THE CONSTITUTIONAL PERILS OF JUROR-EXCUSAL AGREEMENTS

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ABSTRACT

Lurking in the shadows, and largely absent from the discourse around jury selection, is a ubiquitous, but under-analyzed practice: agreements made by counsel to excuse large swaths of jurors before individual voir dire. These agreements take different forms and are regulated—if at all—arbitrarily. Because of this arbitrary regulation, they present a fertile ground for rampant and invidious discrimination to occur in jury selection. Not only do these agreements provide the parties with ample opportunity for discrimination, but they also qualify as state action by requiring judicial approval.

As a case study, this Article looks at Texas Code of Criminal Procedure Article 35.05 and the way it has been applied in capital cases. It argues that the constitutional principles taught by cases like Strauder*,* Batson*, and* McCollum *create a judicial obligation to regulate these agreements to avoid impermissible discrimination. Then, this Article puts forth several solutions that would allow courts to investigate proposed agreements, protect the equal protection and due process rights at issue in juror-selection procedures, and prevent the courts from participating in unconstitutional discrimination.*

This Article also highlights a certain area of criminal procedure that proves difficult to square with the prevailing jurisprudence: How do we structure procedures when the adversarial system fails? When interests converge, the adversarial system breaks down. In these scenarios, courts, legislatures, and lawyers must be creative in their problem-solving. What this Article offers in the context of juror-excusal agreements is, hopefully, the kind of creative solution helpful for courts when reliance on the adversarial system fails.

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I. INTRODUCTION

Serving on a jury is among the most important civic duties that our legal system requires of its populace.[1] The U.S. system of governance relies on jury service, and our legal system has long acknowledged that the right to serve on a jury is a powerful one not to be taken lightly.[2] As such, almost every facet of state and federal voir dire procedure has been challenged, analyzed, argued, theorized, and decided by the courts.[3] And, as one would expect, much has then been said about the ethics, nuance, and veiled substance of individual voir dire practices by practitioners and scholars as well.[4] However, there is a significant, yet subtle, aspect of voir dire procedure that has not received significant attention in the courts or academy and yet is ubiquitous across jurisdictions in civil and criminal trials. This is the process by which the lead attorneys in any case may agree to excuse a list of potential jurors prior to starting individual voir dire.[5] There is precious little discussion of these "juror-excusal agreements," as I call them, despite the eminent threat of unregulated discrimination that they introduce.[6] While this practice occurs in federal and state courts across the country, few have critically analyzed the constitutional implications of the deference afforded such agreements.[7]

The purpose of this Article is to provide courts and practitioners with both the constitutional principles with which to analyze these agreements and several potential steps a court can take to guard against the passive approval of constitutionally insidious jury selection practices.[8] It is important that the

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1. Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 829 (2015).

2. Powers v. Ohio, 499 U.S. 400, 407 (1991) ("[Jury service is a citizen's] most significant opportunity to participate in the democratic process.").

3. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding that a state law restricting jury service to white citizens violated a black defendant's equal protection rights under the Fourteenth Amendment); Batson v. Kentucky, 476 U.S. 79, 85–87 (1986) (expanding the principle of *Strauder* and holding that racially motivated juror exclusion from a venire panel is also unconstitutional); Miller-El v. Dretke, 545 U.S. 231, 265–66 (2005) (finding that the trial court had erred in denying the defendant's *Batson* challenge when the prosecution had excluded ten of the eleven black members of the venire panel); Flowers v. Mississippi, 588 U.S. 284, 311–16 (2019) (finding that the prosecution had failed to provide a truly race-neutral reason for striking a black member of the venire panel because its alleged race-neutral reason also applied to many of the white members of the panel).

4. *See* Janeen Kerper, *The Art and Ethics of Jury Selection,* 24 AM. J. TRIAL ADVOC. 1, 1–3 (2000); HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 64–65 (1993); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

5. *See, e.g.*, TEX. CRIM. PROC. CODE § 35.05 (providing that a venireperson may be excused if both parties consent).

6. *But see* Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613, 642 (2021) (interviewing prosecutors and criminal defense attorneys about the level of deference judges will give them to agree on "benevolent" excusals for work, family, or personal reasons).

7. *See id.*

8. *See infra* Parts III–IV (discussing the constitutional framework regarding juror-excusal agreements, how to apply this framework to their agreements, and steps the courts could take to resolve this issue).

scope of this practice not be understated—I have spoken with criminal and civil practitioners in several states, all of which saw juror-excusal agreements as ubiquitous.[9] Thus, though the analysis of the article is predominantly focused on criminal cases in Texas, the import of the analysis should be just as weighty in any other courts.

For the ease of the reader and limitations of the author, this Article will primarily use capital cases in Texas as the focal point of the analysis for a few reasons.[10] First, Texas is foremost among the states in implementing the death penalty and, despite the common understanding that capital cases are given heightened scrutiny,[11] these cases present particularly egregious examples of constitutionally problematic juror-excusal agreements.[12] Second, the author has spent a significant amount of his relatively short legal career studying the Texas death penalty and working with the capital defense community, so there is a personal knowledge benefit as well. Third, Texas is a perfect case study for pedagogical reasons because, uniquely, the State has actually codified the practice.[13] In Texas, the Code of Criminal Procedure provides the following: "One summoned upon a special venire may by consent of both parties be excused from attendance by the court at any time before he is impaneled."[14] This statute grounds the often amorphous and off-the-record practices that exist in other jurisdictions to a convenient and concrete textual anchor.[15]

Another goal of this Article is to draw attention to an eminent soft spot in criminal procedure rules—what happens when the interests of the defense and the state in an unconstitutional practice converge?[16] There are countless instances where the answer to a difficult question regarding the substantive outcomes of procedures is simply: Does the adversarial process exist to protect this right?[17] The adversary system presumes party control of the presentation of evidence and argument with a passive decisionmaker merely listening to both sides and rendering an uninterested decision.[18] However, when the parties' interests in the occurrence of an unconstitutional act

9. *See infra* Section II.B (discussing the application of Texas Code of Criminal Procedure Article 35.05 and various Texas cases confronting these unconstitutional outcomes).

10. *See infra* Section II.B.1 (analyzing capital cases in Texas with regard to juror-excusal agreements).

11. *But see* Anna VanCleave, *The Illusion of Heightened Standards in Capital Cases*, 2023 U. ILL. L. REV. 1289, 1291 (2023) (arguing that the nominal claim of heightened standards in capital cases actually leads to less protection for capital defendants).

12. *See infra* Section II.A (enumerating examples of problematic juror-excusal agreements in Texas capital punishment cases).

13. *See* TEX. CRIM. PROC. CODE § 35.05.

14. *See id.*

15. *See id.*

16. *See infra* Part IV (noting that juror-excusal agreements reflect the convergence of the state and defense's unconstitutional interests).

17. *See* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 312–13 (1989).

18. *Id.* at 302.

converge, the framework that the American court system relies on fails.[19] The agreements discussed in this Article are one example of such a failure.[20] In the face of these failures, legal thinkers must be creative about how we analyze and prevent the harms that loom in these non-adversarial gaps.[21] The analytical path taken here and the potential solutions offered may be examples of how the law can address these issues.[22]

This Article undertakes this analysis in three main parts. Part II begins by describing the practice at issue and providing examples of these agreements in various state court cases.[23] Then, it lays out the statutory language and structure of Article 35.05.[24] Finally, it provides the factual and procedural history of the few Texas capital cases in which these agreements were given real analysis on the record.[25] Part III identifies and describes the relevant constitutional and procedural principles that coalesce to give these agreements a constitutional dimension.[26] First, as exemplified in *Batson*, the Equal Protection Clause is violated when jurors are discriminated against on the basis of race.[27] Second, the U.S. Constitution's criminal procedure clauses recognize a communal interest in a transparent and rights-respecting judicial system.[28] Third, the state action doctrine is seen both in the context of peremptory challenges and otherwise.[29] Part IV argues that the convergence of these constitutional doctrines imposes an obligation on courts to avoid approving and enforcing racially discriminatory agreements that would constitute a constitutional violation.[30] The remedy for racially discriminatory voir dire practices—which is already accepted in the case law—creates an obligation for trial courts to regulate these agreements to prevent shrouded discrimination. Additionally, Part IV provides a few responses to challenges made to the analysis it puts forth.[31] Finally, Part V suggests a few potential solutions to provide safe-guards against judicial

19. *See infra* Section II.A (discussing how this issue conflicts with the adversarial system).

20. *See infra* Section II.A (providing examples of how problematic juror-excusal agreements fail to properly embody our adversarial justice system).

21. *See infra* Part V (proposing potential solutions).

22. *See infra* Part V (explaining the viability of the potential solutions).

23. *See infra* Section II.A (discussing various examples of jury excusal agreements).

24. *See infra* Section II.B (discussing the general mechanics and purpose of Article 35.05).

25. *See infra* Section II.B.1 (providing a handful of capital punishment cases where the facts surrounding the different *Batson* challenges and the trial courts' rulings are analyzed thoroughly).

26. *See infra* Part III (discussing how the Equal Protection Clause, guarantee of judicial transparency, and state action doctrine affect juror-excusal agreements).

27. *See* Batson v. Kentucky, 476 U.S. 79, 85–87 (1986).

28. *See infra* Section III.A.2 (observing how the American adjudicatory system is based in a pursuit of transparency, accuracy, and fairness).

29. *See infra* Section III.A.3 (analyzing the state action doctrine's effect on juror-excusal agreements).

30. *See infra* Part IV (concluding that trial courts are constitutionally forbidden from enforcing racially discriminatory juror-excusal agreements).

31. *See infra* Section IV.C (addressing potential challenges to this Article's analysis and conclusions).

enforcement of racially discriminatory juror-excusal agreements.[32] These include both legislative and judicial steps that could be taken both prophylactically and remedially.[33]

II. THE PRACTICE

Peremptory and cause challenges during the juror selection process have been the source of much scholarly and judicial scrutiny.[34] Juror-excusal agreements have not received the same level of analysis, and yet might be even *more* ubiquitous.[35] In fact, empirical research shows that judges treat dismissals for perceived economic hardship quite differently than cause or peremptory challenges.[36] A comprehensive survey of prosecutors and defense attorneys performed by Professor Anna Offit revealed that the most common practice was for the judge to say, "attorneys, see who you agree on and when you're done, approach the bench."[37] The interviews Offit conducted were across numerous judicial districts and anonymized to ensure the most reliable form of the data collected.[38] Because it is rarely an on-the-record type of occurrence, truly exhaustive empirical research is near impossible. Further, even if an inquiry into the frequency of these agreements was possible, the fact that they are out-of-the-courtroom discussions prevents us from any confidence in the veracity of the real motivations behind them. That very issue is much of the reason for this Article and the suggestions given to remedy the concerns it raises.[39]

The practice does not seem to have obviously nefarious origins, however. In theory, these agreements serve the interests of everyone involved: they allow the attorneys to avoid lengthy and drawn-out voir dire processes when certain potential jurors are obviously not going to be selected.[40] In larger, high-profile cases there may be several hundred people called for the venire.[41] Individual questioning would be far too cumbersome,

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32. *See infra* Part V (providing a number of different safe-guards to protect our justice system from problematic juror-excusal agreements).

33. *See infra* Sections V.A–B (outlining the different ways that the Texas State Legislature and Judiciary could play a part in implementing the proposed safe-guards).

34. *See* Daniel Edwards, *The Evolving Debate over* Batson*'s Procedures for Peremptory Challenges*, NAT'L ASS'N ATTY'S GEN., (Apr. 14, 2020), https://www.naag.org/attorney-general-journal/the-evolving-debate-over-batsons-procedures-for-peremptory-challenges/.

35. Offit, *supra* note 6, at 634.

36. *Id.*

37. *Id.* at 642 (*citing* Interview with 6Q, Fed. Pub. Def., in U.S. (2020)).

38. *Id.* at 635.

39. *See infra* Part V (suggesting remedies).

40. *See generally* Holland v. Illinois, 493 U.S. 474, 481–83 (1990) (defending the peremptory challenge device).

41. *See, e.g.*, Graham Kates, *More Than 500 New Yorkers to Be Considered as Jurors in Trump's "Hush Money" Trial*, CBS NEWS (Apr. 15, 2024, 6:00 AM), https://www.cbsnews.com/news/trump-trial-new-york-jury-selection/ (providing an example of a large jury pool being called for a high-profile trial).

time consuming, and detrimental to the court's resources.[42] If the attorneys can determine obvious disqualification grounds from questionnaires, allowing them to agree on certain removals—even if a particular amount of bartering and gamesmanship is inevitable—serves the interests of efficiency.[43] Nevertheless, it is almost never a formal or codified practice, so there is very little ever written about it either in legal scholarship or judicial opinions.[44]

This Section provides a thorough list of cases in which these agreements have been recognized, approved, and, though more rarely, analyzed.[45] It then lays out the statute that codifies the practice in Texas.[46] While the practice is ubiquitous across jurisdictions in both civil and criminal cases, Texas's statute is unique and provides us with a valuable textual anchor for our analysis.[47] However, the problem should in no way be considered a Texas-specific problem—Texas simply just had the inclination to codify the practice thereby exposing it to more scrutiny.[48]

A. State Court Examples

In *Godfrey v. State*, the Indiana Court of Appeals affirmed a conviction after deciding whether jeopardy attached to a criminal trial once some of the jurors were sworn in or if every single juror needed to be sworn in.[49] During the swearing in ceremony, all jurors stood to take the oath.[50] However, after the oath, two jurors remained standing and informed the parties that they may suffer financial hardship if they were sat on the jury.[51] After conferring, the court excused the jurors by agreement of the parties.[52] The agreement itself was not substantively challenged, but it was plainly acceptable as a basis for the court to allow the excusal of the jurors.[53] Importantly, Indiana does not have a statute in its procedural code that explicitly allows these agreements.[54]

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42. *See infra* Section IV.C.2 (discussing judicial efficiency).

43. *See infra* Section IV.C.2 (discussing judicial efficiency).

44. *See infra* Part I (mentioning that Texas is one of the few states in which juror-excusal agreements are codified).

45. *See infra* Section II.A (providing numerous examples and subsequent analysis of juror-excusal agreements).

46. *See infra* Section II.B (summarizing the statutory foundation for juror-excusal agreements in Texas).

47. *See infra* Section II.B (discussing Texas Code of Criminal Procedure Article 35.05 generally).

48. *See infra* Section II.B (detailing the statute in question).

49. 380 N.E.2d 621, 645–46 (1978).

50. *Id.* at 645.

51. *Id.*

52. *Id.* at 646.

53. *Id.*

54. *See Indiana Jury Rules: Rules 1–30*, INDIANA RULES OF COURT (updated, effective Jan. 1, 2021), https://rules.incourts.gov/Content/jury/default.htm (noting the lack of a jury-excusal by agreement statute).

Nevertheless, the court of appeals saw no issue with the trial's dismissal of the jurors when the parties agreed.[55]

In *State v. Spangler*, the Minnesota Court of Appeals found no reversible error after a judge approved the parties' agreement to dismiss a juror.[56] There, the discussion between the parties was on the record because the terminology used was not clear to the clerk.[57] When discussing the need to sit the alternate, the clerk responded, "[B]ecause we struck one for cause."[58] The prosecutor objected to that categorization and said that it was not a strike for cause—defense counsel concurred informing the clerk that "we all agreed on that."[59]

On appeal, defendant argued that the trial court's approval of that excusal essentially granted the state an extra peremptory challenge.[60] The court of appeals rejected that argument because "[t]he parties and the court agreed to excuse the [potential juror] before the prospective jurors had been called in or sworn."[61] Further, the defendant argued that because no provision in the state's rules of criminal procedure did not authorize excusals by agreement, it must have been improper.[62] The court of appeals nevertheless held that "[w]hile it is true that no provision contemplates the exact scenario that arose in this case, neither do the rules prohibit the district court's action."[63] Because the parties agreed to remove the juror, and not without cause, the court of appeals affirmed the district court's inherent power to enforce the agreement.[64]

B. Statutory Example to Ground Our Analysis: Texas Code of Criminal Procedure Article 35.05

Though this problem extends far beyond one state, the Texas statute provides our inquiry with a helpful starting point.[65] It is important to spend some time with the language of this statute to fully flesh out what is explicit and, perhaps more importantly, what is implicit. The statute states simply that "[o]ne summoned upon a special venire may by consent of both parties be excused from attendance by the court at any time before he is impaneled."[66]

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55. Godfrey v. State, 380 N.E.2d 621, 646–47 (1978).
56. 816 N.W.2d 651, 655 (Minn. Ct. App. 2012).
57. *Id.*
58. *Id.* at 652.
59. *Id.*
60. *Id.* at 653.
61. *Id.*
62. *Id.* at 654.
63. *Id.* at 654–55.
64. *Id.* at 655.
65. *See generally* Scott A. Anderson, *Anticipating the Judicial Response to Ohio's Proposed Statewide Sentencing Database*, 33 FED. SENT. R. 244, 244–46 (2021) (noting a tendency to support trial court discretion in favor of defendant's rights).
66. TEX. CRIM. PROC. CODE § 35.05.

As we are all textualists now,[67] this Section starts with what is—and is *not*—said in Article 35.05.[68] For an excusal to be allowed, only one thing is required—consent by both parties.[69] However, upon that consent, regardless of how or why, the potential juror "may" be excused.[70] This permissive "may" ensures that the power to remove the jurors does not lie exclusively with the agreeing parties.[71] The power and discretion to actually enforce the agreement is given to the court upon learning that both sides have agreed.[72] What this also means, therefore, is that the constitutional dimensions of those excusals involve the trial judge—the one actor with the power to enforce or reject these agreements.[73]

What Article 35.05 does *not* provide is even more important. There is a complete lack of guidance for the courts when deciding whether to grant these agreed-upon excusals.[74] There is no regulation of what these agreements may be founded upon nor any specific procedure by which constitutional rights are safeguarded.[75] In essence, the statute states that if parties agree—through *any* process and for *any* reason—the court *may* act to enforce that agreement.[76] If that is all that Article 35.05 truly means, it is woefully inadequate to protect even the most facially egregious constitutional violations. In fact, there are examples of several cases in which the courts have been confronted with powerfully unconstitutional outcomes.

1. Texas Cases Under Article 35.05

a. Mata v. Johnson

In *Mata v. Johnson*, the Fifth Circuit came back to the question of whether a defendant should receive a new trial based on the discriminatory venire practices of the defense counsel.[77] Ramon Mata was convicted of capital murder for stabbing Minnie Rene Houston, a prison guard, while he

67. Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) [hereinafter Scalia Lecture Series] https://www.youtube.com/watch?v=dpEtszFT0Tg.

68. As a side note, one thing that is *not* included in the statute is the consideration that jurors may in fact be women. *See* TEX. CRIM. PROC. CODE § 35.05.

69. *Id.*

70. *Id.*

71. Whether that is the actual, on-the-ground practice is a question that will be addressed later. *See generally infra* Part IV (providing a detailed constitutional analysis of juror-excusal agreements).

72. TEX. CRIM. PROC. CODE § 35.05.

73. *See generally* Renico v. Lett, 559 U.S. 766, 776 (2010) (noting the U.S. Supreme Court's support of a trial judge's discretion in managing trials); Arizona v. Washington, 434 U.S. 497, 510–11 (1978) (same).

74. *See* TEX. CRIM. PROC. CODE § 35.05 (noting the lack of guidance available).

75. *See id.* (displaying the lack of regulations and standards for applying the rule).

76. *See id.*

77. 99 F.3d 1261, 1264 (5th Cir. 1996), *vacated in part on reh'g*, 105 F.3d 209 (5th Cir. 1997).

was incarcerated.[78] Because he was serving a sentence for a previous murder at the time he killed Officer Houston, he was charged with capital murder.[79] The trial was moved to the neighboring county upon the determination that almost 20% of all residents in the county were affiliated with the prison in some way.[80] Once the venire pool was summoned, seventy-six potential jurors arrived for the voir dire process—eight of whom were black.[81]

During the jury selection process, defense counsel and the state agreed to exclude every black venireperson from the jury, which the trial court allowed without so much as a request for a non-discriminatory explanation or the requirement of either side to expend a single peremptory challenge.[82] In his habeas proceedings, Mata alleged that this agreement to remove every potential black juror violated his right to equal protection under the Fourteenth Amendment, as well as his right to a fair cross-section jury under the Sixth Amendment.[83]

On appeal, the Fifth Circuit reviewed the juror-excusal agreement as a form of a peremptory strike because "it would be ludicrous to believe that state actors could avoid the constitutional infirmity of race-based peremptory strikes by mutual agreement."[84] The court then described its analysis as a "balance the competing harms" approach.[85] The court dismissed the idea that harm to the defendant was of significant concern and instead focused on minimizing the damage suffered by the criminal justice system as a whole.[86] The court also agreed with the Seventh Circuit's opinion in *United States v. Boyd*, in which the court treated the defendant as having waived the constitutional rights at issue through their attorney.[87] Because the court also saw the rights of the jurors as having long since been at issue, it focused entirely on ensuring the integrity of the criminal justice system.[88] Therefore, *Mata*'s harm-balancing test requires courts to "consider the facts peculiar to [the] case, balance[ing] the competing harms to the system, and choose [the] course of action that [they] believe will do the least damage to the system and to the peoples' perception of it."[89]

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78. *Id.*

79. *Id.* ("Under that provision, it is a capital offense for a person, while incarcerated in a penal institution, to murder another who is employed in the operation of the penal institution."); TEX. PENAL CODE § 19.03(a)(5).

80. *Mata*, 99 F.3d at 1264.

81. *Id.*

82. *Id.*

83. *Id.* at 1265.

84. *Id.* at 1269.

85. *Id.* at 1270.

86. *Id.*

87. *Id.* (citing United States v. Boyd, 86 F3d 719, 724 (7th Cir. 1996)).

88. *Id.* ("Our current concern, then, must be principally for the reputation and integrity of the system in general.").

89. *Id.* at 1270–71.

b. Wilson v. Cockrell

In 1994, Jackie Barron Wilson was convicted of the rape and murder of a five-year-old girl and sentenced to death.[90] After the Texas Court of Criminal Appeals affirmed his conviction, he filed a habeas petition in which he argued, amongst other things, that his attorney agreed with the State to excuse most minorities from the jury panel, over his objection, in violation of the Equal Protection Clause.[91] In the record before the habeas court, defense counsel and prosecutors had entered an agreement to excuse 775 of the 840 potential venirepersons, including 211 of the 216 minorities on the panel.[92] The remaining five were then struck by peremptory and for-cause challenges—the two remaining African Americans were struck by peremptory challenges from the State, and three Hispanic venirepersons were struck via peremptory challenges by defense counsel.[93] Both defense counsel and the prosecutors filed sworn affidavits stating that their agreements were founded solely based on the potential jurors' views of the death penalty and not race.[94] Further, the trial judge stated in his affidavit that he would never have tolerated such a race-based agreement, but did not state that he took any steps to investigate the reasons for the agreement.[95]

The district court looked to *Strauder*, *Batson*, and the Fifth Circuit's opinion in *Mata* to guide its analysis.[96] The State challenged the idea that Wilson had standing to challenge the agreement because he did not object at trial, and therefore consented to his attorney's actions.[97] However, Wilson did make an outburst in court complaining that his counsel allowed all the Hispanics to be struck as Wilson himself was Hispanic.[98] Without giving the question significant analysis, the district court presumed that Wilson had standing as the Fifth Circuit had presumed in *Mata.*[99] However, unlike the defendant in *Mata*, the court held that Wilson had not presented enough evidence to make a prima facie case that the agreement was based on race.[100] Instead, the court held that "while these agreed excusals resulted in very few minorities being among those questioned in an effort to select twelve jurors, ... [w]ithout more than a showing that the agreed excusals had an impact on the racial make-up of the jury, Petitioner ha[d] not established an Equal

90. Wilson v. Cockrell, No. 3:99-CV-0809-R, 2002 WL 32590134, at *1, *3 (N.D. Tex. Sept. 24, 2002).
91. *Id.* at *1–2.
92. *Id.* at *3.
93. *Id.*
94. *Id.* at *4.
95. *Id.*
96. *Id.*
97. *Id.* at *5.
98. *Id.*
99. *Id.*
100. *Id.*

Protection claim under *Mata*."[101] Further, even if Wilson had shown with a statistical model enough to make a prima facie case for racial discrimination, the prosecution and defense counsels' affidavits were sufficient to rebut the prima facie showing.[102] The district court then held that Wilson had not done enough to dispute those affidavits and raise a factual question such that an evidentiary hearing was necessary.[103] The district court denied relief on Wilson's Equal Protection claim, and the Fifth Circuit denied a certificate of appealability.[104]

c. Ex parte Robertson

In 2020, the Texas Court of Criminal Appeals re-opened a 1997 habeas petition on its own initiative to consider whether the defense attorney's agreement to strike thirty-three black jurors was a *Batson* violation.[105] In his original petition, Robertson argued that this agreement violated his Sixth Amendment right to effective counsel, but the trial court held that that the agreement was not proven by a preponderance of the evidence.[106] Robertson was later granted a new punishment phase because of an unconstitutional nullification issue,[107] but he was then given another death sentence.[108] In a motion to stay his execution, Robertson suggested that the Texas Court of Criminal Appeals reconsider his 1997 habeas petition in light of the new legal authority from that court and the U.S. Supreme Court.[109]

The court reopened Robertson's habeas application and remanded it to the trial court for fact finding on the issue of the juror-excusal agreement.[110] Specifically, the court asked for an official court reporter's transcript and all exhibits from the 1997 hearing, all venire members' questionnaires, any agreements executed by counsel, and any additional briefing the trial court deemed necessary.[111]

More important than what the court decided was Judge Newell's concurrence explaining why, in his view, the juror-excusal agreement would be a constitutionally impermissible action for the defense counsel to take.[112] The root issue, as Judge Newell aptly described, is that "[r]acially-motivated peremptory strikes during jury selection not only affect a defendant's rights,

101. *Id.*
102. *Id.* at *6.
103. *Id.*
104. *Id.*; Wilson v. Cockrell, 75 Fed. App'x 983, at *14 (5th Cir. 2003).
105. *Ex parte* Robertson, 603 S.W.3d 427, 427 (Tex. Crim. App. 2020).
106. *Id.*
107. *Id.* at 428.
108. *Id.*
109. *Id.*; Pena-Rodriguez v. Colorado, 580 U.S. 206 (2017); Buck v. Davis, 580 U.S. 100 (2017); Ripkowski v. State, 61 S.W.3d 378, 391 n.48 (Tex. Crim. App. 2001).
110. *Robertson*, 603 S.W.3d at 428.
111. *Id.*
112. *Id.* at 429 (Newell, J., concurring).

[but] they also deprive a community of its voice in a criminal trial."[113] Judge Newell wrote separately to suggest that the U.S. Supreme Court would likely not see this fact pattern as a particularly difficult case.[114] Judge Newell clarified that refusing to find a harm based on the fact that defense counsel agreed, and the defendant was white, as the dissent would have held, fails to recognize the extent of the protections *Batson* offered. Specifically, "[s]election procedures that purposefully exclude [African-American] persons from juries undermine public confidence in the fairness of our system of justice."[115] The Newell concurrence emphasized the type-two and type-three harms that are explicitly protected by *Batson*, but are often overlooked by more conservative views of Equal Protection rights.[116]

d. Irsan v. State

Ali Irsan was tried in 2018 for the murder of his daughter and her boyfriend.[117] Irsan's trial was amidst a wave of anti-Muslim animus that arose during President Donald Trump's "Muslim ban,"[118] which restricted immigration from predominantly Muslim countries.[119] Jocelyn Henderson, a potential juror, indicated no particular antipathy or support for the death penalty in her questionnaire.[120] When the potential of a financial hardship arose, the court asked Ms. Henderson to "come back Wednesday [and] let me know . . . [b]ecause I think you'd be a great juror, so we'd love to have you if it's not a financial hardship."[121] Despite this sentiment from the court, the parties dismissed Ms. Henderson from the pool pursuant to the excusal agreement statute.[122] When she was informed of this, Ms. Henderson said that she remained interested in serving on the jury and had arranged with her employer to allow her to serve.[123]

After hearing her statement on the phone, the court asked the parties if they still wanted her to be excused.[124] They agreed that they did, and the court excused her.[125] After the call ended, the defense attorney volunteered the statement that "for the record, Judge, she is a Black female. . . . [a]nd knowing what the evidence could . . . [what] could come out in evidence . . .

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113. *Id.*
114. *Id.*
115. *Id.* at 430 (citing *Batson*, 476 U.S. at 87).
116. *Id.*
117. Brief for Appellant at 122–23, Irsan v. State, No. AP-77,082, 2020 WL 5033440, at *1 (Tex. Crim. App. Aug. 25, 2020) (per curiam) [hereinafter *Irsan* Brief].
118. Proclamation Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).
119. *See id.*
120. *See Irsan* Brief, *supra* note 117, at 38–42.
121. *Id.* at 39.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

[is] another reason I take into consideration in our decision to agree to her."[126] The prosecution did not object, and the court responded, "Well, I don't know what those [reasons] are, but if it's important to you, I imagine there's a good reason."[127] On appeal, Irsan's attorneys argued that the discriminatory agreement made by his trial counsel violated the Equal Protection Clause of the Fourteenth Amendment.[128]

On appeal, Irsan's defense counsel raised a familiar argument—exclusion of a prospective juror on the basis of race or gender violates the Equal Protection Clause of the Fourteenth Amendment.[129] Citing *Strauder* and *Batson*, Irsan argued that this instance of racially discriminatory jury selection was no different than the traditional facts where one party acts impermissibly and the other objects.[130] That defense counsel explicitly acknowledged his racial motivation in agreeing with the State did not undercut the fact that racial bias permeated the voir dire process—it confirmed it. Further, there need not be any showing of animus for the race-based exclusion to be constitutionally problematic.[131] Thus, Irsan argued, there is no substantive distinction between the two fact patterns and should be no substantive distinction in how the courts review it.[132]

III. THE NECESSARY CONSTITUTIONAL FRAMEWORK

With these cases providing the backdrop of how these agreements work in practice, this Article now turns to the constitutional principles that are directly implicated. First, the promise of Equal Protection and its substantive edges.[133] Second, the constitutional promises of transparency and justice in criminal proceedings found throughout the constitution's criminal procedure clauses.[134] Third, the state action doctrine and its application to the Fourteenth Amendment.[135]

126. *Id.* at 40, 47.
127. *Id.* at 40.
128. *Id.* at 41.
129. *See id.*
130. *Id.* at 42 ("Because 'even a single instance of . . . discrimination against a prospective juror is impermissible[.]'") (citing Flowers v. Mississippi, 588 U.S. 284, 300 (2019)).
131. *Id.* at 46.
132. *Id.* at 42–56.
133. *See infra* Section III.A.1 (discussing equality implications in a trial procedure context).
134. *See infra* Section III.A.2–3 (discussing the public trial right protecting transparency and accountability).
135. *See infra* Section III.B.1–2 (discussing the state action doctrine's jurisprudence and its application to jury proceedings).

A. Equal Protection in Criminal Procedure

1. Strauder v. West Virginia

The equality implications of trial procedure are not always as straightforward as other discriminatory contexts.[136] In *Strauder v. West Virginia*, the U.S. Supreme Court provided a roadmap for how courts are to view voir dire proceedings through a constitutional lens.[137] The Court first presented an equal treatment, or anti-classification, view of the Equal Protection Clause.[138] Then, it also introduced a substantive justice view of equal protection that takes stock of the social messaging of the laws at issue.[139] Both are relevant for the juror-excusal agreements at issue here.[140]

In *Strauder*, the Court was asked whether citizens of the United States, when charged and tried for crimes, had a right to a jury trial devoid of racial discrimination in the jury-selection process.[141] The challenged West Virginia statute allowed only white men to serve as jurors.[142] Building on the *Slaughter-House Cases*, Justice Strong acknowledged that the Fourteenth Amendment works in concert with the Thirteenth and Fifteenth Amendments toward a "common purpose" which was to protect black people against laws that continued their social subordination.[143] Further, the opinion recognized that "[t]he very fact that [black] people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority . . . ."[144] Mr. Strauder was not the individual directly discriminated against in his case.[145] The constitutional violation was itself, to Justice Strong, the infliction of brands and badges of inferiority.[146]

This recognition, in the Court's eyes, was fully in line with the authors' intent when they drafted the Equal Protection Clause.[147] The Court recognized that "the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against

136. For an example of a conceptually simple discrimination case, *see Obergefell v. Hodges*, 576 U.S. 644 (2015).

137. 100 U.S. 303, 307–10 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

138. *Id.* at 307–08.

139. *Id.* at 310–11.

140. *See id.* at 307–11.

141. *Id.* at 305.

142. *Id.*

143. *Id.* at 305–06 ("This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the [white race] enjoy.").

144. *Id.* at 308.

145. *See id.* at 310.

146. *Id.* at 308.

147. *See id.* at 309–10.

them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws."[148] Namely, the fear that states may enforce laws that continue to relegate black communities to the lowest caste of society because of their race was the primary animating factor of the promise of equal protection of law.[149]

There remains language within *Strauder* that adds texture to the constitutional harms addressed.[150] Namely, Justice Strong seemed to elicit two interacting principles within his understanding of "equal protection."[151] He first asked whether the Fourteenth Amendment could be understood to say anything "but declaring that the law in the states shall be the same for the black as for the white . . . ."[152] This language seems to strike directly to an anti-classification principle—to treat someone differently based on a protected characteristic is constitutionally problematic.[153]

However, Justice Strong's opinion was deeper than just an anti-classification approach—it emphasized language implying a fuller concept of justice.[154] He continued on to say that despite the language of the amendment being prohibitory, it necessarily contains a positive right to "exemption from unfriendly legislation against them distinctively as [black],—exemption from legal discriminations, implying inferiority in civil society . . . and discriminations which are steps towards reducing them to the condition of a subject race."[155] This second analytical strand provides the lens through which we are to read the opinion as a whole.[156] The Equal Protection Clause provided recently freed slaves, and black Americans broadly, with a positive right not to be subjected to laws that relegate them into a lower social caste.[157] Reading the opinion as a whole, Justice Strong's antecedent, anti-classification language should be read within the context of the subsequent anti-subordination language.[158] Reading these two sentences together, it is likely that Strong's pronouncement of it being the same for "the

148. *Id.* at 309.
149. *Id.*
150. *See id.* at 307–08.
151. *See id.*
152. *Id.* at 307.
153. *Id.* at 307–08.
154. *See id.*; Sanford Levinson, *Why* Strauder v. West Virginia *Is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS UNIV. L.J. 603, 614 (2018).
155. *Strauder*, 100 U.S. at 308.
156. *Id.*
157. Levinson, *supra* note 154.
158. *Strauder*, 100 U.S. 307–08.

black as for the white" references the *social meaning* of "black" and "white," not merely phenotypical attributes.[159]

The classifications that Strong was condemning were those that classified based on race in a subordinating or oppressive way.[160] This interpretation is also the only way that Mr. Strauder's harm makes sense as Mr. Strauder himself was not the one being discriminated against in his case.[161] The reason he was unconstitutionally harmed nonetheless was because of the social message communicated through the statute about the unequal standing of black citizens—i.e., if they do not even deserve the right to serve on juries, why would they deserve a fair and equal trial?[162] The odious nature of the *recognition* of race in seating a jury in *Strauder* was the way it inherently *stratified* the races.[163]

Much of what the Court announced in *Strauder* has more to do with the constitutional interests of communities than it did the rights of Mr. Strauder himself.[164] The traditional equal protection scenario has the plaintiff situated as the direct recipient of the discrimination.[165] However, Mr. Strauder's right was not merely to not be the victim of a racist actor; Mr. Strauder's constitutional protection extended a guarantee that he is not subjected to a criminal justice system that lacked the transparency and pursuit of equality required by the Constitution.[166]

The substantive complexity of the Equal Protection Clause included the protection of Mr. Strauder alongside the interests of the black community in West Virginia as well.[167] As further developed through *Batson* and its progeny, racial representativeness in juries is invaluable for several adjacent reasons.[168] As we see in Justice Strong's opinion, the segregation of the jury had a social message about the community's opportunity to participate in governance.[169] Part of the constitutional harm was foreclosing from black Americans "[the] valuable opportunity to [meaningfully] participate in a process of government."[170] This communal principle was not a right

159. *Id.*; *see* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1, 37 (1991) (explaining the differences between defining race as purely phenotypical and defining race through the social-class lens of what it *means* to be black in a particular culture).

160. *Strauder*, 100 U.S. at 307–08.

161. *Id.* at 305.

162. *Id.* at 308.

163. *See* Levinson, *supra* note 154, at 615.

164. *Strauder*, 100 U.S. at 309.

165. *See id.*

166. *Id.*

167. *Id.*

168. Batson v. Kentucky, 476 U.S. 79, 87–88 (1986).

169. Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 351, 361 (1999); *see also* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 211–17 (1995) (linking discrimination against particular age groups during jury selection with discrimination of voter participation in the same age groups).

170. *See* Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting).

possessed by Mr. Strauder, but a constitutional imperative that an invidious court proceeding harms those other than the defendant.[171]

This communal interest in the equality and fairness of criminal justice proceedings is not explicitly enumerated in the Fourteenth Amendment like Mr. Strauder's individual rights.[172] However, a communal interest in fair criminal procedures is recognized throughout the Supreme Court's case law. Building on this communal interest, and discussed further below, the Court's criminal procedure cases have created a foundational obligation of transparency and clarity for the courts to protect.[173]

2. Transparency in Criminal Procedure Clauses

The communal aspect of the Equal Protection Clause, first recognized in *Strauder* and later announced in *Batson*, stands on the constitutional obligations of the criminal justice systems in America.[174] A parallel and reinforcing principle is the idea that the criminal justice system owes a duty to all citizens, not just the defendants it may be prosecuting.[175] While not as explicitly mandated, "the Constitution's criminal procedure provisions contain an implicit, overarching transparency guarantee."[176] In her excellent article, Dean Cover persuasively outlines what she calls the transparency protections.[177]

There are the constitutional protections traditionally recognized: substantive and procedural fairness,[178] the adversarial system,[179] and, historically, promoting the accuracy of judicial outcomes.[180] Looking deeper,

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171. *Strauder*, 100 U.S. at 306.

172. *Duncan*, 391 U.S. at 149.

173. *See infra* Section III.A.2 (outlining the progression of the U.S. Supreme Court's caselaw that made clear the Constitution's guarantee of transparency in the criminal justice system).

174. *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986); *Strauder*, 100 U.S. at 308–09.

175. *Batson*, 476 U.S. at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

176. Aliza Cover, *The Constitutional Guarantee of Criminal Justice Transparency*, 74 ALA. L. REV. 171, 172 (2022).

177. *Id.* at 174.

178. *Id.* at 172; Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

179. *See* Cover, *supra* note 176, at 173; Strickland v. Washington, 466 U.S. 668, 685 (1984) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275–76 (1942) ("[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.").

180. *See* Cover, *supra* note 176, at 173; *Strickland*, 466 U.S. at 685 ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel['s] playing a role that is critical to the ability of the adversarial system to produce just results."); *id.* at 686 ("The benchmark for

however, one notices that every provision of the Sixth Amendment is "fundamentally a prohibition on government secrecy in criminal adjudication."[181] The public trial right protects transparency and accountability,[182] the jury drawn from the community ensures accountability to the people that the system draws power from,[183] the speedy trial right prevents the government from bypassing the public jury through excessive pretrial detention,[184] the Confrontation Clause ensures clarity regarding witnesses and evidence,[185] and the assistance of counsel right guarantees every defendant that they will be able to access and participate in the trial to the fullest extent.[186] Dean Cover finds affirmation of this reading in the Suspension Clause,[187] Ex Post Facto Clause,[188] Treason Clause,[189] the Fourth Amendment,[190] the Eighth Amendment,[191] and the Fifth Amendment.[192] Cover's analysis seems precisely right—the Constitution mandates a criminal justice system that is accountable and transparent to the people it seeks to govern.[193] Cover's thesis also reinforces the more subtle analysis in *Strauder*.[194] The unconstitutional actions of individuals taint the criminal justice system in which they operate, and the criminal justice system

judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."); *id.* at 687 (characterizing a "fair trial" as "a trial whose result is reliable").

181. Cover, *supra* note 176, at 173; *see also* Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1574 (2022) ("These Sixth Amendment guarantees are ones of transparency, pledging that defendants have the right to have the public watch over their trials and determine their fates, that they should be provided with information related to their prosecutions, and that they have the opportunity to face their accusers. Keeping information at the heart of the prosecution process secret is entirely opposed to these basic constitutional principles.").

182. Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2176 (2014); Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 982–85 (2021); Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 157 (2018).

183. *See* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 420 (2009); Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 884 (2019).

184. George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1845 (1997) (book review).

185. Crawford v. Washington, 541 U.S. 36, 51 (2004).

186. Cover, *supra* note 176, at 173–74.

187. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

188. *Id.* art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").

189. *Id.* art. III, § 3, cl. 1 ("No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

190. *Id.* amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

191. *Id*. amend. VIII ("Excessive bail shall not be required . . . .").

192. *Id.* amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."); *id*. ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

193. Cover, *supra* note 176, at 174.

194. Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

therefore owes a public duty to acknowledge and eradicate those infirmities.[195] When a criminal proceeding is not transparently adhering to the rights of the defendants, the community suffers a constitutional harm.[196] This is the root harm in *Strauder* and one of three justifications in *Batson*.[197]

3. Batson *and Its Progeny*

The Supreme Court believed that—at least in theory—peremptory challenges allow the parties to be assured that the impaneled jury is impartial to both parties.[198] Though peremptory challenges are not a constitutional right,[199] they are "one of the most important of the rights secured to the accused."[200] The Supreme Court's first articulation of the harms caused by racially discriminatory peremptory strikes came in *Batson v. Kentucky*.[201] There, a Kentucky trial judge allowed a prosecutor to use peremptory challenges to remove all four black people from the venire pool.[202] When defense counsel sought a hearing, the trial judge refused because the parties were entitled to use their challenges to "strike anybody they want."[203]

In *Batson*, the Court recognized three distinct harms caused by these discriminatory challenges.[204] First, discriminatory challenges deprive defendants of a jury selected according to non-discriminatory criteria.[205] Second, they harm the potential jurors by "excluding them from participation in the legal system solely on the basis of their race or sex."[206] Third, these discriminations degrade the integrity of the legal system by "undermin[ing]

195. *See* Cover, *supra* note 176, at 174.

196. *Id.*

197. *See Strauder*, 100 U.S. at 310; Batson v. Kentucky, 476 U.S. 79, 100 (1986).

198. Swain v. Alabama, 380 U.S. 202, 219 (1965).

199. Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges.").

200. *Swain*, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)). For critical challenges to and arguments for the abolition of peremptory challenges, *see* Audrey M. Fried, *Fulfilling the Promise of Batson: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311, 1314 (1997) (citing Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995) (discussing the pros and cons of allowing peremptory challenges in light of the various functions of juries and concluding that peremptory challenges should be eliminated)); 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 (1994) (analyzing the development of peremptory challenges and suggesting that peremptory challenges be abolished).

201. 476 U.S. 79, 89 (1986) ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

202. *Id.* at 83.

203. *Id.*

204. *Id.* at 86–87.

205. *Id.*

206. Fried, *supra* note 200 (citing *Batson*, 476 U.S. at 87).

public confidence in the [system's fairness]."[207] The *Batson* Court extended *Strauder* to peremptory strikes and held that they violate the Equal Protection Clause of the Fourteenth Amendment.[208] Additionally, "though *Batson* is often thought of as a case that merely prevents the prosecution from exercising peremptory challenges in a racially discriminatory manner, its holding was also concerned with ending racial discrimination in the jury selection process as a matter of equal protection."[209]

Batson's reasoning was further clarified through the lens of the juror's rights in *Powers v. Ohio*.[210] The Court held that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races."[211] Allowing defendants of different races to object to their exclusion placed the concern for the juror's rights seemingly on equal footing as the concern for the defendant's rights.[212] The Court used a two-prong approach that began by determining that a racially discriminatory peremptory strike had taken place and then granting third-party standing to criminal defendants and civil litigants to assert the rights of the juror.[213] This shift also logically aligns with the reasoning in *Strauder*.[214] There, the denial of a non-discriminatory jury was a constitutional harm because of the social implications—if racism was allowed in picking the jury, why would racism be disallowed in the jury's decision?[215] After *Powers*, it is clear how the protection of the juror's rights aligns completely with the defendant's constitutional interests regardless of the race of either.[216]

So abhorrent was the use of race to prevent seating a juror that the Court explicitly ensured the ability of prosecutors to challenge defense counsel for *Batson* violations as well.[217] In *Georgia v. McCollum*, the Court held that, regardless of the party using them, "rac[ially] [discriminatory] challenges violate the equal protection rights of jurors and damage the integrity of the justice system."[218] This extension of *Batson* to encompass racist peremptory strikes made by the defendant relied on the idea that they constituted state

207. *Batson*, 476 U.S. at 87.

208. *Id.* at 89.

209. *Ex parte* Robertson, 603 S.W.3d 427, 429 (Tex. Crim. App. 2020) (citing *Batson*, 476 U.S. at 86); *see also Batson*, 476 U.S. at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

210. 499 U.S. 400, 414–15 (1991).

211. *Id.* at 402.

212. *Id.* at 414.

213. *Id.* at 415 (holding that criminal defendants have third-party standing); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (holding that civil litigants have third-party standing).

214. *See Powers*, 499 U.S. at 415; Strauder v. West Virginia, 100 U.S. 303, 308–09 (1879).

215. *Strauder*, 100 U.S. at 308–09.

216. *Powers*, 499 U.S. at 415.

217. Georgia v. McCollum, 505 U.S. 42, 59 (1992).

218. Fried, *supra* note 200, at 1318 (citing *McCollum*, 505 U.S. at 48–50).

action under the Fourteenth Amendment, and that the prosecution had third-party standing to enforce them.[219] The Court continued to emphasize that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same" and "[s]election procedures that purposefully exclude African-Americans from juries undermine the public confidence in the verdict—as well they should."[220]

The flexibility each state has been afforded under *Batson* is consistent with the Supreme Court's "established practice" of "allowing the States wide discretion" to "experiment with solutions" within constitutional limits, rather than dictating "state rules of criminal procedure" or "imposing a single solution on the States from the top down."[221] When the Supreme Court prescribes a procedural "framework" to "vindicate [a] constitutional right," as it did in *Batson*, that framework is "merely one method of satisfying" constitutional requirements.[222] Each state remains authorized to "craft procedures that . . . are superior to, or at least as good as," the approved framework, so long as equivalent "assurance" is provided that constitutional rights will be protected.[223] Despite the broad pronouncements of rights and protections, the Court has provided states with an equally broad discretion on how to approach protecting those rights.[224]

The next Section will address the Court's state action jurisprudence and explain why the enforcement of juror-excusal agreements generally, and especially under Texas's statute, qualifies as state action.[225]

B. The State Action Doctrine

1. Shelley v. Kraemer

The question of immense importance that separates this analysis from that in *Batson* and *Powers* is the question of who is *actually acting* under Article 35.05.[226] The answer to that question seems fairly straightforward—"[s]tate action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."[227] While that could seem simple, the actual metes and bounds of what qualifies as state action are hotly debated. State action has been analyzed and applied

219. *McCollum*, 505 U.S. at 50–56.
220. *Id.* at 49.
221. Smith v. Robbins, 528 U.S. 259, 272–75 (2000).
222. *Id.* at 273, 276.
223. *Id.* at 276.
224. *Id.*
225. *See infra* Section III.B (discussing the state action doctrine in the context of the enforcement of juror-excusal agreements).
226. *See* Shelly v. Kraemer, 334 U.S. 1, 20 (1948).
227. *Id.*

controversially in countless articles across decades.[228] In this context, it will be helpful to first outline the general sense of the Supreme Court's interpretation of "state action."[229] Once that is more or less established, this Section will then apply it to the cases used to illustrate the issues arising out of Article 35.05 and the excusal agreements it codifies.

Despite the pronouncement in *Shelley*, "[s]cholars have extensively discussed various problems with the doctrine, calling the distinction between public and private action 'arbitrary,' and both the Supreme Court and lower federal courts have admitted the difficult nature in determining when a private party's actions are state action."[230] Even without a clearly articulated test, the importance of this analysis is unquestionable. If equal protection only protects against state action, the relevant question is always whether "the state permitting private racial discrimination to continue, even if the state did not create it, constitutes 'state action' for constitutional purposes."[231] This is precisely the question at issue here.[232]

Shelley seems to stand for the idea that when courts enforce agreements—even purely private ones—the coercive power of the state renders said enforcement state action.[233] However, what is unclear after *Shelley* is whether that principle applies to all instances of private agreements, or only when the Equal Protection Clause is implicated.[234] In *Shelley*, the question presented was whether a trial court could enforce racially discriminatory restrictive covenants that—though not violating state contract law—would violate the Equal Protection Clause.[235] Specifically, the U.S. Supreme Court "recognized that the action of state courts in enforcing a substantive common-law rule . . . may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have . . . the most rigorous conceptions of procedural due

228. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503–05 (1985) (discussing the unclear principles to determine the existence of state action); *see also* Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 283 (2013) ("The line of state action opinions has been criticized as incoherent, ungrounded, and insincere.").

229. *See* Turner, *supra* note 228.

230. David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 221 (2017) (citing Rodriguez v. Plymouth Ambulance Serv., 577 F.3d 816, 823 (7th Cir. 2009)); Int'l Soc'y for Krishna Consciousness v. Air Can., 727 F.2d 253, 255 (2d Cir. 1984) (admitting that state action determination constitutes "one of the more slippery and troublesome areas of civil rights litigation") (citation omitted).

231. Howard, *supra* note 230, at 223.

232. *See id.* at 223–26 (providing for more background history on the dual principles of equality and liberty underlying the need for a state action doctrine).

233. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

234. Fortunately, for purposes of this Article, the answer to this question is irrelevant. As this scenario and these arguments exist in the context of racially discriminatory private agreements that would violate the Equal Protection Clause, *Shelley*'s potential limiting factors do not undercut the strength of this argument. *See id.*

235. *Id.* at 14.

process."[236] The plain effect was that the trial court's enforcement of the restrictive agreements of the parties—which were racially discriminatory and violative of the Fourteenth Amendment—was "state action . . . in the full and complete sense of the phrase."[237] Now, notably, as Professor Laurence Tribe explained, if *Shelley* was consistently applied, it "would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement."[238] However, *Shelley* has been largely treated by courts as limited exclusively to racial discrimination situations.[239]

2. State Action in Batson *Claims*

Within the context of jury procedure, the U.S. Supreme Court held that a defense counsel using racially discriminatory strikes is state action as well.[240] First, the Court comparatively analyzed the harms of *Batson* and found they are equally present when the defense counsel is the one using racially discriminatory peremptory strikes.[241] While the defense attorney may in some ways be accountable to their client—e.g., in an ineffective assistance of counsel claim (IAC)—the standards for prevailing on those claims are incredibly high.[242] For this reason, the defendant is still being tried by a jury that is empaneled through an unconstitutionally discriminatory process.[243] Additionally, while there is no right to sit on a jury, the juror "does possess the right not to be excluded from one on account of race."[244] Finally, when racially discriminatory peremptory strikes are used, it degrades the integrity

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236. *Id.* at 17.

237. *Id.* at 19.

238. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1697 (Found. Press, Inc. ed., 2d ed. 1988).

239. *See, e.g.*, United Egg Producers v. Standard Brands, Inc., 44 F.3d 940, 942–43 (11th Cir. 1995) (holding that a court's enforcement of a settlement to restrict disparaging advertising about a product does not constitute state action restricted by the First Amendment because "the reach of *Shelley* remains undefined outside of the racial discrimination context"); Parks v. "Mr. Ford," 556 F.2d 132, 135–36 n.6a (3d Cir. 1977) (noting *Shelley*'s restriction to cases involving racial discrimination and refusing to find state action for the private enforcement of a garageman's lien); SMI Indus., Inc. v. Lanard & Axilbund, Inc., 481 F. Supp. 459, 462–63 n.5 (E.D. Pa. 1979) (finding that a landlord's distraint of tenant's property was not state action because *Shelley* "has been limited to discrimination cases"); Wilco Elec. Sys., Inc. v. Davis, 543 A.2d 1202, 1204–05 (Pa. Super. Ct. 1988) (holding that enforcing a restrictive covenant giving a private party the right to provide television services to a development's residents did not constitute state action restricted by the First Amendment under *Shelley* because no racial discrimination was involved); Ginsberg v. Yeshiva of Far Rockaway, 358 N.Y.S.2d 477, 479, 482–83 (N.Y. App. Div. 1974) (refusing to bar enforcement of restrictive covenants prohibiting religious institutions in a residential neighborhood, as *Shelley* involved racially discriminatory covenants), *aff'd*, 325 N.E.2d 876, 877 (N.Y. 1975).

240. Georgia v. McCollum, 505 U.S. 42, 59 (1992).

241. *Id.*

242. *See* Strickland v. Washington, 466 U.S. 668, 691–92 (1984) ("[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance . . . .").

243. *See id.*

244. Powers v. Ohio, 499 U.S. 400, 409 (1991).

of the justice system as a whole, regardless of who is using them.[245] In essence, as the Court later affirmed, when a juror is dismissed based on race or gender, it causes harm not only to the litigant, but to the community as a whole, and to the individual wrongly excluded.[246]

Recognizing these harms, the Court then went on to apply its state action inquiry to defense counsels in a criminal trial setting.[247] The first prong of the Court's state action inquiry is "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority."[248] Further, peremptory strikes "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury."[249] Because the right to exercise peremptory strikes was only given to the parties by the law, the first prong was satisfied.[250]

The second prong asks "whether the private party charged with the deprivation can be described as a state actor."[251] Here, the Court applied three principles: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[252] The Court found that peremptory challenges "perform a traditional function of the government: Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact."[253] Thus, the peremptory strikes—regardless of which side used them—when used discriminatorily, were state action for the purposes of the Fourteenth Amendment.[254]

What becomes apparent through the constitutional background of racial discrimination in voir dire is the Court's absolute abhorrence of the very idea. While the Court has not necessarily remained as steadfast in protecting the broad understanding of state action in other contexts,[255] it has been steadfast in rooting out racial discrimination in jury selection—even going so far as to

245. *McCollum*, 505 U.S. at 50 ("Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.").

246. J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127, 140 (1994).

247. *McCollum*, 505 U.S. at 44.

248. *Id.* at 51 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982)).

249. *Id.* (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991)).

250. *Id.*

251. *Id.* (citing *Lugar*, 457 U.S. at 939).

252. *Id.* (citing *Edmonson*, 500 U.S. at 621–22).

253. *Id.* at 52 (quoting *Edmonson*, 500 U.S. at 620).

254. *Id.*

255. *See* TRIBE, *supra* note 238 (discussing the variety of approaches to differing state action contexts).

recognize the broad societal harms.[256] Recognizing the coalescence of these two strands of constitutional jurisprudence, the application to discriminatory juror-excusal agreements becomes surprisingly straightforward. The next Part applies these principles to the common practices of agreed excusals through the lens of Article 35.05 and the cases laid out previously.[257]

IV. THE APPLICATION: THE CONSTITUTIONAL ANALYSIS OF JUROR-EXCUSAL AGREEMENTS

From the Supreme Court's precedent, two things become abundantly clear—racial discrimination in selecting a jury is unconstitutional for myriad reasons, and the actions of defense counsel, the prosecution, and the trial judge are all state action.[258] However, if the traditional *Batson* analysis mapped perfectly onto discriminatory juror-excusal agreements, there would be no need for additional action because courts could rely on the adversarial process to guard against such practices.[259] Unfortunately, these agreements present a unique interest convergence that removes the safeguards and obligations typical to the parties in a criminal trial.[260]

The way Texas courts understand and apply Article 35.05 allows for unregulated, off-the-record opportunities for the parties to discriminate against venirepersons with impunity.[261] These agreements, when brought into the light, violate the principles outlined in *Strauder*, *Batson*, and *Shelley* with equal force.[262] What is less clear is whether the procedural distinctiveness between a traditional *Batson* scenario and an agreement creates a substantive distinctiveness as well.[263] While discriminatory agreements do place culpability on defendants in some circumstances, they create the same set of harms the Court sought to protect in *Batson*.[264] Additionally, because they occur in the space where the adversary system does not provide the rights-protecting structure so heavily relied on in American criminal procedure, discriminatory agreements are substantively different from waiver or the failure to object to an opposing party's violation.[265]

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256. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

257. *See* discussion *infra* Part III (discussing state action in the context of juror-excusal agreements).

258. *See* discussion *supra* Section III.B (explaining that racial discrimination in jury selection is unconstitutional). For an example of arguments identifying state trial court judges and personnel as state actors in violation of constitutional rights, *see* Complaint at 4, United States v. Texas, No. 21-CV-173-1cc, 2021 U.S. Dist. LEXIS 146722 (W.D. Tex. Aug. 3, 2021).

259. *See Batson*, 476 U.S. at 87.

260. *See id.*

261. *See* Irsan v. State, No. AP-77,082, 2020 Tex. Crim. App. Unpub. LEXIS 352, at *2 (Tex. Crim. App. Aug. 25, 2020).

262. *See* discussion *supra* Sections III.A.1, III.A.3, III.B.1 (expanding upon these principles).

263. *See* discussion *infra* notes 338–41 and accompanying text (stating that there is no substantive difference).

264. *See* Mata v. Johnson, 99 F.3d 1261, 1268–69 (5th Cir. 1996).

265. *See id.*

A. Excusal Agreements Create All the Same Harms in Batson *and* Strauder

These excusal agreements can take different forms. Sometimes they take the form of two attorneys agreeing that a black woman is unlikely to be particularly friendly to either of their interests and moving to excuse her on that basis.[266] Other times, it could be an agreement of the parties to excuse 775 of the 840 potential jurors, which happen to include all but four minority jurors.[267] Or, they could be anywhere in the middle. Regardless of what they look like, these agreements give rise to all of the constitutional infirmities repudiated in *Batson* and *Strauder*.[268] They harm the juror, they harm the community from which the juror was drawn, and they negate the constitutional guarantee of due process and equal protection mandated by the Constitution.[269]

One significant difference between these excusal agreements and the facts in *Strauder*, *Batson*, *Powers*, and *McCollum* is the lack of evidence—these agreements are almost always off the record and outside of the courtroom.[270] These agreements are predominantly made between the two attorneys prior to their appearance before the court and are never in writing.[271] Therefore, when analyzing the issues with these practices under the framework the Supreme Court has provided, we must determine whether the different circumstances mitigate the discriminatory harm.[272] For all of the reasons addressed below, and countless more, the answer is that they do not.[273]

First, consider the harm to the defendant. There is no shortage of scholarship and judicial recognition of the insidious effects of juror bias against defendants.[274] Countless empirical studies have revealed that race

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266. *See Irsan*, 2020 Tex. Crim. App. Unpub. LEXIS 352, at *2.

267. *See* Wilson v. Cockrell, 75 F. App'x 983, at *3 (5th Cir. 2003) (discussing four potential jurors who were later dismissed through peremptory challenges).

268. *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986); Strauder v. West Virginia, 100 U.S. 303, 312 (1879).

269. *Batson*, 476 U.S. at 87.

270. *See Irsan*, 2020 Tex. Crim. App. Unpub. LEXIS 352, at *2–4.

271. *See*, *e.g.*, *Wilson*, 75 Fed. Appx. 983, at *3 (demonstrating an oral agreement in a court appearance).

272. *Batson*, 476 U.S. at 93–94.

273. *See* discussion *infra* notes 288–334 (discussing why different circumstances do not mitigate discriminatory harm).

274. *See* Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165, 1168 (1995) (addressing how social imagery and ideology exert mutually transformative pressure on each other in the adjudicative process); Justin Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 839 (2019) (showing empirical support for the assertion that "Americans automatically associate the concepts of payback and retribution with Black and the concepts of mercy and leniency with White").

invades criminal proceedings despite our best efforts to root it out.[275] This principle, properly understood, acknowledges that when racial discrimination of any kind is present in the formation of the jury—regardless of the discriminating actor—there is a constitutional violation.[276] When the Court analyzed the West Virginia statute in *Strauder*, it was of no consequence that Mr. Strauder was not the one personally discriminated against—he nevertheless had a right to a trial free of racial discrimination.[277] The harm was not that the State treated Mr. Strauder differently because of his race, but that it treated the jurors differently because of their race.[278] Mr. Strauder still suffered under this treatment because of the social message that the racial mistreatment sent from the state to the other jurors. Justice Strong very perceptively noted that "[t]he very fact that [black] people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority."[279]

Mr. Strauder suffered a harm because the State's allowance of discrimination when seating the jurors implicitly endorsed racially discrimination throughout the trial.[280] If the State could discriminate based on race when seating the jury, why can the jury not discriminate based on race during its deliberation?[281] What about in deciding which witnesses to deem credible? What about when determining which attorney to trust more? The Court held that the Equal Protection Clause protected Mr. Strauder "from legal discriminations, implying inferiority in civil society . . . and discriminations which are steps towards reducing them to the condition of a subject race."[282] Importantly, this is true even if Mr. Strauder himself had committed a racially discriminatory act.[283] Had it been in Mr. Strauder's interest for the jury to be racially biased, the same social message would have been conveyed to the jury.[284] While it would not have harmed him in the same way, the communal harm would have persisted nonetheless.[285]

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275. David Baldus et al., McCleskey v. Kemp: *Denial, Avoidance, and the Legitimization of Racial Discrimination in the Administration of the Death Penalty*, DEATH PENALTY STORIES 229, 249–53 (Blume & Steiker eds., 2007); William Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 261 (2001) (showing empirically that willingness to return a death sentence correlates with lower numbers of racial minorities on capital juries).

276. *See* Strauder v. West Virginia, 100 U.S. 303, 308–10 (1879).

277. *Id*. at 306; Martin v. Texas, 200 U.S. 316, 321 (1906); *Ex parte* Virginia, 100 U.S. 339, 345 (1879).

278. *Strauder*, 100 U.S. at 306.

279. *Id.* at 308.

280. *Id.*

281. *See id.*

282. *Id.*

283. *Id.*

284. *Id.* at 310.

285. *Id.*

Under Article 35.05, the very same "legal discriminations, implying inferiority in civil society" are permitted, provided the state and defense can agree.[286] In the case of Mr. Irsan, for example, this agreement is on the record and openly before the trial court.[287] When the court allows the parties to racially discriminate in juror selection, the court loses its ability to prevent further discrimination in the proceedings.[288] On what grounds could the court possibly prevent the State from using Mr. Irsan's Muslim faith against him in opening arguments?[289] If the court has already permitted racial discrimination, the right that Mr. Irsan has to a trial free of racial discrimination is violated before it begins.[290]

Second, the potential venirepersons themselves are victims of insidious racial discrimination.[291] In the case of juror-excusal agreements, jurors are being excluded from their civil duty to jury service based on their immutable characteristics—and will almost never know it.[292] The potential jurors are in a most vulnerable position as they have no process by which they can investigate why they were struck, no process by which they can object or advocate for themselves, and no attorney concerned with their rights.[293] The only way their rights are considered is if the trial court itself undertakes to do so.[294] If prosecution and the defense agree to do so, and the trial courts rubberstamp the agreements as they typically do, constitutional infirmity has already invaded the proceeding without so much as a second glance.[295]

Third, and most profoundly, the broader communal right is equally present here as in the context of racial peremptory strikes.[296] The U.S. Supreme Court's "representative cross section of the community" requirement affirms the idea that the jury is not merely twelve individuals with rights, but a political entity necessary for democratic governance.[297] When the Court recognized this aspect of how racially discriminatory venire selection harms the defendant, it acknowledged that the same underlying reasons make it detrimental to the community as a whole.[298] The use of racial

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286. *See id.*

287. Isran v. State, No. AP-77,082, 2020 Tex. Crim. App. Unpub. LEXIS 352, at *2 (Tex. Crim. App. Aug. 25, 2020).

288. *See* Batson v. Kentucky, 476 U.S. 79, 88 (1986).

289. *See Irsan*, Tex. Crim. App. Unpub. LEXIS 352, at *3.

290. *See Batson*, 476 U.S. at 86–87.

291. *Id.* at 87.

292. *Id.*

293. *See* J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127, 140 (1994).

294. *Batson*, 476 U.S. 79, 88 (1986).

295. *Id.*

296. *See* discussion *supra* Section II.B.1.i (discussing caselaw and common rights regarding preemptory strikes).

297. Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (citing Peters v. Kiff, 407 U.S. 493, 500 (1972)); *see also* ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 283 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1989) (1899) (describing the jury system and universal suffrage as "two instruments of equal power, which contribute to the supremacy of the [political] majority").

298. *Taylor*, 419 U.S. at 529–31.

discrimination in jury selection has long been weaponized for the subjugation of racial minorities.[299]

Specifically, the Court announced that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[300] Further, "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'"[301] It follows then, in the same way that all racial discrimination vitiates the defendant's right to a discrimination-free trial, it also vitiates society's right to transparent and unbiased governing institutions.[302]

The case of Ramon Mata is illustrative of this point.[303] When Mr. Mata's attorney agreed to dismiss all eight black venirepersons from the jury pool, it imbued the social impact of that discrimination against the entire community.[304] The understanding that society's interest in punishing criminals grants the state power to prosecute was foundational to the establishment of our current adversary system.[305] When the state and defense agree that certain portions of society need not be represented on the jury, they are asserting the same "badge of inferiority" against every member of that community from which the jury pool was drawn.[306] Thus, the fact that these agreements typically keep their discriminations hidden is of no moment to the constitutional analysis.[307] That the discrimination is hidden from its victims does not mediate or aggravate the invidiousness of the act itself.[308] If anything, the idea that the discrimination is shrouded behind the guise of cooperation makes it all the more disturbing when it rears its head.[309]

Finally, and by no means least important, the direct harm of the excluded juror(s) remains profoundly present.[310] In addition to the impact of

299. *See* Ramos v. Louisiana, 590 U.S. 83, 89–90 (2020) (striking down nonunanimous jury verdicts as unconstitutional and pointing to the explicitly racist origins of the nonunanimous jury laws in Louisiana and Oregon, which were designed to neutralize the impact of black Americans receiving the right to sit on juries); *see generally* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018) (chronicling the nineteenth-century effort to eliminate racial discrimination in juries as well as the subsistence of racial inequality today).

300. *Batson*, 476 U.S. at 87–88 (citing Ballard v. United States, 329 U.S. 187, 195 (1946)); McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting).

301. *Batson*, 476 U.S. at 88 (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

302. At least those that are free of *de jure* discrimination. For an introduction to arguments exposing the *de facto* discrimination pervading certain societal institutions, *see* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 1–16 (Foundation Press, 2019).

303. *See* Mata v. Johnson, 99 F.3d 1261, 1264 (5th Cir. 1996).

304. *Id.*

305. *See* Roscoe Pound, *A Survey of Social Interests*, HARV. L. REV. 1, 20–25 (1943); Witherspoon v. Illinois, 391 U.S. 510, 519–20 n.15 (1968).

306. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

307. *Id.*

308. *Id.*

309. *See id.* (discussing the perils of agreeing to discriminate or exclude).

310. *See* Powers v. Ohio, 499 U.S. 400, 414–15 (1991).

racial discrimination outlined above, jurors are situated in an especially concerning position. They are the most vulnerable to racial discrimination, yet they are the least equipped to effectively protect themselves from it.[311] Since these agreements often take place off the record—preventing even members of the proceedings from knowing they happen—the jurors are only left with the knowledge that they were removed and without the opportunity to inquire further.[312] Even if they are told explicitly, they cannot object to the exclusion because they are not parties to the selection process.[313]

In addition to the lack of knowledge and power to object, obtaining declaratory or monetary relief afterward is exceedingly hard.[314] Because there is only one instance of discrimination, injunctive relief is typically unavailable as well.[315] Thus, venirepersons who may have had their most fundamental of constitutional rights violated by the trial proceedings are left entirely without recourse.[316] This is only worsened by the fact that these discriminatory agreements are enforced by the trial courts without any effort to interrogate their validity.[317]

These agreements, sheltered by Article 35.05's perfunctory and open-ended language, are pregnant with discriminatory permission.[318] They statutorily provide the litigants with the space to discriminate, so long as they agree on who to discriminate against.[319] The on-the-ground practice of these agreements is made more constitutionally problematic by the statute's grant of final decision-making responsibility to the court itself.[320]

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311. *Id.*

312. *See id.* (discussing the injustice of jurors having no opportunity to be heard if excluded).

313. Audrey M. Fried, *Fulfilling the Promise of* Batson*: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311, 1321 (1997) (citing *Powers*, 499 U.S. at 414).

314. *Id.* at 1321 n.70 ("A Westlaw search conducted on September 8, 1997 yielded only one case in which an excluded juror has challenged discriminatory jury selection practices. In *Shaw v. Hahn*, 56 F.3d 1128 (9th Cir.), cert denied, 116 S. Ct. 418 (1995), a black woman who was excluded from a jury by peremptory challenge brought suit against the party that exercised the challenge, alleging that the peremptory [challenge] violated her equal protection rights. However, the Ninth Circuit affirmed the district court's dismissal of the suit on the grounds that the issue was precluded by the ruling, in the original case, that the peremptory challenge was based on race-neutral reasons.").

315. *Id.*

316. *Id.*

317. *Id.*

318. *See* Lawrence G. Sager & Nelson Tebbe, *Discriminatory Permissions and Structural Injustice*, 106 MINN. L. REV. 803, 814–21 (describing the implicit endorsements by state and local governments to discriminate against protected classes and how to spot them).

319. *See id.*

320. *Id.*

B. The State Action Question Under Article 35.05 Is Even Clearer Than Prior Cases

The state action question in these agreements is far simpler than those the Court faced in cases like *Georgia v. McCollum*.[321] Discriminatory jury strikes are state action for the purposes of the Fourteenth Amendment, whether done by the state or by defense counsel.[322] Unquestionably, a trial court's enforcement of racially discriminatory agreements is state action under the Fourteenth Amendment.[323] The agreements being analyzed here involve all three.

These juror-excusal agreements are unique from those analyzed in *Shelley*, *Batson*, and *McCollum*, but the divergent facts are distinctions without a difference.[324] Here, the state prosecutors and defense counsels are both participating in the racially discriminatory excusal of a juror.[325] Instead of doing so on the record through a peremptory strike, their shared venture allows them to do so off the record and without the risk of a *Batson* challenge from the other side.[326] There is no meaningful substantive difference here other than that the parties have given each other permission to remove jurors on impermissible grounds.[327] In no way does this mitigate the constitutional infirmity of such an act.

Admittedly, when comparing the trial court's role in the Article 35.05 excusal agreement to that of the court in a restrictive covenant dispute, there are substantive differences.[328] However, Article 35.05's language creates *more* state action than was present in *Shelley*.[329] There, the Court was merely asked to adjudicate a long-recognized, common-law claim.[330] Thus, it would have been within reason for the Court to see its own role as quite removed and detached from any actual substantive action. In stark juxtaposition, the trial court's role under Article 35.05 is one of total, unguided discretion to act upon its own will.[331] The language of the statute is explicitly permissive—the court "may" dismiss upon the agreement of both parties.[332] Thus, the court

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321. *See* Batson v. Kentucky, 476 U.S. 79, 87–88 (1986) (holding that that discriminatory peremptory strikes by the prosecution is state action for the purpose of the Fourteenth Amendment).

322. Georgia v. McCollum, 505 U.S. 42, 51 (1992).

323. Shelly v. Kraemer, 334 U.S. 1, 14 (1948).

324. *See id.* at 14–18 (discussing distinct facts of discrimination by excusing a juror).

325. TEX. CRIM. PROC. CODE § 35.05.

326. *See generally* discussion *supra* Section IV.A (describing the joint nature of the agreements).

327. *See* discussion *supra* Section IV.A (explaining how attorneys can cause harm through agreements).

328. *See* TEX. CRIM. PROC. CODE § 35.05.

329. *See id.*; *Shelley*, 334 U.S. at 14.

330. *Shelley*, 334 U.S. at 4. *See, e.g.*, 25 CAUSES OF ACTION 2d 371 (2019) (outlining the scope and background of causes of action to enforce restrictive covenants as applicable to residential subdivisions).

331. *See* TEX. CRIM. PROC. CODE § 35.05.

332. *Id.*

has the power to say no.[333] This grant of discretion places the final say on the trial court itself.[334] It has the choice to enforce these agreements or not, without any explicit regulations, guidelines, or even reported precedent to guide it.[335] Put plainly, when the court enforces a juror-excusal agreement, it is doing so because it chooses to.[336] It is hard to fathom a clearer example of state action than a government institution doing something that it has unfettered discretion not to do.[337]

The result of these two lines of constitutional jurisprudence intertwining in the context of Article 35.05, and the ubiquitous practices nationwide represented by it, is an obligation to ensure there is no racial discrimination animating these agreements.[338]

C. Unavoidable Complicated Questions and Their Respective Answers

When juror-excusal agreements remove potential venirepersons from the jury pool because of their race, sex, national origin, or other constitutionally protected characteristics, those agreements violate the Equal Protection Clause.[339] Additionally, because the trial courts are the actors with final say on whether or not to excuse the jurors, the enforcement of these agreements additionally qualifies as state action under the Fourteenth Amendment.[340] Thus, trial courts have an affirmative obligation to act—either remedially or prophylactically—to ensure they are not unwittingly permitting unconstitutional conduct.[341] Not only do the trial courts have the power to act sua sponte to challenge these agreements, they have an affirmative obligation to do so.[342]

Despite the similarity in substantive constitutional concerns between modern juror-excusal agreements and traditional *Batson* claims, there are significant differences in the procedural context of these agreements that complicate things.[343] For example, does the defendant not waive their rights to object if their own counsel consents to the agreement?[344] If not, how is this different from the failure to object to an impermissible peremptory strike by

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333. *See id.*
334. *See id.*
335. *See id.*
336. *See id.*
337. *See id.*
338. *See generally* discussion *supra* Part II (explaining how such agreements are common in criminal courts).
339. U.S. CONST. amend. XIV, § 1.
340. *See* TEX. CRIM. PROC. CODE § 35.05.
341. *See* discussion *infra* Section IV.C.1 (discussing why a court may act sua sponte).
342. *See* discussion *infra* Section IV.C.1 (explaining how jurisdiction relates to sua sponte actions).
343. *See* discussion *supra* Section IV.A (comparing *Batson* challenges to excusal agreements).
344. *See, e.g.*, Wilson v. Cockrell, No. 3:99-CV-0809-R, 2002 WL 32590134, at *6 (N.D. Tex. Sept. 24, 2002) (demonstrating how failure to object can constitute consent).

an opposing party?[345] Does the fact that it may significantly reduce judicial efficiency get any consideration?[346] If a defendant has the same attorney in trial and on appeal, how will the issue be raised? These are all fair questions. Still, the U.S. Supreme Court's criminal procedure jurisprudence is well-equipped to contend with these challenges.[347]

1. Waiver

So, what does a court, or an aspiring legal scholar, do with the fact that a defendant is participating—or at the very least acquiescing—in unconstitutional conduct?[348] If traditional *Batson* claims can be waived, why is acquiescence or affirmative participation different on either substantive or procedural grounds?[349] This is likely due to the breakdown in the adversarial process.

The adversary system of adjudication functions when we assume two key principles: "[f]irst, the parties themselves are responsible for gathering and presenting evidence and arguments on behalf of their positions," and "[s]econd, the decisionmaker knows nothing of the litigation until the trial, when the parties present their neatly packaged cases . . . ."[350] When parties are in charge of representing their own interests, it creates an environment of internal checks, such that courts may worry less about the protection of a defendant's rights.[351] Further, if there is error, the courts' institutional interest in legitimacy is not threatened—if a defendant has the capacity to advocate for themselves through an attorney, the court need not bear the responsibility of any failure to advocate on their behalf.[352] Further, it could be argued that to act in favor of some right that a party has not sought to vindicate themselves would be a paternalistic removal of agency.[353] Thus, the adversarial system not only allows the parties to protect their own interests through controlling the litigation, but it also protects the institutional interests of the courts.[354] For this reason, procedural mechanisms require parties to

345. *See* discussion *supra* Part IV (describing *Batson* and agreements).

346. *See* discussion *infra* Section IV.C.2 (addressing concerns for inefficient trial procedures).

347. *See* discussion *supra* Section III.A (explaining the Court's role in criminal cases).

348. There are issues with attributing the attorney's conduct to a defendant as a matter of law when defendants may range greatly in mental capacity. Whether the rights of an intellectually disabled defendant should be forfeited in the same way as a defendant who approved of and participated in the conduct is no small or simple question. However, this issue may be addressed in a subsequent article.

349. *See, e.g.*, *Wilson*, 2002 WL 32590134, at *6 (giving an example of waiver).

350. Sward, *supra* note 17, at 312.

351. *See id.*

352. *See id.*

353. *See id.*

354. Jeffrey Anderson, *The Principle of Party Representation*, 70 BUFF. L. REV. 1029, 1087–92 (2022) (discussing the competing interests in a court's decision to act sua sponte, including the parties' rights to control their litigation and the court's institutional interests).

protect their own interests and permit those interests—even constitutional rights—to be forfeited based on a party's failure to pursue them.[355]

There are some contexts, however, in which courts will not defer to the parties and will instead act unprompted, or sua sponte. The most common example is in a case where a court's jurisdiction to hear the case is in question.[356] Because subject-matter jurisdiction refers to "a tribunal's 'power to hear a case'" if not clearly established, courts will determine and rule on their own jurisdiction despite neither party raising the issue.[357] There are also situations in which courts may, but need not, act of their own volition. These contexts typically include circumstances where "the parties' interests in controlling the litigation may be balanced or outweighed by institutional interests of the judiciary."[358] In situations where the courts need to ensure that they are litigating the correct issues,[359] avoiding plainly erroneous judgments,[360] or things of the like, courts have acted sua sponte without reversal. An example of such an institutional interest is legitimacy.

As the *Batson* Court announced, when a court suspects that there may be racially discriminatory jury selection processes, the injury extends not solely to the defendant, but also to the venireperson and the very fabric of social trust in the judiciary.[361] The communal interest in transparent, constitutional court procedure is one that the courts have an obligation to protect independent of the rights of the defendant.[362] In typical circumstances, the waiver of a *Batson* claim may not be a threat to the courts' institutional legitimacy because when the parties are adverse the courts can rely on the incentive structure to gird against impermissible collusion.[363] However, as addressed, the breakdown of the adversarial process in the context of these agreements gives life to unique and existential concerns for the courts themselves and not only the parties before them.[364] As such, the traditional

355. *See, e.g.*, TEX. R. APP. P. 33.1(a) ("[T]he complaint was made to the trial court by a timely request, objection, or motion . . . .").

356. Anderson, *supra* note 354, at 1088.

357. *Id.*; *see also* Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 81 (2009) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006)); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("[S]ubject-matter jurisdiction . . . [is] the courts' statutory or constitutional *power* to adjudicate the case.").

358. Anderson, *supra* note 354, at 1094; *see, e.g.*, Maalouf v. Islamic Republic of Iran, 923 F.3d 1095, 1109–10 (D.C. Cir. 2019).

359. *See* Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990); Caspari v. Bohlen, 510 U.S. 383, 388–89 (1994) (concluding that a *Teague* non-retroactivity issue was "a subsidiary question fairly included in the question presented," namely, whether the Double Jeopardy Clause applies to successive noncapital sentence enhancement proceedings).

360. United States v. Atkinson, 297 U.S. 157, 160 (1936) (stating that "[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings").

361. Batson v. Kentucky, 476 U.S. 79, 87–88 (1986).

362. *Id.*

363. *Id.*

364. *Id.*

limitations on reviewing constitutional error—like waiver and invited-error doctrine—no longer rest on the same normative concerns and are outweighed by obligation to ensure that juror-excusal agreements are not harboring discrimination.[365]

In line with this reasoning, several state courts have held that trial courts have the standing to raise *Batson* challenges sua sponte.[366] These holdings are grounded in *Batson*, *Powers*, and *McCollum*.[367] These several courts have held that "[i]f the courts allow jurors to be excluded because of group bias . . . they would be willing participants in a scheme that could only undermine the very foundation of our system of justice."[368] It seems uncontroversial for this to equally apply when the effects of an agreement present prima facie evidence of impermissible discrimination.[369]

Under Article 35.05, when presented with juror-excusal agreements, a court has full discretion to grant or deny these agreements—thus, a court has a duty to investigate the basis of such agreement to ensure that its decision is not violative of the Constitution.[370] This affirmative duty is not unfounded in the U.S. Supreme Court's precedent. To find it, one need only reread the several cases already addressed above within this context:

"By requiring trial courts to be sensitive to[] racially discriminatory use of peremptory challenges, our decision enforces *the mandate* of equal protection and furthers the ends of justice."[371]

"Without the direct and indispensable participation of the judge, . . . the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court "has not only made itself a party to the [biased act], but *has elected to place its power*, property and prestige behind the [alleged] discrimination."[372]

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365. *Id.*

366. *See* People v. Bell, 473 Mich. 275, 287 (2005) ("The Supreme Court's rationale for allowing a defendant to raise a *Batson* issue supports our conclusion that a trial court may sua sponte raise a *Batson* issue."); State v. Evans, 100 Wash. App. 757, 765–67 (2000) (holding that a trial court may raise a *Batson* issue sua sponte to protect the rights secured by the Equal Protection Clause); Commonwealth v. Carson, 559 Pa. 460, 476–79 (1999) (same); Brogden v. State, 102 Md. App. 423, 430–32 (1994) (same); Lemley v. State, 599 So.2d 64, 69 (Ala. Cr. App., 1992) (same).

367. *Bell*, 473 Mich. at 286 ("*Batson* and its progeny make clear that a trial court has the authority to raise sua sponte such an issue to ensure the equal protection rights of individual jurors.").

368. State v. Alvarado, 221 N.J. Super. 324, 328 (1987).

369. *See id.*

370. *See Carson*, 741 A.2d at 693–94, *abrogated on other grounds by* Commonwealth v. Freeman, 827 A.2d 385, 400–02 (Pa. 2003) ("The Court's extensions of the *Batson* rationale were specifically based on the need to retain the integrity of the judicial process by eliminating discrimination from the courtroom . . . *Batson* and its progeny suggest[] the existence of an affirmative trial court duty to prevent the discriminatory use of peremptory challenges."); *see also* Powers v. Ohio, 499 U.S. 400, 415–16 (1991) (discussing race discrimination in the judicial system and in the selection of jurors).

371. Batson v. Kentucky, 476 U.S. 79, 99 (1986) (emphasis added).

372. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991) (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961)) (emphasis added).

"The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. The courts are under *an affirmative duty* to enforce the strong statutory and constitutional policies embodied in that prohibition."[373]

"Be it at the hands of the State or the defense," if a court allows jurors to be excluded because of group bias, "[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it."[374]

Trial courts may choose to enforce or not enforce juror-excusal agreements, but they have no discretion to enforce them without sufficient measures to ensure their constitutionality.[375]

Additionally, as recognized in *Batson* and *Strauder*, there are fundamental rights at stake that have affirmatively not been waived—the constitutional right to a justice system free of racial discrimination held by both the potential venirepersons themselves and the public as a whole.[376] Because these agreements negatively affect the communities in which they take place, and the judicial enforcement of them denigrates the integrity of the court system, a true waiver-of-rights argument must contend with the rights not waived.[377] Putting aside the defendant for a moment, there is no colorable argument for the waiver of the venireperson's rights, as the one personally discriminated against, or the waiver of the interest that communities have in constitutional judicial systems.[378] These rights are equally at risk in the context of these agreements and cannot be subverted under a theory that the defendant may have failed to object to defense counsel's agreement.[379]

2. Judicial Efficiency

Another argument is founded in the inefficiency of the trial if a court must investigate to ensure that these agreements are not impermissible.[380] While this concern is likely valid, it is somewhat irrelevant. The constitutional concerns of a defendant and a criminal justice system at large cannot be supplanted by prudential concerns of efficiency. Again, similarly

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373. *Powers*, 499 U.S. at 416 (emphasis added).

374. Georgia v. McCollum, 505 U.S. 42, 49–50 (1992) (quoting State v. Alvarado, 534 A.2d 440, 442 (N.J. Super. Ct. App. Div. 1987)).

375. *See id.*

376. *See Batson*, 476 U.S. at 99.

377. *See id*.

378. *See id.*

379. *See id.*

380. *See generally* Sebastian Lewis, *Precedent and the Rule of Law*, 41(4) OXFORD J. L. STUD. 873, 873-888 (2021), https://doi.org/10.1093/ojls/gqab007 (discussing precedent regarding the inverse argument to judicial efficiency).

to how IAC claims can in some instances require a "trial within a trial" type of process to determine prejudice, the constitutional protections of criminal defendants are first-order inquiries while prudential efficiency concerns are second-order inquiries.[381] When judicial processes prevent a defendant from their constitutionally promised due process and equal protection, those processes are invalidated.[382] So too here, if a more efficient process would allow an unconstitutional race-based jury procedure, efficiency alone is insufficient to justify the lack of procedural protection of the defendant.[383]

3. How Must the Claim Be Raised?

A significant concern with these agreements, reflected in the lack of data that exists about them, is the fact that an attorney will likely not object to their own actions.[384] Thus, if the same attorney represents a client in both the trial and habeas proceedings, it is difficult to imagine the issue will ever come to light. This is very true, but this is an issue with the difficulty of rooting out the action itself, not the constitutional impermissibility of the action.[385] However, this is where the state action aspect of enforcing the agreements comes into play.[386] Because it is the trial courts that must approve and enforce the agreements, it is the trial courts that have the obligation to ensure that any agreement is not based on impermissible grounds.[387] As the existence of such an agreement would be a reversible error, it therefore must be the case that the courts are obligated to undertake the effort to regulate them.[388] Thus, the issue of challenging the agreements is nullified when there has already been an inquiry into the agreement on the record in the voir dire proceeding, as argued for below.[389] Because this inquiry would place evidence in the record on appeal, it would allow for the defendant to challenge the judge's enforcement of the agreement on appeal or in a habeas context.[390]

V. POTENTIAL SOLUTIONS FOR COURTS TO IMPLEMENT

The constitutional issues inherent in the pervasive use of juror-excusal agreements and the language of Article 35.05 are myriad;[391] thankfully, so

381. *See id.*
382. *See id.*
383. *See id.*
384. *See id.*
385. *See id.*
386. *See id.*
387. *See id.*
388. *See id.*
389. *See* discussion *infra* Part V (providing solutions to the problems recognized in Article 35.05).
390. *See* discussion *infra* Part V (discussing the function of the solutions provided).
391. *See generally* discussion *supra* Part IV (applying the constitutional analysis of juror-excusal agreements).

are the potential solutions. While the courts could never be fully assured of the reasons underlying these agreements, that should not prevent them from taking the affirmative steps to try. This Part outlines a few potential solutions that states could implement to prevent litigants from racially discriminating against venirepersons with impunity.[392]

A. Legislative Action

The most obvious, and least politically salient, source of improvement would be in the form of legislative action. Tomorrow, the Texas legislature could amend Article 35.05 in any number of ways that would improve protections.[393] An incredibly simple and modest improvement would be to simply include language forbidding parties from using race, sex, or other protected characteristics in these agreements.[394] While it might have little direct effect, it would give the courts a textual obligation to interrogate the agreements before blindly accepting them.[395]

A perhaps more effective amendment would be to require, in the Code of Criminal Procedure, an in-depth, two-step process to the juror-excusal agreements.[396] This hypothetical new process could proceed as follows. In part one, the parties would agree on a list of venirepersons to excuse and provide that list to the court via written record with the biographical information—predominantly race, sex, age, and disability status—for each juror.[397] In part two, the court then would accept that document into the record and review it to see if there are patterns arising with the excused jurors.[398] Reflecting traditionally understood peremptory challenge procedure, the court would be looking for a prima facie showing of discriminatory result.[399] If there are patterns of excusing certain protected demographics, the burden would then shift back to the parties who would need to overcome the prima facie showing of a discriminatory excusal agreement.[400] While this would require genuinely probable evidence, the burden would merely be by a preponderance of the evidence—not so onerous

392. *See* discussion *infra* Section V.A–B (explaining the potential solutions to the discrimination issue).

393. *See* discussion *supra* Section II.B.1 (describing the current Texas cases under Article 35.05).

394. *See* discussion *supra* Section III.A.3 (discussing the implications with race, sex, and other protected characteristics absent from the framework).

395. *See* discussion *supra* Section III.A.3 (explaining the textual structure of Article 35.05 in relation to the *Batson* challenge).

396. *See* discussion *supra* Part IV (reviewing the juror-excusal agreement structure).

397. *See* discussion *supra* Section III.A (explaining concerns with the existing framework).

398. *See* discussion *supra* Part IV (applying the existing analysis of juror-excusal agreements).

399. *See* discussion *supra* Section III.A.3 (interpreting the procedure for preemptory challenges).

400. *See* discussion *supra* Part III (discussing the issue of discriminatory excusals and the associated burden of proof).

that it will significantly hinder attorneys from representing the interests of their clients so long as they are not acting discriminatorily.[401]

Notably, this would incur a significant burden on both the litigants and the trial courts—that is undeniable.[402] Nevertheless, this burden is the necessary constitutional burden of each actor.[403] The disincentive against juror-excusal agreements that would result may have an impact on certain aspects of efficiency and judicial economy, but the normative weight of those interests falls far short of a defendant's constitutional right to due process, and the community's constitutional promise of judicial systems that are free from racial discrimination.[404]

B. Judicially Imposed Safe-Guards

If, as seems the case in Texas, the legislature is more enmeshed in other pursuits than the protection of criminal defendants' rights,[405] the obligation on the trial courts remains the same. State criminal courts have tremendous deference on the way they conduct their trials.[406] That wide discretion comes with the burden to ensure their procedure is constitutional.[407] Thus, in the absence of legislative action, courts have a constitutional duty to operate in ways that protect litigants (especially criminal defendants), gird against erosion of their own legitimacy, and further the constitutional interests of the communities in which they operate.[408] A trial court would be well within its discretion to require a similar procedure to the proposed amendment described above.[409] A court could simply ask litigants to place an affirmative reason for each juror they have agreed upon with each juror's biographical information on the record. This has two significant benefits.

First, it ensures that there is a record created if there is new evidence later discovered that unveils discriminatory practices. In many of the example cases there are unique features that allow an appellate court to catch the agreements—an attorney stating it explicitly in open court, for example.[410]

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401. *See* discussion *supra* Section II.B.1.c (arguing the applicable burden of proof is preponderance of the evidence).

402. *See supra* notes 393–401 and accompanying text (explaining a new structure to fix the article).

403. *See* discussion *supra* notes 399–401 and accompanying text (applying a new framework for the applicable burden of proof).

404. *See* discussion *supra* Part IV (addressing the existing concerns with the juror-excusal agreement framework).

405. *See, e.g.*, Tex. S.B. 14, 88th Leg., R.S. (2023); Tex. S.B. 8, 87th Leg., R.S. (2021) (addressing transgender policy and access to abortions).

406. *See* Smith v. Robbins, 528 U.S. 259, 272–76 (2000) (providing that each state remains authorized to "craft procedures that . . . are superior to, or at least as good as," the approved framework, so long as equivalent "assurance" is provided that constitutional rights will be protected).

407. *Id.*

408. *See id.*

409. *See* discussion *supra* notes 393–95 and accompanying text (proposing an amendment to the existing framework).

410. *See Irsan* Brief, *supra* note 117, at 39–40.

However, the lack of on-the-record discussion or explanation all but guarantees that no empirical research can be done on this practice. Because the practice is by its very nature an off-the-record, efficiency-oriented practice, there is no way to tell how many times attorneys have conspired to vitiate jury proceedings with constitutionally impermissible agreements.[411] While it will be inevitable that some courts will continue to rubber-stamp[412] the parties' agreements—as is the common practice now—the information being in the record provides a meaningful opportunity for review in appellate courts, on collateral review, and by empiricists studying the way the agreements tend to operate.[413] If there is no change to the practice of juror-excusal agreements other than the creation of a record, there is already immeasurable improvement.

Second, it could ensure that there is a single reason that both parties' assent to. In the absence of this reason, it could very well be the case that while one party, for example, may not want black women on the jury, the other party is agreeing to remove all black women because the first party also agreed to remove all Hispanic men. In this hypothetical, the parties to the agreement do not share a single motivation for each juror which would make it exceedingly difficult to meet the discriminatory intent showing for both parties.[414] However, if the court required the parties to provide a single reason, it would require them to provide one that is both race-neutral and plausible for them to agree on. This would significantly limit the number of facially race-neutral but functionally absurd reasons that could be given.

Again, these proffered solutions will likely reduce the number of juror-excusal agreements by a fairly significant margin, especially in the cases where the pools comprise of over 800 potential jurors.[415] However, these cases are also the ones where the sheer number of jurors excused by agreement make it that much easier for the parties to hide their discriminatory intentions from the court—potentially even from the other party.[416] Thus, the cooling effect would simply push the litigants to work through the jury pool as it is available and any challenges would be in the form of peremptory or for-cause, the kinds with which courts are well-versed in addressing.[417]

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411. *See* Irsan v. State, No. AP-77,082, 2020 WL 5033440, at *1 (Tex. Crim. App. Aug. 25, 2020) (per curiam).

412. Jordan M. Steiker et al., *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 HOUS. L. REV. 889, 922 (2018) (outlining the practice of state habeas judges summarily adopting the states of facts by the state, often without even reading the other briefs).

413. *See id.*

414. *See* discussion *supra* Section II.B and Part III (explaining the impact of the applicable burden of proof).

415. *See* Wilson v. Cockrell, 75 F. App'x 983, at *3 (5th Cir. 2003).

416. *See id.*

417. *See id.*

VI. CONCLUSION

"The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."[418] Despite what a justifiable reading of Texas Code of Criminal Procedure Article 35.05 might suggest, there are inherent constitutional limits to the juror-excusal agreements that have become ubiquitous in Texas and around the country. These agreements ostensibly serve the interests of efficiency in trial and judicial economy, but they cannot do so at the expense of the fundamental constitutional rights to due process and equal protection.

When jurors are discriminated against in voir dire proceedings, not only does it violate the jurors' right to be free of discrimination from state actors, but it also vitiates the trial for the present defendant and degrades the communities' trust in the courts and power structures that govern it.[419] Juror excusal agreements are chronically under-acknowledged and need a significant overhaul of the processes regulating them to ensure that they do not violate the constitutional rights of jurors and defendants.[420] If the current practices of juror excusal agreements continue as they have, without any meaningful regulation or scrutiny, the state and its courts become passive participants in invidious discrimination—making "affixed by the law, an assertion of their inferiority."[421] Thus, in order to ensure that modern jury selection respects its constitutional limits, some requirements must be imposed.[422] Those requirements could take any one of several forms: the legislature can act to regulate the practice to protect the constitutional rights of the vulnerable parties involved, or the courts must affirmatively act to ensure that the substance of the agreements they approve of do not run afoul of constitutional obligations.

In Texas, Article 35.05 operates without any protocol protecting jurors or trial courts from being subject to racial discrimination.[423] The practice of juror-excusal agreements under Article 35.05, as they exist now, are ripe with discriminatory opportunity.[424] Without meaningful steps to regulate or scrutinize the practice, trial courts and venirepersons can never be confident in the constitutionality of even seemingly run-of-the-mill proceedings. States and courts have an obligation to act affirmatively to root out the insidious and often hidden discriminatory agreements that otherwise will go unregulated and unchecked.

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418. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

419. *See* discussion *supra* Section V.A (establishing the harm caused by discriminatory practices in voir dire proceedings).

420. *See* discussion *supra* Section V.B (explaining the shortcomings of the juror-excusal agreements).

421. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

422. *Id.*

423. TEX. CRIM. PROC. CODE § 35.05.

424. *See id.* (explaining the existing juror-excusal agreements).