THE END OF PURPOSEFUL DISCRIMINATION: THE SHIFT TO AN OBJECTIVE *BATSON* STANDARD

Abstract: In *Batson v. Kentucky*, the U.S. Supreme Court instituted a three-step analysis to prohibit the discriminatory use of peremptory challenges in jury selection. Many courts and advocates have criticized that analysis as confusing, ineffective, and impervious to implicit discrimination. As a result, courts have modified the *Batson* analysis many times in its thirty-year history. Since 2018, however, numerous state courts adopted a reformed *Batson* standard that fundamentally changes the use of peremptory challenges. Most significantly, the rule lowers the prima facie showing of discrimination at step one, lists "presumptively invalid" justifications for challenges at step two, and requires courts to determine only if "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge" at step three. Other state courts are using jury selection task forces to consider if they should adopt the objective *Batson* standard in their jurisdiction. This Note analyzes the recent *Batson* reforms in Washington, California, and Connecticut, the earliest states to adopt a version of the objective *Batson* standard, and argues that, despite the efficacy of the objective observer standard in eliminating some discriminatory challenges, it poses significant burdens on litigants, courts, and communities at large. As an alternative to that standard, this Note concludes that jurisdictions should instead abolish the use of peremptory challenges outright and engage in comprehensive jury reform, including public jury selection databases, more precise juror summoning, and targeted juror outreach and education efforts to systemically underrepresented communities.

INTRODUCTION

Over twenty-three years, Mississippi tried Curtis Flowers, a Black man, six times for the same murders; combined, the government used peremptory challenges to remove all but one of the forty-two Black jurors before them.[1] In 2019, the U.S. Supreme Court in *Flowers v. Mississippi* overturned his conviction because the Court found the prosecutor's purpose for using peremptory

[1] Flowers v. Mississippi, 139 S. Ct. 2228, 2234–35 (2019); Nicholas Bogel-Burroughs, *After 6 Murder Trials and Nearly 24 Years, Charges Dropped Against Curtis Flowers*, N.Y. TIMES (Sept. 5, 2021), https://www.nytimes.com/2020/09/04/us/after-6-murder-trials-and-nearly-24-years-charges-dropped-against-curtis-flowers.html [https://perma.cc/A9UT-CQYK]. In the second and third trials, the prosecutor used race-based peremptory challenges to remove Black jurors during jury selection, which is unconstitutional under *Batson v. Kentucky*. *Flowers*, 139 S. Ct. at 2235; *see* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that "the Equal Protection Clause forbids . . . challeng[ing] potential jurors solely on account of their race"). This conduct resulted in the Mississippi Supreme Court reversing both of those convictions. *Flowers*, 139 S. Ct. at 2235.

challenges against Black jurors was to discriminate by race.[2] Writing for the majority in *Flowers*, Justice Brett M. Kavanaugh described a "relentless, determined effort" by the prosecutor to eliminate as many Black jurors from the jury as possible.[3] That relentless effort to exclude Black citizens from serving on juries has existed since the first trial in the United States.[4] Although the Civil Rights Act of 1875 and subsequent U.S. Supreme Court decisions prohibit lawyers from explicitly discriminating by race when selecting a jury, discrimination persists nonetheless through peremptory challenges, which allow a lawyer to strike a prospective juror from the jury without cause or justification.[5]

In 1986, the Court in *Batson v. Kentucky* established a three-step analysis to determine if purposeful discrimination motivated a peremptory challenge.[6] First, the party opposing the peremptory challenge must make a prima facie case of discrimination; second, the party utilizing the peremptory challenge must provide a race-neutral reason for the challenge; and third, after considering the totality of the circumstances the judge determines if purposeful discrimination motivated the proponent of the peremptory challenge.[7] Justice Thurgood Marshall agreed with the majority's holding in *Batson* but argued in a concurring opinion that the three-step analysis had two core flaws: (1) a lawyer who intends to discriminate purposefully could easily provide an unprejudiced reason for the strike; and (2) a lawyer who does not intentionally discriminate may still be consciously, or unconsciously, motivated by discriminatory reasons.[8] These flaws led Justice Marshall to argue that lawyers should be prohibited from using peremptory challenges in criminal trials.[9]

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[2] *Flowers*, 139 S. Ct. at 2235; Bogel-Burroughs, *supra* note 1.

[3] *Flowers*, 139 S. Ct. at 2246; *see* Bogel-Burroughs, *supra* note 1 (quoting Justice Brett M. Kavanaugh's characterization of the prosecutor's conduct in *Flowers*).

[4] *See* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910 (2004) (noting that 1860 was likely the first year a Black citizen ever sat on a jury); *infra* notes 55–79 and accompanying text (describing the history of racial discrimination in jury selection).

[5] *Flowers*, 139 S. Ct. at 2235; *see infra* notes 61–79 and accompanying text (describing legislative action in the mid-nineteenth century to end racial discrimination in jury selection and the subsequent role of peremptory challenges in continuing that discrimination).

[6] *Batson*, 476 U.S. at 96–98.

[7] *Id.* Although *Batson* only focused on racial discrimination, subsequent Court decisions have extended its protections to other groups and modified different steps in the analysis; for a discussion of the current state of the law, see *infra* Part I.C.

[8] *Batson*, 476 U.S. at 106 (Marshall, J., concurring). Justice Thurgood Marshall also argued that a judge's ruling on a peremptory challenge could similarly be distorted by "conscious or unconscious racism." *Id.*; *see* Annie Sloan, Note, *"What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 239–41 (2020) (describing Justice Marshall's arguments in his concurring opinion).

[9] *Batson*, 476 U.S. at 107; *see* Sloan, *supra* note 8, at 241 (noting Justice Marshall's argument to abolish peremptory challenges).

In the decades since Justice Marshall's concurrence, courts continue to identify those same flaws in the application of *Batson*.[10] Developments in cognitive science also affirmed his concerns about the role that unconscious bias plays in decision-making.[11] In 2018, the Washington Supreme Court addressed what it saw as an ineffective *Batson* framework and adopted a new *Batson* rule that, among other changes, prohibited peremptory challenges under an objective standard; this Note refers to the new framework as the "objective observer regime."[12] Since Washington adopted this new rule, an increasing number of state courts and/or legislatures are considering, or adopting, some form of the objective *Batson* rule.[13] Most of these states are doing so through jury selection task forces that comprehensively study any jury selection disparities in their jurisdiction and recommend reforms to their judiciary.[14] The composition and deliberation of each task force has varied in its form, substance, and impact.[15]

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[10] *E.g.*, Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) ("I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole."); State v. Holmes, 221 A.3d 407, 411 (Conn. 2019) ("From its inception . . . *Batson* . . . has been roundly criticized . . . largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors.") (citation omitted); State v. Jefferson, 429 P.3d 467, 476 (Wash. 2018) (identifying "*Batson*'s main deficiencies" as "(1) . . . mak[ing] 'it very difficult . . . to prove [purposeful] discrimination even where it almost certainly exists' and (2) [its] fail[ure] to address peremptory strikes due to implicit or unconscious bias, as opposed to purposeful race discrimination." (footnote omitted) (quoting City of Seattle v. Erickson, 398 P.3d 1124, 1132 (Wash. 2017))); *see* Sloan, *supra* note 8, at 239–41 (observing that Justice Marshall's skepticisms of *Batson* have been confirmed over the framework's decades-long history and noting recent suggestions by members of the Court to abolish peremptory challenges).

[11] *See* Anthony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160–61, 187–88 (2005) (presenting an overview of decision-making in the brain and discussing how implicit bias shapes those decisions); discussion *infra* Part I.E (discussing the science of implicit bias and how courts have applied its findings to *Batson*).

[12] WASH. CT. GEN. R. 37(e) (adopting a standard that establishes a peremptory challenge is impermissible if "an objective observer could view race or ethnicity as a factor in the use of the . . . challenge"). The rule effectively eliminates any step one threshold, provides a list of "[r]easons [p]resumptively [i]nvalid" if offered at step two, and implements additional requirements for justifying a strike based on a jurors' conduct. *Id.* 37(c), (h), (i); *see infra* notes 195–200 (providing an in-depth discussion of the Washington rule).

[13] *E.g.*, CAL. CIV. PROC. CODE § 231.7(d)(1) (West 2020) (adopting a standard that establishes a peremptory challenge is impermissible if "there is a substantial likelihood that an objectively reasonable person would view race [or other identities] . . . as a factor in the use of the peremptory challenge"); *see* WASH. CT. GEN. R. 37(e); *infra* notes 119–120 and accompanying text (discussing the states that have expressed interest in reforming *Batson* and those that have formed task forces to study these reforms).

[14] *E.g.*, State v. Holmes, 221 A.3d 407, 436–37 (Conn. 2019) (establishing Connecticut's task force for "propos[ing] necessary solutions to the jury selection process in Connecticut"); *see infra* note 120 and accompanying text (noting the states that have established task forces).

[15] *See* discussion *infra* Part III.A–C (discussing the jury selection task forces in Washington, California, and Connecticut).

To better understand this new *Batson* rule, this Note studies the debates and compromises of the task forces, legislatures, and judiciaries of Washington, California, and Connecticut—three states that have adopted or proposed an objective *Batson* rule.[16] It also analyzes the handful of cases from courts

[16] *See infra* Part II. Although some states use the term "work group" rather than "task force," this Note uses the term "task force" to refer broadly to groups studying jury selection. *E.g.*, Order, In the Matter of the Proposed New Rule 37—Jury Selection, (No. 25700-A-1221 (Wash. Apr. 5, 2018) [hereinafter Wash. GR 37 Order] (promulgating the recommendation of the Washington "Jury Selection Workgroup"). When this Note discusses a specific state's group it will use the group's designation (task force or work group). Additionally, the scope of this Note is confined to Washington, California, and Connecticut because they are, respectively, the earliest and most developed case studies of the development and implementation of this rule. *See infra* Part II. This Note, however, will reference reforms in other states when they are relevant and significant. *See infra* note 324 and accompanying text (discussing Arizona Supreme Court's ordering abolishing peremptory challenges). Because the pace of *Batson* reform across different states has increased considerably within the last year, this Note will not provide a full accounting of those reforms. *See infra* and accompanying text (presenting *Batson* reforms in different states within the last few years).

As of September 30, 2021, a number of additional states will have considered adopting some version of the modified *Batson* framework introduced by the Washington Supreme Court's General Rule 37 (GR 37), which this Note refers to as the "objective observer regime." WASH. CT. GEN. R. 37. These states are: (1) Arizona (the Arizona Supreme Court rejected a proposed rule that was similar to the objective observer regime and adopted a rule that abolishes peremptory challenges in civil and criminal cases, effective January 1, 2022); (2) Colorado (the Colorado Supreme Court rejected a proposed rule change that would adopt the objective observer regime); (3) Kansas (the state bar association plans to lobby the state legislature to adopt an objective observer standard in 2021); (4) Massachusetts (the Massachusetts Legislature is considering a bill to adopt an objective observer regime); (5) Mississippi (the Mississippi Legislature considered, but did not adopt, a bill that would have adopted the objective observer regime); (6) New Jersey (the Supreme Court of New Jersey established a judicial commission to study "the nature of discrimination in the jury selection process" and adopted the objective observer regime's list of presumptively invalid reasons into their state's *Batson* doctrine); (7) New York (the New York State Justice Task Force established the Jury Selection Working Group which is "actively analyzing [the objective observer regime]" and the New York State Legislature is considering legislation that prohibits peremptory challenges in criminal trials); (8) North Carolina (the North Carolina Task Force for Racial Equity in Criminal Justice recommended that the state supreme court adopt a rule that implements the objective observer regime); and (9) Utah (the Supreme Court of Utah asked their rules committee to review their *Batson* doctrine and noted that other states, such as Washington and California, have accomplished *Batson* reform through rule changes). Order, In the Matter of Rules 18.4 & 18.5, Rules of Criminal Procedure & Rule 47(e), of the Arizona Rules of Civil Procedure, No. R-21-0020 (Ariz. filed Aug. 30, 2021) [hereinafter Sup. Ct. of Ariz. Order] (adopting rule changes that abolish peremptory challenges); AMENDED MINUTES, ARIZONA SUPREME COURT 13 (Aug. 24, 2021), https://www.azcourts.gov/Portals/20/2021%20Rules/Amended%20Rules%20Minutes_082421.pdf?ver=2021-08-31-172413-260 [https://perma.cc/42BM-42WX] (rejecting a proposed rule that is similar to the objective observer regime); In the Matter of Petition to Amend Rules 18.4 & 18.5 of Rules of Criminal Procedure & Rule 47(e) of the Arizona Rules of Civil Procedure, No. R-21-0020 app. A (Ariz. proposed Jan. 11, 2021), https://www.azcourts.gov/Rules-Forum/aft/1208 [https://perma.cc/KHQ8-HKA6] (proposing the abolition of peremptory challenges); Petition to Amend the Arizona Rules of Supreme Court to Adopt New Rule 24 on Jury Selection, R-21-0008 app. A, at 1–5 (proposed Jan. 8, 2021), https://www.azcourts.gov/Rules-Forum/aft/1196 (proposing a rule that is similar to the objective observer regime); Thy Vo, *Racial Discrimination Still Exists in Jury Selection. Colorado's Supreme Court Rejected a Proposal Meant to Fix That.*, COLO. SUN. (July 21, 2021), https://coloradosun.com/2021/07/21/racism-jury-selection-colorado-supreme-court/ [https://perma.cc/YLK3-MYQ7]; *Jury Pool*, ACLU KAN. (May 10, 2021), https://www.aclukansas.org/en/

that have reviewed *Batson* objections under the objective observer regime.[17] This piece further identifies the proposed reforms to *Batson*, arguing that jurisdictions should: (1) abolish peremptory challenges; and (2) engage in comprehensive jury selection reform.[18] Part I of this Note discusses the role of peremptory challenges in jury selection and its history as a method for discrimination, the *Batson* decision and its extension to other groups, and the role of implicit bias in decision-making.[19] Part II outlines the unique task force approaches of the three earliest states to modify their *Batson* framework.[20] Finally, Part III argues that the objective observer standard creates significant burdens on numerous parties and recommends instead that jurisdictions instead abolish peremptory challenges and engage in comprehensive jury selection reform.[21]

I. THE AMERICAN JURY

Jury trials were an entitlement of the American people in 1776; in 1791, the Sixth and Seventh Amendments enshrined those rights in the U.S. Constitution.[22] Around a half-century after that Amendment's ratification, Alexis de Tocqueville wrote that the American jury was principally a "political institu-

publications/jury-pool [https://perma.cc/TBR7-YSQ3]; S. 918, 192d Gen. Ct., Reg. Sess. (Mass. 2021); Brian A. Wilson, *Rethinking* Batson-Soares, BOS. BAR J. (June 28, 2021), https://bostonbarjournal.com/2021/06/28/rethinking-batson-soares/#_ednref13 [https://perma.cc/5QYB-MTUS#_ednref13]; S.B. 2211, 2021 Leg., Reg. Sess. (Miss. 2021); State v. Andujar, 254 A.3d 606, 626, 631 (N.J. 2021); S. 6066, 2021-2022 Leg., Reg. Sess. (N.Y. 2021) (providing the state senate version of the bill); Assemb. 8010, 2021-2022 Leg., Reg. Sess. (N.Y. 2021) (providing the assembly version of the bill); Carmen Beauchamp Ciparick & Deborah A. Kaplan, *'*Batson*' Review Already Underway by Chief Judge's Justice Task Force*, N.Y. L.J (Apr. 12, 2021), https://www.law.com/newyorklawjournal/2021/04/12/batson-review-already-underway-by-chief-judges-justice-task-force/ [https://perma.cc/BSN4-RUFY]; NORTH CAROLINA TASK FORCE FOR RACIAL EQUALITY IN CRIMINAL JUSTICE: REPORT 2020, at 102 (2020), https://ncdoj.gov/wp-content/uploads/2020/12/TRECReportFinal_12132020.pdf [https://perma.cc/K23L-DCGX]; *see* Batson *Reform: State by State*, BERKELEY L., https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ [https://perma.cc/3HAR-SZM9] (cataloging the status of *Batson* reforms throughout the country); State v. Aziakanou, No. 20180284, 2021 WL 4468427, at *14 & n.12 (Utah Sept. 30, 2021). The Berkeley Law Death Penalty Clinic maintains an active database that monitors *Batson* reform efforts in different states. Batson *Reform: State by State*, *supra*.

[17] *See infra* notes 289–297 and accompanying text.

[18] *See infra* notes 22–334 and accompanying text.

[19] *See infra* notes 22–169 and accompanying text.

[20] *See infra* notes 170–297 and accompanying text.

[21] *See infra* notes 298–334 and accompanying text.

[22] U.S. CONST. amend. VI (guaranteeing the right to a jury trial in criminal prosecutions); U.S. CONST. amend. VII (ensuring the right to a jury trial in civil cases); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 67 (Touchstone, 3d ed. 2005); *see* Bute v. Illinois, 333 U.S. 640, 650 (1948) (noting that the Bill of Rights was ratified in 1791); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (noting that "juries were at the heart of the Bill of Rights"). Eleven of the thirteen colonies adopted state constitutions by 1780; eight of those constitutions provided the right of jury trials. DENNIS HALE, THE JURY IN AMERICA 66–67 (2016).

tion," rather than a mere "judicial institution."[23] He observed that the jury functions as a form of popular sovereignty because it executes the laws created by the legislature; by permitting jurors to judge violations of the law, the power shifts away from the aristocracy and toward the citizenry.[24] Those called for jury service, Tocqueville argued, must represent a genuine cross-section of the community to ensure a "stable and uniform" government.[25] Moreover, he believed that jury service operates as a political function for the individual juror because it fosters "respect for judicial decisions and the idea of law," functions he thought were essential to a democratic citizen.[26] Tocqueville's insights remain relevant and insightful well over a century after he wrote them, as the American legal system now works to dismantle systemic discrimination from jury service.[27]

The process of jury selection varies among federal and state jurisdictions but all share a basic process.[28] First, a group of potential jurors, called the "ve-

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[23] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 311, 315 (Olivier Zunz ed., Arthur Goldhammer trans., The Library of America 2004) (1835); *see* HALE, *supra* note 22, at 89–90 (discussing Tocqueville's argument that the jury serves multiple functions in American civic life).

[24] TOCQUEVILLE, *supra* note 23, at 314–15 ("The man who judges in *criminal* cases is therefore the true master of society."); *see also* HALE, *supra* note 22, at 90 (describing Tocqueville's arguments about the "political consequence[s]" of juries). Tocqueville compared this function of popular sovereignty to England, where jurors are drawn from the aristocracy: "The aristocracy makes the laws, enforces the laws, and judges infractions of the laws." TOCQUEVILLE, *supra* note 23, at 314 (footnote omitted); *see also* HALE *supra*, note 22, at 90–91 (describing Tocqueville's distinction between American and English juries).

[25] TOCQUEVILLE, *supra* note 23, at 315 ("[I]f society is to be governed in a stable and uniform way, jury lists must expand and contract with voter lists. In my opinion, this should always be the lawmaker's primary focus.").

[26] *See id.* at 316. Most modern Americans agree with Tocqueville's view of jury service: a PEW Research Center (PEW) study showed 67% of Americans believe jury service "is part of what it means to be a good citizen." PEW RSCH. CTR., PUBLIC SUPPORTS AIM OF MAKING IT 'EASY' FOR ALL CITIZENS TO VOTE 8 (2017), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2017/06/06-28-17-Voting-release.pdf [https://perma.cc/9KSB-KLPB]; *see* John Gramlich, *Jury Duty Is Rare, but Most Americans See It as Part of Good Citizenship*, PEW RSCH. CTR. (Aug. 24, 2017), https://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship/ [https://perma.cc/C3QP-RNWP] (reporting on the findings from a 2017 PEW study on jury duty).

[27] *See infra* notes 46–169 and accompanying text (describing the history of racial and gender discrimination in the American jury, and legislative, judicial, and executive efforts to remedy that discrimination).

[28] *See Steps in a Trial: Selecting the Jury*, A.B.A (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/ [https://perma.cc/A4BF-BXFJ] (describing the general procedures of jury selection). *Compare* 28 U.S.C. § 1863 (permitting each district court to create their own jury selection plan), *with* 705 ILL. COMP. STAT. ANN. 310/2 (2020) (sourcing master juror list from lists of "all Illinois driver's license, Illinois Identification Card, and Illinois Person with a Disability Identification Card holders, all claimants for unemployment insurance, and all registered voters"), *and* TEX. GOVT. CODE ANN. § 62.001(a) (West 2020) (compiling master juror list from "current voter registration lists" and lists of citizens who "hold a valid . . . driver's license or a valid personal identification card").

nire" or "jury pool," are summoned to the courthouse for jury duty.[29] Most jurisdictions select members of the venire from a list composed of registered voters and/or licensed drivers, often referred to as a master juror list.[30] Each member of the venire must satisfy a set of statutory requirements to be a juror, which varies by jurisdiction, but generally limits service by age, citizenship status, or criminal history.[31] Second, the clerk tentatively seats the required number of jurors, and the judge and/or the lawyers in the case question each potential juror about any potential bias or disqualification under the statutory requirements, a process called voir dire.[32] After voir dire, a lawyer may ask to remove a juror for cause if they believe the juror is biased.[33] A lawyer may also remove a juror by using a peremptory challenge, which permits a lawyer to remove a juror without stating a reason for the strike.[34] Once all the seats on the jury are filled, they are called the petit jury or the trial jury, and hear the case.[35]

Using a peremptory challenge to remove a juror because of their race or gender violates the Equal Protection Clause because it denies the prospective juror equal treatment under the law.[36] Those prohibitions, however, only came

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[29] *Steps in a Trial: The Jury Pool*, A.B.A (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jurypool/ [https://perma.cc/CA2F-GFDW].

[30] *Id.*; *see, e.g.*, *Learn About the Massachusetts Jury System*, MASS.GOV, https://www.mass.gov/info-details/learn-about-the-massachusetts-jury-system [https://perma.cc/Q28C-7UBS] (Apr. 25, 2018) (calling their list of potential jurors the "Master Juror List").

[31] 28 USC § 1865(b) (limiting the requirements for jury service by age, residency in the jurisdiction, citizenship, proficiency in English, mental or physical ability, and felon status); *Steps in a Trial: The Jury Pool*, *supra* note 29 (noting that jurisdictions cull the master juror list of prospective jurors who fail to meet the statutory requirements for jury service).

[32] *Steps in a Trial: Selecting the Jury*, *supra* note 28. In *J.E.B. v. Alabama ex rel. T.B.*, the Court described voir dire's purpose as "a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." 511 U.S. 127, 143–44 (1994). Massachusetts, for example, requires the court to question a prospective juror to "learn whether he is related to either party, has any interest in the case, has expressed or formed an opinion, or is sensible of any bias or prejudice." MASS. R. CRIM. P. 20(b)(1).

[33] *Steps in a Trial: Selecting the Jury*, *supra* note 28. A lawyer may raise as many for cause objections as they wish. *Id.* A lawyer must also articulate their reason for objecting to a juror for cause. MASS. R. CRIM. P. 20(b)(3).

[34] *Steps in a Trial: Selecting the Jury, supra* note 28; *see infra* notes 46–54 and accompanying text (discussing the adoption of peremptory challenges from English common law, its purpose as a tool to remove jurors without providing an explanation, and its potential to be used in a discriminatory manner).

[35] *Steps in a Trial: Selecting the Jury*, *supra* note 28; *Jury*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining petit jury as "[a] jury (usu[ally] consisting of 6 or 12 person) summoned and empaneled in the trial of a specific case").

[36] *J.E.B.*, 511 U.S. at 130–31; Batson v. Kentucky, 476 U.S. 79, 89 (1986); *see* Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (suggesting that "national origin" could be a cognizable group within *Batson*'s scope); Daniel Edwards, *The Evolving Debate Over* Batson*'s Procedures for Peremptory Challenges*, NAT'L ASS'N OF ATTORNEYS GEN. (Apr. 14, 2020), https://www.naag.org/civil-law/attorney-general-journal/the-evolving-debate-over-batsons-procedures-for-

about in the late-twentieth century, after a centuries-long practice of excluding jurors based on race or gender.[37]

Part I documents how the United States systematically excluded groups of citizens from jury service, and the efforts of courts and legislatures to exacerbate, or remedy, that discrimination.[38] Section A of this Part discusses the history, function, and criticisms of the peremptory challenge.[39] Section B catalogs the history of discrimination in jury selection.[40] Section C discusses the Court's decision in *Batson v. Kentucky* and its modern framework.[41] Section D discusses the Court's extension of *Batson* to civil cases and other discrete groups.[42] Section E considers the role of implicit bias in decision-making.[43] Section F presents various reform efforts within the *Batson* framework.[44] Finally, Section G considers comprehensive reform efforts outside of the *Batson* framework.[45]

A. Peremptory Challenges

Peremptory challenges—adopted from English common law—allow a lawyer to remove a juror without cause or explanation.[46] They have been a part of the American trial, in some form, since at least 1790.[47] Each jurisdiction sets the number of peremptory challenges a party is allowed.[48] Their use is prem-

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peremptory-challenges/ [https://perma.cc/TY7Z-N9FM] (describing permissible and impermissible uses of peremptory challenges).

[37] *See J.E.B.*, 511 U.S. at 130–31 (holding that gender-based peremptory challenges were unconstitutional in 1991); *Batson*, 476 U.S. at 89 (overruling *Swain v. Alabama* and lowering the threshold to show purposeful discrimination in peremptory challenges). Before *Batson*, a defendant had to show that a prosecutor not only used peremptory challenges in a discriminatory manner during their trial, but also in other, unrelated trials; the *Batson* Court described this standard as "a crippling burden of proof." *Batson*, 476 U.S. at 92; Swain v. Alabama, 380 U.S. 202, 223–24 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

[38] *See infra* notes 46–169 and accompanying text.

[39] *See infra* notes 46–54 and accompanying text.

[40] *See infra* notes 55–79 and accompanying text.

[41] *See infra* notes 80–91 and accompanying text.

[42] *See infra* notes 92–112 and accompanying text.

[43] *See infra* notes 113–120 and accompanying text.

[44] *See infra* notes 121–136 and accompanying text.

[45] *See infra* notes 137–169 and accompanying text.

[46] Swain v. Alabama, 380 U.S. 202, 212–14 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). Historians believe peremptory challenges were first used in Rome. *Batson*, 476 U.S. at 119 (Burger, C.J., dissenting) (referencing historical evidence that parties could use peremptory challenges in Roman trials (citing WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 175 (1852))); *see also* Page, *supra* note 11, at 156 n.2 (commenting on the ancient roots of peremptory challenges).

[47] *Swain*, 380 U.S. at 214 (noting that in 1790 Congress provided a defendant with peremptory challenges in trials for certain crimes); Page, *supra* note 11, at 157 (same).

[48] *E.g.*, FED. R. CRIM. P. 24(b) (providing the parties a designated number of peremptory challenges depending on the term of imprisonment for the offense charged).

ised on the assumption that parties will remove potentially biased jurors.[49] Moreover, litigants become more confident in the impartiality of the jury when they can strike jurors that they perceive as biased against them.[50] If, however, a lawyer is perceived as discriminating against a discrete group by striking them from the jury, the perception of impartiality is greatly diminished for the opposing party and the public.[51] Those who believe peremptory challenges will always permit this purposeful discrimination have long called for their abolition.[52] Within the last five years or so, an increasing number of state supreme

[49] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (noting that the "sole purpose [of peremptory challenges] is to permit litigants to assist the government in the selection of an impartial trier of fact"); *Swain*, 380 U.S. at 219.

[50] *See Swain*, 380 U.S. at 219 (describing that a "function of the challenge is . . . to assure the parties that the jurors . . . will decide [the case] on . . . evidence placed before them"). The Court in *Swain* noted that peremptory challenges allow a lawyer to challenge a juror "for a real or imagined partiality that is less easily designated or demonstrable," while challenges for cause require an articulable legal basis to strike the juror successfully. *Id.* at 220 (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887)). William Blackstone characterized peremptory challenges as "an arbitrary and capricious species of challenge" that is justified, in part, because of the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." *Swain*, 380 U.S. at 242 (Goldberg, J., dissenting) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353).

[51] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994) (noting that "active discrimination by litigants . . . during jury selection 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law'" (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991))). The Court also warned that the public could see "the judicial system [as] acquiesc[ing]" in discrimination if it permits this discrimination. *Id.* at 140.

[52] *See* Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) ("I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole."); Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) ("The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely . . . ."); *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with . . . the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."); *see* Edwards, *supra* note 36 (summarizing the dissenting and concurring opinions expressing the desire to end peremptory challenges). This intergenerational argument has similarly existed in legal scholarship. *See* Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 230 (1986) ("A more equitable legal system would eliminate peremptory challenges . . . ."); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1712 (2006) (arguing that "[t]he next step, supported by a growing number of judges, is to eliminate the peremptory challenge"); L. Darnell Weeden, *Mississippi Allows Peremptory Challenges for Fake, Race-Neutral Reasons in Violation of* Batson*'s Equal Rights Rationale*, 53 SUFFOLK U. L. REV.159, 173 (2020) ("Because *Batson* has not been very useful in combatting discrimination on the basis of race, I join the many commentators who support the abolition of peremptory challenges altogether."); *see also* Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 371 n.5 (2010) (collecting scholarship that argues in favor of eliminating peremptory challenges). It has also existed in other legal systems, such as Canada, which passed a law in June 2019 that eliminated peremptory challenges in response to "growing concern that peremptory challenges were being used to promote discrimination and create juries which did not reflect the Canadian population." Michelle I. Bertrand, Richard Jochelson, Davis Ireland, Kathleen Kerr-Donohue, Inga A. Christianson & Kaitlynd Walker, "*We Have Centuries of Work Undone by a Few Bone-Heads?": A Review of Jury History, a Present Snapshot of Crown and Defence Counsel Per-*

court justices have argued that the most prudent path to eliminating discrimination in jury selection is to eliminate peremptory challenges.[53] Proponents argue that restricting the use of peremptory challenges is antithetical to their purpose of being unencumbered challenges.[54]

B. Race Discrimination in Jury Selection

It is unlikely that a Black citizen ever sat on an American jury until 1860.[55] This Part outlines the use of intimidation, exclusionary juror lists, and peremptory challenges to protect and reinforce racial power in jury selection.[56] Subsection 1 discusses the history of explicit and implicit discrimination in jury selection and the early Supreme Court case law attempting to prohibit that discrimination.[57] Subsection 2 introduces *Batson*, the Supreme Court's modern framework to prevent discrimination.[58] Subsection 3 illustrates the extension of the *Batson* framework to other protected groups.[59] This provides an essential historical and doctrinal background to understand better the current reform efforts.[60]

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spectives on Bill C-75's Elimination of Peremptory Challenges, and Representativeness Issues, 43 MANITOBA L.J. 111, 131 (2020). Arguments for this reform were made repeatedly over decades. *Id.* at 131 (noting that the "Canadian Parliament had been lobbied for decades [to eliminate peremptory challenges]" and doing so "was recommended in the 1991 report of Manitoba's Aboriginal Justice Inquiry").

[53] State v. Holmes, 221 A.3d 407, 439 (Conn. 2019) (Mullins, J., concurring) (arguing for the abolition of peremptory challenges); State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Cady, C.J., concurring) (same); *Veal*, 930 N.W.2d at 340 (Wiggins, J., concurring in part and dissenting in part) (same); Spencer v. State, 149 A.3d 610, 648 (Md. 2016) (McDonald, J., dissenting) (same); State v. Jefferson, 429 P.3d 467, 481 (Wash. 2018) (Yu, J., concurring) (same); *see* Commonwealth v. Sanchez, 151 N.E.3d 404, 425–26 n.19 (Mass. 2020) (reasoning that "[t]here may well be good arguments for [abolishing peremptory challenges]" but declining to address the issue "without full briefing and input from the bar") (citations omitted). As noted in Section C of Part II, Connecticut faces unique constitutional barriers in eliminating peremptory challenges because their state constitution includes them as a right to both parties. *See Holmes*, 221 A.3d at 439 (Mullins, J., concurring) (noting that "outright elimination of the peremptory challenge would raise constitutional concerns"); *supra* note 267 and accompanying text (describing Connecticut's unique constitutional framework).

[54] Flowers v. Mississippi, 139 S. Ct. 2228, 2273 (2019) (Thomas, J., dissenting) (noting a peremptory challenge "must 'be exercised with full freedom, or it fails of its full purpose'" (quoting Lewis v. United States, 146 U.S. 370, 378 (1892))); Georgia v. McCollum, 505 U.S. 42, 70 (1992) (Scalia, J., dissenting) (describing the "ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair"); *see infra* notes 263–271 and accompanying text (presenting the arguments in favor of maintaining peremptory challenges).

[55] Forman, *supra* note 4, at 910; *Learn About the Massachusetts Jury System*, *supra* note 30 (noting that "[i]n 1860, Massachusetts became the first state . . . to bestow the right . . . of jury service on African-American citizens").

[56] *See infra* notes 61–112 and accompanying text.

[57] *See infra* notes 61–79 and accompanying text.

[58] *See infra* notes 80–91 and accompanying text.

[59] *See infra* notes 92–112 and accompanying text.

[60] *See* discussion *infra* Part II (presenting an in-depth analysis of the objective *Batson* regime).

1. The History of Race and Jury Selection

Opposition to Black citizens' service on juries was significant and long-fought.[61] These debates took place amid a period of brutal violence toward Black citizens in the South, largely perpetrated by the Ku Klux Klan.[62] Much of this violence, however, went unpunished because partial juries refused to convict the perpetrators.[63] In response to this jury nullification, Congress passed the Civil Rights Act of 1871 (Ku Klux Act), which in part modified juror qualifications to exclude anyone who conspired to deny any citizen of equal protection of the laws.[64] The Ku Klux Act decreased the number of white jurors who were either sympathizers or members of the Klan and increased the number of Black jurors seated, which led to successful federal prosecutions of Klan members.[65] Encouraged by this success with integrated juries, Congress passed the Civil Rights Act of 1875 (Act of 1875), which criminalized race-based exclusions from jury service.[66] Although the Act of 1875 led to an in-

[61] Forman, *supra* note 4, at 910–11. Proponents of allowing Black citizens to serve as jurors argued that doing so was a natural extension of the Reconstruction Era's promise of equal protection and equitable administration of the laws. *Id.* at 912, 927. Senator Charles Sumner of Massachusetts, a proponent, asked, "How can justice be administered throughout States thronging with colored fellow-citizens unless you have them on the juries?" *Id.* at 895. Opponents argued that Black citizens did not have the intelligence and impartiality to serve on juries, that judgments by all-Black juries against white defendants were not legitimate, and that jury service would eventually lead to broader participation by Black citizens in the justice system. *Id.* at 913–14. Senator Reverdy Johnson of Maryland, for example, questioned the legitimacy of judgments entered against white citizens "pronounced by twelve ignorant black men" who were "without the capacity absolutely necessary to a faithful and intelligent discharge of that duty." *Id.* at 913.

[62] *Id.* at 918, 924. Historians have argued that the total number of people murdered during this post-Civil War period is unknown, but they describe the violence as "reaching epidemic proportions by the late 1860s and early 1870s." *Id.* at 918.

[63] *Id.* at 921. Commentary by judges and politicians at the time affirmed that the nullification of juries, not partial judging, made it difficult to convict the perpetrators of this violence. *Id.* at 921 & n.135. There is also evidence that jury nullification and providing false testimony as a witness were part of the Klansman's oath. *Id.* at 921, 922 n.137. A Klansman is reported as saying that "if we could get on the jury we could save [the defendant]" and that "you could not bring proof enough to convict." *Id.* at 921–22.

[64] Civil Rights Act of 1871 (Ku Klux Act), ch. 22, §§ 2, 5, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. § 1985); Forman, *supra* note 4, at 923. A provision of the Ku Klux Act disqualified any juror who had previously attempted to, "deny to any citizen of the United States the due and equal protection of the laws." Ku Klux Act §§ 2, 5; *see* Forman, *supra* note 4, at 923 (describing Section 5's protections as making ineligible any juror "who had conspired to deny the civil rights of blacks").

[65] Ku Klux Act §§ 2, 5; Forman, *supra* note 4, at 924–25. In 1870, the year before the Act was passed, federal prosecutors secured forty-three convictions of Klan members; in 1872, they secured over 500. Forman, *supra* note 4, at 926. For example, Klan members violently attacked Black citizens throughout South Carolina in 19871 in an episode of violence that historians described as "a savage rampage." *Id.* at 924. Despite the Klan's attempt to remove and intimidate Black jurors, more than half of South Carolina juries that year were composed of Black citizens. *Id.* at 925.

[66] Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335–37 (establishing that participation in race-based exclusions from jury service is a misdemeanor) (codified as amended at 18 U.S.C. § 243); Forman, *supra* note 4, at 930 n.182.

crease in Black participation in jury service in some Southern counties, it was left largely unenforced elsewhere.[67]

In 1873, West Virginia passed a statute that codified what was already de facto law: only white men over twenty-one years of age were qualified for jury service.[68] In 1880, the Supreme Court in *Strauder v. West Virginia* affirmed the promise of the Civil Rights Act of 1875 and held that such race-based exclusions from jury service were unconstitutional and violated the Equal Protection Clause.[69] Although this holding led to the eradication of state statutes that facially discriminated by race, discrimination still persisted under the guise of facially neutral statutes.[70]

By administering facially neutral juror qualification statutes in a discriminatory manner—principally by refusing to call Black citizens for jury service or excluding them for cause—local governments and lawyers continued to exclude systematically Black citizens from juries.[71] More than fifty years after *Strauder*, there were still counties that had never called a Black citizen to serve as a juror.[72] One jury commissioner in Alabama testified that Black citizens were excluded from the county's juror rolls, not on account of their race, but because he knew of no Black citizen who possessed the impartiality and intelligence to be a juror.[73] The Court, in 1935 in *Norris v. Alabama*, held that this categorical exclusion of Black citizens as unqualified for jury service was unconstitutional.[74] Although Black citizens were now being called for jury ser-

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[67] Forman, *supra* note 4, at 930. In the decade following the Civil Rights Act of 1875 (Act of 1875), New Orleans; Washington County, Texas; and Warren County, Mississippi, all saw significant increases in the percentage of Black citizens called for jury service. *Id.* at 930–31. Yet records from some large cities, such as Savannah, Georgia, revealed that the state had not called a single Black citizen for jury service. *Id.* at 931. Not only was the Act of 1875 scarcely enforced, but it was also found unconstitutional less than ten years later. The Civil Rights Cases, 109 U.S. 3, 26 (1883); Forman, *supra* note 4, at 930 n.182.

[68] Act of March 12, 1873, ch. 47, 1872–73 W. Va. Acts. 102, 102 (1874), *invalidated by* Strauder v. West Virginia, 100 U.S. 303, 305, 310 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

[69] *Strauder*, 100 U.S. at 310; *see* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[70] *See* Norris v. Alabama, 294 U.S. 587, 589 (1935) (holding that although a "state statute defining the qualifications of jurors may be fair on its face," discriminatory implementation of the statute is prohibited under the Equal Protection Clause).

[71] *Norris*, 294 U.S. at 591; Michael J. Klarman, *Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the 1940s*, 89 J. AM. HIST. 119, 122, 125 (2002) (noting that *Norris* had little effect in preventing discrimination in many southern states).

[72] *See Norris*, 294 U.S. at 591, 597 (recounting anecdotal evidence that by the mid-1930s some counties in Alabama had never let a Black citizen serve on a jury).

[73] *Id.* at 598–99 ("I do not know of any negro in Morgan County . . . who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment . . . ."); *see supra* note 61 and accompanying text (noting that the proposition that Black citizens are inherently unqualified to serve played a central role in the U.S. Senate debates about permitting Black citizens to participate in jury service).

[74] 294 U.S. at 597, 599.

vice more frequently, the discriminatory use of peremptory challenges still prevented many from being seated as jurors.[75]

Courts struggle to identify when purposeful discrimination motivated a peremptory challenge.[76] Beginning in 1964, in *Swain v. Alabama*, the Court held that an inference of discriminatory use is attached to a peremptory challenge if no Black citizen has been seated in the jurisdiction.[77] That burdensome standard allowed discriminatory strikes to continue, and in 1984, the Court in *Batson* overruled the *Swain* standard and established a more searching purposeful discrimination threshold.[78] The *Batson* standard, and the many subsequent cases that modified its application and scope, have not, however, eradicated racial discrimination in juror selection.[79]

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[75] *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) (discussing the Petitioner's underlying trials in which prosecutors used peremptory challenges to remove all but one of forty-two Black jurors before them); Batson v. Kentucky, 476 U.S. 79, 83 (1986) (noting that the government removed all of the prospective Black jurors through peremptory challenges); Swain v. Alabama, 380 U.S. 202, 223–24 (1965) (holding that the use of peremptory challenges to remove all Black jurors may rebut the presumption of non-discriminatory intent), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986); discussion *supra* Part I.A (discussing the history, function, and criticisms of peremptory challenges).

[76] *Cf. Batson*, 476 U.S. at 96–98 (establishing a three-step framework to determine if purposeful discrimination motivated a peremptory challenge); *Swain*, 380 U.S. at 224 (holding that the presumption of non-discrimination "may well be overcome" if the prosecutor has struck every Black juror in a jurisdiction); *see* discussion *infra* Part I.F. (tracing the different modifications to *Batson* and presenting the various criticisms of that regime's inability to identify purposeful discrimination).

[77] *Swain*, 380 U.S. at 224. The Court held that a judge could draw an inference of purposeful discrimination if a prosecutor, "in case after case . . . is responsible for the removal of Negroes who have been selected as qualified jurors . . . and who have survived challenges for cause, with the result that no Negros ever serve on petit juries." *Id.* at 223; *see also* Sloan, *supra* note 8, at 238 (describing the holding in *Swain*).

[78] *Batson*, 476 U.S. at 96–98; *see* Sloan, *supra* note 8, at 239 (discussing the Court's holding in *Batson* and its substantial changes to jury selection doctrine); *infra* Part I.C. (discussing the current state of the law regarding *Batson*).

[79] *See Batson*, 476 U.S. at 96–98 (establishing the three-part *Batson* analysis); ELISABETH SEMEL, DAGEN DOWNARD, EMMA TOLMAN, ANNE WEIS, DANIELLE CRAIG & CHELSEA HANLOCK & BERKLEY L. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS, at vi (2020). Researchers conducted a study of around seven hundred California Courts of Appeal cases where *Batson* challenges were raised to prosecutors' peremptory challenges between 2006 and 2018. SEMEL ET AL., *supra*, at vi. Their findings showed that those strikes were used disproportionately against people of color: 72% were used to remove Black jurors, 28% were used to remove Latinx jurors, 3.5% were used to remove Asian-American jurors, and 0.5% were used to remove white jurors. *Id.* The most common justification proffered (at step two of the *Batson* inquiry) was the juror's demeanor; the second most common was having a "relationship with someone who had been involved in the criminal legal system." *Id.* They also reported that, out of the 142 cases claiming a *Batson* violation the California Supreme Court has heard over the last thirty years, the court has found a *Batson* violation in only three cases. *Id.* at vii. Similarly, a study analyzing the felony trials in North Carolina in 2011 showed that "prosecutors removed nonwhite jurors at about twice the rate that they did white jurors." Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1419, 1426; *see* Jack Brook, *Racism Tainted Their Trials. Should They Still Be Executed?*, THE MARSHALL PROJECT, Aug. 7, 2019, https://www.themarshallproject.org/2019/08/07/racism-tainted-their-trials-should-they-still-be-executed [https://perma.cc/9X3K-WS6H] (re-

2. *Batson* and Its Modern Framework

In 1986, in *Batson*, the Supreme Court established a three-step analysis that lowered the evidentiary standard required to show discriminatory use of a peremptory challenge.[80] At step one, the party opposing the peremptory challenge must make a prima facie case of discrimination.[81] At step two, the party utilizing the peremptory challenge must then offer a group-neutral reason for their use of the challenge.[82] This stated reason need only be genuine; it does not have to be "persuasive, or even plausible."[83] At step three, the judge considers the totality of the factors and determines if the stated reasons were legitimate.[84] A judge may consider many factors in making that determination.[85]

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porting on a study of death row defendants' trials that showed prosecutors removed "qualified black jurors at twice the rate that they removed non-black jurors").

[80] *Batson*, 476 U.S. at 92–93, 96–98 (describing the evidentiary standard established in *Swain v. Alabama* as "a crippling burden of proof, [making] prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny," and establishing a three-part analysis) (footnote omitted).

[81] Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019); *Batson*, 476 U.S. at 96. As the *Batson* Court noted, the judge should consider the totality of circumstances when determining if a moving party has established a prime facie case of discrimination. 476 U.S. at 96–97. The Court provided a non-exhaustive list of indicators of discrimination, such as a "'pattern' of strikes," or questions asked during voir dire that "support or refute an inference of discriminatory purpose." *Id.* at 97; *see* R. MICHAEL CASSIDY & SUZANNE VALDEZ, PROSECUTORIAL ETHICS 104 n.8 (3d ed. 2019) (noting that "[s]tate and federal courts have taken differing approaches on the issue of what constitutes a 'pattern' of discrimination"); *see also infra* notes 125–130 and accompanying text (presenting courts' varying step one standards).

[82] *Flowers*, 139 S. Ct. at 2241; Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam); *Batson*, 476 U.S. at 98. Although *Batson* held that a "race-neutral" reason was required, many courts describe the standard as requiring a "neutral" reason because the Court subsequently extended the framework to other distinct groups. *Batson*, 476 U.S. at 97; *e.g.*, Commonwealth v. Sanchez, 151 N.E.3d 404, 427 (Mass. 2020) (describing the *Batson* standard as requiring a "group-neutral" reason at step two).

[83] *Purkett*, 514 U.S. at 768–69. Scholars have argued *Purkett v. Elem*'s broad holding has made successfully objecting to a peremptory challenge more difficult. CASSIDY & VALDEZ, *supra* note 81, at 105 (describing *Purkett*'s holding as a "big impediment . . . counsel has to overcome in making a *Batson* challenge"). Like step one, some courts have established a heightened standard beyond *Purkett* that requires the stated reason to be "both 'adequate' and 'genuine.'" *Sanchez*, 151 N.E.3d at 410 (quoting Commonwealth v. Oberle, 69 N.E.3d 993, 1000 (Mass. 2017)); *see* CASSIDY & VALDEZ, *supra* note 81, at 105 (identifying Massachusetts's heightened step two standard).

[84] *Flowers*, 139 S. Ct. at 2241; *Batson*, 476 U.S. at 98. In *Purkett*, the Court cautioned judges to only consider the persuasiveness of the reason at step three no matter how "implausible or fantastic" the explanation. 514 U.S. at 768. The Court reasoned that considering the persuasiveness at step two impermissibly shifts the burden of persuasion to the striking party. *Id.*; CASSIDY & VALDEZ, *supra* note 81, at 105 n.17 (noting *Purkett*'s distinction between the second and third steps of the *Batson* analysis).

[85] Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) (providing the following non-exclusive list of credibility factors: "the [attorney]'s demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy"); *see* Miller-El v. Dretke, 545 U.S. 231, 241, 255 (2005) (holding that disparate questioning of group and non-group members can be evidence of discriminatory intent); CASSIDY & VALDEZ, *supra* note 81, at 104 (noting that a judge has significant discretion in making this determination and may rely on a lawyer's

Courts review *Batson* rulings under a clearly erroneous standard, which is deferential to the trial court's determination.[86] If the appellate court finds the trial court made an error at step one, state and federal courts differ on whether the remedy should be remand or reversal.[87] If, however, the appellate court determines the trial court erred in denying a *Batson* objection at step three, it is a structural error that requires reversal.[88]

Justice Marshall articulated the strongest critique of the standard in his concurring opinion.[89] He argued that a striking party may lie outright as to the actual reason for the strike or be misguided by "unconscious racism" that motivates the genuine, race-neutral reason.[90] Because he believed that peremptory challenges allow racial prejudices to shape the selection of a jury, he urged the Court to eliminate them.[91]

3. *Batson* Extended: Gender, Sexual Orientation, and Religion Affiliation

Although *Batson* initially applied only to the government's peremptory challenges in criminal cases, the Supreme Court extended its reach in several key decisions.[92] Most broadly, in the early 1990s the Court held that *Batson* applied to strikes used by criminal defendants and litigants in civil cases.[93]

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demeanor and conduct at voir dire); Edwards, *supra* note 36 (describing *Miller-El v. Cockrell*'s impact on step three of the *Batson* analysis).

[86] *Flowers*, 139 S. Ct. at 2244 (first citing *Batson*, 476 U.S. at 98 n.21; then citing Snyder v. Louisiana, 552 U.S. 472, 477, 479 (2008)).

[87] *Compare* United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir. 1989) (holding that step one error requires remand to the trial court to continue the *Batson* inquiry), *and* State v. Bennett, 843 S.E.2d 222, 238 (N.C. 2020) (same), *with Sanchez*, 151 N.E.3d at 417 (holding that step one error is structural error and requires reversal).

[88] *E.g.*, MC Winston v. Boatwright, 649 F.3d 618, 628 (7th Cir. 2011); *see* 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 22.3(d) (4th ed. Supp. 2020) (noting that step three *Batson* error is structural).

[89] *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring); *see* Sloan, *supra* note 8, at 239 (describing Justice Marshall's concerns about the efficacy of the *Batson* framework).

[90] *Batson*, 476 U.S. at 106 (arguing that a striking party's demeanor-based explanation, such as a Black juror being "distant," could be motivated by "conscious or unconscious racism"); *see* Sloan, *supra* note 8, at 239–40 (detailing the flaws that Justice Marshall identified in the *Batson* analysis). Justice Marshall also reasoned that "[a] judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported." *Batson*, 476 U.S. at 106.

[91] *Batson*, 476 U.S. at 107; *see* Sloan, *supra* note 8, at 239, 241 (discussing Justice Marshall's argument for abolishing peremptory challenges).

[92] *E.g.*, Georgia v. McCollum, 505 U.S. 42, 59 (1992) (extending *Batson* to peremptory challenges used by criminal defendants); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616, 631 (1991) (extending *Batson* to peremptory challenges used by litigants in civil cases); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (extending *Batson* to prohibit gender-based peremptory challenges).

[93] *McCollum*, 505 U.S. at 59; *Edmonson*, 500 U.S. at 616, 631. *See generally* Sharon Leigh Nelles, Note, *Extending* Batson v. Kentucky *to the Criminal Defendant's Use of the Peremptory Challenge: The Demise of the Challenge Without Cause*, 33 B.C. L. REV. 1081, 1111, 1128–37 (1992) (describing in more detail the Court's holding in *McCollum* and *Edmonson*). Moreover, the Court clarified that a litigant does not have to be the same race as the excluded juror to object to the strike.

Subsequently, the Court extended *Batson* to prohibit gender-based peremptory challenges.[94] In 1994, in *J.E.B. v. Alabama ex rel. T.B.*, the Court held that gender-based discrimination in jury selection violated the Equal Protection Clause because it lacked "an exceedingly persuasive justification."[95] Proponents of gender-based strikes argued that they should be permitted because a juror's gender can bias them, especially in cases where gender is at issue.[96] The Court rejected that argument and held that gender-based strikes harm the litigants' right to an impartial jury, the legitimacy of the judicial system within the community, and the excluded juror's right to equal protection of the laws.[97]

Whether the Court would be willing to extend that logic to sexual orientation-based peremptory challenges is an open question because the Court has

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Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding that "a criminal defendant may object . . . whether or not the defendant and the excluded juror share the same race[]"); *see Edmonson*, 500 U.S. at 618 (summarizing the holding in *Powers*).

[94] *J.E.B.*, 511 U.S. at 129. The prohibition against women serving on juries lasted until the twentieth century when Congress permitted their service in federal court. *Id.* at 131; Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 38 (1992). Women in Wyoming Territory were the exception to the complete ban on jury service in the nineteenth century: they were permitted to serve as jurors from 1870 to 1871. *J.E.B.*, 511 U.S. at 131 n.2. Congress permitted women to serve on juries in federal courts in 1957; prior to this, a woman's ability to serve depended on state law. Forman, *supra*, at 38. In the early-1940s, state law in roughly half the country excluded women from jury service; although most of these laws were repealed by the 1960s, a few states maintained these exclusions. Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1924 (1992). Mississippi, for example, maintained its statute until 1968. Forman, *supra*, at 38 n.18.

[95] 511 U.S. at 136–37, 146. Specifically, the Court's inquiry was whether "peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury." *Id.* at 137. The concept of excluding women from juries was adopted from the English common law on the rationale that women were "too fragile and virginal to withstand the polluted courtroom atmosphere." *Id.* at 132. America's adoption of sex discrimination was generally rooted in what the Court in *Frontiero v. Richardson* called "an attitude of 'romantic paternalism' . . . [which] put women, not on a pedestal, but in a cage." *Id.* at 133 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).

[96] *Id.* at 137–38. For example, proponents argued that men would be biased in favor of the father in a paternity case, and women similarly biased to the mother. *Id.* 137–39. Trial manuals at the time encouraged prosecutors to select women as jurors if the victim was a child or "if you can't win your case with the facts" because women may rely on "their 'women's intuition.'" *Id.* at 138 n.10 (quoting Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 210 (1989)). Another manual cautioned against empaneling women if a lawyer's case needed to be proven through technical "blackboard figures" and the lawyer did not want a verdict based on "intuition" or "sympathy." *Id.* (quoting 3 MELVIN M. BELLI, MODERN TRIALS §§ 51.67, 51.68, at 446–47 (2d ed. 1982)).

[97] *See id.* at 138, 140–42 (citing *Powers*, 499 U.S. at 410). There is limited information on the gender composition of modern juries; a study of the jury composition of all felony trials over a one-year period in North Carolina, however, showed an equal gender distribution in the aggregate number of jurors empaneled. Wright et al., *supra* note 79, at 1427 & n.81; *see infra* note 149 and accompanying text (discussing the study's findings on gender composition in jury selection).

not heard a case that raises the issue.[98] In *J.E.B.*, however, the Court held that a peremptory challenge could be based on group-status if the group receives "rational basis" review under the Equal Protection Clause.[99] That language left unanswered whether *Batson* necessarily extends to a group for whom the court applies a level of scrutiny beyond rational basis review.[100]

Because of this lack of clarity from the Supreme Court, there is no uniform prohibition in federal or state courts against using sexual orientation in exercising a peremptory challenge.[101] The level of scrutiny that applies to sexual orientation is somewhat unclear because *United States v. Windsor*, the seminal case applying the Equal Protection Clause to sexual orientation, never stated the level of scrutiny it applied to sexual orientation.[102] The U.S. Court of

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[98] Kristal Petrovich, Note, *Extending* Batson *to Sexual Orientation: A Look at* Smithkline Beecham Corp. v. Abbott Labs, 2015 U. ILL. L. REV. 1681, 1689 (describing the lack of precedent regarding peremptory challenges based on sexual orientation); Mark E. Wojcik, *Extending* Batson *to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1, 25 (2019) (noting that the Court has not heard a case concerning the constitutionality of peremptory challenges "based on sexual orientation, gender identity, or gender expression").

[99] *J.E.B.*, 511 U.S. at 143 ("Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."); *see* Petrovich, *supra* note 98, at 1689 (discussing *J.E.B.*'s inference that *Batson* would apply to a group if it receives heightened scrutiny).

[100] Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) (noting that *J.E.B.* "did not state definitively whether heightened scrutiny is sufficient to warrant *Batson*'s protection or merely necessary"); Wojcik, *supra* note 98, at 11 (commenting that after "*J.E.B.*, federal courts have held that *Batson* 'prohibits peremptory challenges based on *any* classification that warrants heightened judicial scrutiny'" (quoting SANDY WEINBERG, AM. BAR. ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 108D, at 1 (2018), https://www.abajournal.com/files/2018_hod_midyear_108D.pdf [https://perma.cc/43FD-9VMV])). *See generally* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227–28 (2002) (discussing the different levels of scrutiny and the corresponding analysis courts apply to government action that targets the discrete group). Rational basis review is highly deferential and requires a minimal justification for the unequal treatment of the group. *See Smithkline*, 740 F.3d at 482 (describing rational basis review as "ordinarily unconcerned with the inequality that results from the challenged state action"). For example, in *J.E.B.*, the Court applied "an exceedingly persuasive justification" standard to gender-based peremptory challenges. 511 U.S. at 136. Applying that standard, the Court noted that "the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial." *Id.* at 136–37.

[101] *See* Wojcik, *supra* note 98, at 25–26 (summarizing the varying treatment in federal and state courts).

[102] United States v. Windsor, 570 U.S. 744, 769–70 (2013) (holding that the Defense of Marriage Act was a "law having the purpose and effect of disapproval of [same-sex couples]" but failing to specify the level of scrutiny applied); *see Smithkline*, 740 F.3d at 480 (noting *Windsor*'s silence on the level of scrutiny it applied to sexual orientation); *see* Wojcik, *supra* note 98, at 28 (same). *Smithkline* noted that *Lawrence v. Texas*, an earlier landmark case on the level of scrutiny applied to sexual orientation, was similarly silent on the level of scrutiny it applied. *Smithkline*, 740 F.3d at 480; *see* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that the "statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" but failing to identi-

Appeals for the Ninth Circuit, however, held in *Smithkline Beecham Corp. v. Abbott Laboratories* that sexual orientation requires heightened scrutiny, and therefore *Batson* must be extended to prohibit peremptory challenges that are motivated by a juror's sexual orientation.[103] Strikingly, only two state supreme courts—Massachusetts and Nevada—have held that *Batson* applies to sexual orientation-based peremptory challenges.[104] Numerous state supreme courts have, however, found that sexual orientation requires heightened scrutiny, and a handful of state legislatures have passed laws prohibiting discrimination in jury selection based on sexual orientation.[105] In recent years, there have been efforts within the American Bar Association (ABA),[106] Congress,[107] and nu-

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fy a level of scrutiny applied to the Due Process claim); Wojcik, *supra* note 98, at 28 (noting *Lawrence*'s silence on the level of scrutiny).

[103] *Smithkline*, 740 F.3d at 481, 484.

[104] Commonwealth v. Carter, 172 N.E.3d 367, 372 (Mass. 2021); Morgan v. State, 416 P.3d 212, 224 (Nev. 2018); *see* Rachel Scharf, *LGBTQ Jurors Part of Protected Class, Mass. Justices Say*, LAW360 (Aug. 16, 2021), https://www.law360.com/appellate/articles/1413057?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles [https://perma.cc/MFV8-68Z8] (reporting that Massachusetts and Nevada are the only state supreme courts that have extended *Batson* to sexual orientation).

[105] Wojcik, *supra* note 98, at 21, 25–26 (identifying California, Connecticut, Iowa, and New Mexico as states that apply heightened scrutiny to sexual orientation). California, Colorado, Illinois, Minnesota, Oregon, and Wisconsin all have laws prohibiting jury discrimination based on sexual orientation. *Id.* at 33 & n.248 (identifying states); *see, e.g.*, CAL. CIV. PROC. CODE § 231.7(a) (West 2020) ("A party shall not use a peremptory challenge to remove a prospective juror on the basis of . . . gender identity, sexual orientation . . . or the perceived membership . . . in any of those groups.").

[106] WEINBERG, *supra* note 100, at 16; Wojcik, *supra* note 98, at 30. For example, in 2018 the American Bar Association (ABA) adopted a resolution urging federal and state courts to "extend *Batson* . . . to prohibit discrimination against jurors on the basis of sexual orientation or gender identity/expression." WEINBERG, *supra* note 100; Wojcik, *supra* note 98, at 30 (discussing the A.B.A. resolution). Proponents of the resolution noted a 2001 study that showed "30% of lesbian or gay court users believed those who knew their sexual orientation did not treat them with respect, and 39% believed their sexual orientation was used to lessen their credibility." WEINBERG, *supra* note 100, at 3 (citing JUDICIAL COUNCIL OF THE STATE OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS 13 (2001), https://www.courts.ca.gov/documents/sexualorient_report.pdf [https://perma.cc/VQP7-DTKE]). Proponents' policy arguments parallel the justifications the Court applied to prohibiting race- and gender-based discrimination. WEINBERG, *supra* note 100, at 10–12; Wojcik, *supra* note 98, at 30. The A.B.A. argued that peremptory strikes harm the litigants who may empanel a less partial jury, the community at large—who develop cynicism toward the fair and unbiased principals of the court system and affirm erroneous stereotypes about LGBTQ people—and it offends the dignity of the juror. WEINBERG, *supra* note 100, at 10–12; Wojcik, *supra* note 98, at 30–31.

[107] *See* Jury ACCESS Act, S. 250, 116th Cong. § 2 (2019) (proposing an amendment to a jury selection anti-discrimination law that prohibits exclusion of jurors based on "sexual orientation" or "gender identity"); Wojcik, *supra* note 98, at 31–33 (providing a detailed legislative history of the Jury ACCESS Act and similar legislative efforts in the House of Representatives to pass legislation that prohibits jury discrimination based on sexual orientation or gender identity in federal courts).

merous state legislatures to extend *Batson*'s protection to sexual orientation uniformly throughout courts.[108]

Similarly, there is no uniform prohibition against using peremptory challenges because of a potential juror's religious affiliation.[109] Most cases concerning religious discrimination are decided under the First Amendment and, therefore, the Equal Protection Clause question is often not addressed; the Court, however, has suggested, but not explicitly held, that a heightened form of scrutiny may apply to religion.[110] Despite this lack of guidance from the Supreme Court, lower courts—and approximately a dozen states—have extended *Batson* protections to religious affiliation-based peremptory challenges.[111] Scholars have argued that the Court should apply strict scrutiny to reli-

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[108] *See, e.g.*, OR. REV. STAT. § 10.030 (2021) (prohibiting exclusion from jury service "on the basis of . . . sexual orientation"); *see* Wojcik, *supra* note 98, at 33–38 & n.263 (describing Oregon's Section 10.030 legislation and similar state legislation in California, Colorado, Illinois, and Minnesota).

[109] *See* CASSIDY & VALDEZ, *supra* note 81, at 104–05 (noting that although the Supreme Court has not extended *Batson*'s protections to religion, numerous state courts have done so); Edwards, *supra* note 36, at n.39 (describing the various treatment courts have given religious affiliation-based peremptory challenges); Wojcik, *supra* note 98, at 12 & n.77 (describing the various treatment federal and state courts have given religious affiliation, and noting that around a dozen states prohibit religious affiliation-based peremptory challenges). In *Miller-El v. Dretke*, Justice Stephen Breyer wrote in his concurrence that "if [peremptory challenges are] used to express stereotypical judgments about race, gender, *religion*, or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function." 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (emphasis added); Edwards, *supra* note 36 (quoting *Dretke*, 545 U.S. at 272 (Breyer, J., concurring)) (summarizing Justice Breyer's concurrence in *Dretke*).

[110] *E.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263 n.5 (2020) (answering a question about religious discrimination, but not addressing the Equal Protection Clause question); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 n.5 (2017) (same). *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (listing religion among "suspect distinctions" alongside race and nationality); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (grouping religion with race and national origin when discussing the potential application of heightened scrutiny); Benjamin Hoorn Barton, Note, *Religion-Based Peremptory Challenges After* Batson v. Kentucky *and* J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191, 205 & n.66 (1995) (arguing that the Court's jurisprudence supports the inference that strict scrutiny should be applied to religion); Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 912, 918–19 (2013) (discussing the Court's jurisprudence on religion and the Equal Protection Clause, and arguing that "'Footnote Four' [in *Carolene Products*] said that the Fourteenth Amendment protects religion from discrimination, just as much as it protects race or national origin discrimination").

[111] *Dretke*, 545 U.S. at 270 (Breyer, J., concurring) (noting that lower courts have applied *Batson* to religious affiliation-based peremptory challenges); United States v. Brown, 352 F.3d 654, 669 (2d Cir. 2003) ("[I]f a prosecutor, when challenged, said that he had stricken a juror because she was Muslim, or Catholic, or evangelical, upholding such a strike would be error."); United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (applying *Batson* to a peremptory challenge based on the prospective juror's Jewish faith); CASSIDY & VALDEZ, *supra* note 81, at 105 (discussing several lower courts' extension of *Batson* to religious affiliation-based peremptory challenges); Wojcik, *supra* note 98, at 12 & n.77 (noting that ten states have revised their jury selection laws to prohibit religious affiliation-based strikes). *But see* Taylor v. Carey, No. CIV S-05-0788 MCE, 2008 WL 3244303, at *26 (E.D. Cal. Aug. 7, 2008) (describing the argument to extend *Batson* to religion as a "dicey proposition" because "certain religions may well have tenets at odds with the controlling law, e.g., drug use,

gion, and therefore extend *Batson* to prohibit religion-based peremptory challenges, but the question remains unanswered.[112]

C. Implicit Bias

The "unconscious racism" that Justice Marshall warned about in *Batson* is understood today as implicit bias—the involuntary cognitive process of relying on biases and stereotypes in decision-making.[113] Implicit bias is often framed as "good people"—that is, people who do not consciously hold discriminatory beliefs—being unintentionally motivated by unconscious biases in their decision-making.[114]

The brain simplifies and categorizes the stimuli presented to it, allowing a person to make more reliable predictions about outcomes with incomplete information.[115] The brain also uses stereotypes during decision-making, which are a belief-system based on broad correlations between a discrete group and a

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participation in capital punishment proceedings."); State v. Gowdy, 727 N.E.2d 579, 586 (Ohio 2000) (holding that a religious belief-based peremptory challenge was permissible). Numerous federal appeals courts have left the question open. *E.g.*, United States v. Girouard, 521 F.3d 110, 113 (1st Cir. 2008); United States v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003); *see* United States v. Heron, 721 F.3d 896, 902–03 (7th Cir. 2013) (discussing the challenges of extending *Batson* to religion-based peremptory challenges but declining to answer the question). Several federal circuits have acknowledged that even if *Batson* extended to religious affiliation, discrimination based on religious beliefs would be permissible. *DeJesus*, 347 F.3d at 510 ("Even assuming that the exercise of a peremptory strike on the basis of religious affiliation is unconstitutional, the exercise of a strike based on religious beliefs is not."); *see Girouard*, 521 F.3d at 113 n.3 (noting that the Second, Third, and Seventh Circuits have all acknowledged different treatment for religious affiliation and belief).

[112] *See* Barton, *supra* note 110, at 193 (arguing that *Batson* should extend to religion-based peremptory challenges); Calabresi & Salander, *supra* note 110, at 913 (arguing "that discrimination on the basis of religion ought always to be subjected to strict scrutiny"); Christie Stancil Matthews, *Missing Faith in* Batson*: Continued Discrimination Against African Americans Through Religion-Based Peremptory Challenges*, 23 TEMP. POL. & CIV. RTS. L. REV. 45, 80–81 (2013) (arguing that courts and legislatures should bar religion-based peremptory challenges because they may be used as a race-neutral reason to strike Black jurors).

[113] *Implicit Bias*, STAN. ENCYCLOPEDIA OF PHIL. (July 31, 2019), https://plato.stanford.edu/entries/implicit-bias/ [https://perma.cc/DBG2-44FP]; *see* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (arguing that a lawyer or judge's perception of race-neutral reasons can be skewed by "unconscious racism"). For a discussion of the criticisms scholars have raised about the measurement and scope of implicit bias, see Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. STATE L.J. 193, 199–200, 199 n.21 (2018).

[114] *E.g.*, Page, *supra* note 11, at 160–61 ("To put it simply, good people often discriminate, and they often discriminate without being aware of it." (citing John F. Dovidio et al., *Contemporary Racial Bias: When Good People Do Bad Things*, *in* THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 141, 141 (Arthur G. Miller ed., 2004))); *see* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE, at xv (Batnam Books Trade 2016) (2013) ("By 'good people' we refer to those, ourselves included, who intend well and who strive to align their behavior with their intentions.").

[115] Page, *supra* note 11, at 186. When the brain is confronted with information that does not fit into a category it has formed, it will simplify the information further—potentially to the point of erroneous representation—to complete the categorization. *Id.*

trait.[116] Stereotypes simplify our understanding of society and can lead us to apply erroneously new information based on those stereotypes.[117] They are not, however, immutable; studies have shown that through "cognitive correction," people can recognize their biases at work and avoid acting upon them.[118]

Although scholars have been writing about implicit bias since the turn of the twenty-first century, courts have only recently shown an appetite—albeit a voracious one—for considering its implications on *Batson*; since 2018, at least seven state supreme courts, in California, Connecticut, Iowa, Massachusetts, New Jersey, Utah, and Washington, and the Oregon Court of Appeals, have considered the effect that implicit bias has on the efficacy of *Batson*.[119] Addi-

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[116] *Id.* at 187–88.

[117] *Id.* at 186, 188.

[118] Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 166 (2010). Known as the "shooter bias" studies, researchers instructed participants to complete a video game simulation that tasked them with identifying and shooting an armed suspect in a crowd of people. *Id.* at 155. The results showed that participants were more likely to "shoot Black perpetrators more quickly and more frequently than white perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders." *Id.* (quoting Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 357 (2007)). Further studies compared the outcomes of the public and police officers, which showed that members of the public were more likely to shoot Black people than white people in both the armed or unarmed study conditions; police officers, however, "showed no implicit or explicit racial bias in their ultimate decisions to shoot the armed and not shoot the unarmed—regardless of race." *Id.* at 156. The principal researcher of the study said that although "[they] don't mean to suggest that this is conclusive evidence that there is no racial bias in police officers' decisions to shoot . . . [they]'ve run these tests with thousands of people now, and . . . never seen this ability to restrain behavior in any other group than police officers." *Id.* at 156 (quoting Benedict Carey, *Study Finds Police Training Plays Key Role in Shootings*, N.Y. TIMES (June 2, 2007), https://www.nytimes.com/2007/06/02/us/02police.html [https://perma.cc/BX9M-BJQ5]). Commentators have argued these findings show that training for implicit bias is effective. *Id.*

[119] State v. Andujar, 254 A.3d 606, 623, 630 (N.J. 2021) (discussing the harmful role implicit bias plays in peremptory challenges); Commonwealth v. Sanchez, 151 N.E.3d 404, 428–29 (Mass. 2020) (Lowy, J., concurring) (same); People v. Rhoades, 453 P.3d 89, 148 (Cal. 2019) (Liu, J., dissenting) (same); State v. Holmes, 221 A.3d 407, 411 (Conn. 2019) (same) (citation omitted); State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Cady, C.J., concurring) (same); *Veal*, 930 N.W.2d at 343 (Appel, J., concurring in part and dissenting in part) (same); State v. Jefferson, 429 P.3d 467, 476 (Wash. 2018) (same); *Jefferson*, 429 P.3d at 481 (Yu, J., concurring) (same); State v. Curry, 447 P.3d 7, 14 (Or. App. 2019) (same), *adhering to on reconsideration*, 461 P.3d 1106 (Or. App. 2020); State v. Aziakanou, No. 20180284, 2021 WL 4468427, at *14 (Utah Sept. 30, 2021) (same); *see also* Bennett, *supra* note 118, at 152 (arguing that "[l]awyers, judges, and other legal professionals need to heighten their awareness and understanding of implicit bias"); Mike Catalini, *NJ High Court Finds Implicit Bias at Play in Jury Selection*, ASSOC. PRESS (July 13, 2021), https://apnews.com/article/government-and-politics-courts-8b13804702d7e17a13ef447e35dee739 [https://perma.cc/9Q2Y-VXST]; Edwards, *supra* note 36 (summarizing the recent decisions in California, Connecticut, Iowa, Oregon, and Washington); Beth Schwartzapfel, *A Growing Number of State Courts Are Confronting Unconscious Racism in Jury Selection*, THE MARSHALL PROJECT (May 11, 2020), https://www.themarshallproject.org/2020/05/11/a-growing-number-of-state-courts-are-confronting-unconscious-racism-in-jury-selection [https://perma.cc/6WSC-MAUF] (reporting that advocates raised the prospect of a "working group to look at implicit bias" to the North Carolina Supreme Court); Sloan, *supra* note 8, at 242 (noting that

tionally, California, Connecticut, New Jersey, and Washington have commissioned working groups or task forces to study, among other problems, the role of implicit bias in jury selection and to recommend solutions to their states' *Batson* framework.[120]

D. Batson *Reform*

Justice Clarence Thomas has argued that *Batson* should be overturned, allowing parties to use peremptory challenges without restriction.[121] That view has garnered little support among the Court.[122] Short of overturning *Batson* outright, however, reform efforts have focused on modifying the *Batson* framework or reforming attorney conduct within the framework.[123] The fol-

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the Washington Supreme Court's 2018 rulemaking was the first to offer protections for implicit biases and non-purposeful discrimination).

[120] *Holmes*, 221 A.3d at 436–37 (following the Washington Supreme Court's approach and establishing a jury selection working group while noting that "implicit bias may be equally as pernicious and destructive [as purposeful discrimination] to the perception of the justice system"); *Andujar*, 254 A.3d at 612, 631 (ordering "a Judicial Conference on Jury Selection to convene this fall [of 2021]"); Wash. GR 37 Order, *supra* note 16 (noting that the Jury Selection Workgroup was formed by the state's Supreme Court); Press Release, Sup. Ct. of California, Announcement of Jury Selection Work Group Charge (Jan. 29, 2020), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-11/SupCt20200129.pdf [https://perma.cc/J3DE-7H5W]; Merrill Balassone, *Supreme Court Announces Jury Selection Work Group*, CAL. CTS. NEWSROOM (Jan. 29, 2020), https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group [https://perma.cc/W64W-HZ65] (announcing the creation of the California Jury Selection Work Group); *see also* Sloan, *supra* note 8, at 250–53 (detailing how Washington's jury selection group formed). The Utah Supreme Court delegated the task of studying and recommending changes to their *Batson* doctrine to their rules committee. *Aziakanou*, 2021 WL 4468427, at *14 n.12.

[121] Flowers v. Mississippi, 139 S. Ct. 2228, 2271 (2019) (Thomas, J., dissenting) ("I would return to our pre-*Batson* understanding—that race matters in the courtroom—and thereby return to litigants one of the most important tools to combat prejudice in their cases."); *see also* Edwards, *supra* note 36 (detailing Justice Clarence Thomas's desire to shift the Court's jurisprudence to a framework without *Batson*). Justice Thomas views peremptory challenges as a tool that Black defendants may use *affirmatively* to remove prospective white jurors they perceive as prejudiced against them. *Flowers*, 139 S. Ct. at 2274 (Thomas, J., dissenting) ("[T]he Court continues to apply a line of cases that prevents, among other things, black defendants from striking potentially hostile white jurors."); Georgia v. McCollum, 505 U.S. 42, 60 (1992) (Thomas, J., concurring) (arguing that applying *Batson* to criminal defendants will hurt Black litigants in particular because it will "inexorably . . . lead to the elimination of peremptory strikes"); *see* Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1828 (1993) (discussing Justice Thomas's view that peremptory challenges can be used affirmatively to combat bias on juries). Justice Antonin Scalia similarly framed the expansion of *Batson* as an anti-defendant product of "an activist, 'evolutionary' constitutional jurisprudence . . . [that] destroy[s] the ages-old right of criminal defendants to exercise peremptory challenges as they wish." *McCollum*, 505 U.S. at 70 (Scalia, J., dissenting).

[122] *See Flowers*, 139 S. Ct. at 2252, 2269, 2271 (Thomas, J., dissenting). Justice Neil Gorsuch was the only justice to join Justice Thomas's dissent and he did not join Part IV in which Justice Thomas articulates this argument. *Id.*

[123] *See infra* notes 125–136 and accompanying text (presenting reform efforts to the *Batson* framework and attorney conduct within the framework).

lowing sub-sections respectively detail the attempts to lower the initial showing of discrimination under *Batson* and the efforts to reform the kind of attorney conduct *Batson* targets.[124]

1. Step One Modifications

States may modify the *Batson* framework to provide more protections to jurors.[125] The most common modification, adopted by six states, is to lower the step one standard to require only a request for a *Batson* hearing by the objecting party.[126] The modification is attractive to courts because of its logistical benefits: when a judge finds a party has not made the prima facie showing at step one under the traditional *Batson* standard, they rarely solicit the group-neutral reason from the striking party.[127] Therefore, if an appellate court finds the trial court erred in that step one finding, the record is silent as to the reason for the strike.[128] The court must then engage in a resource-intensive remand or retrial over a

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[124] *See infra* notes 125–130 and accompanying text (discussing modifications to the step one threshold of the *Batson* framework); notes 131–136 and accompanying text (discussing proposals to reform attorney conduct).

[125] *See* Johnson v. California, 545 U.S. 162, 168 (2005) (acknowledging "that States . . . have flexibility in formulating appropriate procedures to comply with *Batson*"). A challenge with modifying the *Batson* framework, however, is that federal courts may read the state's language as falling below the federal standard. *See id.* (holding that California's step one standard of "more likely than not" is not permissible); *see Sanchez*, 151 N.E.3d at 424 (adopting the federal *Batson* standard because the prior step one standard in Massachusetts required "showing that (1) a *pattern* of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a *likelihood* they are being excluded . . . solely by reason of their group membership" (emphasis added) (quoting Commonwealth v. Soares, 387 N.E.2d 499, 517 (Mass. 1979), *abrogated by Sanchez*, 151 N.E.3d 404)).

[126] State v. Holloway, 553 A.2d 166, 171–72 (Conn. 1989); Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996); State v. Parker, 836 S.W.2d 930, 939 (Mo. 1992) (en banc); State v. Jones, 358 S.E.2d. 701, 703 (S.C. 1987), *abrogated by* State v. Chapman, 454 S.E.2d 317 (S.C. 1995); CAL. CIV. PROC. CODE § 231.7(b), (c) (West 2020); WASH. CT. GEN. R. 37(c), (d); *see* People v. Rhoades, 453 P.3d 89, 148 (Cal. 2019) (Liu, J., dissenting) (identifying jurisdictions that have modified step one to only require a request from the objecting party), *cert. denied*, Rhoades v. California, 141 S. Ct. 659 (2020); Edwards, *supra* note 36, at n.93 (same); *see also* Edwards, *supra* note 36 (cataloging states that have modified different steps in their *Batson* framework). Other states are considering this approach as well. *See Sanchez*, 151 N.E.3d at 428 (Lowy, J., concurring) (proposing that step one "[be] satisfied when counsel objects to a peremptory challenge on the basis of race or another protected class"); CONN. JUDICIAL BRANCH JURY SELECTION TASK FORCE, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 16 (2020) [hereinafter CONN. FINAL REPORT] (proposing a modified *Batson* standard that only requires citation to the rule to raise an objection).

[127] *See Sanchez*, 151 N.E.3d at 426 (instructing trial judges who find step one has not been satisfied to "think long and hard before they decide to require no explanation . . . for the challenge and make no findings of fact" (quoting Commonwealth v. Issa, 992 N.E.2d 336, 347 n.14 (Mass. 2013))).

[128] *See id.* at 417 (noting the difficulty in determining "the real motives of a [striking] party . . . years later"). This is a common and significant challenge with a higher step one threshold; in Massachusetts, for example, the Supreme Judicial Court noted that they have reversed numerous murder convictions in the last few years because the trial judge erroneously ended the *Batson* inquiry at step one. *Id.* at 428 (Lowy, J., concurring).

strike that may not have been discriminatory.[129] For states that have considered, but declined to adopt this standard, their concern is that not having an evidentiary burden to request an explanation from the striking party will slow down jury empanelment because it incentivizes litigants to challenge every strike.[130]

2. Attorney Reform

Other efforts focus on reforming attorney conduct within the *Batson* framework.[131] Some scholars have proposed that prosecutors should no longer use peremptory challenges.[132] The rationale for this proposal is two-fold: first, prosecutors have a heightened ethical duty to ensure a just process for the defendant, and their use of peremptory challenges may impanel a partial jury and/or violate the independent right of citizens to serve on a jury.[133] Second,

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[129] *See* Parker Yesko, *How Can Someone Be Tried Six Times for the Same Crime?*, APM REPS. (May 1, 2018), https://www.apmreports.org/story/2018/05/01/how-can-someone-be-tried-six-times-for-the-same-crime [https://perma.cc/7ZLE-VVHJ] (detailing the logistical challenges and emotional burdens placed on litigants during retrials); *see supra* note 87 and accompanying text (noting that jurisdictions have different remedies for step one error).

[130] *Sanchez*, 151 N.E.3d at 425 n.19 (identifying "litigants . . . strong incentive to challenge every peremptory strike" if there was no step one evidentiary burden). The court in *Sanchez* suggested that this modification to step one "would alter the nature of a peremptory challenge so fundamentally that it would raise the question whether peremptory challenges simply should be abolished." *Id.*

[131] *See, e.g.*, Howard, *supra* note 52, at 372 (suggesting that attorneys, especially prosecutors, should reflect on how they use peremptory challenges).

[132] *Id.* (proposing that prosecutors waive their use of peremptory challenges while arguing that "[t]he unique litigation role and ethical responsibilities of criminal prosecutors, however, make them particularly suited to a cost-benefit analysis of peremptory challenges"); Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1170–71 (2014) (arguing that allowing prosecutors to waive their use of peremptory challenges is not adequate to prevent discriminatory strikes, and suggesting a complete ban on prosecutors using peremptory challenges). Other scholars have proposed that prosecutors collect and publicize data about their use of peremptory challenges and train staff to avoid discriminatory use. Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1483–85 (2012). Regardless of which policy an office chooses, some scholars have argued that offices should make public internal policies regarding how they intend to exercise their prosecutorial discretion. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice*,*"* 82 NOTRE DAME L. REV. 635, 638 (2006) (detailing scholarly arguments for "prosecutors' offices . . . to articulate and publicize office polices and principles of decisionmaking to guide the discretion of individual attorneys").

[133] Howard, *supra* note 52, at 372 ("Prosecutors should voluntarily abstain from using tools that are legal but risk seating a biased jury and denying individuals of a certain class, race, or gender the right to serve on juries."). The notion that prosecutors have a higher ethical standard to seek justice stems from the Supreme Court's admonition in *Berger v. United States* that the government's obligation "is not that it shall win a case, but that justice shall be done." 295 U.S. 78, 88 (1935); CASSIDY & VALDEZ, *supra* note 81, at 1–2 (presenting the justifications for a prosecutor's heightened duty to seek justice and noting *Berger*'s guidance on the responsibility of a prosecutor); *see also* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

based off anecdotal and empirical evidence, prosecutors remove Black jurors more frequently than defense attorneys.[134]

Other proposals apply to all lawyers, such as seating a juror unless both parties agree to remove the juror through a peremptory challenge.[135] The proponents of this approach see this protocol as a work-around to achieving the politically challenging task of abolishing peremptory challenges outright.[136]

E. A Fair Cross-Section: Comprehensive Jury Selection Reform Through Jury Selection Databases, Reformed Juror Summoning, and Juror Education

In addition to reforming *Batson*, there have been efforts to create more representative venires.[137] In *Taylor v. Louisiana*, the Supreme Court held that the venire must be drawn from a "fair-cross-section" of the community.[138] The Court reasoned that unrepresentative juries undermine the public's confidence in the impartiality of the courts.[139] Acknowledging that unrepresentative juries are the product of multiple processes, reform efforts have sought to understand better: (1) when and how prospective jurors are filtered out of the jury selection process; (2) how juror summoning protocols can cause less diverse venires; and (3) how outreach to specific communities can decrease the rate of unanswered summonses.[140]

This Section discusses three core pieces of comprehensive jury selection reform, which works to combat the causes of unrepresentative jury selection

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[134] *See* Smith, *supra* note 132, at 1171 (supporting an argument for abolishing prosecutors use of peremptory challenges by noting that "[i]t is well-documented that prosecutors use peremptory challenges to get rid of prospective jurors who are African American"); Wright et al., *supra* note 79, at 1419, 1426 (reporting findings from a study of jury trials in North Carolina that showed "prosecutors removed nonwhite jurors at about twice the rate that they did white jurors").

[135] Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 7 (2014) (detailing a proposal where "any [peremptory challenge] would be the product of mutual consent . . . [i]f the parties failed to reach an agreement, they would end up with the first twelve jurors on the panel").

[136] *See id.* at 6, 44 (describing a scenario in which one party refuses to agree to a peremptory challenge as "tantamount to abolishing peremptory challenges on a case-by-case basis at the insistence of the parties").

[137] *See infra* notes 137–169 and accompanying text (detailing efforts to reform jury selection beyond *Batson*).

[138] 419 U.S. 522, 527, 530, 539 (1975). The Court characterized the fair cross-section requirement as "fundamental to the jury trial guaranteed by the Sixth Amendment." *Id.* at 530; *see* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

[139] *Taylor*, 419 U.S. at 530.

[140] *See infra* notes 145–169 and accompanying text (discussing reform efforts to: (1) implement jury selection databases; (2) modify juror summoning protocols; and (3) improve juror outreach and education).

outside of the courtroom.[141] Subsection 1 of this Section presents efforts to create public databases that track all steps of the jury selection process, from summons to empanelment or removal.[142] Subsection 2 discusses attempts to modify juror summoning protocols to achieve a more representative cross-section of the community in the venire and proactively educate the community about jury service.[143] Although this Note discusses these approaches separately, it is important to note that they are not mutually exclusive and advocates have proposed them in tandem to stem each tide of disparity.[144]

1. Jury Databases

Although it is possible to trace the formation of a jury in a specific case, no jurisdiction-wide data exist that show in the aggregate which citizens are selected for service and which are not.[145] Compiling these data is cumbersome because court clerks often record information about the composition of the venire by hand in loose leaf records, including which jurors are removed for cause or through peremptory challenges.[146] Jurisdictions are therefore left only to anecdotal evidence about which members of the community most often appear for jury duty or are most often removed by prosecutors or defense attorneys.[147]

Despite these challenges, researchers at Wake Forest University compiled a public database (the Jury Sunshine Project) tracking how jury selection transpired for more than one thousand North Carolina felony trials in 2011.[148] Their research showed that although the overall racial composition of jurors who served was relatively equal, judges and prosecutors were more likely to remove jurors of color.[149] Conversely, defense attorneys, who removed the most jurors

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[141] *See infra* notes 145–169 and accompanying text.

[142] *See infra* notes 145–156 and accompanying text.

[143] *See infra* notes 157–169 and accompanying text.

[144] *E.g.*, CONN. FINAL REPORT, *supra* note 126, at 4–5, 7, 16–18, 44–45 (proposing a jury selection database, an improved summoning process, a modified *Batson* standard, and improved juror outreach).

[145] Wright et al., *supra* note 79, at 1409.

[146] *Id.* at 1417.

[147] *See id.* (noting that this lack of data "makes it difficult to identify patterns of [attorney] behavior" during jury selection).

[148] *Id.* at 1409, 1419, 1422.

[149] *Id.* at 1425–26. The empanelment rate for prospective jurors was as follows: 58% white jurors, 56% Black jurors, and 50% non-Black jurors of color. *Id.* at 1425. There were also relatively equal rates of jury service by gender. *Id.* at 1427 n.81 (finding a service rate of 55% for women and 55.4% for men). The researchers noted, however, that prosecutors were twice as likely to remove prospective Black jurors (20.6% of their strikes) as white jurors (9.7%). *Id.* at 1426. Prosecutors removed Black men at a significantly higher rate (removing 23.6% of all potential jurors) than the rates of Black women (18.5%), white men (11.1%), and white women (8.3%). *Id.* at 1427–28. This higher frequency is significant, in part, because Black men composed a small percentage of the venire (6.4%). *Id.* at 1427. Similarly, judges removed Black jurors for cause (13.5% of judges' removals) more frequently

overall, were more likely to remove white jurors.[150] These rates varied by county; for example, prosecutors in Forsyth County removed on average three Black jurors for every one white juror, whereas prosecutors in Wake County only removed approximately two Black jurors for every one white juror.[151]

The researchers believe that collection and dissemination of this information could lead to more precise and robust jury reform.[152] Comparisons to other jurisdictions could require institutional actors such as the district attorney's offices or court chambers to review and address discriminatory trends.[153] Furthermore, they argue that these data can be used externally to motivate political debates about practices by a prosecutor's office or by judges in a county.[154] Because most district attorneys are elected, the electorate could remove a district attorney whose office disproportionally removes certain members of the community.[155] Moreover, if a district attorney is aware that a prosecutor

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than they did for white jurors (10.5%); however, they removed non-Black jurors of color much more frequently (21.7%) than white jurors (10.5%). *Id.* at 1426.

[150] *Id.* at 1423, 1425. Researchers attribute defense attorneys' higher removal of white jurors (22.2% of their strikes, compared to 9.9% for Black jurors) as "*nearly* rebalanc[ing] the level of jury service among races . . . by using their peremptory challenges more often against white jurors." *Id.* at 1426.

[151] *Id.* at 1428–29. On average, juries in urban counties showed higher levels of racial disparity than those in rural counties. *Id.* at 1429 (reporting Black-to-white removal ratios of 1.2 and 1.1 for judges in urban and rural counties, respectively; ratios of 2.3 and 1.7 for prosecutors; and ratios of 0.5 and 0.3 for defense attorneys).

[152] *See id.* at 1441 (noting that when states require consistent protocols for collecting data within jurisdictions, the disparities across courthouses become clearly identifiable).

[153] *Id.* at 1428–29, 1441.

[154] *Id.* at 1429, 1441–42. The researchers predict that public data will lead to "more informed accountability in a world where criminal court professionals get very little feedback from the communities they serve." *Id.* at 1441–42. The researchers further predict that "[v]oters . . . will value inclusive practices in their criminal courts and will expect their agents, operating in the sunshine, to deliver the results." *Id.* at 1442. One researcher has analyzed these data and argued that the racial composition of the venire and the empaneled jury "may have a strong impact on the conviction rate." Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J.L. & ECON. 189, 196, 205 (2018). This study showed that when the percentage of white jurors in the venire increases from less than 22% to greater than 39%, Black defendants are more likely to be convicted (70% compared to 82%) and white defendants are less likely to be convicted (76% compared to 71%). *Id.* at 204–05. Conversely, when the percentage of Black jurors in the venire increases from less than 3.3% to greater than 11%, all defendants are less likely to be convicted (80% compared to 68% for Black defendants; 76% compared to 68% for white defendants). *Id.* at 205.

[155] *See* Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC (May 18, 2016), https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/ [https://perma.cc/4LLQ-WQ7U] (noting that forty-six states elect their local prosecutors). One study showed that less than 20% of incumbent district attorneys face a challenger in primary or general elections. Ronald F. Wright, *Beyond Prosecutor Elections*, 67 S.M.U. L. REV. 593, 601 (2014); *see* Lantigua-Williams, *supra* (noting that incumbent prosecutors are often reelected in uncontested races). Even when an incumbent has a challenger, more than half win reelection. Wright, *supra*, at 601 (noting that incumbents with a challenger win 64% of the primary elections and 70% of the general elections). For example, Doug Evans, the district attorney whose office prosecuted Curtis Flowers, has been the sole candidate for the position in all but one race for the last thirty years. Parker

under his or her supervision is using peremptory challenges in a discriminatory manner, they have a responsibility to take corrective action.[156]

2. Juror Summoning Reform and Juror Outreach

The Supreme Court held that an unrepresentative venire violates the Sixth Amendment if, among other factors, the representation of the group is not reasonably representative of the group's proportion of the community.[157] In practice, however, that standard permits considerable underrepresentation of discrete groups.[158]

Creating master juror lists from sources that only include a self-selecting group of the community, like voter registration lists, is one cause of an unrepresentative venire.[159] Recently, several states have endeavored to source their

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Yesko, *Doug Evans Sued for Using Race in Jury Selection*, APM REPS. (Nov. 18, 2019), https://www.apmreports.org/story/2019/11/18/doug-evans-sued-for-using-race-in-jury-selection-naacp [https://perma.cc/7L8S-BEC9]; *see supra* notes 1–3 and accompanying text (describing the U.S. Supreme Court's decision in *Flowers v. Mississippi* to reverse Flowers's conviction because of *Batson* violations by prosecutors).

[156] MODEL RULES OF PROF'L CONDUCT r. 5.1(b) (requiring that a lawyer who "ha[s] direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct"). Further, Model Rule 5.1(c)(2) holds a lawyer with managerial responsibility over another lawyer responsible for the subordinate's violation of the rules if the managing lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." *Id.* r. 5.1(c)(2).

[157] Duren v. Missouri, 439 U.S. 357, 364 (1979) (holding that the excluded group must be "a 'distinctive' group" whose "representation . . . in venires . . . is not fair and reasonable in relation to the number of such persons in the community; and . . . [the] underrepresentation is due to systemic exclusion of the group in the jury-selection process"). In *Duren v. Missouri*, the Court found women were not fairly and reasonably represented in venires because they composed more than 50% of the population but 15% of the venire. *Id.* 365–66. The Court also held that women were systematically excluded from the jury selection process in every jury pool for more than a year. *Id.* at 366. Moreover, as noted by Connecticut's Jury Selection Task Force, the Connecticut Supreme Court held in *State v. Gibbs* that a venire composed of 4.21% Hispanic citizens did not violate the fair cross-section requirement because Hispanic citizens only composed 7% of the jurisdiction. 758 A.2d 327, 337 (Conn. 2000); CONN. FINAL REPORT, *supra* note 126, at 6 (characterizing the holding in *Gibbs* as "establish[ing] that there is no systemic discrimination in the present jury summoning process").

[158] *See* Wright et al., *supra* note 79, at 1419, 1427, 1428 & n.83 (showing that in 2011, Black men composed 11% of North Carolina's population but only represented 6.4% of the citizens summoned for jury service that year). Non-diverse venires have led trial courts to hold jurors of color to higher standards than white jurors to achieve a fairer cross-section. State v. Williams, No. 79267-9-I, 2020 WL 6869993, at *5–6 (Wash. Ct. App. Nov. 23, 2020). For example, in Washington, a trial court held a juror of color to a higher standard when determining if he should be excused because of a hardship, stating, "He's a person of color . . . I would prefer to keep him . . . ordinarily, we would excuse. I hate to—why don't we keep him for further questioning." *Id.* at *5. The appellate court held that although the court was trying to ensure the jury represented a fair cross-section of the community, the court clearly abused its discretion by engaging in a racially discriminatory analysis. *Id.* at *6.

[159] *See* HEATHER CREEK & ALEXIS SCHULER, THE PEW CHARITABLE TR., WHY ARE MILLIONS OF CITIZENS NOT REGISTERED TO VOTE? 1 (2017) (reporting that nearly one in four eligible voters were not registered to vote in 2014). These citizens are more likely to be people of color and/or low-income. NICHOLAS LIEDTKE, ASSEMB. COMM. ON JUDICIARY, JURY SERVICE, S. 2019–2020-592, Reg.

master juror lists from multiple sources that are more likely representative of their community, like the list of state tax filers.[160]

Another cause of the lack of representation is an imprecise summoning system.[161] For example, in Connecticut, the number of summonses sent to a community in a jurisdiction is proportional to the community's share of the population.[162] But a disproportionate number of the jurors who do not show up for jury service are from communities with large minority populations.[163] When a juror does not show up for jury duty, a summons is sent to the next randomly selected juror, possibly from a different community in the jurisdiction.[164] One reform effort seeks to address this disparity by sending the new summons to the same community as the nonresponsive juror.[165] They also propose that the number of summons sent should be based on the *rate* of jurors who show up for service, rather than on the community's population.[166] Moreover, states have also taken efforts proactively to educate the public about jury service in the hopes that more citizens will participate in jury service.[167] Connecticut, for example, is considering outreach efforts that specifically target recently nationalized citizens.[168]

Sess., at 6 (Cal. 2020) (cataloging significant demographic differences in race and income-levels of eligible voters who are unregistered); *see* Kyle C. Barry, *California Adopts New Laws to Fight Racism in Jury Selection*, THE APPEAL (Sept. 30, 2020), https://theappeal.org/politicalreport/california-jury-selection-racial-discrimination/ [https://perma.cc/EVX9-L448] (discussing the racial disparities caused by sourcing potential jurors from voter registration lists and lists of licensed drivers).

[160] *See* CAL. CIV. PROC. CODE § 197(2) (West 2020) (sourcing master juror lists from "resident state tax filers" among other sources); *infra* notes 225–231 and accompanying text (discussing juror summoning reform efforts in California).

[161] *See* Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. (Sept. 1, 2015), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/ [https://perma.cc/C34E-L5FV] (identifying the juror summoning process as a cause of racially unrepresentative juries).

[162] CONN. GEN. STAT. § 51-220 (2020) (establishing that the number of summons sent within a jurisdiction is "equal to a percentage of the town's population rounded off to the nearest whole number"); *see* CONN. FINAL REPORT, *supra* note 126, at 7 (suggesting amended legislation that bases the number of new summonses sent to a community on their rate of jury attendance in past years).

[163] *See* CONN. FINAL REPORT, *supra* note 126, at 12 (noting that communities with larger minority populations fail to appear for jury duty at a higher rate than other communities); Joshi & Kline, *supra* note 161 (citing higher rates of undeliverable or unanswered juror summons in minority communities as a cause of racially unrepresentative juries).

[164] GEN. § 51-237 (providing for summoning new jurors if not enough jurors attend jury service); *cf.* CONN. FINAL REPORT, *supra* note 126, at 9 (proposing a reformed summoning system that sends the new summons to an address in the same zip code).

[165] CONN. FINAL REPORT, *supra* note 126, at 7.

[166] *Id.*

[167] *Id.* at 43–44 (cataloging the tailored juror outreach efforts of various states).

[168] *Id.* at 45–47 (proposing the creation of cultural aids on appropriate clothing and logistical details that may deter citizens from participating along with an explanation of the cultural role the jury trial plays in American civic life).

Ultimately, a truly representative venire serves as a prophylactic against an attempt by a lawyer to remove a group of jurors because each lawyer is allowed only a limited number of peremptory challenges.[169]

II. A New Regime: The Task Force Approach and the Shift to an Objective Standard

Frustrated by *Batson v. Kentucky*'s failures, the Washington Supreme Court established a task force to propose solutions to the framework for determining when a peremptory challenge is prohibited.[170] They adopted the recommendations of that task force in General Rule 37 (GR 37) in April 2018.[171] Among other changes, it replaced the purposeful discrimination finding at step three with an inquiry into whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."[172] In the few years since GR 37's adoption, at least two states, California and Connecticut, have formed jury selection task forces and adopted or proposed similar rules.[173] Comparison of these three task forces demonstrates the recurring policy challenges in *Batson* reform and the various approaches jurisdictions may take to studying and prohibiting discrimination in jury selection.[174]

Section A of this Part discusses the work of the Washington Jury Selection Workgroup and the creation of GR 37.[175] Section B considers the work of the California Jury Selection Work Group and legislative action addressing jury selection.[176] Section C discusses the proposal of the Connecticut Jury Selection Task Force addressing jury selection in their state.[177] Finally, Section D presents an analysis of the handful of cases in which Washington courts have applied the objective observer regime.[178]

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[169] *See, e.g.*, Cal. Civ. Proc. Code §§ 231(a), (c) (West 2020) (allowing each party twenty peremptory challenges in criminal cases where the defendant faces life imprisonment or the death penalty, ten in all other criminal cases, and six in civil cases).

[170] Sloan, *supra* note 8, at 250–53 (detailing the creation and adoption of GR 37).

[171] Wash. GR 37 Order, *supra* note 16; Sloan, *supra* note 8, at 253 (discussing the promulgation of GR 37).

[172] Wash. Ct. Gen. R. 37(e); Sloan, *supra* note 8, at 236 (summarizing the rule's provisions).

[173] *See infra* notes 202–231 and accompanying text (discussing reforms in California); *infra* notes 232–288 and accompanying text (discussing reforms in Connecticut).

[174] *See infra* notes 179–334 and accompanying text (analyzing reforms in Washington, California, and Connecticut and proposing numerous solutions to peremptory challenges and juror summoning).

[175] *See infra* notes 179–201 and accompanying text.

[176] *See infra* notes 202–231 and accompanying text.

[177] *See infra* notes 232–288 and accompanying text.

[178] *See infra* notes 289–297 and accompanying text. This Note refers to the "objective observer regime" to encompass the unique protocols of GR 37 at each step of the *Batson* analysis (e.g., a low step one threshold, the list of reasons presumptively invalid and the protocol for demeanor-based strikes at step two, and the object observer standard at step three). *See* Batson v. Kentucky, 476 U.S. 79, 96–98 (1986) (establishing the three-step analysis).

A. GR 37 and Washington's Jury Selection Workgroup

In 2018, the Washington Supreme Court adopted GR 37, a novel and fundamental modification of the *Batson* framework.[179] Its most drastic modification is the adoption of a new standard that requires a judge to consider at step three whether, in light of the totality of the circumstances, an "objective observer *could* view race or ethnicity as a *factor* in the use of the peremptory challenge."[180] The court is therefore no longer required to find that "purposeful discrimination" motivated the peremptory challenge.[181]

In 2013, the Washington Supreme Court in *State v. Saintcalle* expressed their dismay with the *Batson* framework and suggested that the court utilize its rulemaking process to remedy *Batson*'s oft-stated failures.[182] In response, the American Civil Liberties Union (ACLU) submitted a proposed rule that prosecutors strongly criticized.[183] Presented with this gridlock between prosecutors and advocacy groups, the Washington Supreme Court established a jury selection work group to reach a consensus on a proposal and, if a consensus could not be reached, to present the court with well-articulated positions and their drawbacks.[184] The work group published a final report documenting their rec-

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[179] Wash. GR 37 Order, *supra* note 16; WASH. CT. GEN. R. 37; *see* Sloan, *supra* note 8, at 236 (describing the implementation of GR 37).

[180] WASH. CT. GEN. R. 37(e) (emphasis added). An "objective observer" is defined as a person who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State." *Id.* 37(f); *see* Sloan, *supra* note 8, at 236, 236 & n.16 (discussing the objective observer standard).

[181] WASH. CT. GEN. R. 37(e) ("The court need not find purposeful discrimination to deny the peremptory challenge.").

[182] *See* 309 P.3d 326, 335, 339 (Wash. 2013) (en banc), *abrogated on other grounds by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017) (noting *Batson*'s inability to prevent implicit biases and suggesting that a court rule that "strengthen[s] our procedures for *Batson* challenges . . . may be the most effective way to reduce discrimination and combat minority underrepresentation in our jury system"); Sloan, *supra* note 8, at 245–46 (providing a detailed description of *State v. Saintcalle*'s holding and its role in the creation of GR 37).

[183] PROPOSED NEW GR 37—JURY SELECTION WORKGROUP, FINAL REPORT 1 (2018) [hereinafter WASH. FINAL REPORT]; Sloan, *supra* note 8, at 247–48 (noting that the American Civil Liberties Union's (ACLU) proposed rule, which was in response to *Saintcalle*, focused on addressing implicit bias and included a list of "presumptively invalid reasons for a strike"). In response to the court's request for public comment on the proposed rule, the Washington Association of Prosecuting Attorneys (WAPA) responded with significant criticisms of the rule, arguing that "the rule was 'slanted' against the State because it could require prosecutors to seat jurors biased against [them]." Sloan, *supra* note 8, at 248 & n.101 (quoting Wash. Ass'n Prosecuting Attorneys, Comment Letter on Proposed Rule GR 36, at 3–4 (Jan. 4, 2017), https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Pam%20Loginsky.pdf [https://perma.cc/9XWD-65P2])). WAPA also noted that the ACLU rule failed to address gender-based peremptory challenges, which defense attorneys—albeit anecdotally—use "common[ly] in some kinds of cases in some areas, particularly domestic violence cases." *Id.* at 249 & n.109 (quoting Telephone Interview with Criminal Deputy Prosecutor (Nov. 2, 2018)). WAPA submitted their own proposed rule that closely tracked the current *Batson* framework. *Id.* at 248.

[184] WASH. FINAL REPORT, *supra* note 183, at 1. The work group composed of more than a dozen members of the community, including members of the ACLU, WAPA, the criminal defense bar, and

ommendations to the court, as well as their areas of consensus and disagreement.[185] The work group came to the consensus that the rule should reflect a low threshold at step one so that the striking party must always provide a group-neutral reason for the strike.[186] The work group also agreed that *Batson* should extend beyond purposeful discrimination to include some recognition of implicit bias.[187] Finally, a majority of the work group agreed that the standard should be from the perspective of an objective observer.[188]

The work group disagreed, however, on several significant provisions that were adopted in the final rule.[189] The most significant disagreement was over the threshold language establishing an impermissible strike; specifically, whether a strike would be invalid if an objective observer *could view* or *would view* race or ethnicity a factor in the strike.[190] Opponents of the "could view" approach argued that it was an ambiguous standard that would presumably invalidate every strike used against a juror of color.[191] Proponents argued it was a stricter standard that would better prevent discrimination and would also mitigate the accusatory inference that a striking party was purposefully discriminating.[192] Additionally, members disagreed over the list of reasons treated as

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various judge and affinity-group bar associations. *Id.* at 16; Sloan, *supra* note 8, at 250. The full membership list included members of the ACLU, Asian Bar Association of Washington, Administrative Office of the Courts (of Washington), Courts of Limited Jurisdiction Jury Administrator, District and Municipal Court Judges' Association; Korematsu Center for Law and Equality, Latina/o Bar Association of Washington, Legal Voice, Loren Miller Bar Association of Washington; Superior Court Judges' Association, Superior Court Jury Administrator, Washington Association of Criminal Defense Lawyers, WAPA, Washington Defense Trial Lawyers, Washington State Association for Justice. WASH. FINAL REPORT, *supra* note 183, at 16.

[185] WASH. FINAL REPORT, *supra* note 183, at 3–5 (detailing areas of consensus); *id.* at 5–6 (listing areas of disagreement); *id.* at 7–9 (recommending changes based on the findings of the work group).

[186] *Id.* at 4; Sloan, *supra* note 8, at 250. That change was motivated in part by the logistical errors presented if an appellate court finds error at step one. WASH. FINAL REPORT, *supra* note 183, at 4; *see* Sloan, *supra* note 8, at 250 (discussing the rationale behind the consensus on a low step one threshold); *supra* notes 125–130 and accompanying text (presenting the logistical challenges of step one error for appellate courts).

[187] WASH. FINAL REPORT, *supra* note 183, at 3 ("Workgroup members rejected the 'purposeful discrimination standard' established by *Batson* because it fails to consider discrimination caused by implicit bias."); Sloan, *supra* note 8, at 250.

[188] Sloan, *supra* note 8, at 251.

[189] *See* WASH. FINAL REPORT, *supra* note 183, at 5–6 (presenting the areas of disagreement); Sloan, *supra* note 8, at 251–53 (providing a detailed discussion of the work group's areas of disagreement).

[190] WASH. FINAL REPORT, *supra* note 183, at 6 (describing the topic as "one of the most significant areas of disagreement within the workgroup"); Sloan, *supra* note 8, at 251.

[191] Individual Statement by Hon. Franklin L. Dacca, *in* WASH. FINAL REPORT, *supra* note 183, at app.2 (arguing that the "could view" standard "is unworkable and will virtually result in the denial of every [strike]"); Sloan, *supra* note 8, at 251, 257 (noting that some members criticized the "could view" threshold as "too vague and hypothetical" and summarizing Judge Franklin L. Dacca's criticisms of the standard).

[192] Statement of ACLU of Washington, Washington Ass'n of Criminal Defense Lawyers, Fred T. Korematsy Ctr. for L. & Equality, Legal Voice, Loren Miller Bar Ass'n & Latina/o Ass'n of Wash-

presumptively invalid if offered at step two.[193] The work group also disagreed on other ancillary topics, such as the inclusion of gender and sexual orientation in *Batson*'s protections, and a requirement for judges to explain their rulings on the record.[194]

On April 5, 2018, the Washington Supreme Court adopted the most expansive version of the rule that included the "could view" standard of proof, the list of presumptively invalid reasons for striking a juror, and no guidance on the appropriate standard of review or remedy.[195] At step one, the rule allows a party to raise a *Batson* objection by citing GR 37.[196] At step two, the rule enumerates presumptively invalid reasons that cannot be used to justify a peremptory challenge because of their historical association of these justifications with eliminating jurors of color, such as: personally having or being close to someone who has had prior contact with law enforcement; living in a high-

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ington, *in* WASH. FINAL REPORT, *supra* note 183, at app.2 (suggesting that the "could view" standard "softens the accusatory edge of the objection" and that the "'would view' standard was not 'meaningfully different' from the 'purposeful discrimination' standard under *Batson*"); Sloan, *supra* note 8, at 251 (discussing the proponents' rationale in support of the "could view" standard and against the "would view" standard).

[193] WASH. FINAL REPORT, *supra* note 183, at 6 (noting that "[m]embers were evenly split" over the list of presumptively invalid reasons); Sloan, *supra* note 8, at 251; *see infra* note 197 and accompanying text (discussing the list of presumptively invalid reasons in more detail). Disagreement over the list of presumptively invalid reasons focused on balancing the desire to maintain a judge's discretion during voir dire and prohibiting reasons that are overwhelmingly associated with a discriminatory strike. *Compare* Individual Statement by Hon. Franklin L. Dacca, *supra* note 191 (noting that although he understood the merit of presumptively invalid reasons, he felt they "would unduly invade the province of the trial court's discretion and management of the voir dire process . . . [they] would set up an unworkable (and unduly lengthy) voir dire process which would likely compromise the rights of the parties and litigants . . . [and] the jurors themselves"), *with* Statement of ACLU et al., *supra* note 192 (arguing that "These justifications, standing alone, provide little reason to question a person's fitness to serve as a juror. And they are systematically harmful in the aggregate."); *see also* Sloan, *supra* note 8, at 251 (summarizing the ACLU position regarding the list of presumptively invalid reasons).

[194] WASH. FINAL REPORT, *supra* note 183, at 5–6; Sloan, *supra* note 8, at 252. For a detailed accounting of the internal debates of the work group see Sloan, *supra* note 8, at 250–53.

[195] WASH. CT. GEN. R. 37; Wash. GR 37 Order, *supra* note 16; *see* Sloan, *supra* note 8, at 253 (noting that "the court unanimously approved the most protective version of the rule, which the ACLU coalition supported"); *see also* Sloan, *supra* note 8, at 251 (referring to the ACLU, Washington Association of Criminal Defense Lawyers, and the Black and Latino bar associations as the ACLU coalition, which advocated "for a more protective [rule]"). A few months after implementing the rule, the court adopted GR 37 into their *Batson* framework in *State v. Jefferson*. 429 P.3d 467, 479–80 (Wash. 2018); *see* Sloan, *supra* note 8, at 253–54 (describing the effects of the court's decision in *Jefferson*). Some members of the court raised concerns about adopting GR 37 into the state's constitutional standard, rather than leaving it as a court rule. *Jefferson*, 429 P.3d at 483 (Madsen, J., concurring in part and dissenting in part). The *Jefferson* court also established a de novo standard of review and required a remedy of reversal for GR 37 error; two subjects on which GR 37 was silent. *Id*. at 470, 480 (majority opinion); Sloan, *supra* note 8, at 253–54 (noting that GR 37 did not provide a remedy or a standard of review).

[196] WASH. CT. GEN. R. 37(c), (d).

crime community; or not being a native English speaker.[197] Moreover, the striking party must provide "reasonable notice" to the judge and opposing party before using a prospective juror's conduct or demeanor, such as "failing to make eye contact" or having a "problematic attitude," as the justification for the strike.[198] The rule advises that notice must be reasonably given so the judge and opposing party may independently monitor and verify the alleged conduct; if the behavior is not verified by the judge or opposing counsel, the striking party may not use that reason.[199] The restraints on the use of specific justifications for strikes, including conduct-based strikes, reflect that litigants have historically used these seemingly neutral explanations to remove jurors of color.[200]

Washington's novel approach of establishing an objective observer standard for peremptory challenges through rulemaking garnered national attention and prompted both California and Connecticut to establish similar task forces.[201]

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[197] *See* WASH. CT. GEN. R. 37(h)(i)–(vii) (listing "[r]easons [p]resumptively [i]nvalid"); *see* Sloan, *supra* note 8, at 236 (noting GR 37's adoption of presumptively invalid reasons). The full list of presumptively invalid reasons is as follows:

> (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.

WASH. CT. GEN. R. 37(h)(i)–(vii).

[198] *See* WASH. CT. GEN. R. 37(i) (listing the following conduct as requiring reasonable notice: "allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language or demeanor; or provided unintelligent or confused answers"); *see* Sloan, *supra* note 8, at 236 (noting GR 37's heightened procedure for reliance on conduct).

[199] WASH. CT. GEN. R. 37(i) ("If any party intends to offer one of [the enumerated] reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice . . . . A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.").

[200] *See* WASH. CT. GEN. R. 37(h), (i) ("The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection in Washington State: [listing reasons]."). *See generally* SEMEL ET AL., *supra* note 79, at vi (reporting findings from a study of *Batson* challenges that found conduct- or demeanor-based justifications were prosecutors' most commonly stated reason for a strike; the second most common was a having a "relationship with someone who had been involved in the criminal legal system").

[201] *See* Joyce E. Cutler, *California Juror Challenges on Race, Bias Would Be Banned (1)*, BLOOMBERG L. (June 11, 2020), https://news.bloomberglaw.com/us-law-week/california-juror-challenges-on-race-bias-would-be-banned [https://perma.cc/S2B5-TGDT] (describing California's approach as "based on the Washington Supreme Court's General Rule 37 that recognizes implicit bias and uses an objective standard to assess whether racial bias influenced juror removal"); Edwards, *supra* note 36 (noting that numerous state courts have expressed interest in adopting a standard similar to GR 37); *infra* notes 202–231 and accompanying text (discussing California); *infra* notes 232–271 and accompanying text (discussing Connecticut); *see also* Barry, *supra* note 159 (noting the influence that GR 37 has had on other states); Schwartzapfel, *supra* note 119 (same).

B. California's Jury Selection Work Group, Code of Civil Procedure § 231.7, and California Senate Bill 592

In January 2020, the California Supreme Court announced that they too would form a work group (the California Jury Selection Work Group) to study the state's *Batson* framework and suggest modifications if necessary.[202] It took the court seven months to form the work group because of delays related to the COVID-19 pandemic, leading members of the bar to lose confidence in the work group's effectiveness.[203] Many advocates called on the California Legislature to take decisive action to address *Batson*'s shortcomings.[204] In late September 2020, the California Legislature heeded that call and passed two crucial pieces of legislation detailed in the subsections below.[205] The first adopted the objective observer regime and the later reformed the juror summoning process.[206]

1. California Assembly Bill 3070: California Adopts the Objective Observer Regime

On September 30, 2020, the Governor of California signed California Assembly Bill 3070 (A.B. 3070) into law, amending Section 231.7 of the Califor-

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[202] Press Release, Sup. Ct. of California, *supra* note 120; Balassone, *supra* note 120; EMILY WONDER & NICHOLAS LIEDTKE, ASSEMB. COMM. ON JUDICIARY, JURIES: PEREMPTORY CHALLENGES, A. 2020–2021-3070, Reg. Sess., at 10 (Cal. 2020). The announcement detailed around a dozen questions to guide the group's studies, most notable of which questioned whether the "purposeful discrimination standard impose[s] an appropriate burden on litigants." Press Release, Sup. Ct. of California, *supra* note 120, at 1. The court has subsequently articulated the group's mandate as a "12 to 15 month[] . . . study [on] a broad range of topics related to jury selection, including diversity in California jury pools, changes to jury instructions and the impact of unconscious bias." Merrill Balassone, *California Supreme Court Names Jury Selection Work Group*, CAL. CTS. NEWSROOM (July 6, 2020), https://newsroom.courts.ca.gov/news/california-supreme-court-names-jury-selection-work-group [https://perma.cc/C9F2-MCL8].

[203] Cutler, *supra* note 201 (reporting that in June 2020, a court spokesperson said the court "was 'challenged' by the coronavirus pandemic, [and] 'has been considering the constituency of the group and will begin recruitment and selection soon'"). A California public defender commented that "[the workgroup] 'has [not] been empowered to do anything. No further details have been provided. In other words: There is no work group.'" *Id.* (internal quotation omitted). A June 2020 report by the Berkeley Law Death Penalty Clinic noted that "[t]here has been no subsequent statement regarding the goals of the work group or its membership [since the January announcement]. Over the last three decades, the court has declined many opportunities to remedy these inequities." SEMEL ET AL., *supra* note 79, at viii. The authors of that report also commented that "as this report makes evident, the topics identified for study by the work group have been amply studied. The questions posed have been answered." *Id.* at 71.

[204] SEMEL ET AL., *supra* note 79, at viii ("The legislature—through the passage of AB 3070—is better suited to effectively address [these issues] . . . . The time for a decisive 'course correction' by the California Legislature is now.").

[205] *See infra* notes 207–231 and accompanying text.

[206] Act of Sept. 28, 2020, ch. 230, § 1, 2020 Cal. Stat. 87 (codified as amended at CAL. CIV. PROC. CODE § 197 (West 2020)) (reforming the juror summoning process by including state tax filers in the master juror list); Act of Sept. 30, 2020, ch. 318, § 3, 2020 Cal. Stat. 92 (codified as amended at CAL. CIV. PROC. CODE § 231.7 (West 2020)) (adopting the objective observer regime).

nia Code of Civil Procedure to model Washington's GR 37 with three additions: a peremptory strike is invalid if there is a (1) "*substantial likelihood* that an objectively reasonable" observer; (2) "*would* view" group-membership; or (3) "*perceived*" group-membership, as a factor in the strike.[207] The rule extends the protections of GR 37 beyond race and includes ethnicity, gender identity, sexual orientation, national origin, and religious affiliation as protected groups.[208]

Under California's new *Batson* procedure, the objecting party only needs to cite the rule to raise an objection at step one.[209] The striking party must then provide their reason for the strike.[210] Similar to GR 37, a party may not rely on a number of presumptively invalid reasons, many of which are modeled on GR 37's list.[211] A party may overcome that presumption by showing through "clear and convincing evidence" that the reason (1) is not connected to the juror's identity and (2) relates to their potential bias.[212] The judge must find it is "highly probable" that the reason is "unrelated to conscious or unconscious bias."[213] Moreover, if a party relies on a specific demeanor-based justification: (1) the striking party must explain why that demeanor is relevant to the case at hand; and (2) the judge must verify the behavior happened.[214]

The rule also extends tremendous latitude to trial judges to remedy a violation, including selecting a new jury; granting extra peremptory challenges to the objecting party; or ordering a mistrial and reselecting the jury if the judge has already impaneled a jury.[215] On appeal, the rule provides for a de novo

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[207] CIV. PROC. § 231.7(d)(1) (emphasis added); EMILY WONDER & NICHOLAS LIEDTKE, ASSEMB. COMM. ON JUDICIARY, JURIES: PEREMPTORY CHALLENGES, A. 2020–2021-3070, Reg. Sess., at 10 (Cal. 2020) (noting that AB 3070's drafters "incorporate[d] many of the suggestions from the Washington workgroup"). Objective observer is defined as a person who "is aware that unconscious bias, in addition to purposeful discrimination, ha[s] resulted in the unfair exclusion of potential jurors in the State of California." CIV. PROC. § 231.7(d)(2)(A). Substantial likelihood is defined as "more than a mere possibility but less than a standard of more likely than not." *Id.* § 231.7(d)(2)(B). The amendments to Section 231.7 became effective in January 1, 2022, in criminal jury trials and January 1, 2026, in civil jury trials. *Id.* § 231.7(i), (k), (n); *see* Act of Sept. 30, 2020 § 3 (noting that the amendment would not apply to civil trials until 2026).

[208] CIV. PROC. § 231.7(d)(1) (listing "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups" as protected groups).

[209] *Id.* § 231.7(b), (c).

[210] *Id.* § 231.7(c).

[211] *Compare id.* § 231.7(e)(1)–(13) (list of presumptively invalid reasons), *with* WASH. CT. GEN. R. 37(h)(i)–(vii) (same).

[212] CIV. PROC. § 231.7(e).

[213] *Id.* § 231.7(f).

[214] *Id.* § 231.7(g)(1)–(2) ("The reasons . . . are presumptively invalid unless the trial court . . . confirm[s] that the asserted behavior occurred . . . . Even with that confirmation, the [striking party] shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.").

[215] *Id.* § 231.7(h). The rule also permits a trial judge to "[p]rovide another remedy as the court deems appropriate." *Id.* § 231.7 (h)(5).

standard of review; appellate courts, however, are prohibited from drawing inferences about a juror's demeanor or a striking party's justifications unless those reasons are expressly stated on the record.[216] If an appellate court finds a trial court erred in overruling an objection, the rule requires a remedy of reversal and remand for a new trial.[217]

The California District Attorneys Association (CDAA) strongly opposed A.B. 3070, arguing that its modifications created an unworkable standard that was so pro-defendant that it might put the integrity of trials at risk.[218] Prosecutors and an association of judicial officers argued that the Legislature was rushing the bill through the legislative process without providing sufficient time for debate and consideration of the legislation's impact.[219] Despite this opposition,

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[216] *Id.* § 231.7(j) ("The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor . . . not expressly state[d] on the record . . . . The reviewing court . . . shall not speculate as to . . . reasons . . . not given to explain . . . use of the . . . challenge or the . . . failure to challenge similarly situated jurors . . . .").

[217] *Id.*

[218] EMILY WONDER & NICHOLAS LIEDTKE, ASSEMB. COMM. ON JUDICIARY, JURIES: PEREMPTORY CHALLENGES, A. 2020–2021-3070, Reg. Sess., at 13 (Cal. 2020) ("[California Assembly Bill 3070 (A.B. 3070)] would remove judicial discretion during voir dire, and would replace the prohibition on purposeful discrimination with a vague objective standard . . . [and] would presumptively invalidate a number of reasons that have long been accepted by state and federal courts to justify a juror challenge . . . ."). The California District Attorneys Association (CDAA) argued that the "substantial likelihood" standard could "allow for a finding of an improper peremptory challenge even when a judge determines it is more likely than not that there was no discrimination." S. COMM. ON PUB. SAFETY, JURIES: PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE, A. 2019–2020-3070, Reg. Sess., at 12 (Cal. 2020). Moreover, they note that the rule infers implicit bias "without any evidence that a particular prosecutor possesses any bias, subconscious or otherwise." *Id.* They described the list of presumptively invalid reasons as "intentionally and clearly tailored" to benefit defendants in a manner that "skews challenges in a way that destroys the balance needed for a fair trial as required by due process." *Id.* at 13. An example of this one-sided treatment, they argued, was that having a "generally positive experience[] with police"—a trait likely to motivate a peremptory challenge by a defense attorney—was not a presumptively invalid reason. *Id.* at 12 (emphasis omitted). They posit that because the rule "automatically presumes" bias, prosecutors will not be able to remove jurors for "common sense reasons" such as "a distrust of law enforcement" or may be altogether "discouraged from exercising challenges for legitimate reasons because of the presumption of discriminatory use." *Id.* Further, the bill was sponsored by the California Attorneys for Criminal Justice (CACJ), an organization of criminal defense attorneys, which likely contributed to this pro-defendant perception. *Id.* at 1; Jim Frederick & Kate M. Wittlake, *New Jury Selection Procedure in California: Is This the End of Peremptory Challenges? Is This the End of* Batson?, 10 NAT'L L. REV., no. 337, Dec. 2020, https://www.natlawreview.com/article/new-jury-selection-procedure-california-end-peremptory-challenges-end-batson [https://perma.cc/3ZL2-JZBK].

[219] S. COMM. ON PUB. SAFETY, JURIES: PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE, A. 2019–2020-3070, Reg. Sess., at 13 (Cal. 2020). The CDAA commented that "[t]his legislative session has been like no other in California history . . . . This bill represents nothing less than an upheaval of California's jury selection process, and it is being advanced without the benefit of extensive debate, careful review and sober consideration that should attend such expansive changes to our jury system." *Id.* (emphasis omitted); *see also* Frederick & Wittlake, *supra* note 218 (quoting the CDAA's statement opposing the bill). The Association of African American California Judicial Officers (AACJO) similarly called on the legislature to withdraw the bill until it can be "subject to full review and discussion before it is offered to the full Assembly for consideration." S. COMM. ON PUB.

A.B. 3070 passed in the Senate by one vote, after failing to pass in the Senate the day before.[220] In January 2021, Senator Tom Umberg, Chairman of the Senate's Judiciary Committee and an opponent of A.B. 3070, proposed a bill that would end peremptory challenges in criminal cases.[221] The bill failed in committee in April 2021.[222]

The California Legislature anticipated that both the Judicial Branch of California and the California Department of Justice will have increased workloads based on the belief that A.B. 3070 will slow down voir dire and increase the number of appeals.[223] Although court observers in Washington have observed that GR 37 has led to attorneys using fewer peremptory challenges, A.B. 3070's efficacy and workability are unknown because it will not be implemented until January 1, 2022 in criminal jury trials and January 1, 2026 in civil jury trials.[224]

SAFETY, JURIES: PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE, A. 2019–2020-3070, Reg. Sess., at 13 (Cal. 2020); *see also* Frederick & Wittlake, *supra* note 218 (summarizing the AAC-JO's criticism of the bill). For example, the CDAA noted that a draft of the bill extended Section 231.7 to include for cause challenges—whose categories are enumerated by statute and are decided by the court—in addition to peremptory challenges, an indicator, they argued, that the rule's drafters fundamentally misunderstood jury selection. S. COMM. ON PUB. SAFETY, JURIES: PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE, A. 2019–2020-3070, Reg. Sess., at 12 (Cal. 2020) ("We are deeply concerned that this amendment [including for cause challenges] suggests a lack of appreciation for how the jury selection process works."); *see* Act of Sept. 30, 2020, ch. 318, § 3, 2020 Cal. Stat. 92 (codified as amended at CAL. CIV. PROC. CODE § 231.7 (West 2020)) (applying the objective observer regime to peremptory and for cause challenges in the July 28, 2020 version of the bill). *See generally* CIV. PROC. § 229 (providing the exclusive list of reasons a juror can be removed for cause in California).

[220] Cheryl Miller, *Key Lawmaker Proposes Eliminating Peremptory Challenges in Criminal Cases*, THE RECORDER (Mar. 11, 2021), https://www.law.com/therecorder/2021/03/11/key-lawmaker-proposes-eliminating-peremptory-challenges-in-criminal-cases/ [https://perma.cc/XCE8-4ETZ] (reporting that AB 3070 "initially failed passage in the Senate" and "pass[ed] a second roll by just one vote [the next day]").

[221] S. 212, 2020–2021 Legis., Reg. Sess. (Cal. 2021) (failed in committee); *see* Miller, *supra* note 220 (reporting on the introduction of SB 212). Criminal defense attorneys oppose the bill because they believe A.B. 3070 "deserves a chance to work." Miller, *supra* note 220 (quoting Ignacio Hernández, a lobbyist for California Attorneys for Criminal Justice on SB 212).

[222] S. 212, 2020–2021 Legis., Reg. Sess. (Cal. 2021) (failed in committee).

[223] S. COMM. ON APPROPRIATIONS, JURIES: PEREMPTORY CHALLENGES, A. 2019–2020-3070, Reg. Sess., at 1 (Cal. 2020).

[224] CIV. PROC. § 231.7(i), (k), (n); *see* S. COMM. ON APPROPRIATIONS, JURIES: PEREMPTORY CHALLENGES, A. 2019–2020-3070, Reg. Sess., at 1, 4 (Cal. 2020) (describing the anticipated increase in workloads for the court system and the state's department of justice); Barry, *supra* note 159 (noting that the rule has a delayed effective date for criminal and civil trials); EMILY WONDER & NICHOLAS LIEDTKE, ASSEMB. COMM. ON JUDICIARY, JURIES: PEREMPTORY CHALLENGES, A. 2020–2021-3070, Reg. Sess., at 10 (Cal. 2020) (describing informal commentary that GR 37 has led to a "decrease in the overall use of peremptory challenges").

2. California Senate Bill 592: California Reforms Their Juror Summoning Process

Before 2020, California sourced its master juror list from voter registration, driver's license, and state-identification cardholder lists.[225] In September 2020, Governor Newsom signed California Senate Bill 592 (S.B. 592) into law, which requires jurisdictions to source their master lists from an additional source: residents who file state taxes.[226] Jurisdictions may also go beyond these lists and source from telephone or utility company lists as well.[227] The drafters of the legislation believed that by only using voter registration and driver's license data to source the master juror lists, jurisdictions created jury pools that were underinclusive of poor citizens and citizens of color.[228] Proponents reason that significantly more citizens file state taxes than register to vote or obtain a driver's license or state-identification card and therefore sourcing from residents who file state taxes would create master juror lists that better reflect the state's population.[229] Moreover, the drafters note that twenty-one states and U.S. territories source their master juror lists from state tax records.[230] California provided a variation on the form and substance of Washington's *Batson* reform and Connecticut paid close attention to both states in its reform work.[231]

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[225] CIV. PROC. § 197(b)(1).

[226] *Id.* § 197(2) ("Beginning on January 1, 2022, the list of resident state tax filers, the list of registered voters, and the Department of Motor Vehicles' list of licensed drivers and identification cardholders resident . . . when substantially purged of duplicate names, shall be considered inclusive of a representative cross section of the population . . . ."); Act of Sept. 28, 2020, ch. 230, § 1, 2020 Cal. Stat. 87 (codified as amended at CAL. CIV. PROC. CODE § 197 (West 2020)); *see* Barry, *supra* note 159 (reporting on California Senate Bill 592 (S.B. 592)'s effect on jury selection in California).

[227] CIV. PROC. § 197(a) ("Sources may include, in addition to other lists, customer mailing lists, telephone directories, or utility company lists."). Conversely, the U.S. District Court for the Southern District of California announced a new jury selection plan that became effective in January 30, 2021 that has only one source: voter registration lists. Order, In the Matter of Adoption of a Jury Selection Plan (as Amended) & Proposed Local Rule Change, No. 147–I (S.D. Cal. filed Dec. 09, 2020) [hereinafter S.D. Cal. Jury Selection Plan Order], https://www.casd.uscourts.gov/rules/general-orders.aspx#tab1 [https://perma.cc/Z8DL-4FDP]; This single-source plan has come under significant criticism from members of the community for being underinclusive of jurors of color. Maya Srikrishnan, *Federal Court's Jury Selection Plan Under Fire*, VOICE OF SAN DIEGO (Jan. 22. 2021), https://www.voiceofsandiego.org/topics/government/federal-courts-jury-selection-plan-under-fire/ [https://perma.cc/V2PE-TCTW]. One commentator argued that "[t]he Southern District is 'knowingly engaging in behavior that excludes citizens from jury service by race'" by limiting their source list to only registered voters. *Id*.

[228] NICHOLAS LIEDTKE, ASSEMB. COMM. ON JUDICIARY, JURY SERVICE, S. 2019–2020-592, Reg. Sess., at 1, 4 (Cal. 2020) ("In California, significant evidence exists to demonstrate that jury pools skew whiter and richer than the population as a whole, likely due in part to the data sources utilized by courts when summoning jurors.").

[229] *Id.* at 4, 7.

[230] *Id.* at 4 (citing data from the National Center for State Courts).

[231] CONN. FINAL REPORT, *supra* note 126, at 20.

C. Connecticut's Jury Selection Task Force

Nearly three months after California's legislative reforms, Connecticut's Jury Selection Task Force (the Task Force) proposed a court rule to the Connecticut Supreme Court that adopted the objective observer regime, modeled on GR 37.[232] One year earlier, in *State v. Holmes*, Chief Justice Richard A. Robinson of the Connecticut Supreme Court established the Task Force to propose solutions to *Batson*'s well-known failures.[233] Specifically, the court in *Holmes* charged the Task Force with four areas of reform: (1) changing the juror questionnaires sent to prospective jurors; (2) enhancing the summoning process to create venires that represent the demographics of the community; (3) crafting model jury instructions that address the role of implicit bias in decision-making; and (4) drafting a lowered *Batson* standard that does not require a showing of purposeful discrimination.[234] The court reasoned that the rule-making process permits broader consideration of relevant data than would be practicable if the issue arose through litigation.[235] Moreover, the court required that the Task Force involve members from both the criminal and civil litigation bar—a characteristic Chief Justice Robinson believed would increase the Task Force's diversity and credibility.[236]

At their first meeting in July 2020, Chief Justice Robinson asked the Task Force members to make *Batson* more robust in preventing discrimination.[237] Five months later, the more than thirty Task Force members—composed of current and former Connecticut judges, prosecutors, civil and criminal defense at-

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[232] *Id.* at 1, 16–18, 20 (presenting the work of Connecticut's Jury Selection Task Force (the Task Force) and proposing a rule in which a peremptory challenge is invalid "[i]f . . . as reasonably viewed by an objective observer, [the strike] legitimately raises the appearance that . . . race or ethnicity was a factor in the challenge").

[233] State v. Holmes, 221 A.3d 407, 412 (Conn. 2019) ("[We] refer the systemic concerns about *Batson*'s failure to address the effects of implicit bias and disparate impact to a Jury Selection Task Force, appointed by the Chief Justice, to consider measures intended to promote the selection of diverse jury panels in our state's courthouses."); *see also* Edwards, *supra* note 36 (summarizing the court's decision in *Holmes*).

[234] *Holmes*, 221 A.3d at 438; *see also* Edwards, *supra* note 36 (detailing the court's four areas of concern for the Task Force).

[235] *Holmes*, 221 A.3d. at 437 n.25 ("[B]ecause many of the relevant issues have not yet been presented to us through the crucible of the adversarial process, we . . . stay our hand in favor of the rule-making process, which is better suited to consider the array of relevant studies and data . . . along with the interests of the stakeholders . . . .").

[236] *Id.* at 436–37; CONN. JUDICIAL BRANCH JURY SELECTION TASK FORCE, MINUTES OF JULY 14, 2020 MEETING, at 1 (2020), https://www.jud.ct.gov/Committees/jury_taskforce/taskforce_minutes_071420.pdf [https://perma.cc/47GM-BRGF] ("[Chief] Justice Robinson . . . not[ed] the diversity not only of race, ethnicity and gender, but also of mind [on the Task Force], which [he said] brings added credibility to the Task Force because not everyone shares the same ideas on how to address the problem."); *see also* Edwards, *supra* note 36 (noting the *Holmes* court's desire to have diverse members on the Task Force).

[237] CONN. JUDICIAL BRANCH JURY SELECTION TASK FORCE, *supra* note 236, at 1 (noting that Chief Justice Robinson "asked the Task Force members to give teeth to the *Batson* decision").

torneys, academics, members of affinity-group bar associations, and a state legislator—reported their findings in a fifty-eight-page report.[238] The Task Force was divided into four subcommittees to address the four categories of reform identified in *Holmes*.[239] Subsection 1 of this Section will discuss the Task Force's new *Batson* standard.[240] Subsection 2 outlines the Task Force's deliberation regarding the abolishment of peremptory challenges.[241] Subsection 3 then discusses the Task Force's other recommendations, including a jury selection database, a reformed summoning process, and improved juror outreach efforts.[242]

1. The Task Force Recommended the Objective Observer Regime

The *Batson* Working Group, a group in the Implicit Bias in the Jury Selection Process and *Batson* Challenges subcommittee of the Task Force, unanimously proposed a court rule that substantially mirrors GR 37.[243] Their rule is different, however, in two ways: (1) the strike must be "*reasonably* viewed by an objective observer"; and (2) it must "*legitimately* raise[] the appearance that . . . race or ethnicity was a factor in the challenge."[244] This language arguably

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[238] CONN. FINAL REPORT, *supra* note 126; *Jury Selection Task Force*, STATE OF CONN. JUDICIAL BRANCH, https://www.jud.ct.gov/Committees/jury_taskforce/default.htm#Purpose [https://perma.cc/24NJ-KF2Q] (providing details about the members of the Task Force).

[239] Jury Selection Task Force Subcommittees, *in* CONN. FINAL REPORT, *supra* note 126 (identifying the following subcommittees: (1) Data, Statutes & Rules; (2) Juror Summoning Process; (3) Implicit Bias in the Jury Selection Process and *Batson* Challenges; and (4) Juror Outreach & Education). The Implicit Bias Model Jury Instruction Working Group was a part of the Implicit Bias in the Jury Selection Process and *Batson* Challenges Subcommittee, but this Note does not discuss it because the working group addresses discrimination after the jury has been selected. *See* CONN. FINAL REPORT, *supra* note 126, 34–41, for the full report of that Subcommittee.

[240] *See infra* notes 243–262 and accompanying text.

[241] *See infra* notes 263–271 and accompanying text.

[242] *See infra* notes 272–288 and accompanying text.

[243] CONN. FINAL REPORT, *supra* note 126, at 20; *see* WASH. CT. GEN. R. 37. The proposal suggests adopting a "Practice Book" rule to be included in the Connecticut Practice Book, which contains the general rules of the Connecticut courts. CONN. FINAL REPORT, *supra* note 126, at 20. *See generally Conn. Practice Book: 2021 Court Rules*, STATE OF CONN. JUDICIAL BRANCH, https://www.jud.ct.gov/pb.htm [https://perma.cc/WN7B-AYAJ].

[244] CONN. FINAL REPORT, *supra* note 126, at 16 (emphasis added). An objective observer is defined as someone who "(1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors [based on] race, or ethnicity; and (2) is deemed to be aware of and to have given due consideration to the circumstances set forth in section (g)." *Id.* at 16–17. Defining the objective observer as one who has acknowledged and applied the "circumstances considered," which are enumerated in the rule—disparate questioning or "disproportionate[]" use of strikes against jurors of color, for example—is an addition to the Washington and California approaches and was likely included to give more context for the role of the observer; no explanation, however, for this addition was provided. CONN. FINAL REPORT, *supra* note 126, at 16–17; *see* CAL. CIV. PROC. CODE § 231.7(d)(2)(A) (West 2020) (defining an "objectively reasonable person" as someone who "is aware that unconscious bias, in addition to purposeful discrimination, [has] resulted in the unfair exclusion of potential jurors in . . . California"); WASH. CT. GEN. R. 37(f) (defining an objective observer as "aware that implicit, institutional, and

sets a higher standard than Washington's "could view" language and a likely equivalent standard to California's "substantial likelihood" and "would view" language, although the California language extends beyond race or ethnicity.[245] The Connecticut Task Force did not oppose extending their rule to other groups, but decided to follow the language in *Holmes* that expressly addressed race and ethnicity and did not extend protections to religious affiliation or sexual orientation.[246]

At step one, like the Washington and California rules, the objecting party need only cite the rule to raise a *Batson* objection; once the objection is made, the striking party must state the reason for the strike.[247] Also, similar to the Washington and California rules, it provides a non-exhaustive list of "[c]ircumstances considered" that a court should weigh in its step-three determination, such as disparate questioning or more frequent use of peremptory challenges against jurors of color.[248] It includes a nearly identical list of presumptively invalid reasons to California's and also includes a similar standard to overcome the presumption; in comparison, Washington's rule provides no such opportunity.[249] Finally, the Connecticut rule also provides a requirement

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unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State").

[245] *Compare* CIV. PROC. § 231.7(d)(1) ("If the court determines there is a *substantial likelihood* that an objectively reasonable person *would view* race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor . . . then the objection shall be sustained.") (emphasis added), *and* CONN. FINAL REPORT, *supra* note 126, at 16 ("If the court determines that the use of the challenge . . . as *reasonably* viewed by an objective observer, *legitimately* raises the appearance that . . . race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated.") (emphasis added), *with* WASH. CT. GEN. R. 37(e) ("If . . . an objective observer *could view* race or ethnicity as a factor, then the peremptory challenge shall be denied.") (emphasis added). This assessment is mere speculation; in practice, trial courts may implement these standards differently, and only GR 37 is currently in effect. *See* WASH. CT. GEN. R. 37; *infra* note 224 and accompanying text (noting that California Code of Civil Procedure Section 231.7 goes into effect in 2022 in criminal jury trials and 2026 in civil jury trials).

[246] CONN. FINAL REPORT, *supra* note 126, at 20 ("The decision to limit our analysis only to race and ethnicity was based on a number of factors, principally . . . *Holmes* specifically related to matters of race, and concomitantly, ethnicity, in light of historical realities.").

[247] *Id.* at 16 ("The objection shall be made by simple citation to this rule . . . . Upon objection . . . the party exercising the peremptory challenge shall articulate the reason that the peremptory challenge has been exercised.").

[248] *Id.* at 17 (providing the full list of circumstances considered at section (g) of the proposed rule); *see* CIV PROC. § 231.7(2)(C)(3) (detailing the circumstances considered); WASH. CT. GEN. R. 37(g) (same).

[249] *Compare* CIV. PROC. § 231.7(f) ("To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons . . . are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case."), *and* CONN. FINAL REPORT, *supra* note 126, at 17 (noting that the presumption can be rebutted if the striking party "demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and . . . legitimately bears on the prospective juror's ability to be fair and impartial in light of particular

of notice and verification for demeanor-based strikes that is similar to the Washington and California rules.[250]

On appeal, the rule provides for a de novo standard of review, although any factual findings by the trial court are reviewed under a clearly erroneous standard.[251] If the appellate court determines the trial court erred in denying an objection, the rule requires reversal of the judgment.[252] Notably, the drafters debated the appropriate standard of review, which was the only component of the rule that did not gain unanimous approval, barely achieving majority approval.[253] The *Batson* Working Group reasoned that the de novo standard of review and the strict remedy of reversal were appropriately tailored to the gravity of removing a juror for discriminatory reasons.[254] More broadly, they

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facts and circumstances at issue in the case"), *with* WASH. CT. GEN. R. 37(h) (failing to include any standard to rebut a presumption of invalidity). The rule is unique, however, in that it leaves to the trial court's discretion whether a presumptively invalid reason retains that presumption if offered against a white juror. CONN. FINAL REPORT, *supra* note 126, at 21 (noting that "the 'reach' of the presumptions is most appropriately determined by judges to whom that question may be presented").

[250] CONN. FINAL REPORT, *supra* note 126, at 17–18; *see* CIV. PROC. § 231.7(g) (providing the protocol for conduct- and demeanor-based strikes); WASH. CT. GEN. R. 37(i) (same).

[251] CONN. FINAL REPORT, *supra* note 126, at 16 ("The denial of an objection to a peremptory challenge . . . shall be reviewed . . . de novo, except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard."). A clearly erroneous standard requires an appellate court to defer to a trial court's determination on questions of fact, unless the appellate court believes the trial court made an error in that determination. *Clearly-erroneous standard*, BLACK'S LAW DICTIONARY, *supra* note 35. A de novo standard allows the appeals court to draw their own conclusions on matters of law, regardless of the trial court's determination. *Appeal de novo*, BLACK'S LAW DICTIONARY, *supra* note 35.

[252] CONN. FINAL REPORT, *supra* note 126, at 16.

[253] *Id.* at 21; Statement of Douglas Lavine, *in* CONN. FINAL REPORT, *supra* note 126, at 23 (noting that appellate standard of review section of the rule "was barely adopted by a majority of the members of our own committee"). Critics of the appellate standard argued, among other things, that it was too harsh of a standard to apply to the subjective determination that a trial judge must make when evaluating a peremptory challenge. Statement of Douglas Lavine, *supra*, at 22–23 (proposing a clearly erroneous standard because it is "more suited to the difficult and sensitive issues . . . to which reasonable people could, in most instances, disagree"). Some members questioned whether it was constitutionally permissible to declare a standard of review or a remedy in a court rule. *Id.* (arguing that "[i]t is the courts, and the courts *alone*, who are tasked with deciding what the standard of review ought to be" and that the "decisions about automatic reversal are far better left to the courts, and do not belong in a rule such as this one"); *see* Individual Statement of Daniel Krisch, *in* CONN. FINAL REPORT, *supra* note 126, at 23–24 (noting that the Connecticut Supreme Court's decision in *Connecticut v. DeJesus* held that a Superior Court may not promulgate rules which "restrict[] the Supreme Court's 'oversight and supervision' of the courts' 'core judicial truth-seeking function.'" (quoting State v. DeJesus, 953 A.2d 45, 72 (Conn. 2008)). Further, one member argues that even if proponents of the rule successfully defended it on constitutional grounds, this section of the rule "invites litigation" and is a "possibly fatal flaw baked into" an otherwise "laudatory" rule. Individual Statement of Daniel Krisch, *supra*, at 24.

[254] Statement of the *Batson* Working Group, *in* CONN. FINAL REPORT, *supra* note 126, at 25 ("[B]ecause of the significance of the issue at stake and the failure of less stringent requirements to ameliorate the injustices that have continued despite good faith efforts, we . . . urge consideration of this provision as a reflection of our aspiration that meaningful change will occur . . . .").

argued that the desire for a perfect rule cannot be an impediment to significant, albeit fragmented, reform.[255] Finally, they noted that if the provision invites litigation regarding its constitutionality, such conflict may be necessary to achieve the comprehensive reform desired by the court.[256]

The Working Group also addressed many anticipated criticisms of the rule.[257] First, they noted that members of the bar may be resistant to the new regime.[258] They suggested that, not only do the benefits of the rule outweigh any discontent, anecdotal evidence from Washington indicates members of their bar are adapting to GR 37's novel regime.[259] Second, they addressed concerns that a list of presumptively invalid reasons may require a lawyer to seat a juror whom they believe is biased against their case or their client.[260] The Working Group argued that the proposed rule still permits a lawyer to rely on their intuition about the partiality of a prospective juror, so long as that intuition is not based on a presumptively invalid reason.[261] Finally, they included a novel provision that requires the chief justice to select a person, or group, to oversee challenges with the application of the rule.[262]

2. The Task Force Considered Abolishing Peremptory Challenges

In formulating this rule, the Peremptory Challenges Working Group, another working group in the Implicit Bias in the Jury Selection and *Batson* Challenges Subcommittee, also considered: (1) whether peremptory challenges allow implicit biases to taint the jury selection process; (2) whether it is prudent to end or limit the use of peremptory challenges; and (3) whether judges should be required to preside over jury selection in civil cases.[263]

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[255] CONN. FINAL REPORT, *supra* note 126, at 22 ("We therefore cannot allow the perfect to be the enemy of the good. It is in that spirit, and with a deep desire to make our court system fairer and engender greater trust in it by all communities in our state, that we [submit this proposal].").

[256] Statement of the *Batson* Working Group, *supra* note 254, at 26 ("There may well be opposition to [the appellate review section] and litigation may ensue if it is adopted. Conflict may be necessary . . . . Bold action is required if there is to be meaningful change in the way a reviewing court considers *Batson* challenges.").

[257] CONN. FINAL REPORT, *supra* note 126, at 21–22.

[258] *Id.* at 21.

[259] *Id.* ("[T]wo members of Washington's Rule 37 committee have informed us that while the adoption of Rule 37 was a controversial matter in their state, lawyers—including prosecutors—have adapted to it and accept it as part of a changed legal landscape.").

[260] *Id.*

[261] *Id.* ("The rule contains numerous safeguards to protect the right of lawyers to continue to rely on intuition and instinct in using peremptories—but *not* if that intuition and instinct are grounded in impermissible bias.").

[262] *Id.* at 18. Despite anticipating difficulties associated with implementing and applying the new rule, the Working Group reaffirmed their belief that members of the bar will be able to overcome these challenges. *Id.* at 22.

[263] *Id.* at 26. To conserve their resources, the Connecticut Judicial Branch allows the parties in civil trials to conduct voir dire without a judge or a court reporter present; a judge may, however, be

The Working Group noted that despite the lack of conclusive evidence that peremptory challenges imbue jury selection with implicit bias that would not otherwise be there, peremptory challenges may nonetheless inject implicit bias into the process.[264] Although they unanimously recommended (1) keeping peremptory challenges and (2) not requiring judges to preside over jury selection in civil cases, their discussions are insightful.[265]

The Working Group recommended keeping peremptory challenges for four reasons.[266] First, to eliminate peremptory challenges, they would need to amend their constitution, because unlike her sister states, Connecticut provides peremptory challenges to parties in civil and criminal cases as a matter of constitutional right.[267] Second, despite peremptory challenges' shortcomings, the Working Group noted that they serve various beneficial roles for all stakeholders.[268] Third, the Working Group anticipated opposition to the abolition of peremptory challenges would be so significant it would stymie any effort to amend the state's constitution.[269] Fourth, although the Work Group noted that ending peremptory challenges would prevent some instances of discrimination, they anticipated its aggregate effect would not be proportional to the political effort neces-

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asked to resolve disputes that arise among the parties. Kervick v. Silver Hill Hosp., 72 A.3d 1044, 1055 (Conn. 2013).

[264] CONN. FINAL REPORT, *supra* note 126, at 28–30 ("Scholarly research and logic suggest that peremptory challenges provide an opportunity for implicit bias to impact jury selection.").

[265] *Id.* at 26; *see also id.* at 26–34 (providing the full discussion of the Working Group).

[266] *Id.* at 30. They also considered giving prosecutors fewer challenges than defense attorneys but decided against doing so because there was no "workable evidence-based methodology by which to decide on [a] reduced number." *Id.* at 32. Moreover, they believed that approach would require the state legislature to adopt unappealing "pro-defendant" legislation because the law provides peremptory challenges to "the parties" without distinction of role in the Connecticut Constitution. *Id.* at 33; *see* CONN. CONST. art. 1, § 19 ("[T]he parties shall have the right to challenge jurors peremptorily . . . ."); *infra* note 267 and accompanying text (discussing the constitutional right to peremptory challenges under the Connecticut Constitution).

[267] CONN. CONST. art. 1, § 19 ("In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law."); CONN. FINAL REPORT, *supra* note 126, at 27 & n.16, 30 (discussing the 1972 constitutional amendment that adopted the right of peremptory challenges and noting the Connecticut Constitution's "unique" role in this regard (first citing CONN. CONST. art. 1, § 19; then quoting Rozbicki v. Huybrechts, 589 A.2d 363, 366 n.2 (Conn. 1991)).

[268] CONN. FINAL REPORT, *supra* note 126, at 30–31 (representing the benefits of peremptory challenges as: "[G]iv[ing] parties and their lawyers a sense of control . . . enhanc[ing] the public's perception of procedural fairness . . . hedg[ing] against unrestrained judicial power . . . prevent[ing] some biased individuals from serving on juries; and . . . sav[ing] time that otherwise would be spent on cause challenges").

[269] *Id.* at 31. The Working Group noted that in 1997, the Connecticut House of Representatives proposed a measure to eliminate voir dire of individual jurors, which "went nowhere after a public hearing." *Id.* at 31 n.38. They described these efforts as "either . . . d[ying] on the vine, provok[ing] a firestorm of controversy, or both." *Id.*

sary to abolish peremptory challenges.[270] Finally, they made short work of deciding not to require judges to be on the bench for jury selection in civil cases because all of the problems with discrimination in jury selection are present in criminal cases, where a judge presides over the entirety of jury selection.[271]

3. The Task Force Recommends a Jury Selection Database, Juror Summoning Reform, and Improved Juror Outreach

The Task Force also recommended systemic reforms beyond the *Batson* framework, such as a jury selection database, reforming the juror summoning process, and increasing public education about jury service among underrepresented communities.[272]

a. A Jury Selection Database

The Task Force's Data, Statutes and Rules Subcommittee recommended that the state's jury management system electronically record every step of a prospective juror's journey through the jury selection process.[273] The database would record as much information as possible about each stage of the selection process, such as the way a juror was removed, such as a peremptory or for cause challenge, the reasons provided for removal, and the names of the attorneys exercising those challenges.[274] They also recommend that prospective jurors be required to provide demographic information, including their race, ethnicity, age, and gender; they left the choice of including sexual orientation and/or gender identity to the Chief Justice.[275] The Subcommittee believed that these data could

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[270] *Id.* at 31–32 (reasoning that although eliminating peremptory challenges "would have some ameliorative effect . . . it seems ill-advised to take a monumental step for a possibly marginal gain" (emphasis omitted) (footnotes omitted)).

[271] *See id.* at 33–34. They also noted that the "rule would be costly, inefficient, and would likely encounter resistance from judges." *See id.* at 34.

[272] *See infra* notes 273–288 and accompanying text.

[273] CONN. FINAL REPORT, *supra* note 126, at 3–5.

[274] *Id.* at 5. Specifically, the report recommends documenting the following stages:

> a) released without being subject to voir dire because of 'hardship'; b) released without being subject to voir dire because all trial jurors had been selected for voir dire to cease; c) subjected to voir dire; d) challenged for cause; e) dismissed for cause and the general type of reason for such dismissal; f) dismissed by peremptory challenge; g) selected for jury service, whether or not the case settles or proceeds; as well as h) the sequential order in which each venireperson in the venire panel was subject to any of the above possible dispositions, in cases where jurors are released individually; and i) the names and JURIS numbers of the attorney(s) – first chair trial counsel – raising the challenges in (d), (f), and (g) above.

Id.

[275] *Id.* at 4 & n.5.

more precisely identify the stages that jurors are removed from the process and serve to educate practitioners on their own trends in jury selection.[276]

b. Juror Summoning Reform and Improved Juror Outreach

The Jury Summoning Subcommittee proposed numerous revisions to achieve a fairer cross-section of the community in their jury pools.[277] Although Connecticut obtains their master juror lists from numerous sources, the Subcommittee identified other failures in the state's summoning process.[278] First, the Subcommittee identified that citizens from minority communities constitute an unrepresentative number of the jurors who fail to show up for service or have their summons returned as undeliverable.[279] They proposed numerous remedies, including updating and deduplicating the master juror lists annually to increase accuracy, and pairing the summons and National Change of Address systems to avoid sending a summons to an undeliverable address.[280] Further, when a summons is returned as undeliverable, the proposal would require a new summons to be sent to the same zip code, rather than the next random juror selected from the master list.[281] Relatedly, the number of summonses sent to a community would no longer be based purely on their proportion of the judicial district's population, but instead on the rate of summoned jurors from their community who showed up for jury service.[282] The Subcommittee believed that sending more summonses to areas with higher rates of undeliverable and unanswered summonses would lead to a more representative jury pool.[283] Second, they proposed that jury service be extended to legal permanent residents

[276] *Id.* at 5 (reasoning that "the data will meaningfully demonstrate *Batson* challenges by data-driven pattern[s] rather than just anecdotally" and that "the data will allow attorneys . . . to look at their own patterns and personally address their behaviors and attitudes and provide an opportunity for external research").

[277] *Id.* at 7.

[278] *Id.* (noting the state "require[s] the use of four source lists, registered voters, licensed drivers and those with [Department of Motor Vehicles] identification cards, unemployment lists and lists from revenue services").

[279] *Id.* at 7, 12.

[280] *Id.* at 7–9. If a person changes their address and does not file a change of address card, the U.S. Postal Service will be unable to deliver the summons. *Id.* at 8–9. If they file a change of address card, that information is included in the National Change of Address; therefore, the new summoning system would be informed that the addressee has moved. *Id.*

[281] *Id.* at 7, 9.

[282] *Id.* at 7. Connecticut currently determines the number of summonses sent to each town by sending an amount "equal to a percentage of the town's population rounded off to the nearest whole number." CONN. GEN. STAT. § 51-220 (2020). For example, if a town composes 45% of a jurisdiction's population, 45% of that district's summonses are sent to the town. *See id.* (determining the number of summonses sent to a community based on their proportion of the jurisdiction's population).

[283] *See* CONN. FINAL REPORT, *supra* note 126, at 6–7 (noting the Connecticut Supreme Court precedent that upheld the state's summoning process as constitutional and suggesting various reforms to the summoning process).

and convicted felons.[284] Third, they proposed modifying the text of the juror summons to increase the likelihood of citizen engagement.[285] Finally, they suggested that jurors be paid more for their service to lessen the burden for lower-income citizens.[286]

In March 2020, the Connecticut Legislature introduced House Bill 6548, which adopted all the non-*Batson* recommendations of the Task Force regarding achieving a fair cross-section.[287]

D. Applying the Objective Observer Standard: A Preliminary Review of GR 37 in the Washington Courts

As the first state to implement the objective observer standard, Washington serves as a helpful, albeit early, case study of the efficacy and practicality of this new rule.[288] Commentators have informally observed that in the few years since GR 37's adoption, use of peremptory challenges in Washington has decreased, although there has been no quantitative study to confirm this observation.[289]

In that time, the Washington appellate courts have applied GR 37 in a handful of cases, providing insight into the effects that the rule has on jury se-

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[284] *Id.* at 7 ("Under our proposal, non-citizens who are permanent residents can serve as can a convicted felon.").

[285] *Id.* at 10–12. These changes include removing the current language on the outside of the summons envelope which says, "[i]mportant court document inside—immediate action required" and replacing it with more engaging language, such as "[a] summons for you to serve your community and ensure equal justice." *Id.* at 10 (emphasis omitted). Inside the envelope, they suggest express language that informs the prospective juror that they can be paid for their service, as well as a notice to the prospective juror's employer, which verifies they have been summoned and states in part: "Employers are obligated to pay jurors their regular rate of pay for the first five days of jury service. If you have any questions about your employee's obligation to serve as a juror or an employer's obligation to accommodate, you may contact Jury Administration . . . ." *Id.* at 10–11. They also recommended a follow-up notice that reminds the prospective juror that "[y]ou can receive payment for your jury service if your employer is not compensating you for days of jury service. You can be reimbursed for reasonable expenses like transportation and family care." *Id.* at 11 (emphasis omitted). The Subcommittee did not make a recommendation regarding increasing enforcement measures for failure to appear for jury service. *Id.* at 13. Connecticut law holds that failure to appear for jury service is an offense punishable by a civil penalty, although the provision is not enforced. CONN. GEN. STAT. § 51-237 (2020); CONN. FINAL REPORT, *supra* note 126, at 12. Although strict enforcement presents many downsides, the Subcommittee suggested stricter enforcement may be necessary if their proposals do not produce a more diverse jury pool. CONN. FINAL REPORT, *supra* note 126, at 13.

[286] CONN. FINAL REPORT, *supra* note 126, at 7.

[287] H. 6548, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

[288] *See generally* CONN. FINAL REPORT, *supra* note 126, at 20–21 (using the implementation of GR 37 as an indicator of the effect of the new regime).

[289] *See* EMILY WONDER & NICHOLAS LIEDTKE, ASSEMB. COMM. ON JUDICIARY, JURIES: PEREMPTORY CHALLENGES, A. 2020–2021-3070, Reg. Sess., at 10 (Cal. 2020) (noting that "anecdotal evidence in Washington suggest[s] a decrease in the overall use of peremptory challenges, [although] no formal studies are yet available").

lection.[290] For example, in 2020, in *State v. Listoe*, the Court of Appeals of Washington held that a trial court misapplied GR 37 in denying a defendant's objection to a peremptory challenge because an objective observer could see the prosecutor's strike as considering the juror's race.[291] The prosecutors in *Listoe* used a peremptory challenge to remove Juror 17, the sole Black juror, because they thought his answers to hypothetical questions during voir dire suggested that he may have difficulty applying a law he disagrees with.[292] The trial court overruled the defendant's GR 37 objection, noting that Juror 17's comments to the hypothetical questions could lead an objective observer to believe the strike was motivated by his answers to the hypothetical questions, and not his race.[293] Applying a de novo standard of review, the Court of Appeals held that an objective observer could view race as a factor in the strike considering: (1) Juror 17 was the only Black person in the venire; (2) he communicated distrust toward "the criminal justice system" during voir dire; and (3) he only expressed skepticism, not unwillingness, to follow an implausible hypothetical law.[294] The court reasoned that even though the prosecutors did not rely on some of Juror 17's answers that suggested a distrust of "the criminal justice system," an objective observer could still view those answers as a

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[290] *E.g.*, State v. Pierce, 455 P.3d 647, 654 (Wash. 2020) (plurality opinion); State v. Listoe, 475 P.3d 534, 544 (Wash. Ct. App. 2020); State v. Omar, 460 P.3d 225, 226 (Wash. Ct. App. 2020).

[291] 475 P.3d at 544.

[292] *Id.* at 537–38 ("The State believed that Juror 17['s answers during voir dire] indicated an inability to follow the law."). During voir dire, the defense counsel asked the venire a hypothetical question about whether he thinks "it's better to let a guilty person go free than to lock up an innocent person." *Id.* at 537. Juror 17 smirked and responded: "Just the situation and how things are. Personal experience being innocent—people being innocent and still getting in trouble. Just smirking at that. I've seen it happen. I know it happens." *Id.* The prosecutors then followed-up with Juror 17 to determine if he would have any difficulty finding someone guilty under a hypothetical law that made eating cookies illegal; Juror 17 responded that he would. *Id.* at 537–38. The prosecutor then asked: "Okay. So the law is—I will say—I mean, it's kind of a like hyperbolic. It's a ridiculous sounding law, to make a point. So the law—if you disagree with the law, would you have problems following it?" to which Juror 17 responded: "Yeah." *Id.* at 538. Only one other member of the venire expressed having reservations about convicting someone under that law; that juror was removed, although it is unclear from the trial record which party sought that juror's removal. *Id.* at 538 & n.3. After the exchange about the cookie hypothetical, Juror 17 said he heard about a law that made it illegal to mispronounce Arkansas, and in response, the prosecutor asked if he would have any problems convicting someone under that law; Juror 17 gave a somewhat unclear answer, the gist of which was that he would. *Id.* at 538.

[293] *Id.* at 539. As noted by the Court of Appeals, the trial court applied the inverse of the rule: GR 37 asks if an objective observer could have viewed *race* as a factor for the strike, not whether they could have viewed a *race-neutral* reason as *the* factor for the strike. *See id.* at 542 n.7 ("In effect, the trial court's construction required Listoe to demonstrate purposeful discrimination. Such a showing is no longer necessary under GR 37.").

[294] *Id.* at 539, 542. On the third factor, the court noted that "asking someone if they have a problem convicting someone of violating a plainly ridiculous law is not the same as asking them whether they would *follow* the law as given to them by the court. Any rational person would have a problem with convicting someone for eating a cookie." *Id.* at 542.

race-based factor for the strike.[295] Moreover, the court held that if the only member of a racial group gives a different answer than the rest of the venire, racial bias may be a factor even if the answer is not historically associated with race.[296] Therefore, because an objective observer could have viewed race as a factor in the strike against Juror 17, the Court of Appeals held that the trial court erred in overruling defendant's objection, reversed the conviction, and remanded for a new trial.[297]

III. COMPREHENSIVE *BATSON* REFORM

We must heed history's warning: discrimination, whether purposeful or implicit, will pervade our institutions if permitted.[298] Identifying and eliminating discrimination in jury selection is an evergreen problem; our cultural biases militate against impartiality in ways that are difficult to identify.[299] But the various modifications to *Batson v. Kentucky* produce ambiguous, occasionally circuitous, procedures that are unlikely to be more effective than their predecessors.[300]

Section A of this Part asserts that the objective observer regime is too broad of a standard.[301] Section B then argues that abolishing peremptory challenges is necessary, but not sufficient, to eradicate discrimination in jury selection, and jurisdictions must robustly collect and analyze data about their jury selection and summoning processes.[302] Further, this Note suggests there may be benefits to achieving these reforms through a task force or legislative action.[303]

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[295] *Id.* at 541. The court noted that Juror 17's answer "the situation and how things are" to the hypothetical about freeing someone who is guilty person or convicting someone who is innocent represented a distrust of law enforcement that "echo[es] justifications for exclusion . . . that have historically been associated with discrimination . . . [and] parties are no longer permitted to rely on expressions of distrust of law enforcement or statements regarding 'having a close relationship with people who have been stopped, arrested, or convicted of a crime[].'" *Id.* (quoting WASH. CT. GEN. R. 37(h)(ii), (iii)).

[296] *Id.* ("[I]mplicit racial bias and disparate experiences might still be a factor when the only member of a racially cognizable group on the venire provides a different response to a hypothetical scenario from almost all the other prospective jurors.").

[297] *Id.* at 542, 544.

[298] *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2234–35 (2019) (summarizing the discriminatory use of peremptory challenges throughout Curtis Flowers' numerous trials); *supra* notes 55–297 and accompanying text (tracing the history of discrimination in the American jury from the founding to the twenty-first century).

[299] *See supra* notes 113–120 and accompanying text (discussing the role implicit bias plays in the *Batson* framework and various modifications states have made to the framework).

[300] *See* discussion *supra* notes 170–297 and accompanying text (presenting reform efforts to implement an objective observer regime and considering the benefits and shortcomings of that approach).

[301] *See* discussion *infra* notes 304–320 and accompanying text.

[302] *See* discussion *infra* notes 321–334 and accompanying text.

[303] *See* discussion *infra* notes 321–334 and accompanying text.

A. The Illusive Objective Observer

Washington's GR 37 represents an innovative and bold approach to an intractable problem.[304] Its substance, however, creates a vague standard that, even by the most conservative interpretation, requires a finding of impropriety in the use of many peremptory challenges.[305] For example, to find a peremptory challenge permissible under this standard, a trial judge must find that race could not have *possibly* been a factor in a peremptory challenge used against a juror of color.[306] Everything that is known about implicit bias militates against such a conclusion being possible.[307] Even if a trial judge believes a strike was proper, a searching standard of review and a remedy of reversal strongly disincentives ruling otherwise.[308]

The same logic extends to California's addition of the "clear and convincing" rebuttal standard for reasons deemed presumptively invalid.[309] If the rea-

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[304] WASH. CT. GEN. R. 37; *see* Sloan, *supra* note 8, at 242 (describing GR 37's approach to *Batson* as "groundbreaking").

[305] *See* WASH. CT. GEN. R. 37(e) (establishing that a peremptory challenge is impermissible if "an objective observer could view race or ethnicity as a factor" and that a "court need not find purposeful discrimination to deny the peremptory challenge").

[306] *Cf. id.* ("If . . . an objective observer *could view* race or ethnicity as a factor . . . then the peremptory challenge shall be denied.") (emphasis added).

[307] *See* Page, *supra* note 11, at 209–10 (reporting that studies suggest "unconscious bias is most likely to occur in ambiguous situations where it is hard to determine conclusively what is or is not prejudiced" and commenting that "peremptory challenge[s] . . . [are] precisely such an ambiguous situation"). California's addition of the "substantial likelihood" requirement partially mitigates this problem, but it is still a subjective determination. *See* CAL. CIV. PROC. CODE § 231.7(d)(1) (West 2020) ("If the court determines there is a substantial likelihood that an objectively reasonable person would view [group membership] . . . as a factor . . . the objection shall be sustained.").

[308] *See, e.g.*, State v. Pierce, 455 P.3d 647, 654 (Wash. 2020) (plurality opinion) (ordering a new trial after a *Batson* error); State v. Listoe, 475 P.3d 534, 544 (Wash. Ct. App. 2020) (same); *see also* State v. Omar, 460 P.3d 225, 226, 228 (Wash Ct. App.) (affirming a trial court's *sua sponte* objection under GR 37 to a defendant's peremptory challenge—used in a robbery trial—against a juror of color who had experienced a robbery), *review denied*, 475 P.3d 164 (Wash. 2020). *But see* State v. Bango, No. 81045-6-1, 2021 WL 1091506, at *2, *3, *8 (Wash. Ct. App. Mar. 22) (holding that in a trial for first-degree murder, "an objective observer would not view . . . race or ethnicity as a factor in the strike" of a juror of color whose family member was fatally shot forty years ago), *review denied*, 493 P.3d 738 (Wash. 2021); Sloan, *supra* note 8, at 257 & n.161 (citing anecdotal evidence from one Washington prosecutor that approximately "half of the GR 37 objections he had seen had been denied"). In one case, the trial court permitted the prosecution to use a peremptory strike against a Black juror, but the state later conceded error under GR 37 on appeal because race could be viewed as a factor in the strike. State v. Saylor, No. 80946-6-1, 2021 WL 960832, at *1 (Wash. Ct. App. Mar. 15, 2021) (per curiam); *see* Appellant's Opening Brief at 3, State v. Saylor, No. 80946-6-1, 2021 WL 960832, at *1 (Wash. Ct. App. Mar. 15, 2021) (per curiam) (noting that the prosecutor's reasons for striking the juror were "that the juror (1) was 'a little bit nitpicky with the—with the way I was asking questions'; (2) that she 'felt the same way about meth and alcohol'; and (3) 'she said she wanted to know the history of someone, whether they, you know, have a history of stealing or things like that in order to make a determination'").

[309] *See* CIV. PROC. § 231.7(e) (providing that the presumption of invalidity is overcome if the striking party "can show by clear and convincing evidence that an objectively reasonable person

sons presumptively invalid are so designated because of their strong association with race, it is difficult to imagine the type of evidence that could clearly and convincingly show they are *unrelated* to race.[310]

The objective observer standard subjects peremptory challenges, which were designed to be "arbitrary and capricious," to speculation about how they *could* have been used.[311] Informal reports from the Washington bar suggest the new regime has resulted in the use of fewer peremptory challenges, likely because of the searching standard GR 37 imposes on peremptory challenges.[312]

This regime will therefore prevent some discriminatory strikes that would have otherwise been permissible under any other *Batson* standard in use.[313] On the one hand, this result is laudable and a victory for the parties in the case, the citizens who would have been removed, and the integrity of our judicial system.[314] Yet on the other hand, the regime essentially requires empanelment of jurors of color who may be partial, but whose partiality may not be fully discernable in a challenge for cause.[315] It comes with significant collateral conse-

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would view the rationale as unrelated to the prospective juror's [group membership] . . . and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case"); *see also* CONN. FINAL REPORT, *supra* note 126, at 17 (proposing a similar standard of overcoming the presumption of validity); *supra* note 249 and accompanying text (describing Connecticut's proposed standard).

[310] *See* WASH. CT. GEN. R. 37(h) (describing reasons presumptively invalid as "hav[ing] been [historically] associated with improper discrimination in jury selection"); S. COMM. ON PUB. SAFETY, JURIES: PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE, A. 2019–2020-3070, Reg. Sess., at 6 (Cal. 2020) (noting list of presumptively invalid reasons "have historically been associated with improper discrimination in jury selection"). *But see Bango*, 2021 WL 1091506, at *2–3, *8 (holding that "an objective observer would not view . . . race as a factor in the strike").

[311] *See* WASH. CT. GEN. R. 37(e) (describing the objective observer standard); Swain v. Alabama, 380 U.S. 202, 219 (1965) ("[The peremptory challenge], as Blackstone says, [is] an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose." (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

[312] *See* EMILY WONDER & NICHOLAS LIEDTKE, ASSEMB. COMM. ON JUDICIARY, JURIES: PEREMPTORY CHALLENGES, A. 2020–2021-3070, Reg. Sess., at 10, 12 (Cal. 2020) (noting that although no empirical evidence exists, prosecutors in Washington appear to be less likely to use peremptory challenges because of GR 37's "heightened standards").

[313] *Compare* WASH. CT. GEN. R. 37(e) (establishing that a peremptory challenge is invalid if "an objective observer could view race or ethnicity as a factor in the use of the [strike]"), *with* Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019) (holding that a peremptory challenge is invalid if the court believes the "stated [group-neutral] reasons . . . were a pretext for discrimination").

[314] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994) ("Discrimination in jury selection . . . causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.").

[315] State v. Omar, 460 P.3d 225, 226 (Wash Ct. App. 2020) (holding that in a robbery trial, "an objective observer could view race as a factor" in a strike by defense counsel against a juror of color who experienced a robbery), *review denied*, 475 P.3d 164 (Wash. 2020). *But see* State v. Bango, No. 81045-6-1, 2021 WL 1091506, at *2–3, *8 (Wash. Ct. App. Mar. 22) (holding that "an objective observer would not view . . . race or ethnicity as a factor in the strike" when considering a juror of color whose family member was shot and killed decades ago), *review denied*, 493 P.3d 738 (Wash. 2021).

quences to litigants, the courts, and the community.[316] For example, the regime will slow down the jury selection process because a *Batson* hearing is granted upon request.[317] Moreover, given the low threshold of the rule and the de novo standard of review, the rule will likely increase the number of retrials, which will ultimately place significant burdens on the resources of the litigants and the courts.[318] This is particularly true in criminal trials considering the toll that passage of time, and the burdens of a retrial, can have on a key witness's availability, a defendant's ability to cross-examine witnesses effectively and present affirmative evidence, and a victim's emotional resiliency.[319] Because peremptory challenges create ample opportunity for bias in jury selection, and because standards like *Batson* are more cumbersome than effective at combatting this discrimination, courts should simply abolish peremptory challenges.[320]

B. Abolish Peremptory Challenges, Robustly Collect Data, and Strive for a Fairer Cross-Section

Abolishing peremptory challenges poses far fewer complications than adopting the objective observer regime does; in fact, many recognize abolition as a necessary step to eradicating discrimination from jury selection.[321] Schol-

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In California, this logic extends further given the broad scope of their rule. *See* CAL. CIV. PROC. CODE § 231.7(a) (West 2020) (extending rule to "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership . . . in any of those groups").

[316] *See* S. COMM. ON APPROPRIATIONS, JURIES: PEREMPTORY CHALLENGES, A. 2019–2020-3070, Reg. Sess., at 1 (Cal. 2020) (anticipating increased budgetary needs to handle work generated from California's modified *Batson* framework).

[317] *See* Commonwealth v. Sanchez, 151 N.E.3d 404, 425 n.19 (Mass. 2020) (anticipating that removal of step one would "strong[ly] incentive[ize] [litigants] to challenge every peremptory strike"); CIV. PROC. § 231.7(b), (c) (establishing that step one is satisfied upon an objection by a party).

[318] *See* CIV. PROC. § 231.7(d)(1), (j) (providing the standard for an impermissible peremptory challenge and requiring a de novo standard of review); S. COMM. ON APPROPRIATIONS, JURIES: PEREMPTORY CHALLENGES, A. 2019–2020-3070, Reg. Sess., at 1 (Cal. 2020) (noting that the new California *Batson* framework will likely increase the workload for the California Department of Justice and the state court system).

[319] *See* Yesko, *supra* note 129 ("People retire, people pass away, people move, people say, 'You know what, I'm fed up, I don't want to be a part of this anymore, don't call me.'") (quoting a former prosecutor on the challenges of retrials); *see also* David Abel, Laura Crimaldi & Steve Annear, *What Do Boston Marathon Bombing Survivors Want Federal Prosecutors to Do Next?*, BOS. GLOBE (Aug. 15, 2020), https://www.bostonglobe.com/2020/08/15/metro/what-do-boston-marathon-bombing-victims-want-federal-prosecutors-do-next/?event=event12 [https://perma.cc/PJ25-HA3W] (reporting the victims' painful and complicated emotions regarding the possibility of a retrial after an appellate court overturned the death sentence of the perpetrator of the Boston Marathon bombing).

[320] *See infra* notes 321–334 and accompanying text (presenting an argument in favor of abolishing peremptory challenges).

[321] Batson v. Kentucky, 476 U.S. 79, 108 (1986) (Marshall, J., concurring) ("[O]nly by banning peremptories entirely can such discrimination be ended."); *see supra* note 52 and accompanying text (collecting arguments by justices of the U.S. Supreme Court, numerous justices of state supreme courts, and many legal scholars in support of the abolition of peremptory challenges).

ars and members of the bar argue that abolition is not politically feasible.[322] They assert that the need for substantial reform is pressing and solutions that move courts in the right direction cannot be stymied by the promise of unlikely, albeit more effective alternatives.[323] Abolishing peremptory challenges may be more feasible than some believe: the Supreme Court of Arizona recently abolished peremptory challenges in both civil and criminal trials.[324] And in only two years, at least six states have considered adopting the objective observer regime, which fundamentally changes the nature of peremptory challenges; assuming Connecticut adopts the recommendation of their committee, approximately fifty million Americans will live in a jurisdiction with an objective observer standard.[325] This rapid progress strongly suggests that calls to abolish peremptory challenges are not futile.[326]

Although abolishing peremptory challenges will serve as a bulwark against discrimination in jury selection, it will not necessarily create representative juries.[327] States must adopt data collection protocols similar to those executed by the Jury Sunshine Project, and proposed in Connecticut, which precisely identify the demographic composition of the venire from summons to empanelment.[328] In conjunction with those efforts, states must modify their

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[322] *See* Howard, *supra* note 52, at 420 (noting "legislative reluctance to abolish" peremptory challenges); Morrison, *supra* note 135, at 6 (describing efforts to end peremptory challenges as "impassioned, but doomed").

[323] *See* CONN. FINAL REPORT, *supra* note 126, at 22 ("We . . . cannot allow the perfect to be the enemy of the good.").

[324] Sup. Ct. of Ariz. Order, *supra* note 16.

[325] *See* WASH. CT. GEN. R. 37 (adopting the court rule on April 24, 2018); Act of Sept. 30, 2020 § 3 (amending the California Code of Civil Procedure to adopt the objective observer regime on September 30, 2020); Letter from Chase T. Rogers & Omar A. Williams (Dec. 31, 2020), *in* CONN. FINAL REPORT, *supra* note 126 (submitting proposal to adopt an objective observer standard to the Chief Justice of the Connecticut Supreme Court); *see also* Rich Scinto, *CT Bill Would Allow More Black, Hispanic People on Juries*, PATCH (Jan. 13, 2021), https://patch.com/connecticut/across-ct/bill-would-change-jury-duty-connecticut [https://perma.cc/5LSH-TEPH] ("[T]he recommendations are excellent and extensive . . . . At this point, I anticipate implementing many of them . . . .") (statement from Chief Justice Richard Robinson on the Task Force's final report); *California*, U.S. CENSUS BUREAU (reporting a population of approximately 39.5 million citizens of California), https://data.census.gov/cedsci/profile?g=0400000US06# [https://perma.cc/6TRS-Z9US]; *Connecticut*, U.S. CENSUS BUREAU (reporting a population of 3.5 million citizens in Connecticut), https://data.census.gov/cedsci/profile?g=0400000US09# [https://perma.cc/JA27-287K]; *Washington*, U.S. CENSUS BUREAU (reporting a population of approximately 7.6 million citizens in Washington) https://data.census.gov/cedsci/profile?g=0400000US53# [https://perma.cc/M3KD-J4V2]; *supra* note 16 and accompanying text (providing an overview of certain states' recent progress toward an objective observer standard).

[326] *See* Morrison, *supra* note 135, at 6 (describing efforts to end peremptory challenges as "doomed"); CONN. FINAL REPORT, *supra* note 126, at 4–5, 7, 9, 10–12, 16–18 (detailing the extensive and diverse reform efforts within and beyond the *Batson* framework).

[327] *See* CONN. FINAL REPORT, *supra* note 126, at 4–5, 7, 9, 10–12 (suggesting reforms that attempt to create venires that are more representative of their jurisdiction); *supra* notes 157–169 and accompanying text (presenting the challenges of creating diverse venires).

[328] *See* Wright et al, *supra* note 79, at 1419, 1423 (describing The Jury Sunshine Project and its stated goal of serving "as a demonstration project"); CONN. FINAL REPORT, *supra* note 126, at 3–5

summoning process to focus on achieving a fairer cross-section in the venire.[329] Further, efforts must be made among attorneys—within firms, prosecutors' offices, and the criminal defense bar—to more thoughtfully and critically study how they approach jury selection.[330]

Moreover, achieving these reforms through thoughtful debate among the bar and the bench can be beneficial to all parties.[331] Regardless of the outcome, participating in a task force or the legislative process gives stakeholders the opportunity to find common ground with their colleagues.[332] It also encourages participants to think critically about their own strategies in using peremptory challenges.[333] That improved understanding can translate to more considerate leadership or thoughtful training among staff.[334]

CONCLUSION

Discrimination, whether explicit or implicit, has existed in our jury system since the country's founding. Despite the Supreme Court's efforts to provide a framework that eliminates discrimination, it continues to distort jury selection, most often through peremptory challenges. The objective observer regime is an innovative solution to this intractable problem. It has garnered significant support in only four years, and it will likely continue to be adopted in other jurisdictions. It fundamentally changes the role of the peremptory challenge and, by extension, the process of jury selection. It comes, however, with significant costs to litigants and the courts. It alters the character of peremptory challenges so fundamentally that jurisdictions should abolish use of peremptory challenges outright.

(detailing the task force's recommendation to develop a public jury selection database that tracks all citizen interactions with the jury selection process). *See generally supra* notes 145–156, 273–276 and accompanying text (noting the creation and effect of a jury database in North Carolina and proposed efforts to create a similar database in Connecticut).

[329] *See* CONN. FINAL REPORT, *supra* note 126, at 4–5, 7, 9, 10–12 (proposing reforms that increase the number of underrepresented citizens in the venire); *supra* notes 277–288 and accompanying text (discussing the efforts in Connecticut to shift from a summons system that is based on proportions of population to one based on yield rates of summoned jurors who show up for service).

[330] *See* CONN. FINAL REPORT, *supra* note 126, at 5 (suggesting that the jury selection database "will allow attorneys an opportunity to look at their own patterns and personally address their behaviors and attitudes"); *supra* notes 131–136 and accompanying text (presenting various proposed reforms to attorney conduct).

[331] *See* Rogers & Williams Letter, *supra* note 325, CONN. FINAL REPORT, *supra* note 126 (expressing that the task force was proud of their work).

[332] *See id.* (noting that "[a] diverse group of stakeholders . . . [had] an opportunity for robust examination and for discussion from many perspectives").

[333] *See* WASH. FINAL REPORT, *supra* note 183, at 3–6 (presenting areas of consensus and disagreement among the members).

[334] *See* Burke, *supra* note 132, at 1483 (proposing various reforms to improve prosecutor training to "neutralize the biases that might lead to racialized peremptory challenges"); *supra* notes 131–136 and accompanying text (discussing the value of attorney-led reform for use of peremptory challenges).

That effort alone, however, will not be sufficient to achieve a fair cross-section of the community. Therefore, jurisdictions should establish public, state-wide databases that catalog citizens' interactions with the jury system; diversify the sources from which they summon new jurors; and proactively conduct outreach and education to increase retention rates.

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