quo” with respect to the peremptory challenge, dictating that the peremptory challenge should be available to both parties.¹⁴⁸

Further, in the 1990s a committee of jurists in Arizona, a “state at the vanguard of jury reform,” conducted a study of the jury system and voted to retain peremptory challenges for both parties.¹⁴⁹ The committee reasoned that peremptory challenges are necessary “if jury selection [is] to be fair in fact and seen to be fair by the litigant, who would see that he or she had some degree of control over an otherwise random selection process.”¹⁵⁰ Additionally, in a study conducted in 1995 to assess federal district court judges’ views on the importance of peremptory challenges in criminal cases, judges overwhelmingly believed that on balance, peremptory challenges in their current state contribute positively to the justice system.¹⁵¹ Less than sixteen percent of district court judges supported eliminating the peremptory challenge entirely.¹⁵² Further, most of the judges who would retain the peremptory challenge “would also retain current rules and practices” in the

¹⁴⁵ Roberts, *supra* note 6, at 1512.

¹⁴⁶ See Williams, *supra* note 1, at 483–84; Broderick, *supra* note 16, at 369.

¹⁴⁷ Marder, *supra* note 12, at 1685–86; AM. BAR ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS (2005), https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam/bna.com/bnabooks/ababnalannual/2005/023.pdf [<https://perma.cc/V8RZ-REKB>].

¹⁴⁸ Marder, *supra* note 12, at 1686.

¹⁴⁹ *Id.* at 1687–88.

¹⁵⁰ *Id.* at 1689 (quoting B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 285 (1996)).

¹⁵¹ Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 JUDICATURE 185, 186–87 (1996).

¹⁵² *Id.* at 188.

federal system.¹⁵³ Interestingly, but perhaps not surprisingly, the judges were split along political lines with respect to their view on problems associated with peremptory challenges.¹⁵⁴ When asked which of multiple factors was problematic in the context of peremptory challenges, “Republican appointees were more likely to view the unequal number of challenges allocated to each side as creating an unfair advantage for criminal defendants,” while Democratic appointees were more likely to consider peremptory challenges problematic because they are “a vehicle for producing discrimination in jury selection and composition.”¹⁵⁵

Overall, the consensus appears to be that the right of both parties to the peremptory challenge is so ingrained in the jury system that it will not be eliminated for either side in the near future. Thus, we must consider how the peremptory challenge system can be improved without completely eliminating the right and with a legal doctrine that is insufficient to root out discriminatory use of the peremptory challenge in practice.

III. THE WISDOM OF EQUALITY: FROM THE THEORETICAL RIGHT TO THE PRACTICAL EXERCISE OF THE PEREMPTORY CHALLENGE

The origins and legislative history of the peremptory challenge demonstrate that the legal community has considered the somewhat esoteric concept of “fairness” between the parties as central to the allocation of peremptory challenges to the prosecution. However, notwithstanding the theoretical “right” of each side to an impartial jury, arguments in legislative history also make clear that if the practical exercise of peremptory challenges results in a favorable advantage to one side, an equal allocation of peremptory challenges is not warranted. As highlighted in testimony given during the 1977 effort to reform the Federal Rules of Criminal Procedure, the defendant is the subject of the trial, and thus the consequences of a biased jury directly affect his freedom and potentially whether he lives or dies.¹⁵⁶ To this end, defense counsel is charged with “zealously” advocating on behalf of her client.¹⁵⁷ On the other hand, the prosecutor represents the interests of victims of crime and the community at large, and must, as a “minister of justice,” seek justice in the legal system.¹⁵⁸ The view that victims have an interest

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 187.

¹⁵⁵ *Id.*

¹⁵⁶ *See infra* Part I.C.

¹⁵⁷ MODEL RULES OF PROF'L CONDUCT Preamble and Scope (AM. BAR ASS'N 2018).

¹⁵⁸ *Id.* r. 3.8 cmt. 1. Similarly, scholar Maureen Howard has commented on the prosecutor's peculiar role: “[D]espite the theoretically adversarial nature of our system, the

equal to that of defendants to a fair and impartial jury was highlighted in the 1995 proposal to equalize the allocation of peremptory challenges as part of the Victim Rights and Domestic Violence Prevention Act, for example.¹⁵⁹

If viewed in a vacuum, only an equal allocation of peremptory challenges to the defense and prosecution would be “fair.” This notion, however, discounts the importance of how the defendant and community at large view the fairness of the justice system. Further, this view is premised on the assumption that the exercise of peremptory challenges is not shaped by factors that allow an inordinate opportunity for peremptory challenges to result in a jury partial to the government, thereby undermining the fairness of a technically equal system.¹⁶⁰ This Part argues that allocating a greater number of peremptory challenges to the defense than to the prosecution better serves theoretical and actual fairness.

A. THE THEORETICAL RIGHT TO THE PEREMPTORY CHALLENGE & PERCEPTIONS OF FAIRNESS

The notion of fairness is at the heart of the argument to equalize the number of peremptory challenges, especially when argued on a victims’ rights basis. However, for a number of reasons, the defendant’s and community’s perception of the justice system’s fairness is best served by maintaining an unequal allocation of peremptory challenges, notwithstanding victims’ rights.¹⁶¹

prosecutor is among the most important arbiters of justice’ due to her discretion in investigating and resolving criminal matters, thus elevating her to a ‘quasi-judicial’ role.” Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 407 (2010) (quoting Alan M. Dershowitz, *Foreword* to JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT, at ix (1985)).

¹⁵⁹ 141 CONG. REC. 38275–77 (1995) (statement of Sen. Kyl).

¹⁶⁰ See *Hearing*, supra note 1, at 4 (statement of Jay Schulman). *But see* Williams, supra note 1, at 511–12 (“Ultimately, this is a policy question If Congress determines that criminal defendants need more peremptory strikes than the government to ensure a fair jury, then logically, criminal defendants should always be afforded more peremptory strikes than the government. In other words, the Federal Rules of Criminal Procedure should be changed to provide the defendant more peremptory strikes in all types of cases: capital, felony, and misdemeanor. If, on the other hand, the legislatures conclude the government has an interest equal to a criminal defendant in seating a fair jury, then the number of peremptory strikes afforded each side should always be equal. It is difficult to rationally justify the inconsistent distribution of peremptory strikes currently in place under the Federal Rules of Criminal Procedure.”). This Comment disagrees with this view by considering more holistically the values served by an unequal or equal allocation of peremptory challenges.

¹⁶¹ See Friedman, supra note 21, at 511–12. Friedman explains the importance of the defendant’s perception of fairness in the justice system with respect to peremptory challenges

First, it is important that the defendant view the process by which he is tried as just. As one scholar explains, “[g]iven the nature of a criminal trial, in which the state attempts to deprive an individual of liberty (or even of life), increasing not only the actuality of fairness but also the accused’s perception of fairness is a crucial goal.”¹⁶² While victims’ perception of justice is important, the broader community’s perception of justice is also better served by an unequal number of peremptory challenges, given the reality that prosecutors may be better able to use their peremptory challenges to strike a class of people from the jury and other imbalances in the criminal justice system. Notably, some argue that improper use of peremptory challenges by the prosecution, such as striking jurors on the basis of their race, harms the community’s perception of justice by delegitimizing the justice system.¹⁶³ In this view, minority constituents are symbolically harmed when minorities are discriminatorily struck in open court, and the court environment gives the appearance of the American government’s seal of approval on such behavior.¹⁶⁴ Further, there is evidence that members of the public in fact expect that prosecutors further justice and are concerned with the means by which prosecutors secure convictions.¹⁶⁵ This community concern was recently reflected in the public outcry in response to *Flowers v. Mississippi*.¹⁶⁶ In November 2019, the NAACP filed a class action lawsuit

and implies that this goal may be even stronger than actual fairness. He goes so far as to argue that “even if an asymmetrical rule on peremptories led to a substantially greater number of errors in favor of the accused as compared to those that would be yielded by a symmetrical rule . . . , that would not be enough to condemn the asymmetrical rule.” *Id.* at 519.

¹⁶² *Id.* at 512.

¹⁶³ See Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2137 (2006) (“Peremptory challenges do indeed occasion symbolic and localized harms—both to defendants and to communities of jurors—by permitting the exclusion of minorities from juries.”); Alafair S. Burke, *Prosecutors & Peremptories*, 97 IOWA L. REV. 1467, 1475–76 (2012) (“Prosecutors also represent a diversely constituted public. As such, they are in essence lawyers for the very communities disenfranchised by race-based peremptory challenges.”); Marder, *supra* note 12, at 1696.

¹⁶⁴ See Marder, *supra* note 12, at 1696 (“The exercise of peremptories takes place in open court, beneath the American flag, the judicial seal, the watchful eye of the judge . . .”).

¹⁶⁵ Burke, *supra* note 163, at 1475 (noting that the public expects that prosecutors will not only convict but also further justice, and that people are “more likely to comply with legal authority when they perceive it to be legitimate, thereby creating a more enduring form of compliance . . .”).

¹⁶⁶ 139 S. Ct. 2228 (2019); see also *supra* note 15.

against the prosecutor in that case for his discriminatory use of peremptory challenges “on behalf of every potential Black juror in the district.”¹⁶⁷

Additionally, the notion of fairness does not depend on equality of rights between the prosecution and defense in other areas of the criminal justice system. Indeed, inequalities in these other areas of the system actually strengthen the community’s perception of the system’s fairness.¹⁶⁸ Most fundamentally, this inequality is represented in the presumption of innocence of the accused that the prosecution must overcome beyond a reasonable doubt.¹⁶⁹ Additionally, due process requires that the prosecution disclose certain evidence to the defense, while the defense has no corresponding duty.¹⁷⁰

Furthermore, strong procedural safeguards for the accused provide broad assurance that he or she will not be improperly convicted, serving the community’s perception of fairness in the criminal justice system. In 2005, the New Jersey state committee promulgating recommendations on the proper allocation of peremptory challenges explained in its memorandum that the state “represents ‘the people,’ including, in a broad sense, the jurors.”¹⁷¹ However, because the right to a trial by jury “is a right possessed by the defendant, the Committee determined that defendants should receive more peremptory challenges than the State.”¹⁷² Further, the Committee explained that a limitation in the absolute number of peremptory challenges along with an unequal allocation of peremptories between the defense and prosecution would not “adversely affect the interests of fairness and

¹⁶⁷ Kira Lerner, *Civil Rights Groups Sue Mississippi Prosecutor for Illegally Striking Black Jurors*, APPEAL (Nov. 18, 2019), <https://theappeal.org/civil-rights-groups-sue-mississippi-prosecutor-for-illegally-striking-black-jurors/> [https://perma.cc/5AZF-JPX2]. The lawsuit stated, “The honor and privilege of jury service is a defining feature of what it means to be an American citizen When state or local officials bar a citizen from service because he or she is Black, that discriminatory act is no mere indignity. It is an assertion that the prospective juror is inferior—a second-class citizen who cannot be entrusted with the responsibilities of full citizenship.” *Id.*

¹⁶⁸ See Goldwasser, *supra* note 21, at 822 (The constitutional scheme “[d]oes not envision an adversary proceeding between two equal parties. Rather, it recognizes [t]he awesome investigative and prosecutorial powers of the government and is designed to redress . . . [that] advantage.” (internal quotation marks omitted)); see also Roberts, *supra* note 6, at 1539–40 (noting that other aspects of the criminal justice system are “asymmetrical,” including “greater access than the prosecution to pretrial discovery, including a right to the production of favorable material; greater ability to appeal the outcome of a criminal case . . . and, because of the federal unanimous verdict requirement, an ability—not shared by the prosecution—to ‘win’ on the basis of just one juror vote”).

¹⁶⁹ See Goldwasser, *supra* note 21, at 822.

¹⁷⁰ *Id.*

¹⁷¹ N.J. SPEC. COMM. ON PEREMPTORY CHALLENGES, *supra* note 111, at 8.

¹⁷² *Id.* at 53.

justice.”¹⁷³ In fact, the Committee expected that this arrangement would “enhance in the eyes of the public the credibility of our system of administering justice.”¹⁷⁴

B. PRACTICAL EXERCISE OF THE PEREMPTORY CHALLENGE AND ACTUAL FAIRNESS

Actual fairness concerns whether the defense and prosecution actually use their peremptory challenges in a nondiscriminatory manner.¹⁷⁵ Certain studies that have considered both the prosecutorial and defense use of peremptory challenges shed light on whether an equal or unequal allocation of peremptory challenges is more likely to produce impartial juries. In one such study, David Baldus and his colleagues examined the use of peremptory challenges in capital cases in Pennsylvania to determine the extent of discrimination in their use.¹⁷⁶ The study found that: (1) discrimination on the basis of race and sex by prosecutors and defense attorneys is widespread; (2) nonetheless, prosecutors are “considerably more successful than defense counsel in their attempts to control jury composition”; and (3) the prosecution’s “‘advantage’ in the use of peremptory challenges” increases the probability of death sentences for defendants, increases “discrimination in the application of the death penalty,” and “denies defendants a trial by a jury that includes at least one of their ‘peers.’”¹⁷⁷ Further, Baldus’s study found that the prosecution “disproportionately strik[es] black venire members and defense counsel disproportionately strik[es] non-blacks.”¹⁷⁸ The study also indicated that “most of the adverse impact of the current system on jury decision making flows from the aggressive use of peremptories by prosecutors against blacks and defense counsel against non-blacks.”¹⁷⁹

Importantly, one theory Baldus considered was the “canceling out” theory of prosecutorial and defense peremptory challenges, which hypothesizes that each side’s peremptory challenges tend to offset the effects of the other side’s.¹⁸⁰ The study suggested that this theory was relatively valid

¹⁷³ *Id.* at 8.

¹⁷⁴ *Id.*

¹⁷⁵ Note, *supra* note 163, at 2131.

¹⁷⁶ See David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 121–22.

¹⁷⁹ *Id.* at 130.

¹⁸⁰ *Id.* at 96.

if “viewed in the aggregate.”¹⁸¹ In other words, across all cases, the efforts of the two sides could reasonably be described as canceling each other out, and the defense may even have the upper hand.¹⁸² This is because “defense counsel use[d] a larger proportion of their peremptories” than did the prosecution, resulting in a higher strike rate for the defense.¹⁸³ However, the study demonstrated a key prosecutorial advantage.¹⁸⁴ Because the prime targets of the prosecution were “substantially smaller in number than were defense counsel’s prime targets,” the prosecution was more effective in depleting members of the target group.¹⁸⁵ The study found, for example, that when two “prime [prosecution] targets, young black men and women, were present in a venire, they were completely eliminated 78% and 67% of the time, respectively”¹⁸⁶

The authors also touched on the practical incentive structure that shapes the prosecution’s discriminatory use of its peremptory challenges, namely, the importance of obtaining convictions.¹⁸⁷ Specifically, they discussed Philadelphia, where for years prosecutors abided by a jury selection model set forth in a 1986 training video, the McMahon Tape.¹⁸⁸ The video, which focused on how prosecutors could obtain more criminal convictions, provided instructions on how to select a “conviction prone” jury.¹⁸⁹ The tape explained that “the worst jurors . . . are ‘blacks from the low-income areas’” because they have a “resentment for law enforcement [and] . . . for authority.”¹⁹⁰ Similarly, in connection with a survey he was conducting on North Carolina’s *Batson* cases, a North Carolina trial judge “found that in the 1990s North Carolina prosecutors circulated and used a ‘cheat sheet’ of approved reasons for minority strikes that included such reasons as ‘lack of eye contact,’ [and] ‘air of defiance’”¹⁹¹ Prosecutors continue to use similarly illegitimate reasons to strike jurors today, and a convict at costs

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See id.* at 125.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 100.

¹⁸⁷ *Id.* at 11.

¹⁸⁸ *Id.* at 41.

¹⁸⁹ *Id.* at 42 (quoting videotape transcript: Jury Selection with Jack McMahon, DATV Productions) (on file with University of Pennsylvania Journal of Constitutional Law).

¹⁹⁰ *Id.* at 42 (quoting Jury Selection with Jack McMahon, *supra* note 189).

¹⁹¹ Pollitt & Warren, *supra* note 141, at 1980.

culture persists in many offices around the country.¹⁹² Thus, not only are prosecutors more successful in eliminating their target groups, but the pressure to secure convictions can also encourage prosecutors to utilize peremptory challenges in a discriminatory manner, degrading both perceived and actual fairness.

To conclude, in *Batson v. Kentucky*, Justice Marshall argued that only complete abolition of the peremptory challenge would prevent prosecutors' discriminatory use of peremptory challenges.¹⁹³ He explained that abolition of the peremptory challenge for both the prosecution and the defense would be fair because it would apply to both the prosecution and defense equally, much like the argument that equalization would be fair because it would apply equally to the prosecution and to the defense.¹⁹⁴ However, the history of the peremptory challenge and debates that have followed calls for reform demonstrate that abolition will likely continue to be opposed and may be impossible to implement in the near future.¹⁹⁵ Further, it is questionable whether abolition of the peremptory challenge would even lead to fairer results.¹⁹⁶ At the very least, an unequal allocation of peremptory challenges is necessary to serve the goal of fairness. Inequality in the peremptory challenge context promotes both the accused's and the community's perceptions of fairness and mitigates the prosecution's practical incentive to secure convictions by eliminating its target groups from the jury.

¹⁹² See *id.*; see also John Terzano, *Changing the "Convict at All Costs" Culture of Prosecutor's Offices*, HUFFPOST (March 18, 2010, 5:12 AM), https://www.huffpost.com/entry/changing-the-convict-at-a_b_367864 [<https://perma.cc/7RSP-NV9V>].

¹⁹³ *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

¹⁹⁴ See *id.* at 107–08.

¹⁹⁵ See, e.g., Marder, *supra* note 12, at 1686 (“Even though [groups seeking jury reform] recognize that the peremptory challenge has been difficult to police and has led to juries that are less diverse than they might otherwise be, they have been unwilling to recommend the elimination of the peremptory.”).

¹⁹⁶ See Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *supra* note 176, at 129 (“[O]nly a few criminal law practitioners appear willing to counter the strong and widespread belief on both sides that peremptories are critical to protect their clients' interests. Judicial abolition, therefore, seems unlikely, as the United States Supreme Court and most state and federal courts appear content with the symbolic compromise they have created. The prospects of abolition by State legislatures seem equally unlikely.”); Richard Gabriel, *Thank and Excuse: Five Steps Toward Improving Jury Selection*, JURY EXPERT (Aug. 28, 2015), <http://www.thejuryexpert.com/2015/08/thank-and-excuse-five-steps-toward-improving-jury-selection> [<https://perma.cc/NVL3-MEQ9>] (“The elimination of peremptory challenges would, in fact, harm the rights of the parties to obtain a fair and impartial jury and is a wrong-headed solution to a very real problem that does exist in today's jury selections across the country.”).

IV. LOOKING FORWARD: THE POTENTIAL PROMISE OF PROGRESSIVE PROSECUTION

This Comment has, until this point, primarily considered arguments that have already been offered by commentators regarding whether the relative allocation of peremptory challenges between the prosecution and defense should be equal or unequal. One influence on the justice system that may limit the need for an unequal allocation of peremptory challenges is “progressive prosecution.” This Part describes the emergence of the progressive prosecution movement and considers whether the movement can serve perceived and actual fairness, making an unequal allocation of peremptory challenges unnecessary. It posits that if equality in the number of peremptory challenges is a worthy goal—to provide victims of sexual violence with a sense of recognition of their rights and experiences, for example—then the progressive prosecution movement may provide a solution by increasing the broader community’s perception of fairness and by providing a check on the discriminatory use of peremptory challenges in practice.

A. BACKGROUND ON PROGRESSIVE PROSECUTION

Prosecutors, as relatively free agents in the justice system, have the ability to exercise substantial discretion. For this reason, some scholars have called on prosecutors to voluntarily waive their peremptory challenges¹⁹⁷ or to put in place “voluntary reforms” to minimize the government’s exercise of racially-focused peremptory challenges.¹⁹⁸ One scholar notes that “prosecutors themselves have the institutional ability to transform prosecutorial culture and incentives from the inside.”¹⁹⁹ Further, scholars have argued that rules of ethics and the possibility of disciplinary sanctions

¹⁹⁷ See, e.g., Howard, *supra* note 158.

¹⁹⁸ Burke, *supra* note 163, at 1471–73 (“In light of *Batson*’s failure to alter a stubborn pattern of using peremptory challenges in racialized ways, scholars have repeatedly called for the abolishment of peremptory challenges. But, despite criticism of the practice, every jurisdiction in the country continues to employ peremptory strikes. . . . Doctrinal change, rules of ethics, and disciplinary sanctions would not be necessary, however, if lawyers abated racialized jury selection through their own voluntary conduct.”); see also Howard, *supra* note 158, at 372 (“The unique litigation role and ethical responsibilities of criminal prosecutors, however, make them particularly suited to a cost-benefit analysis of peremptory challenges.”); Jeffrey L. Kirchmeier, Stephen R. Greenwald, Harold Reynolds & Jonathan Sussman, *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1365 (2009) (“Ethical prosecutors, perhaps, are in the best position to prevent egregious misconduct by other attorneys. Thus, prosecutor offices can evaluate methods of training and supervising lawyers, and when a violation occurs in a specific office, that office should reassess its training.”).

¹⁹⁹ Burke, *supra* note 163, at 1473.

may be successful in reducing discriminatory use of the peremptory challenge.²⁰⁰ These arguments express confidence in individual lawyers to abstain from violating *Batson* and, in simple terms, control themselves. However, other scholars are more wary of placing faith in the individual prosecutor. Some argue that the view in various Supreme Court decisions that prosecutors use peremptory strikes “fairly” and to “secure an impartial trial,” rather than to manipulate jury composition in order to obtain a conviction, is “unfounded.”²⁰¹ Others lament the fact that “the stereotypical attitudes that have guided the use of the peremptory challenge have been difficult to change.”²⁰²

While change at the level of the individual prosecutor or prosecutor’s office may have previously seemed overly optimistic, with the emergence of the “progressive prosecution” movement, there is reason to believe that self-regulation could become the norm. Since 2015, many prosecutors running for District Attorney, State’s Attorney, and similar positions across the country have professed a commitment to “reducing mass incarceration, eliminating unwarranted racial disparities [in the criminal justice system], and seeking justice for all, including the accused.”²⁰³ Progressive prosecutors, who tend to come from more diverse backgrounds,²⁰⁴ typically emphasize that “the criminal justice system is failing to promote fairness” and promise to pursue justice rather than convict at all costs.²⁰⁵

This movement has gained widespread support from many in the legal community and has brought a sense of hope that prosecutors “hold the key”

²⁰⁰ *Id.* at 1472.

²⁰¹ Heinz, *supra* note 32, at 215.

²⁰² Morehead, *supra* note 14, at 633.

²⁰³ Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 2 (2019).

²⁰⁴ Lucy Lang, *SF Election Advances Progressive Prosecution Movement*, S.F. CHRON. (Nov. 15, 2019), <https://www.sfchronicle.com/opinion/article/S-F-election-advances-progressive-prosecution-14836775.php> [<https://perma.cc/3C8X-WGAA>].

²⁰⁵ Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y.L. SCH. L. REV. 69, 72 (2020); see Jeffrey Bellin, *Defending Progressive Prosecution*, 39 YALE L. & POL’Y REV. (forthcoming 2020) (manuscript at 5) <https://ssrn.com/abstract=3479165> [<https://perma.cc/GEM7-CEYW>] (“Bazelon makes a strong case that the new wave of prosecutors, not legislators, governors, police, or judges, ‘hold the key to change.’”) (citing EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION xxvii (2019)); Davis, *supra* note 203, at 1 (“[I]n recent years, a number of incumbent district attorneys have been challenged and defeated by individuals who pledged to use their power and discretion to reduce the incarceration rate and eliminate unwarranted racial disparities in the criminal justice system.”); see also John Terzano, *Changing the “Convict at All Costs” Culture of Prosecutor’s Offices*, HUFFPOST (March 18, 2010, 5:12 AM), https://www.huffpost.com/entry/changing-the-convict-at-a_b_367864 [<https://perma.cc/7RSP-NV9V>].

to changing the justice system for the better.²⁰⁶ Some support for the movement centers on prosecutors' ideology and professed commitment to fairness and reducing racial bias.²⁰⁷ The shift in mindset away from focusing on convictions or being "tough on crime"—or rhetoric suggesting such a shift—inspires confidence that these prosecutors will be committed to implementing real policy and procedural changes while in office.²⁰⁸ Other supporters offer a hopeful view of prosecutors' status as discretionary agents who can implement change faster than judges or legislators.²⁰⁹ For example, Emily Bazelon argues that reform-minded prosecutors can change the justice system more effectively than any other actors in the near term, given that they can regulate their own conduct and to some extent the conduct of other prosecutors.²¹⁰ She explains, "While it would be nice if lawmakers and the courts threw themselves into fixing the criminal justice system, in the meantime, elections for prosecutors represent a shortcut to addressing a lot of dysfunction."²¹¹ Supporters have cited policies that prosecutors have implemented, such as reforms to cash bail systems, reduced sentencing recommendations, and plea bargaining, as evidence that the movement has enjoyed success.²¹²

²⁰⁶ Bellin, *supra* note 205, at 4 (citing BAZELON, *supra* note 205, at xxvii).

²⁰⁷ See Davis, *supra* note 203, at 2 ("[I]n recent years, a number of incumbent district attorneys have been challenged and defeated by individuals who pledged to use their power and discretion to reduce the incarceration rate and eliminate unwarranted racial disparities in the criminal justice system."); Gajwani & Lesser, *supra* note 204, at 72; Terzano, *supra* note 205.

²⁰⁸ See Del Quentin Wilber, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (Aug 5, 2019, 4:00 AM), <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms> [<https://perma.cc/HP3X-EJS4>] ("This is a real movement that could have real consequences, and this new crop of progressive prosecutors are looking at the job in a very different way.") (quoting Professor Angela J. Davis); Davis, *supra* note 203, at 2, 3. Additionally, Professor Davis explains that in *Berger v. United States*, "the Supreme Court noted that the prosecutor's 'interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done,'" a perspective that has shaped the progressive prosecution movement and has been echoed by so-called progressive prosecutors. *Id.* at 2, 5 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

²⁰⁹ See, e.g., Benjamin Levin, *Imagining the Progressive Prosecutor*, MINN. L. REV. (forthcoming 2021) (manuscript at 6) (<https://ssrn.com/abstract=3542792>) [<https://perma.cc/27VZ-HVZD>] ("[R]ather than attacking prosecutorial discretion as a structural ill in need of a cure, many commentators and reformers have come to argue that replacing the discretionary actors (and their ideology) might be the best way to begin dismantling the carceral state.").

²¹⁰ Bellin, *supra* note 205, at 5; see also BAZELON, *supra* note 205, at xxvi–xxvii.

²¹¹ BAZELON, *supra* note 205, at xxxi.

²¹² See generally, e.g., Davis, *supra* note 202 (discussing various progressive prosecutors' criminal justice reform policies, the success of those policies in those prosecutors' districts, and support of the movement).

However, skeptics have important concerns. First, while head prosecutors run for election on promises of reform, line prosecutors—who make up the bulk of prosecutors at trial—are influenced by institutional and personal factors and need not worry as much about oversight or liability for their actions.²¹³ Regardless of head prosecutors’ promises to pursue justice rather than convictions, line prosecutors operate within an adversarial system and are interested in succeeding in their careers.²¹⁴ Further, line prosecutors do not have their District Attorneys sitting over their shoulders watching them prosecute trials, and thus prosecutorial accountability is low.²¹⁵ Because incentives other than the vision of reform with which newly elected progressive District Attorneys enter office shape line prosecutors’ conduct, “there is significant potential for noncompliance from those on the lower rungs of the hierarchy due to a lack of buy-in to the goals of the head prosecutor.”²¹⁶ Accordingly, implementing the reforms of a head prosecutor may require line prosecutors to “*restrain themselves* in an environment in which they have access to nearly unlimited leverage over defendants and face a near-zero probability of legal liability for malicious acts.”²¹⁷

A second problem stems from the various political dynamics across jurisdictions, along with the fact that turnover from elections can dampen progressive prosecutors’ ability to make widespread and lasting change, as

²¹³ See Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 760 (2018).

²¹⁴ See David E. Patton, *A Defender’s Take on “Good” Prosecutors*, 87 FORDHAM L. REV. 20, 23 (2018) (explaining that prosecutors are likely influenced by ego and ambition); Kirchmeier, Greenwald, Reynolds & Sussman, *supra* note 198, at 1384 n. 317 (citing Janet C. Hoeffel, *Prosecutor Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1140–41 (2005)) (“[T]he adversarial system often encourages prosecutors to focus on winning the case for the prosecution rather than seeking justice and also ensuring defendants’ rights are protected.”); Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part One: Internal Constraints*, 61 B.C.L. REV. E. SUPP. I-32, I-39 (2020) (“Young line prosecutors seeking trial experience may be less likely to buy in to their chief’s progressive agenda.”).

²¹⁵ See Note, *supra* note 213, at 758. The author explains, “Ironically, the Court’s rationale for narrowing the scope of prosecutorial liability includes a ‘public interest’ concern—too much liability would ‘prevent the vigorous and fearless performance of the prosecutor’s duty.’” *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976)).

²¹⁶ *Id.* at 760 (“While line prosecutors must run many charging decisions by their bosses, not every decision they make or interaction they have is supervised.”). Additionally, line prosecutors may enjoy immunity for their indiscretions. See *id.* at 758 (“[T]he Court’s rationale for narrowing the scope of prosecutorial liability includes a ‘public interest’ concern—too much liability would ‘prevent the vigorous and fearless performance of the prosecutor’s duty.’”) (quoting *Imbler*, 424 U.S. at 427).

²¹⁷ *Id.* at 762.

more conservative prosecutors may take their place.²¹⁸ According to Bazelon, approximately twelve percent of the population lives in a community with a District Attorney who could be considered progressive.²¹⁹ While this is significant, not every jurisdiction welcomes progressive prosecution ideology.²²⁰ For example, prosecutors who ran for District Attorney on a progressive ideology in Sacramento and San Diego, California, lost to incumbent District Attorneys in those districts by a significant margin.²²¹ To some, these failures “provide[] an early warning sign that the progressive prosecution platform may hold little currency with voters outside of a limited number of cities.”²²²

On the other hand, progressive prosecutors have won elections in more conservative districts. For example, five progressive District Attorneys were “elected in major cities in Texas,” including Dallas and San Antonio.²²³ For example, in 2016, Kim Ogg was elected as District Attorney in Houston.²²⁴ Once in office, Ogg supported bail reform and declined to prosecute minor drug offenses.²²⁵ She successfully “implemented a review system that seeks consensus among [prosecutors in her office] before levying capital charges.”²²⁶ Further, she “dismissed thirty-seven prosecutors from her office [and] hired a progressive defense attorney as her chief of staff.”²²⁷ Still, the progressive prosecution movement relies primarily on voters, who are “notoriously fickle.”²²⁸ For this reason, some argue that progressive prosecutors should not be viewed as a “one-way ratchet toward leniency,” as

²¹⁸ Levin, *supra* note 209, at 3 (“[T]he realities of jurisdictions, municipalities, and offices mean that one progressive prosecutor might arrive on the job casting one type of figure, but bend into another as she swims in the political dynamics around her.”).

²¹⁹ Bellin, *supra* note 204, at 4 (quoting BAZELON, *supra* note 205, at 290).

²²⁰ Note, *supra* note 213, at 766–67.

²²¹ *See id.* at 767.

²²² *Id.*

²²³ Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [<https://perma.cc/J8ZQ-CTAP>].

²²⁴ *Id.*; Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 8, 10–11 (2018).

²²⁵ Bazelon & Krinsky, *supra* note 223.

²²⁶ Alan Greenblatt, *Law and the New Order: A Fresh Wave of District Attorneys Is Redefining Justice*, GOVERNING: THE FUTURE OF STATES AND LOCALITIES (Apr. 2017), <https://www.governing.com/topics/public-justice-safety/gov-district-attorneys-houston-criminal-justice-reform.html> [<https://perma.cc/UJJ6-DELR>].

²²⁷ Davis, *supra* note 224, at 10.

²²⁸ Note, *supra* note 213, at 766.

voters may be swayed by an uptick in crime or other external events to seek a return to the prosecutor who promises to be tough on crime.²²⁹

B. PROGRESSIVE PROSECUTION & THE PEREMPTORY CHALLENGE

Despite its limitations, the progressive prosecution movement could greatly reduce the discriminatory use of the peremptory challenge and could therefore justify the states' trend toward an equal allocation of peremptory challenges between the prosecution and defense. There are two main reasons for this. First, progressive prosecutors have committed to reducing racial biases in the criminal justice system and have the potential to increase the community's perception of fairness in criminal procedure, lessening the need for a lower number of peremptory challenges for the prosecution. Second, the movement has resulted in policy changes that have made criminal procedure fairer. If extended to exercising peremptory challenges in a nondiscriminatory way, these changes could lessen the need for the safeguard of the defendant's additional peremptory challenges.

First, regarding the community's perception of justice, progressive prosecutors have greater potential than their predecessors to increase perceived fairness. This not only applies with respect to the criminal justice system as a whole but also with respect to demonstrating a commitment to non-discrimination in criminal procedure. These prosecutors are not only making promises of procedural fairness—their promises are being conveyed directly to the public. In this way, the progressive prosecution movement has brought transparency to one of the least transparent electorally accountable positions in government.²³⁰ As journalist Sam Reisman explains, “[T]he rise of the progressive prosecutor represents new voter awareness about the roles prosecutors play in assessing what charges to bring, whether to incarcerate, negotiating plea deals and recommending sentencing.”²³¹ Further, data on

²²⁹ *Id.* at 767.

²³⁰ See Press Release, ACLU, Americans Overwhelmingly Support Prosecutorial Reform, Poll Finds (Dec. 12, 2017), <https://www.aclu.org/press-releases/americans-overwhelmingly-support-prosecutorial-reform-poll-finds> [https://perma.cc/2LSL-4BNU] (“Prosecutors are the most powerful, unaccountable, and least transparent actors in the criminal justice system.” (internal quotation marks omitted)); see also Davis, *supra* note 202, at 6 (“[T]here is very little transparency in the prosecutorial function. Prosecutors’ most important and consequential duties, charging and plea-bargaining, are performed behind closed doors. It is impossible to hold prosecutors accountable without knowing how they carry out these important functions. Second, most people pay very little attention to prosecutor races.”).

²³¹ Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (April 7, 2019, 8:02 PM) <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> [https://perma.cc/9JFV-APSR].

these prosecutorial decisions, which some progressive prosecutors have voluntarily elected to make public, “may be used to identify patterns of constitutional violations and disparate treatment of defendants and/or victims.”²³²

Awareness surrounding the progressive prosecution movement has also been fueled by outside forces, including educational programs by organizations such as the ACLU.²³³ As a result, there appears to be a greater awareness among various communities about prosecutorial elections, progressive prosecutors’ goals and policies, and how they are implementing change in the system.²³⁴ Prosecutorial transparency and a greater awareness of prosecutors’ commitment to ending discriminatory conduct is important in the context of peremptory challenges because it can increase the community’s confidence in and perception of prosecutorial fairness at the trial level. If prosecutors can be trusted to engage in conduct that is nondiscriminatory, then the need, at least from an “optics” standpoint, for a lower number of peremptory challenges than that granted to the defense is lessened.

It is important to note that prosecutors have not explicitly addressed the issue of peremptory challenges, at least not outwardly to the public. However, there is evidence that progressive prosecutors have successfully implemented safeguards that might reduce racial biases in other areas of criminal procedure, which suggests that prosecutors may also have success in limiting the abuse of the peremptory challenge. For example, some prosecutors’ offices have recently added or expanded conviction integrity units that check line prosecutors’ work.²³⁵ This would hopefully include prosecutors’ jury selection and *Batson* records. As another example, Philadelphia District Attorney Larry Krasner has said, “We are not going to overcharge We are not going to try to coerce defendants. We are going to proceed on charges that are supported by the facts in the case, period.”²³⁶ To that end, Krasner requires prosecutors “to get his approval on any plea

²³² Davis, *supra* note 203, at 9.

²³³ *Id.* at 6.

²³⁴ Reisman, *supra* note 231.

²³⁵ See Davis, *supra* note 203, at 10, 19. Davis discusses Cook County State’s Attorney Kim Foxx’s conviction integrity unit, specifically noting: “[Foxx’s] Conviction Integrity Unit dropped charges against some defendants who claimed they had been wrongfully convicted, including dismissing charges against eighteen individuals on November 16, 2017” *Id.* at 10.

²³⁶ Maura Ewing, *America’s Leading Reform-Minded District Attorney Has Taken His Most Radical Step Yet*, SLATE (Dec. 4, 2018, 3:40 PM), <https://slate.com/news-and-politics/2018/12/philadelphia-district-attorney-larry-krasner-criminal-justice-reform.html> [<https://perma.cc/956X-4J7F>].

offer” that carries a prison sentence of greater than fifteen to thirty years.²³⁷ Krasner’s efforts have had real results: the office filed “18 percent fewer cases than in 2017, including 25 percent fewer misdemeanors.”²³⁸ Further, prosecutors in his office opened 6,500 fewer cases in the year after he was elected to District Attorney than they opened in the previous year.²³⁹ Similarly, Kim Foxx “issued guidelines to the prosecutors in her office, ordering them to proactively ask for pretrial release in appropriate cases,” among other reforms.²⁴⁰ A year after Kim Foxx entered office, “the Cook County jail population had decreased by more than 1,000 people.”²⁴¹

Further, two principles proposed by *The Progressive Prosecutor’s Handbook*, a guide for progressive prosecutors to navigate the difficulties of implementing change in their offices,²⁴² address *Batson* violations—one directly and one indirectly. These principles indicate that progressive prosecutors can implement concrete policies to eliminate abuse of the peremptory challenge.²⁴³ For example, the author warns that progressive prosecutors “[should not] countenance jokes about evading *Batson*” and should make clear to line prosecutors that procedural fairness is expected.²⁴⁴ The author also suggests that progressive prosecutors hire diverse line prosecutors and supervisory prosecutors, as offices with a more diverse makeup are less likely to tolerate racism, “coded or explicit.”²⁴⁵

Further, many progressive prosecutors themselves are racially and ethnically diverse or come from diverse backgrounds, and many have implemented policies to address diversity.²⁴⁶ For example, Kim Foxx is the first African-American woman to serve as District Attorney for Cook County, Illinois.²⁴⁷ Additionally, Larry Krasner, a former public defender, launched a nationwide effort to recruit more diverse Assistant District

²³⁷ Davis, *supra* note 203, at 12.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 9.

²⁴¹ *Id.*

²⁴² See David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. 25 (2017).

²⁴³ *Id.* at 40.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back.*, WASH. POST (Nov. 9, 2019), <https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3dastory.html> [<https://perma.cc/C9Z8-N778>].

²⁴⁷ Davis, *supra* note 203, at 8.

Attorneys.²⁴⁸ Upon taking office, Krasner “fired 31 of the office’s prosecutors” and “immediately began recruiting and filling the open positions with lawyers who share his vision of criminal justice reform.”²⁴⁹ This effort included recruiting public defenders and law students from historically black law schools.²⁵⁰ Diversity among lead and line prosecutors can serve the perception of the justice system as fairer for the community, and particularly for diverse members of the community.

Ultimately, closer examination of empirical data will be required to determine whether the movement can present a solution that serves as a compromise between those who support an unequal number of peremptory challenges and those who believe the number should be equal. Thus, an unequal allocation of peremptory challenges should be maintained in the federal system and among states that have not equalized the number of peremptory challenges allocated between the prosecution and defense while awaiting evidence that progressive prosecution can justify equalization.

CONCLUSION

In conclusion, the peremptory challenge is a revered, yet perplexing, and in some corners detested, facet of the American criminal justice system. It is unlikely that peremptory challenges will be abolished any time soon, and thus, we are left to determine how to properly use and allocate them while maintaining fairness for the accused, victims of crimes, and the community at large. The arguments supplied in the 1977 debates that resulted in the federal system declining to allocate an equal number of peremptory challenges to the defense and prosecution remain relevant to the federal system and states today, notwithstanding the failures of *Batson*. At this time, allocating a greater number of peremptory challenges to the defense is necessary to maintain both the perception of fairness in the justice system and actual fairness in the exercise of peremptory challenges at trial. Accordingly, the federal system and remaining states that maintain an unequal number of peremptory challenges should continue to do so—at least for now. There is potential for the progressive prosecution movement to supplant the role that the unequal allocation of peremptory challenge plays in maintaining fairness. However, the progressive prosecution movement is young and it is likely too early to tell whether the movement will persist and

²⁴⁸ *See id.* at 11.

²⁴⁹ *Id.* at 11.

²⁵⁰ *Id.*

what its consequences will be.²⁵¹ Thus, while the movement holds promise for the preemptory challenge, whether it can justify equalizing the number of preemptory challenges cannot yet be determined, and the legal community must consider further empirical evidence on its successes before making that decision. In the meantime, stasis is the best solution.

²⁵¹ See, e.g., Note, *supra* note 213, at 767 (“The movement toward progressive prosecutors is so young that few of the recently elected nontraditional prosecutors have faced reelection, and so the durability of these shifts remains to be seen.”); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1541–42 (2020); Alan Greenblatt, *Progressives Find Political Success, and Pushback, as Prosecutors*, GOVERNING: THE FUTURE OF STATES AND LOCALITIES (May 2019), <https://www.governing.com/topics/politics/gov-prosecutors-elections-district-attorney-races.html> [<https://perma.cc/R6EA-DN65>].