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BE LIKE *ANDUJAR*: WHY THE NEW JERSEY SUPREME COURT GOT IT RIGHT

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I. INTRODUCTION

On May 31st, 2017, a black male from Newark entered the Essex County Courthouse to fulfill his civic duty of serving on an impartial jury, something provided to all criminal defendants as a constitutional right.[1] This man, referred to as F.G., by all indications, was not simply another one of the nearly thirty-two million Americans who are called each year

1. State v. Andujar, 254 A.3d 606, 612 (N.J. 2021); U.S. CONST. amend. VI.

to serve as jurors.[2] Instead, he appeared to show eagerness and a passion for serving, volunteering to answer many questions in *voir dire* and repeatedly indicating that he thought he was able to serve as "a fair and impartial juror."[3]

However, F.G. would not return to the courthouse the next day.[4] Instead, he would find himself arrested before he could report back because of a warrant out of Newark.[5] The defense counsel for defendant Edwin Andujar did not oppose the removal, but did relay a sentiment that might seep into the mind of many: "I think coming to court for jury service no one expects they are going to be looked up to see if they have warrants."[6] In an attempt to answer the concerns of the defense, the prosecutor stated, "the State is not in the habit of doing what counsel just suggested where we are looking at a random juror's[] criminal history," but that it made the decision to conduct the check because of F.G's answers at *voir dire*.[7]

F.G. was a major subject of *voir dire* the previous day, to the tune of him being questioned for a half-hour at sidebar and over thirty pages of the day's transcript being attributed to this questioning.[8] He indicated that he had ample interaction with many involved in the criminal justice system, including two cousins in law enforcement, five or six close friends who had been accused of crimes, and two cousins who had been murdered in domestic disputes.[9] He also continued to emphasize that he believed the criminal justice system was fair and effective "because you are judged by your peers" and stressed the importance of diverse perspectives and backgrounds.[10] Still, the prosecutor attempted to strike F.G. for cause, citing his background and lingo as his reasoning.[11] The defense replied that, "the State's position [is] untenable in the sense that it means no black man in Newark would be able to sit on this jury," and the prosecution's strike amounted to holding the events that happened to people around him against his case for being selected to serve.[12] The trial

2. *Andujar*, 254 A.3d at 612; *Jury Duty: Who Gets Called, And Who Actually Serves*, NPR (June 7, 2015, 7:26 AM), https://www.npr.org/2015/06/07/412633577/jury-duty-who-gets-called-and-who-actually-serves.
3. *Andujar*, 254 A.3d at 612–14.
4. *Id.* at 615–16.
5. *Id.*
6. *Id.*
7. *Id.* at 615–16.
8. *Id.* at 612.
9. *Id.* at 612–14.
10. *Id.*
11. *See id.* at 614.
12. *Id.* at 614–15.

judge found the defense's argument more persuasive, as it rejected the motion and found F.G. would "make a fair and impartial juror."[13]

It was at this point that the prosecution conducted the background check that would result in his removal and subsequent arrest.[14] As a result, F.G. was dismissed, largely without issue, before the peremptory challenge stage of jury selection.[15] In fact, the defense counsel argued this point exactly when it unsuccessfully asked for an additional peremptory challenge due to its belief that the prosecution avoided having to use one on F.G.[16] But this might have only been the tip of the iceberg. In avoiding the use of a peremptory strike, the prosecution also eluded any inquisition into potential race–based motives behind removing F.G.[17] Under *Batson v. Kentucky*, this review is necessary to protect the rights of both the criminal defendant and the excluded juror under the Sixth and Fourteenth Amendments.[18]

It is for this reason that, upon review, in *State v. Andujar*, the New Jersey Supreme Court took great care in discussing the approaches of other jurisdictions in addressing this problem and formulating a detailed rule for New Jersey courts to follow.[19] This standard, while certainly detailed and thorough, can be boiled down to a simple concept: providing the judge and defense attorney with more "checks and balances" on the prosecutor in this area.[20] The court made it explicit that its decision was designed to prevent a prosecutor's potential implicit bias from becoming

13. *Id*. at 615.

14. *See id*.

15. *See id*. at 628 ("The trial court properly denied the State's challenge that F.G. be removed for cause. Ordinarily, the next step would have been for the State to exercise a peremptory challenge that defendant could have challenged under *Batson* and *Gilmore*.").

16. As the New Jersey Supreme Court described:

> After a short recess, during which defense counsel consulted her office, she asked the court to award defendant one additional peremptory challenge. Counsel argued the State had an unfair advantage in that it could access databases to run a criminal history check, but defendant could not. According to defendant, "[t]he State clearly would have used a peremptory strike for this potential juror" for the reasons they expressed at sidebar; instead, they "used their resources" and did not have to 'use a peremptory strike.' An additional peremptory challenge, counsel argued, would partly 'fix that imbalance.' It would not, however, 'address the concern that the State is record checking people that they don't like.'"

Id. at 615–17.

17. *See id*.; Batson v. Kentucky, 476 U.S. 79, 83 (1986) ("Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.").

18. *See Andujar*, 254 A.3d at 618–19; *Batson*, 476 U.S. at 92–94*;* U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1.

19. *See Andujar*, 254 A.3d at 626–27.

20. *See id.*

the basis for a pre-*Batson* criminal background check.[21] While the decision also requested additional help from the legal community to fight against implicit bias in the jury selection process, the justices clearly felt that the newly instituted safeguards would effectively bar this particular means of evading a *Batson* analysis.[22]

This Comment will argue that other jurisdictions should adopt *Andujar*'s standard to combat abuse by prosecutors and protect the constitutional rights of both criminal defendants and prospective jurors. It aims to emphasize that curtailing prosecutorial discretion in this area is necessary to prevent implicit and explicit racial bias from infecting the jury selection process. In Part II, this Comment will detail *Batson*, the history leading up to the decision, and how courts have applied it.[23] Part III will discuss how other jurisdictions deal with prosecutors conducting criminal background checks, as well as expound on the *Andujar* standard in greater detail.[24] Part IV works to illustrate how great prosecutorial discretion can contribute to the problem of implicit bias in the criminal justice system, and how judges and defense attorneys are a useful and natural check on that discretion.[25] Finally, Part V will compare the *Andujar* solution to two prevailing answers to the problem presented in the case.[26] In the end, it seeks to demonstrate that the nationwide implementation of the principles from *State v. Andujar* is an effective and feasible way to further protect *Batson* against circumvention.[27]

II. PEREMPTORY CHALLENGES: RACE-BASED DISCRIMINATION IN THE JURY SELECTION PROCESS

The Sixth Amendment guarantees that, "[i]n 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

21. *See id.* at 628. The court acknowledged that this was likely the situation with F.G. *Id.* at 629 ("To be clear, we do not find the trial prosecutors engaged in purposeful discrimination or any willful misconduct. The record, instead, suggests implicit or unconscious bias on the part of the State.").

22. *See id.* at 630–32. The court stated, "[t]o be clear, the State would not have been able to run a criminal history check under the standard outlined above. It has yet to offer a reasonable, individualized basis for conducting a record check of F.G. As a result, to the extent the State relies on the results of the check to justify F.G.'s removal, its argument lacks force." *Id.* at 628.

23. *See infra* Part II.

24. *See infra* Part III.

25. *See infra* Part IV.

26. *See infra* Part V.

27. *See infra* Part VI.

have been committed."[28] The Fourteenth Amendment of the U.S. Constitution states that, "[n]o state shall…deny to any person within its jurisdiction the equal protection of the laws."[29] Under the equal protection doctrine, government classifications based on race are subject to the most exacting standard of review: strict scrutiny.[30] Strict scrutiny requires the government to show a compelling government interest and that the means employed are narrowly tailored to achieving that purpose.[31] There are essentially three categories of laws that have been challenged as unconstitutional classifications based on race: race classifications made on the face of the law,[32] facially neutral laws,[33] and race classifications that benefit minorities.[34]

Peremptory challenges are facially neutral government actions.[35] Facially neutral classifications are subject to strict scrutiny if the party bringing the claim can prove both discriminatory impact and discriminatory purpose.[36] However, courts have held that the traditional means-ends analysis required under strict scrutiny does not need to be used for peremptory challenges because there is never a legitimate or compelling end to considering race in jury selection.[37] As the U.S. Supreme Court stated in *Snyder v. Louisiana*, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."[38] However, this view had not always been adopted by the Supreme Court.[39]

28. U.S. CONST. amend. VI.

29. U.S. CONST. amend. XIV, § 1.

30. *See* Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 440 (1985).

31. *See id.*

32. *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954).

33. *See, e.g.,* Washington v. Davis, 426 U.S. 229, 229 (1976); Palmer v. Thompson, 403 U.S. 217, 217 (1971).

34. *See, e.g.,* Fisher v. Univ. of Tex., 579 U.S. 365, 365 (2016); Grutter v. Bollinger, 539 U.S. 306, 306 (2003); Gratz v. Bollinger, 539 U.S. 244, 244 (2003).

35. *See, e.g., Batson*, 476 U.S. at 92–94.

36. *See, e.g., id.*; Washington v. Davis, 426 U.S. at 240; *Palmer*, 403 U.S. at 225–26; John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 689 (2014) (Arguing that "the Court should begin to address the reality of implicit racial bias by reigning in criminal justice actors' discretion and by refocusing its equal protection analysis on disparate impact rather than intent.").

37. *See* Snyder v. Louisiana, 552 U.S. 472, 478 (2008).

38. *Id.* at 478 (quoting United States v. Vasquez–Lopez, 22 F.3d 900, 902 (9th Cir. 1989)).

39. *See Batson*, 476 U.S. at 90–93; Swain v. Alabama, 380 U.S. 202, 209–28 (1965).

A. The Old Standard: Swain v. Alabama

Prior to its landmark decision in *Batson v. Kentucky*, the relevant precedent was set forth in *Swain v. Alabama*.[40] *Swain* was decided in 1965 and involved an African American defendant in Alabama who claimed, inter alia, that the petit jury chosen in his case should have been declared void because peremptory challenges were used by the prosecution to exclude the only six remaining African American prospective jurors.[41] In deciding the case, the author of the majority opinion, Justice White, engaged in a lengthy historical analysis of peremptory challenges and concluded that, "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[42] Therefore, the Court refused to apply the Equal Protection Clause to inquire about the motivation behind a prosecutor's peremptory challenge because "[t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards."[43] The end result was that a prosecutor could strike a prospective juror for any reason, including the assumption that a juror of a certain race would be favorable to a defendant of that same race.[44]

B. The Current Standard: Batson v. Kentucky

In its landmark decision in *Batson v. Kentucky*, the Supreme Court acknowledged the fact that the *Swain* decision left prosecutorial discretion in this area all but completely unchecked and responded by overruling it.[45] The Court noted an evolution in equal protection precedent and found that *Swain's* unwillingness to inquire into potentially discriminatory peremptory challenges was inconsistent with the general principles of the doctrine.[46] Contrary to that decision, "the

40. *Batson*, 476 U.S. at 79; *Swain*, 380 U.S. at 202.
41. *Swain*, 380 U.S. at 202–06.
42. *Id.* at 220.
43. *Id.* at 221–22. The Court closed its opinion by acknowledging that there may be an avenue to challenging the apparent systematic discrimination that was going on in Alabama's Talladega County, as there had never been a single African American individual chosen for jury service in either a criminal or civil case. *Id.* at 222–23. However, it found that this systematic discrimination is not properly addressed solely in the context of the case it was deciding and in light of the specific challenges used by the prosecutor against the six jurors. *Id.* at 224.
44. *See Batson*, 476 U.S. at 90–93.
45. *Id.* at 92–93.
46. *Id.* at 93–94.

defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of the mind to discriminate.'"[47]

Citing its decision in *Washington v. Davis*, the Court stated that "[c]ircumstantial evidence of invidious [discriminatory] intent may include proof of disproportionate impact" and a black juror who was struck from service "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[48] After a prima facie case is made, the Court instituted a burden-shifting framework in order to then place the onus on the prosecution to justify its action.[49] The prosecution cannot merely meet this burden through arguing generally that it did not participate in discriminatory practices or that the decision was a result of its officials practicing due diligence in their employment obligations.[50] Instead, it must show that "permissible racially neutral selection criteria and procedures have produced the monochromatic result."[51]

Importantly, Justice Powell's majority opinion expanded on the findings necessary to satisfy both burdens.[52] A prima facie case requires the defendant to make a showing that he or she belongs to a racial group and other members of that group have been excluded from jury participation.[53] While the Court noted that a "systematic exclusion" or a substantial underrepresentation of members of a particular race from the venire over a period of time may meet the burden, it also explicitly states that purposeful discrimination may be shown through the particulars of the defendant's case alone.[54] Overall, the defense is required to allege facts, such as a "pattern" of strikes or certain questioning during *voir dire*, that ultimately "raise[s] an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[55]

47. *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

48. *Batson*, 476 U.S. at 96 (quoting Washington v. Davis, 426 U.S. at 239–242).

49. *Batson*, 476 U.S. at 94.

50. *Id.* (citing Alexander v. Louisiana, 405 U.S. 625, 632 (1972)); Jones v. Georgia, 389 U.S. 24, 25 (1967)).

51. *Batson*, 476 U.S. at 94 (citing *Alexander*, 405 U.S. at 632; *Davis*, 426 U.S. at 241).

52. *Id.* at 94–98.

53. *Id.* at 94 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

54. *Batson*, 476 U.S. at 94–95 (citing Hernandez v. Texas, 347 U.S. 475, 482 (1954); Whitus v. Georgia, 385 U.S. 545, 552 (1967); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977)).

55. *Batson*, 476 U.S. at 96–97.

In turn, the prosecution does get the opportunity to defend its strike based on a race-neutral reason when the burden shifts.[56] Importantly, this reason may not be based on a prejudicial assumption that a member of a certain racial group is more likely to be partial to a defendant of that same race.[57] The Court also places great emphasis on the fact that the standard will not undermine the peremptory challenge itself, as the standard does not rise to the level of a for-cause challenge, nor have similar standards amongst the states led to great administrative burdens.[58] Finally, it is only after both parties have met their burdens that the court will make its determination of whether a *Batson* violation has occurred.[59]

More recent Supreme Court decisions demonstrate the fact-intensive nature of the *Batson* analysis and the considerable discretion courts have in applying the three-part test.[60] Nevertheless, at the very least, the prosecutor is required to face the reasoning behind its peremptory challenges, justify that reasoning, and provide enough evidence to support that it is not simply pretext for racial discrimination.[61] Uncovering and evaluating evidence that either supports or contradicts the State's argument is a required byproduct of *Batson*.[62] A court may find that the evidence does not amount to "purposeful discrimination," but the process of inquiring is the only safeguard against a reversion back to *Swain*.[63] Thus, circumvention of the inquiry proves fatal to the essential protection it is meant to provide.

III. CRIMINAL BACKGROUND CHECKS: AN ATTEMPT TO CIRCUMVENT

56. *Id.* at 97.
57. *Id.* at 98.
58. *Id.* at 97–99.
59. *See id.* at 98. Put succinctly by Justice Alito in the Court's *Snyder v. Louisiana* decision, "[f]irst, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race–neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." Foster v. Chatman, 578 U.S. 488, 499–500 (2016) (citing *Snyder*, 552 U.S. at 476–77 (internal quotations and brackets omitted)).
60. *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (2019); *Foster*, 578 U.S. at 512–13.
61. *See Flowers*, 139 S. Ct. at 2251; *Foster*, 578 U.S. at 512–13.
62. *See Flowers*, 139 S. Ct. at 2251; *Foster*, 578 U.S. at 512–13.
63. *See Batson*, 476 U.S. at 79; *Swain*, 380 U.S. at 202.

BATSON

As is clear from *State v. Andujar*, prosecutorial discretion in accessing arrest records creates a unique problem in the *Batson* context.[64] While, in principle, arrest records are a facially race-neutral accounting of one's criminal history, in practice, they have disproportionately affected persons of color negatively.[65] There has been a tremendous amount of research into the many ways that having an arrest record can have a harsh impact on almost all facets of someone's life.[66] Jury selection is no different. Putting aside criminal background checks for a moment, Professor Vida B. Johnson, in her article, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, notes that questions about interactions with the criminal justice system are prevalent during *voir dire*.[67] Not only do these questions revolve around the prospective juror herself, but they probe into whether her family or close friends have been arrested or charged with a crime in the recent past.[68] We see this in practice in *Andujar*, where the prosecutor asked F.G., "[h]ave you, any family member, or close friend ever been accused of committing an offense other than a minor motor vehicle offense?"[69] While F.G.'s answer did not indicate that he himself had been arrested or charged with a crime, the mere fact that he had friends and family that had been perpetrators of crime and victims of it was enough for the prosecutor to challenge him for cause.[70] While that challenge was denied, it ended up being only a precursor to the criminal background check done on F.G. and the successful challenge that resulted from it.[71]

While it is ultimately unclear as to the exact reason why the prosecutor then decided to run a criminal background check on F.G., the New Jersey Supreme Court makes it clear that this is a case of first impression in deciding "when a criminal history check can be run on a

64. *Andujar*, 254 A.3d at 628.

65. *See, e.g.,* Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 391–95 (2016). For more information about the criminal justice system's disproportionately negative impact on people of color, *see generally*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (New Press rev. ed. 2012).

66. *See, e.g.*, Johnson, *supra* note 65, at 391–95.

67. Johnson, *supra* note 65, at 418.

68. *See id.* (citing Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 33 CT. REV. 10, 11 (1999), http://aja.ncsc.dni.us/courtrv/cr36-1/CR36-1Mize.pdf.).

69. State v. Andujar, 254 A.3d 606, 612 (2021).

70. *Id.* at 614–15

71. *See id.* at 615–17.

prospective juror."[72] In crafting its reasoning and its ultimate standard, the Court noted that it would use the approaches of other states as helpful guidance.[73] In doing so, it gives examples of safeguards from these states, but just as prevalently it lists states that have explicitly declined to limit a prosecutor's ability to conduct these unilateral background investigations.[74] First, this section will detail the various state court decisions and the reasoning behind continuing to allow the prosecution unfettered discretion. Second, it will discuss the approaches crafted by other states to limit this discretion before the New Jersey Supreme Court's decision in *Andujar*. Finally, it will describe the *Andujar* standard in detail.

A. Standard 1: Unfettered Discretion

A number of state courts have explicitly declined to limit the ability of prosecutors to conduct criminal background checks on prospective jurors.[75] The Louisiana Supreme Court's 1984 decision in *State v. Jackson* was one of the first to address this seemingly very specific issue, finding no issue with the State having unilateral power to access arrest records and use them in jury selection.[76] The defendant's principal contention was that he was denied a fair trial that comported with the requirements of due process because he could not access those same arrest records.[77] The Court's principal justification for finding the claim meritless was that the arrest records were only relevant to the State's interests in jury selection and not the defendant's.[78] Notably, the Court and others with similar approaches did not have to address the issue in the *Batson* context, but were only required to decide that the

72. *Id.* at 610.

73. *Id.* at 625.

74. *Id.* at 625–26.

75. *See, e.g.*, State v. Jackson, 450 So. 2d 621, 628 (La. 1984); State v. Smith, 532 S.E.2d 773, 780 (N.C. 2000); Coleman v. State, 804 S.E.2d 24, 30 (Ga. 2017); People v. Franklin, 135 N.E.2d 743, 750–51 (Ill. 1990); Charbonneau v. State, 904 A.2d 295, 319 (Del. 2006); Salmon v. Commonwealth, 529 S.E.2d 815, 819 (Va. 2000); State v. Hernandez, 393 N.W.2d 28, 29–30 (Minn. Ct. App. 1986).

76. *Jackson*, 450 So.2d at 628–29.

77. *Id.*

78. *See id.* ("The criminal records of prospective jurors may be useful to the state in its desire to challenge jurors with inclinations or biases against the state. But they are not pertinent to the purpose of *defendant's* voir dire: to *challenge* jurors whom defendant believes will not approach the verdict in a detached and objective manner.").

prosecution's exclusive access to these records did not amount to a deprivation of the defendant's constitutional rights.[79]

However, Georgia's Supreme Court and North Carolina's Supreme Court have both been faced with cases that had a similar set of facts to *Andujar*.[80] The decisions provide perhaps the most clear constitutional argument in disputing the New Jersey Supreme Court's reasoning: the limiting language in *Batson* itself.[81] As mentioned previously, in explaining the burden placed on the State to provide a race-neutral justification for the strike of a black potential juror, the Court "emphasize[s] that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."[82] Therefore, subsequent decisions have echoed *Batson's* commitment to preserving the peremptory challenge and judicial efficiency.[83]

The North Carolina Supreme Court quoted the Supreme Court's argument in *Hernandez v. New York* that *Batson* "permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process," in finding that the trial court was not required to investigate whether or not the State had run a criminal background check on prospective jurors other than the black juror that had been stricken.[84] The Court then dispensed with any argument that the resulting strike had been motivated by purposeful discrimination in two brief paragraphs.[85]

Similarly, in *Coleman v. State*, which was decided by the Georgia Supreme Court in 2017, the Court upheld a lower Georgia court's ruling that *Batson* did not require courts to conduct any further inquiry into the practices of the prosecution which provided a basis for its peremptory

79. *See, e.g.*, *Franklin*, 135 N.E.2d at 750–51; *Salmon*, 529 S.E.2d at 819; *Charbonneau*, 904 A.2d at 319; *Hernandez*, 393 N.W.2d at 29–30.

80. *Smith*, 532 S.E.2d at 779; *Coleman*, 804 S.E.2d at 720.

81. *See Smith*, 532 S.E.2d at 780; *Coleman*, 804 S.E.2d at 725–26.

82. Batson v. Kentucky, 476 U.S. 79, 97 (1986).

83. *See Smith*, 532 S.E.2d at 780; *Coleman*, 804 S.E.2d at 725–26.

84. *Smith*, 532 S.E.2d at 780 (quoting Hernandez v. New York, 500 U.S. 352, 358 (1991)).

85. *Smith*, 532 S.E.2d at 780 ("Here, the prosecutor's articulated reason for excusing the juror was that she questioned the juror's veracity: the juror had stated on her questionnaire that she had no criminal history, yet a criminal history check revealed she had been charged and convicted of writing a check on a closed account. The court accepted this reason as race-neutral and overruled defendant's objection. The court did not err in doing so. The prosecutor's challenge does not appear to have been motivated by purposeful discrimination, but appears both race-neutral and otherwise beyond reproach. Even if, as defendant contends, few people who bounce checks regard doing so as criminal behavior, people who are criminally charged with and convicted of doing so are surely more enlightened. And those who take oaths as jurors must know what an oath means.").

challenges.[86] This was interpreted to include criminal background checks, of which the defense was not afforded access to.[87] In the Court's eyes, the defendant was not able to show how his lack of access to the records would have given support to his *Batson* claim.[88] It did not reach any analysis of why the prosecutor chose to conduct the criminal background check in the first place.[89]

Therefore, many of the state courts that have continued to allow unfettered prosecutorial discretion to conduct background checks have in many ways failed to appreciate the nuance of the problem. As seen above, many Courts have formulated their decisions without considering the possible *Batson* implications.[90] Even in the case of the Georgia Supreme Court, which was faced with a *Batson* inquiry, the analysis into the possible race-based reasons for the background check was virtually nonexistent.[91] The North Carolina Supreme Court's decision was not much different, as it seemingly cursorily accepted the prosecutor's argument that questions about a juror's truthfulness was the only reason behind the inquiry.[92] Whether intentionally or unintentionally, these Courts neglected to consider that implicit bias could play a factor in the State's decision.[93] However, possibly most concerning is the viewpoint of these courts that a half-baked examination of these prosecutorial determinations is sufficient and all that is required by *Batson*.[94]

B. Standard 2: A Test for Prosecutors

However, prior to *Andujar*, other courts found it necessary to limit the prosecutor's discretion in this area.[95] The New Jersey Supreme Court

86. *Coleman*, 804 S.E.2d at 726 (citing Williams v. State, 519 S.E.2d 232, 233 (Ga. 1999) ("*Batson* did not entitle defendant to question the prosecutor and law enforcement officers about investigatory information on which the State based its peremptory challenges.").

87. *Coleman*, 804 S.E.2d at 726.

88. *See id.* at 725.

89. *See id.* at 725–26.

90. *See, e.g.*, State v. Jackson, 450 So.2d 621, 628–29; People v. Franklin, 135 N.E.2d 743, 750–51; Salmon v. Commonwealth, 529 S.E.2d 815, 819; Charbonneau v. State, 904 A.2d 295, 319; State v. Hernandez, 393 N.W.2d 28, 29–30.

91. *Coleman*, 804 S.E.2d at 726.

92. State v. Smith, 532 S.E.2d 773, 780 (2000).

93. *See id.*; *Coleman*, 804 S.E.2d at 726.

94. *See Coleman*, 804 S.E.2d at 726; *Smith*, 532 S.E.2d at 540.

95. *See, e.g.*, State v. Bessenecker, 404 N.W.2d 134, 138–39 (Iowa 1987); Commonwealth v. Cousin, 873 N.E.2d 742, 750 (Mass. 2007); Commonwealth v. Hampton, 928 N.E.2d 917, 930–31 (Mass. 2010); State v. Goodale, 740 A.2d 1026, 1030–31 (N.H. 1999); Losavio v. Mayber, 496 P.2d 1032, 1034–35 (Colo. 1972); Tagala v. State, 812 P.2d 604, 612–13 (Ala. Ct. App. 1991); State v. Second Jud. Dist. Ct., 431 P.3d 47, 50–52 (Nev. 2018); People v. Murtishaw, 631 P.2d 446, 465 (Cal. 1981).

specifically relies on some of Massachusetts's rulings, namely the requirements of disclosing arrest records to defense counsel during the jury selection process and getting court approval first if the jury is already sworn in.[96] But, once again, many of the cases involving arrest records are more concentrated on the issue of whether the defense counsel should have equal access to the same information as the prosecutor rather than whether the State should be conducting criminal background checks as a matter of course.[97] As seen above, states differ on this issue, but many require disclosure.[98] The principal justification for many of the decisions is grounded in the specific state's criminal code, but also to address the broad policy concern of promoting fairness amongst the parties.[99]

Perhaps the most rigorous standard, outside of New Jersey, is Iowa's.[100] In *State v. Bessenecker*, the Iowa Supreme Court interprets the legislative intent of its criminal code as being skeptical of unlimited access to background checks.[101] The decision, delivered in 1987, reflects concern with many of the same issues that *Andujar* ponders, some thirty-four years after in 2021.[102] While there is no allegation of purposeful race-based discrimination in the case, the concern over juror privacy prevails over prosecutors' exercising unfettered discretion in accessing these records.[103] As a result, the court decides that an order is required to allow

96. State v. Andujar, 254 A.3d 606, 625 (N.J. 2021) (citing *Cousin*, 873 N.E.2d at 750; *Hampton*, 928 N.E.2d at 930–31).

97. *See, e.g.*, *Bessenecker*, 404 N.W.2d at 138–39; *Cousin*, 873 N.E.2d at 750; *Hampton*, 928 N.E.2d at 930–31; *Goodale*, 740 A.2d at 1030–31; *Losavio*, 496 P.2d at 1034–35; *Tagala*, 812 P.2d at 612–13; *Second Judicial Dist. Ct.*, 431 P.3d at 50–52; *Murtishaw*, 631 P.2d at 465.

98. *See, e.g.*, *Bessenecker*, 404 N.W.2d at 138–39; *Cousin*, 873 N.E.2d at 750. *But see, e.g.*, State v. Jackson, 450 So.2d 621, at 628–29.

99. *See, e.g.*, *Bessenecker*, 404 N.W.2d at 138–39.

100. *See id.*; Johnson, *supra* note 65, at 418.

101. *Bessenecker*, 404 N.W.2d at 137 ("The overall tone of caution set by the legislature against the dissemination of criminal history data, except as carefully specified, indicates a legislative purpose of protection of the individual against unwarranted circulation of his or her rap sheet.").

102. *See id.*; State v. Andujar, 254 A.3d 606, 615 (N.J. 2021).

103. *Bessenecker*, 404 N.W.2d at 138 ("Jurors act as participants with the court in the adjudicatory process. The summons to jury duty does not cause them to be suspected of crimes not have they applied for sensitive jobs requiring background checks. . .. While a county attorney obviously has an interest in learning something of the backgrounds of prospective jurors, it would be unfair to allow the county attorney unfettered discretion to obtain rap sheets, which may contain unproved charges, on each prospective juror.").

the prosecutor to obtain criminal background information on a juror during the entire jury selection process.[104]

Bessenecker's reasoning is instructive to the majority in *State v. Andujar*, and defendant Andujar's counsel made the exact aforementioned argument that seemed to underlie the Iowa Supreme Court's decision: "I think coming to court for jury service no one expects they are going to be looked up to see if they have warrants."[105] The majority in *Bessenecker* did not explicitly contemplate its test's implications within the *Batson* context, but *Andujar* demonstrates how a substantially similar standard works to fight against race-based discrimination.[106]

C. The Andujar *Standard*

After examining precedent from other jurisdictions, the court in *Andujar* created a rule that would mandate communication between both parties and, most importantly, the trial court itself.[107] The court's rule is pages long and reflects a painstaking commitment to protecting historically marginalized groups that have been the precise targets of the checks.[108] It stated that, "[g]oing forward from today, any party seeking to run a criminal history check on a prospective juror must first get permission from the trial court."[109] Then, it distinguished between requests made before the empaneling of the jury and the more uncommon requests made after the jury has already been selected, the latter of which are only granted "when compelling circumstances exist."[110] In the case of those made beforehand, it stated that the party must show "a reasonable, individualized, good-faith basis to believe that a record check might reveal pertinent information unlikely to be uncovered through the ordinary *voir dire* process."[111] The court continued to expand upon these safeguards by requiring that the other party be notified, have the ability to object, and be given an opportunity to be heard before the conduction

104. *Id.* ("We believe the statute would permit the county attorney to obtain a rap sheet on an individual only when there is a reasonable basis for believing that the rap sheet may contain information that is pertinent to the individual's selection as a juror . . . . Because the court has a special interest in and a duty to protect the rights of jurors, we believe the court should in its adjudicative capacity determine whether a reasonable basis exists for obtaining the rap sheet of a particular juror.").

105. *Andujar*, 254 A.3d at 615; *see also Bessenecker*, 404 N.W.2d at 137–38.

106. See *Bessenecker*, 404 N.W.2d at 137–38; *Andujar*, 254 A.3d at 628–29.

107. *Andujar*, 254 A.3d at 626–27.

108. *Id.*

109. *Id.* at 626.

110. *Id.* at 626–27.

111. *Id.* at 626.

of the background check.[112] The court even explicitly listed certain "presumptively invalid" reasons for a check.[113] Here, while it noted that the trial court does not need to apply the full *Batson* framework at this point, the aforementioned "presumptively invalid" reasons for conducting a check reads like a laundry list of justifications that one could argue would be based on implicit bias.[114] Not only does the court include reasons based on specific answers of jurors that deny criminal histories or convictions, but also reasons such as, "lives in a high-crime neighborhood; has a child outside of marriage; receives public benefits; or is not a native English speaker."[115] It is only after the party has shown a "good-faith basis" that is not based on "presumptively invalid reasons" and the court has overruled an objection if it has been lodged by the other party, that the court may grant the asking party's request.[116]

The procedure for conducting the background check and the process afterward continue to add more layers of protection.[117] First, neither the court itself, nor either party, may conduct the background check on their own, but instead, a law enforcement officer will be tasked with running the check of the prospective juror.[118] Second, if the criminal history check reveals certain facts that may make the juror ineligible to serve, the trial judge conducts an initial questioning of the juror, who in turn, "should generally be afforded an opportunity to explain and provide context for the results of the background check."[119] In conjunction with this, the Court also surmised that certain circumstances may call for the prosecution or defense to "supplement the inquiry."[120] Finally, after all of these preliminary steps, the lower court is instructed to follow the ordinary procedures for jury selection, namely allowing the parties to use their for-cause and/or peremptory challenges.[121] These challenges are of course subject to a full-fledged *Batson* analysis.[122]

The *Andujar* standard might be best boiled down to a system of "checks and balances" where the court grants judges, defense attorneys, and even the law enforcement officials conducting the background check certain power in a realm that had been previously occupied by the

112. *Id.*
113. *Id.* (citing Wash. Gen. R. 37(h)).
114. *Id.*
115. *Id.*
116. *Id.* at 626–27.
117. *Id.*
118. *Id.*
119. *Id.* at 627.
120. *Id.*
121. *Id.*
122. *Id.*

prosecutor alone.[123] The defense attorney is not only guaranteed the same access to the same information but has an opportunity to lodge an objection and provide additional information in support of her position if necessary.[124] In a similar way, the inclusion of a judge makes sure the courts are involved, which contrasts with the "backroom" inquiry that prosecutors might be able to make in unfettered discretion jurisdictions.[125] Just as they are required to provide a legal basis for a favorable evidentiary ruling, prosecutors must be ready to substantiate a proper argument that does not include possible racial undertones.[126] Therefore, the *Andujar* decision merely provides more levels of checks by numerous sets of eyes on prosecutorial discretion, which the court acknowledges might be influenced by bias, whether explicit or implicit.[127]

IV. THE NEED TO COMBAT IMPLICIT BIAS

If it was not already apparent that the New Jersey Supreme Court committed itself to fighting against implicit bias in *State v. Andujar*, the opinion concluded with a plea to do so.[128] The court requested a judicial conference on the issue of jury selection in the *Batson* context.[129] It stated, "[t]he purpose of the Conference is straightforward: to enhance 'public respect for our criminal justice system and the rule of law' by 'ensur[ing] that no citizen is disqualified from jury service because of . . . race' or other impermissible considerations."[130] This purpose was formulated through the court's recognition that the law on the books is not able to fully appreciate the importance of combatting implicit bias.[131]

123. *Id.* at 626–27. A "checks and balances" system is ordinarily referred to in the context of the U.S. government, which employs a separation of powers between the three branches of government. *Separation of Powers with Checks and Balances*, BILL OF RTS. INST., https://billofrightsinstitute.org/essays/separation-of-powers-with-checks-and-balances (last visited Mar. 11, 2023). As James Madison once wrote, "The accumulation of all powers, legislative, executive and judicia[l] in the same hands, whether of one, a few, or many, and whether hereditary, self–appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.* One might say the vesting of unchecked discretion in the hands of the prosecutor can be seen in a similar way.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 630–32.

129. *Id.*

130. *Id.* at 631 (citing *Batson*, 476 U.S. at 99).

131. *Andujar*, 254 A.3d at 630–32.

The court noted the changing times, but also some conflicting viewpoints on the issue that makes this discourse necessary.[132]

A. What is Implicit Bias?

Implicit bias is defined by the American Psychological Association as "a negative attitude, of which one is not consciously aware, against a specific social group."[133] It has been well established that the problems associated with implicit bias are especially pervasive in both the legal field and the criminal justice system.[134] Prosecutors, as shown previously, are government actors that play an important role in almost every point in the criminal justice process.[135] It has even been argued that "[n]o government official in America has as much unreviewable power and discretion as the prosecutor."[136] This Comment has discussed prosecutorial discretion, particularly during *voir dire* proceedings in regard to the questioning of potential jurors and the relatively rare situation where this leads to further action in the form of a criminal background check.[137] However, other areas of prosecutorial decision-making are illustrative of the damage that unchecked power can do to marginalized communities.[138] This section will first detail the different levels of the prosecutorial process, which includes the decision to charge, the plea-bargaining process, and behavior at trial.[139] It will then present the major check on the prosecutor's discretion: judges and defense attorneys and their actions during trial. It will conclude with a discussion of the applicability of the *Andujar* decision to these other areas.

132. *Id.*

133. *Implicit Bias*, AM. PSYCH. ASS'N (Nov. 2022), https://www.apa.org/topics/implicit-bias.

134. *See, e.g.,* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006) (citing Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006)) ("The very existence of implicit bias poses a challenge to legal theory and practice because discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions.").

135. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805 (2012). *See generally* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors Conflicts of Interest*, 58 B.C. L. REV. 463 (2017) (proposing adjustments to the prosecutorial process to eliminate conflicts of interest and better align the prosecutor's interest with that of the public).

136. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009).

137. *See supra* Part III.

138. *See infra* Part IV, Section B.

139. *See* Smith & Levinson, *supra* note 135, at 805.

B. Implicit Bias in Other Areas of Prosecutorial Discretion

On its face, the specific situation presented in *Andujar* seems to be a relatively rare occurrence, as even the prosecutor admitted that "the State is not in the habit of doing what counsel just suggested where we are looking at a random juror's' criminal history."[140] However, that situation is only one example of a much broader concept: prosecutorial discretion. Prosecutors are involved not only in jury construction, which is in fact only one small step in the criminal justice process, but largely have the power to decide whether a charge even reaches that point.[141] Even when the decision is made to charge, a prosecutor might decide to offer a plea bargain or take other steps that affect how the case proceeds.[142] Finally, once a jury is chosen and seated, the prosecutor has the ability (and is often incentivized) to portray the defendant in a deeply negative light to that jury.[143] These other steps in the process are no more immune to implicit prosecutorial bias than jury selection, making it valuable to discuss whether certain *Andujar* safeguards, or the decision's general principles, could be applied in these other areas.

Perhaps the most important decision made by a prosecutor is the initial one: what should a suspect be charged with, assuming that suspect should be charged at all? Empirical studies have found a discrepancy between the charging decisions of white and black individuals, even when controlled for certain factors.[144] Scholars, relying on various research methods, have surmised that this discrepancy is the result of the implicit bias of the prosecutor.[145] Given that these decisions are made largely

140. State v. Andujar, 254 A.3d 606, 615 (N.J. 2021).

141. *See* Smith & Levinson, *supra* note 135, at 805. The prosecutor first has discretion to decide what crimes to charge someone with or whether to charge at all. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 806; Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J.L. & PUB. POL'Y. 257, 264 (2019) (citing Darnell F. Hawkins, *Causal Attribution and Punishment for Crime*, 2 DEVIANT BEHAV. 207, 208 (1981); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 767–68 (1998)).

145. The most supported method is the Implicit Association Test, or "IAT" for short, which is embraced largely by psychologists and uses reaction times to measure one's association between two subjects. Clemons, *supra* note 36, at 693. The test is designed to eliminate an individual's conscious efforts to correct for his or her implicit bias. *See, e.g., id.*; Smith & Levinson, *supra* note 135, at 801–03. IAT findings have consistently revealed that many test takers are more prone to associate black individuals with weapons than white individuals, implying a belief of greater propensity towards violence. *See, e.g.,* Smith & Levinson, *supra* note 135, at 806–08.

strategically, and with relatively few mandated checks on them,[146] commentators have noted that the important question of whether the accused acted in self-defense or not can be affected by whether one implicitly associates someone with violence.[147] As a result, similar stereotypes might leak into a prosecutor's *mens rea* determination or how they gauge the potential for success of a charge.[148]

The racial disparities in the plea-bargaining process follow a similar line of thinking. Research has found that there are similar discrepancies in the reduction of charges, mostly in cases involving minor offenses committed by those with no criminal history.[149] Commentators have suggested that, after controlling for a number of factors, "a defendant's race may be used as a proxy for their likelihood to recidivate and latent criminality."[150] Because of this, a prosecutor's implicit associations could factor into a decision about whether or not to offer that defendant a plea bargain.[151]

Finally, a prosecutor's implicit biases can influence the way that they decide to address the jury and portray the defendant to that jury.[152] While the constitutional right of a defendant to a fair trial includes a duty for the prosecution to not "intimate that the defendants would be more likely than those of other races to commit the crime charged," research from the state of Washington indicates that this is rarely enforced through the

146. *See id.* at 810 ("The American Bar Association's Standards for the Prosecutorial Function lists the following factors among those for the prosecutor to consider in making the charging decision: What motives did the accused possess? Is the offense proportionate to the potential punishment? What is 'the extent of the harm caused by the offense'? Each of these guideposts requires highly subjective decision–making. They can have a massive impact on how the prosecutor believes the facts unfolded.").

147. *Id.* at 807 ("Prosecutors must assess the strength of a potential self-defense claim to determine whether they should bring charges at all, and if so, whether to offer a plea to manslaughter or another less serious charge.").

148. *See id.* at 810 (detailing other examples, such as drug possession vs. drug dealing and deciding whether to charge a suspect with forcible rape).

149. *See* Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea–Bargaining*, 59 B.C. L. REV. 1187, 1240–41 (2018). *See generally*, Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091 (2018) (discussing implicit bias in prosecutorial summations and statements to the jury and in the plea bargaining process); Anna D. Vaynman & Mark R. Fondacaro, *Prosecutorial Discretion, Justice, and Compassion: Reestablishing Balance in Our Legal System*, 52 STETSON L. REV. 31 (2022) (arguing that the plea bargaining process creates potential for abuse by the prosecutor and offering suggestions to combat the problem).

150. Berdejo, *supra* note 149, at 1241.

151. *See id.* at 1240–41; Avery & Cooper, *supra* note 144, at 293–94.

152. *See* Michael Callahan, Note, *"If Justice Is Not Equal For All, It Is Not Justice": Racial Bias, Prosecutorial Misconduct, and the Right to a Fair Trial in* State v. Monday, 35 SEATTLE U. L. REV. 827, 827–28 (2012).

granting of new trials.[153] However, the Washington Supreme Court, in a way that is similar to the New Jersey Supreme Court in *Andujar*, recognized that the interests of prosecutorial discretion do not outweigh the right of the defendant to have a trial where racial biases or stereotypes do not infect the process.[154] In *State v. Monday*, the court found reversible error where the prosecutor alluded to racial undertones throughout the trial of a black defendant.[155] The majority came to this result using a burden-shifting framework that first requires the defendant to prove "flagrant" or "intentional" use of race and gives the State the opportunity to demonstrate that the usage was harmless.[156]

C. The Importance of Judges and Defense Attorneys

These three areas of prosecutorial discretion differ in many ways from the prosecutor conducting a unilateral background investigation into a juror during *voir dire*. Yet, one can see the importance of providing as many "checks and balances" as possible on prosecutorial decision-making without diluting the prosecutor's ability to do his or her job.[157] The two natural checks on the prosecutor's behavior are the actions of

153. *Id.*

154. Krista L. Nelson & Jacob J. Stender, Note, *"Like Wolves in Sheep's Clothing": Combating Racial Bias in Washington State's Criminal Justice System*, 35 SEATTLE U. L. REV. 849, 850–51 (2012).

155. *Id.* at 850–51. Most notably, in his closing argument, the prosecutor stated, "the code is black folk don't testify against black folk. You don't snitch to the police." *Id.* at 851.

156. *Id.* at 856–57 ("A five-justice majority held 'that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, [the court] will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict.' The majority also expressly stated that when the defendant demonstrates that such misconduct occurred, the burden is on the State to demonstrate beyond a reasonable doubt that the misconduct was harmless." (citing State v. Monday, 257 P.3d 551, 565 (Wash. 2011))). The concurrence employs a "zero tolerance approach." *Id.* at 857–58. "It proposed that any degree of racial discrimination is sufficient to vacate a conviction, regardless of whether the bias had an impact on the outcome of the trial." *Id.* at 857.

157. Christina Morris, *The Corrective Value of Prosecutorial Discretion: Reducing Racial Bias Through Screening, Compassion, and Education*, 31 B.U. PUB. INT. L. J. 275, 277 (2022) ("Thus, any attempts at prosecutorial reform must balance two conflicting goals: accountability and independence. On one hand, prosecutors must be held accountable for their actions because their misconduct can lead to conviction of the innocent or excessive punishment of the guilty. On the other hand, prosecutorial independence promotes efficiency and individualized criminal justice outcomes. At present, the laws governing prosecutorial conduct are weighted heavily in favor of independence rather than accountability.").

the defense attorney[158] and the judge.[159] While it may not be feasible to provide significant judicial oversight or adversarial checks during the charging or plea-bargaining stages of the prosecutorial process, the above mentioned Washington State approach allows for the defense to challenge a prosecutor's statements at trial and the judge to make a determination after hearing both sides of the issue.[160] In essence, the *Andujar* standard calls on these same actors to take similar actions.[161] The judge is first called upon to determine whether there is a "good faith basis" for the check, and the defense attorney is notified and allowed to object throughout the process.[162] A comparison of the two standards simply shows that courts are willing to give judges and defense attorneys more oversight in the process when necessary.[163] More states should be open to this approach both because, on its face, it provides more individualized protection to people of color in the criminal justice system and because there is a blueprint for implementation. In other words, it is more feasible than other suggestions for combating the problem.

V. OTHER SUGGESTIONS

The broad issue of implicit bias and its potential effect on prosecutorial discretion has led many commentators to suggest an array of solutions.[164] This section will detail two prevailing suggestions and

158. Ellen C. Yaroshefsky, *Duty of Outrage: The Defense Lawyer's Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System is Unjust*, 44 HOFSTRA L. REV. 1207, 1208 (2016).

159. Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 CALIF. L. REV. 965, 965 (2020).

160. Nelson & Stender, *supra* note 154, at 857–58.

161. State v. Andujar, 254 A.3d 606, 626–27 (N.J. 2021).

162. *Id.*

163. *See id.*; Nelson & Stender, *supra* note 154, at 857–58.

164. *See, e.g.*, Amber Hall, *Using Legal Ethics to Improve Implicit Bias in Prosecutorial Discretion*, 42 J. LEGAL PROF. 111, 112 (2017) (stating that the Model Rules of Professional Conduct already provide a remedy for combating implicit bias if followed correctly); Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357, 357 (2017) (suggesting an alternative strategy: hybrid jury strikes that are less discretionary than peremptory challenges, but do not rise to the standard of for cause challenges); Natalie Salmanowitz, *Unconventional Methods for a Traditional Setting: The Use of Virtual Reality to Reduce Implicit Racial Bias in the Courtroom*, 15 U.N.H. L. REV. 117, 120 (2016) ("[D]emonstrat[ing] the advantage of incorporating virtual reality into the courtroom, not…delineat[ing] plans for its actual implementation" and seeking to prompt further consideration of "unconventional methods" to reduce implicit racial bias in the courtroom); Mirko Bagaric et al., *The Solution to the Pervasive Bias and Discrimination in the Criminal Justice System: Transparent and Fair Artificial Intelligence*, 59 AM. CRIM. L. REV. 95, 95 (2022) (arguing that algorithms are important tools in combating bias in the criminal justice system); Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in*

compare them to the approach presented by the New Jersey Supreme Court in *State v. Andujar*.

A. Eliminating Peremptory Challenges

Many commentators echo the sentiment of Justice Marshall in *Batson*, where he concurred in the judgment and stated, "only by banning peremptories entirely can such discrimination be ended."[165] Many have argued effectively that this is a starting point for ensuring real progress in ending discrimination in the jury selection process[166], but others have also acknowledged that eliminating peremptory challenges may be unrealistic and ultimately futile.[167] Some commentators advocating for abolition have pointed to the fact that Arizona's Supreme Court eliminated peremptory challenges in all trials and other states have flirted with the idea,[168] but many remain exceedingly skeptical of the practice, citing the importance of being able to remove jurors who hold harmful biases but elude challenges for cause.[169] While many criticize *Batson* for a lack of success,[170] it would reasonably follow that taking measures to eliminate circumvention of the *Batson* standard, the only major check on peremptory challenges, would be more feasible than

the Criminal Justice System, 80 MD. L. REV. 487, 487 (2021) (discussing the effect of technology usage in the criminal legal system and offering suggestions to further that effectiveness).

165. Batson v. Kentucky, 476 U.S. 79, 108 (1986) (Marshall, J., concurring); *see also* Timothy J. Conklin, *The End of Purposeful Discrimination: The Shift to an Objective* Batson *Standard*, 63 B.C. L. REV. 1037, 1089–90 (2022).

166. *See, e.g.*, Conklin, *supra* note 165, at 1089–90.

167. *See, e.g.*, Maureen A. Howard, *Taking The High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 420 (2010) (arguing that, because of "legislative reluctance to abolish them, it is time for prosecutors to . . . voluntarily waive peremptory challenges"); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 6 (2014) ("We can keep issuing impassioned, but doomed, calls for abolition . . . . Instead, we should consider a different approach for using peremptory challenges: that they be allowed only on consent.").

168. *See, e.g.*, Conklin, *supra* note 165, at 1090 (citing Order, In the Matter of Rules 18.4 & 18.5, Rules of Criminal Procedure & Rule 47(e), of the Arizona Rules of Civil Procedure, No. R-21-0020 (Ariz. filed Aug. 30, 2021) (adopting rule changes that abolish peremptory challenges)).

169. Kelso L. Anderson, *Will Striking Peremptory Challenges Remove Bias in Juries?*, AM. BAR. ASS'N (May 24, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/may-2022/will-striking-peremptory-challenges-remove-bias-juries/. Additionally, as the Arizona Supreme Court's decision only took effect a year ago, the effects of such decision are still uncertain. *See id.*

170. *Panelists Call Batson a Failure, Offer Solutions*, AM. BAR ASS'N (March 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/march-2017/panelists-call--i-batson--i--a-failure--offer-solutions/.

eliminating the peremptory challenge system altogether.[171] While the New Jersey Supreme Court called for a reconsideration of New Jersey's longstanding practice of providing by far the most peremptory challenges in the United States, it also acknowledged the New Jersey State Bar Association's view that peremptory challenges "offer 'very real protections against juror bias.'"[172] It speaks even greater volumes that the court did not, by itself, use its *Andujar* decision to eliminate peremptory challenges or even decrease them but instead fashioned the protections that have been the subject of this Comment.[173]

B. No Inquiry Into or Disqualification Based on Arrest Records

As of 2013, every state except for Colorado and Maine, as well as the federal level, have statutory provisions that exclude individuals with prior criminal convictions from jury service in some regard.[174] These statutes vary in what crimes constitute disqualification, how long disqualification may last, and other important considerations.[175] This has led many scholars to argue that these automatic disqualifications should be abolished at least in some instances.[176] In a similar way to those advocating for the elimination of peremptory challenges, advocates of this reform have valid arguments that the usage of arrest records has a disparate impact on people of color and that the justifications for such a stringent policy do not outweigh it.[177] This Comment does not argue that public attitudes, ensuring jury "morality," and guarding the prosecution

171. Howard, *supra* note 167, at 420; Morrison, *supra* note 167, at 6; Anderson, *supra* note 169.

172. State v. Andujar, 254 A.3d 606, 631 (N.J. 2021) (citing N.J. State Bar Ass'n, *Pandemic Task Force Report of the Committee on the Resumption of Jury Trials* 3 (July 2, 2020) https://tcms.njsba.com/personifyebusiness/Portals/0/2020%20Pandemic%20Task%20Force/NJSBA%20RJT_Jury%20Selection%20Proposal.pdf).

173. *Id.* Other states have also been willing to adopt similar standards. *See supra* Part III, Section B.

174. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595–96 (2013); James L. Buchwalter, Annotation, *Disqualification or Exemption of Juror for Conviction of, or Prosecution for, Criminal Offense*, 75 A.L.R.5th 295 (2000) ("The typical state statute, court rule, or common-law principle disqualifies from criminal or civil jury service persons who have been convicted of, or are charged with, either a felony or a lesser offense involving theft or some other offense evincing moral turpitude. Much of the case law in this area involves criminal proceedings in which a potential juror has been erroneously excluded from a jury under the mistaken belief that the juror is disqualified from service, and the convicted defendant contends that prejudice resulted from the error.").

175. Roberts, *supra* note 174, at 595–99.

176. *See id.* at 593.

177. *See id.* at 602–05, 634.

from jurors who lack a respect for justice are particularly sound rationales for continuing this practice.[178] Instead, it merely acknowledges that these arguments bear on the feasibility of implementing such a large change to current policy. It would once again stand to reason that there would not be the same amount of opposition to implementing a check on prosecutors who wish to second–guess potential jurors on prior convictions.[179] As a result, the *Andujar* framework does not eliminate the arrest record as a basis for disqualification but only ensures that prosecutors cannot cursorily conclude, based on implicit biases, that a juror lied about her arrest record and check for themselves.[180]

VI. CONCLUSION

In the 1986 case of *Batson v. Kentucky*, the Supreme Court found that the Constitution's guarantee of equal protection instituted a major check on the exercise of peremptory challenges, a practice that had historically and intentionally gone unchecked.[181] In doing so, the Court was willing to sacrifice certain autonomy of the parties to use these challenges for any possible reason in order to protect defendants' right to a fair trial and potential jurors' right not to be excluded based on race.[182] However, *Batson* also included dicta that many have interpreted as an effort to preserve the largely unrestrained nature of the peremptory challenge.[183] As a result, many state courts have echoed a similar sentiment in limiting *Batson* to its explicit language and refusing to take measures to prevent circumvention of the process.[184] In doing so, these courts miss

178. *See generally id.* at 614–34 (arguing that public perception, juror character, the "purity" of the jury, and embitterment against the system are not sufficient justifications for continuing to categorically exclude jurors based on their arrest record).

179. *See generally id.* at 595–96. As mentioned prior, almost every state has a statute that uses criminal records to exclude jurors in some manner. *Id.* Despite the unfettered discretion jurisdictions, Part III, Section B details the various safeguards instituted by other states. Also, of equal importance, is the number of states that have not considered this question, which may make it easier for these states to adopt *Andujar* safeguards because they will not be contradicting precedent. *See supra* Part III.

180. State v. Andujar, 254 A.3d 606, 626–27 (N.J. 2021).

181. 476 U.S. 79, 93–94 (1986); *cf.* Swain v. Alabama, 380 U.S. 202, 220 (1965).

182. *See Batson*, 476 U.S. at 93–94; U.S. CONST. amend. VI.

183. 476 U.S. at 101. *See* State v. Smith, 532 S.E.2d 773, 780 (N.C. 2000) (citing Hernandez v. New York, 500 U.S. 352, 358 (1991)); Coleman v. State, 804 S.E.2d 24, 30 (Ga. 2017); *infra* Part III, Section A.

184. *See Smith*, 532 S.E.2d at 780 (citing *Hernandez*, 500 U.S. at 358); *Coleman*, 804 S.E.2d at 30; *supra* Part III, Section A.

the boat and ignore the aforementioned objective of the decision: ensuring racial bias does not taint the jury selection process.[185]

In the case of Edwin Andujar and juror F.G., there was no opportunity to even begin a *Batson* analysis.[186] The New Jersey Supreme Court recognized this issue, finding that the State's actions and subsequent decision to conduct a criminal background check on F.G. was a result of its implicit bias.[187] In response, it instituted a detailed test that provided an immediate answer and even called for further considerations by the legal community on how to further eliminate implicit bias from being a means to exclude jurors from serving based on race.[188] Yet, other jurisdictions, even when faced with similar facts, choose to leave the prosecutor sole discretionary power to do exactly what the prosecutors did in *Andujar*.[189]

As this Comment has continuously argued, when balancing effectiveness and feasibility, nationwide implementation of the *Andujar* standard is a necessary step in protecting the objectives of *Batson*. The decision's "checks and balances" approach allows the defense attorney to step in as a proxy for the interests of the defendant, puts the onus on the prosecutor to make a colorable argument for conducting the check, and leaves the ultimate decision to the judge to weigh the prosecutor's reasoning with the prospective juror's privacy and civic duty (which might be seen as a privilege by many) to serve on a jury.[190] The approach places judges and defense attorneys in a position not all that unfamiliar to them as, when possible, these actors provide the most natural checks on the expansive sphere of prosecutorial discretion.[191] Additionally, broad utilization of the *Andujar* framework is much more realistic than two prevailing suggestions, eliminating peremptory challenges altogether or requiring almost every state to change its procedures regarding use of arrest records in *voir dire*.[192] Therefore, the New Jersey Supreme Court illustrates a problem that would have been foreign to the Supreme Court

185. *Batson*, 476 U.S. at 99 ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

186. *See* State v. Andujar, 254 A.3d 606, 628 (N.J. 2021).

187. *Id.* at 629 ("To be clear, we do not find the trial prosecutors engaged in purposeful discrimination or any willful misconduct. The record, instead, suggests implicit or unconscious bias on the part of the State. In the end, we find that defendant's constitutional right to be tried by an impartial jury, selected free from discrimination, was violated.").

188. *Id.* at 626–27, 630–32.

189. *Smith*, 532 S.E.2d at 780 (citing *Hernandez*, 500 U.S. at 358); *Coleman*, 804 S.E.2d at 30.

190. *See supra* Part III, Section C.

191. *See supra* Part IV, Section C.

192. *See supra* Part V.

justices at the time of *Batson*, but, more importantly, provides precedent that would allow other states to close this major prosecutorial loophole before it becomes a more threatening tool. Doing so is imperative in making sure that *Batson v. Kentucky*'s aspiration of "ensur[ing] that no citizen is disqualified from jury service because of his race" lives on.[193]

193. 476 U.S. 79, 99 (1986).