INSTRUCTION NO. 1 - INTRODUCTION

Congratulations on your selection as a juror! These Instructions are to help you better understand the trial and your role in it.

In an Indictment, a Grand Jury has charged defendant Jean Theresa Hoffert, who is also known as Terry Hoffert, with "mail fraud," "wire fraud," "bank fraud," "identity theft," and "money laundering" offenses arising from an alleged scheme to defraud borrowers and lenders of the proceeds of mortgage loans. An Indictment is simply an accusation—it is not evidence of anything. The defendant has pled not guilty, and she is presumed absolutely not guilty of each offense charged unless and until the prosecution proves her guilt on that offense beyond a reasonable doubt.

You must decide during your deliberations whether or not the prosecution has proved the defendant's guilt on each offense charged beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

Remember, only defendant Jean Theresa Hoffert, and not anyone else, is on trial. Also, the defendant is on trial *only* for the offenses charged against her in the Indictment, and not for anything else. Remember that each count charges a separate

crime. You must consider each count separately and return a separate, unanimous verdict for each count.

Please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.

INSTRUCTION NO. 16 - CONDUCT OF JURORS DURING TRIAL

You must decide this case ***solely*** on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.
- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them

when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.

- Do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation about this case, the law, or the people involved on your own
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony
- Do not read any news stories or articles, in print, on the Internet, or in any "blog," about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining two Instructions at the end of the evidence.

JUROR PLEDGE

NORTHERN DISTRICT OF IOWA FEDERAL COURT

As a juror, I understand we play a critical role to ensure a fair trial, so I pledge:

I will not talk to anyone, or let anyone talk to me about this case.
-This includes my family and friends.
-This includes my fellow jurors until we begin our deliberations.

I will not send or receive electronic communications about this case.
-This includes: phone calls, texts, e-mails, blogs, tweets, or other internet posts.

I will avoid reading information about this case.
-This includes research about the facts, law, people, or places involved in this case on the internet or anywhere else.
-This includes all news reports on the internet, in print, or broad- cast.

I will not decide the issues in this case based on biases.
-This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies, or generalizations.

Instead, I will base my verdict on the evidence, reason, common sense, and the law in the instructions.

THANK YOU FOR SERVING AS A JUROR IN YOUR U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

CERTIFICATION

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the [illegible] or against the

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of race, color, religious beliefs, national origin, or sex of the defendant.

Juror

Juror

Juror

Juror

Juror

Juror

Juror Questions About Implicit Bias:

1. After watching the "never judge" Michael Conrad video where I stop it at the end of the "rap sheet" before the rest of the video is played: "What do you think of the person pictured in the video?" "Why?" After playing the rest of the video: "Were you surprised to find out the image if the person in the video was the arresting officer? (I ask this of jurors whose facially expressions demonstrate obvious surprise) "Why?" "When you think of the term arresting officer what race of an officer to you think of?" "Why?" "Can you see how gut feelings can lead to false impressions?" "Can you see how stereotypes can lead to false impressions?" "Can you see how generalizations can lead to false impressions?" "Is it important to keep an open mind until you have heard and seen all of the evidence?" "Why?"

2. After watching the first segment of the What Would You Do Stolen Bike video and explaining the other two segments involving the young Black man and the attractive young blonde woman (I don't show all three simply to save time): "How do you explain the vast differences in reactions to the folks in the park to the three different folks trying to steal the bike?" "Are you open to the possibility that the reason for the different reactions is subconscious or implicit bias?" "What else might explain the differences in reactions?"
3. "How would you feel if were being tried by an all Hispanic jury and Hispanic judge" "Why?"
4. "Would you want any stereotypes, gut feelings, or generalizations about whites to influence the Hispanic jury or judge's view of the facts of your case?" "If you were sitting where Mr. Rodriguez is as a defendant in a federal criminal case would you have any concerns about a person with your views, attitudes and opinions sitting in judgment?" "Should Mr. Rodriguez have any concerns about you as a juror in the case?" "Do you have any concerns about you sitting in judgment of Mr. Rodriguez? "Should I have any concerns about you as a juror in this case?"
5. "If you heard a fellow juror tell a racial, sexist, etc joke during one of your breaks would you say or do anything?" "Why or why not?" "What if it happened during jury deliberations?"

6. "If during your jury deliberations you heard a fellow juror make a comment that appeared to you to be based on a stereotype about (Hispanic, Blacks, etc whatever the defendant is) what to you believe is your obligation?" "What would you do or say?"
7. "I want each of you to know that I am worried whether Mr. Rodriguez, as the only Hispanic in the courtroom, is able to receive the fairest trial possible – what can you tell us to assure that this will happen?" Do you have any concerns about Mr. Rodriguez's ability to receive a fair trial?

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FLOWERS *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 17–9572. Argued March 20, 2019—Decided June 21, 2019

Petitioner Curtis Flowers has been tried six separate times for the murder of four employees of a Mississippi furniture store. Flowers is black; three of the four victims were white. At the first two trials, the State used its peremptory strikes on all of the qualified black prospective jurors. In each case, the jury convicted Flowers and sentenced him to death, but the convictions were later reversed by the Mississippi Supreme Court based on prosecutorial misconduct. At the third trial, the State used all of its 15 peremptory strikes against black prospective jurors, and the jury convicted Flowers and sentenced him to death. The Mississippi Supreme Court reversed again, this time concluding that the State exercised its peremptory strikes on the basis of race in violation of *Batson* v. *Kentucky*, 476 U. S. 79. Flowers' fourth and fifth trials ended in mistrials. At the fourth, the State exercised 11 peremptory strikes—all against black prospective jurors. No available racial information exists about the prospective jurors in the fifth trial. At the sixth trial, the State exercised six peremptory strikes—five against black prospective jurors, allowing one black juror to be seated. Flowers again raised a *Batson* claim, but the trial court concluded that the State had offered race-neutral reasons for each of the five peremptory strikes. The jury convicted Flowers and sentenced him to death. The Mississippi Supreme Court affirmed. After this Court vacated that judgment and remanded in light of *Foster* v. *Chatman*, 578 U. S. ___, the Mississippi Supreme Court again upheld Flowers' conviction in a divided 5-to-4 decision. Justice King dissented on the *Batson* issue and was joined by two other Justices.

Held: All of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective

juror Carolyn Wright was not motivated in substantial part by discriminatory intent. Pp. 7–31.

(a) Under *Batson*, once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial judge then must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination. The *Batson* Court rejected four arguments. First, the *Batson* Court rejected the idea that a defendant must demonstrate a history of racially discriminatory strikes in order to make out a claim of race discrimination. Second, the *Batson* Court rejected the argument that a prosecutor could strike a black juror based on an assumption or belief that the black juror would favor a black defendant. Third, the *Batson* Court rejected the argument that race-based peremptories should be permissible because black, white, Asian, and Hispanic defendants and jurors were all "equally" subject to race-based discrimination. Fourth, the *Batson* Court rejected the argument that race-based peremptories are permissible because both the prosecution and defense could employ them in any individual case and in essence balance things out. Pp. 7–15.

(b) Four categories of evidence loom large in assessing the *Batson* issue here, where the State had a persistent pattern of striking black prospective jurors from Flowers' first through his sixth trial. Pp. 15–30.

(1) A review of the history of the State's peremptory strikes in Flowers' first four trials strongly supports the conclusion that the State's use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. The State tried to strike all 36 black prospective jurors over the course of the first four trials. And the state courts themselves concluded that the State had violated *Batson* on two separate occasions. The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury. Pp. 19–22.

(2) The State's use of peremptory strikes in Flowers' sixth trial followed the same pattern as the first four trials. Pp. 22–23.

(3) Disparate questioning can be probative of discriminatory intent. *Miller-El* v. *Cockrell*, 537 U. S. 322, 331–332, 344–345. Here, the State spent far more time questioning the black prospective jurors than the accepted white jurors—145 questions asked of 5 black prospective jurors and 12 questions asked of 11 white seated jurors. The record refutes the State's explanation that it questioned black and white prospective jurors differently only because of differences in the jurors' characteristics. Along with the historical evidence from the earlier trials, as well as the State's striking of five of six black

prospective jurors at the sixth trial, the dramatically disparate questioning and investigation of black prospective jurors and white prospective jurors at the sixth trial strongly suggest that the State was motivated in substantial part by a discriminatory intent. Pp. 23–26.

(4) Comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred. See *Snyder* v. *Louisiana*, 552 U. S. 472, 483–484. Here, Carolyn Wright, a black prospective juror, was struck, the State says, in part because she knew several defense witnesses and had worked at Wal-Mart where Flowers' father also worked. But three white prospective jurors also knew many individuals involved in the case, and the State asked them no individual questions about their connections to witnesses. White prospective jurors also had relationships with members of Flowers' family, but the State did not ask them follow-up questions in order to explore the depth of those relationships. The State also incorrectly explained that it exercised a peremptory strike against Wright because she had worked with one of Flowers' sisters and made apparently incorrect statements to justify the strikes of other black prospective jurors. When considered with other evidence, a series of factually inaccurate explanations for striking black prospective jurors can be another clue showing discriminatory intent. The overall context here requires skepticism of the State's strike of Carolyn Wright. The trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. Pp. 26–30.

240 So. 3d 1082, reversed and remanded.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined as to Parts I, II, and III.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17–9572

CURTIS GIOVANNI FLOWERS, PETITIONER *v.* MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[June 21, 2019]

JUSTICE KAVANAUGH delivered the opinion of the Court.

In *Batson* v. *Kentucky*, 476 U. S. 79 (1986), this Court ruled that a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial.

In 1996, Curtis Flowers allegedly murdered four people in Winona, Mississippi. Flowers is black. He has been tried six separate times before a jury for murder. The same lead prosecutor represented the State in all six trials.

In the initial three trials, Flowers was convicted, but the Mississippi Supreme Court reversed each conviction. In the first trial, Flowers was convicted, but the Mississippi Supreme Court reversed the conviction due to "numerous instances of prosecutorial misconduct." *Flowers* v. *State*, 773 So. 2d 309, 327 (2000). In the second trial, the trial court found that the prosecutor discriminated on the basis of race in the peremptory challenge of a black juror. The trial court seated the black juror. Flowers was then convicted, but the Mississippi Supreme Court again reversed the conviction because of prosecutorial misconduct at trial.

In the third trial, Flowers was convicted, but the Mississippi Supreme Court yet again reversed the conviction, this time because the court concluded that the prosecutor had again discriminated against black prospective jurors in the jury selection process. The court's lead opinion stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers* v. *State*, 947 So. 2d 910, 935 (2007). The opinion further stated that the "State engaged in racially discriminatory practices during the jury selection process" and that the "case evinces an effort by the State to exclude African-Americans from jury service." *Id.,* at 937, 939.

The fourth and fifth trials of Flowers ended in mistrials due to hung juries.

In his sixth trial, which is the one at issue here, Flowers was convicted. The State struck five of the six black prospective jurors. On appeal, Flowers argued that the State again violated *Batson* in exercising peremptory strikes against black prospective jurors. In a divided 5-to-4 decision, the Mississippi Supreme Court affirmed the conviction. We granted certiorari on the *Batson* question and now reverse. See 586 U. S. ___ (2018).

Four critical facts, taken together, require reversal. *First*, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Tr. of Oral Arg. 32. *Second*, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. *Third*, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. *Fourth*, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly

situated to white prospective jurors who were not struck by the State.

We need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not "motivated in substantial part by discriminatory intent." *Foster* v. *Chatman*, 578 U. S. ___, ___ (2016) (slip op., at 23) (internal quotation marks omitted). In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion.

I

The underlying events that gave rise to this case took place in Winona, Mississippi. Winona is a small town in northern Mississippi, just off I–55 almost halfway between Jackson and Memphis. The total population of Winona is about 5,000. The town is about 53 percent black and about 46 percent white.

In 1996, Bertha Tardy, Robert Golden, Derrick Stewart, and Carmen Rigby were murdered at the Tardy Furniture store in Winona. All four victims worked at the Tardy Furniture store. Three of the four victims were white; one was black. In 1997, the State charged Curtis Flowers with murder. Flowers is black. Since then, Flowers has been tried six separate times for the murders. In each of the first two trials, Flowers was tried for one individual murder. In each subsequent trial, Flowers was tried for all four of the murders together. The same state prosecutor tried Flowers each time. The prosecutor is white.

At Flowers' first trial, 36 prospective jurors—5 black and 31 white—were presented to potentially serve on the jury. The State exercised a total of 12 peremptory strikes, and it used 5 of them to strike the five qualified black prospective jurors. Flowers objected, arguing under *Batson* that the State had exercised its peremptory strikes in a racially discriminatory manner. The trial court rejected the *Batson* challenge. Because the trial court allowed the State's peremptory strikes, Flowers was tried in front of an all-white jury. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court reversed the conviction, concluding that the State had committed prosecutorial misconduct in front of the jury by, among other things, expressing baseless grounds for doubting the credibility of witnesses and mentioning facts that had not been allowed into evidence by the trial judge. *Flowers*, 773 So. 2d, at 317, 334. In its opinion, the Mississippi Supreme Court described "numerous instances of prosecutorial misconduct" at the trial. *Id.,* at 327. Because the Mississippi Supreme Court reversed based on prosecutorial misconduct at trial, the court did not reach Flowers' *Batson* argument. See *Flowers*, 773 So. 2d, at 327.

At the second trial, 30 prospective jurors—5 black and 25 white—were presented to potentially serve on the jury. As in Flowers' first trial, the State again used its strikes against all five black prospective jurors. But this time, the trial court determined that the State's asserted reason for one of the strikes was a pretext for discrimination. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' *Batson* challenge. The trial court disallowed the strike and sat that black juror on the jury. The jury at Flowers' second trial consisted of 11 white jurors and 1

black juror. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court again reversed. The court ruled that the prosecutor had again engaged in prosecutorial misconduct in front of the jury by, among other things, impermissibly referencing evidence and attempting to undermine witness credibility without a factual basis. See *Flowers* v. *State*, 842 So. 2d 531, 538, 553 (2003).

At Flowers' third trial, 45 prospective jurors—17 black and 28 white—were presented to potentially serve on the jury. One of the black prospective jurors was struck for cause, leaving 16. The State exercised a total of 15 peremptory strikes, and it used all 15 against black prospective jurors. Flowers again argued that the State had used its peremptory strikes in a racially discriminatory manner. The trial court found that the State had not discriminated on the basis of race. See *Flowers*, 947 So. 2d, at 916. The jury in Flowers' third trial consisted of 11 white jurors and 1 black juror. The lone black juror who served on the jury was seated after the State ran out of peremptory strikes. The jury convicted Flowers and sentenced him to death.

On appeal, the Mississippi Supreme Court yet again reversed, concluding that the State had again violated *Batson* by discriminating on the basis of race in exercising all 15 of its peremptory strikes against 15 black prospective jurors. See *Flowers*, 947 So. 2d, at 939. The court's lead opinion stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Id.,* at 935. The opinion explained that although "each individual strike may have justifiably appeared to the trial court to be sufficiently race neutral, the trial court also has a duty to look at the State's use of peremptory challenges *in toto*." *Id.,* at 937. The opinion emphasized that

"trial judges should not blindly accept any and every reason put forth by the State, especially" when "the State continues to exercise challenge after challenge only upon members of a particular race." *Ibid.* The opinion added that the "State engaged in racially discriminatory practices" and that the "case evinces an effort by the State to exclude African-Americans from jury service." *Id.,* at 937, 939.

At Flowers' fourth trial, 36 prospective jurors—16 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of 11 peremptory strikes, and it used all 11 against black prospective jurors. But because of the relatively large number of prospective jurors who were black, the State did not have enough peremptory challenges to eliminate all of the black prospective jurors. The seated jury consisted of seven white jurors and five black jurors. That jury could not reach a verdict, and the proceeding ended in a mistrial.

As to the fifth trial, there is no available racial information about the prospective jurors, as distinct from the jurors who ultimately sat on the jury. The jury was composed of nine white jurors and three black jurors. The jury could not reach a verdict, and the trial again ended in a mistrial.

At the sixth trial, which we consider here, 26 prospective jurors—6 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of six peremptory strikes, and it used five of the six against black prospective jurors, leaving one black juror to sit on the jury. Flowers again argued that the State had exercised its peremptory strikes in a racially discriminatory manner. The trial court concluded that the State had offered race-neutral reasons for each of the five peremptory strikes against the five black prospective jurors. The jury at Flowers' sixth trial consisted of 11 white jurors and 1 black juror. That jury convicted Flowers of murder and

sentenced him to death.

In a divided decision, the Mississippi Supreme Court agreed with the trial court on the *Batson* issue and stated that the State's "race-neutral reasons were valid and not merely pretextual." *Flowers* v. *State*, 158 So. 3d 1009, 1058 (2014). Flowers then sought review in this Court. This Court granted Flowers' petition for a writ of certiorari, vacated the judgment of the Mississippi Supreme Court, and remanded for further consideration in light of the decision in *Foster*, 578 U. S. ___. *Flowers* v. *Mississippi*, 579 U. S. ___ (2016). In *Foster*, this Court held that the defendant Foster had established a *Batson* violation. 578 U. S., at ___ (slip op., at 25).

On remand, the Mississippi Supreme Court by a 5-to-4 vote again upheld Flowers' conviction. See 240 So. 3d 1082 (2017). Justice King wrote a dissent for three justices. He stated: "I cannot conclude that Flowers received a fair trial, nor can I conclude that prospective jurors were not subjected to impermissible discrimination." *Id.*, at 1172. According to Justice King, both the trial court and the Mississippi Supreme Court "completely disregard[ed] the constitutional right of prospective jurors to be free from a racially discriminatory selection process." *Id.,* at 1171. We granted certiorari. See 586 U. S. ___.

II

A

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process. See *Powers* v. *Ohio*, 499 U. S. 400, 407 (1991).

Jury selection in criminal cases varies significantly based on state and local rules and practices, but ordinarily consists of three phases, which we describe here in general terms. *First*, a group of citizens in the community is randomly summoned to the courthouse on a particular day for

potential jury service. *Second*, a subgroup of those prospective jurors is called into a particular courtroom for a specific case. The prospective jurors are often questioned by the judge, as well as by the prosecutor and defense attorney. During that second phase, the judge may excuse certain prospective jurors based on their answers. *Third*, the prosecutor and defense attorney may challenge certain prospective jurors. The attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial. In addition to challenges for cause, each side is typically afforded a set number of peremptory challenges or strikes. Peremptory strikes have very old credentials and can be traced back to the common law. Those peremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked.

That blanket discretion to peremptorily strike prospective jurors for any reason can clash with the dictates of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This case arises at the intersection of the peremptory challenge and the Equal Protection Clause. And to understand how equal protection law applies to peremptory challenges, it helps to begin at the beginning.

Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." A primary objective of the Equal Protection Clause, this Court stated just five years after ratification, was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Slaughter-House Cases*, 16 Wall. 36, 71 (1873).

In 1875, to help enforce the Fourteenth Amendment,

Congress passed and President Ulysses S. Grant signed the Civil Rights Act of 1875. Ch. 114, 18 Stat. 335. Among other things, that law made it a criminal offense for state officials to exclude individuals from jury service on account of their race. 18 U. S. C. §243. The Act provides: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude."

In 1880, just 12 years after ratification of the Fourteenth Amendment, the Court decided *Strauder* v. *West Virginia*, 100 U. S. 303. That case concerned a West Virginia statute that allowed whites only to serve as jurors. The Court held the law unconstitutional.

In reaching its conclusion, the Court explained that the Fourteenth Amendment required "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Id.,* at 307. In the words of the *Strauder* Court: "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.*, at 308. For those reasons, the Court ruled that the West Virginia statute excluding blacks from jury service violated the Fourteenth Amendment.

As the Court later explained in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court's decisions in the *Slaughter-House Cases* and *Strauder* interpreted the Fourteenth Amendment "as proscribing all state-imposed discriminations against the Negro race," including in jury service. *Brown*, 347 U. S., at 490.

In the decades after *Strauder*, the Court reiterated that States may not discriminate on the basis of race in jury selection. See, *e.g., Neal* v. *Delaware*, 103 U. S. 370, 397 (1881); *Carter* v. *Texas*, 177 U. S. 442, 447 (1900); *Norris* v. *Alabama*, 294 U. S. 587, 597–599 (1935); *Hale* v. *Kentucky*, 303 U. S. 613, 616 (1938) (*per curiam*); *Pierre* v. *Louisiana*, 306 U. S. 354, 362 (1939); *Smith* v. *Texas*, 311 U. S. 128, 130–131 (1940); *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953); *Hernandez* v. *Texas*, 347 U. S. 475, 477–478, 482 (1954); *Coleman* v. *Alabama*, 377 U. S. 129, 133 (1964).

But critical problems persisted. Even though laws barring blacks from serving on juries were unconstitutional after *Strauder*, many jurisdictions employed various discriminatory tools to prevent black persons from being called for jury service. And when those tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors.

In the century after *Strauder*, the freedom to exercise peremptory strikes for any reason meant that "the problem of racial exclusion from jury service" remained "widespread" and "deeply entrenched." 5 U. S. Commission on Civil Rights Report 90 (1961). Simple math shows how that happened. Given that blacks were a minority of the population, in many jurisdictions the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors. So prosecutors could routinely exercise peremptories to strike all the black prospective jurors and thereby ensure all-white juries. The exclusion of black prospective jurors was almost total in certain

jurisdictions, especially in cases involving black defendants. Similarly, defense counsel could use—and routinely did use—peremptory challenges to strike all the black prospective jurors in cases involving white defendants and black victims.

In the aftermath of *Strauder*, the exclusion of black jurors became more covert and less overt—often accomplished through peremptory challenges in individual courtrooms rather than by blanket operation of law. But as this Court later noted, the results were the same for black jurors and black defendants, as well as for the black community's confidence in the fairness of the American criminal justice system. See *Batson*, 476 U. S., at 98–99.

Eighty-five years after *Strauder*, the Court decided *Swain* v. *Alabama*, 380 U. S. 202 (1965). The defendant Swain was black. Swain was convicted of a capital offense in Talladega County, Alabama, and sentenced to death. Swain presented evidence that no black juror had served on a jury in Talladega County in more than a decade. See *id.,* at 226. And in Swain's case, the prosecutor struck all six qualified black prospective jurors, ensuring that Swain was tried before an all-white jury. Swain invoked *Strauder* to argue that the prosecutor in his case had impermissibly discriminated on the basis of race by using peremptory challenges to strike the six black prospective jurors. See 380 U. S., at 203, 210.

This Court ruled that Swain had not established unconstitutional discrimination. Most importantly, the Court held that a defendant could not object to the State's use of peremptory strikes in an individual case. In the Court's words: "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.,* at 221. The *Swain* Court reasoned that prosecutors do not always judge prospective jurors individually when exercising peremptory strikes. Instead, prosecutors choose which prospective jurors to strike "in light of the

limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." *Ibid*. In the Court's view, the prosecutor could strike prospective jurors on the basis of their group affiliations, including race. In other words, a prosecutor could permissibly strike a prospective juror for any reason, including the assumption or belief that a black prospective juror, because of race, would be favorable to a black defendant or unfavorable to the State. See *id.,* at 220–221.

To be sure, the *Swain* Court held that a defendant could make out a case of racial discrimination by showing that the State "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," had been responsible for the removal of qualified black prospective jurors so that no black jurors "ever serve on petit juries." *Id.,* at 223. But *Swain*'s high bar for establishing a constitutional violation was almost impossible for any defendant to surmount, as the aftermath of *Swain* amply demonstrated.

Twenty-one years later, in its 1986 decision in *Batson*, the Court revisited several critical aspects of *Swain* and in essence overruled them. In so doing, the *Batson* Court emphasized that "the central concern" of the Fourteenth Amendment "was to put an end to governmental discrimination on account of race." 476 U. S., at 85. The *Batson* Court noted that *Swain* had left prosecutors' peremptory challenges "largely immune from constitutional scrutiny." 476 U. S., at 92–93. In his concurrence in *Batson*, Justice Byron White (the author of *Swain*) agreed that *Swain* should be overruled. He stated: "[T]he practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so" that "I agree with the Court that the time has come to rule as it has." 476 U. S., at 101–102.

Under *Batson*, once a prima facie case of discrimination has been shown by a defendant, the State must provide

race-neutral reasons for its peremptory strikes. The trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination. *Id.,* at 97–98.

Four parts of *Batson* warrant particular emphasis here.

First, the *Batson* Court rejected *Swain*'s insistence that a defendant demonstrate a history of racially discriminatory strikes in order to make out a claim of race discrimination. See 476 U. S., at 95. According to the *Batson* Court, defendants had run into "practical difficulties" in trying to prove that a State had systematically "exercised peremptory challenges to exclude blacks from the jury on account of race." *Id.*, at 92, n. 17. The *Batson* Court explained that, in some jurisdictions, requiring a defendant to "investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges" posed an "insurmountable" burden. *Ibid.*

In addition to that practical point, the Court stressed a basic equal protection point: In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.

For those reasons, the *Batson* Court held that a criminal defendant could show "purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*." *Id.*, at 96 (emphasis added).

Second, the *Batson* Court rejected *Swain*'s statement that a prosecutor could strike a black juror based on an assumption or belief that the black juror would favor a black defendant. In some of the most critical sentences in the *Batson* opinion, the Court emphasized that a prosecutor may not rebut a claim of discrimination "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they

would be partial to the defendant because of their shared race." 476 U. S., at 97. The Court elaborated: The Equal Protection Clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *Id.,* at 97–98. In his concurrence, Justice Thurgood Marshall drove the point home: "Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the intelligence, experience, or moral integrity to be entrusted with that role." *Id.,* at 104–105 (internal quotation marks and citations omitted).

Third, the *Batson* Court did not accept the argument that race-based peremptories should be permissible because black, white, Asian, and Hispanic defendants and jurors were all "equally" subject to race-based discrimination. The Court stated that each removal of an individual juror because of his or her race is a constitutional violation. Discrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or jurors on account of race. As the Court later explained: Some say that there is no equal protection violation if individuals "of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy* v. *Ferguson*, 163 U. S. 537

(1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers*, 499 U. S., at 410 (citing *Loving* v. *Virginia*, 388 U. S. 1 (1967)).

Fourth, the *Batson* Court did not accept the argument that race-based peremptories are permissible because both the prosecution and defense could employ them in any individual case and in essence balance things out. Under the Equal Protection Clause, the Court stressed, even a single instance of race discrimination against a prospective juror is impermissible. Moreover, in criminal cases involving black defendants, the both-sides-can-do-it argument overlooks the percentage of the United States population that is black (about 12 percent) and the cold reality of jury selection in most jurisdictions. Because blacks are a minority in most jurisdictions, prosecutors often have more peremptory strikes than there are black prospective jurors on a particular panel. In the pre-*Batson* era, therefore, allowing each side in a case involving a black defendant to strike prospective jurors on the basis of race meant that a prosecutor could eliminate all of the black jurors, but a black defendant could not eliminate all of the white jurors. So in the real world of criminal trials against black defendants, both history and math tell us that a system of race-based peremptories does not treat black defendants and black prospective jurors equally with prosecutors and white prospective jurors. Cf. *Batson*, 476 U. S., at 99.

B

Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, *Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. By taking steps to

eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system. *Batson* immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States.

In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding. See *Foster*, 578 U. S. ___; *Snyder* v. *Louisiana*, 552 U. S. 472 (2008); *Miller-El* v. *Dretke*, 545 U. S. 231 (2005) (*Miller-El II*). Moreover, the Court has extended *Batson* in certain ways. A defendant of any race may raise a *Batson* claim, and a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races. See *Hernandez*, 347 U. S., at 477–478; *Powers*, 499 U. S., at 406. Moreover, *Batson* now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases. See *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 129 (1994); *Georgia* v. *McCollum*, 505 U. S. 42, 59 (1992); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 616 (1991).

Of particular relevance here, *Batson*'s holding raised several important evidentiary and procedural issues, three of which we underscore.

First, what factors does the trial judge consider in evaluating whether racial discrimination occurred? Our precedents allow criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race. For example, defendants may present:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and

investigation of black and white prospective jurors in the case;

- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

See *Foster*, 578 U. S. ___; *Snyder*, 552 U. S. 472; *Miller-El II*, 545 U. S. 231; *Batson*, 476 U. S. 79.

Second, who enforces *Batson*? As the *Batson* Court itself recognized, the job of enforcing *Batson* rests first and foremost with trial judges. See *id.*, at 97, 99, n. 22. America's trial judges operate at the front lines of American justice. In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process.

As the *Batson* Court explained and as the Court later reiterated, once a prima facie case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge's assessment of the prosecutor's credibility is often important. The Court has explained that "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge." *Snyder*, 552 U. S., at 477 (quotation altered). "We have recognized that these determinations of credibility and demeanor lie peculiarly within a

trial judge's province." *Ibid.* (internal quotation marks omitted). The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race. The ultimate inquiry is whether the State was "motivated in substantial part by discriminatory intent." *Foster*, 578 U. S., at ___ (slip op., at 23) (internal quotation marks omitted).

Third, what is the role of appellate review? An appeals court looks at the same factors as the trial judge, but is necessarily doing so on a paper record. "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U. S., at 98, n. 21. The Court has described the appellate standard of review of the trial court's factual determinations in a *Batson* hearing as "highly deferential." *Snyder*, 552 U. S., at 479. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Id.,* at 477.

III

In accord with the principles set forth in *Batson*, we now address Flowers' case.

The Constitution forbids striking even a single prospective juror for a discriminatory purpose. See *Foster*, 578 U. S., at ___ (slip op., at 9). The question for this Court is whether the Mississippi trial court clearly erred in concluding that the State was not "motivated in substantial part by discriminatory intent" when exercising peremptory strikes at Flowers' sixth trial. *Id.*, at ___ (slip op., at 23) (internal quotation marks omitted); see also *Snyder*, 552 U. S., at 477. Because this case arises on direct review, we owe no deference to the Mississippi Supreme Court, as

distinct from deference to the Mississippi trial court.

Four categories of evidence loom large in assessing the *Batson* issue in Flowers' case: (1) the history from Flowers' six trials, (2) the prosecutor's striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial. We address each in turn.

A

First, we consider the relevant history of the case. Recall that in *Swain*, the Court held that a defendant may prove racial discrimination by establishing a historical pattern of racial exclusion of jurors in the jurisdiction in question. Indeed, under *Swain*, that was the only way that a defendant could make out a claim that the State discriminated on the basis of race in the use of peremptory challenges.

In *Batson*, the Court ruled that *Swain* had imposed too heavy a burden on defendants seeking to prove that a prosecutor had used peremptory strikes in a racially discriminatory manner. *Batson* lowered the evidentiary burden for defendants to contest prosecutors' use of peremptory strikes and made clear that demonstrating a history of discriminatory strikes in past cases was not necessary.

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

as *Swain* had allowed. After *Batson*, the defendant may still cast *Swain*'s "wide net" to gather "'relevant'" evidence. *Miller-El II*, 545 U. S., at 239–240. A defendant may rely on "all relevant circumstances." *Batson*, 476 U. S., at 96–97.

Here, our review of the history of the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. (Recall that there is no record evidence from the fifth trial regarding the race of the prospective jurors.)

The numbers speak loudly. Over the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike. The State tried to strike all 36. The State used its available peremptory strikes to attempt to strike every single black prospective juror that it could have struck. (At oral argument in this Court, the State acknowledged that statistic. Tr. of Oral Arg. 32.) Not only did the State's use of peremptory strikes in Flowers' first four trials reveal a blatant pattern of striking black prospective jurors, the Mississippi courts themselves concluded on two separate occasions that the State violated *Batson*. In Flowers' second trial, the trial court concluded that the State discriminated against a black juror. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' *Batson* challenge. In Flowers' next trial—his third trial—the prosecutor used all 15 of its peremptories to strike 15 black prospective jurors. The lead opinion of the Mississippi Supreme Court stated: "The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge."

Flowers, 947 So. 2d, at 935. The opinion further stated that "the State engaged in racially discriminatory practices during the jury selection process" and that the "case evinces an effort by the State to exclude African-Americans from jury service." *Id.,* at 937, 939.

To summarize the most relevant history: In Flowers' first trial, the prosecutor successfully used peremptory strikes against all of the black prospective jurors. Flowers faced an all-white jury. In Flowers' second trial, the prosecutor tried again to strike all of the black prospective jurors, but the trial court decided that the State could not strike one of those jurors. The jury consisted of 11 white jurors and 1 black juror. In Flowers' third trial, there were 17 black prospective jurors. The prosecutor used 15 out of 15 peremptory strikes against black prospective jurors. After one black juror was struck for cause and the prosecutor ran out of strikes, one black juror remained. The jury again consisted of 11 white jurors and 1 black juror. In Flowers' fourth trial, the prosecutor again used 11 out of 11 peremptory strikes against black prospective jurors. Because of the large number of black prospective jurors at the trial, the prosecutor ran out of peremptory strikes before it could strike all of the black prospective jurors. The jury for that trial consisted of seven white jurors and five black jurors, and the jury was unable to reach a verdict. To reiterate, there is no available information about the race of prospective jurors in the fifth trial. The jury for that trial consisted of nine white jurors and three black jurors, and the jury was unable to reach a verdict.

Stretching across Flowers' first four trials, the State employed its peremptory strikes to remove as many black prospective jurors as possible. The State appeared to proceed as if *Batson* had never been decided. The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try

Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury. The trial judge was aware of the history. But the judge did not sufficiently account for the history when considering Flowers' *Batson* claim.

The State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case.

B

We turn now to the State's strikes of five of the six black prospective jurors at Flowers' sixth trial, the trial at issue here. As *Batson* noted, a "'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." 476 U. S., at 97.

Flowers' sixth trial occurred in June 2010. At trial, 26 prospective jurors were presented to potentially serve on the jury. Six of the prospective jurors were black. The State accepted one black prospective juror—Alexander Robinson. The State struck the other five black prospective jurors—Carolyn Wright, Tashia Cunningham, Edith Burnside, Flancie Jones, and Dianne Copper. The resulting jury consisted of 11 white jurors and 1 black juror.

The State's use of peremptory strikes in Flowers' sixth trial followed the same pattern as the first four trials, with one modest exception: It is true that the State accepted one black juror for Flowers' sixth trial. But especially given the history of the case, that fact alone cannot insulate the State from a *Batson* challenge. In *Miller-El II*, this Court skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt "to obscure the otherwise consistent pattern of opposition to" seating black jurors. 545 U. S., at 250. The overall record of this case suggests that the same tactic may have been employed here. In light of all of the

circumstances here, the State's decision to strike five of the six black prospective jurors is further evidence suggesting that the State was motivated in substantial part by discriminatory intent.

C

We next consider the State's dramatically disparate questioning of black and white prospective jurors in the jury selection process for Flowers' sixth trial. As *Batson* explained, "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." 476 U. S., at 97.

The questioning process occurred through an initial group *voir dire* and then more in-depth follow-up questioning by the prosecutor and defense counsel of individual prospective jurors. The State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions. On average, therefore, the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror.

One can slice and dice the statistics and come up with all sorts of ways to compare the State's questioning of excluded black jurors with the State's questioning of the accepted white jurors. But any meaningful comparison yields the same basic assessment: The State spent far more time questioning the black prospective jurors than the accepted white jurors.

The State acknowledges, as it must under our precedents, that disparate questioning can be probative of discriminatory intent. See *Miller-El* v. *Cockrell*, 537 U. S. 322, 331–332, 344–345 (2003) (*Miller-El I*). As *Miller-El I* stated, "if the use of disparate questioning is determined by race at the outset, it is likely [that] a justification for a

strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination." *Id.,* at 344.

But the State here argues that it questioned black and white prospective jurors differently only because of differences in the jurors' characteristics. The record refutes that explanation.

For example, Dianne Copper was a black prospective juror who was struck. The State asked her 18 follow-up questions about her relationships with Flowers' family and with witnesses in the case. App. 188–190. Pamela Chesteen was a white juror whom the State accepted for the jury. Although the State asked questions of Chesteen during group *voir dire*, the State asked her no individual follow-up questions about her relationships with Flowers' family, even though the State was aware that Chesteen knew several members of Flowers' family. Compare *id.*, at 83, with *id.*, at 111. Similarly, the State asked no individual follow-up questions to four other white prospective jurors who, like Dianne Copper, had relationships with defense witnesses, even though the State was aware of those relationships. Those white prospective jurors were Larry Blaylock, Harold Waller, Marcus Fielder, and Bobby Lester.

Likewise, the State conducted disparate investigations of certain prospective jurors. Tashia Cunningham, who is black, stated that she worked with Flowers' sister, but that the two did not work closely together. To try to disprove that statement, the State summoned a witness to challenge Cunningham's testimony. *Id.*, at 148–150. The State apparently did not conduct similar investigations of white prospective jurors.

It is certainly reasonable for the State to ask follow-up questions or to investigate the relationships of jurors to the victims, potential witnesses, and the like. But white

prospective jurors who were acquainted with the Flowers' family or defense witnesses were not questioned extensively by the State or investigated. White prospective jurors who admitted that they or a relative had been convicted of a crime were accepted without apparent further inquiry by the State. The difference in the State's approaches to black and white prospective jurors was stark.

Why did the State ask so many more questions—and conduct more vigorous inquiry—of black prospective jurors than it did of white prospective jurors? No one can know for certain. But this Court's cases explain that disparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race. See *Miller-El I*, 537 U. S., at 331–332, 344–345. In other words, by asking a lot of questions of the black prospective jurors or conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike. And by not doing the same for white prospective jurors, by not asking white prospective jurors those same questions, the prosecutor can try to distort the record so as to thereby avoid being accused of treating black and white jurors differently. Disparity in questioning and investigation can produce a record that says little about white prospective jurors and is therefore resistant to characteristic-by-characteristic comparisons of struck black prospective jurors and seated white jurors. Prosecutors can decline to seek what they do not want to find about white prospective jurors.

A court confronting that kind of pattern cannot ignore it. The lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated.

The prosecutor's dramatically disparate questioning of black and white prospective jurors—at least if it rises to a certain level of disparity—can supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent. See *ibid*.

To be clear, disparate questioning or investigation alone does not constitute a *Batson* violation. The disparate questioning or investigation of black and white prospective jurors may reflect ordinary race-neutral considerations. But the disparate questioning or investigation can also, along with other evidence, inform the trial court's evaluation of whether discrimination occurred.

Here, along with the historical evidence we described above from the earlier trials, as well as the State's striking of five of six black prospective jurors at the sixth trial, the dramatically disparate questioning and investigation of black prospective jurors and white prospective jurors at the sixth trial strongly suggests that the State was motivated in substantial part by a discriminatory intent. We agree with the observation of the dissenting justices of the Mississippi Supreme Court: The "numbers described above are too disparate to be explained away or categorized as mere happenstance." 240 So. 3d, at 1161 (opinion of King, J.).

D

Finally, in combination with the other facts and circumstances in this case, the record of jury selection at the sixth trial shows that the peremptory strike of at least one of the black prospective jurors (Carolyn Wright) was motivated in substantial part by discriminatory intent. As this Court has stated, the Constitution forbids striking even a single prospective juror for a discriminatory purpose. See *Foster,* 578 U. S., at ___ (slip op., at 9).

Comparing prospective jurors who were struck and not struck can be an important step in determining whether a

Batson violation occurred. See *Snyder*, 552 U. S., at 483–484; *Miller-El II*, 545 U. S., at 241. The comparison can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination. When a prosecutor's "proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Foster*, 578 U. S., at ___ (slip op., at 23) (quotation altered). Although a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent. *Miller-El II*, 545 U. S., at 247, n. 6.

In this case, Carolyn Wright was a black prospective juror who said she was strongly in favor of the death penalty as a general matter. And she had a family member who was a prison security guard. Yet the State exercised a peremptory strike against Wright. The State said it struck Wright in part because she knew several defense witnesses and had worked at Wal-Mart where Flowers' father also worked.

Winona is a small town. Wright had some sort of connection to 34 people involved in Flowers' case, both on the prosecution witness side and the defense witness side. See, 240 So. 3d, at 1126. But three white prospective jurors—Pamela Chesteen, Harold Waller, and Bobby Lester—also knew many individuals involved in the case. Chesteen knew 31 people, Waller knew 18 people, and Lester knew 27 people. See *ibid.* Yet as we explained above, the State did not ask Chesteen, Waller, and Lester individual follow-up questions about their connections to witnesses. That is a telling statistic. If the State were concerned about prospective jurors' connections to witnesses in the case, the State presumably would have used

individual questioning to ask those potential white jurors whether they could remain impartial despite their relationships. A "State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U. S., at 246 (internal quotation marks omitted).

Both Carolyn Wright and Archie Flowers, who is the defendant's father, had worked at the local Wal-Mart. But there was no evidence that they worked together or were close in any way. Importantly, the State did not ask individual follow-up questions to determine the nature of their relationship. And during group questioning, Wright said she did not know whether Flowers' father still worked at Wal-Mart, which "supports an inference that Wright and Flowers did not have a close working relationship." 240 So. 3d, at 1163 (King, J., dissenting). And white prospective jurors also had relationships with members of Flowers' family. Indeed, white prospective juror Pamela Chesteen stated that she had provided service to Flowers' family members at the bank and that she knew several members of the Flowers family. App. 83. Likewise, white prospective juror Bobby Lester worked at the same bank and also encountered Flowers' family members. *Id.*, at 86. Although Chesteen and Lester were questioned during group *voir dire*, the State did not ask Chesteen or Lester individual follow-up questions in order to explore the depth of their relationships with Flowers' family. And instead of striking those jurors, the State accepted them for the jury. To be sure, both Chesteen and Lester were later struck by the defense. But the State's acceptance of Chesteen and Lester necessarily informs our assessment of the State's intent in striking similarly situated black prospective jurors such as Wright.

The State also noted that Wright had once been sued by Tardy Furniture for collection of a debt 13 years earlier.

Id., at 209. Wright said that the debt was paid off and that it would not affect her evaluation of the case. *Id.*, at 71, 90–91. The victims in this case worked at Tardy Furniture. But the State did not explain how Wright's 13-year-old, paid-off debt to Tardy Furniture could affect her ability to serve impartially as a juror in this quadruple murder case. The "State's unsupported characterization of the lawsuit is problematic." 240 So. 3d, at 1163 (King, J., dissenting). In any event, the State did not purport to rely on that reason alone as the basis for the Wright strike, and the State in this Court does not rely on that reason alone in defending the Wright strike.

The State also explained that it exercised a peremptory strike against Wright because she had worked with one of Flowers' sisters. App. 209. That was incorrect. The trial judge immediately stated as much. *Id.*, at 218–219. But incorrect statements of that sort may show the State's intent: When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent.

That incorrect statement was not the only one made by the prosecutor. The State made apparently incorrect statements to justify the strikes of black prospective jurors Tashia Cunningham, Edith Burnside, and Flancie Jones. The State contradicted Cunningham's earlier statement that she had only a working relationship with Flowers' sister by inaccurately asserting that Cunningham and Flowers' sister were close friends. See *id.*, at 84, 220. The State asserted that Burnside had tried to cover up a Tardy Furniture suit. See *id.*, at 226. She had not. See *id.*, 70–71. And the State explained that it struck Jones in part because Jones was Flowers' aunt. See *id.,* at 229. That, too, was not true. See *id.*, at 86–88. The State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury. See *Foster*, 578 U. S., at

___ (slip op., at 23); *Miller-El II*, 545 U. S., at 240, 245.

To be sure, the back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations. That is entirely understandable, and mistaken explanations should not be confused with racial discrimination. But when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling. So it is here.

The side-by-side comparison of Wright to white prospective jurors whom the State accepted for the jury cannot be considered in isolation in this case. In a different context, the Wright strike might be deemed permissible. But we must examine the whole picture. Our disagreement with the Mississippi courts (and our agreement with Justice King's dissent in the Mississippi Supreme Court) largely comes down to whether we look at the Wright strike in isolation or instead look at the Wright strike in the context of all the facts and circumstances. Our precedents require that we do the latter. As Justice King explained in his dissent in the Mississippi Supreme Court, the Mississippi courts appeared to do the former. 240 So. 3d, at 1163–1164. As we see it, the overall context here requires skepticism of the State's strike of Carolyn Wright. We must examine the Wright strike in light of the history of the State's use of peremptory strikes in the prior trials, the State's decision to strike five out of six black prospective jurors at Flowers' sixth trial, and the State's vastly disparate questioning of black and white prospective jurors during jury selection at the sixth trial. We cannot just look away. Nor can we focus on the Wright strike in isolation. In light of all the facts and circumstances, we conclude that the trial court clearly erred in ruling that the State's peremptory strike of Wright was not motivated in substantial part by discriminatory intent.

* * *

In sum, the State's pattern of striking black prospective jurors persisted from Flowers' first trial through Flowers' sixth trial. In the six trials combined, the State struck 41 of the 42 black prospective jurors it could have struck. At the sixth trial, the State struck five of six. At the sixth trial, moreover, the State engaged in dramatically disparate questioning of black and white prospective jurors. And it engaged in disparate treatment of black and white prospective jurors, in particular by striking black prospective juror Carolyn Wright.

To reiterate, we need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–9572

CURTIS GIOVANNI FLOWERS, PETITIONER
v. MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[June 21, 2019]

JUSTICE ALITO, concurring.

As the Court takes pains to note, this is a highly unusual case. Indeed, it is likely one of a kind. In 1996, four defenseless victims, three white and one black, were slaughtered in a furniture store in a small town in Montgomery County, Mississippi, a jurisdiction with fewer than 11,000 inhabitants. One of the victims was the owner of the store, which was widely frequented by residents of the community. The person prosecuted for this crime, petitioner Curtis Flowers, an African-American, comes from a local family whose members make up a gospel group and have many community ties.

By the time jury selection began in the case now before us, petitioner had already been tried five times for committing that heinous and inflammatory crime. Three times, petitioner was convicted and sentenced to death, but all three convictions were reversed by the State Supreme Court. Twice, the jurors could not reach a unanimous verdict. In all of the five prior trials, the State was represented by the same prosecutor, and as the Court recounts, many of those trials were marred by racial discrimination in the selection of jurors and prosecutorial misconduct. Nevertheless, the prosecution at the sixth trial was led by the same prosecutor, and the case was tried in Montgomery County where, it appears, a high

percentage of the potential jurors have significant connections to either petitioner, one or more of the victims, or both.

These connections and the community's familiarity with the case were bound to complicate a trial judge's task in trying to determine whether the prosecutor's asserted reason for striking a potential juror was a pretext for racial discrimination, and that is just what occurred. Petitioner argues that the prosecution improperly struck five black jurors, but for each of the five, the prosecutor gave one or more reasons that were not only facially legitimate but were of a nature that would be of concern to a great many attorneys. If another prosecutor in another case in a larger jurisdiction gave any of these reasons for exercising a peremptory challenge and the trial judge credited that explanation, an appellate court would probably have little difficulty affirming that finding. And that result, in all likelihood, would not change based on factors that are exceedingly difficult to assess, such as the number of *voir dire* questions the prosecutor asked different members of the venire.

But this is not an ordinary case, and the jury selection process cannot be analyzed as if it were. In light of all that had gone before, it was risky for the case to be tried once again by the same prosecutor in Montgomery County. Were it not for the unique combinations of circumstances present here, I would have no trouble affirming the decision of the Supreme Court of Mississippi, which conscientiously applied the legal standards applicable in less unusual cases. But viewing the totality of the circumstances present here, I agree with the Court that petitioner's capital conviction cannot stand.

SUPREME COURT OF THE UNITED STATES

No. 17–9572

CURTIS GIOVANNI FLOWERS, PETITIONER
v. MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[June 21, 2019]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins as to Parts I, II, and III, dissenting.

On a summer morning in July 1996 in Winona, Mississippi, 16-year-old Derrick "Bobo" Stewart arrived for the second day of his first job. He and Robert Golden had been hired by the Tardy Furniture store to replace petitioner Curtis Flowers, who had been fired a few days prior and had his paycheck docked for damaging store property and failing to show up for work. Another employee, Sam Jones, Jr., planned to teach Stewart and Golden how to properly load furniture.

On Jones' arrival, he found a bloodbath. Store owner Bertha Tardy and bookkeeper Carmen Rigby had each been murdered with a single gunshot to the head. Golden had been murdered with two gunshots to the head, one at very close range. And Stewart had been shot, execution style, in the back of his head. When Jones entered the store, Stewart was fighting for every breath, blood pouring over his face. He died a week later.

On the morning of the murders, a .380-caliber pistol was reported stolen from the car of Flowers' uncle, and a witness saw Flowers by that car before the shootings. Officers recovered .380-caliber bullets at Tardy Furniture and matched them to bullets fired by the stolen pistol. Gunshot residue was found on Flowers' hand a few hours after

the murders. A bloody footprint found at the scene matched both the size of Flowers' shoes and the shoe style that he was seen wearing on the morning of the murders. Multiple witnesses placed Flowers near Tardy Furniture that morning, and Flowers provided inconsistent accounts of his whereabouts. Several hundred dollars were missing from the store's cash drawer, and $235 was found hidden in Flowers' headboard after the murders. 240 So. 3d 1082, 1092–1095, 1107 (Miss. 2017).

In the 2010 trial at issue here, Flowers was convicted of four counts of murder and sentenced to death. Applying heightened scrutiny, the state courts found that the evidence was more than sufficient to convict Flowers, that he was tried by an impartial jury, and that the State did not engage in purposeful race discrimination in jury selection in violation of the Equal Protection Clause. *Id.,* at 1096, 1113, 1139, 1135.

The Court today does not dispute that the evidence was sufficient to convict Flowers or that he was tried by an impartial jury. Instead, the Court vacates Flowers' convictions on the ground that the state courts clearly erred in finding that the State did not discriminate based on race when it struck Carolyn Wright from the jury.

The only clear errors in this case are committed by today's majority. Confirming that we never should have taken this case, the Court almost entirely ignores—and certainly does not refute—the race-neutral reasons given by the State for striking Wright and four other black prospective jurors. Two of these prospective jurors knew Flowers' family and had been sued by Tardy Furniture—the family business of one of the victims and also of one of the trial witnesses. One refused to consider the death penalty and apparently lied about working side-by-side with Flowers' sister. One was related to Flowers and lied about her opinion of the death penalty to try to get out of jury duty. And one said that because she worked with two

of Flowers' family members, she might favor him and would not consider only the evidence presented. The state courts' findings that these strikes were not based on race are the opposite of clearly erroneous; they are clearly correct. The Court attempts to overcome the evident race neutrality of jury selection in this trial by pointing to a supposed history of race discrimination in previous trials. But 49 of the State's 50 peremptory strikes in Flowers' previous trials were race neutral. The remaining strike occurred 20 years ago in a trial involving only one of Flowers' crimes and was never subject to appellate review; the majority offers no plausible connection between that strike and Wright's.

Today's decision distorts the record of this case, eviscerates our standard of review, and vacates four murder convictions because the State struck a juror who would have been stricken by any competent attorney. I dissent.

I

Twice now, the Court has made the mistake of granting this case. The first time, this case was one of three that the Court granted, vacated, and remanded in light of *Foster* v. *Chatman*, 578 U. S. ___ (2016), which involved a challenge under *Batson* v. *Kentucky*, 476 U. S. 79 (1986). See *Flowers* v. *Mississippi*, 579 U. S. ___ (2016). But "*Foster* did not change or clarify the *Batson* rule in any way," so remanding was senseless and unproductive: "Without pointing out any errors in the State Supreme Court's analysis" or bothering to explain how *Foster* was relevant, "the [Court] simply order[ed] the State Supreme Court to redo its work." *Flowers*, 579 U. S., at ___, ___ (ALITO, J., dissenting) (slip op., at 1, 4).

Unsurprisingly, no one seemed to understand *Foster*'s relevance on remand. The defendants simply "re-urge[d] the arguments [they] had raised" before, and all three courts promptly reinstated their prior decisions—

confirming the impropriety of the entire enterprise. 240 So. 3d, at 1117–1118, 1153; *State* v. *Williams*, 2013–0283 (La. App. 4 Cir. 9/7/16), 199 So. 3d 1222, 1230, 1238 (pointing out that "*Foster* did not change the applicable principles for analyzing a *Batson* claim"); *Ex parte Floyd*, 227 So. 3d 1, 13 (Ala. 2016).

Flowers then filed another petition for certiorari, raising the same question as his first petition: whether a prosecutor's history of *Batson* violations is irrelevant when assessing the credibility of his proffered explanations for peremptory strikes. Under our ordinary certiorari criteria, we would never review this issue. There is no disagreement among the lower courts on this question, and the question is not implicated by this case—the Mississippi Supreme Court *did* consider the prosecutor's history, see 240 So. 3d, at 1122–1124, 1135, and, to the extent there is a relevant history here, it is one of race-*neutral* strikes, see Part III, *infra*.

Nonetheless, Flowers' question presented at least had the virtue of being a question of law that could affect *Batson*'s application. Unchastened by its *Foster* remand, however, the Court granted certiorari and changed the question presented to ask merely whether the Mississippi Supreme Court had misapplied *Batson* in this particular case. In other words, the Court tossed aside any pretense of resolving a legal question so it could reconsider the factual findings of the state courts. In so doing, the Court disregards the rule that "[w]e do not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U. S. 220, 227 (1925), particularly where there are "'concurrent findings of fact by two courts below,'" *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 841 (1996).

The Court does not say why it disregarded our traditional criteria to take this case. It is not as if the Court lacked better options. See *Gee* v. *Planned Parenthood of*

Gulf Coast, Inc., 586 U. S. ___ (2018) (THOMAS, J., dissenting from denial of certiorari). Perhaps the Court lacked confidence in the proceedings below. Flowers' case, like the others needlessly remanded in light of *Foster*, comes to us from a state court in the South. These courts are "familiar objects of the Court's scorn," *United States* v. *Windsor*, 570 U. S. 744, 795 (2013) (Scalia, J., dissenting), especially in cases involving race.[1]

Or perhaps the Court granted certiorari because the case has received a fair amount of media attention. But if so, the Court's action only encourages the litigation and relitigation of criminal trials in the media, to the potential detriment of all parties—including defendants. The media often seeks "to titillate rather than to educate and inform." *Chandler* v. *Florida*, 449 U. S. 560, 580 (1981). And the Court has "long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial," by "influenc[ing] public opinion" and "inform[ing] potential jurors of . . . information wholly inadmissible at the actual trial." *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 378 (1979); *e.g., Sheppard* v. *Maxwell*, 384 U. S. 333, 356–363 (1966); *Irvin* v. *Dowd*, 366 U. S. 717, 725–728 (1961). Media attention can produce other dangers, too, including discouraging reluctant witnesses from testifying and encouraging eager witnesses, prosecutors, defense counsel, and even judges to perform for the audience. See *Estes* v. *Texas*, 381 U. S. 532, 591 (1965) (Harlan, J., concurring). Any appearance that this Court gives closer scrutiny to cases with significant media attention will only exacerbate these problems and undermine the fairness of criminal trials.

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[1] *E.g., Tharpe* v. *Sellers*, 583 U. S. ___ (2018) (*per curiam*); *Buck* v. *Davis*, 580 U. S. ___ (2017); *Foster* v. *Chatman*, 578 U. S. ___ (2016); *In re Davis*, 557 U. S. 952 (2009); *Snyder* v. *Louisiana*, 552 U. S. 472 (2008).

Whatever the Court's reason for taking this case, we should have dismissed it as improvidently granted. If the Court wanted to simply review the state courts' application of *Batson*, it at least could have had the decency to do so the first time around. Instead, the Court wasted the State's, defendant's, and lower court's time and resources—to say nothing of prolonging the ongoing "'nightmare'" of Bobo Stewart's and the other victims' families as they await justice. Tr. 3268–3272. And now, the majority considers it a point of pride to "break no new legal ground," *ante,* at 3, 31, and proceeds to second-guess the factual findings of two different courts on matters wholly collateral to the merits of the conviction. If nothing else, its effort proves the reason behind the rule that we do not take intensively fact-specific cases.

II

The majority's opinion is so manifestly incorrect that I must proceed to the merits. Flowers presented no evidence whatsoever of purposeful race discrimination by the State in selecting the jury during the trial below. Each of the five challenged strikes was amply justified on race-neutral grounds timely offered by the State at the *Batson* hearing. None of the struck black jurors was remotely comparable to the seated white jurors. And nothing else about the State's conduct at jury selection—whether trivial mistakes of fact or supposed disparate questioning—provides any evidence of purposeful discrimination based on race.

A

1

The majority focuses its discussion on potential juror Carolyn Wright, but the State offered multiple race-neutral reasons for striking her. To begin, Wright lost a lawsuit to Tardy Furniture soon after the murders, and a

garnishment order was issued against her. App. 71–72; Record 2697. Noting that Wright claimed the lawsuit "would not affect her evaluation of the case," the majority questions how this lawsuit "could affect [Wright's] ability to serve impartially." *Ante,* at 29. But the potential bias is obvious. The "victims in this case" did not merely "wor[k] at Tardy Furniture." *Ibid.* At the time of the murders, Bertha Tardy owned Tardy Furniture. Following her murder, her daughter and son-in-law succeeded her as owners; they sued Wright, and the daughter testified at this trial. See App. 71, 209; 240 So. 3d, at 1093; Tr. 1656. Neither the trial court nor Flowers suffered from any confusion as to how losing a lawsuit to a trial witness and daughter of a victim might affect a juror. See App. 280, and n. 2; Recording of Oral Arg. 13:40–13:47 in No. 2010–DP–01328–SCT (Miss., July 14, 2014) (Flowers' counsel arguing that "'the potential jurors who were sued by'" Tardy had more "'basis for being upset with her'" than Flowers did), https://judicial.mc.edu/case.php?id=1122570. Indeed, a portion of the daughter's testimony focused on obtaining judgments and garnishments against customers who did not pay off their accounts. Tr. 2672–2674.

Faced with this strong race-neutral reason for striking Wright, the majority first suggests that the State did not adequately explain how the lawsuit could affect Wright. But it is obvious, and in any event the majority is wrong—the State *did* spell it out. See App. 209 ("'She was sued by Tardy Furniture, after these murders, by the family members that will be testifying here today'"). Moreover, Flowers did not ask for further explanation, instead claiming that "'there is no evidence of an actual lawsuit,'" *id.,* at 211, even though Wright had admitted it, *id.,* at 71–72. The State then entered into the record a copy of the judgment containing a garnishment amount. *Id.,* at 215; see Record 2697.

Second, the majority quotes the dissent below for the proposition that the "'State's unsupported characterization of the lawsuit is problematic.'" *Ante,* at 29. But the Court neglects to mention that the dissent's basis for this statement was that "[n]othing in the record supports the contention that Wright's wages were garnished." 240 So. 3d, at 1162 (King, J., dissenting). Again, that is incorrect. See Record 2697.

Finally, the majority dismisses the lawsuit's significance because "the State did not purport to rely on that reason *alone* as the basis for the Wright strike." *Ante,* at 29 (emphasis added). But the fact that the State had *additional* race-neutral reasons to strike Wright does not make the lawsuit any less of a race-neutral reason. As the State explained, Wright knew nearly every defense witness and had worked with Flowers' father at what the trial court described as the "'smallest Wal-Mart . . . that I know in existence.'" App. 218. The majority tries to minimize this connection by pointing out that "Wright said she did not know whether Flowers' father still worked at Wal-Mart." *Ante,* at 28. That is understandable, given that Wright testified that *she* no longer worked at the Wal-Mart. Tr. 782. The majority misses the point: Wright had worked in relatively close proximity with the defendant's father.[2]

2

The majority, while admonishing trial courts to "consider the prosecutor's race-neutral explanations," *ante,* at 17, completely ignores the State's race-neutral explanations for striking the other four black jurors.

Tashia Cunningham stated repeatedly that she

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[2] The majority also complains that the State did not ask enough "follow-up questions" of Wright. *Ante,* at 28. I see no reason why the State needed more information. Besides, if the State *had* asked more questions, the majority would complain that the State engaged in "dramatically disparate" questioning of Wright.

"'d[id]n't believe in the death penalty'" and would "'not even consider'" it. App. 129; see 2d Supp. Record 256b. When pressed by the trial court on this point, she vacillated, saying that she "'d[id]n't think'" she could consider the death penalty but then, "'I might. I might. I don't know. I might.'" App. 130. Opposition to the death penalty is plainly a valid, race-neutral reason for a strike. Moreover, Cunningham knew Flowers' sister, having worked with her on an assembly line for several years. *Id.,* at 83–85. She testified that they did not work in close proximity, but a supervisor testified that they actually worked "'side by side.'" *Id.,* at 149–152. Both this apparent misstatement and the fact that Cunningham worked with Flowers' sister are valid, race-neutral reasons.

Next, Edith Burnside knew Flowers personally. Flowers had visited in her home, lived one street over, and played basketball with her sons. *Id.,* at 75, 79–80. Burnside also testified repeatedly that she "'could not judge anyone,'" no "'matter what the case was,'" *id.,* at 69–70, 143–144, and that her "'problem with judging'" could "'affect [her] judgment'" here, *id.,* at 144. Finally, she too was sued by Tardy Furniture soon after the murders, and a garnishment order was entered against her. See *id.,* at 71, 141–142; *Tardy Furniture Co.* v. *Burnside*, Civ. No. 1359 (Justice Ct. Montgomery Cty., Miss., June 23, 1997), Dkt. 13, p. 553.

Next, Dianne Copper had worked with both Flowers' father and his sister for "'a year or two'" each. App. 77, 189, 234, 236. She agreed that because of these relationships and others with various defense witnesses, she might "'lean toward'" Flowers and would be unable to "'come in here . . . with an open mind.'" *Id.,* at 190; see *id.,* at 78. She also said that deciding the case on "'the evidence only'" would make her "'uncomfortable.'" *Id.,* at 191–192.

Finally, as to Flancie Jones, Flowers conceded below

that he "did not challenge [her] strike" and that "'the State's bases for striking Jones appear to be race neutral.'" Supp. Brief for Appellant in No. 2010–DP–01348–SCT (Miss.), p. 20, n. 12. Because any argument as to Jones "was not raised below, it is waived." *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002). Even if Flowers had not waived this argument, this strike was obviously supported by race-neutral reasons. Jones was related to Flowers in several ways. See App. 73, 179. She was late to court on multiple occasions. *Id.,* at 180, 182. On her juror questionnaire, she said she was "'strongly against the death penalty,'" but when asked about her opposition, said, "'I guess I'd say anything to get off'" jury duty. *Id.,* at 181; see 2d Supp. Record 325b. She then admitted that she was not necessarily "being truthful" on her questionnaire but refused to provide her actual view on the death penalty, saying, "'I—really and truly . . . don't want to be here.'" App. 181–182.

3

In terms of race-neutral validity, these five strikes are not remotely close calls. Each strike was supported by multiple race-neutral reasons articulated by the State at the *Batson* hearing and supported by the record. It makes a mockery of *Batson* for this Court to tell prosecutors to "provide race-neutral reasons for the strikes," and to tell trial judges to "consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances," *ante,* at 17, and then completely ignore the State's reasons for four out of five strikes.

Only by ignoring these facts can the Court assert that "the State's decision to strike five of the six black prospective jurors is further evidence suggesting that the State was motivated in substantial part by discriminatory intent." *Ante,* at 23. Putting aside the fact that the majority has its numbers wrong (the State struck five of seven

potential black jurors),[3] the bare numbers are meaningless outside the context of the *reasons* for the strikes. The majority has no response whatsoever to the State's race-neutral explanations and, for four of the five strikes, does not dispute the state courts' conclusion that race played no role at all. For *Batson* purposes, these strikes might as well have been exercised against white jurors. Yet the majority illegitimately counts them all against the State.

B

Given the multiple race-neutral reasons for the State's strikes, evidence of racial discrimination would have to be overwhelming to show a *Batson* violation. The majority's evidence falls woefully short.

As the majority explains, "comparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." *Ante,* at 26–27. For example, "[w]hen a prosecutor's 'proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.'" *Ante*, at 27. By the same token, a defendant's failure to find any similarly-situated whites permitted to serve tends to disprove purposeful discrimination. Here, neither the majority nor Flowers has identified any nonstruck white jurors remotely similar to any of the struck black jurors.

The majority points to white jurors Pamela Chesteen and Bobby Lester, who worked at the Bank of Winona and therefore had interacted with several members of Flowers' family as bank customers. By the majority's lights, Ches-

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[3] The majority ignores the fact that, after the initial *Batson* challenge, the State tendered a black juror as an alternate instead of exercising available peremptory strikes. The State also tendered the first black juror available. This is hardly a "'consistent pattern'" of strikes against black jurors. *Ante*, at 22.

teen's and Lester's banker-customer relationship was the same as Wright's co-worker relationship with Flowers' father. *Ante,* at 27–28. That comparison is untenable. Lester testified that working at the bank meant he and Chesteen "'s[aw] everyone in town.'" App. 86. And as the trial court explained, "a bank teller, who waits on customers at a bank," has a "substantially different" relationship from someone who "work[s] at the same business establishment with members of the defendant's family." *Id.,* at 278; see *id.,* at 236. The Mississippi Supreme Court agreed that "a coworker relationship" and "employee/customer relationship are distinguishable." 240 So. 3d, at 1127. The majority mentions none of this, evidently relying on its superior knowledge of the banker-customer relationships at the Bank of Winona.

The more relevant comparator to Chesteen and Lester is Alexander Robinson, a black man who was a customer at a store where Flowers' brother worked. App. 82. The State confirmed with Robinson that this relationship was "'just a working relationship'"—*i.e.,* an employee-customer relationship—and immediately thereafter clarified with Chesteen and Lester that their relationships with Flowers' family members was "'like Mr. Robinson, just a working relationship.'" *Id.,* at 82–83, 85–86.[4] The State then tendered Robinson, Chesteen, and Lester as jurors. *Id.,* at 203, 208. Later, the State would strike black jurors Wright and Copper, who were both co-workers of members of Flowers' family. As the trial court understood, it is "evident . . . that the prosecution utilized peremptory strikes only against those individuals who actually worked with, or who in the past had worked with, members of Flowers' family." *Id.,* at 278; see *id.,* at 279.

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[4] Thus, the majority is simply wrong to complain that the State failed to ask Chesteen or Lester "individual follow-up questions" on this issue. *Ante,* at 28.

Next, the majority contends that white jurors Chesteen, Lester, and Harold Waller, like Wright, "knew many individuals involved in the case." *Ante,* at 27. Yet the majority concedes that Wright knew more individuals than any of them. And the more relevant statistic from the State's perspective is how many *defense* witnesses a juror knows, since that knowledge suggests a greater connection to the defendant. By Flowers' own count, Wright knew substantially more defense witnesses than the three white jurors. According to Flowers, Wright knew 19 defense witnesses, while Chesteen knew 14 and Lester and Waller knew around 6 each. See Brief for Petitioner 49, n. 37; Brief for Appellant in No. 2010–DP–01348–SCT (Miss.), p. 114.

Additional relevant differences existed between Wright and the three white jurors. Wright had been *sued* by a witness and member of the victim's family, and worked at the same store as the defendant's father. Chesteen, on the other hand, was *friends* with the same member of the victim's family and also knew another victim's wife. App. 93–94, 46. The trial court found that Chesteen "had a much closer relationship with members of the victim[s'] families tha[n] she had with anyone in Flowers' family." *Id.,* at 278.

Likewise, Waller knew victim Carmen Rigby and her husband; their children attended school with his daughter, and "'[t]hey were involved in school activities together.'" Tr. 821, 1042. He served on the school board with Rigby. *Id.,* at 1043. And victim Bobo Stewart "'went to school with [Waller's] daughter,'" and Waller knew his family. App. 48, 53.

Similarly, Lester had been friends with Rigby's husband "'for years,'" and he "'knew her family.'" Tr. 822, 1045. Lester's wife taught Stewart first grade. App. 48; Tr. 1045. Lester was related by marriage to Bertha Tardy and had known the Tardy family his entire life, growing

up with Bertha's daughter. *Id.,* at 787–788. His daughter had just graduated with Bertha's grandson, and they were friends. *Id.,* at 788, 1046. As Lester put it, "'I have a lot of connections to the [victims'] families.'" *Id.,* at 788.

Given that these prospective jurors were favorable for the State, it is hardly surprising that the State would not affirmatively "us[e] individual questioning to ask th[e]se potential white jurors whether they could remain impartial despite their relationships" with victims' families or prosecution witnesses, *ante,* at 27–28, for to do so could invite defense strikes. Revealingly, Flowers' counsel had exhaustively questioned these three white jurors—treating them much differently than Wright. Flowers' counsel asked Wright only a handful of questions, all of which sought to confirm that she could judge impartially. App. 90–91, 105–106. By contrast, Flowers' counsel asked Chesteen more than 30 questions, most of which sought to cast doubt on Chesteen's ability to remain impartial given her relationships with the victims' families. *Id.,* at 93–95, 111–118. Flowers' counsel asked Lester more than 60 questions and Waller about 15 questions along the same lines. Tr. 1045–1047; App. 160–174; Tr. 1042–1044; App. 123–124. Flowers was so concerned about these white jurors' connections with the victims that he tried to strike both Chesteen and Lester—but not Wright—for cause, and when that failed, he exercised peremptory strikes on all three white jurors. Tr. 1622, 1624, 1743–1744; App. 204, 208; see *id.,* at 278.

In short, no reasonable litigant or trial court would consider Wright "similarly situated," *ante,* at 28, to these three white jurors.

C

The majority next discovers "clue[s]" of racial discrimination in minor factual mistakes supposedly made by the State during the *Batson* hearing. *Ante,* at 29–30. As an

initial matter, Flowers forfeited this argument by failing to present it to the trial court. Under *Batson*, the trial court must decide whether, "*in light of the parties' submissions*," "the defendant has shown purposeful discrimination." *Snyder* v. *Louisiana*, 552 U. S. 472, 477 (2008) (emphasis added; internal quotation marks omitted). The Court has made clear that "a prosecutor simply has got to state his reasons as best he can [at the *Batson* hearing] and stand or fall on the plausibility of the reasons he gives." *Miller-El* v. *Dretke*, 545 U. S. 231, 252 (2005).

The same rule must apply to the defendant, the party with the ultimate burden of proving purposeful discrimination. *Johnson* v. *California*, 545 U. S. 162, 170–171 (2005); *Batson*, 476 U. S., at 96–98. Thus, if the defendant makes no argument on a particular point, the trial court's failure to consider that argument cannot be erroneous, much less clearly so. See, *e.g.*, *Davis* v. *Baltimore Gas and Elec. Co.*, 160 F. 3d 1023, 1027–1028 (CA4 1998); *Wright* v. *Harris County*, 536 F. 3d 436, 438 (CA5 2008). Excusing the defendant from making his arguments before the trial court encourages defense counsel to remain silent, prevents the State from responding, deprives the trial court of relevant arguments, and denies reviewing courts a sufficient record. See *Snyder*, *supra,* at 483; *Garraway* v. *Phillips*, 591 F. 3d 72, 76–77 (CA2 2010).[5]

Even if Flowers had not forfeited his argument about the State's "mistakes," it is devoid of merit. The *Batson* hearing was conducted immediately after *voir dire*, before a transcript was available. App. 214; *id.,* at 225–226. In

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[5]At a minimum, Mississippi has reasonably read *Batson*'s "'prophylactic framework,'" *Johnson* v. *California*, 545 U. S. 162, 174 (2005) (THOMAS, J., dissenting), to mean that the party making a *Batson* claim forfeits arguments not made to the trial court. See *Pitchford* v. *State*, 45 So. 3d 216, 227–228 (Miss. 2010); accord, Record 2965. Thus, whether as a matter of *Batson* itself or the State's implementation of *Batson*, Flowers forfeited these arguments.

explaining their strikes, counsel relied on handwritten notes taken during a fast-paced, multiday *voir dire* involving 156 potential jurors. *Id.,* at 229, 258. Still, the majority comes up with only a few mistakes, and they are either imagined or utterly trivial. The majority claims that the State incorrectly "asserted that Burnside"—one of the struck black jurors—"had tried to cover up a Tardy Furniture suit." *Ante,* at 29. But the State's assertion was at least reasonable. When the State asked Burnside about the lawsuit, she responded that "'[i]t wasn't a dispute'" and "'[w]e never had no misunderstanding about it.'" App. 141–142. Quite reasonably, the State asked why the matter ended up in court, and Burnside conceded that she had to be sued, even as she insisted that there "'was no falling-out about it.'" *Id.,* at 142. As previously explained, a judgment and garnishment were issued against her.

The majority's other supposed mistakes are inconsequential. First, the State confused which potential juror worked with Flowers' sister, and then corrected its mistake. See *id.,* at 218–219, 234. Second, the State referred to that juror, Tashia Cunningham, as "'a close friend'" of Flowers' sister, whereas the testimony established only that they worked together closely. *Id.,* at 220. Flowers *agreed* with the "'friendship'" characterization during the *Batson* hearing, *id.,* at 221, and in any event, whether Cunningham and Flowers' sister were close co-workers or close friends is irrelevant. Third, the State confused struck juror Flancie Jones' familial relationships with Flowers, saying that Flowers' sister was Jones' niece, when in fact Flowers' sister was apparently married to Jones' nephew. *Id.,* at 229, 231. But whatever the precise relationship, even Flowers conceded that Jones had an "'in-law relationship to the entire [Flowers] family,'" so the relevant point remained: Jones was related in multiple ways to Flowers. *Id.,* at 230–231; Tr. 967–968. It is hard to imagine less significant "mistakes."

Tellingly, Flowers' counsel, although aided by "'many interns,'" App. 214, made many more mistakes during this process. *E.g., id.,* at 204–205 (incorrectly identifying a juror); *id.,* at 207–208 (striking a juror and then immediately making an argument premised on not striking that juror); *id.,* at 210 (confusing jurors); *id.,* at 211 (confusing which family members were acquainted with a juror); *id.,* at 212 (incorrectly stating that no general question was asked of all jurors as to accounts or suits with the Tardys, see *id.,* at 70, 217); *id.,* at 222–223 (confusing jurors); *id.,* at 230 ("'[M]aybe we didn't get to this juror'").[6]

In short, in the context of the trial below, a few trivial errors on secondary or tertiary race-neutral reasons for striking some jurors can hardly be counted as "telling" evidence of race discrimination. *Ante,* at 30; see *ibid.* ("[M]istaken explanations should not be confused with racial discrimination").

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[6] These mistakes continued before this Court. Flowers asserts that in his first four trials, the State "struck every black panelist that [it] could," Brief for Petitioner 23; that is false. See *infra*, at 30. Flowers says that the State asked potential juror Robinson "a total of five questions," Brief for Petitioner 15, n. 14, but it actually asked 10. See App. 82–83; Tr. 1147–1148. Flowers says that the State "did not question [Robinson] on [his] relationship" with Flowers' brother, Brief for Petitioner 46, n. 35; it did. See App. 82–83. Flowers refers to Bertha Tardy's "son," Brief for Petitioner 52, but Tardy's only child was a daughter. See Tr. 3268. Flowers says that "the Mississippi Supreme Court found two clear *Batson* violations" in the third trial, Brief for Petitioner 32; it did not. See *infra*, at 28–29. Flowers repeatedly refers to "the decidedly false claim that Wright's" and Burnside's "wages had been garnished," Brief for Petitioner 56, 50, 18, 22, n. 24, 51; Tr. of Oral Arg. 8, 11, 12, even though that claim is true. See *supra,* at 6–9. Flowers said that Wright "still work[ed]" at Wal-Mart at the time of jury selection, Tr. of Oral Arg. 16; she did not. Tr. 782. Flowers agreed that in this trial, the State struck "every black juror that was available on the panel" after "the first one," Tr. of Oral Arg. 57–58; Reply Brief 1, but it did not. See App. 241 (tendering a black juror as an alternate).

D

Turning to even less probative evidence, the majority asserts that the State engaged in disparate—"dramatically disparate," the majority repeats, *ante,* at 2, 19, 23, 26, 31—questioning based on race. By the majority's count, "[t]he State asked the five black prospective jurors who were struck a total of 145 questions" and "the 11 seated white jurors a total of 12 questions." *Ante,* at 23. The majority's statistical "evidence" is irrelevant and misleading.

First, the majority finds that only one juror—Carolyn Wright—was struck on the basis of race, but it neglects to mention that the State asked her only five questions. See App. 71–72, 104–105. Of course, the majority refuses to identify the "certain level of disparity" that meets its "dramatically disparate" standard, *ante,* at 26, but its failure to recognize that the only juror supposedly discriminated against was asked hardly any questions suggests the majority is "slic[ing] and dic[ing]" statistics, *ante,* at 23. Asking other black jurors more questions would be an odd way of "try[ing] to find some pretextual reason" to strike Wright. *Ante,* at 25.

Second, both sides asked a similar number of questions to the jurors they peremptorily struck. This is to be expected—a party will often ask more questions of jurors whose answers raise potential problems. Among other reasons, a party may wish to build a case for a cause strike, and if a cause strike cannot be made, those jurors are more likely to be peremptorily struck. Here, Flowers asked the jurors he struck—all white, Tr. of Oral Arg. 57—an average of about 40 questions, and the State asked the black jurors it struck an average of about 28 questions. The number of questions asked by the State to these jurors is not evidence of race discrimination.

Moreover, the majority forgets that correlation is not causation. The majority appears to assume that the only

relevant difference between the black jurors at issue and seated white jurors is their race. But reality is not so simple. Deciding whether a statistical disparity is caused by a particular factor requires controlling for other potentially relevant variables; otherwise, the difference could be explained by other influences. See Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 709 (1980); cf. *Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 587 U. S. ___, ___, n. 4 (2019) (THOMAS, J., concurring) (slip op., at 9, n. 4) (showing that bare statistical disparities can be used to support diametrically different theories of causation). Yet the majority's raw comparison of questions does not control for any of the important differences between struck and seated jurors. See *supra,* at 11–14. This defective analysis does not even begin to provide probative evidence of discrimination. See, *e.g., People Who Care* v. *Rockford Bd. of Ed., School Dist. No. 205*, 111 F. 3d 528, 537–538 (CA7 1997) (Posner, C. J.) ("[A] statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation"). Indeed, it is difficult to conceive of a statistical study that could possibly control for all of the relevant variables in this context, including tone of voice, facial expressions, and other relevant information.

Most fundamentally, the majority's statistics are divorced from the realities of this case. Winona is a very small town, and "'this was the biggest crime that had ever occurred'" there. Tr. 1870. As one juror explained, "'[e]verybody in Winona has probably'" heard about the case. *Id.,* at 1180; accord, *id.,* at 1183 (Flowers' counsel stating the same). One potential juror knew almost everyone "'involved in it'" between her job as a teacher and attendance at church. App. 81–82. Tardy Furniture "'basically did business with the whole Winona community.'" Tr. 2667.

Moreover, Flowers' family was "'very, very prominent'" in Winona's black community. *Id.,* at 1750. As the trial court explained,

> "'Flowers has a number of brothers and sisters. His parents are well-known. [His father] is apparently one of the most well-thought of people in this community. You have had countless numbers of African-American individuals that have come in and said they could not sit in judgment because of their knowledge of Mr. Flowers, and they could not be fair and impartial.'" App. 197; see *id.,* at 199–200; Tr. 1750.

Flowers' counsel stated that when Flowers' father "'was working as a greeter at Wal-Mart,'" there was "'probably not a person in Winona who wouldn't have said, "Mr. Archie's my friend."'" App. 221. According to the trial court, "the overwhelming majority" of potential black jurors "stated that they could not sit in judgment of him because of kinships, friendships, and family ties." *Id.,* at 256.

To obtain a sufficient jury pool, the trial court had to call 600 potential jurors. *Id.,* at 258. In such a small county, that meant a man, his wife, his mother, and his father were all called for jury duty in this case. See Tr. 939–941. According to Flowers,

> "seventy-five percent of the total qualified venire, sixty-three percent of the venire members actually tendered for acceptance or rejection as jurors, and forty percent of the persons empanelled as jurors or alternates (six of 15) were personally acquainted with either the defendant or one or more of the decedents or their families and/or had actual opinions as to guilt or innocence formed prior [to] the trial." Brief for Appellant 130.

Before peremptory strikes even started, the venire had

gone from 42% to 28% black. App. 194–195. As the trial court explained, "'nothing the State has done has caused this statistical abnormality.'" *Id.,* at 198. Instead, any "'statistical abnormality'" "'is strictly because of the prominence of [Flowers'] family.'" *Id.,* at 200. Flowers' counsel admitted that she was not "'surprise[d]'" by the reduction given the circumstances and the experiences in the previous trials. *Id.,* at 199.[7]

The state courts appropriately viewed the parties' questioning in light of these circumstances. The Mississippi Supreme Court, for example, found that the State "asked more questions" of the "jurors who knew more about the case, who had personal relationships with Flowers's family members, who said they could not be impartial, or who said they could not impose the death penalty," and that "[t]hose issues are appropriate for followup questions." 240 So. 3d, at 1125. The court also found that "[t]he State's assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record." *Ibid.* The majority wonders why "the State spent far more time questioning the black prospective jurors" and concludes that "[n]o one can know." *Ante*, at 23, 25. But even Flowers admits that "more African-American jurors knew the parties, most of the [State's] follow-up questions pertained to relevant matters, [and] more questions were asked of jurors who had personal relationships about the case, or qualms

[7] One trial had to be moved to a new venue because "during *voir dire* it became apparent that a fair and impartial jury could not be impaneled." *Flowers* v. *State*, 842 So. 2d 531, 535 (Miss. 2003). At another trial, one of two black jurors seated was "excused after he informed the judge that he could not be a fair and impartial juror." *Flowers* v. *State*, 947 So. 2d 910, 916 (Miss. 2007). And at the next trial, one of the alternate jurors, who was black, was convicted of perjury after it came to light that she had lied during *voir dire* about not knowing Flowers and had visited him in jail. *Flowers* v. *State*, 240 So. 3d 1082, 1137 (Miss. 2017).

about the death penalty." Pet. for Cert. 23 (emphasis deleted).

The majority ignores Flowers' concession, but the questions asked by the State bear it out. The State's questions also refute the majority's suggestion that the State did not "not as[k] white prospective jurors th[e] same questions." *Ante,* at 25. The State asked all potential jurors whether Tardy Furniture sued them, and only Wright and Burnside answered in the affirmative. See App. 70–71, 99–100, 217–218. Two of five questions to Wright and around eight questions to Burnside followed up on this lawsuit. *Id.,* at 70–72, 141–143. All potential jurors were asked whether they knew Flowers' father, and no white jurors had worked with him at Wal-Mart. *Id.,* at 61, 218. Two of Wright's remaining three questions followed up on this relationship. *Id.,* at 104–105. The State asked all potential jurors whether anyone lived in the areas around Flowers' house, and no white jurors answered in the affirmative. *Id.,* at 75–81. Seven questions to Copper—another black prospective juror—and three to Burnside followed up on this geographic proximity. *Id.,* at 75–77, 79–80. Copper's remaining questions were mostly about her working with Flowers' father and sister and her statement that she would lean in Flowers' favor. *Id.,* at 77–78, 189–190. Burnside's remaining questions were mostly about Flowers' visits to her house and her statement that she could not judge others. *Id.,* at 80–81, 143–144. The State asked all potential jurors whether anyone was related to Flowers' family, and only Jones, a black prospective juror, answered affirmatively, leading to about 18 follow-up questions. *Id.,* at 72–75, 86–88, 179–180. Jones' remaining questions were mostly about her being late to court and her untruthful answer regarding the death penalty on the jury questionnaire. *Id.,* at 75, 180–182. Finally, nearly all of Cunningham's questions were about her work with Flowers' sister. *Id.,* at 83–85, 130–133. Any reasonable

prosecutor would have followed up on these issues, and the majority does not cite even a single question that it thinks suggests racial discrimination.

The majority's comparison of the State's questions to Copper with its questions to several white jurors is baseless. As an initial matter, Flowers forfeited this argument by not making it at the trial court. See *supra,* at 14–15; App. 235–238. And as the Court has previously explained, "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial" because "an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Snyder*, 552 U. S., at 483.

Even if Flowers had not forfeited this argument, it is meritless. As previously discussed, Copper worked with two of Flowers' family members and testified that she could "'lean toward'" Flowers and would not decide the case "'with an open mind.'" App. 190; see *id.,* at 78. These answers justified heavier questioning than was needed for Chesteen, the white bank teller who occasionally served Flowers' family members. Moreover, the State *did* ask Chesteen and Lester, a white juror who also worked at the bank, "follow-up questions about [their] relationships with Flowers' family." *Ante*, at 24; see App. 83, 86.[8] I have already addressed Lester and Waller, another white juror who had connections to the victims, and why the State did not need to ask them more questions. See *supra*, at 11–14. The majority also references Larry Blaylock and Marcus Fielder, two other white prospective jurors who "had relationships with defense witnesses." *Ante,* at 24.

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[8]The majority seems to draw a distinction between individual questions asked during group *voir dire* and individual questions asked during individual *voir dire*. *Ante*, at 23–24. I cannot imagine why this distinction would matter here. The majority does not explain its reasoning, and its statistics treat these questions the same.

As for Blaylock, the majority makes no attempt to say what those "relationships" were, presumably because the only relationship discussed at the *Batson* hearing was Blaylock's 30-year friendship with the *prosecutor's* primary investigator—whom the defense planned to call as a hostile witness. App. 215; Tr. 1041–1042. The investigator was also his uncle by marriage, *id.,* at 1078, and the defense asked Blaylock some 46 questions. *Id.,* at 1041–1042, 1078, 1182–1187. Likewise, Fielder's only relationship discussed at the *Batson* hearing was his work for a prosecution witness who had investigated the murders. See App. 215. The defense felt it necessary to ask Fielder about 30 follow-up questions. Tr. 1255–1260. In short, despite the majority's focus on Copper, *ante*, at 24, no one could (or did) compare the State's need to question her with its need to question these jurors.

Next, the majority complains that the State had a witness testify that Cunningham worked closely with Flowers' sister. According to the majority, "[t]he State apparently did not conduct similar investigations of white prospective jurors." *Ibid.* Putting aside that the majority offers no record support for this claim, the majority does not tell us what investigation was performed, much less which white jurors could or should have been similarly investigated. As far as the record reveals, the State made one call to Cunningham's employer on the morning of the hearing to ask a single question: Where did Cunningham work in relation to Flowers' sister? App. 149, 154. I see no reason to assume that the State failed to conduct any other single-phone-call "investigations" in this high-profile trial. Nor am I aware of white jurors who worked in any proximity to Flowers' family members. If the majority is going to infer racial bias from the State's attempt to present the truth in court—particularly in a case where juror perjury had been a problem, see *supra,* at 21, n. 7—it ought to provide a sound basis for its criticism.

Finally, to support its view that "[t]he difference in the State's approaches to black and white prospective jurors was stark," the majority asserts that "[w]hite prospective jurors who admitted that they or a relative had been convicted of a crime were accepted without apparent further inquiry by the State." *Ante*, at 25. The majority again cites nothing to support this assertion, and the record does not support it. Three of the struck black jurors had relatives with a criminal conviction. See Tr. 883 (Burnside); *id.,* at 885 (Copper); 2d Supp. Record 255b (Cunningham). The State asked no questions to either Copper or Cunningham on this point, and it asked three questions to Burnside about her son's robbery conviction and. See App. 144–145. The State treated white jurors similarly. For example, the State asked three questions to Suzanne Winstead about a nephew's drug charges, Tr. 1190–1191; four questions to Sandra Hamilton about crimes of her first cousins, *id.,* at 977; and two questions to Larry Blaylock about a cousin who committed murder, *id.,* at 978–979.[9]

Because any "disparate questioning or investigation of black and white prospective jurors" here "reflect[s] ordinary race-neutral considerations," *ante,* at 26, this factor provides no evidence of racial discrimination in jury selection below.

E

If this case required us to decide whether the state courts were correct that no *Batson* violation occurred here, I would find the case easy enough. As I have demonstrated,

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[9] The majority ominously warns that, through questioning, prosecutors "can try to find some pretextual reason . . . to justify what is in reality a racially motivated strike" and that "[p]rosecutors can decline to seek what they do not want to find about white prospective jurors." *Ante,* at 25. I would not so blithely impute single-minded racism to others. Doing so cheapens actual cases of discrimination.

the evidence overwhelmingly supports the conclusion that the State did not engage in purposeful race discrimination. Any competent prosecutor would have struck the jurors struck below. Indeed, some of the jurors' conflicts might even have justified for-cause strikes. But this case is easier yet. The question before us is not whether we "'would have decided the case differently,'" *Easley* v. *Cromartie*, 532 U. S. 234, 242 (2001), but instead whether the state courts were *clearly* wrong. And the answer to that question is obviously no.

The Court has said many times before that "[t]he trial court has a pivotal role in evaluating *Batson* claims." *Snyder*, 552 U. S., at 477. The ultimate question in *Batson* cases—whether the prosecutor engaged in purposeful discrimination—"involves an evaluation of the prosecutor's credibility," and "'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.'" *Ibid.* The question also turns on "a juror's demeanor," "making the trial court's firsthand observations of even greater importance." *Ibid.* "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson* v. *Bessemer City*, 470 U. S. 564, 575 (1985).

Because the trial court is best situated to resolve the sensitive questions at issue in a *Batson* challenge, "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, *supra,* at 477; see *Foster*, 578 U. S., at ___ (slip op., at 10). Our review is particularly deferential where, as here, "an intermediate court reviews, and affirms, a trial court's factual findings." *Easley*, *supra,* at 242.

Under this clear-error standard of review, "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson*, *supra*, at 574; see also *Cooper* v. *Harris*, 581

U. S. ___, ___ (2017) (slip op., at 4). The notion that it is "impermissible" to adopt the view of the evidence that I have outlined above is incredible. Besides being supported by carefully reasoned opinions from both the trial court and the Mississippi Supreme Court—opinions that, unlike the majority's, consider all relevant facts and circumstances—that view is *at a minimum* consistent with the factual record. At the *Batson* hearing, the State offered "a coherent and facially plausible story that is not contradicted" by the record, and the trial court's "decision to credit" such a story "can virtually never be clear error." *Anderson*, *supra,* at 575. The trial court reasonably understood the supposedly "dramatically disparate" questioning to be explained by the circumstances of this case—circumstances that the majority does not dispute. Likewise, the trial court reasonably did not view any picayune mistakes by the State to be compelling evidence of racial discrimination. (Of course, neither did the defense, which is presumably why it did not make that argument. But the clear-error and forfeiture doctrines are speed bumps en route to the Court's desired destination.) Yet the Court discovers "clear error" based on its own review of a near-decade-old record. The majority apparently thinks that it is in a better position than the trial court to judge the tone of the questions and answers, the demeanor of the attorneys and jurors, the courtroom dynamic, and the culture of Winona, Mississippi.

III

Given that there was no evidence of race discrimination in the trial here, the majority's remaining explanation for its decision is conduct that took place *before* this trial. The majority builds its decision around the narrative that this case has a long history of race discrimination. This narrative might make for an entertaining melodrama, but it has no basis in the record. The history, such as it is, does not

come close to carrying Flowers' burden of showing that the state courts clearly erred.

A

The State exercised 50 peremptory strikes in Flowers' previous trials. As the case comes to us, 49 of those strikes were race neutral. If this history teaches us anything, it is that we should not assume the State strikes jurors based on their race.

Flowers' first trial was for the murder of Bertha Tardy only. In that trial, the State exercised peremptory strikes on five black jurors and seven white jurors. App. 35. The trial court found that Flowers had not made out even a prima facie *Batson* case, *id.,* at 12, n. 3, much less showed purposeful race discrimination in any of the State's strikes. Thus, as this case comes to us, all of the State's strikes in this trial were race neutral.

What the majority calls the second trial is actually Flowers' first trial for another murder—that of Bobo Stewart. During jury selection, the State exercised peremptory strikes on five black jurors and two white jurors; the trial court disallowed one of the State's strikes under *Batson*. App. 35; *id.,* at 17–19. Flowers was convicted and apparently did not appeal on *Batson* grounds. Eventually, the Mississippi Supreme Court reversed Flowers' convictions from the first two trials for reasons unrelated to jury selection. The court held that certain evidence relevant to all four murders was improperly admitted. *Flowers* v. *State*, 773 So. 2d 309, 317, 319–324 (Miss. 2000); *Flowers* v. *State*, 842 So. 2d 531, 538, 539–550 (Miss. 2003).

The State next tried Flowers for all four murders together. In this "third" trial—actually the first trial for the murders of Robert Golden and Carmen Rigby—the State struck 15 black jurors. App. 35. The trial court found no *Batson* violations. *Flowers* v. *State*, 947 So. 2d 910, 916 (Miss. 2007) (plurality opinion). On appeal, Flowers did

not challenge four of the strikes, *id.,* at 918, and the Mississippi Supreme Court unanimously upheld the trial court's ruling as to nine of the other strikes, see *id.,* at 918–935. Four justices, constituting a plurality of the court, would have held that two strikes violated *Batson*, 947 So. 2d, at 926, 928; one justice concurred only in the judgment because she "d[id] not agree" with the "plurality" "that this case is reversible on the *Batson* issue alone," *id.,* at 939 (Cobb, P. J., concurring in result); and four justices would have held that no strikes violated *Batson*, 947 So. 2d, at 942–943 (Smith, C. J., dissenting). If the concurring justice thought any strikes were impermissible, *Batson* would have required her to reverse on that basis.

Thus, the Court is wrong multiple times over to say that the Mississippi Supreme Court "conclud[ed] that the State had again violated *Batson* by discriminating on the basis of race in exercising all 15 of its peremptory strikes against 15 black prospective jurors." *Ante,* at 5. That court unanimously concluded that 13 strikes were race neutral, and a majority concluded that the remaining two strikes did not violate *Batson*. Therefore, neither the trial court nor the Mississippi Supreme Court found any *Batson* violation in this third trial—all 15 strikes were race neutral.[10]

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[10] The Court repeatedly and inaccurately attributes statements by the plurality to the Mississippi Supreme Court—or deems those statements part of a "lead opinion," *ante,* at 5, 20, even though a majority of that court disagreed in relevant part. The Court also takes the plurality's statements out of context. For instance, three times the Court quotes the plurality's statement that "'[t]he instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.'" *Ante,* at 2, 5, 20. But that statement was focused solely on the fact that "[t]he prosecutor exercised all fifteen of his peremptory strikes on African-Americans." *Flowers*, 947 So. 2d, at 935. One could just as easily say that Flowers' own strikes here—11 whites, zero blacks—present an overwhelming prima facie case of racial discrimination. Tr. of Oral Arg. 57 (admitting

In the next two trials, Flowers apparently did not even allege a *Batson* violation. In the "fourth" trial, the State struck 11 black jurors but did not exercise its three remaining strikes; five black jurors were seated. App. 28–29, 35. In the "fifth" trial, the State struck five jurors, but Flowers is unable to identify the race of these jurors, and three black jurors were seated. Brief for Petitioner 13. Thus, up to the present trial, the State had sought to exercise 50 peremptory strikes, 36 on potential black jurors. Finally, in this trial, the State struck five black jurors and one white juror; one black juror sat on the jury, and one black juror was an alternate.

According to the majority, "the State's use of peremptory strikes in Flowers' first four trials reveal[s] a blatant pattern of striking black prospective jurors." *Ante*, at 20. The majority claims that "[o]ver the course of the first four trials, there were 36 black prospective jurors against whom the State could have exercised a peremptory strike," and "[t]he State tried to strike all 36." *Ibid*. The majority's argument is wrong on several levels.

First, the majority is wrong on the numbers. The majority repeatedly says that over "the six trials combined," "the State struck 41 of the 42 black prospective jurors it could have struck." *Ante*, at 31; see *ante,* at 2. Yet in the fourth trial, according to Flowers himself, the State did not exercise available peremptory strikes on at least three black jurors. See App. 28–29. Moreover, the majority does not know the races of the struck jurors in the fifth trial. Given that at least three black jurors were seated and that the State exercised only five strikes, it would appear that the State did not exercise available strikes against at least

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that Flowers' trial counsel "only exercised peremptories against white jurors"). As the Court understands, a prima facie case is only the first step of *Batson*, *ante,* at 12–13, and a majority of the Mississippi Supreme Court in the third trial found that Flowers failed to carry his burden of proving purposeful racial discrimination as to *any* strike.

three black jurors. Finally, in the most recent trial, the State tendered two black jurors for service on the jury, one of whom served as an alternate. (The majority's strike numbers include strikes of alternates, so its juror numbers should too.) However the majority arrived at its numbers, the record tells a different story.[11]

Second, the Court says that "[t]he State's actions in the first four trials necessarily inform our assessment of the State's intent," for "[w]e cannot ignore that history." *Ante,* at 22. Putting aside that no court below ignored the history, the majority completely ignores Flowers' failure to challenge the State's actions in the fifth trial—the one that immediately preceded this one. Flowers bears the burden of proving racial discrimination, and the reason information about the fifth trial is not "available," *ante,* at 21, is that Flowers failed to present it. Perhaps he did not *want* to present it because the State struck only white jurors—who knows? Regardless, this failure must count against Flowers' claim. Surely a party making a *Batson* claim cannot gather data from select trials and present only favorable snippets.

Third, and most importantly, that the State previously sought to exercise 36 strikes against black jurors does not "speak loudly" in favor of discrimination here, *ante,* at 20, because 35 of those 36 strikes were race neutral. By the majority's own telling, the trial court may "consider historical evidence of the State's *discriminatory* peremptory

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[11] Rather than explain its numbers, the Court points out that when pressed at oral argument, the State agreed that 41 of 42 potential black jurors had been stricken. *Ante*, at 2, 20. No one else—not even Flowers—has agreed with that statistic. See Brief for Petitioner 32; App. 35. Flowers certainly did not present it to the state courts. The question before us is whether those courts clearly erred, and in reviewing their decisions, we must affirm "'if the result is correct'" based on the actual record. *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U. S. 706, 722, n. 3 (2001).

strikes from past trials." *Ante,* at 19 (emphasis added). As I have shown, 35 of 36 strikes were not "discriminatory peremptory strikes." The bare number of black-juror strikes is relevant only if one eliminates other explanations for the strikes, cf. *supra,* at 18–19, but prior adjudications (and Flowers' failure to even object to some strikes) establish that legitimate reasons explained all but one of them. Is the majority today holding that the prior courts all committed clear error too? And what about the strikes that even Flowers did not object to—is the majority *sua sponte* holding that the State was engaged in purposeful racial discrimination as to those strikes? The majority's reliance on race-neutral strikes to show discrimination is judicial alchemy.

B

The only incident in the history of this case even hinting at discrimination was that a trial judge 20 years ago prevented the State from striking one black juror in a case involving only one of Flowers' crimes. If this single impermissible strike could provide evidence of purposeful race discrimination in a different trial 11 years later involving different murders (and victims of different races), it is surely the weakest of evidence. Even Flowers concedes that a single "*Batson* violation 20 years ago" would be only "weakly probative." Tr. of Oral Arg. 19–20. That is the precise situation here. And this "weakly probative" single strike certainly does not overcome the complete absence of evidence of purposeful race discrimination in this trial. We know next to nothing about this strike, for Flowers has not even provided us with a transcript of the jury selection from that trial. And the trial court's ruling on the strike was never reviewed on appeal.

Pretending for a moment that the concurring justice in the third trial had voted differently than she did, the history still could not overcome the absence of evidence of

purposeful race discrimination in *this* trial. Flowers forthrightly acknowledged that he needed to show "discrimination in *this* trial in order to have a *Batson* violation." *Id.,* at 23 (emphasis added). At a minimum, the state courts' finding—that the history does not carry Flowers' burden of proving purposeful race discrimination here—is not clearly erroneous. The courts below were presented with Flowers' view of the history, and even accepting that view and "[t]aking into account the 'historical evidence' of past discrimination," the Mississippi Supreme Court held that the trial court did not err "in finding that the State did not violate *Batson*." 240 So. 2d, at 1135; see *id.,* at 1122–1124. The majority simply disregards this assessment by the state courts.

IV

Much of the Court's opinion is a paean to *Batson* v. *Kentucky*, which requires that a duly convicted criminal go free because a juror was arguably deprived of his right to serve on the jury. That rule was suspect when it was announced, and I am even less confident of it today. *Batson* has led the Court to disregard Article III's limitations on standing by giving a windfall to a convicted criminal who, even under *Batson*'s logic, suffered no injury. It has forced equal protection principles onto a procedure designed to give parties absolute discretion in making individual strikes. And it has blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.

A

In *Batson*, this Court held that the Equal Protection Clause prohibits the State from "challeng[ing] potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case." 476 U. S., at 89. "[I]ndividual

jurors subjected to racial exclusion have the legal right to bring suit on their own behalf." *Powers* v. *Ohio*, 499 U. S. 400, 414 (1991). To establish standing to assert this equal protection claim in a separate lawsuit, the juror would need to show that the State's action caused him to suffer an injury in fact, and a likelihood that a favorable decision will redress the injury. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). Flowers, however, was not the excluded juror. And although he is a party to an ongoing proceeding, "'"standing is not dispensed in gross"'"; to the contrary, "'a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. ___, ___ (2017) (slip op., at 5).

Flowers should not have standing to assert the excluded juror's claim. He does not dispute that the jury that convicted him was impartial, see U. S. Const., Amdt. VI, and as the Court has said many times, "'[d]efendants are not entitled to a jury of any particular composition.'" *Holland* v. *Illinois*, 493 U. S. 474, 483 (1990). He therefore suffered no legally cognizable injury. The only other plausible reason a defendant could suffer an injury from a *Batson* violation is if the Court thinks that he has a better chance of winning if more members of his race are on the jury. But that thinking relies on the very assumption that *Batson* rejects: that jurors might "'be partial to the defendant because of their shared race.'" *Ante,* at 14 (quoting *Batson*, *supra,* at 97). Moreover, it cannot be squared with the Court's later decisions, which hold that "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." *Powers*, 499 U. S., at 416 (holding that a white defendant has standing to challenge strikes of black jurors).

Today, the Court holds that Carolyn Wright was denied equal protection by being excluded from jury service. But she is not the person challenging Flowers' convictions (she

would lack standing to do so), and I do not understand how Flowers can have standing to assert her claim. Why should a "denial of equal protection to other people" that does "not affect the fairness of that trial" mean that "the defendant must go free"? *Id.*, at 431 (Scalia, J., dissenting).

In *Powers*, the Court relied on the doctrine of third-party standing. As an initial matter, I doubt "whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others." *Kowalski* v. *Tesmer*, 543 U. S. 125, 135 (2004) (THOMAS, J., concurring); see also *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ___, ___–___ (2016) (THOMAS, J., dissenting) (slip op., at 2–5).

Even accepting the notion of third-party standing, it is hard to see how it could be satisfied in *Batson* cases. The Court's precedents require that a litigant asserting another's rights have suffered an "'injury in fact'" and have "a close relation" to the third party. *Powers*, *supra*, at 411. As shown, Flowers suffered no injury in fact under the Court's precedents. Moreover, in the ordinary case, the defendant has no relation whatsoever to the struck jurors. (Here, as it happens, all the struck jurors knew Flowers or his family, but that hardly *helps* his *Batson* claim.)

In *Powers*, the Court concluded that defendants and struck jurors share a "common interest." 499 U. S., at 413. But like most defendants, Flowers' interest is in avoiding prison (or execution). A struck juror, by contrast, is unlikely to feel better about being excluded from jury service simply because a convicted criminal may go free. And some potential jurors, like Flancie Jones here, "'really and truly . . . don't want to'" serve on a jury in the first place. App. 181 (emphasis added); see also *Hayes* v. *Missouri*, 120 U. S. 68, 71 (1887) (referring to "an unfortunate disposition on the part of business men to escape from jury duty"). If Flowers had succeeded on his *Batson* claim at

trial and forced Jones onto the jury, it seems that *he*—her supposed third-party representative with a "common interest"—would have inflicted an injury on her.

Our remedy for *Batson* violations proves the point. The convicted criminal, who suffered no injury, gets his conviction vacated.[12] And even if the struck juror suffered a cognizable injury, but see *Powers*, *supra,* at 423–426 (Scalia, J., dissenting), that injury certainly is not redressed by undoing the valid conviction of another. Under Article III, Flowers should not have standing.

B

The more fundamental problem is *Batson* itself. The "entire line of cases following *Batson*" is "a misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges." *Campbell* v. *Louisiana*, 523 U. S. 392, 404, n. 1 (1998) (THOMAS, J., concurring in part and dissenting in part). "[R]ather than helping to ensure the fairness of criminal trials," *Batson* "serves only to undercut that fairness by emphasizing the rights of excluded jurors at the expense of the traditional protections accorded criminal defendants of all races." *Campbell, supra,* at 404, n. 1. 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.

1

In *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), the

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[12] The Court has never explained "why a violation of a third party's right to serve on a jury should be grounds for reversal when other violations of third-party rights, such as obtaining evidence against the defendant in violation of another person's Fourth or Fifth Amendment rights, are not." *Campbell* v. *Louisiana*, 523 U. S. 392, 405 (1998) (THOMAS, J., concurring in part and dissenting in part).

Court invalidated a state law that prohibited blacks from serving on juries. In doing so, we recognized that the racial composition of a jury could affect the outcome of a criminal case. See *id.,* at 308–309. The Court explained that "[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Id.*, at 309. Thus, we understood that allowing the defendant an opportunity to "secur[e] representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial." *Georgia* v. *McCollum*, 505 U. S. 42, 61 (1992) (THOMAS, J., concurring in judgment).

In *Swain* v. *Alabama*, 380 U. S. 202 (1965), the Court held that individual peremptory strikes could not give rise to an equal protection challenge. *Swain* followed *Strauder* in assuming that race—like other factors that are generally unsuitable for the government to use in making classifications—can be considered in peremptory strikes: "In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." *Swain*, 380 U. S., at 221. That is because the peremptory "challenge is 'one of the most important of the rights secured to the accused.'" *Id.*, at 219. Based on its long history, the peremptory system "affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." *Id.,* at 212; see *id.,* at 212–219. The strike both "eliminate[s] extremes of partiality on both sides" and "assure[s] the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Id.,* at 219. Because this system, "in and of itself, provides justification for striking any group of otherwise qualified jurors in any

given case, whether they be Negroes, Catholics, accountants or those with blue eyes," *id.,* at 212, we concluded that an equal protection challenge was unavailable against individual peremptory strikes.

Then, in a departure from the previous century of jurisprudence, the Court moved its focus from the protections accorded the *defendant* to the perceptions of a hypothetical struck *juror*. In *Batson*, the Court concluded that the government could not exercise individual strikes based solely on "the assumption—or [the] intuitive judgment—that [jurors] would be partial to the defendant because of their shared race." 476 U. S., at 97. The Court's opinion in *Batson* equated a law categorically excluding a class of people from jury service with the use of discretionary peremptory strikes to remove members of that class: "Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Ibid.* (citation omitted). *Batson* repeatedly relies on this analogy. See *id.,* at 86, 89; *id.,* at 87 ("A person's race simply is unrelated to his fitness as a juror" (internal quotation marks omitted)); see also *ante,* at 14 (quoting *Batson*, *supra,* at 104–105 (Marshall, J., concurring)); *Powers*, 499 U. S., at 410 ("Race cannot be a proxy for determining juror bias or competence").

But this framing of the issue ignores the nature and basis of the peremptory strike and the realities of racial prejudice. A peremptory strike reflects no judgment on a juror's competence, ability, or fitness. Instead, the strike is exercised based on intuitions that a potential juror may be less sympathetic to a party's case. As Chief Justice Burger emphasized, "venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-

strike exclusion merely suggests potential partiality in a particular isolated case." *Batson*, *supra*, at 122–123 (dissenting opinion) (internal quotation marks omitted); accord, *Powers*, *supra,* at 424 (Scalia, J., dissenting). "[T]he question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is *in fact* partial, but whether one from a different group is *less likely* to be." *Swain*, 380 U. S., at 220–221 (emphasis added). Therefore, "veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges"; instead, "they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." *Id.*, at 221.

Batson rejects the premise that peremptory strikes can be exercised on the basis of generalizations and demands instead "an assessment of individual qualifications." 476 U. S., at 87. The Court's *Batson* jurisprudence seems to conceive of jury selection more as a project for affirming "the dignity of persons" than as a process for providing a jury that is, including in the parties' view, fairer. *Powers*, *supra*, at 402; see *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 631 (1991); see also *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 140–142 (1994).

2

Batson's focus on individual jurors' rights is wholly contrary to the rationale underlying peremptory challenges. And the application of equal protection analysis to individual strikes has produced distortions in our jurisprudence that are symptomatic of its poor fit, both as a matter of common sense and the protections traditionally accorded litigants.

The Court did not apply equal protection principles to individual peremptory strikes until more than 100 years after the Fourteenth Amendment was ratified. Once it

did, it quickly extended *Batson* to civil actions, strikes by criminal defendants, and strikes based on sex. *Edmonson*, *supra*; *McCollum*, 505 U. S. 42; *J. E. B.*, *supra*. But even now, we do not apply generally applicable equal protection principles to peremptory strikes. For example, our precedents do not apply "strict scrutiny" to race-based peremptory strikes. And we apply "the same protection against sex discrimination as race discrimination" in reviewing peremptory strikes, *J. E. B.*, *supra*, at 145, even though sex is subject to "heightened" rather than "strict" scrutiny under our precedents. Finally, we have not subjected all peremptory strikes to "rational basis" review, which normally applies absent a protected characteristic. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440–442 (1985); see generally *Batson*, *supra,* at 123–125 (Burger, J., dissenting); *J. E. B.*, *supra,* at 161 (Scalia, J., dissenting). Thus, the Court's own jurisprudence seems to recognize that its equal protection principles do not naturally apply to individual, discretionary strikes.

Now that we have followed *Batson* to its logical conclusion and applied it to race- and sex-based strikes without regard to the race or sex of the defendant, it is impossible to exercise a peremptory strike that cannot be challenged by the opposing party, thereby requiring a "neutral" explanation for the strike. But requiring an explanation is inconsistent with the very nature of peremptory strikes. Peremptory strikes are designed to protect against fears of partiality by giving effect to the parties' intuitions about jurors' often-unstated biases. "[E]xercised on grounds normally thought irrelevant to legal proceedings or official action," like "race, religion, nationality, occupation or affiliations," *Swain*, *supra*, at 220, they are a form of action that is by nature "arbitrary and capricious," 4 W. Blackstone, Commentaries on the Laws of England 346 (1769) The strike must "be exercised with full freedom, or it fails of its full purpose." *Lewis* v. *United States*, 146

U. S. 370, 378 (1892). Because the strike may be exercised on as little as the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," *id.,* at 376, reasoned explanation is often impossible. And where scrutiny of individual strikes is permitted, the strike is "no longer . . . peremptory, each and every challenge being open to examination." *Swain*, *supra*, at 222.

In sum, as other Members of this Court have recognized, *Batson* charted the course for eliminating peremptory strikes. See, *e.g., Rice* v. *Collins*, 546 U. S. 333, 344 (2006) (BREYER, J., concurring); *Batson*, *supra,* at 107–108 (Marshall, J., concurring). Although those Justices welcomed the prospect, I do not. The peremptory system "has always been held essential to the fairness of trial by jury." *Lewis*, *supra,* at 376. And the basic premise of *Strauder*—that a juror's racial prejudices can make a trial less fair—has not become "obsolete." *McCollum*, 505 U. S., at 61 (opinion of THOMAS, J.). The racial composition of a jury matters because racial biases, sympathies, and prejudices still exist. This is not a matter of "assumptions," as *Batson* said. It is a matter of reality.[13] The Court knows these prejudices exist. Why else would it say that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias"? *Turner* v. *Murray*, 476 U. S. 28, 36–37 (1986).[14] For that matter,

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[13] Academic studies appear to support this commonsense proposition. See, *e.g.,* Carter & Mazzula, Race and Racial Identity Status Attitudes, 11 J. Ethnicity Crim. Justice 196, 211 (2013) ("[R]acial bias exists in juror decision making"); Ellsworth & Sommers, Race in the Courtroom, 26 Personality & Soc. Psychol. Bull. 1367, 1367–1379 (2000). Cf. *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 148–149 (1994) (O'Connor, J., concurring) ("We know that like race, gender matters").

[14] It is telling that Flowers here sought a new trial because the trial court supposedly failed to allow sufficient questioning on racial prejudice. See Record 2936. Evidently Flowers was operating "on the

why else say here that "Flowers is black" and the "prosecutor is white"? *Ante,* at 3. Yet the Court continues to apply a line of cases that prevents, among other things, black defendants from striking potentially hostile white jurors. I remain "certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes." *McCollum*, *supra,* at 60 (opinion of THOMAS, J.).

Instead of focusing on the possibility that a juror will misperceive a peremptory strike as threatening his dignity, I would return the Court's focus to the fairness of trials for the defendant whose liberty is at stake and to the People who seek justice under the law.

* * *

If the Court's opinion today has a redeeming quality, it is this: The State is perfectly free to convict Curtis Flowers again. Otherwise, the opinion distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts. Any competent prosecutor would have exercised the same strikes as the State did in this trial. And although the Court's opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims' families. I respectfully dissent.

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assumption that" jurors might "be biased in a particular case simply because the defendant is black." *Batson* v. *Kentucky*, 476 U. S. 79, 97 (1986). Perhaps unsurprisingly, then, he exercised peremptory strikes against 11 white jurors and 0 black jurors.

The Western District of Washington's bench and bar have long-standing commitments to a fair and unbiased judicial process. As a result, the emerging social and neuroscience research regarding unconscious bias prompted the Court to create a bench-bar-academic committee to explore the issue in the context of the jury system and to develop and offer tools to address it.

One tool the committee developed was a set of jury instructions that address the issue of unconscious bias. Research regarding the efficacy of jury instructions is still young and some of the literature has raised questions whether highlighting the notion of unconscious bias would do more harm than good.[1] However, the body of research supports that, as a general matter, awareness and mindfulness about one's own unconscious associations are important and thus a decision-maker's ability to avoid these associations, however that is achieved, will likely result in fairer decisions.[2]

Accordingly, the proposed instructions are intended to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making. The instructions thus serve the purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations.

The committee has incorporated unconscious bias language into a preliminary instruction, into the witness credibility instruction, and into a closing instruction.[3] In addition, the committee has developed an instruction that can be given before jury selection if the parties are going to ask questions during *voir dire* regarding bias, including unconscious bias.

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[1] See, e.g., Irene V. Blair, The Malleability of Automatic Stereotypes and Prejudice, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (cumulating research on value of instruction to suppress stereotype and finding it mixed); Jennifer K. Elek & Paula Hannaford-Agor, First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making, 49 CT. REV. 190, 193 195, 198 (2013), available at http://aja.ncsc.dni.us/publications/courtrv/cr49-4/CR49-4Elek.pdf; Jennifer A. Richeson & J. Nicole Shelton, Negotiating Interracial Interactions: Costs, Consequences, and Possibilities, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316 (2007); Jacquie D. Vorauer, Completing the Implicit Association Test Reduces Positive Intergroup Interaction Behavior, 23 PSYCHOL. SCI. 1168 (2012) (finding that White participants' taking race-based IAT led to their non-White (Aboriginal) partners feeling less well regarded than after interactions after a non-race-based IAT); Jennifer K. Elek & Paula Hannaford-Agor, Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of a Specialized Jury Instruction, NAT'L CENTER FOR STATE CTS. (Apr. 2014), available at http://ncsc.contentdm.oclc.org/cdm/ref/collection/juries/id/273 (finding "no significant effects of the instruction on judgments of guilt, confidence, strength of prosecution's evidence, or sentence length"; but the study's authors also reported that they were unable to identify the more traditionally-expected baseline bias, "which prevented a complete test of the value of the instructional intervention.").

[2] See Adam Benforado & John Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 EMORY L.J. 311, 325–26 (2007).

[3] The committee suggests introducing the topic as part of the preliminary instructions as there is research that suggests priming jurors may be more effective than waiting until the end of a case. See, e.g., Lisa Kern Griffin, Narrative, Truth, and Trial, 101 GEO. L.J. 281, 232 (2013); Kurt Hugenberg, Jennifer Miller & Heather M. Claypool, Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem, 43 J. EXPERIMENTAL SOC. PSYCH. 334 (2007) (finding that warnings given ahead of time about likely misperceptions of other race faces may be effective).

PRELIMINARY INSTRUCTION TO BE GIVEN TO THE ENTIRE PANEL BEFORE JURY SELECTION

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual preference, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

PRELIMINARY INSTRUCTIONS TO BE GIVEN BEFORE OPENING STATEMENTS

DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

In addition, please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B.

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[1] Definitions modified by combining writings and comments by Harvard Professor Mahzarin Banaji.

[2] http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;
(2) the witness's memory;
(3) the witness's manner while testifying;
(4) the witness's interest in the outcome of the case, if any;
(5) the witness's bias or prejudice, if any;
(6) whether other evidence contradicted the witness's testimony;
(7) the reasonableness of the witness's testimony in light of all the evidence; and
(8) any other factors that bear on believability.

You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual preference, or gender in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Model Ninth Circuit Criminal Instruction 1.7 (modified)

INSTRUCTION TO BE GIVEN
DURING CLOSING INSTRUCTIONS
(perhaps before 7.5 – Verdict Form)

DUTY OF JURY

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

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[2] http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf

Racial Equity in Criminal Justice: Jury Issues

EMILY COWARD

NC RACIAL EQUITY NETWORK PROJECT ATTORNEY

UNC SCHOOL OF GOVERNMENT

I. Racial Equity: A Working Definition
II. Historical and Continuing Legacy of Race-Based Juror Exclusion
III. Why it Matters
IV. Possible Reforms:
- ❑ Ensure Jury Pools Reflect Communities
- ❑ Strengthen *Batson* Standard
- ❑ Address Juror Bias
- ❑ Collect Juror Data

This Task Force seeks to promote **RACIAL EQUITY** and eliminate racially disparate outcomes.

How do you define racial equity?

One definition: we will have achieved racial equity when we can't predict outcomes on the basis of race. An equity lens is historically informed, and focuses on systems rather than individuals, and outcomes rather than intent.

Historical Exclusion of People of Color from North Carolina Juries

"The underrepresentation and exclusion of people of color from juries has seriously undermined the credibility and reliability of the criminal justice system, and there is an urgent need to eliminate this practice."

Illegal Racial Discrimination in Jury Selection -Equal Justice Initiative, 2010

Jury Discrimination: "A Stubborn Legacy"

"The ability to serve on a jury is one of the many ways African Americans have struggled to participate in our democratic processes."

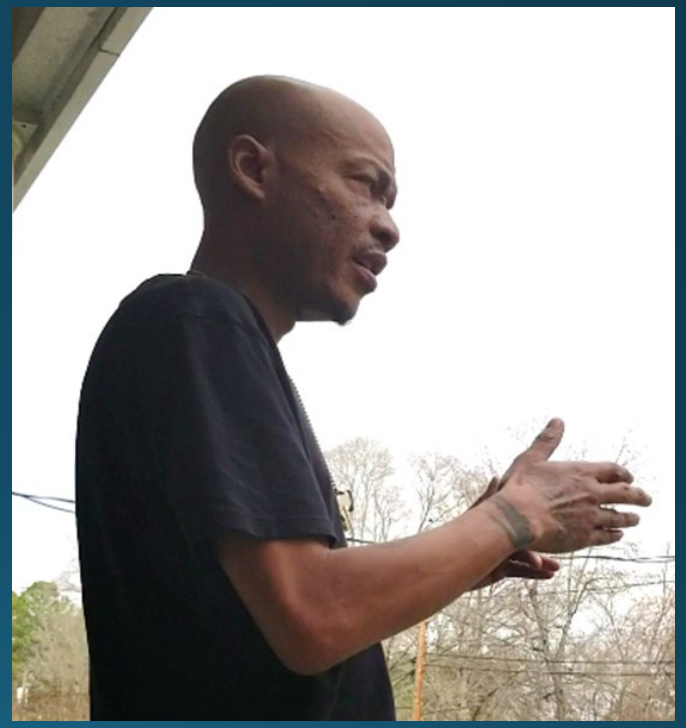
-*State v. Marcus Robinson*

US Supreme Court in 1880 held that the Equal Protection Clause prohibits race-based exclusion from jury service.

This prohibition was not enforced, and even today, enforcement remains elusive. Statistics bear this out. MSU Study, WFU Jury Sunshine Project, Pollitt and Warren, *Thirty Years of Disappointment*.

When the jury formation process is perceived as *unfair* …

- Legitimacy of convictions depends upon perceived fairness of the process
- Loss of public trust in prosecutorial function
- May chill future participation by marginalized groups
- Cynicism about process correlated with failure to follow and respect law
- Undermines democratic check on state's power
- Undermines defendant's right to a fair trial



Diverse juries …

1) Ensure Jury Pools Reflect Communities

Does our jury formation process ensure representative jury pools?

2) Strengthen *Batson* Standard

What more could we do to prevent racialized jury selection?

3) Prevent bias from influencing jury decision-making

How can court actors best address juror bias?

4) Collect juror data to monitor racial disparities in North Carolina's jury system

Fair Cross Section Guarantee

Reforms to ensure jury pools reflect the community

>Expand sources used to create jury lists

>Update lists more frequently

>Send additional mailings to summoned jurors

>Reduce undeliverable summonses by correcting addresses

>Include race data on jury lists to monitor compliance with Fair Cross Section guarantee

>End authority of Jury Commissioners to remove names from master jury lists

>Ensure transparency at every stage of the juror formation process – including those in which a private software company is involved

>Increase juror pay and consider offering childcare for jurors at the courthouse

Reviving *Batson's* Promise

Promising *Batson* Reforms

>Expand *Batson's* protection by focusing on outcomes over intent, similar to WA General Rule 37

- Adopt Objective Observer Standard
- Abolish Prima Facie Case
- Disallow Strikes Where Race Could be a Factor
- Reconsider Commonly Accepted "Race Neutral" Justifications, see also CA AB3070
- Disallow Demeanor-Based Strikes

>Enable appellate review of *Batson* challenges

- Consistent Self-Identification of Race and Gender
- Complete Recordation of Jury Selection

>Mandatory racial equity and implicit bias training; use of implicit bias desk cards for prosecutors and defense attorneys

Addressing Juror Bias

Strategies for Preventing Convictions Based on Juror Bias

- Juror Education and Instruction on Implicit Bias
  - Implicit Bias Video – Update from Video Advisory Group
  - Implicit Bias Jury Instructions
  - Juror Pledge
- Legal education on exploring bias during voir dire
- Legal and judicial education on proper and improper references to race at trial

Better Jury Data

Data is essential for monitoring compliance with legal protections afforded by Fair Cross Section clause and *Batson v. Kentucky*

Collect data on demographics regarding people receiving summons, reporting for jury duty, excused or deferred, challenged for cause, peremptorily struck, and seated on a jury.

Increase transparency of juror data at all stages of juror formation process.

Please contact me with any questions:
escoward@sog.unc.edu

NC CRED

NC Commission on Racial & Ethnic Disparities
in the Criminal Justice System

July 1, 2020

The Honorable Cheri Beasley
Chief Justice
North Carolina Supreme Court
P. O. Box 1841
Raleigh, NC, 27602

Dear Chief Justice Beasley,

The North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System (NC CRED) writes to you today during a watershed moment in the struggle for racial justice. In the wake of the continuing killing of Black people by law enforcement officers and vigilantes, people across our state and across our country are hurting and crying out for justice. On June 2nd, you made a timely speech asserting that "we must do better, we must *be* better" in ensuring equal justice for African Americans in our legal system.[i] We agree, and we support your intention to develop a new "plan for accountability in our courts." We applaud you for rising to the moment, and we write to you today with a proposal that could contribute to repairing the lack of trust in our court system expressed by a majority of North Carolinians.[ii]

North Carolina Needs a Commission on Jury Discrimination

As you know, NC CRED is a nonprofit, nonpartisan organization consisting of criminal justice leaders and stakeholders who share a commitment to building a more equitable, effective, and humane criminal justice system throughout the state.[iii] Since its inception, NC CRED has focused on racial disparities in all aspects of the criminal justice system, including jury selection.

In response to the historical and continuing removal of Black people from North Carolina juries, NC CRED urges the North Carolina Supreme Court to establish a commission on racial discrimination in North Carolina jury selection. We believe that this jury commission should be a central component of any accountability plan.

The longstanding and ongoing legacy of racial discrimination in jury selection is well documented, especially in North Carolina.[iv] Our current legal framework has proven incapable of addressing the problem.[v] Recognizing the failures of the *Batson* framework, courts in other states have formed commissions to develop more robust responses to this multifaceted and enduring problem. The North Carolina Supreme Court can lead us in ending race discrimination in jury selection by establishing a commission to (1) study and develop more effective safeguards against race discrimination and racialized outcomes in jury selection, and (2) develop a comprehensive jury selection data collection program sufficient to monitor enforcement of legal protections against jury discrimination.

Why it Matters

Racial discrimination in jury selection violates the rights of both defendants and potential jurors and undermines public confidence in our system of justice. "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[vi] Courts have recognized that "prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[vii] As you know, "[f]or most of this country's history, African Americans were not

permitted to serve on juries in the United States."[viii] Decades after *Strauder v. West Virginia*, 100 U.S. 303 (1879), in which the U.S. Supreme Court expressly outlawed discrimination against Black people in jury selection, resistance to the inclusion of African Americans remained powerful. In the 1920s and 1930s in North Carolina, for example, not a single African American served as a North Carolina juror.[ix] Modern jury discrimination is rooted in the systematic and often violent suppression of Black civic participation, and it has no place in the operation of our courts.[x]

Discrimination in jury selection erodes trust in the justice system.[xi] After jury selection in the *State v. Jarrion Hood* case tried in Durham County in 2018, struck juror Jermichael Smith stated, "[W]hen you see that [a Black defendant is] going to get stuck being judged by middle-aged white women, middle-aged white men, as a Black man, I didn't feel like that was—it kind of hurt me that I didn't get picked."[xii] As the Equal Justice Initiative has observed, "[t]he sting of mistreatment can linger for years. . . . Memories of the racially-charged trial still trouble [wrongly struck juror Byron Minnieweather, who lamented that] '[i]t was my civil right to participate as a juror.'"[xiii] These experiences cause people to lose faith in the legal process and decrease the likelihood of future participation in jury service, as demonstrated by research showing that procedural justice–the perception that the legal process is fair–promotes compliance with the law.[xiv]

Evidence of Jury Discrimination in North Carolina

The racialized use of peremptory strikes in North Carolina jury selection is well documented. In 2012, a study of North Carolina capital cases analyzing over 7400 peremptory strikes found that the State struck 53% of eligible Black jurors and 26% of all other eligible jurors from capital trial juries.[xv] In a 2018 study of all felony jury trials across North Carolina in 2011, a Wake Forest School of Law study found the same racially disparate strike patterns in non-capital cases: on average, prosecutors across the state struck Black jurors at twice the rate of white jurors.[xvi]

Despite research demonstrating stubborn patterns of racialized strikes, and despite reviewing over 70 *Batson* challenges in the past 30 plus years, this Court has never once ruled that a defendant met his burden of proving discrimination against a juror of color.[xvii] Neither has the North Carolina Court of Appeals ever found a single instance of discrimination against a juror of color. "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero."[xviii] Our state's constitution, in a unique provision adopted in 1970, provides that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." This provision is "an absolute guarantee" that the justice system "be free of both the reality and the appearance of racism, sexism and other forms of discrimination . . . ."[xix] It protects against even a perception of bias, in addition to the actual bias prohibited by the state and federal constitutional guarantees of equal protection.[xx] Yet, no juror of color struck by a prosecutor has ever found relief under this provision either.[xxi] It is clear that our current legal framework is not up to the challenge of addressing discrimination in jury selection. As Justice

Thurgood Marshall predicted, the *Batson* framework has largely failed. *Batson v. Kentucky*, 476 U.S. 79, 106 (Marshall, J., concurring). Fortunately, there is more this Court can do to address this difficult problem. Establishing a commission on discrimination in jury selection would be a powerful step in that direction.

A Way Forward

North Carolina would not be the first state to recognize that jury discrimination is escaping meaningful judicial review.[xxii] In 2015, the Washington Supreme Court convened a task force to consider a proposed general rule aimed at strengthening *Batson* protections. The result of the task force was the codification of Washington General Rule 37, which, among other things, ends the requirement to prove purposeful discrimination to succeed on a *Batson* claim and provides instead that the *Batson* objection will be reviewed from the perspective of an objective observer.[xxiii] According to the rule, the objective observer "is aware that implicit, institutional, and unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[xxiv] Additionally, General Rule 37 provides that reasons historically associated with jury discrimination are presumptively invalid, including, for example, "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; having a close relationship with people who have been stopped, arrested, or convicted of a crime; and living in a high-crime neighborhood."

Connecticut formed a Jury Selection Task Force in December 2019, which Chief Justice Richard Robinson announced in the case of *State v. Holmes* (SC 20048) 2019. While the

Connecticut Supreme Court rejected Mr. Holmes's *Batson* challenge, it found that "[t]he broader themes of disparate impact and implicit bias that the defendant advances raise, as the state candidly acknowledges, extremely serious concerns with respect to the public perception and fairness of the criminal justice system." For this reason, the court created a task force charged with "(1) proposing changes to statutes governing the confirmation form and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate Batson's requirement of purposeful discrimination."

Most recently, in January 2020, the Chief Justice of the California Supreme Court announced the formation of a study group to consider what additional measures should be taken to ensure diversity in California juries. This announcement came shortly after California Appeals Court Judge P.J. Humes, in a case rejecting a *Batson* claim in a 2017 murder case in which the prosecutor dismissed all Black jurors, called for "the Legislature, Supreme Court and Judicial Council to consider meaningful measures to reduce actual and perceived bias in jury selection."

In October 2017, the Iowa Supreme Court called for a Committee on Jury Selection to review the process on selection of jury pools and jurors. The Committee's 2018 report recommended, in addition to a number of proposed reforms aimed at ensuring a fair cross section of the community in Iowa jury pools, a reduction in the number of available peremptory strikes,

comprehensive training on *Batson* for the Iowa judiciary, and a comprehensive review of methods to reduce implicit bias in jury selection and throughout trials.[xxv]

In addition to considering the topics reviewed by the commissions and study groups in other states–-including addressing strikes motivated by implicit bias, revisiting the purposeful discrimination standard and the prima facie case, and responding to strike justifications historically associated with discrimination–-this Court should ask a North Carolina Jury Discrimination Commission to recommend data collection efforts sufficient to promote transparency and monitor progress in fortifying the right to an impartial jury. In its recent decision in *State v. Hobbs*, this Court recognized the importance of historical evidence in evaluating claims of jury discrimination.[xxvi] Ongoing collection of data reflecting the use of peremptory strikes and for cause challenges is necessary to review current practices in light of historical patterns of racialized jury selection.[xxvii] Additionally, this Court should charge the Commission to look beyond peremptory strikes and consider all decisions that shape the demographic composition of juries, including challenges for cause and jury formation procedures at the state and county level.[xxviii]

North Carolina needs a bold plan to end discrimination in jury selection, and the state is fortunate to have practitioners, scholars, and court actors who can help develop such a plan. This Court has exercised leadership in forming commissions to address pressing concerns in the recent past, including the Chief Justice's Commission on the Administration of Law and Justice (2015) and the Advisory Commission on Portraits (2019). You have recognized that it is time for the judiciary to create new systems of accountability to address longstanding problems that

plague our justice system. NC CRED believes strongly that such a comprehensive plan must include a meaningful effort to address the harmful practice of race-based jury selection. For the reasons set out above, NC CRED respectfully encourages the Court to form a commission to study and address jury discrimination in North Carolina. We pledge our full support for the work of such a commission.

Sincerely,

James E. Williams, Jr.
Board Chair

Stephen Raburn
Executive Director

The North Carolina Commission on Racial and Ethnic Disparities in the Courts

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[i] Josh Shaffer & Will Doran, *Emotional NC Supreme Court Chief Says Racism, Prejudice 'Stubbornly Persist' in Courts*, News & Observer, June 2, 2020 ("The data overwhelmingly bears out the truth . . . [that] in our courts, African Americans are more harshly treated, more severely punished, and more likely to be presumed guilty.")
[ii] Josh Shaffer & Will Doran, *Emotional NC Supreme Court Chief Says Racism, Prejudice 'Stubbornly Persist' in Courts*, News & Observer, June 2, 2020 (noting the finding of Chief Justice Martin's Commission on the Administration of Law and Justice that "a majority of North Carolinians lack trust and confidence in our court system").
[iii] http://ncracialjustice.org/about/

[iv] See Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1548-49 (2012) (hereinafter referred to as the "MSU study"); See *State v. Marcus Reymond Robinson*, Order Granting Motion for Appropriate Relief, ACLU.ORG; EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010).
[v] *See* Daniel Pollitt and Brittany Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957 (2016).
[vi] *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).
[vii] *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (1995) (internal quotations omitted); see also *State v. Saintcalle*, 309 P.3d 326, 337 (Wash. 2013) (when courts "allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict").
[viii] *State v. Marcus Reymond Robinson*, Order Granting Motion for Appropriate Relief, ACLU.ORG.
[ix] Id.
[x] *See* James Forman, Jr., *Juries and Race in the Nineteenth Century,* 113 Yale L. J. 895, 909–910 (2004); EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010); April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 Stan. J. C.R. & C.L. 1 (2020); Thomas W. Frampton, *The Jim Crow Jury*, 71 Vanderbilt Law Review 1593, 1613-14 fns 118, 123, 124 (2019).
[xi] EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010) ("When documented acts of illegal discrimination against minority citizens go unremedied, the integrity and credibility of the criminal justice system itself suffers, and excluded jurors and communities lose faith in the system.").
[xii] Interview on file with Elizabeth Hambourger at the Center for Death Penalty Litigation.
[xiii] EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010)
[xiv] Tyler, Tom R.; Blader, Steven L. (2000), *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement*. Psychology Press.
[xv] See Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1548-49 (2012).
[xvi] Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407 (2018); *see also* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031 (2010)..
[xvii] James E. Coleman and David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, North Carolina State Bar Journal, Fall 2017 Vol. 22, No. 3.
[xviii] Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1959 (2016) (quoting U.S. v. Hinds Cty. Sch. Bd., 417 F.2d 852, 858 (5th Cir. 1969)).
[xix] *State v. Cofield*, 320 N.C. 297, 310 (1987) (Mitchell, J. concurring).
[xx] *Cofield*, 320 N.C. at 302 ("the judicial system . . . . must also be perceived to operate evenhandedly.") (emphasis in original).
[xxi] In *State v. Cofield*, 320 N.C. 297 (1987), this Court held that the selection of a grand jury foreperson violated Art. I Sec. 26 as it was not conducted in a racially neutral manner. However, no claim of discrimination against a juror of color during jury selection has ever succeeded under Art. I Sec. 26.
[xxii] Beth Schwartzapfel, *A Growing Number of States are Confronting Unconscious Racism in Jury Selection*, The Marshall Project, May 11, 2020.
[xxiii] See Washington General Rule 37. The incorporation of strikes motivated by implicit bias in the *Batson* framework came on the heels of Justice Wiggin's lead opinion in *State v. Saintcalle*, 309 P.3d 326 at 336, 339

(Wash. 2013), in which he lamented that that the prevalence of implicit biases "upends the Batson framework," and called a new *Batson* framework that "accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion."

[xxiv] *Id.*

[xxv] Recommendations of the Iowa Committee on Jury Selection, March 2018.

[xxvi] State v. Hobbs, ___ N.C. ___, ___ S.E.2d ___ (May 1, 2020).

[xxvii] Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407 (2018).

[xxviii] *Id.*, Thomas Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, (March 2020).

IN THE SUPREME COURT OF NORTH CAROLINA

No. 388A10

Filed 5 June 2020

STATE OF NORTH CAROLINA

v.

ANDREW DARRIN RAMSEUR

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dated 3 June 2014 entered by Judge Joseph N. Crosswhite, Senior Resident Superior Court Judge, in Superior Court, Iredell County, dismissing defendant's motions for appropriate relief. Heard in the Supreme Court on 26 August 2019.

Glenn Gerding, Appellate Defender, by Daniel K. Shatz and Andrew DeSimone, Assistant Appellate Defenders, for defendant-appellant.

Joshua H. Stein, Attorney General, by Jonathan P. Babb and Danielle Marquis Elder, Special Deputy Attorneys General, for the State-appellee.

Cassandra Stubbs for ACLU Capital Punishment Project, Burton Craige for North Carolina Advocates for Justice, and James Coleman and Irv Joyner for North Carolina Conference of the NAACP, amici curiae.

EARLS, Justice.

Defendant, Andrew Darrin Ramseur, was convicted of two counts of first-degree murder and sentenced to death in 2010. After his trial, defendant filed a motion seeking relief pursuant to the newly enacted North Carolina Racial Justice Act on the basis that race was a significant factor in the decision to seek or impose the death penalty in his case. Before the trial court ruled on defendant's motion, the

General Assembly amended the Racial Justice Act in 2012 and then, in 2013, repealed the Racial Justice Act in its entirety. The trial court determined that this repeal rendered defendant's pending motion void and therefore dismissed defendant's Racial Justice Act claims. Here we are asked to decide the constitutionality of the retroactive application of the repeal of the Racial Justice Act. For the reasons stated herein, we hold that applying the repeal retroactively violates the constitutional prohibition on *ex post facto* laws, and therefore we reverse the trial court.

Background

On 31 December 2007, defendant was indicted for two counts of first-degree murder and one count of robbery with a dangerous weapon in connection with the 16 December 2007 murders of Jennifer Lee Vincek and Jeffrey Robert Peck. On the same day, the State filed a notice of its intent to seek the death penalty in defendant's case. Before trial, on 7 December 2009, defendant filed a "Motion for Change of Venue" based upon allegations of prejudice stemming from pre-trial publicity and racial tensions in Iredell County that were exacerbated by the fact that he was a black defendant accused of killing two white victims. In his motion, defendant alleged that the likelihood of a death sentence in Iredell County and the surrounding area was greater because of, *inter alia*, substantial pre-trial publicity and public comments including: the distribution to media outlets of surveillance footage of the crime, inflammatory media coverage of the case, and the prevalence of overtly racist comments and discussion on community internet blogs and websites. On a similar

basis, defendant simultaneously filed a "Motion to Continue Trial to Investigate Claim Pursuant to the Racial Justice Act" to examine whether the decision to seek the death penalty was free from racial discrimination.

The North Carolina Racial Justice Act (the RJA, or the Original RJA) was ratified by the General Assembly on 6 August 2009 and provided that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 [hereinafter Original RJA] (codified at N.C.G.S. § 15A-2010 (2009)) (repealed 2013). The RJA implemented a hearing procedure authorizing a defendant to raise an RJA claim either at the Rule 24 pretrial conference or in postconviction proceedings. *Id.*, § 1, 2009 N.C. Sess. Laws at 1214–15. Upon the filing of an RJA claim, the RJA mandated that "[t]he court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." *Id.*, § 1, N.C. Sess. Laws at 1214. With respect to the evidence required to establish racial discrimination, the RJA placed the burden of proof on the defendant and provided, in pertinent part:

> (a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.
>
> (b) Evidence relevant to establish a finding that race

> was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:
>
> (1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
>
> (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
>
> (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Id., § 1, 2009 N.C. Sess. Laws at 1214. When a defendant meets his evidentiary burden, and it is not successfully rebutted by the State, the RJA prescribes a remedy distinct to RJA claims:

> If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

Id., § 1, 2009 N.C. Sess. Laws at 1214. The General Assembly provided that the RJA "applies retroactively" and that for defendants sentenced to death prior to the RJA's effective date, "motions under this act shall be filed within one year of the effective date of this act." *Id.*, § 2, 2009 N.C. Sess. Laws at 1215.

Following hearings on 14 and 18 December 2009, the trial court denied defendant's motion for change of venue and defendant's motion to continue for RJA-related discovery. Defendant's trial began during the 10 May 2010 criminal session of Superior Court, Iredell County. On 11 May 2010, defendant made an oral motion to modify the courtroom arrangement objecting to the fact that when the parties arrived for trial, the first four rows directly behind the defense table were cordoned off by yellow crime scene tape. After the trial court denied his oral motion, defendant filed a written motion the following day alleging that this quarantining of the area behind the defense table effectively segregated the courtroom by race and forced defendant's family to sit in the back of the courtroom behind the crime scene tape while others, including white members of the victims' families, were able to sit in the front of the courtroom behind the prosecution table. The trial court ordered that the crime scene tape be removed but required that three rows behind the defense table remain vacant.

During jury selection, defendant twice objected to the prosecutor's use of peremptory challenges to exclude black jurors pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court denied both of defendant's *Batson* challenges.

Defendant also renewed his motions to change venue and to continue for RJA-related discovery, noting that all twelve jurors selected to hear the case were white, and that all black potential jurors had been excused. The trial court denied these motions. On 28 May 2010, the jury returned verdicts finding defendant guilty of all charges. On 7 June 2010, following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended defendant be sentenced to death for each murder conviction. On 8 June 2010, the trial court sentenced defendant to death for each murder charge and to 61 to 83 months imprisonment for robbery with a dangerous weapon. Defendant gave notice of appeal to this Court.

Following his trial, on 10 August 2010, defendant filed a post-conviction motion for appropriate relief (MAR) under the RJA in both the trial court and in this Court. On 7 September 2010, this Court entered an order dismissing without prejudice defendant's MAR filed in this Court and staying further proceedings in defendant's direct appeal "until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Iredell County." *State v. Ramseur*, 364 N.C. 433, 702 S.E.2d 62 (2010).

On 21 June 2012, following a ruling in an RJA case in Cumberland County, *State v. Robinson*, No. 91 CRS 23143, Order Granting Motion for Appropriate Relief (Superior Court, Cumberland County, Apr. 20, 2012), *vacated by* 368 N.C. 596, 780 S.E.2d 151 (2015), and before the trial court ruled on defendant's pending RJA motion, the General Assembly passed a new law substantially amending the RJA (the

Amended RJA). An Act to Amend Death Penalty Procedures, S.L. 2012-136, §§ 1–10, 2012 N.C. Sess. Laws 471 [hereinafter Amended RJA] (repealed 2013). Under the Amended RJA, the trial court was not automatically required to hold an evidentiary hearing upon the filing of an RJA claim. *Compare* Original RJA, § 1, 2009 N.C. Sess. Laws at 1214 ("The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties."), *with* Amended RJA, § 3, 2012 N.C. Sess. Laws at 472 (enacting N.C.G.S. § 15A-2011(f)(2) (Supp. 2012)) ("If the court finds that the defendant's motion fails to state a sufficient claim under this Article, then the court shall dismiss the claim without an evidentiary hearing."), *and* Amended RJA, § 3, 2012 N.C. Sess. Laws at 472 (enacting N.C.G.S. § 15A-2011(f)(3) (Supp. 2012)) ("If the court finds that the defendant's motion states a sufficient claim under this Article, the court shall schedule a hearing on the claim and may prescribe a time prior to the hearing for each party to present a forecast of its proposed evidence."). Additionally, the Amended RJA added a waiver provision as a prerequisite to filing an RJA claim, providing that:

> It shall be a condition for the filing and consideration of a motion under this Article that the defendant knowingly and voluntarily waives any objection to the imposition of a sentence to life imprisonment without parole based upon any common law, statutory law, or the federal or State constitutions that would otherwise require that the defendant be eligible for parole.

Amended RJA, § 3, 2012 N.C. Sess. Laws at 471.

Moreover, the Amended RJA altered what is necessary to establish racial discrimination by, *inter alia*: limiting the geographic regions solely to the "county or prosecutorial district" (eliminating "judicial division" and "State"); defining the relevant time period as "the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence"; and mandating that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor under this Article." *Id.*, § 3, 2012 N.C. Sess. Laws at 472–73; *see also id.*, § 4, 2012 N.C. Sess. Laws at 473 (repealing N.C.G.S. § 15A-2012 (2009)). The Amended RJA also repealed N.C.G.S. § 15A-2011(b) (2009) (as set forth above) and provided instead, in relevant part:

> Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence, that either (i) the race of the defendant was a significant factor or (ii) race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Id., § 3, 2012 N.C. Sess. Laws at 472. The General Assembly provided that the Amended RJA applies retroactively to any motions filed or hearings commenced under the Original RJA and that a defendant who filed an MAR under the RJA "shall have 60 days from the effective date of this act to amend or otherwise modify the motion." *Id.*, § 6, 2012 N.C. Sess. Laws at 473.

On 31 August 2012, defendant filed an amendment to his MAR filed under the Original RJA, asserting that he was entitled to pursue claims under both the Original RJA and the Amended RJA. On 29 November 2012, the State filed a response to defendant's RJA motions and requested judgment on the pleadings.

On 13 June 2013, still prior to any ruling by the trial court on defendant's pending RJA and Amended RJA motions, the General Assembly repealed the RJA in its entirety (the RJA Repeal). Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372 [hereinafter RJA Repeal]. The General Assembly provided that the RJA Repeal "is retroactive and applies to any" MAR filed pursuant to the RJA "prior to the effective date of this act," and that all such motions "are void." *Id.*, 5.(d), 2013 N.C. Sess. Laws at 372. In light of the RJA Repeal, the State filed a second response on 23 August 2013 requesting that defendant's RJA claims be dismissed on the basis of the repeal. Defendant filed a response asserting that retroactive application of the RJA Repeal would be unconstitutional and that ruling on the State's motion would be premature.

In an order entered on 3 June 2014, the trial court dismissed defendant's RJA and Amended RJA claims. Citing only the statute and with no further explanation, the trial court stated that the only exception to the retroactive application of the RJA Repeal is in cases in which a final order has been entered. Because the trial court had not entered any final order in defendant's case, the trial court ruled that the RJA Repeal rendered all of his RJA and Amended RJA claims void. In addition, the trial

court made an alternative ruling summarily stating, without further elaboration or examination of the evidence or the parties' legal arguments, that "[i]n the alternative, this Court can determine that defendant's RJA and Amended RJA claims are without merit. An evidentiary hearing is not necessary to decide the issues raised in these claims, and these claims are all denied on the pleadings." The trial court also denied defendant's request for additional discovery.

On 9 April 2015, defendant filed a petition for writ of certiorari seeking review of the trial court's order and a "Motion to Maintain Stay of Direct Appeal." This Court allowed defendant's petition for writ of certiorari and his motion to maintain the stay of his direct appeal.

Standard of Review

At issue here is the constitutionality of the retroactive application of the RJA Repeal. "We review constitutional issues de novo." *State v. Whittington*, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014) (citing *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013), *cert. denied*, 572 U.S. 1134 (2014)).

Ex Post Facto Analysis of the RJA Repeal

Defendant argues that the retroactive application of the RJA Repeal violates the prohibition against *ex post facto* laws under the United States and North Carolina Constitutions.[1] Following relevant precedents of this Court indistinguishable from

[1] Defendant also challenges the constitutionality of the retroactive application of the RJA Repeal on other grounds, arguing that it: violates his rights under the Due Process and Law of the Land Clauses of the Federal and State Constitutions; violates the Constitutional

the facts of this case, we hold that the RJA Repeal is an unconstitutional *ex post facto* law when applied retroactively.

As an initial matter, it is well established that "a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation." *State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999) (citing *In re Mitchell*, 285 N.C. 77, 203 S.E.2d 48 (1974)); *see also Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980) (explaining that "a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment"). Here, in light of the plain language of the RJA Repeal, *see* RJA Repeal, § 5.(d), 2013 N.C. Sess. Laws at 372 ("[T]his section is retroactive and applies to any motion for appropriate relief filed . . . prior to the effective date of this act. All motions filed . . . prior to the effective date of this act are void."), it is clear that the General Assembly intended for

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prohibition against Bills of Attainder under the Federal Constitution; violates his right to equal protection of the law under the Federal and State Constitutions; violates the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Federal Constitution and Article I, Section 26 of the North Carolina Constitution; violates the guarantee of separation of powers under Article I, Section 6 and Article IV, Section 1 of the State Constitution; and deprives him of a vested right under the State Constitution. In addition to challenging the retroactive application of the RJA Repeal, defendants in the RJA cases before this Court also contend that the RJA Repeal was enacted with discriminatory intent and therefore is invalid under the Equal Protection Clauses of the Federal and State Constitutions. In light of our holding, we do not reach these other arguments. This opinion does not address in any way the prospective application of either the Amended RJA or the RJA Repeal.

the RJA Repeal to have a retroactive application. Thus, the sole question is whether the retroactive application of the RJA Repeal violates the prohibition against *ex post facto* laws.

Both our state and federal constitutions prohibit the enactment of *ex post facto* laws. U.S. Const. art. I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of contracts . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."); *see also State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (stating that "both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition"). The purpose of this prohibition against *ex post facto* laws is to "restrict[ ] governmental power by restraining arbitrary and potentially vindictive legislation" and to "assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981) (citations omitted). Moreover, "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000).

The United States Supreme Court has explained that there are four categories, first enumerated in 1798 by Justice Chase in *Calder v. Bull*, to which the prohibition against *ex post facto* laws applies:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Collins v. Youngblood, 497 U.S. 37, 42 (1990) (emphasis omitted) (quoting *Calder v. Bull*, 3 U.S. 386, 390–91 (1798) (opinion of Chase, J.)). The Court has also defined an *ex post facto* law as one "which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925); *see also Collins*, 497 U.S. at 50 (stating that the term "defense," as used in *Beazell*, "was linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission' " (quoting *Beazell*, 269 U.S. at 169–70)).

At issue here is the third category of *ex post facto* laws, which includes not only those laws that increase the maximum sentence attached to a crime, but also any law

that makes the range or measure of punishments more severe.[2] *See, e.g.*, *Peugh v. United States*, 569 U.S. 530, 539 (2013) (stating that the Court has "never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause" (citing *Lindsey v. Washington*, 301 U.S. 397 (1937))); *California Dep't of Corr. v. Morales*, 514 U.S. 499, 505 (1995) ("[T]he Ex Post Facto Clause forbids the States to enhance the *measure of punishment* by altering the substantive 'formula' used to calculate the applicable sentencing range." (emphasis added)). The Supreme Court has explained that "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed" and that "an increase in the possible penalty is ex post facto, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier." *Lindsey*, 301 U.S. 397, 401 (citations omitted). Accordingly, in order to establish that a challenged law impermissibly falls into this third category, a defendant "need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme," but he must "establish[ ] that the measure of punishment

[2] Defendant also argues that the RJA Repeal implicates the fourth category of *ex post facto* laws identified in *Calder* because it changed the quantum and type of evidence sufficient to sustain his death sentences. It is not necessary to reach that additional question with regard to the RJA Repeal given our analysis below but the fourth category of *ex post facto* laws is relevant to the issue whether the Amended RJA can be applied retroactively.

itself has changed." *Morales*, 514 U.S. at 510 n.6 (1995) (citing *Lindsey*, 301 U.S. at 401).

Here the State first contends that defendant cannot establish any change in the measure of punishment attached to his criminal offenses because the Original RJA was enacted *after* defendant's crimes, and therefore the RJA Repeal had no effect on the punishment "applicable at the time of the crimes committed." The General Assembly, however, by giving the RJA retroactive effect, has declared that the RJA was the applicable law at the time the crimes were committed. The State does not challenge the constitutionality of the retroactive application of the RJA here, and we note that the *Ex Post Facto* Clause does not prohibit the retroactive application of laws that—like the RJA—are ameliorative in nature. *See Dobbert v. Florida*, 432 U.S. 282, 294 (1977) ("It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law."). This unusual situation is illustrated by this Court's decision in *State v. Keith*, 63 N.C. 140 (1869).

There the defendant, who had been indicted for murder stemming from events that occurred when he was serving as a Confederate officer in the Civil War, sought to avail himself of an "Amnesty Act" passed by the General Assembly following the conclusion of the war. *Id.* at 141–42. This Act provided a "full and complete amnesty, pardon and discharge" for all "homicides, felonies or misdemeanors" committed by officers and soldiers of both the United States and the Confederacy, provided that such acts were "done in the discharge of any duties imposed on him, purporting to be

by a law . . . . or by virtue of any order emanating from any officer, commissioned or non-commissioned." Act of Dec. 22, 1866, ch. 3, § 1, 1866-67 N.C. Sess. Laws 6, 6–7. By the time the defendant was brought to trial, however, the Constitutional Convention of 1868 had enacted "An Ordinance in Relation to the Pardon of Officers and Soldiers of the Late Confederate Service" repealing the Amnesty Act. Act of March 13, 1868, ch. 29, § 1, 1868 N.C. Ordinances and Resolutions of the Constitutional Convention 69, 69; *see also Keith*, 63 N.C. at 144 (stating that the "Convention of 1868 . . . was assembled under the Reconstruction Acts of Congress to form a new Constitution for the State, and as representing the people of North Carolina, it had general legislative powers"). The trial court "refus[ed] to discharge the prisoner entirely upon the effect of the ordinance of 1868," and the defendant appealed. *Keith*, 63 N.C. at 143.

On appeal, the Court considered whether the ordinance of 1868 violated the prohibition against *ex post facto* laws. *Id.* at 143–45. The Court noted that the "effects of a pardon are well settled in law: as far as the State is concerned, they destroy and entirely efface the previous offence; it is as if it had never been committed." *Id.* at 143; *see also id.* at 144 ("Bishop says it is 'a remission of guilt,' not only of the punishment of guilt." (citing 1 Bishop Cr. L. § 749)). Accordingly, the Court concluded that the ordinance of 1868, which had the intended effect of "reviv[ing] the previous

offences of the prisoner," "was substantially an *ex post facto* law" because "it made criminal what, before the ratification of the ordinance was not so."[3] *Id.* at 144–45.

Here, as in *Keith*, the legislature passed a law aiming to repeal a prior, ameliorative law that had retroactively changed the law applicable to crimes already committed. While the repeal in *Keith* involved the first *Calder* category, *see Calder*, 3 U.S. at 390 ("1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action."), the RJA Repeal falls under the third category inasmuch as it alters only the punishment and not the underlying crime. However, the *Ex Post Facto* Clause's prohibition against retroactive legislation applies with equal force to each category. *See, e.g.*, *Collins*, 497 U.S. at 46 (stating that "the constitutional prohibition is addressed to laws, 'whatever their form,' which make innocent acts criminal, alter the nature of the offense, or increase the punishment" and that "the prohibition which may not be evaded is the one defined by the *Calder* categories" (quoting *Beazell*, 269 U.S. at 170)). The General Assembly, having decided with the enactment of the RJA to "alter the legal consequences of conduct . . . completed prior to its enactment," *Gardner*, 300

[3] The Court also concluded that the ordinance of 1868 unconstitutionally deprived the defendant of a vested right under the Law of the Land Clause of the North Carolina Constitution. *Keith*, 63 N.C. at 144–45. As noted above, defendant has also raised this issue in support of his position, but we decline to reach this argument and limit our analysis solely to the *Ex Post Facto* Clause. *See, e.g.*, *Weaver*, 450 U.S. at 30 n.13 ("When a court engages in *ex post facto* analysis, which is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory change touches any vested rights.").

N.C. at 718, and to extend a new form of relief from the maximum punishment for first degree murder, cannot now "revive" the former measure of punishment attached to crimes already committed and make more burdensome "what, before the ratification of" the RJA Repeal, was less severe.[4] *Keith*, 63 N.C. at 144–45.

Nonetheless, the State contends that *Keith* is inapposite due to the unique nature and greater breadth of the Amnesty Act in comparison to the RJA. Specifically, the State asserts that the conditional, "potential" nature of the relief provided by the RJA renders it distinguishable from the "firmly established" immunity afforded by the Amnesty Act, which the State describes as a "blanket pardon" or "blanket amnesty." The State notes that the Court in *Keith* compared the Amnesty Act to "a general pardon by parliament," which need not be formally pleaded and cannot be waived. *Id.* at 142. According to the State, "the Amnesty Act did not grant conditional relief, it gave a full immunity to all Confederate and Union soldiers for acts done during the Civil War," whereas the RJA is merely a procedure that does "not provide 'amnesty' from the death penalty."

[4] While generally "both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition," *Wiley*, 355 N.C. at 625, 565 S.E.2d at 45, the United States Supreme Court, unlike this Court, has not addressed a situation in which the legislature passes a law aiming to repeal a prior, ameliorative law that had retroactively changed the law applicable to crimes already committed. To the extent that the Supreme Court would reach a different conclusion when analyzing the United States Constitution, we are bound under our State Constitution's *Ex Post Facto* Clause by *Keith*.

Yet, this characterization of the Amnesty Act is inaccurate as the Amnesty Act limited its potential relief to acts committed in the "discharge of duties imposed" and required an indicted defendant to "show that he was an officer or private in either" the United States or the Confederacy, at which point "it shall be presumed that he acted under orders, until the contrary shall be made to appear." Act of Dec. 22, 1866, ch. 3, §§ 1-2, 1866-67 N.C. Sess. Laws 6, 6-7; *see also Keith*, 63 N.C. at 143 ("All that could have been necessary for the prisoner to do in this case, was to show that he was an officer or soldier, and that the felony was committed in the discharge of his duties as such, and we are clearly of opinion that this was sufficiently alleged; indeed no objection of that kind was taken below, and it may, therefore, admit of some doubt, whether it could properly be taken here."). The State concedes that, following a defendant's successful showing that he was an officer or private in the United States or the Confederacy, the resulting presumption was not irrebuttable. For instance, in *State v. Cook*, in addressing whether the defendant, a Confederate soldier, was entitled to relief under the Amnesty Act, the Court stated:

> The defendant craves the benefit of that act. But it cannot be allowed him; because it does not appear that his offence had any connection with his war duties. . . . It was not the intention of the act to exempt persons from punishment merely because they were soldiers; but only for acts which they committed *as* soldiers.

State v. Cook, 61 N.C. 535, 536–37 (1868). Thus, even with the Amnesty Act's more broadly aimed remedy, its conditional relief contemplated that certain procedural and

evidentiary steps may be required before a defendant did or did not receive the benefit of the Act.

More importantly, however, in stressing the nature of the Amnesty Act as a "blanket pardon" or "general pardon by parliament," the State does not identify anything about this characterization, apart from placing the Amnesty Act's repeal in a different *Calder* category, that changes the retroactivity analysis for the purposes of the *Ex Post Facto* Clause. Indeed, in explaining why a parliamentary pardon need not be formally pleaded, as opposed to a traditional executive pardon, the Court in *Keith* stated that "[t]he reason why a Court must, *ex officio*, take notice of a pardon by act of parliament, is that it is considered as a public law; having the same effect on the case as if the general law punishing the offence had been repealed or amended." *Keith*, 63 N.C. at 143 (quoting *United States v. Wilson*, 32 U.S. 150, 163 (1833)). While there are procedural differences in line with the different aims of the respective laws, both the Amnesty Act and the RJA are public laws "repeal[ing] or amend[ing]" the substantive laws of crime and punishment with respect to crimes already committed.

Finally, in that latter respect, the State asserts that the Original RJA did not substantively change the rules of law governing the death penalty, and therefore the RJA Repeal did not impermissibly increase the measure of punishment. The State points out that a retroactive law is not rendered impermissibly *ex post facto* if it results in a mere disadvantage to a defendant, and that "changes in the procedures

by which a criminal case is adjudicated, as opposed to the changes in the substantive law of crimes," do not constitute *ex post facto* laws. *Collins*, 497 U.S. at 45; *see also Miller v. Florida*, 482 U.S. 423, 433 (1987) ("[E]ven if a law operates to the defendant's detriment, the *ex post facto* prohibition does not restrict 'legislative control of remedies and modes of procedure which do not affect matters of substance.' Hence, no *ex post facto* violation occurs if the change in the law is merely procedural and does 'not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt.' " (citations omitted)); *Morales*, 514 U.S. at 506 n.3 (stating that "the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable"). According to the State, the RJA, which did not change the statutory aggravating circumstances that made defendant eligible for the death penalty, is merely "a procedural opportunity to raise a statutory claim for relief based on alleged racial discrimination," the repeal of which left in place existing mechanisms "to allege racial discrimination in his case by other means." This contention by the State misapprehends the nature and scope of the RJA.

With the enactment of the RJA, the General Assembly declared that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. In order to effectuate this mandate the General

Assembly expansively defined what is necessary to establish "that race was the basis of the decision to seek or impose a death sentence." *Id.*, § 1, 2009 N.C. Sess. Laws at 1214. Specifically, such "[a] finding . . . may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed."[5] *Id.*, § 1, 2009 N.C. Sess. Laws at 1214. Moreover, in setting forth the type of evidence sufficient to support such a finding, the General Assembly provided that a defendant could rely on, *inter alia*, "statistical evidence" tending to show that either "[d]eath sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race," "[d]eath sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race," or "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection." *Id.*, § 1, 2009 N.C. Sess. Laws at 1214.[6] This allowance of the use of statistical evidence must be seen as deliberate, as it comes after the Supreme Court's decision in *McCleskey v. Kemp*.

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[5] Notably, while the RJA does not define the temporal parameters of the phrase "at the time the death sentence was sought or imposed," even in the substantially curtailed Amended RJA this timeframe was limited to the "period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence." Amended RJA, § 3, 2012 N.C. Sess. Laws at 471.

[6] The RJA also eliminated any procedural bars that would apply to traditional motions for appropriate relief. Original RJA, § 1, 2009 N.C. Sess. Laws at 1215 ("Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General

There the Court rejected the petitioner's reliance solely on statistical evidence of racial disparities in capital sentencing in the context of claims brought under the Fourteenth and Eighth Amendments and indicated that the role of such evidence in litigating racial discrimination should be prescribed by state legislatures. *McCleskey v. Kemp*, 481 U.S. 279, 314–319 (1987) ("McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes."). Following that suggestion, the General Assembly designed the RJA as a new substantive claim permitting the use of statistical evidence of racial disparities across different geographic areas and periods of time to establish racial discrimination in capital sentencing. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2111–12 (2010) ("In enacting the [RJA], North Carolina determined that its inquiry would not be limited by *McCleskey v. Kemp* and its rejection of statistical evidence when examining constitutional claims[.] . . . The legislature understood that it was creating a different system of proof than that prescribed by *McCleskey*, explicitly accepting the Court's invitation to legislatures to act because they, rather than the

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Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief."); *see also* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2114 n.370 (2010) ("[T]his provision allows defendants to litigate racial discrimination regarding peremptory strikes even if objections were not made at trial or might be subject to other procedural bars in Article 89.").

United States Supreme Court, are best able to judge how statistical studies should be used in regulating the death penalty." (footnotes omitted)).[7] The General Assembly's decision to afford capital defendants this new, substantive basis for challenging the validity of a death sentence reflects ongoing concerns with the difficulty of proving covert racial discrimination,[8] particularly in capital sentencing

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[7] As one state senator stated during the floor debate on the day the Senate first approved the RJA bill:

> Without this legislation, previous efforts to raise this issue would have been to no avail because of the *McCleskey* decision. . . . The *McCleskey* decision . . . said that while statistics may show race discrimination, it doesn't rise to the level of being a constitutional violation of the equal protection clause and specifically directed that if states wanted to provide this additional protection and making it a means by which somebody could prove race discrimination, then they could do it. And that's what we're doing here today.

Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009), https://archive.org/details/NorthCarolinaSenateAudioRecordings20090514/North_Carolina_Senate_Audio_Recordings_20090514.mp3; *see also* Rep. Deborah Ross, House Floor Debate on Racial Justice Act (July 14, 2009), https://www.ncleg.gov/DocumentSites/House Documents/2009-2010%20Session/Audio%20Archives/2009/07-14-2009.mp3 ("In a 5-4 decision, the U.S. Supreme Court said that you don't have the constitutional right to present statistical evidence, though at the end of his opinion for the five judge majority, Justice Lewis Powell said 'these arguments are best presented to legislative bodies.' "); Barbara O' Brien & Catherine M. Grosso, *Confronting Race: How A Confluence of Social Movements Convinced North Carolina to Go Where the McCleskey Court Wouldn't*, 2011 Mich. St. L. Rev. 463 (2011).

[8] *See* Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009), https://archive.org/details/NorthCarolinaSenateAudioRecordings20090514/North_Carolina_Senate_Audio_Recordings_20090514.mp3 ("I want to step back and explain, very quickly, where this idea of using statistics to prove race discrimination comes from and why it's needed. Race discrimination is very hard to prove. Rarely, particularly in today's time, do people just outright say, 'I am doing this because of the color of your skin.' Imagine if our Civil Rights Act that was passed in '64 said that the only way that you could prove race discrimination was by that sort of evidence—an admission by the person engaging in racial discrimination. We would have had very little change in our society and culture in terms of

decisions, *see Turner v. Murray*, 476 U.S. 28, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."), as well as the fact that the harm from racial discrimination in criminal cases is not limited to an individual defendant, but rather it undermines the integrity of our judicial system and extends to society as a whole, *Batson*, 476 U.S. at 87 ("Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

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the hiring practices."); Rep. Rick Glazier, House Floor Debate on Racial Justice Act (July 14, 2009), https://www.ncleg.gov/DocumentSites/HouseDocuments/2009-2010%20Session/Audio%20Archives/2009/07-14-2009.mp3 ("Well, I'm here to tell you, at least from my perspective, that unstated motivation is extraordinarily difficult to ferret out. That is why we use statistical evidence in employment discrimination cases, and if we are using statistical evidence in employment cases to protect property rights, I fail to see why credible statistical evidence ought not be a legislative reason or a legislative priority to allow people to use to fight for their life."); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) ("Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." (alteration in original) (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971))); *see generally Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (stating that while the "Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection violates the Equal Protection Clause," "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences" (citations omitted)).

As this Court, in addressing Article I, Section 26 of our State Constitution ("No person shall be excluded from jury service on account of sex, race, color, religion, or national origin."), stated:

> Article I, section 26 does more than protect individuals from unequal treatment. The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice. Such discrimination thereby undermines the judicial process.
>
> Exclusion of a racial group from jury service, moreover, entangles the courts in a web of prejudice and stigmatization. To single out blacks and deny them the opportunity to participate as jurors in the administration of justice—even though they are fully qualified—is to put the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law.

State v. Cofield, 320 N.C. 297, 302–03, 357 S.E.2d 622, 625–26 (1987) (footnote omitted) (citation omitted); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) ("By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system."); *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) ("Discrimination in the jury selection process undermines

our criminal justice system and poisons public confidence in the evenhanded administration of justice.); *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (2005) ("Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice[.] Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that 'overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication[.]" (cleaned up)); *Ballard v. United States*, 329 U.S. 187, 195 (1946) ("The systematic and intentional exclusion of women, like the exclusion of a racial group, or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (citations omitted)).

As part of its decision to make this new type of claim available to capital defendants, the General Assembly specified that the RJA would provide a unique and limited remedy:

> If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. Thus, in its efforts to combat racial discrimination in our state's application of the death penalty—the most serious and irrevocable of our state's criminal punishments—the General Assembly designed a new substantive claim that fundamentally changes what is necessary to prove racial discrimination and, in return, provides a limited grant of relief that is otherwise unavailable.[9] *See generally Turner*, 476 U.S. at 35 ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."); *California v. Ramos*, 463 U.S. 992, 998–99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

Accordingly, the RJA Repeal is not a mere procedural alteration that may "produce[ ] some ambiguous sort of 'disadvantage.' " *Morales*, 514 U.S. at 506 n.3.

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[9] As part of its contention that the RJA and its repeal amount merely to procedural changes in the law, the State catalogues at length the existing legal doctrines and mechanisms for addressing racial discrimination in the criminal justice system. None of these protections, however, are as robust as the substantive guarantees provided by the RJA to these defendants. Indeed, the unique and otherwise unavailable protection afforded by the RJA was the reason for its enactment and, presumably, for its subsequent repeal.

Rather, by retroactively eliminating the RJA's substantive claim and its accompanying relief, the RJA Repeal increases the severity of the standard of punishment attached to the crime of first-degree murder and deprives defendant of a defense to the "nature or amount of the punishment imposed for its commission." *Collins*, 497 U.S. at 50 (quoting *Beazell*, 269 U.S. at 169–70). As such, the retroactive application of the RJA Repeal to defendant violates the prohibition against *ex post facto* laws.

It is within the purview of the General Assembly to pass such ameliorative laws granting potential relief from crimes and punishment to defendants for crimes already committed, and, having done so, it cannot then withdraw that relief consistent with the *Ex Post Facto* Clause, which "restricts governmental power by restraining arbitrary and potentially vindictive legislation," *Weaver*, 450 U.S. at 28–29, and serves "a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life," *Carmell*, 529 U.S. at 533. This interest in restricting "arbitrary and potentially vindictive legislation" is particularly relevant here,[10] given that the Amended RJA

[10] Here the *Ex Post Facto* Clause's interest in providing notice and fair warning is lessened, as the measure of punishment to which the RJA repeal subjected defendant was the same pre-RJA measure of punishment of which he had notice at the time he committed his crimes. But this was equally true in *Keith*, where the ordinance of 1868 returned the law to that which existed at the time the defendant allegedly committed his crimes, at which time he would have been deemed to have had notice not only of the potential legal consequences of participating in armed secession, but also of the consequences of homicides that

and the RJA Repeal followed closely on the heels of the four Cumberland County cases, in which the trial court concluded that the RJA evidentiary hearings uncovered significant evidence of widespread racial discrimination and disparities in our state's capital sentencing scheme and in which four convicted murderers had their sentences commuted to life imprisonment without parole by that court.

The dissent gives no weight to this fundamental fairness interest, which is apart from the concept of notice that is embodied in the constitutional prohibition on *ex post facto* laws. Instead, the dissent is premised on the narrow proposition that the only interest served by the *Ex Post Facto* Clause is to deter crime by providing "actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression." (quoting *Garner v. Jones*, 529 U.S. 244, 253 (2000)). However, the U.S. Supreme Court has acknowledged repeatedly, and did again in *Garner,* that preventing arbitrary and potentially vindictive legislation is also a purpose of the *Ex Post Facto* Clause. *Weaver*, 450 U.S. at 28–29. In *Garner*, the Court observed that "[t]he danger that legislatures might disfavor certain persons after the fact is present even in the parole context, and the Court has stated that the *Ex Post Facto* Clause guards against such abuse." *Id.* at 253 (citing *Miller*, 482 U.S. at 429).

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transcended the acceptable norms of war. Indeed, following the defendant's alleged role in the "Shelton Laurel Massacre," including the summary execution of thirteen captives, three of them aged 13, 14, and 17, the Confederate Governor of North Carolina, Zebulon B. Vance, had vowed to "follow him [Keith] to the gates of hell, or hang him." Phillip Shaw Paludan, *Victims: A True Story of the Civil War* 107 (1981).

The dissent reads the *ex post facto* prohibition too narrowly when concluding that it does not apply to the repeal of the RJA.

Our decision is further premised on the North Carolina Constitution, which this Court previously found to prohibit laws that seek to retroactively impose a greater penalty. Referring to the North Carolina Constitution, we explained:

> These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate them, nor can any Court sitting on American soil sanction their violation. . . . The ordinance in question was substantially an *ex post facto* law; it made criminal what, before the ratification of the ordinance was not so; and it took away from the prisoner his vested right to immunity.

State v. Keith, 63 N.C. at 144–45. Here the right is to challenge a sentence of death on the grounds that it was obtained in a proceeding tainted by racial discrimination, and, if successful, to receive a sentence of life without parole. Repealing the RJA took away that right, and the repeal cannot be applied retroactively consistent with this state's constitutional prohibition on *ex post facto* laws.

We note that our analysis under the *Ex Post Facto* Clauses of the U.S. and North Carolina Constitutions addresses a question purely of law and applies equally to anyone in the same circumstances as defendant—specifically, any capital defendant who filed a motion for appropriate relief under the Original RJA. With respect to this class of individuals, the RJA Repeal cannot, consistent with

constitutional guarantees, retroactively apply to void their pending RJA claims. We express no opinion on the ultimate merits of defendant's RJA claims, nor those of any other capital defendant, and leave those issues to the trial courts to adjudicate in the first instance.

Ex Post Facto Analysis of the Amended RJA

Our holding that the RJA Repeal cannot constitutionally apply retroactively to pending RJA motions necessitates examining whether the trial court erred in its alternative ruling that defendant's RJA and Amended RJA claims were without merit and its denial of his claims without a hearing. In order to address that issue, however, we must first determine whether the retroactive application of the Amended RJA violates the prohibition against *ex post facto* laws under the United States and North Carolina Constitutions. Specifically, defendant argues that "[t]o the extent that the amended RJA took away categories of claims that were available under the original RJA or impaired Mr. Ramseur's ability to assert any of his RJA claims, the retroactive application of the amended RJA was unconstitutional for all the same reasons the retroactive application of the repeal bill was unconstitutional."

Like the RJA Repeal, the Amended RJA contains a provision explicitly stating that it should apply retroactively:

> Unless otherwise excepted, this act, including the hearing procedure, evidentiary burden, and the description of evidence that is relevant to a finding that race was a significant factor in seeking or imposing a death sentence, also applies to any postconviction motions for appropriate

> relief that were filed pursuant to S.L. 2009-464. This act also applies to any hearing that commenced prior to the effective date of this act.

Amended RJA, § 6, 2012 N.C. Sess. Laws at 473. The Amended RJA further specifies that a person who filed an RJA MAR would have sixty days from the effective date of the act, 2 July 2012, to file an amended motion. *Id.*, § 6, 2012 N.C. Sess. Laws at 473. On its face, the law was intended to apply retroactively and, because it allowed defendants to amend their RJA MARs, there was an acknowledgement that the new evidentiary standards created a substantive change in the law.

The changes implemented by the Amended RJA, as summarized above, are both procedural and substantive. Moreover, the law also contained a severability clause which states: "If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable." *Id.*, § 9, 2012 N.C. Sess. Laws at 473. Therefore, it is necessary to evaluate each of the changes worked by the Amended RJA to determine whether they fall into any of the categories of an *ex post facto* law when applied retroactively.

The Amended RJA made several significant changes to the Racial Justice Act. First, the Amended RJA altered the hearing procedure by providing that the trial court was no longer automatically required to hold an evidentiary hearing upon the filing of an RJA claim. Rather, under the Amended RJA, the trial court need only

schedule a hearing if it "finds that the defendant's motion states a sufficient claim." *Id.*, § 3, 2012 N.C. Sess. Laws at 473.

Second, the Amended RJA substantially altered the evidentiary requirements for an RJA claim. Specifically, as previously discussed, the Amended RJA altered what is necessary to establish racial discrimination by, *inter alia*: limiting the geographic regions solely to the "county or prosecutorial district" (eliminating "judicial division" and "State"); defining the relevant time period as "the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence"; and mandating that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor under this Article." *Id.*, § 3, 2012 N.C. Sess. Laws at 472–73 (amending N.C.G.S. § 15A-2011(c) (2009) and enacting N.C.G.S. § 15A-2011(d)–(g) (Supp. 2012)); *see also id.*, § 4, 2012 N.C. Sess. Laws at 473 (repealing N.C.G.S. § 15A-2012 (2009)). The Amended RJA also repealed N.C.G.S. § 15A-2011(b) (2009)[11] and provided instead, in relevant part:

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[11] N.C.G.S. § 15A-2011(b) (2009) of the Original RJA provided:

> Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:
>
> (1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of

> Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence, that either (i) the race of the defendant was a significant factor or (ii) race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Id., § 3, 2012 N.C. Sess. Laws at 472.

Third, the Amended RJA added a waiver provision providing that in order to assert an RJA claim, a defendant must knowingly and voluntarily waive any objection to the imposition of a sentence to life imprisonment without parole. *Id.*, § 3, 2012 N.C. Sess. Laws at 471.

We conclude that the first alteration, amending the hearing procedure, is merely a procedural change which, while possibly working some disadvantage to a defendant, does not implicate the prohibition against *ex post facto* laws. *See Morales*, 514 U.S. at 506 n.3. The second alterations amending the evidentiary requirements,

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> another race.
>
> (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
>
> (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Original RJA, § 1, 2009 N.C. Sess. Laws at 1214.

however, do constitute changes in the criminal law that cannot be applied retroactively. These revisions fall within the fourth *Calder* category by altering the "legal rules of evidence" and require a different, more stringent, standard of proof in showing the racially discriminatory imposition of the death penalty. *See Collins*, 497 U.S. at 41 (quoting *Calder*, 3 U.S. at 390 (opinion of Chase, J.)).

The third alteration, adding the waiver provision, may only be an *ex post facto* law as applied to certain defendants. It creates a condition precedent to asserting an RJA defense which, like the RJA Repeal, changes the punishment for any defendant who, prior to the amendment, could assert an RJA defense *and* further object to a sentence of life imprisonment without parole. It is difficult to determine whether any defendant actually could fall into such a category. In any event, any potential issue with the retroactive application of this waiver provision is unrelated to the trial court's alternative ruling in this case that defendant's RJA claims were without merit. Accordingly, because we need not decide this issue in order to determine whether the trial court erred in its alternative ruling, we decline to address here whether the retroactive application of the Amended RJA's waiver provision violates the prohibition against *ex post facto* laws.

In summary, the evidentiary changes effected by the Amended RJA are an *ex post facto* law that cannot constitutionally be applied to defendants who had RJA MARs pending at the time of the Amended RJA. For those defendants, the original RJA evidentiary rules apply. However, the portion of the Amended RJA which grants

a trial judge discretion over whether to hold a hearing is a procedural change which can be applied retroactively to pending RJA MARs.

Defendant's RJA Claims

Next, defendant argues that the trial court erred in its alternative rulings that defendant's RJA and Amended RJA MARs were without merit and could be denied without conducting an evidentiary hearing and that defendant was not entitled to discovery with respect to his RJA claims. The evidentiary forecast produced by defendant with his motions requires reversal of the trial courts' alternative rulings.

Defendant's extensive RJA and Amended RJA MARs "state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. Specifically, in accordance with the requirements of the RJA, defendant forecast, *inter alia*, statistical and non-statistical evidence that, taken in the light most favorable to defendant, tends to show that race was a significant factor in the prosecution's use of peremptory challenges, in the prosecution's decision to proceed capitally, and in the actual imposition of death sentences, at the time defendant's sentence was impos with respect to all four of the relevant geographic areas.

Defendant also alleged how in his case: he was brought to trial against a backdrop of prejudicial pre-trial publicity and racial tensions in the community; the

four rows in the courtroom directly behind the defense table were cordoned off with yellow crime scene tape at the start of the trial, suggesting that defendant was a dangerous criminal and forcing his black family members to sit in the back of the courtroom; six individuals who were later selected to serve as jurors were in the courtroom and observed the police tape before it was taken down two days later; all twelve jurors selected to hear the case were white and the trial court allowed the prosecution to exercise peremptory challenges to excuse all potential black jurors not removed for cause; the trial court denied defendant's request for a change of venue; and the trial court did not allow defense counsel to question potential jurors about issues of racial bias nor question the jury about whether they heard media accounts of the case or racially biased comments in the community. Both defendant's RJA MAR and Amended RJA MAR plainly "state[ ] a sufficient claim" under the RJA, as required by the Amended RJA in order to trigger an evidentiary hearing. Thus, the trial court at a minimum erred as a threshold matter in not conducting an evidentiary hearing on defendant's claims. Additionally, defendant's MARs established that he was entitled to discovery under N.C.G.S. § 15A-1415(f) (2019), which provides for complete discovery of state files in capital post-conviction cases. Accordingly, the trial court erred in denying defendant's MARs on the pleadings.

Conclusion

In sum, we conclude that the RJA Repeal and the provisions of the Amended RJA altering the evidentiary requirements for an RJA claim constitute impermissible

ex post facto laws and cannot be constitutionally applied retroactively to defendant's pending RJA claims. Further, we conclude that the trial court erred in ruling that defendant's claims lacked merit and denying his RJA claims without a hearing. We remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

The narrow issue presented by this case is whether, as applied to defendant, legislation repealing the Racial Justice Act of 2009 (the RJA) constitutes an ex post facto law. The majority incorrectly answers this question in the affirmative. The repeal plainly does not qualify as an ex post facto law because it left defendant in precisely the same legal situation as the one he occupied on 16 December 2007, when, according to a jury, he murdered Jennifer Lee Vincek and Jeffrey Robert Peck. The repeal did not subject defendant to more serious or additional charges for past conduct, nor did it increase the punishment in effect on 16 December 2007. When properly viewed, the General Assembly intended the RJA to provide a procedural mechanism by which a defendant could collaterally attack a capital sentence. The General Assembly did not intend to make a substantive change to the death penalty sentencing law. As such, the General Assembly had the constitutional authority subsequently to amend it and repeal it.

Viewed more broadly, though, this case is about who should determine the future of the death penalty in North Carolina. Under our system of government, the obvious answer to this question is that ultimate authority over death penalty policy resides with the people of this State. It is for them to determine whether North Carolina will have a death penalty and to establish, within constitutional bounds, the circumstances in which that penalty may be imposed. Ordinarily, the people exercise this power indirectly through their elected representatives in the General Assembly.

The majority's interpretation of the RJA cedes significant portions of the people's authority over death penalty policy to the courts. In the majority's view, the law empowers a judge to vacate a defendant's death sentence based on statistical evidence that race had been a significant factor in *other* death penalty proceedings in the county, prosecutorial district, judicial division, *or the State as a whole*, regardless of the role of race in defendant's own capital proceeding. This interpretation could be viewed as granting policymaking power to the judiciary to effectively eliminate the death penalty in North Carolina. By invalidating the RJA repeal, the majority does more than merely misapply the constitutional prohibition on ex post facto laws. It also intrudes upon the right of the people, in the form of their elected representatives, to decide death penalty policy for this State. I respectfully dissent.

Defendant was indicted on 31 December 2007 for the 16 December 2007 murders of Jennifer Lee Vincek and Jeffrey Robert Peck during the commission of an armed robbery of the Broad Street Shell Station in Iredell County for approximately $90 to $100. At the time of the armed robbery, Ms. Vincek worked at the station as a cashier on third shift, and Mr. Peck was a customer. At trial the jury watched a security video from the store capturing the robbery and murders as they occurred. The video showed the first shot striking Ms. Vincek while she lay on the ground behind the counter in a fetal position. When Ms. Vincek attempted to crawl away on her hands and knees, she was shot again. The video showed that her hair "popped off her back." The medical examiner testified that Ms. Vincek suffered from three

gunshot wounds with the first two being fairly superficial, but the third and fatal gunshot striking her in the back. Mr. Peck died from a single gunshot wound to the chest.

A jury convicted defendant of two counts of first-degree murder and one count of armed robbery. In recommending the death penalty, the jury unanimously found the following statutory aggravating factors under N.C.G.S. § 15A-2000: "(1) the capital felony was committed while the defendant was in engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); (2) the capital felony was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the capital felony was part of a course of conduct in which the defendant engaged and which included the commission of the defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11)." Consistent with the jury's recommendation, the trial court entered a death sentence for each murder and a sentence of 61 to 83 months to run consecutively for the armed robbery.

Defendant committed his crimes in 2007, before the original RJA was enacted in 2009. After the original RJA was enacted, defendant delayed his direct appeal, *State v. Ramseur*, 364 N.C. 433, 702 S.E.2d 62 (2010), and instead filed a post-conviction motion for appropriate relief (MAR) under the RJA. Defendant filed his first MAR seeking relief under the original RJA and later filed a MAR under the amended RJA. Before the trial court rendered judgment, the legislature repealed the statutory provisions upon which defendant's motions relied. Act of June 13, 2013, S.L.

2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372 [hereinafter the RJA Repeal]. In an order dated 3 June 2014, the trial court recognized that Session Law 2013-154 repealed the RJA and that the statutory language of the repeal retroactively applied to void defendant's RJA motions.

The trial court concluded that, because no final order had been entered on defendant's RJA claims or his claims under the amended RJA, those claims were controlled by the repeal of the RJA, and his RJA claims were voided as a matter of law. The trial court concluded that the unconditional repeal of the RJA warranted the dismissal of defendant's RJA claims, citing *Spooners Creek Land Corp. v. Styron*, 276 N.C. 494, 496, 172 S.E.2d 54, 55 (1970), and *In re Incorporation of Indian Hills*, 280 N.C. 659, 663, 186 S.E.2d 909, 911 (1972).

I.

Our system of government is founded on a principle that all people are created equal, possessing equal rights. *The Declaration of Independence* para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); *see also* N.C. Const. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."). It is

imperative that all are treated equally under the law in every case that comes before the courts, particularly in criminal trials when life and liberty are at stake. Our state and federal constitutions recognize this sacred responsibility and safeguard against invidious discrimination. *See*, *e.g.*, N.C. Const. art. I, § 19 (protecting life, liberty, and due process rights with the Law of the Land Clause); *id.* art. I, § 26 (prohibiting exclusion "from jury service on account of sex, race, color, religion, or national origin"); *see also Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race and setting the factual threshold for a defendant to establish a prima facie case of purposeful discrimination in jury selection); *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501 (1962) (A defendant cannot be selected for prosecution based on race, religion, or other arbitrary classification.); *State v. Bowman*, 349 N.C. 459, 509 S.E.2d 428 (1998) (discussing the constitutional right to a jury of one's peers and the protections to prevent arbitrary exclusion from the jury pool); *State v. Mitchell*, 321 N.C. 650, 653, 365 S.E.2d 554, 556 (1988) (A jury foreman cannot be excluded based on race.).

"[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." *Gregg v. Georgia*, 428 U.S. 153, 226, 96 S. Ct. 2909, 2949 (1976) (White, J., concurring). The imposition of the death penalty "has a long history of acceptance both in the United States and in England." *Id.* at 176, 96 S. Ct. at 2927

(Stewart, J., opinion expressing the judgment of the Court). In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), the Supreme Court of the United States held that imposing and carrying out the death penalty under statutes that provide no basis for determining whether the penalty was proportionate to the crime would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person." *Gregg*, 428 U.S. at 179–80, 96 S. Ct. at 2928 (footnote omitted); *see McCleskey v. Kemp*, 481 U.S. 279, 302, 107 S. Ct. 1756, 1772–73 (1987) (reviewing and approving of new statutory measures to, *inter alia*, ensure individualized assessments for each defendant's punishment based on definite statutory criteria such as the finding and weighing of aggravating factors by a jury). The weightiest of criminal punishment certainly requires the necessary legal justification. *Gregg*, 428 U.S. at 189, 96 S. Ct. at 2932. The Court in *Gregg* reviewed the legislative backlash from *Furman* and concluded:

> Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Id. at 186–87, 96 S. Ct. at 2931 (recognizing that ascertaining contemporary standards for purposes of the death penalty's viability under the Eighth Amendment is best left to legislative judgment).

While there is " 'no perfect procedure,' " "our consistent rule has been that constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.' " *McCleskey*, 481 U.S. at 313, 107 S. Ct. at 1778 (alteration in original) (first quoting *Zant v. Stephens,* 462 U.S. 862, 884, 103 S. Ct. 2733, 2746 (1983); then quoting *Singer v. United States*, 380 U.S. 24, 35, 85 S. Ct. 783, 790 (1965)). These safeguards are "designed to minimize racial bias in the process" and protect "the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants," on a case-by-case basis. *Id.* at 313, 107 S. Ct. at 1778. Case-by-case assessments by the courts have narrowed the scope of when the death penalty can be imposed based on the specific facts and the particular defendant.[1]

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[1] *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005) (precluding the death penalty due to offender's age); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002) (precluding the death penalty due to offender's mental retardation); *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986) (precluding the death penalty due to offender's mental insanity); *Batson*, 476 U.S. at 84, 106 S. Ct. at 1716 (curtailing improper consideration of the race of potential jurors); *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368 (1982) (requiring offender's intent to kill); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978) (allowing offender's individualized mitigating circumstances); *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861 (1977) (reviewing the proportionality of the crime to the penalty); *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978 (1976) (requiring an individualized assessment of the

II.

In North Carolina, a prosecutor has discretion to pursue the death penalty given the facts of a case, *see* N.C.G.S. § 15A-2004 (2019), but that prosecutorial discretion is limited by the constitutional principles of equal protection and due process, *see Oyler*, 368 U.S. at 456, 82 S. Ct. at 506. Recognizing the gravity of capital punishment, the General Assembly has created by statute other significant safeguards for capitally tried defendants. A defendant in a capital trial is given two attorneys. N.C.G.S. § 7A-450(b1) (2019). A capitally tried defendant may move to transfer venue to avoid local prejudice against him and secure a fair and impartial trial. *Id.* § 15A-958. Following a guilty verdict of first-degree murder, in a separate trial phase the jury considers aggravating factors from a comprehensive list, *id.* § 15A-2000(e), presented pursuant to the Rules of Evidence, *see id.* § 8C-1 (2019), and weighs any mitigating factors in defendant's favor, *id.* § 15A-2000(f). The jury must find the existence of an aggravating factor beyond a reasonable doubt and that that factor outweighs any mitigating factors before recommending the death penalty. *Id.* § 15A-2000(c)(1)–(3). This Court automatically reviews cases where a death sentence is imposed, *id.* § 7A-27(a)(1), to ensure the defendant received a fair trial, free from

offender and circumstances with objective standards to guide the process for imposing a sentence of death).

prejudicial error, and that the death sentence was proportional to the facts of the defendant's individual case.

In addition to a direct appeal, the General Assembly by statute provides an avenue for post-conviction review and lists grounds for post-conviction relief. *See* N.C.G.S. § 15A-1411 through N.C.G.S. § 15A-1422. A defendant may collaterally attack his conviction and sentence through a MAR filed with the trial court, *id.* § 15A-1420(b1)(1), or directly with this Court, N.C. R. App. P. 21(f) (2019). A capitally tried defendant may file a MAR on the grounds listed in N.C.G.S. § 15A-1415(b). *See, e.g.*, N.C.G.S. § 15A-1415(b)(7) ("There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required."); *id.* § 15A-1415(b)(8) (The sentence imposed was "unauthorized at the time imposed . . . or is otherwise invalid as a matter of law.").

Any trial court decision on a MAR is subject to appellate review. *See State v. Stubbs*, 368 N.C. 40, 42–43, 770 S.E.2d 74, 76 (2015); *see also District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69, 129 S. Ct. 2308, 2320 (2009) ("Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided."). The capitally tried defendant may raise issues of racial discrimination on direct appeal and through post-conviction MARs. *See* N.C.G.S. § 15A-2000(d)(2) (On appeal a death

sentence may be overturned, *inter alia*, "upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.").

The RJA was signed into law on 11 August 2009. North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 [hereinafter original RJA] (codified at N.C.G.S. § 15A-2010 (2009)) (repealed 2013). This legislation, echoing our existing constitutional safeguards, provided that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." *Id.*, § 1, 2009 N.C. Sess. Laws at 1214.

Under the RJA, a defendant who had been sentenced to death had the opportunity to file a post-conviction MAR using statistical or other evidence. It provides in part:

> (a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

Id. It allowed relief if a defendant proved that death sentences in the specified geographic areas were sought more frequently upon persons of one race or upon persons when victims were of another race, or when race was a "significant factor" in peremptory challenges during jury selection. *Id.* If the court found that the defendant had met his burden of proof then his death sentence was converted to a sentence of life without the possibility of parole. *Id.*

While the RJA became effective immediately and applied retroactively, *id.*, § 2, 2009 N.C. Sess. Laws at 1215, its retroactive application provided different relief and different filing requirements, depending on the status of a particular defendant's case. For those defendants who had previously been sentenced to death, the RJA required them to file a MAR within one year of the RJA's enactment. *Id.* The one-year requirement did not apply to those with pending cases. *See id.*, § 1, 2009 N.C. Sess. Laws at 1214. Though generally adhering to the requirements for filing MARs, the RJA also gave a specific mechanism in pending cases to those who claimed race was a significant factor in seeking the death penalty. *Id.* In those cases, defendants were allowed to raise their claims at the pretrial conferences. *Id.* If a defendant were successful in presenting the pretrial claim, then the State was prevented from seeking the death penalty in that case. *Id.*

In its original form, the RJA did not expressly address whether, in addition to producing statistical evidence that race had been a significant factor in other death penalty cases, a defendant had to show that race played a substantial role in the outcome of his own case. The majority interprets the RJA not to require such a showing. As explained in section V below, this erroneous interpretation of the RJA overlooks the RJA's stated purpose and raises serious separation-of-powers issues.

The General Assembly amended the RJA on 2 July 2012. An Act to Amend Death Penalty Procedures, S.L. 2012-136, §§ 1–10, 2012 N.C. Sess. Laws 471, 471

[hereinafter amended RJA]. The amending legislation made it clear that a defendant had to show particularized racial bias in his case to prevail:

> A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the death penalty *in the defendant's case* "at the time the death sentence was sought or imposed."

Id., § 3, 2012 N.C. Sess. Laws at 471 (emphasis added). The amendment limited the relevant time frame for any statistical evidence presented by defining "at the time the death sentence was sought or imposed" "as the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence." *Id.* The amendment also limited the geographic area of relevant statistical evidence to the county or prosecutorial district and made other procedural changes. *Id.* The trial court was authorized to dismiss claims it determined to be insufficient without a hearing. *Id.*, § 3, 2012 N.C. Sess. Laws at 471–72. The amendment applied retrospectively to any case that had not received a final order affirmed on appeal under the original RJA. *Id.*, § 8, 2012 N.C. Sess. Laws at 472. Though the amended statute provided no additional post-conviction statutory procedural remedies to defendants alleging discrimination, a defendant retained the same right to bring claims based on constitutional violations as he possessed before and during the tenure of the RJA.

On 19 June 2013, the RJA was repealed in its entirety. RJA Repeal, §§ 5.(a), 6, 2013 N.C. Sess. Laws at 372. The repeal legislation applies retroactively, though it

exempts any judgments granting relief under the RJA that were affirmed on appeal and became final orders before the repeal legislation's effective date. *Id.*, § 5.(d), 2013 N.C. Sess. Laws at 372. Furthermore, the repeal legislation expressly acknowledges the continued existence of other procedural mechanisms by which capitally sentenced defendants may seek relief from death sentences on the ground that racial discrimination played a significant role in their convictions or sentences:

> Upon repeal of Article 101 of Chapter 15A of the General Statutes, a capital defendant retains all of the rights which the State and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race, that the jury that hears his or her case is impartial, and that the trial was free from prejudicial error of any kind. These rights are protected through multiple avenues of appeal, including direct appeal to the North Carolina Supreme Court, and discretionary review to the United States Supreme Court; a postconviction right to file a motion for appropriate relief at the trial court level where claims of racial discrimination may be heard; and again at the federal level through a petition of habeas corpus.

Id., § 5.(b), 2013 N.C. Sess. Laws at 372. In short, in repealing the RJA, the General Assembly merely eliminated one procedural mechanism by which defendants sentenced to death could seek relief for alleged racial discrimination; it left intact other procedural mechanisms by which defendants could seek relief on the same basis.

On 18 December 2015, following the wholesale repeal of the RJA, this Court reviewed and ultimately vacated trial court orders dated 20 April 2012 and 13

December 2012 that had granted certain defendants relief under the RJA. *State v. Robinson*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015); *see also State v. Augustine, Golphin and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015). The cases were remanded to the trial court. *Robinson*, 368 N.C. at 597, 780 S.E.2d at 152; *Augustine*, 368 N.C. at 594, 780 S.E.2d at 552.[2]

In our orders, vacating the trial court's orders, we determined that the trial court should have allowed the State's motion to continue, citing section 15A-952(g)(2) that "requires a trial court ruling on a motion to continue in a criminal proceeding to consider whether a case is 'so unusual and so complex' that the movant needs more time to adequately prepare." *Robinson*, 368 N.C. at 596, 780 S.E.2d at 151 (quoting N.C.G.S. § 15A-952(g)(2) (2013)); *see id.* ("The breadth of respondent's study placed petitioner in the position of defending the peremptory challenges that the State of North Carolina had exercised in capital prosecutions over a twenty-year period. Petitioner had very limited time, however, between the delivery of respondent's study and the hearing date."). This Court "express[ed] no opinion on the merits of respondent's motion for appropriate relief," but vacated the trial court's order and remanded to the trial court to "address petitioner's constitutional and statutory

[2] The majority's analysis relies, in part, on some of the substance of these vacated trial court orders. A vacated order is treated as if the order were never entered. *See Alford v. Shaw*, 327 N.C. 526, 544 n.6, 398 S.E.2d 445, 455 n.6 (1990) (defining "vacate" as " '[t]o annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment' " (citing *Black's Law Dictionary* 1388 (rev. 5th ed. 1979))).

challenges pertaining to the Act." *Id.* Thus, no defendant had received statutory relief under the original or amended RJA before its repeal because no trial court judgment granting relief had been affirmed upon appellate review; therefore, no one has an established or "vested" right in the RJA procedure.

There is no dispute that the General Assembly intended to repeal retroactively the RJA. The question presented is whether the repeal violated the constitutional prohibition against ex post facto laws. Generally, a law is considered ex post facto if it criminalizes conduct after it occurred or increases the penalty of a crime already committed. The majority claims the RJA is "[a] public law[ ] 'repeal[ing] or amend[ing]' the substantive laws of crime and punishment with respect to crimes already committed." (Third and fourth alterations in original.) However, neither the crime of first-degree murder nor its potential punishment has been altered by the RJA or its repeal. The General Assembly intended the RJA to provide a new procedure through which a capitally sentenced defendant could collaterally challenge a death sentence. Consequently, the General Assembly acted within the scope of its authority when it amended and later repealed the RJA. The General Assembly has the authority to pass legislation directed at pending litigation and has the authority to direct statutory post-conviction criminal procedures and remedies, including procedural measures that do not alter the substance of the underlying crime and its punishment.

III.

"The legislative power of the State shall be vested in the General Assembly." N.C. Const. art. II, § 1. As the agent of the people's sovereign power, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895), the General Assembly has the presumptive power to act, *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *Preston*, 325 N.C. at 448–49, 385 S.E.2d at 478 (citations omitted). "We review constitutional questions de novo. In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *State ex. rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted).[3]

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and

[3] The majority ignores this historic presumption of constitutionality of laws enacted by the legislature.

what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

As the policymaking branch, one legislature generally cannot bind a future legislature. *See Kornegay v. City of Goldsboro*, 180 N.C. 441, 451, 105 S.E. 187, 192 (1920). Thus, the General Assembly has the authority to enact new statutes, to amend or repeal current statutes, and to enact statutes directed at pending claims. "The Legislature may alter a provision of law at any time before the rights of parties are settled." *Blue Ridge Interurban R. Co. v. Oates*, 164 N.C. 167, 171, 80 S.E. 398, 399 (1913). A mere expectation that a law or a favorable statutory provision will continue does not amount to a vested property right or prevent the General Assembly from revisiting its policy decisions. *Armstrong v. Armstrong*, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988); *Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 79, 40 S.E.2d 690, 696 (1946). When statutes providing a particular remedy are unconditionally repealed, the remedy is gone, and "there can be no further proceedings under the remedy." *Spooners Creek Land Corp.*, 276 N.C. at 495–96, 172 S.E.2d at 55; *see also In re Incorporation of Indian Hills*, 280 N.C. at 663, 186 S.E.2d at 912.

Specifically, regarding criminal cases, "[r]emedies must always be under the control of the legislature," "and it may prescribe altogether different modes of procedure in its discretion" that do not "dispense with any of those substantial

protections" that the law at the time provided the accused. *Thompson v. State of Missouri*, 171 U.S. 380, 386, 18 S. Ct. 922, 924 (1898); *see also In re Kivett*, 309 N.C. 635, 672, 309 S.E.2d 442, 464 (1983) ("Procedural changes of the law in criminal cases are not violations of the ex post facto doctrine." (citing *Dobbert v. State of Florida*, 432 U.S. 282, 97 S. Ct. 2290 (1977)). "There is no vested right in procedure and statutes affecting procedural matters may be given retroactive effect or applied to pending litigation." *State v. Morehead*, 46 N.C. App. 39, 43, 264 S.E.2d 400, 402 (1980) (citing *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E.2d 598 (1952)). Even if a certain criminal procedure implicates a constitutional right, it does not transform it into a substantive provision. *See id.* at 42–43, 264 S.E.2d at 402 (allowing an amendment to the North Carolina Speedy Trial Act to apply to the defendant's pending case because, "[a]t that time, defendant had no vested or substantial rights under the statute" even though the Sixth Amendment protects the right to a speedy trial). Modes of procedure do not operate substantive changes, "leav[ing] untouched the nature of the crime and the amount or degree of proof essential to conviction," *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 590, 4 S. Ct. 202, 210 (1884); their alteration cannot constitute an ex post facto violation.

IV.

Since our earliest history, ex post facto laws have been prohibited. Ex post facto laws criminalize past actions or increase a punishment from what a defendant could

have received at the time of the crime's commission. Recognizing that one of the purposes of criminalizing conduct is deterrence,

> [a] law made after the fact (ex post facto) could not logically have deterred the crime; to punish a person for an act not contrary to the law when committed was therefore unjust. More than individual injustice was involved; the whole social basis of republican government was jeopardized if the people did not know exactly what was prohibited.

John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 63 (2d ed. 2013). The first constitution of North Carolina adopted in 1776 provided "[t]hat retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made." N.C. Const. of 1776, Declaration of Rights, § 24. Early in our nation's history, the Supreme Court of the United States discussed the idea of ex post facto laws in *Calder v. Bull*, 3 U.S. 386 (1798). Relying in part on the North Carolina Constitution's explicit prohibition on criminal ex post facto laws, the Supreme Court in *Calder* confined the definition of ex post facto laws to retrospective criminal laws that punish acts committed before they became crimes and laws that exact a more severe punishment than they would have incurred at the time they were committed. *The North Carolina State Constitution* 63–64.

As recently as 2010, "[t]his Court has articulated that 'both the federal and state constitutional ex post facto provisions are evaluated under the same definition.' " *State v. Whitaker*, 364 N.C. 404, 406, 700 S.E.2d 215, 217 (2010) (quoting

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002), *cert. denied*, 537 U.S. 1117, 123 S. Ct. 882 (2003)). The term ex post facto generally should be limited to only those retroactive laws "that create, or aggravate, the crime; or [i]ncrease the punishment, or change the rules of evidence, for the purpose of conviction." *Calder*, 3 U.S. at 391 (opinion of Chase, J.). "[A]ny statute . . . which makes more burdensome the punishment for a crime, after its commission, . . . is prohibited as ex post facto," *Beazell v. Ohio*, 269 U.S. 167, 169–70, 46 S. Ct. 68, 68 (1925), because "legislatures may not retroactively . . . increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719 (1990).

To be an ex post facto law, the legislative change must "alter[ ] the definition of criminal conduct or increase[ ] the penalty by which a crime is punishable." *California Dep't of Correction v. Morales*, 514 U.S. 499, 506 n.3, 115 S. Ct. 1597, 1602 n.3 (1995). "[M]ore burdensome" does not equate to "some ambiguous sort of 'disadvantage' " for defendant, *id.*; it relates to the quantum of punishment assigned to the offense at the time of its commission, *see, e.g.*, *State v. Bowditch*, 364 N.C. 335, 341, 700 S.E.2d 1, 5 (2010) ("An ex post facto law may be defined . . . as a law that 'allows imposition of a different or greater punishment than was permitted when the crime was committed.' " (quoting *State v. Barnes*, 345 N.C. 184, 233–34, 481 S.E.2d 44, 71 (1997))); *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991), *cert. denied*, 522 U.S. 876, 118 S. Ct. 196 (1997); *State v. Wright*, 302 N.C. 122, 128, 273

S.E.2d 699, 704 (1981); *State v. Detter*, 298 N.C. 604, 637, 260 S.E.2d 567, 589–90 (1979).

Even if a legislative amendment creates a disadvantage, that circumstance "is an insufficient basis to establish an ex post facto violation unless the change in the law actually increased the quantum of punishment for the offense," *Hameen v. State of Delaware*, 212 F.3d 226, 245–46 (3rd Cir. 2000), in other words, the range of punishment assigned to the offense at the time of its commission.

The central concern of the Ex Post Facto Clause is "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S. Ct. 891, 895–96 (1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 30, 101 S. Ct. 960, 965 (1981)); *see also Dobbert*, 432 U.S. at 297, 97 S. Ct. at 2300 ("The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder."); *Garner v. Jones*, 529 U.S. 244, 253, 120 S. Ct. 1362, 1369 (2000) (The ex post facto doctrine carries "some idea of actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression . . . .").

The majority focuses its analysis of the original RJA on the third *Calder* category, which prohibits "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed" as an ex

post facto law. *Calder*, 3 U.S. at 390 (opinion of Chase, J.). The majority concludes the RJA repeal fits into the third *Calder* category because it " 'revive[s]' the former measure of punishment attached to crimes already committed and make[s] more burdensome" the punishment that the original RJA made "less severe." According to the majority's rationale, the original RJA's retroactivity changed the quantum of punishment annexed to every capital conviction by offering the possible sentence of life without the possibility of parole. In its view, the RJA repeal then "revive[d]" the "more severe" punishment of death when it in actuality only altered a post-conviction procedure.

The majority wrongly concludes that the original RJA retroactively and substantively changed the quantum of punishment the law annexed to the crime of first-degree murder and that the RJA repeal increases its punishment. The punishment for first-degree murder before, during, and after the RJA has been the same and remains the same. The General Assembly intended the RJA to be a procedure to collaterally attack a capital sentence. By its nature, a collateral attack does not address the substance of the crime itself or its penalty.

The foundation of the majority's approach is that, "[t]he General Assembly, . . . by giving the RJA retroactive effect, has declared that the RJA was the applicable law at the time the crimes were committed." It makes this claim without analysis. However, it begs the question of whether the General Assembly, by using the term "retroactive," intended simply to give all those subject to the death penalty an

additional procedural tool to attack their sentences or, more expansively, to substantively change the punishment for first-degree murder. Courts should interpret statutes as the legislature intended. If the General Assembly had wanted to change the statutory punishment for first-degree murder to incorporate the provisions of the RJA, it could have done so; but, it chose not to change the statutory punishment. Likewise, the General Assembly could have specified that the provisions of the RJA are retroactive to the dates of each offense. Again, it did not do so. The General Assembly simply provided that the RJA's provisions were "retroactive." Certainly, whether the provisions of the RJA apply to a particular defendant is unknown at the time of the offense. They only apply if a defendant receives a death sentence.

The best reading of this provision in context of the entire RJA is that the General Assembly intended the RJA procedure to be available to all those who had been sentenced to death already or those facing capital trials who are ultimately sentenced to death. The text of the statute supports this interpretation. As previously discussed, the RJA provides for different remedies and filing requirements, depending on each defendant's status. The RJA is not a substantive change in the penalty for first-degree murder. This interpretation of the RJA is consistent with the position taken in a publication by the University of North Carolina School of Government, the institute tasked with educating legal practitioners and judges. *See* The Racial Justice Act, *N.C. Capital Case Law Handbook* ch. 7, at 273 (School of

Gov't, Chapel Hill, N.C., 3d ed. 2013) ("In analyzing the possible ex post facto constraints on the application of the amended RJA, it is helpful to divide capital defendants into three classes based on the date of the charged offense: Offense dates prior to August 11, 2009. These defendants allegedly committed murder prior to the enactment of the original RJA. The protections offered by the amended RJA, although less substantial than the protections offered by the original RJA, are no less than what was available to these defendants at the time of their alleged crimes. Therefore, there is no ex post facto problem for these defendants." (emphasis omitted)). No doubt, as considered by the author of this publication, ex post facto case law does not support the majority's analysis.

In *Dobbert v. State of Florida*, 432 U.S. 282, 97 S. Ct. 2290 (1977), a new statute in effect at the time of the petitioner's trial made the jury's recommendation of a life or death sentence advisory and not binding on a judge. *Id.* at 289–91, 97 S. Ct. at 2296–97. It altered the method used to determine whether a criminal defendant would receive the death penalty because the judge could still impose the death penalty against the jury's recommendation. *Id.* at 294–95, 97 S. Ct. at 2299. In the petitioner's case, "the trial judge, pursuant to his authority under the amended Florida statute, overruled the jury's recommendation and sentenced petitioner to death." *Id.* at 287, 97 S. Ct. at 2295. The petitioner argued, *inter alia*, that "the change in the role of the judge and jury in the imposition of the death sentence in Florida between the time of the first-degree murder and the time of the trial constitutes an

ex post facto violation." *Id.* at 292, 97 S. Ct. at 2297. The Supreme Court, however, described the change as "clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293–94, 97 S. Ct. at 2298.[4]

The Supreme Court considered the statutory change to be procedural, and not a matter of substance, even when the change occurred during the initial trial itself, when the sentence was first imposed. "[A] procedural change is not ex post facto," even if it works "to the disadvantage of a defendant." *Id.* at 293, 97 S. Ct. at 2298. Moreover, the petitioner could not show he was entitled to a lesser sentence; his argument amounted to mere speculation because "it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life." *Id.* at 294, 97 S. Ct. at 2299.

[4] Retroactive, substantive rule changes interfere with the jury's fact-finding process by altering the burden of proof for the underlying offense or the quantum of punishment. *Compare State v. Correll*, 715 P.2d 721 (1986) (retroactively applying an aggravating circumstance that did not exist at the time the offense was committed, makes defendant guilty of a greater crime), *with Hameen*, 212 F.3d at 244 (allowing a judge to impose the death penalty under a modified sentencing scheme when the jury had already unanimously found the aggravating factors outweighed the mitigating circumstances and classifying the modification as procedural); *accord Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) (requiring a jury to adjudicate a defendant's guilt and the presence or absence of the aggravating factors to the death penalty for first-degree murder, in keeping with Sixth Amendment right to a jury trial in capital prosecutions).

In *California Department of Correction v. Morales*, 514 U.S. 499, 115 S. Ct. 1597 (1995), a California statute amended post-conviction parole procedures to allow the Board of Prison Terms to decrease the frequency of parole suitability hearings under certain circumstances. Respondent Morales broadly argued that "the Ex Post Facto Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment." *Id.* at 508, 115 S. Ct. at 1602. The Court first determined that the legislation did not alter the definition of the crime, *id.* at 505, 115 S. Ct. at 1601, and further rejected respondent's expansive argument, holding instead that the amendment did not increase the "punishment" attached to respondent's crime of second-degree murder. *Id.* at 507–08, 115 S. Ct. at 1602. Even if it altered the method for fixing a parole release date, it did not change respondent's indeterminate sentence of fifteen years to life for the murder of his wife. *Id.* at 508–09, 115 S. Ct. at 1603. *Compare id.* (recognizing a "speculative and attenuated possibility" of parole for respondent who, while parole-eligible, had committed more than one murder, one while paroled for another offense)*, and Jones v. Keller*, 364 N.C. 249, 259, 698 S.E.2d 49, 57 (2010) (affirming the trial court in finding no ex post facto violation when the defendant "d[id] not allege that any legislation or regulation has altered the award of sentence reduction credits" or that there had been an administrative change in the interpretation of applicable regulations), *cert. denied*, 563 U.S. 960, 131 S. Ct. 2150 (2011)*, with Lynce*, 519 U.S. at 439–47, 117 S. Ct. at 895–99 (retroactively cancelling provisional early release credits awarded to a state prisoner to alleviate prison

overcrowding, thereby resulting in rearrest and reincarceration of that prisoner, violated Ex Post Facto Clause).

In *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 4 S. Ct. 202 (1884), a change in the rules of evidence, occurring after the commission of the crime but before the defendant's retrial, enlarged the class of competent witnesses to testify in criminal trials to include convicted felons. *Id.* at 587–88, 4 S. Ct. at 209. The State presented a convicted felon as a new witness who testified against the defendant. *Id.* Despite the new law's effect of expanding the range of admissible evidence in the guilt or innocence phase, the Supreme Court of the United States held the change was not ex post facto because it "relate[d] to modes of procedure only in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure." *Id.* at 590, 4 S. Ct. at 210. It did not meet the definition of an ex post facto law because the change did not alter the underlying crime, the burden of proof for proving its elements, or the punishment prescribed for it:

> [T]hey do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. *The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.*

Id. at 589–90, 4 S. Ct. at 210 (emphasis added); *see also Thompson*, 171 U.S. at 386–87, 18 S. Ct. at 924–25 (finding no ex post facto violation in the seemingly pointed change in the law to allow admissibility of handwriting comparisons upon retrial because it "did not enlarge the punishment to which the accused was liable when his crime was committed" or change the quality of degree of proof required to prove the offense at the time of its commission).

Applying ex post facto jurisprudence, it is clear that both the original RJA and its amendment were procedural in nature. The original and amended RJA statutes provided a procedural tool for seeking post-conviction relief for claims of racial discrimination. Neither altered the elements of first-degree murder, the necessary proof for conviction, or its potential penalties. There has always been and remains the possibility of amelioration of a defendant's capital sentence on direct appeal, *see* N.C.G.S. § 15A-2000(d)(2), and through post-conviction relief, N.C.G.S. § 15A-1417. The repeal of the RJA left defendants in capital cases other means of raising claims of discrimination. As a procedural statute, it is not an ex post facto violation to amend the RJA or repeal it.[5]

[5] The interpretation of the Ex Post Facto Clause has included the concept of "vested rights" with the implication that an ex post facto law impairs a vested right. "The true construction and meaning of the prohibition is, that the states pass no law to deprive a citizen of *any right vested in him* by existing laws." *Calder*, 3 U.S. at 394 (opinion of Chase, J.) (emphasis added) (discussing a just application of retroactive rules, including pardons and a taking justly compensated). "Alterations which leav[e] untouched the nature of the crime and the amount or degree of proof essential to conviction . . . relate to modes of procedure only, in which no one can be said to have a *vested right*, and which the state, upon grounds of public

The majority heavily relies on *State v. Keith*, 63 N.C. 140 (1869), to support its classification of the RJA repeal as an ex post facto law; however, that case is inapposite.

In the aftermath of the Civil War, the General Assembly passed the Amnesty Act of 1866, which "contain[ed] a full and unequivocal pardon for all 'homicides and felonies' committed by officers or soldiers of the late Confederate States, or by officers or soldiers of the United States, 'done in the discharge of any duties imposed on him, purporting to be by a law of the State or late Confederate States Governor, or by virtue of any order emanating from any officer.' " *Id.* at 142 (quoting Act of Dec. 22, 1866, ch. 3 § 1, 1866-67 N.C. Sess. Laws 6, 6–7). The Act was later repealed by legislative action at the Constitutional Convention of 1868. *Id.* at 144. The central issue in *Keith* was whether the repeal of the Act was valid. *Id.*

The language of the Act expressly provided that, "if the defendant can show that he was an officer or a private in either of the above named organizations at the time, it shall be presumed that he acted under orders, until the contrary shall be made to appear." *Id.* at 142 (quoting Act of Dec. 22, 1866, ch. 3 § 2, 1866-67 N.C. Sess. Laws 6, 6–7). If he could show he was a soldier at the time, then it was presumed he was acting under orders for otherwise criminal acts and would be entitled to full

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policy, may regulate at pleasure." *Hopt*, 110 U.S. at 590, 4 S. Ct. at 210 (emphasis added)); *see also Thompson*, 171 U.S. at 388, 18 S. Ct. at 925 ("We cannot adjudge that the accused had any *vested right* in the rule of evidence . . . ." (emphasis added)).

amnesty for those acts. *Id.* In *Keith* the defendant alleged, and the solicitor agreed, "that his case came within the provisions of that act." *Id.* Thus, Keith properly claimed the Act's benefit and, if the repeal of the Act did not affect the defendant's claim, he was undisputedly entitled to it.

To determine whether the legislature could repeal its grant of legislative amnesty, the Court defined this legislative act as "destroy[ing] and entirely effac[ing] the previous offen[s]e; it is as if it had never been committed." *Id.* at 143. Referencing English common law, the Court determined that, if the legislature issued a general legislative pardon, the Court was bound to take notice of it and "cannot proceed against any person whatsoever" who is entitled to the pardon "as to any of the offen[s]es pardoned" even if he neglects to raise it or waives it. *Id.* at 142. Simply put, the pardon remitted guilt entirely by treating the offense as if it had never occurred. *Id.* at 144.

Even if the soldier did nothing but belong to the historically unique class of Civil War soldiers on duty, he was entitled to relief under it. As a legislative pardon, the Act in effect removed a historically unique class of individuals from the reach of criminal laws, making it as if "the offen[s]e had been repealed or amended" to exclude that class of individuals. *Id.* (A legislative pardon "is considered as a public law; having the same effect on the case as if *the general law punishing the offen[s]e* had been repealed . . . ." (emphasis added) (quoting *United States v. Wilson*, 32 U.S. 150,

163 (1833))).[6] In making its determination, the Court in *Keith* analogized that the revocation of amnesty "was substantially an ex post facto law; it made criminal what, before the ratification of the ordinance was not so; and it took away from the prisoner his vested right to immunity." *Id.* at 145.

The majority relies on the reasoning in *Keith* to argue that the RJA repeal is an unconstitutional ex post facto law that affected defendant's substantive rights. The RJA repeal, however, does not fit the definition of ex post facto as discussed in *Keith*.

In *Keith* the General Assembly granted a blanket legislative pardon to all Civil War soldiers for their crimes, making what had been criminal no longer criminal; it were as if the criminal acts never happened. The Amnesty Act applied to all soldiers, presuming they were acting under orders. The enactment created a vested right to the pardon. The Amnesty Act became part of the substantive criminal trial. Courts were required to apply the legislative pardon even if not raised by the defendant. In

[6] Illustratively, in *State v. Blalock*, 61 N.C. 242, 244 (1867), defendants similarly situated to Keith had already been convicted of murder. On appeal the Court in *Blalock* took judicial notice of the Act, "and seeing from the record that the case of the prisoners came within it, ordered their discharge." *Keith*, 63 N.C. at 143 (citing *Blalock*, 61 N.C. at 247–48). The Court did not remand to the trial court to hold a hearing. On the contrary, the prisoners were automatically entitled to relief once the Court concluded that they fit squarely within the Act's purview. On the other hand, defendant Cook in *State v. Cook*, 61 N.C. 535 (1868), was not entitled to amnesty in the first place because his murder did not occur while he was "on duty." The purview of the Act only included acts done while performing wartime duties. The Act did not speak to the consequences for "off-duty" conduct.

short, soldiers did not have to follow any procedure to be entitled to its benefits. There was no deadline or expiration.

The RJA is clearly not analogous to legislative amnesty. The RJA did not grant amnesty or remit guilt; it is not a pardon. It is not a blanket change in the penalty for first-degree murder. This distinction between the RJA and legislative amnesty is underscored by the fact that the RJA provides a different procedure for defendants already convicted than for those with capital trials pending. Original RJA, § 2, 2009 N.C. Sess. Laws at 1215. It does not provide relief to all those with capital sentences, but rather any potential relief is conditioned on multiple factors. In order to pursue relief, each defendant must meet a filing deadline. RJA claims are not part of a defendant's trial, but must be pursued through a collateral motion for relief. Each defendant has the burden of proof and must provide sufficient evidence in support of the claim. Under the RJA, a defendant's relief becomes vested only upon a final order affirmed on appeal. Even if a defendant theoretically received RJA relief, that relief would not speak to his actual innocence or afford him the opportunity to retry his guilt or innocence through a new trial. Thus, the provisions of the RJA cannot be analogized to a legislative grant of immunity or "a full and unequivocal pardon." *Keith*, 63 N.C. at 142. The RJA simply provided a statutory avenue by which to pursue possible post-conviction relief.

Far from resembling the defendant's situation in *Keith*, defendant's position in this case is more akin to that of the petitioner in *United States ex rel. Forino v.*

Garfinkel, 166 F.2d 887 (3rd Cir. 1948), an Italian national who was serving a sentence for second-degree murder. At the time of the petitioner's offense and trial, state law "pardoned" certain offenders once they had served their sentences. *Id.* at 888–89. The legislature repealed the pardon law before the petitioner completed his sentence. *Id.* at 889. Without a pardon, the petitioner faced deportation. *Id.* at 888. In an effort to avoid that outcome, the petitioner argued that

> in effect that he ha[d] achieved the benefit of a legislative pardon, or at least should be deemed to have acquired the status of a person who has been pardoned by the Pennsylvania Legislature, since otherwise the repealing statute would be given retroactive effect and he would lose his civil right to a legislative pardon, a right which he says was acquired by him prior to the passage of the repealing statute.

Id. at 889. The petitioner further maintained that, to "treat the repealing statute as effective when he had served part of his sentence at the time it was enacted [would have been] to impose upon him the burden of [a constitutionally prohibited] ex post facto law." *Id.*

The United States Court of Appeals for the Third Circuit disagreed. "The flaw in Forino's reasoning lies in the fact that the access to legislative grace was withdrawn by an act of the Pennsylvania Legislature before he had endured his punishment." *Id.* at 889–90. The court noted that "[n]o one has or can acquire a vested right to a pardon," *id.* at 889, and that,

> [t]o sustain Forino's point one would have to take the position that any sentence of imprisonment imposed prior

> to the effective date of the repealing act carried with it a right to a legislative pardon. This would constitute judicial legislation and would change the terms of the Legislative Pardons Act making the issuance of the pardon dependent on the imposition of the sentence on the criminal and not on the criminal having endured his punishment.

Id. at 890. The court concluded that Forino, in making an ex post facto argument, "confuse[d] the nature of punishment and the nature of a pardon. He [took] the broad position that any law which alters his position to his disadvantage is necessarily ex post facto. . . . But the repeal of the Legislative Pardons Act did not change the punishment or inflict a greater punishment on Forino." *Id.* (citing *Calder*, 3 U.S. at 390–91). By the time Forino had served his sentence, "the grace previously afforded by the Legislative Pardons Act had been withdrawn." *Id.*

In other words, the Pennsylvania legislature's repeal of the pardon statute in *Forino* did not amount to an ex post facto law in the petitioner's case because the petitioner never obtained a pardon under the statute. Similarly, the RJA repeal is not an ex post facto law as applied to defendant because defendant was not granted relief under the RJA prior to the repeal. In contrast, the 1868 repealing ordinance at issue in *Keith* deprived the defendant of a benefit he had already obtained.

To reach its desired outcome, the majority here expands the interpretation of ex post facto laws far beyond that described in *Keith* and beyond the interpretation of the Ex Post Facto Clause in federal cases. The majority embeds that expansive interpretation in our state constitution. Notably, as the majority itself concedes, this

Court has repeatedly held that the protection provided by our state constitution against ex post facto laws mirrors the interpretation of its federal counterpart. The majority now seems to overrule our case law and reject this notion.

The offense of first-degree murder and its punishment have not changed. *See Dobbert*, 432 U.S. at 300, 97 S. Ct. at 2302 (suggesting ex post facto comes into play only when, "under the new law a defendant must receive a sentence which was under the old law only the maximum in a discretionary spectrum of length," but "has had no effect on the defendant" when he already received the maximum punishment). Defendant here received fair warning of the range of punishment imposed for first-degree murder, particularly considering the RJA postdates defendant's offenses. Thus, the legislature acted within its constitutional prerogative in repealing the RJA. Its repeal does not constitute an ex post facto law.

The majority continues its misapplication of the correct legal standard for ex post facto laws in its analysis of the amended RJA. In the amended RJA, the General Assembly clarified the original RJA by explicitly stating that a defendant must show the allegations of improper racial influence affected his own proceeding.

The majority characterizes the amendment's changes as both procedural and substantive and therefore subverting "fundamental fairness." It holds the "alterations amending the evidentiary requirements . . . constitute changes in the criminal law that cannot be applied retroactively." It maintains "[t]hese revisions fall

within the fourth *Calder* category by altering the 'legal rules of evidence' and require a different, more stringent, standard of proof in showing the racially discriminatory imposition of the death penalty." The case relied upon by the majority for this proposition, *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620 (2000), clearly frames the fourth *Calder* category in terms of prohibiting laws that retroactively lower the burden of proof required for proving the *commission* of the offense or increasing its punishment "*to facilitate an easier conviction*," thereby "making it easier to meet the threshold for overcoming the presumption" of innocence, *id.* at 532, 120 S. Ct. at 1633. When viewed in its proper context, it is protecting against *those* types of retroactive laws that preserves "fundamental fairness."

> *Calder*'s fourth category addresses this concern precisely. A law reducing the quantum of evidence *required to convict* an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government *subverts the presumption of innocence* by reducing the number of elements it must prove *to overcome that presumption*; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or *by making it easier to meet the threshold for overcoming the presumption*. Reducing the quantum of evidence necessary *to meet the burden of proof* is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, *to facilitate an easier conviction.* There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances

> under which it can deprive a person of his or her liberty or life.

Id. at 532–33, 120 S. Ct. at 1632–33 (emphases added) (internal citation and footnotes omitted).

The quantum of proof required to convict for the offense of first-degree murder or to recommend the death penalty has not been changed. For the same reasons previously discussed, the RJA in its original form or as amended did not change the nature of the crime of first-degree murder, the elements to prove that crime, or the range of its punishment. Neither its amendment, nor its later repeal, violated the prohibition against ex post facto laws. However, the majority's broad reading of the original RJA creates significant constitutional separation-of-powers issues, granting the judiciary the power to make capital punishment policy.

V.

If broadly interpreted and applied, as the majority does, the original RJA is unconstitutional because, through it, the General Assembly delegated its legislative policymaking authority to the judiciary. Since 1776 our state constitution has provided that each branch of government has a distinct function. N.C. Const. of 1776, Declaration of Rights, § IV; *see* N.C. Const. art. I, § 6; N.C. Const. of 1868, art. I, § 8. Among those functions, the General Assembly is the policymaking body; the judiciary adjudicates cases. Article I, Section 18 of the state constitution provides that the courts are open to address wrongs done to a person. N.C. Const. art. I, § 18. Thus,

courts determine specific controversies based on the evidence relevant to the particular case. *See McCleskey*, 481 U.S. at 302, 107 S. Ct. at 1772–73 (reviewing and approving of new statutory measures to, *inter alia*, ensure individualized assessments for each defendant's punishment).

Accountable to and representative of the people, N.C. Const. art. II, §§ 2–5, "[t]he legislative branch of government is without question 'the policy-making agency of our government' " and is "a far more appropriate forum than the courts for implementing policy-based changes to our laws," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)). The legislative branch conducts its business through the passing of statutes reflecting the policymaking decisions of the currently sitting General Assembly. "[I]dentified as [the legislature's] members are, with the other citizens of the community, and faithfully representing their feelings and interests, we can never allow ourselves to think that the acts proceeding from them can be designed for any other purpose than the promotion of the general welfare; or can result from other than the purest and most patriotic motives." *Jones v. Crittendon*, 4 N.C. 55, 55 (1814). It is "[t]he diversity within the [legislative] branch [that] ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise." *Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (Newby, J., concurring in part and dissenting in part). Under our sentencing structure, the extent of punishment is a legislative policy decision. The

legislature provides procedure for capital cases and guidance to juries through aggravating factors by statute.[7] *See* N.C.G.S. § 15A-2000. It also provides for appeals, *see* N.C.G.S. §§ 7A-25 through -32, and post-conviction relief and remedies by statute, *see* N.C.G.S. §§ 15A-1411 through -1422.

Applying the majority's sweeping interpretation of the RJA, if a court finds evidence that race was a significant factor in the imposition of a capital sentence "in the county, the prosecutorial district, the judicial division, or the State," Original RJA, § 1, 2009 N.C. Sess. Laws at 1214, a defendant's capital sentence is changed to life without the possibility of parole, even if the misuse of race was completely unrelated to the defendant or his case. If affirmed on appeal, then that ruling could control all other challenges under the RJA. In other words, all death sentences imposed before the RJA repeal could be changed to life without the possibility of parole. It would not matter that the particular defendant's proceeding was completely untainted by racial considerations. Whether courts should use statewide statistical studies to determine capital punishment policy is precisely the question answered by

[7] *See McCleskey*, 481 U.S. at 305–06, 107 S. Ct. at 1774 (summarizing the case law consensus for the "constitutionally permissible range of discretion in imposing the death penalty" that state legislatures may allow decisionmakers at trial, including the use of aggravating factors); *Zant*, 462 U.S. at 878–79, 103 S. Ct. at 2743–44 (The legislature defines the aggravating factors and the factors circumscribe the class of persons eligible for the death penalty; the jury "makes an individualized determination on the basis of the character of the individual and the circumstances of the crime."); *see also Osborne*, 557 U.S. at 72–73, 129 S. Ct. at 2322 (The state legislature primarily bears the task of harnessing DNA's power to prove actual innocence by creating workable post-conviction measures within the established criminal justice system.).

the Supreme Court of the United States in *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756 (1987).

There the Supreme Court considered whether a court is the proper venue to utilize a statistical study, which purported to show a disparity in those defendants receiving a death sentence based on the race of the victim and, to a lesser extent, the race of the defendant. McCleskey claimed that the study proved Georgia's capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments of the United States Constitution. McCleskey argued that the statistical study "compel[led] an inference that his sentence rests on purposeful discrimination" without regard to the facts of his particular case. *Id.* at 293, 107 S. Ct. at 1767. Like defendant's claim here, McCleskey's argument could extend to all capital cases in his state and, "[i]n its broadest form, . . . extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application." *Id.* at 292, 107 S. Ct. at 1767. Such broad accusations cannot be effectively rebutted, not because they are necessarily true, but because it is practically impossible to show they are *not* true. *See id.* at 296, 107 S. Ct. at 1769.

The Supreme Court declined "to accept the likelihood allegedly shown by the [statistical] study as the constitutional measure of an unacceptable risk of racial

prejudice influencing capital sentencing decisions." *Id.* at 309, 107 S. Ct. at 1776. It then classified the role of making such an assessment based on a statistical study as a legislative function:

> McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."

Id. at 319, 107 S. Ct. at 1781–82 (first quoting *Furman,* 408 U.S. at 383, 92 S. Ct. at 2800 (Burger, C.J., dissenting); then quoting *Gregg,* 428 U.S. at 186, 96 S. Ct. at 2931). "It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution." *Id.* at 319, 107 S. Ct. at 1782. Through its lawmaking and policymaking power, the legislature has the prerogative to criminalize conduct and outline the extent of its punishment; that statutory guidance then directs the judiciary, and the judiciary follows these rules. "[L]egislatures necessarily have wide discretion in the choice of criminal laws and penalties." *Id.* at 298, 107 S. Ct. at 1770. Thus, the reasoning of *McCleskey* did not invite legislatures to authorize courts to utilize statistical studies and make statewide capital punishment policy. To the contrary, the Supreme Court emphasized that the judiciary should confine itself to making individual assessments on a case-by-case

basis. The potential scope and the breadth given the RJA by the majority is derived from a fundamental misunderstanding of the holding in *McCleskey*.

The majority's interpretation of the RJA ignores the plain language of *McCleskey* that legislatures, not courts, are equipped to evaluate statistical information and enact policies based on that information. Courts are designed to determine specific controversies, not formulate policies. The majority's broad reading of the RJA seems to ask the question: Should North Carolina have capital punishment if there exists evidence that race may have been a significant factor in the process anywhere in the State? Answering this question is a quintessential legislative act. A judicial function is to ask whether race was a significant factor in *a particular defendant's case*. Courts are not the vehicle for policy decisions. Whether there should be a death penalty in North Carolina is a decision for the people, through their elected representatives, or directly by them through a constitutional amendment. Thus, it is improper for the majority to interpret the RJA as delegating legislative responsibility to the judiciary.

Courts are required to interpret statutes in a constitutional manner whenever possible. *See, e.g.*, *State v. Barber*, 180 N.C. 711, 712, 104 S.E. 760, 761 (1920) ("It is among the accepted rules of statutory construction that the courts are inclined against an interpretation that will render a law of doubtful validity."); *State v. Pool*, 74 N.C. 402, 405 (1876) ("Whenever an act of the Legislature can be so construed and applied, as to avoid conflict with the constitution, and give it the force of law, such

construction will be adopted by the courts."). Thus, to comply with separation of powers and avoid placing the judiciary in a legislative role, the RJA should be interpreted in such a manner that any relief arising from a finding that race played an improper role must be related to the particular defendant who raises the claim. The stated purpose of the RJA is that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. This provision illustrates the General Assembly's intent that a showing that any misuse of race must have been relevant to the particular defendant's case. This is precisely what the amended RJA attempted to clarify.

The Racial Justice Act did not change the punishment for first-degree murder. It is a procedural, not a substantive, law. Its repeal did not violate the prohibition against ex post facto laws. The repeal should be upheld. I respectfully dissent.

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A Proposal to Properly Address Implicit Bias in the Jury

Anona Su

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A Proposal to Properly Address Implicit Bias in the Jury

Anona Su

I. INTRODUCTION

Through the efforts of Legislators, the people, and courts, our judicial system has sought repeatedly to eliminate bias in the court system. From the actions of civil rights and women's rights advocates, the courts slowly changed its ways and opened its doors to more people than it did in the early days. Equal Protection paved the way for courts to overrule statutes that prevented people from serving on juries based on their race or color.[1] Since that breakthrough, the courts worked to create equal access to the system. These efforts, however, were primarily aimed at eliminating explicit or conscious biases.[2] Only outright expressions of discrimination or prejudice were barred from the court, but these were only surface-level fixes.[3] As the average population becomes more educated and explicit biases become less and less socially accepted, the court system seemed to be approaching a fairer system.[4] In some ways, people have general respect for each other.[5] Courts now do not allow discriminatory actions on part of attorneys because of the movement towards eliminating biases in the courtroom. Thus, although not all explicit biases have been eliminated in the courts,[6] they are

1. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880) (overruling state law that excluded jurors based on race or color based on Equal Protection principles); Foster v. Chatman, 136 S.Ct. 1737 (2016).

2. Conscious bias and explicit bias are the same phenomena. This paper will primarily label it as explicit bias.

3. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARVARD L. & POL'Y REV. 149 (2010); Suja A. Thomas, *What Judges Can Do About Implicit Bias*, JOTWELL (May 22, 2017) (reviewing ANDREW J. WISTRICH & JEFFREY J. RACHLINSKI, IMPLICIT BIAS IN JUDICIAL DECISION MAKING: HOW IT AFFECTS JUDGMENT AND WHAT JUDGES CAN DO ABOUT IT, IN ENSURING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., forthcoming 2017), *available at* SSRN), https://courtslaw.jotwell.com/what-judges-can-do-about-implicit-bias/ [https://perma.cc/DRV9-CSCT].

4. In recent years this point has been arguable as racial prejudice seems to be on the rise like explicit hate crimes. Michael Martin, *Is Racial Prejudice On The Rise?*, NAT'L PUB. RADIO (Oct. 31, 2012), https://www.npr.org/2012/10/31/164029897/is-racial-prejudice-on-the-rise [https://perma.cc/R3QD-TQAP].

5. *See id.* Politics and portrayal of these tensions in media emphasis the previous point that racial prejudice is on the rise. It is unclear just how far reaching the rise is.

6. *See, e.g.*, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE (Aug. 2010), https://eji.org/reports/illegal-racial-discrimination-in-jury-selection [https://perma.cc/KMP2-JBQX]; Kami Chavis, *The Supreme Court Didn't Fix Racist Jury Selection*, THE NATION (May 31, 2016), https://www.thenation.com/article/the-supreme-court-didnt-fix-racist-jury-selection/ [https://perma.cc/BME8-J4WX].

now no longer at the forefront of issues that courts address since many mechanisms have been put in place to prevent such issues.[7] Instead, as the science behind it becomes stronger, the court system has started to turn its head to confront issues of implicit bias within the courtroom.[8]

With the new developments and recent expansion by psychologists studying biases, some courts have taken steps to address implicit or unconscious biases.[9] These efforts, admittedly, are limited and the steps taken to address it range across the board. Courts are faced with a myriad of issues including time constraints and a limited ability to educate jurors to fully combat the unwanted consequences of implicit bias. This effort to combat implicit biases may even come across improperly. Potential jurors may feel hostility to the idea that they have implicit bias due to a lack of exposure to the topic and time given to digest the idea.[10] Moreover, courts may not be in the best position themselves to educate jurors on this complicated matter simply because of its own lack of understanding.[11] Nevertheless, it is crucial to take the steps to start educating jurors on the proper steps to eliminate implicit biases from their decision making process. With the wide range of methods that are currently used by the limited number of courts trying to address the problem, there have been only a few studies conducted on the effectiveness of these methods.[12]

7. *See, e.g.*, U.S. CONST. amend. VI.; *Challenge for Cause*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/challenge_for_cause [https://perma.cc/5C6L-2KA9] (for cause challenges); *Right to Trial by Impartial Jury*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution-conan/amendment-6/right-to-trial-by-impartial-jury [https://perma.cc/S9F5-2U3L] (discussing generally the impartial jury requirement set forth by the Sixth Amendment).

8. *See, e.g.*, Press Release, American Civil Liberties Union, Washington Supreme Court is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection (Apr. 9, 2018) https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection.

9. Unconscious bias and implicit bias are the same phenomena. This paper will primarily label it as implicit bias.

10. The term "bias" can create hostility as people do not like to think of themselves as having biases especially since it reveals hard and difficult aspects of the human nature. *See, Education: Ethical Considerations*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ethics.html [https://perma.cc/4UX9-4KVC]. When articles address bias, there tends to be a first justification that helps distinguish good and bad biases. *See, e.g.*, Community Relations Services Toolkit for Policing, *Understanding Bias: A Resource Guide*, THE DEP'T OF JUSTICE, https://www.justice.gov/crs/file/836431/download.

11. With the understanding of implicit bias expanding, so has recent training developments of judges and lawyers. Pamel M. Casey, et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Casey.pdf. Nonetheless, the trainings are still limited and vary state to state in the acceptance of the phenomena and how to address the issue. *Id.* Thus judges and attorneys are still in the process of learning how to address their own implicit biases.

12. *See generally* Mike Noon, *Pointless Diversity Training: Unconscious Bias, New Racism and Agency*, 31 QUEEN MARY U. OF LONDON 198 (2018); Dr. Janice Gassam, *Does Unconscious Bias Training Really Work?*, FORBES (Oct. 29, 2018), https://www.forbes.com/sites/janicegassam/2018/10/29/does-unconscious-bias-training-really-work/#105b646db8a2 [https://perma.cc/6M93-DXRG]; Jessica Nordell, *Does Starbucks Understand the Science of*

This article first addresses what implicit bias entails and why increasing education and exposure about it is important. More specifically, it addresses why implicit bias education of jurors is critical in order for a fairer court system—particularly for the criminal justice system. It then analyzes the main efforts currently utilized by courts and attorneys across the United States to inform jury members of implicit bias. This article also analyzes some of the more peculiar methods certain courtrooms have been using. With this all-in mind, I propose a methodology that courts should use that is based on the methodologies already in place and scientific research on what effective implicit bias training looks like. I hope that this note leads to more courts employing effective implicit bias trainings to lead to long-term reduction of systematic bias.

II. THE SCIENCE BEHIND IMPLICIT BIAS AND THE TACTICS USED IN IMPLICIT BIAS EDUCATION

Implicit bias is a phenomenon coined by two psychologists to describe the stereotypes our brains have built to help us navigate the world. These implicit biases are something that humans generally do not realize exist and is outside of their control.[13] Many people do not realize they are even acting on these stereotypes, hence the term implicit or unconscious. On one side, these innerworkings and shortcuts provide our brains with faster ways to process information and to limit having to rebuild connections repeatedly.[14] This, on its face, is not negative. The fault these mental shortcuts have is that the connections we build in our brains lead us to make broad overgeneralizations about individuals.[15] These connections are our brains stereotyping individuals and making assumptions about them implicitly based off of cultural and social cues that we have learned through various

Racial Bias?, THE ATLANTIC (May 2, 2018), https://www.theatlantic.com/science/archive/2018/05/starbucks-unconscious-bias-training/559415/ [https://perma.cc/5U7P-NCUS]; Lee Jussim, Ph.D., *Mandatory Implicit Bias Training is a Bad Idea*, PSYCHOLOGY TODAY (Dec. 2, 2017), https://www.psychologytoday.com/us/blog/rabble-rouser/201712/mandatory-implicit-bias-training-is-bad-idea [https://perma.cc/3N9M-K3E2].

13. *See generally Education: Frequently Asked Questions*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/faqs.html#faq1 https://perma.cc/EV7Y-V2PQ]; Renee Montagne, David Greene, & Mahzarin Banaji, *How the Concept of Implicit Bias Came Into Being*, NAT'L PUB. RADIO (Oct. 17, 2016), https://www.npr.org/2016/10/17/498219482/how-the-concept-of-implicit-bias-came-into-being [https://perma.cc/RH49-DCSY].

14. For example, our brains are generally able to understand words even if there are misspellings so long as the first and last letter are correctly in order. What happens in the middle does little in helping our brain process the word in front of us. *See generally* MRC COGNITION AND BRAIN SCIENCE UNIT, https://www.mrc-cbu.cam.ac.uk/people/matt.davis/cmabridge/ [https://perma.cc/QK64-QJY7] (compiling studies done at the University of Cambridge over the years about mix letters and the ability to read them and examples).

15. Charles Stagnor, Dr. Rajiv Jhangiani, & Dr. Hammond Terry, *Social Categorization and Stereotyping: The Negative Outcomes of Social Categorization*, PRINCIPLES OF SOCIAL PSYCHOLOGY (2011), https://opentextbc.ca/socialpsychology/chapter/social-categorization-and-stereotyping/.

interactions with the world.[16] While implicit biases can help us in our everyday lives by eliminating extra mental connections our brains would have to make, these mental "shortcuts" can also be a hinderance to fully assessing an individual based on what they have actually shown us rather than what we think they are like.[17]

An example constantly used to illustrate implicit bias is a color association test—otherwise known as the Stroop Effect.[18] The color association test presents the name of colors in their color and asks individuals to name the color of the word. It then switches up the test by changing the name of the colors to something not associated with the color the word is displayed in.[19] This is a short test to show that the brain develops mental shortcuts and these shortcuts can be hard to shut down even when we are explicitly asked to do so. These shortcuts are what creates the implicit biases people hold.

The idea of implicit bias is deeply convoluted. Implicit bias is difficult to access because individuals do not know when they are using these connections or biases. Thus, in order to continue to develop research and studies on implicit bias, researchers in 1998 began Project Implicit.[20] Project Implicit is a vast database of articles stemming from the data collected which helps provide better lectures and workshops on implicit bias that can be used in various workplaces or the education system.[21] The project also provides lectures and workshops to help individuals learn what implicit bias is, learn about their own biases, and learn the best ways they can manage their biases.[22] Other organizations also realize the importance of implicit bias training. Police officers in various states have had extensive training on the

16. For example, a person may believe that women belong in supervisory roles but define their own female supervisors as "emotional" or "bossy" when these words would not be associated with a male supervisor doing the same exact action.

17. *See* Stagnor *supra*, note 15.

18. The Stroop Effect is named after J. Ridley Stroop in the 1930s. *See Colors, Colors*, NEUROSCIENCE FOR KIDS, https://faculty.washington.edu/chudler/words.html [https://perma.cc/8FV9-32XU].

19. For example, RED is RED and then later on in the test where participants are supposed to name just the color of the word rather than the word itself RED is RED. A sample of test is located at INTERACTIVE STROOP EFFECT EXPERIMENT, https://faculty.washington.edu/chudler/java/ready.html.

20. *See* PROJECT IMPLICIT, https://www.projectimplicit.net/index.html [https://perma.cc/97 FL-H4WA] (last visited Mar. 10, 2019).

21. *See About Us*, PROJECT IMPLICIT, https://www.projectimplicit.net/about.html [https://perma.cc/8YUL-Y78P].

22. *See Products and Services: Lectures and Workshops*, PROJECT IMPLICIT, https://www.projectimplicit.net/lectures.html [https://perma.cc/YW94-VAXC].

subject.[23] In the legal world, attorneys in all type of law firms[24] and judges are starting to recognize their own implicit bias in the courtroom,[25] and, most importantly, training for jurors has been proposed.

What these efforts have come to show is that managing one's implicit bias is important in order to be able to fully assess others without having the mental block of a falsely connected stereotype. Most importantly, it indicates that by going through trainings on the subject, the people who come out on the other side were, at the least, more aware of what implicit bias is and, if the trainings were comprehensive enough, just how to combat it.[26] Education of the public on understanding implicit bias can further reduce all types of bias in the world and hopefully lead to a much more equal and just place where people can be who they are without being subjected to unsupported presumptions.

III. THE IMPORTANCE OF EDUCATING JURORS ON IMPLICIT BIAS

The risks of implicit biases run deep in the courtroom. Educating jurors on implicit bias is critical to further elimination of bias in the courtroom.[27] Implicit bias may be seen in the jury deliberation process because jurors may harbor stereotypes and not realize they are employing them towards witnesses and defendants. Jurors then run the risk of improperly evaluating these individuals based on stereotypes rather than taking in the whole picture of how they presented themselves at the stand. This becomes a critical issue because jurors evaluate the credibility of witnesses. While it is true that the jury, in evaluating the witness, may consider the whole picture, the whole picture should not include any implicit biases that they are bringing into the courtroom. These are their own beliefs that are separate from what they have

23. *See, e.g.*, Al Baker, *Confronting Implicit Bias in the New York Police Department*, N.Y. TIMES (July 15, 2018), https://www.nytimes.com/2018/07/15/nyregion/bias-training-police. html [https://perma.cc/8QSD-SN3Z] (NYPD implicit bias training); Tom James, *Can Cops Unlearn Their Unconscious Bias*, THE ATLANTIC (Dec. 23, 2017), https://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996/ [https://perma.cc/M2WM-5GKC] (Salt Lake PD implicit bias training); Elizabeth Chuck, *Can 'Implicit Bias' Training Stop Police Officers From Acting on Hidden Prejudice?*, NBC NEWS (Oct. 1, 2016), https://www.nbcnews.com/news/us-news/can-implicit-bias-training-stop-police-officers-acting-hidden-prejudice-n656071 [https://perma.cc/A8PW-TP52] (Charlotte PD).

24. *See, e.g.*, *Implicit Bias Initiative*, AM. BAR ASS'N, https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/ (last visited Mar. 10, 2019); Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 THE COLO. LAW. 45, 46–50 (2016).

25. *See, e.g.*, Justin D. Levinson, Mark W. Bennett, & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017); Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

26. *See* Doyin Atewologun, Tinu Cornish, & Fatima Tresh, *Unconscious Bias Training: An Assessment of the Evidence for Effectiveness*, EQUAL. AND HUMAN RIGHTS COMM'N 113 (2018). Effective implicit bias training is also a critical aspect in all of the above-mentioned programs for the police department, law firms, and judges.

27. This paper does not address the implicit bias of judges which is equally as important.

learned about the witness on the stand.[28] If they off-handedly dismiss a witness simply because of some implicit bias they did not realize they were employing—or even the opposite, overly trust a witness that needs to be evaluated just like any other - the trial process becomes less fair. While it is true that a trial will not be perfect, it should at least be reasonable to ask for a trial that is free from biases and prejudice. Being able to take the extra time and steps necessary to understand the implicit biases jurors possess could be, at the very least, a simple check on the jurors to ensure they properly evaluate the evidence presented to them.[29]

The risk implicit bias imposes extends beyond evaluating evidence. Attorneys may also be subject to implicit biases and have to be wary about how they present themselves to jurors. Jurors may feel certain litigators are less effective because of their race or gender. There could even be an overcorrection on a litigator's effectiveness by the jurors because of stereotypes the jurors hold.[30] While an attorney's credibility should not speak to the evidence that is presented in the court, it is without a doubt something that plays into how a jury analyzes what is in front of it in the deliberation room. Bias should not be the determinative factor of any case.[31] The courts need to take active measures to reduce implicit bias issues in the jury to eliminate it as a whole.

While some may argue that this limited exposure to implicit bias will not bring about cultural change, it is a step in the right direction. Implementing educational programs in the courtroom would act as an official recognition of the need to address implicit bias issues all around. Moreover, these changes are part of a larger and highly impactful system that will eventually lead to reducing bias over time. What is important for now is to create a

28. *See, e.g.*, CACI No. 113 Bias.

29. *See* Paul Bisceglio, *Your Stories of Battling Unconscious Bias*, THE ATLANTIC (June 7, 2017), https://www.theatlantic.com/notes/2017/06/unconscious-bias/529464/ [https://perma.cc/M2MD-8DXR].

30. *See* Lara Bazelon, *What it Takes to be a Trial Lawyer If You're Not a Man*, THE ATLANTIC (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/ [https://perma.cc/Z5DD-4TDC]; Women in the Courtroom Committee, *Women in the Courtroom: Best Practices Guides*, THE VOICE OF THE DEFENSE BAR (2007), https://www.dri.org/docs/default-source/dri-white-papers-and-reports/women-in-the-courtroom-best-practices-guide-(2007).pdf; Claire Zillman, *How Ruth Bader Ginsburg Called Out a Man's Unconscious Bias Against Her*, FORTUNE (Sept. 29, 2017), http://fortune.com/2017/09/29/ruth-bader-ginsburg-supreme-court-discrimination/ [https://perma.cc/9XX3-GYGN]; *Justice Ginsburg on Unconscious Bias and Discrimination*, C-SPAN (Sept. 13, 2018), https://www.c-span.org/video/?c4749212/justice-ginsburg-unconscious-bias-discrimination [https://perma.cc/M85S-MEA2]; Julia Edwards, *Justice Dept. Mandates "Implicit Bias" Training for Agents and Lawyers*, REUTERS (June 27, 2016), https://www.reuters.com/article/us-usa-justice-bias-exclusive-idUSKCN0ZD251 [https://perma.cc/4MMK-A9Z4].

31. *See generally* TX Dep't of Hous. and Cmtys. Affairs v. The Inclusive Cmtys. Project, Inc., 135 S.Ct. 2507, 2512 (recognizing that implicit biases can be just as damaging as explicit biases); Turner v. Murray, 476 U.S. 28, 36–37 (determining it is minimally intrusive to discuss issues of racial bias in a capital case).

system that will showcase how critical it is to address the issue and what actions can be taken to solve it. Thus, the specific goals courts should have concerning educating jurors is two-fold: (1) educate them properly on what implicit bias is and how impacts their duties as a juror and (2) what actions they can take as a juror to manage their unconscious bias.

IV. METHODOLOGIES COURTS HAVE ATTEMPTED TO USE

A. Individual Attorneys' Usage of Voir Dire to Draw Out Concerning Implicit Biases Potential Jurors May Have

In both federal and state courts, attorneys and judges alike have the opportunity to conduct a preliminary examination of potential jurors. Individuals who express racial or sex-based prejudice or any other type of prejudice towards a specific group are excused from serving on the jury through a for cause challenge. This, however, only addresses explicit biases. Peremptory challenges are used by attorneys to strike potential jurors and the attorneys do not have to provide a reason why. Both for cause challenges and peremptory challenges are part of voir dire. Voir dire is critical to identifying jurors who can be fair and impartial for both sides of the case even if the desired outcome is different for each side. Attorneys take this opportunity to dive deeper into the minds of the jury and ensure that they are fair and impartial; and when challenges arise, for cause and peremptory challenges may be used.

Opponents to educating jurors on implicit bias believe that it is the job of attorneys to control bias in the courtroom through the usage of peremptory challenges.[32] Attorneys, in a sense, are already given an opportunity to eliminate any unwanted implicit bias. However, this is not as easy as it sounds. Explicit bias is easier to identify than implicit bias. Even then, there is the risk that a potential juror can conceal their explicit bias by answering in the negative to confrontational questions regarding bias; so, attorneys' identification of bias rests on the fact that a potential juror will openly reveal it. When it comes to implicit bias, the issue becomes even more complicated. Implicit bias by its definition is already concealed to the beholder. Thus, for attorneys to be effective at identifying implicit bias they have to somehow be able to inquire into something the juror does not even realize they have. Requiring attorneys to do their best and draw out the implicit bias would be ineffective, especially since they do not even know what they are looking for.

Peremptory challenges theoretically can be made based on implicit biases if the attorney conducts proper voir dire to draw out the issues.[33] This

32. *See* United States v. Adkinson, 916 F.3d 605 (7th Cir. 2019).

33. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 158–161 (2010).

is very challenging considering the time limitations of how long voir dire tends to last. Even assuming attorneys can be effective in detecting implicit bias and proper voir dire questioning can be developed to draw out this specific concern, this process does little to serve the goal, set out previously, of reducing implicit bias in the long-term. It neither explains to the jurors what implicit bias nor how they should take it into consideration for the decision-making process of the case. Moreover, the countless studies that have delved into implicit bias show that everyone has some, making it nearly impossible to completely eliminate implicit bias without any action by the individual who has the unconscious bias.[34]

B. Where the *Batson* Challenge Comes In

The *Batson* objection arises when an attorney objects to the validity of a peremptory challenge of the opposing attorney.[35] The objecting attorney must make a prima facie case that the peremptory challenges are being used discriminatorily by the opposing counsel.[36] Attorneys may use a peremptory challenge to strike down a juror they do not want on the jury, however, the reason must not be based on race, gender, or ethnicity.[37] Thus, when a *Batson* challenge is raised, the attorney whose peremptory challenges are being questioned must provide a race, gender, and ethnicity neutral reason for the challenged strike.[38] Finally, the objecting attorney has the burden of proof of demonstrating intentional discrimination.[39]

Batson challenges are questions on attorneys' actions and do not address juror implicit biases. Attorneys theoretically have the opportunity to challenge issues of implicit bias, but this type of objection addresses only the opposing attorney. Thus, *Batson* clearly falls short of being able to address implicit bias of the jurors'.[40] Judges also tend not to reject the explanations proffered by attorneys and appellate courts defer to these trial court findings.[41] Moreover, even Supreme Court Justices have called for it to come to an end as it is ineffective.[42] It also fails to educate jurors on being able to identify their own issues for the decision-making in the case they will serve on. This argument implies that the attorneys themselves are readily

34. *See* Adam Benforado & John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311, 325–326 (2007).

35. *See* Batson v. Kentucky, 476 U.S. 79.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 161–162 (2010).

41. *See* Bennett, *supra* note 40 at 162–165.

42. *See* Rice v. Collins, 546 U.S. 333, 342–44 (2006) (Breyer, J., concurring); Miller-El v. Dretke, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring); Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

armed to overcome their own implicit biases and then be able to strike jurors for implicit biases that are concerning for the case at hand. The argument that attorneys can fix issues of implicit bias completely overlooks the fact that *Batson* challenges only address explicit biases.

C. Presenting Expert Witnesses on Implicit Bias as it Relates to the Case at Hand

Several courts have addressed the issue of implicit bias by using expert witnesses to educate jurors on the subject. Attorneys that present the witness want to remind jurors what unconscious bias is and how it can relate to their decision-making duties in the case at hand.[43] The attorneys must argue in order to be able offer experts who describe what implicit bias is to the jurors.[44] Jurors are then supposed to be able to better analyze the case as a whole when they go into deliberation.

This method, unfortunately, has been largely unsuccessful. The primary roadblock attorneys run into is relevancy. Expert witnesses can either testify about ultimate facts or present scientific evidence.[45] Evidence regarding implicit bias typically falls under scientific evidence. Rarely would experts be able to qualify to testify about ultimate facts that somehow present implicit bias too.[46] The same problem still stands. Opposing counsel have a relatively strong argument that expert testimony on implicit bias is irrelevant. Expert testimony on implicit bias does not speak to an element of the crime and neither is it fact of consequence.[47] Courts have generally seen it only as a far drawn connection that is not necessary for the jury's decision making process and that has no bearing on the facts of the case at hand.[48] What most experts offer on implicit bias are generalizations.[49] Their testimony tends to have little to no connection to the facts of the case, especially because implicit bias is theoretical.[50] The expert is not considering the facts of the case by applying it to the generalized theory of implicit bias. Instead, the experts can only speak to what implicit bias does as a whole and make theoretical assumptions about what could have been happening in the particular case.

The courts that have addressed this tend not to allow the expert to testify

43. *See, e.g.*, Karlo v. Pittsburgh Glass Works, 849 F.3d 61 (3d Cir. 2017) (psychologist offered); Pippen v. State, 854 N.W.2d 1, 6–8 (Iowa 2014) (two psychologists offered); Samaha v. Wash. State DOT, 2012 WL 11091843 (E.D. Wash. 2012) (psychologist offered).

44. *Id.*

45. Fed. R. Evid. 702.

46. *See, e.g.*, Karlo, 849 F.3d at 84 ("[L]acks fit to this case because his population-wide statistics have only speculative application.").

47. *Id.*

48. *Id.*

49. *See* Karlo, *supra* note 46.

50. For example, there is no way to ask what someone was thinking about at that time and if there was a bias underlying that thought process especially if the particular bias in question was implicit thus unknown to the person in question. Experts would only be testifying about some theoretical implicit bias that they could have had.

because expert testimony on implicit bias is too far removed and irrelevant.[51] The *Daubert* standard provides that when considering the admission of expert testimony, the judge must consider "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[52] The Court also included other key questions and considerations for the trial court to determine the admissibility of expert testimony:

> (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.[53]

Moreover, if the trial court finds that there is "too great of an analytical gap between the data and the opinion proffered," the expert testimony can be excluded in order to prevent unfounded conclusions.[54]

Courts have used the *Daubert* standard or reasoning based off of the standard to reject expert testimony on implicit bias.[55] In *Darbin v. Nourse*, the court reiterated the need for a "district court to probe the jury adequately for bias or prejudice about material matters on request of counsel."[56] The court found that the trial court should have made a specific inquiry into biases rather than simply posing general questions to the prospective jurors.[57] In fact, the court states that these specific inquiries could not be substituted by general questions, even though district courts have broad discretion in formulating voir dire questions.[58] Simply allowing potential jurors to make broad denials of bias prevented an informed exercise of peremptory challenges.[59]

51. *See generally* Fed. R. Evid. 702(a); *see also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592 (1993) (superseded by Fed. R. Evid. 702(a) in 2000 but the committee notes 2 illustrate the principles that the new rules were made were amended in response to Daubert and that the standard of review was still appropriate).

52. *See* Daubert, 509 U.S. at 592.

53. *See* Fed. R. Evid. 702; *see also* Daubert, 509 U.S. 580.

54. General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

55. *See* White v. BNSF Ry. Co., No. C09-5188RJB, 2010 WL 1186197 (W.D. Wash. 2010).

56. *See* Darbin v. Nourse, 664 F.2d 1109, 1114 (9th Cir. 1981) (quoting United States v. Baldwin, 607 F.2d 1295, 1297 (9th Cir. 1979), a criminal case, to address how the district court needs to ask questions in order to not limit the scope of voir dire specifically when important testimony is anticipated from government officials even in civil cases).

57. *Id.* at 1115–16.

58. *Id.*

59. *Id.*

If courts were to set aside the issue of admissibility, presenting expert witnesses on implicit bias would theoretically educate jurors on the perils of implicit bias or at least inform them of what implicit bias is. However, using an expert testimony approach would mean that there is no further instruction to the jurors on how it should be applied to the case before them—raising the same issue as before where the expert witness testimony would seems far reaching. Just like any other witness, jurors have to evaluate the expert witness on a whole. Jurors could completely dismiss the expert witness's testimony. The jurors could simply assume that implicit bias does not apply to them. Using the expert witness approach, generally leaves no guidance to the jury to consider their own biases in the case. The goal is not only to the let the jury know what implicit bias is, but also for the jury to be able to apply their newly gained awareness to the case they are sitting on.

Lastly, again setting aside admissibility issues, presenting expert witnesses on implicit bias will likely run into an awkward timing issue. Studies show that implicit bias training is most effective when it primes the audience to think about it throughout their interactions.[60] By using the expert testimony route, there is no specificity as to when the testimony would come in. If it comes into the case late, jurors are not going to remember how they evaluated prior witnesses before the expert witness testimony and whether or not there was bias in how they evaluated the previous witnesses. Even if the testimony comes in earlier in the presentation of evidence, it would be ill-advised for a plaintiff to start without first trying to get the jury to understand the underlying facts of the case. Tactically speaking it seems unlikely that it would be offered first; thus, its effectiveness is already diminished.[61]

D. A Jury Instruction on Implicit Bias

Some courts have developed specific jury instructions on implicit bias, much like the bias eliminating instructions. These instructions, like any other jury instruction, are provided to the jurors at the end of trial before they enter into the jury deliberation room. However, they are not required to be given.[62] Most jury instructions are incorporated into the fair and just trial instructions that already inform jurors to make their decisions free from bias.[63] The more specific implicit bias instructions only add an additional

60. *See, e.g.*, David Rock, Khalil Smith, and Heidi Grant, *What Science Says About Effective Racial Bias Training*, QUARTZ (Apr. 20, 2018), https://qz.com/work/1258494/starbucks-racial-bias-training-what-the-science-says-about-effective-anti-bias-efforts/ [https://perma.cc/DA6E-BYBF]; Joelle Emerson, *Don't Give up on Unconscious Bias Training – Make it Better*, HARVARD BUSINESS REVIEW (Apr. 28, 2017), https://hbr.org/ 2017/04/dont-give-up-on-unconscious-bias-training-make-it-better [https://perma.cc/6QG7-5SYQ]; Jesse Singal, *Awareness is Overrated*, NEW YORK: THE CUT (July 17, 2014), https://www.thecut.com/2014/07/awareness-is-overrated.html [https://perma.cc/7QNK-UA3V].

61. *See supra* note 60.

62. *See* United States v. Sawyers, 740 F. App'x 585 (9th Cir. 2018) (no law requiring jury instruction on implicit bias).

63. *See* CACI No. 113 Bias; WASH. REV. CODE ANN. § GR 37 (West 2018) https://www.

factor that requires jurors to also make their decisions free of implicit bias. Some instructions also include a short definition of what implicit bias is.[64]

The fair and just trial instructions are not enough to specifically address implicit biases. The original bias eliminating instructions only remind jurors to evaluate evidence without taking into consideration biases that they have.[65] Even then, when courts do have the option of given the instruction, it is not automatically given to jurors.[66] Instead, attorneys must request for that the instructions to be presented to the jury or propose the instruction themselves.[67] Moreover, the instructions only mention the explicit biases that the jurors need to avoid.[68] Without direct reference to implicit bias in the instructions, the system relies on assuming that the court and attorneys did their part in eliminating jurors that are clearly biased. Such efforts require no consideration of implicit bias at all.

Implicit bias jury instructions take bias elimination an extra step and remind the jury to specifically check their implicit biases. Many instructions include a short definition of what implicit bias is.[69] This type of jury instruction would provide a meaningful basis for jurors to, at the very least, get a slight grasp on what implicit bias is. All jury instructions are meant to provide guidance to the jury on the law and what to do with the facts.[70] A simple guideline that incorporates eliminating implicit bias from the decision-making process could provide some much-needed information. Like other jury instructions, it expects jurors to be able to take in an instruction on paper and be able to apply it to all of the information given during trial. However, implicit bias is different because it is not about the law specifically but more so conduct by the jurors themselves that they need to check. It is unlikely that there will be a great effect on how jurors may take their implicit biases into consideration when reanalyzing the evidence. Typically, the short definition given in jury instructions is not enough, but it is a start to getting jurors to think about implicit bias. The main issue is that they would have to apply what they learned retroactively. Thus, because these instructions are "after the fact," they can come much too late for jurors

courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr37 [https://perma.cc/359Y-928H].

64. *See Proposed Model Ninth Circuit Criminal Instruction 1.1 (modified)*, https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf; *infra* note 68.

65. *See* CACI No. 113 Bias; *cf. Proposed Model Ninth Circuit Criminal Instruction 1.1 (modified)*, *supra* note 64.

66. *See Sawyers*, 740 F. App'x. 585 (no law requiring jury instruction on implicit bias).

67. *Id.* Even then, it is not required for it to be given.

68. *See* CACI No. 113 Bias.

69. For example, the definition that Washington provides is: "Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention." *Model Ninth Circuit Criminal Instruction 1.1*.

70. *See Jury Instruction and Their Purpose*, USLEGAL.COM, https://courts.uslegal.com/jury-system/jury-instructions-and-their-purpose/ [https://perma.cc/9JBY-YLPE].

to rethink their initial impressions of the witnesses they saw.[71]

Even if the jury instructions are as detailed as they can be, the two main goals of educating jurors are not realized. First, there is not reflection on whether or not the jurors would fully understand what implicit bias is. This is because a very complicated subject has to be reduced down to a simple definition. It is difficult to believe that jurors, without prior knowledge of implicit bias, would understand what it is or how it pertains to their decision making. They would be applying something they just learned to a long trial and would likely forget the information that creates implicit biases. Second, even assuming that the jurors can fully understand the perils of implicit bias as imperative considerations for the case, the instructions also does not provide any information to the jurors as to how to apply their implicit bias training to the case. It simply instructs jurors to not use implicit bias when making their decision. Implicit bias jury instructions alone are not enough to combat the full effect of these biases.[72]

E. Methodologies by Courts that are Outside of the Box – More Recent Developments

1. Washington Courts' Approach to Implicit Bias Checks on Attorneys – General Rule 37

Washington is the first state to implement a comprehensive program that all courts in the state must apply.[73] The Washington Supreme Court adopted a court rule, General Rule 37,[74] that applies to both civil and criminal trials in the state.[75] This rule is aimed at stopping attorneys from using race-based peremptory challenges at not only a conscious and explicit bias level, but also at an implicit, unconscious, and systematic bias level. Washington is the first state to put these challenges in the forefront to be constantly addressed by attorneys and judges alike.[76] It is extremely innovative and should help reduce jury selection bias issues.[77]

This statewide rule is revolutionary. It addresses implicit bias in a way unlike courts have in the past and attempts to address what *Batson* did not.

71. *See* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 292 (2013).

72. *See* Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions Following a Test of a Specialized Jury Instruction*, NATIONAL CENTER FOR STATE COURTS, April 2014, http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/Can%20Explicit%20Instructions%20Reduce%20Expressions%20of%20Implicit%20Bias.ashx [https://perma.cc/9FSE-DVYG].

73. *See* WASH. REV. CODE ANN. § GR 37, *supra* note 63.

74. *See* WASH. REV. CODE ANN. § GR 37, *supra* note 63.

75. *See id.* at (b).

76. *See* ACLU, *supra* note 8; Sydney Brownstone, *Washington Courts Now Have the Country's First Rule for Tackling Implicit Bias in Jury Selection*, THE STRANGER (Apr. 10, 2018), https://www.thestranger.com/slog/2018/04/10/26024644/washington-courts-now-have-the-countrys-first-rule-for-tackling-implicit-bias-in-jury-selection [https://perma.cc/PZ2E-P6VS].

77. *See* Brownstone, *supra* note 76.

However, this, like any other voir dire challenge, does nothing to educate jurors about implicit bias.[78] Instead, it is a check on the attorneys' and judges' implicit biases when they address the jury for jury selection. To truly eliminate implicit bias in the courtroom, it should also involve the decisionmakers of the courtroom—the jury. That is yet to be addressed by General Rule 37.

2. Western District Court of Washington's Dual Method: Video and Jury Instruction on Unconscious Bias

The United States District Court, Western District Court of Washington released a video and jury instructions on the topic of unconscious bias.[79] It is used at the district court level in all of the Western District of Washington. It is the first of its type to be used in federal courts and other districts have proposed to adopt it as well.[80] The video, however, has not been accepted by all courts.[81]

The video opens with the Honorable Judge John C. Coughenour reminding the court's goal of finding jurors "who will decide cases without prejudice or bias."[82] Then, without much context, Judge Coughenour goes on to say that "it has been proven that most biases happen at an unconscious level," and that "researchers have found that unconscious bias is part of how we all think and process information."[83]

Next, the video transitions to Attorney Jeffery Robinson who discusses the fact that "biases can be both positive and negative."[84] Robinson gives a variety of examples of unconscious biases and explains the harmful effects they can have by preventing a person from receiving a fair trial.[85] Yet again, it is pointed out that "unconscious bias is something we all have simply because we are human."[86] The jurors watching the video are repeatedly remind that the process is "deep in our brains" and that they are "automatic

78. *See* WASH. REV. CODE ANN. § GR 37, *supra* note 73 (used in all jury trials and aim to increase jury diversity and cut down on implicit bias).

79. *See* Western Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), https://ww w.youtube.com/watch?v=hdjBbfdRLkA [https://perma.cc/MU2R-R3CA].

80. *See id.*; *see also Unconscious Bias Juror Video*, UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON, https://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/T6MR-YEUQ].

81. *See, e.g.*, State v. Yeck, 2017 Wash. Super. LEXIS 12872, 10 (Wash. Sup. Ct. King Cty. Ct. Dec. 6, 2017); United States v. Binford, 2015 U.S. Dist. LEXIS 190192, E. (E.D. Wash. Feb. 5, 2015); *Lancaster County Judge Denies Request to Show Implicit Bias Video to Prospective Jurors*, INNOCENCE PROJECT (June 29, 2018), https://www.innocenceproject.org/judge-denies-request-to-show-implicit-bias-video/ [https://perma.cc/K6KW-4D9C] (still questioning if judges should intervene on implicit bias topics).

82. *See supra* note 79.

83. *Id.*

84. *See* Western Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), https://www.youtube.com/watch?v=hdjBbfdRLkA [https://perma.cc/MU2R-R3CA].

85. *See supra* note 84.

86. *Id.*

preferences."[87] Attorney Robinson then tells the jury to "consciously think about it," warning about the discrepancies between initial impressions and "what we really know to be fair."[88]

Attorney Robinson then discusses examples of unconscious bias in an attempt to present to the jurors a first-hand experience of somehow realizing their unconscious bias.[89] As an example, the video uses possible inferences the jurors may have had about Judge Coughenour versus a "biker."[90] Again, it is reiterated that "through unconscious bias, our minds make quick decisions that we are not aware of."[91] Next, the video uses the visual test by psychologist John Ridley Stroop regarding processing colors and the words associated with them.[92]

Finally, the video ends with Attorney Annette Hayes discussing how unconscious bias affects day-to-day decision makings and reiterating that we are "not always aware" biases are working.[93] Again, the jurors are told generalized statements to "check" their unconscious bias without giving context to the decisions that they have to make at hand and how to consider the video during jury deliberations.[94]

The focal point of the video is to educate potential jurors and bring to their attention the topic of implicit bias. It also specifically instructs the juror to not be biased, including specific checks on unconscious bias.[95] While it serves the two goals defined prior, it is questionable whether or not the end results will actually be achieved. The video is relatively broad and fails to provide any specificity to applicable situations for the jury to consider. Arguably, the video will only serve to confuse the jurors since it is so far removed from the evidence and facts that they are supposed to be considering —just like how expert testimony has been viewed.

What the video is successful at doing is defining unconscious bias for the jury. The definition of unconscious bias is straight-forward and easy to understand—even though the underlying concept is difficult. It also successfully explains that there are two sides to these underlying processes and that only one of them is the issue—the stereotyping that results for the process. Following the much more technical discussion of the subject, something that the video does well, it goes on to provide an example that gives the jurors something to relate to.[96] This example does not attack the

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* Western Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), https://www.youtube.com/watch?v=hdjBbfdRLkA [https://perma.cc/MU2R-R3CA].

91. *Id.*

92. *Id.*; *see also*, *supra* note 18.

93. *See* Western Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), https://www.youtube.com/watch?v=hdjBbfdRLkA [https://perma.cc/MU2R-R3CA].

94. *Id.*

95. *See* Western Wash. Dist. Ct., *supra* note 84.

96. The video uses a biker versus a judge example without addressing where unconscious bias really comes from. Especially since the issue with the bias is not just about what they

deeper issues with implicit bias. Instead, it is a surface level discussion and is less in-depth than what is necessary to create meaningful understanding by the jurors. Plus, aren't the factors mentioned precisely something we do want the jury to consider? For example, what is it about the person presenting themselves in court that makes them believable? Did they take the extra time to dress in a suit to make themselves appear more believable? How is the witness talking? What we do not want the jurors to do is draw inferences that are based on the witness's race or other immutable characteristics, explicitly or implicitly.[97] These are the stereotypes that are damaging and hurtful to fair proceedings.

The examples should be something more than an example that a juror can easily brush off. While the biker and judge examples can be easier to "stomach," they do not address the more critical issues of racial and sex or gender-based biases. It is these immutable characteristics that tend to lead to the worst and most long-lasting systematic discrimination and this video reduces them implicit bias considerations only to a changeable appearance.[98] Presenting a strong example that the jurors can reflect on fully would give them the tools to further this process when they are in trial.[99] Providing just surface-level discussions is holding back an effective discussion.[100] Jurors are not given an opportunity to apply what they just learned to the things that they have to be wary of during the trial—implicit stereotyping based on gender, race, or sex, and not simply just what the person is wearing.

Combining the video with a jury instruction is a way to get jurors to consider their implicit biases both at the beginning of the trial and at the end of the trial. A reminder of what they learned in the video by a later jury instruction is more effective than just a jury instruction, as discussed before.[101] The jury instruction reaffirms what the jurors should have taken away from the video and how they should analyze the evidence in the deliberation room. Moreover, it serves as a reminder to the jurors how important it is to not be biased, including implicit biases. The simple jury instruction as discussed before lacked context and did not allow the jurors to have a full understanding of implicit bias before they needed to apply it to their thought processes in the case they are deciding. This process of playing a video first at jury voir dire would slightly alleviate this concern since jurors

wear and their appearance, but in fact, it is when the individuals are judged for their race, gender, or sex—a myriad of characteristics outside of their control. It is immutable characteristics which result in implicit biases that courts should be primarily concerned about.

97. *See* Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.") (citations omitted).

98. *See id.*

99. *See infra* Section III (D)(c).

100. There is also the issue of the jurors just simply dismissing this because they feel attacked when someone says they have a bias and feel that they have to justify that they do not. *See Education: Ethical Considerations*, *supra* note 10.

101. *See supra* III (C).

are already taught about implicit bias, and it gives them a reminder at the end of trial to see if they can "check" themselves for these behaviors.

3. Judge Mark W. Bennett's Unconscious Bias Course with the Jury and Jury Instruction

Recently retired Judge Mark W. Bennett of the United States District Court in the Northern District of Iowa took an active role in educating jurors on implicit bias. Judge Bennett served on the bench for over twenty years and during that time would educate jurors on implicit bias. During his own legal training and practice he felt that his background made him extremely diverse and not biased at all.[102] Yet, when he took the Implicit Association Test, multiple times, his results showed that he had a bias against blacks.[103]

During the jury selection process for both criminal and civil cases, Judge Bennett would take approximately an hour or so to educate jurors on implicit bias by doing a training lesson himself. While the jury selection process varies from cases to case, he covers the same material about implicit bias and what it means for the case they will be hearing.[104] Following the lesson, he let the jurors know that at the end of the trial they will have to sign a statement that certifies the decision they reached is free from bias and is fair and just.[105] And finally, even before opening statements by the attorneys, Judge Bennett would give a final jury instruction to the jurors on implicit bias.[106]

For criminal trials with a minority defendant, Judge Bennett began with the usual jury selection procedure seen in all courtrooms. When the jury instruction for presumption of innocence was shown, the implicit bias training began. Judge Bennett would show the potential jurors the presumption of innocence[107] instruction and ask the potential jurors whether or not the defendant that they see beforehand is innocent. What Judge Bennett often gets from jurors is that they do not know whether or not the defendant is innocent because they have heard nothing about the case at hand. While this is a fair answer, Judge Bennett believes that this answer is the underlying reason to many minority defendants' downfall and the rise of

102. *See* Wis. SPD Training, *Judge Mark Bennett – Addressing Unconscious Implicit Bias in Voir Dire*, VIMEO (2016), https://vimeo.com/163018292 [https://perma.cc/CC7B-5LPH].

103. *Id.*

104. If it is a minority defendant in a criminal case, Judge Bennett takes more time to discuss the issue because it is more important with more issues prevailing in society. *See id.*

105. This act is to reaffirm that they will apply what they had just learned. *Id.*

106. *See Addressing Unconscious and Implicit Bias in Voir Dire supra* note 102; Judge Mark Bennett, Instruction No. 16: Conduct of Jurors During Trial, N.D. IOWA, https://northerndistrictpracticeprogram.org/wp-content/uploads/2017/09/Bennett-Conduct-of-Jury-Instructions.pdf [https://perma.cc/E386-FH6E]. This methodology is different than most trial judges because the instructions are given at the beginning of the trial rather than the end.

107. This is critical because the presumption of innocence indicates that the jurors coming into the trial should fully believe that the defendant is innocent even though they are on trial. Simply questioning the innocence is already setting up the defendant for failure. *See Addressing Unconscious and Implicit Bias in Voir Dire, supra* note 102

unconscious bias issues. Judge Bennett would literally get off the bench and walk over to the defendant and shake their hand; he then proceeded to announce to the jurors that he believed that the defendant was innocent. He then told the jurors that if they do not believe the defendant is completely innocent, they can be excused. By incorporating the presumption of innocence into the jury selection proceedings in a way in which the judge is extensively involved, the implicit biases that potential jurors may have that would hinder then from giving the defendant the full benefit of the presumption of innocence to the forefront of their minds.

Judge Bennett would then proceed to show one or more videos to the potential jurors regarding implicit bias. One of the videos is from a television show called *What Would You Do?* from ABC.[108] This video segues into a deeper conversation about implicit bias and how that affects peoples' judgments and decision making. Judge Bennett even went as far as to discuss with the jurors the implicit bias studies that show explicitly that for minority defendants, when the evidence is ambiguous, the jury tends to draw negative conclusions about them, but for white defendants' ambiguous evidence is not drawn unfavorably.

To humanize himself even more, Judge Bennett then discusses the Implicit Association Test (IAT).[109] He even goes on to discuss his own results and how his explicit bias tests all show that he has none, but implicit biases linger. His aim is to get bias out of the courtroom.

Clearly the process that Judge Bennett would go through is extensive and extremely comprehensive. The judge hit the hard topic of implicit bias by raising examples of race and gender stereotypes that people make. This allows the jurors to connect with the examples in a way that is meaningful to the historical discrimination those groups have faced more so than the examples provided by the Western District of Washington's videos. Moreover, by affirming the need for a presumption of innocence no matter what, the jury is yet again reminded that they are supposed to come into the courtroom with a blank canvas for the defendant and that implicit biases must be left outside the court's doors. Finally, by sharing his own experiences with implicit bias, the jurors are able to see that everyone has biases and it is only through an active effort to be aware of them will they be able to minimize the interference bias has with their decision making in the courtroom. The final step of the jurors signing an affirmation to conduct a

108. In this video, three different individuals attempt to steal a bike—one white male, white female, and one black male. All three of them are set up in the same situation with the same tools out in broad daylight. As people walk by, they ask questions and the person says, "I have always wanted a bike like this." The results between how the people react based on the bike thief's race and gender vary drastically. For the white male, people tend to just ignore him after he provides his explanation. For the white female, there were multiple people who actually came and help her steal the bike to. But for the black male, people videotaped him and even went as far as to call the police on him.

109. Jurors are not allowed to take the IAT test till after the trial. *See Addressing Unconscious and Implicit Bias in Voir Dire*, *supra* note 102.

fair trial only reinforces one more time the jurors' lesson to be wary of implicit bias throughout the trial process.[110]

During criminal trials, Judge Bennett would give one last final warning after closing arguments. The implicit bias and fair and just trial jury instruction based on evidence that Judge Bennett relayed to juries was very similar to the initial instruction that they heard. However, this extra reminder was likely very beneficial. The jury was already aware of the implicit bias issue and likely had been keeping it in the back of their minds throughout the trial. Being reminded one extra time would help reaffirm the importance of keeping bias out of the decision-making process for the defendant. At the very end of the case, whether the verdict is guilty or not guilty, the jurors have to sign a certification. This certification states specifically that biases were not involved in reaching the jurors' decision.

Having both the jury instruction and extensive jury selection process, Judge Bennett successfully hit both of the goals as laid out at the beginning of this paper. The jurors got an extensive lesson on implicit bias. The judge also provided various examples that were aimed specifically at the racial, ethnic, sex, and gendered issues of implicit bias issues, which are at the most critical ones. By homing in on these critical issues without skimming over it by providing a more "digestible" version, the court is able to then indicate how critical the whole issue is. It is not just about the way witnesses dress that define who they are but instead it is also their race, gender, ethnicity, and all other immutable characteristics which make them who they are. The jury can see that, and it is important to bring it up and confront it directly. Even more impactful is the judge addressing his own history as a civil rights attorney and how he even still has implicit biases. It reminds the jurors that even the judge is susceptible to implicit bias and that even he needs to check his decision-making process for implicit bias downfalls. The last affirmation of the jurors signing the certification is another useful tool in ensuring the jurors will not use implicit bias, or at least that they will be wary about their own implicit biases. And finally, the jury instruction that is repeated right before the jury decision making processes begins reminds the jurors one last time of all they have learned about implicit bias and why it is important to eliminate it in their deliberation.

Here, even if the jury instruction is similar to the other ones proposed before, the jurors have already received the extensive education needed about what implicit bias is. Additionally, the instructions are meant to serve as another reminder. The only issue is that this is not presented in every case. The last jury instruction is only provided to jurors if it is a criminal trial or if it is requested. The issue with not reminding the jurors with this final jury

110. The Judge even acknowledged the fact that through this extensive jury selection, even at the point of signing the certification, that "invariably they could not sign the certification." Usually one or two people, who at this point have reflected much more on their thought processes, will realize that they could not do it. *See Addressing Unconscious and Implicit Bias in Voir Dire*, *supra* note 102.

instruction is that jurors might forget what has happened at the beginning of the trial. The trial might have begun days or even weeks ago. Having the extra reminder is a good way to reaffirm these important lessons on implicit biases, as said before.

Unfortunately, while this process is very detailed and necessary for jurors to fully understand implicit bias and its dangers in the courtroom, it is long and tedious and requires attorneys to give up time for the trial and their own voir dire process. Attorneys may or may not object to this time usage, but the judge is the one who controls the courtroom. This also assumes that the jurors will be fully engaged in this process. Jurors are already subjected to a long voir dire process even without the judge taking over an hour just to relay to them information about implicit bias. Arguably, this usage of time is necessary because of how complicated implicit bias is and because there is presently no other way to educate jurors on the subject. Implicit bias trainings for police officers, attorneys, teachers, or other professionals typically take much longer and can fill up even several days. What is presented here may be the most time sensitive way to do this sort of training and still cover all the necessary materials to make the jurors' decision making impacted by the information they received.

V. SUGGESTED METHOD – A COMBINATION OF JURY SELECTION IMPLICIT BIAS TRAINING AND JURY INSTRUCTIONS

As the studies reveal, priming jurors to think about implicit bias before the trial gives them the opportunity to process the information they receive.[111] This at the very least means that the jurors need to be informed about implicit bias during jury selection or voir dire. This suggests that a video or instruction by the judge, like what Washington has moved to or what Judge Mark Bennett did, would be the most effective means to raising juror awareness about implicit bias. However, as criticized above, the Washington video is much too short and gives little direction as to why implicit bias is so critical to check. Moreover, the video's confusing information should be adjusted to reflect the critical implicit bias issues. On the other hand, Judge Bennett's implicit bias jury training, while the most detailed of what has been used in courts, takes up a huge amount of time.

A balance between Judge Bennett's course and Washington's videos would be the most ideal. Instead of the judge versus biker list, the video should include examples similar to those that Judge Bennett gives.[112] Judges can also get involved as Judge Bennett did by personalizing implicit bias lessons by showing it is something they experience as well. Based on the

111. *See* Heather M. Claypool, Kurt Hugenberg & Jennifer Miller, *Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem*, 43 J. EXPERIMENTAL SOC. PSYCH. 334 (2007).

112. Like the example of how people react to the bike theft.

arguments raised previously, I believe it is critical to connect to the jurors and emphasize that it is something that happens to everyone. Common objections that people may have to implicit bias are things that actually stem from explicit biases. People may feel that they do not have explicit biases and by telling them they have implicit biases, when they might not really understand the nature of the topic, would make them defensive. Having the judge admitting to them that they too have implicit biases could help the jurors realize that this is something that they really have to take a second to think about.

Finally, by also including the jury instruction, the jurors get to see on paper a final reminder of the details of implicit bias. The jury instruction should include a detailed definition of implicit bias, a reminder of what the jurors learned in the beginning, and a reminder of the importance of leaving out any type of biases, including implicit biases, when deliberating. The court should also expect to read and present it to them like the other jury instructions. Jurors rely on jury instructions and follow them to make the decisions and findings that they need. Even if they are uncertain of some of the evidence presented to them throughout trial, the jury instruction is a way to redirect them down the right path to help them come to a conclusion. This is what the implicit bias instruction should accomplish. The issues about jury instructions that were raised prior are lessened here. The jurors would theoretically have already been educated once about what implicit bias is and how it works. This would be their second time seeing what implicit bias is, at least in the courtroom, and it would serve as a reminder to leave biased judgments behind.

VI. WHERE DO WE GO FROM HERE?

The first step to eliminating implicit bias issues in jury decision making is to impose some type of training—whether that be jury instructions or an implicit bias course—to allow the jurors to reflect on what was presented to them over the course of trial. The method proposed here would be the most effective, not only in educating the jurors properly, but also in terms of time efficiency. With how busy courts are generally this is likely an important concern. Moreover, having the combination of jury training and a jury instruction before deliberation would accomplish both the goals of educating the jurors fully on implicit bias and helping them to apply it to the case at hand. Both, hopefully, will lead to decisions that are freer of biases and reflect the judicial systems goals of fairness and equality.

What is clear from all the implicit bias research regarding courts, workplace, education, and more, is that the training is important but relatively ineffective to impose long-term change, especially if the training itself focuses only on awareness. Long lasting effects take more time and active participation by the individual. It is important to continue these efforts outside of the courtroom as suggested here. Those who receive the training must be consciously working to change the way they act or think about things

that stem from those implicit biases. Recognizing how often and just generally being more aware of their actions, combined with the steps taken to stop relying on those implicit biases, is the only way for long-term change to come. With the implicit bias training of jurors that I am recommending here, perhaps long-term change may be achievable. In the future, this type of instruction may be no longer necessary because people will already take this into consideration and recognize it as something that should not be in the courtroom. The best outcome would be for jurors to take the implicit bias training they receive in the courtroom outside to their own life.

Jury Managers' Toolbox

A Primer on Fair Cross Section Jurisprudence

Overview

The phrase "a jury of one's peers" brings to mind an image of a jury that perfectly mirrors its community in terms of demographic and attitudinal characteristics. In an ideal world, a perfectly representative jury would be best able to fulfill its role as the conscience of the community in judicial decision-making. As a practical matter, however, the legal requirements governing the composition of the jury do not mandate perfect representation of the jury pool. Rather, they set the minimum standards that state and federal courts must achieve to guarantee the Sixth Amendment and Equal Protection rights of criminal defendants to a jury drawn from a fair cross section of the community.

Originally, the Sixth Amendment right to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" focused on the ability of individual jurors to judge the cases before them fairly and impartially. Over time, however, courts came to recognize the reality that jurors have preexisting life experiences, attitudes and opinions that affect the way they perceive and interpret information. Courts abandoned their insistence on unrealistically stringent criteria for the impartiality of individual jurors (e.g., no relevant life experience, attitude or opinions related to the case). Instead, the theory supporting jury diversity is that biases held by individual jurors will be balanced or canceled out by competing biases held by other jurors. Gradually, they adopted the idea that the best way to ensure a fair and impartial jury is to ensure a diverse jury pool from which to select juries. An important caveat concerning the fair cross section requirement is that it only applies to the pool from which juries are selected, not to composition of the jury itself.

Constitutional Basis for the Fair Cross Section Requirement

The fair cross section requirement derives principally from the Sixth Amendment right to an impartial jury and the Equal Protection Clause of the Fourteenth Amendment. These constitutional provisions prohibit exclusion of groups of commonly recognized minorities from being excluded from the jury pool systematically (Sixth Amendment) or intentionally (Equal Protection Clause). As a practical matter, the Sixth Amendment and Equal Protection Clause jurisprudence have tended to merge over time, but originally each provision had slightly different procedural requirements. In addition, the Equal Protection Clause cases tended to focus on grand jury selection procedures while Sixth Amendment cases tended to focus on petit (trial) jury procedures. Some court opinions addressing alleged fair cross section violations will review the facts of the case under both jurisprudential

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theories separately. These federal constitutional requirements may also be supplemented by state constitutional or statutory requirements.

The contemporary test to determine whether a violation of the fair cross section has occurred is the *Duren* test, named for *Duren v. Missouri,* a 1979 case decided by the U.S. Supreme Court.[1] In *Duren,* the Court addressed the question of whether an automatic exemption from jury service offered to women was unconstitutional given that it reduced the percentage of women from 46% of the community to 15% of the pool from which the defendant's jury was selected. The Court described three criteria that a defendant must show to establish a prima facie violation of the fair cross section requirement: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the group's representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population; and (3) the under-representation of the group results from systematic exclusion of the group in the jury selection process.

Once the defendant has established a *prima facie* violation of the fair cross section requirement, the burden shifts to the State to provide a compelling justification for the systematic exclusion of the distinctive group. *Duren* made it clear, however, that the States retained broad discretion to define eligibility qualifications and exemption criteria for jury service.

Distinctive or Cognizable Groups

A "distinctive" group for fair cross section purposes generally refers to groups that see themselves as distinct from other groups, that are seen by others as a distinct group, and that hold values not necessarily held by other groups. Many court opinions also refer to these groups using Equal Protection terminology of "cognizable" groups. In most instances, these groups are defined by immutable characteristics, especially gender, race, and ethnicity (Hispanic/Latino) and are recognized as valid groups under both Sixth Amendment and Equal Protection Clause criteria.[2] In addition to gender, race, and ethnicity, some courts have found groups characterized by religious affiliation or national origin to be distinctive groups under the Sixth Amendment. In most instances, however, distinctive groups characterized by religious affiliation have such a strongly cohesive community that the religious affiliation is similar to ethnicity in terms of its cultural significance (e.g., Jews in New York City[3] and Amish persons in Ohio[4]).

Fair and Reasonable Representation

The second requirement under *Duren* is that the representation of the group alleged to be excluded is not fair and reasonable compared to the proportion of that group in the community. An important caveat related to this requirement is that the relevant "community" consists of individuals who are eligible for jury service in the jurisdiction – that is, they are *qualified and*

[1] *Duren v. Missouri,* 439 U.S. 357 (1979).

[2] Under the Equal Protection Clause of the Fourteenth Amendment, these three demographic characteristics are accorded "strict scrutiny" by courts, requiring the government to offer a compelling justification for disparate treatment.

[3] *U.S. v. Gelb,* 881 F. 2d 1155 (2d Cir. 1989).

[4] *State v. Fulton,* 566 N.E. 2d 1195 (Ohio 1991).

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available for jury service. Qualifications for jury service in most jurisdictions include U.S. citizenship, residency in the geographic area served by the court, adult (age 18 or over), able to speak and understand English, and not subject to other legal disqualifications (e.g., previous felony conviction, mental incompetency). Availability refers to the ability to serve on the date summonsed; thus, unavailability refers to any of several situations in which the individual who is summonsed for jury service cannot be located (summons returned undeliverable by the US Postal Service, juror failed to appear for jury service) or is exempt or excused from jury service. In many jurisdictions, these qualification and availability requirements result in significant differences between the demographic characteristics of the jury-eligible population and those of the total population. For example, the jury-eligible population for communities with large Hispanic or Asian populations is often proportionately much smaller than that of the total population as individuals in those groups are disqualified due to non-citizenship or inability to speak and understand English. Similarly, undeliverable, disqualification, excusal and failure-to-appear rates tend to disproportionately decrease minority representation due to socio-economic factors such as mobility rates, criminal records, and financial hardship for lower-income individuals.

With respect to how the representation of distinctive groups in the jury pool compares to their representation in the community, the law does not require that demographic characteristics exactly mirror one another. Some deviation ordinarily occurs, for example, due to the random selection process. Several measures can be used to determine the extent to which the jury pool demographics differ from those of the community. The two measures most frequently used by courts are absolute disparity and comparative (relative) disparity.[5] Absolute disparity describes the proportional difference in the representation of the distinctive group. In *Duren*, for example, the absolute disparity for women was 31% (46% women in the community - 15% women in the jury pool = 31% absolute disparity).

Comparative disparity is a second measure of representational disparity. Comparative disparity measures the percentage by which the number of distinctive group members in the jury pool falls short of their number in the community. The formula for calculating comparative disparity is the absolute disparity divided by the percentage of the distinctive group in the jury-eligible community. The comparative disparity in *Duren,* for example, was 67% (31% absolute disparity ÷ 46% jury-eligible population = 67%), indicating that the percentage of women in the jury pool was 67% less than would ordinarily be expected for the

[5] A number of additional measures of representational disparity are often used by expert witnesses testifying in jury challenges. These include statistical significance tests, which indicate whether the amount of disparity reflects an actual difference is or simply the result of random chance in the selection process, and disparity of risk analyses, which quantify the representational difference in terms of the probability that the jury pool would have the same percentage of the distinctive group as the result of random chance. Richard Seltzer et al., *Fair Cross-Section Challenges in Maryland: An Analysis and Proposal*, 25 U. Balt. L. Rev. 127, 141 (1996).

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female population of Jackson County, Missouri, in 1976 when the trial took place.

Comparative disparity can be a very useful measure for describing the level of disparity when the proportion of the distinctive group in the jury-eligible population is relatively small (e.g., less than 10%) and the level of absolute disparity would not necessarily reach the threshold needed to establish a prima facie violation of the fair cross section requirement. For example, if African-Americans represented 12% of a jury-eligible community, but only 4% of the jury pool, the absolute disparity would be 8% and the comparative disparity would be 67%. If previous case law had established the requisite threshold for absolute disparity at 10%, a defendant would not be able to demonstrate a violation of the fair cross section requirement, even though the proportion of African-Americans in the jury pool was fully two-thirds less than expected given their representation in the jury-eligible community!

In *Berghuis v. Smith,*[6] the US Supreme Court revisited the fair cross section requirement for the first time since *Duren.* The opinion strongly reaffirms *Duren*'s three-prong test as the appropriate analytical framework for considering jury challenges based on fair cross section claims, but disavowed that *Duren* specified a particular method or test that courts should employ to measure under-representation. It recognized that lower courts had employed a number of different measures of disparity, but found that all of them could be misleading, particularly with respect to comparatively small populations of distinctive groups. It approvingly cited the Michigan Supreme Court's admonition that "provided that the parties proffer sufficient evidence, the results of all of the tests should be considered."

The threshold at which under-representation reaches unconstitutional levels is rarely articulated as a fixed value in court opinions. Most cases that discuss absolute disparity in detail tend to cite values of 10% to 12% absolute disparity as sufficient to establish a prima facie violation of the fair cross section requirement while the threshold level for comparative disparity is generally cited as 40% to 50%. In the *Berghuis* decision, however, the Court explicitly rejected a proposal to adopt a bright-line 10% absolute disparity threshold in *Berghuis* and declined to consider the constitutional significance of such a rule, which may suggest that a purely mechanical approach to fair cross section jurisprudence might be viewed with disfavor if it were raised in an appropriate case.

Systematic Exclusion

The final prong of the *Duren* test is that under-representation of the distinctive group is the result of intentional discrimination (Equal Protection) or systematic exclusion (Sixth Amendment). Systematic exclusion does not have to be intentional, but merely an inherent result of the jury selection process. In *Duren,* the Supreme Court found that the policy of offering automatic exemptions to women was systematic exclusion insofar that it was inherent in the jury selection process.

More recent examples of systematic exclusion are often related to the automation used in the

[66] *Berghuis v. Smith,* 559 U.S. ____ (2010).

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jury selection process. In *U.S. v. Osorio*,[7] for example, the length of the database field for the prospective juror's city of residence in the master jury list was truncated, causing the system to misread the eighth character as the jurors' status. As a result, all of the records for individuals living in Hartford were mistakenly excluded from jury service because the system interpreted the "d" in Hartford to mean "deceased." At that time, the largest single concentration of Hispanics in the state resided in the city of Hartford. In another example, during a routine upgrade to the jury automation system in Kent County, Michigan, the software was mistakenly programmed to randomly select names from the first 125,000 records on the master jury list rather than from the entire list, which was more than 500,000 records in length.[8] The list was sorted alphabetically by zip code and the largest proportion of African-Americans in Kent County resided in the sequentially higher zip codes.

Non-systematic exclusion, in contrast, is the under-representation of distinctive groups in the jury pool due to factors beyond the control of the court. Common examples of non-systematic exclusion include disproportionately low rates of voter registration by minorities that result in under-representation by those groups on the master jury list and subsequently in the jury pool.[9] Courts have no authority to compel members of those groups to register to vote. Another factor commonly related to under-representation of minorities is undeliverable rates, which are strongly correlated with lower socio-economic status and, in turn, correlated with minority status. Courts similarly have no authority to compel individuals to provide the US Postal Service with a forwarding address or to require the agencies that provide the source files for the master jury list to improve their record maintenance procedures. Failure-to-appear rates and excusal rates are likewise highly correlated with socio-economic status and have historically been considered forms on non-systematic exclusion.

Nevertheless, the question of whether the impact of socio-economic factors on the demographic composition of the jury pool could support a fair cross section claim is still unsettled. Some courts in recent years have expanded the scope of systematic exclusion to include factors that may fall outside of the court's ability to prevent, but for which reasonably effective and cost-efficient remedies exist. One of the earliest examples was *People v. Wheeler*,[10] in which the Supreme Court of California found that exclusive reliance on the voter registration list as the sole source of names for the master jury list systematically excluded Blacks and Hispanics from the jury pool. Technological advances had made it possible for courts to merge multiple source lists to create a more inclusive and representative master jury list, making the argument that low voter registration rates by African-Americans and Hispanics no longer justifiable. In *People v. Harris,* the California Supreme Court explicitly warned against under-representation "stemming from negligence or inertia" in the jury selection process, citing

[7] *U.S. v. Osorio,* 801 F. Supp. 966 (D. Conn. 1992).

[8] G. Thomas Munsterman, *Jury Management Study for Kent County, Michigan* (May 6, 2003).

[9] *See, e.g., U.S. v. Biaggi,* 909 F. 2d 662, 676-78 (2d Cir. 1990).

[10] *People v. Wheeler,* 503 P.2d 748 (Cal. 1978).

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cases that recognize that "official compilers of jury lists may drift into discrimination by not taking affirmative action to prevent it."[11]

In *U.S. v. Green*,[12] the U.S. District Court for the Eastern District of Massachusetts ruled that the court's failure to take reasonable steps to address undeliverable and failure-to-appear rates for jurors living in predominately minority zip codes violated the federal Jury Selection and Service Act. The court proposed over-sampling from predominantly minority zip codes as a remedy in that case.[13]

The most recent discussion of this question occurred in *Berghuis v. Smith.* The federal Sixth Circuit Court of Appeals had ruled that the trial court's excusal policy, which "allowed prospective jurors to essentially 'opt out' of jury service if jury duty would constitute a hardship based on child care concerns, transportation issues, or the inability to take time from work" was a systematic exclusion that produced unacceptable under-representation in the jury pool.[14] As the Sixth Circuit stated, "the Sixth Amendment is concerned with social or economic factors when the particular *system* of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel." Upon review, the US Supreme Court concluded that there was insufficient evidence that the trial court's excusal policy caused the under-representation of African-Americans and thus declined to address the question directly.

An Uneasy Relationship between the Second and Third Prongs of *Duren*

The *Duren* test requires that all three elements be satisfied to find a violation of the fair cross section requirement. Yet a close examination of contemporary cases reveals an ongoing ambiguity about whether the ultimate objective of the requirement is a more representative jury pool or a non-exclusionary jury system. In some cases, courts have determined that the fair cross section requirement is satisfied provided that the process of summoning and qualifying jurors does not systematically exclude distinctive groups. Other courts have found fair cross section violations in cases with comparatively low levels of disparity if there is any evidence of systematic exclusion.[15] It remains to be seen whether the more recent expansion of the definition of systematic exclusion will relieve or further exacerbate this tension. Nevertheless, an effective jury system will ensure that jury operations are free of systematic exclusions and that the resulting jury

[11] *People v. Harris,* 36 Cal. 3d 36, 58 (1984).

[12] United States v. Green, 389 F. Supp. 2d 29 (D. Mass. 2005).

[13] The U.S. Court of Appeals for the First Circuit subsequently overturned the order on grounds that the remedy unlawfully supplemented the Jury Plan for the Eastern District of Massachusetts. *In re U.S.,* 426 F. 3d 1 (1st Cir. 2005). In 2006, the U.S. District Court for the Eastern District of Massachusetts amended its Jury Plan to respond to an undeliverable summons by sending an additional summons to the same zip code.

[14] *Smith v. Burghuis,* 543 F.3d 326 (2008), *cert. granted,* (U.S. Sept. 30, 2009) (No. 08-1402). Reducing the term of service, ideally to one day or one trial, reduces the financial impact on prospective jurors, making it possible for people to serve who would otherwise be excused for financial hardship.

[15] The tension between process and outcome is evident in other areas of law involving race and gender discrimination, of course.

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pool is a reasonable reflection of community demographic characteristics.

Further Reading

JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (Harvard University Press, 2000).

ABA PRINCIPLES FOR JURIES AND JURY TRIALS (August 2005).

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Jury Managers' Toolbox

Best Practices for Excusal Policies

Overview

All jurisdictions grant discretion to their trial courts to excuse individual from jury service due to hardship. Excusal differs from disqualification in that individuals who do meet the qualification criteria are statutorily prohibited from serving. Likewise, excusal differs from exemption in that the latter provides individuals with a statutory right to decline to serve if summonsed. While some statutes are more explicit than others with respect to the degree of the hardship that a juror must demonstrate to be excused from jury service, most jurisdictions recognize three types of hardship: medical hardship, financial hardship, and extreme inconvenience.

Factors that Affect Excusal Rates

Nationally, excusal rates average 9% – roughly one out of every 10 people summonsed for jury service – but individual rates range from virtually 0% to more than 20% in some courts. Although community social and demographic factors obviously play a role in excusal rates, the NCSC has found that jury management policies significantly affect these rates. For example, courts that have reduced the length of the term of service to "one day or one trial" greatly minimize the potential hardship associated with jury service, making it feasible for many individuals to serve who would otherwise be excused for financial hardship. See Table 1. Similarly, states and local jurisdictions that provide comparatively more generous juror fees and mileage reimbursements, or that require employers to compensate employees who are summonsed to jury service, have lower excusal rates.

Table 1: Average Excusal Rates, by Term of Service and Juror Compensation

	Term of Service		
Juror Fee	One Day/ One Trial	Longer than One Day/One Trial	Total
Exceeds National Average	4.1%	8.3%	6.6%
Less than National Average	8.1%	9.3%	8.9%
Total	6.0%	8.9%	8.0%

Effective Excusal Policies

Excusal policies that minimize the potential hardship that individuals experience as a result of jury service can significantly reduce excusal rates, increase jury yield, and expand the pool of prospective jurors. Such policies likewise reduce the potential for disproportionate impact on lower-income and minority populations, which improves the demographic representation of the jury pool.

A liberal deferral policy is preferable to outright excusal. If a juror's request to be excused is based on inconvenience rather than true hardship, the court should defer the juror

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to a more convenient service date. An effective deferral policy reduces jury yield in the short term, but this temporary reduction is cancelled out as previously deferred jurors are returned to the jury pool in future terms. Moreover, most courts report increase jury yields due to the tendency of deferred jurors to appear for service in higher proportions than jurors responding on the first summons date.

Increasingly courts permit jurors to defer service one time as a general policy, but require court approval for subsequent deferrals. Absent extenuating circumstances, deferrals should be for a limited period of time (e.g., not to exceed 6 months) and under no circumstances should exceed a full calendar year. Because the jury yield is higher for deferred jurors compared to jurors reporting in response to the first summons, it is advisable to limit the number of deferrals into a single term. To prevent the possibility of "stealth jurors" deferring into jury panels for high profile cases, it is also advisable to prohibit deferrals for jury panels in notorious trials.

Establish a written excusal policy that articulates clear, objective criteria that jurors must show to demonstrate financial or medical hardship. Although court policies concerning the length of the term of service and juror compensation can minimize the potential hardship for many jurors, at any given time some measurable portion of the population will always have bona fide reason to be excused for hardship. This may be the result of the financial burden associated with loss of income; a lack of transportation or excessive travel to report for jury service; the risk of physical or mental harm to the juror; or the responsibility to care for children or dependent adults.

To be a legitimate hardship, the impact of jury service must involve an unreasonable level of *personal* sacrifice. Unless the juror is self-employed, it is not sufficient that the juror's employer be adversely affected by the jury service. If the primary impact of the hardship falls on the juror's employer, rather than on the juror, the juror's service should be deferred rather than excused outright.

With respect to financial hardship, the following criteria would likely justify a request to be excused for hardship:

- the juror is employed, but the employer does not compensate employees while on jury service;
- the expected loss of income due to the anticipated length of jury service cannot be recovered after the service is complete;
- the juror has no supplemental financial support (e.g., spouse, parents, or children) or savings that would offset the loss of income; and
- the juror is the primary income earner for the household.

Similarly objective criteria should be established to determine hardship with respect to lack of transportation (e.g., distance exceeds x miles, juror does not own a vehicle or is not licensed to drive, juror cannot borrow a vehicle or get a ride to the courthouse with family or friends, public transportation is not available) or excessive distance (e.g., one-way trip to the courthouse exceeds x miles or x number of hours in transit).

A request to be excused due to medical hardship should include supporting details about the nature of the medical condition and a statement from a licensed health care

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practitioner that the person is unable to serve as a juror. Take note that the Americans with Disabilities Act prohibits courts from routinely excusing persons with disabilities from jury service if the court can provide a reasonable accommodation for the disability (e.g., assisted listening devices or sign language interpreters for hearing-impaired jurors).

Responsibility for reviewing and granting excusal requests court can be delegated to a jury manager, court administrator, or clerk of court, provided that jurors have a right to appeal a denied excusal request to a judicial officer.

Addressing Hardship Factors

A number of social and community factors are often correlated with increased excusal rates including local employment rates, the dominant types of employers in the community (e.g., manufacturing, retail, service, financial, public) and their practices with respect to compensation for employees while on jury service, median per capita income, and others. As a practical matter, there is little that courts can do to change social and community factors. However, there are a number of steps that courts can take to minimize the hardship associated with jury service.

Reduced Term of Jury Service

As illustrated in Table 1 above, reducing the length of the term of service – ideally to one day or one trial – is the approach most likely to have a significant impact on excusal rates. The average length of a jury trial is two to three days in most states, which is generally a short enough period that most people would be only minimally inconvenienced by having to serve, even if the service entailed some loss of income during that time. Some courts employ a modified one day or one trial approach in which jurors are "on call" for a longer period of time (e.g., one week, one month), but once they are told to report for service and are impaneled as a trial juror or are dismissed after reporting, they have fulfilled their service requirement. If it is not possible to reduce the actual term of service, the court should adopt a policy to excuse jurors for a portion of their term, rather than grant a complete excusal from service.

For most courts, converting to a one day or one trial term of service requires a slight increase in the number of jurors summonsed to compensate for the fact that jurors cannot be recycled to new trials over the longer term of service. The more dramatic the reduction in the term of service (e.g., from two weeks to one day or one trial), the greater the increase in the summoning rate will have to be.

As a practical matter, many courts with longer terms of service tend to have a lower volume of jury trials. For example, in the *State-of-the-States Survey of Jury improvement Efforts,* the NCSC found that more than half of all courts with a term of service longer than one day or one trial averaged 12 or fewer jury trials per year (one per month). Given these low volumes of jury trials, the modified "on call" term of service is fairly easy to implement with virtually no change in summoning rates.

To obtain an accurate estimate of the new summoning rate, the court should determine: (1) the actual number of jurors needed in an average term based on the number of jury panels sent to courtrooms and the number of jurors assigned to those panels (as compared to the number of jurors reporting during those

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terms) and (2) summons jurors with an allowance for yield. After making the transition from the longer term of service to the reduced term of service, the court should reexamine the jury yield to determine if the excusal rate has decreased sufficiently to adjust the summoning rate.

Time and Hardship Screening for Lengthy Trials

Lengthy trials (e.g., trials exceeding 10 days) pose particular difficulties as few individuals are able to clear their calendar for a full two weeks without significant advance notice. A technique that many courts have found useful is to prescreen jurors for time and financial hardship. Jurors who are not available to serve in a longer trial are returned to the jury pool for consideration in more routine trials.

The prescreening process is conducted on the entire pool of jurors, rather than a preselected panel. Typically the jury manager delegated authority by the trial judge to prescreen jurors using objective criteria. Some courts also require that trial counsel consent to the prescreen process. Screening criteria generally includes the following:

- Employer compensates employees while on jury service for at least as long as the anticipated trial length. If employer does not compensate employees on jury service, loss of income for the duration of the trial will not cause financial hardship;
- Juror has no prepaid vacation or business trips planned during the anticipated trial period;
- Juror has no medical procedures and is not a fulltime student.

The jury manager should keep a careful record of the individuals deemed ineligible for the lengthy trial due to time constraints or financial hardship.

After prescreening the jury pool, the jury manager randomly selects a sufficient number of time/hardship eligible jurors to send to the courtroom for jury selection. Because all of the jurors have been prescreened, the jury panel should be large enough to encompass the number of jurors and alternates, the number of jurors excused for cause, and the number of jurors removed by peremptory challenge. As a result of the prescreening process, the trial judge and attorneys are able to immediately focus on substantive issues related to the trial during voir dire.

Increased Juror Fees

In most states, the amount of the juror fee and mileage reimbursement (if any) is established by statute. Although juror fees in most jurisdictions barely reimburse juror for anticipated out-of-pocket expenses and are not intended to compensate for lost income, the amount of the juror fee is actually a significant predictor of excusal rates. In 12 states, however, the jury statute permits local jurisdictions to supplement the jury fee over and above the mandatory state minimum rate. Excusal rates for courts with higher than average juror fees were 25% lower than those with lower than average juror fees.[1] To the extent that local courts have the discretion to increase juror fees, doing so can help reduce excusal fees.

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[1] GREGORY E. MIZE, PAULA L. HANNAFORD-AGOR & NICOLE L. WATERS, STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 23-24 (April 2007).

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An approach that several states have adopted with respect to juror compensation is a graduated juror fee program in which jurors are paid a reduced fee or no fee on the first day of service and an increased fee (up to $50 per day in some jurisdictions) on the second and subsequent days of service. This approach works extremely well in jurisdictions with a one day or one trial term of service insofar that courts incur relatively few costs for juror fees during jury selection when the largest number of jurors report for service. They are then able to substantially increase the fee for jurors who are actually impaneled as trial jurors. The average juror fee for jurisdictions that pay a flat daily rate is $22 compared to $32 for jurisdictions employing a graduated juror fee approach.

Disclaimer: The guidelines discussed in this document have been prepared by the National Center for State Courts and are intended to reflect the best practices used by courts to increase jury yields and expand the pool of prospective jurors to include individuals who would otherwise be excused due to hardship.

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Jury Managers' Toolbox

Characteristics of an Effective Master Jury List

Overview

For most courts, the creation of the master jury list is the first critical step in the jury selection process. The primary objective of this step is to create a master jury list that is broadly inclusive of the jury-eligible population, geographically and demographically representative of the community, and accurate with respect to the names and addresses of potential jurors. The more inclusive the master jury list, the more likely that it will be geographically and demographically representative of the community. Moreover, a more inclusive master jury list distributes the burden of jury service more equitably across the jury-eligible population. The NCSC recommends that the master jury list include 85% or more of the jury-eligible population.[1]

The term "jury-eligible" generally refers to individuals who meet the basic qualification criteria for jury service with respect to citizenship, residency in the community, age (18 and older), English proficiency, and the absence of a criminal history or mental incompetency. Historically, the popularity of voter registration lists in many jurisdictions was due to identical or nearly identical qualification criteria for both voting and jury service; however, exclusive reliance on the voter registration list as the juror source list has since waned as courts became increasingly aware that many of these lists were neither inclusive nor representative of their communities. Juror source lists other than the voter registration list are likely to include individuals who do not meet the statutory qualifications for jury service and, with the exception of age, generally cannot identify those ineligible individuals based on the source list information. Consequently, the 85% standard has gradually evolved to mean that the master jury list should encompass 85% of the total adult population.

Inclusiveness

To ensure that the master jury list is broadly inclusive of the jury-eligible population, the vast majority of states require courts to use multiple source lists to compile the master jury list. Eleven states mandate the use of a combined list of registered voters and licensed drivers[2]; Connecticut, New York, and the District of Columbia supplement those lists with lists of income tax filers, persons receiving unemployment compensation, and persons receiving public welfare benefits (New York

[1] *G. Thomas Munsterman*, *Jury System Management* 4-5 (1996). The American Bar Association does not specify a numerical standard, but recommends that "the jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. *American Bar Association, Principles for Juries and Jury Trials*, Principle 10.A.2. (2005).

[2] Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, The State-of-the-States Survey of Jury Improvement Efforts 13-14 (2007).

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State only). Most states also permit local courts to supplement the required source lists with additional lists. Only eight states rely exclusively on a single source list: the list of registered voters in Mississippi and Montana; the list of licensed drivers in Florida, Michigan, Nevada and Oklahoma; an annual census conducted by each locality in Massachusetts[3]; and recipients of Permanent Fund Income in Alaska.[4]

Duplicate Removal

Courts using multiple source lists to compile the master jury list have established general "merge and purge" procedures to identify and remove duplicate records after two or more source lists have been combined. The accuracy of the duplicate removal process is extremely important. Failing to identify duplicate records undermines the principle of random selection insofar that individuals who have more than one record on the master jury list (e.g., people who both vote and drive) have a greater probability of being selected than individuals with only one record. On the other hand, incorrectly removing a record on the mistaken belief that it duplicates an existing record disenfranchises a potentially eligible individual and decreases the inclusivity of the master jury list.[5] Of the two possible errors, the conventional belief is that disenfranchising a potentially eligible individual is worse than leaving an unrecognized duplicate on the master jury list,[6] although the NCSC recommends that the proportion of unrecognized duplicates not exceed 5% of the total list.[7]

The NCSC has studied the effectiveness of duplicate removal techniques for courts using combined registered voter and licensed driver lists. When the matching criteria are exact matches on the surname, first name, middle initial, birth month and day, and street number or post office box number, the probability of a duplicate record being missed is approximately 6% and the probability of mistakenly removing a unique record is less than 1%.[8] Missing information as well as the existence of extraneous spaces, punctuation, or non-standardized formatting in any of the fields used for matching can result in an unrecognized duplicate being left on the master jury list while the use of fewer matching criteria (e.g., surname, first initial, and date of birth only) will result in fewer unrecognized duplicates. Commercial jury automation software generally employs more sophisticated (trademark protected) matching criteria, which typically results in 2% to 3% unrecognized duplicates left on the master jury list.

Representativeness

As a general rule, as the master jury list becomes more inclusive, it also becomes more representative. By definition, a list that is 100% inclusive of the jury-eligible population will be perfectly representative. For the purpose of fair cross section jurisprudence, demographic representation is the most important criteria. As the Supreme Court of California noted in *People v. Wheeler,* "if [the source] list is not

[3] Mass. Gen. Laws ch. 234A §4 (2009).
[4] Ala. Stat. § 09.20.050 (2009)
[5] *G. Thomas Munsterman & Paula L. Hannaford-Agor, The Promise and Challenges of Jury System Technology* 17-18 (2003).
[6] *Id.*
[7] *Munsterman, supra,* note 1.
[8] *Munsterman, supra,* note 1, at 18-20.

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representative of a cross-section of the community, the process is constitutionally defective ab initio." [9] However, few source lists include gender, race or ethnicity in the information provided for the master jury list; that information is collected, if at all, during the qualification stage of the jury selection process or when the juror reports to the courthouse for service. The actual demographic representation of the master jury list is difficult to ascertain due to the inability to reliably determine whether under-representation of cognizable groups on the qualified list or in the jury pool originated with the master jury list or is the result of intermediate steps in the qualification process (e.g., summonses returned undeliverable, non-response/failure to appear rates, disqualification, exemption, and excusal rates). Consequently, most courts review only the geographic representation of the master jury list on a routine basis to ensure that all eligible localities or sub-localities are included on the master jury list in reasonable proportion to their population.

It is possible to use Census information about each locality to model the demographic representation of the master jury list. Due to the tendency of minority populations to cluster together in neighborhoods, this information can often serve as an indicator of demographic representation. However, any analysis of geographic and demographic representation necessarily involves a tradeoff between the size of the geographic jurisdiction and the likely proportion of identifiable minority populations. As the geographic jurisdiction under analysis becomes smaller (e.g., from township to zip code to census tract), the proportion of identifiable minority populations living within the geographic jurisdiction tends to become larger. This makes it possible to estimate the degree of demographic representation more accurately, but decreases the accuracy of estimates related to geographic representation as a result of the greater number of geographic units included in the analyses.

Accuracy

The final measure of the master jury list is the accuracy of the name and address records in the file. It should go without saying that perfect inclusiveness and representation on the master jury list is meaningless if the court lacks accurate and up-to-date information with which to deliver the jury summonses. Courts do not generally have authority over the executive agencies that provide the source lists for jury selection to demand maintenance of those lists beyond that needed for the agencies' own working use; therefore, it is incumbent on courts to employ other techniques to improve the accuracy of the master jury list. These techniques can include renewing the master jury list more frequently than the maximum allowable period prescribed by law. Increasingly, courts are moving away from periodic recreation of the master jury list to a system in which the master jury list is continually updated. Under this approach, the court periodically (every month to 6 months) receives an electronic file containing new, updated, and purged records from the source list agencies. This information is used to supplement (in the case of new records), amend (in the case of updated records), and remove (in the case of purged records) records from the master jury list. As a result, the court is

[9] *People v. Wheeler,* 503 P. 2d 748, 759 (Cal. 1978).

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able to maintain accurate status fields for existing jurors in the master jury list without having to create and monitor parallel systems to manage jurors in intermediate status (e.g., summonsed, follow-up for non-response/failure to appear, excuse pending, exempt due to previous service, etc.) during the list creation process.

Even courts using a continually updated master jury list must still contend with undeliverable summonses for individuals who have not yet notified the source list agencies of a recent relocation. To address this issue, many courts also conduct National Change of Address (NCOA) updates before printing and posting summonses.[10] Another technique employed in conjunction with the removal of duplicate names is to retain records from the source list with the most reliable addresses (e.g., more frequent maintenance requirements) or, if the source list agency provides a "last updated" field, the record indicating the date of the most recent change.

Before selecting individual records to receive a jury summons, many courts also apply one or more "suppression files" to the master jury list, which prevents the selection of records for individuals who are known to be ineligible for jury service (e.g., deceased persons, persons who have recently completed jury service, and other defined disqualification and exemption criteria). While some courts maintain files as separate datasets, others incorporate the suppression designation as a discrete field in the master jury list. Although suppression files can be useful management tools to prevent the summonsing of persons who are known to be ineligible for jury service, the NCSC recommends that the suppression files only be used cautiously and under close supervision. A number of recent jury challenges originated with unanticipated effects of suppression files.[11] For example:

- In Santa Barbara County, California, the court routinely suppressed the records of individuals who had failed to appear for jury service, intending to follow up on these names at a later date. During a challenge to the jury system in which the defendant claimed that Hispanic citizens were under-represented in jury pool, the court discovered that a disproportionate number of records that had been suppressed for failing to appear for jury service had Hispanic surnames, preventing them from being summonsed.[12]

- The Third Judicial District Court of Michigan, in Wayne County, experienced a similar problem with respect to African-American representation in its jury pool. Beginning in 2002, individuals who had been sent a qualification questionnaire were listed as "active" on the master jury list, a status which served to suppress the record from being reselected and sent a second questionnaire. A program to follow up on

[10] NCOA services are available from vendors licensed by the U.S. Postal Service. *Munsterman & Hannaford-Agor, supra* note 5, at 20-21. The U.S. Postal Service recently implemented rules requiring customers using bulk mail rates to update mailing lists with NCOA within 90 days of the post date.

[11] *See* Paula L. Hannaford-Agor, "Jury News: Suppression Files – Useful Tools or Traps for the Unwary?" 23(3) *Ct. Mgr.* 75 (2008).

[12] *Blair v. Superior Court,* 114 Cal. App. 4th 532 (2d Cal. App. 2004). At that time, the court did not routinely follow-up on FTA jurors.

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non-responders was tried and abandoned because staff felt that the program was not worth the time and effort. The result was that those who never responded to the questionnaire – the vast majority of which lived in the city of Detroit, coincidentally where 80% of the county's African-American residents lived – remained in that status indefinitely, effectively removing them from consideration for jury service.[13]

- In the District of Columbia, persons convicted of felonies are ineligible for jury service for ten years following completion of their criminal sentence. The practice for a long period of time in the D.C. Superior Court was to suppress for 10 years the record of any person who reported having a felony conviction on the qualification questionnaire, regardless of when they completed their criminal sentence. The effect was to hold out jury-eligible citizens from service for a period of time far longer than the statute required, which one defendant challenging the jury system argued was a violation of random selection.[14]

Randomization

For most courts, the final step in the master jury list creation process is the randomization of the list. Some courts assign a random juror identification number to each record on the master jury list and sort the list on the randomly generated number; other courts maintain the list in a non-random order (often alphabetically by zip code or locality) and use computer software to randomly select names from the list.

Disclaimer: The guidelines discussed in this document have been prepared by the National Center for State Courts and are intended to reflect the best practices used by courts to create and maintain an effective master jury list.

[13] *State v. Robinson and Jackson (No. 06 009711-01 and 00 000792), Mich. 3d Cir. (Nov. 12, 2007).*

[14] *U.S. v. Powell, (Criminal No. 06-CF-23645), Defendant's Motion to Dismiss the Indictment or Alternative Stay the Proceedings Where the District of Columbia's Jury Selection System Violates the Sixth Amendment of the Constitution and the D.C. Jury Act (Jan. 31, 2008), at pp.* 20-22.

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Illegal Racial Discrimination in Jury Selection:

A Continuing Legacy

Equal Justice Initiative

The Equal Justice Initiative is a non-profit law organization with headquarters in Montgomery, Alabama.

For more information, please contact:

Equal Justice Initiative
122 Commerce Street
Montgomery, Alabama 36104
(334) 269-1803
www.eji.org
Email: raceandjury@eji.org

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EXECUTIVE SUMMARY

Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries. Nearly 135 years after Congress enacted the 1875 Civil Rights Act to eliminate racially discriminatory jury selection, the practice continues, especially in serious criminal and capital cases.

The staff of the Equal Justice Initiative (EJI) has looked closely at jury selection procedures in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. We uncovered shocking evidence of racial discrimination in jury selection in every state. We identified counties where prosecutors have excluded nearly 80% of African Americans qualified for jury service. We discovered majority-black counties where capital defendants nonetheless were tried by all-white juries. We found evidence that some prosecutors employed by state and local governments actually have been trained to exclude people on the basis of race and instructed on how to conceal their racial bias. In many cases, people of color not only have been illegally excluded but also denigrated and insulted with pretextual reasons intended to conceal racial bias. African Americans have been excluded because they appeared to have "low intelligence"; wore eyeglasses; were single, married, or separated; or were too old for jury service at age 43 or too young at 28. They have been barred for having relatives who attended historically black colleges; for the way they walk; for chewing gum; and, frequently, for living in predominantly black neighborhoods. These "race-neutral" explanations and the tolerance of racial bias by court officials have made jury selection for people of color a hazardous venture, where the sting of exclusion often is accompanied by painful insults and injurious commentary.

While courts sometimes have attempted to remedy the problem of discriminatory jury selection, in too many cases today we continue to see indifference to racial bias in jury selection. Too many courtrooms across this country facilitate obvious racial bigotry and discrimination every week when criminal trial juries are selected. The underrepresentation and exclusion of people of color from juries has seriously undermined the credibility and reliability of the criminal justice system, and there is an urgent need to eliminate this practice. This report contains recommendations we believe must be undertaken to confront the continuing problem of illegal racial bias in jury selection. We sincerely hope that everyone committed to the fair administration of law will join us in seeking an end to racially discriminatory jury selection. This problem has persisted for far too long, and respect for the law cannot be achieved until it is eliminated and equal justice for all becomes a reality.

Bryan A. Stevenson
Executive Director

SUMMARY OF FINDINGS AND RECOMMENDATIONS

Findings

1. The 1875 Civil Rights Act outlawed race-based discrimination in jury service, but 135 years later illegal exclusion of racial minorities persists.

2. Racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases.

3. The United States Supreme Court's 1986 decision in *Batson v. Kentucky* has limited racially discriminatory use of peremptory strikes in some jurisdictions, but the refusal to apply the decision retroactively has meant that scores of death row prisoners have been executed after convictions and death sentences by all-white juries, which were organized by excluding people of color on the basis of race. Moreover, dozens of condemned prisoners still face execution after being convicted and sentenced by juries selected in a racially disciminatory manner.

4. Most state appellate courts have reversed convictions where there is clear evidence of racially discriminatory jury selection. However, by frequently upholding convictions where dramatic evidence of racial bias has been presented, appellate courts have failed to consistently and effectively enforce anti-discrimination laws and adequately deter the practice of discriminatory jury selection.

5. EJI studied jury selection in eight states in the southern United States: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. State appellate courts in each of these states – except Tennessee, whose appellate courts have never granted *Batson* relief in a criminal case – have been forced to recognize continuing problems with racially biased jury selection. The Mississippi Supreme Court concluded in 2007 that "racially profiling jurors and [ ] racially motivated jury selection [are] still prevalent twenty years after *Batson* was handed down."

6. Alabama appellate courts have found illegal, racially discriminatory jury selection in 25 death penalty cases in recent years and compelling evidence of racially biased jury selection has been presented in dozens of other death penalty cases with no relief granted.

7. In some communities, the exclusion of African Americans from juries is extreme. For example, in Houston County, Alabama, 80% of African Americans qualified for jury service have been struck by prosecutors in death penalty cases.

8. The high rate of exclusion of racial minorities in Jefferson Parish, Louisiana, has meant that in 80% of criminal trials, there is no effective black representation on the jury.

9. There is evidence that some district attorney's offices explicitly train prosecutors to exclude racial minorities from jury service and teach them how to mask racial bias to avoid a finding that anti-discrimination laws have been violated.

10. Hundreds of people of color called for jury service have been illegally excluded from juries after prosecutors asserted pretextual reasons to justify their removal. Many of these assertions are false, humiliating, demeaning, and injurious. This practice continues in virtually all of the states studied for this report.

11. There is wide variation among states and counties concerning enforcement of anti-discrimination laws that protect racial minorities and women from illegal exclusion.

12. Procedural rules and defaults have shielded from remedy many meritorious claims of racial bias.

13. Many defense lawyers fail to adequately challenge racially discriminatory jury selection because they are uncomfortable, unwilling, unprepared, or not trained to assert claims of racial bias.

14. Even where courts have found that prosecutors have illegally excluded people of color from jury service, there have been no adverse consequences for state officials. Because prosecutors have been permitted to violate the law with impunity, insufficient disincentives have been created to eliminate bias in jury selection.

15. In some communities racial minorities continue to be underrepresented in the pools from which jurors are selected. When challenges are brought, courts use an inadequate and misleading measure of underrepresentation known as "absolute disparity," which has resulted in the avoidable exclusion of racial minorities in many communities.

16. Under current law and the absolute disparity standard, it is impossible for African Americans to effectively challenge underrepresentation in the jury pool in 75% of the counties in the United States. For Latinos and Asian Americans, challenges are effectively barred in 90% of counties.

17. The lack of racial diversity among jurors in many cases has seriously compromised the credibility, reliability, and integrity of the criminal justice system and frequently triggered social unrest, riots, and violence in response to verdicts that are deemed racially biased.

18. Research suggests that, compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives.

19. Miami; New York; Los Angeles; Hartford, Connecticut; Jena, Louisiana; Powhatan, Virginia; Milwaukee, Wisconsin; and the Flordia Panhandle are among many communities that have seen unrest, violence, or destruction in response to non-diverse criminal jury verdicts.

20. The lack of racial diversity among prosecutors, state court judges, appellate judges, and law enforcement agencies in many communities has made jury diversity absolutely critical to preserving the credibility of the criminal justice system.

Recommendations

1. Dedicated and thorough enforcement of anti-discrimination laws designed to prevent racially biased jury selection must be undertaken by courts, judges, and lawyers involved in criminal and civil trials, especially in serious criminal cases and capital cases.

2. The rule banning racially discriminatory use of peremptory strikes announced in *Batson v. Kentucky* should be applied retroactively to death row prisoners and others with lengthy sentences whose convictions or death sentences are the product of illegal, racially biased jury selection but whose claims have not been reviewed because they were tried before 1986.

3. To protect the credibility and integrity of criminal trials, claims of illegal racial discrimination in the selection of juries should be reviewed by courts on the merits and exempted from procedural bars or technical defaults that shield and insulate from remedy racially biased conduct.

4. Prosecutors who are found to have engaged in racially biased jury selection should be held accountable and should be disqualified from participation in the retrial of any person wrongly convicted as a result of discriminatory jury selection. Prosecutors who repeatedly exclude people of color from jury service should be subject to fines, penalties, suspension, and other consequences to deter this practice.

5. The Justice Department and federal prosecutors should enforce 18 U.S.C. § 243, which prohibits racial discrimination in jury selection, by pursuing actions against district attorney's offices with a history of racially biased selection practices.

6. States should provide remedies to people called for jury service who are illegally excluded on the basis of race, particularly jurors who are wrongly denigrated by state officials. States should implement strategies to disincentivize discriminatory conduct by state prosecutors and judges, who should enforce rather than violate anti-discrimination laws.

7. Community groups, civil and human rights organizations, and concerned citizens should attend court proceedings and monitor the conduct of local officials with regard to jury selection practices in an effort to eliminate racially biased jury selection.

8. Community groups, civil and human rights organizations, and concerned citizens should question their local district attorneys about policies and practices relating to jury selection in criminal trials, secure officials' commitment to enforcing anti-discrimination laws, and request regular reporting by prosecutors on the use of peremptory strikes.

9. States should strengthen policies and procedures to ensure that racial minorities, women, and other cognizable groups are fully represented in the jury pools from which jurors are selected. States and local administrators should supplement source lists for jury pools or utilize computer models that weight groups appropriately. Full representation of all cognizable groups throughout the United States easily can be achieved in the next five years.

10. Reviewing courts should abandon absolute disparity as a measure of underrepresentation of minority groups and utilize more accurate measures, such as comparative disparity, to prevent the insulation from remedy of unfair underrepresentation.

11. State and local justice systems should provide support and assistance to ensure that low-income residents, sole caregivers for children or other dependents, and others who are frequently excluded from jury service because of their economic, employment, or family status have an opportunity to serve.

12. Court administrators, state and national bar organizations, and other state policymakers should require reports on the representativeness of juries in serious felony and capital cases to ensure compliance with state and federal laws barring racial discrimination in jury selection.

13. The criminal defense bar should receive greater support, training, and assistance in ensuring that state officials do not exclude people of color from serving on juries on the basis of race, given the unique and critically important role defense attorneys play in protecting against racially biased jury selection.

14. Greater racial diversity must be achieved within the judiciary, district attorney's offices, the defense bar, and law enforcement to promote and strengthen the commitment to ensuring that all citizens have equal opportunities for jury service.

THE HISTORY OF RACIAL DISCRIMINATION IN JURY SELECTION

From the earliest days of the American republic, the jury system has served as a symbol of American democracy and a "bulwark of liberty" for citizens who stand accused.[1] The right to trial by jury is enshrined in our foundational legal documents, from the Magna Carta to the Declaration of Independence and the Bill of Rights, and in every state constitution.[2] Yet, like the larger democracy it represents, the jury's history as a guarantor of liberty and freedom has been haunted by race-based exclusion and discrimination.

Throughout the Civil War era, jury service was almost universally restricted to white men. (The first African-American juror in a criminal case served in 1860 in Massachusetts.) In many parts of the country, government officials flatly excluded African Americans from jury service for another century after Reconstruction.[3] Today, African Americans have secured a place on the jury rolls, but many prosecutors continue to prevent their service on juries by illegally excluding jurors based on their race.

The First Barrier – Total Exclusion

In the period directly following the Civil War, African-American jury service – with other African-American civil and political rights – featured prominently in debates about the new shape of society, particularly in the South. Black citizens pressed for representative grand juries and trial juries to ensure fair treatment of black people accused of crimes and enforcement of the law against white defendants accused of terror and violence against African Americans.[4]

Black citizens pressed for representative juries to ensure fair treatment of black people accused of crimes and enforcement of the law against white defendants accused of terror and violence against African Americans.

Proponents of equal jury rights met with some success during Reconstruction as legislatures, with black participation, repealed formal race-based jury requirements in many Southern states.[5] Congress included in the Civil Rights Act of 1875 a provision outlawing race-based discrimination in jury service.[6] The peak of this early progress toward equality and inclusion in jury service occurred in 1880 with the United States Supreme Court's decision in *Strauder v. West Virginia*, which overturned a state statute that restricted jury service to whites. The strongly-worded decision condemned the statute as a violation of the equal protection of the laws guaranteed to black citizens by the newly adopted Fourteenth Amendment to the Federal Constitution.[7]

The Civil Rights Act of 1875 outlawed race-based discrimination in jury service.

Strauder, however, marked the high point in the struggle for minority jury participation for over 50 years. By 1880, a backlash against black enfranchisement and political participation was already underway in the South, and the Jim Crow era of white supremacism, state terrorism, and apartheid had begun.[8] The jury service provision of the Civil Rights Act of 1875 was

rarely enforced and had little effect on the conduct of local officials.[9] Despite its forceful condemnation of race-based exclusion, the rule of *Strauder* was easily circumvented.[10] States abandoned statutes that expressly restricted jury service to whites, but local officials achieved the same result by excluding African Americans from jury rolls and implementing ruses to exclude black citizens.[11] In some jurisdictions, names of black residents were included on the lists from which jury panels or "venires" were drawn, but were printed on a different color paper so they could be easily avoided during the supposedly random drawing of the venire.[12] Theoretically valid but vague requirements for jury service – such as intelligence, experience, or good moral character – were applied in practice to mean "no blacks allowed."[13] Another method subject to abuse and manipulation was the key man system, in which prominent citizens submitted lists of suitable jurors to jury commissioners.[14]

Using these techniques to exclude all African Americans from jury service clearly flouted the Constitution, but the Supreme Court was unwilling or unable to enforce the law during this period.[15] Even if a black defendant could afford a lawyer, and even if that lawyer was willing to challenge local racial orthodoxy to raise the issue, the Court almost invariably accepted local jury commissioners' assertions that the total exclusion of African Americans was based not on discrimination but on their inability to find any African Americans qualified for jury service.[16]

Southern white commentators threatened that insistence on black jury participation would justify a return to lynching.

Trials in many parts of the South during this period took place against the background of state-sponsored and -condoned terror, in the form of lynch mobs and extrajudicial killings. During the 1920s and 30s, Southern white commentators defended farcical summary trials of black defendants by all-white juries on the ground that at least they were better than lynching. These observers threatened that insistence on constitutional requirements such as black jury participation would justify a return to lynching.[17]

The reality behind this threat was demonstrated by the case of Ed Johnson. Johnson was falsely accused of raping a white woman and convicted and sentenced to death by an all-white jury in Tennessee in 1906.[18] He appealed to the Supreme Court and challenged the racial composition of his jury. The Court agreed to hear the case, but on the same day the telegram reached Chattanooga, a mob lynched Johnson with the acquiescence of the local sheriff.[19] A note left on Johnson's body informed the Court, "Come get your nig--r now."[20]

A lynching in Marion, Indiana, 1930. Donated by Corbis-Bettmann ©.

In 1935, the Supreme Court finally confronted the rampant exclusion of African Americans from jury pools. The case of *Norris v. Alabama*[21] involved the appeal of one of the "Scottsboro Boys" – nine black teenagers wrongly convicted for raping two white women on a train in Scottsboro, Alabama, despite overwhelming evidence of their innocence.[22] The Scottsboro cases dominated national headlines for months. The teens were tried by all-white juries; no African American had served on a local jury in living memory.[23] A jury commissioner testified he did "not know of any negro . . . who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment."[24] This time, however, the Supreme Court found it "impossible to accept such a sweeping characterization."[25] It reversed Norris's conviction and later reversed six other cases on similar grounds over the next 12 years.[26]

Nine African-American teens ranging in age from 13 to 19 were wrongly arrested, convicted, and originally sentenced to death for raping two white women in Scottsboro, Alabama.

The Supreme Court in 1945 found no constitutional violation in a Texas policy that allowed exactly one African American to serve on each grand jury.

Norris and the related cases signaled a major shift: the Court would no longer tolerate the *total exclusion,* by law or by practice, of black citizens from jury rolls. The next 30 years nonetheless saw continued resistance to African-American jury service, as well as evasions such as tokenism.[27] In a 1945 case, the Supreme Court found no constitutional violation in a Texas county's policy of allowing exactly one African American to serve on each grand jury.[28] Not until the 1960s and 70s, when the Court adopted a "fair cross-section" standard requiring jury and grand jury pools to hew closely to the demographics of the community,[29] did representation of minority citizens in jury pools improve. Pockets of resistance remained, as demonstrated by a memorandum from a Georgia district attorney that surfaced in a 1988 capital case, which instructed local jury commissioners to place in the jury pool the smallest number of African Americans and women that would allow the county to avoid a finding of discrimination.[30] Although the conviction in that case was overturned, the district attorney served until his retirement in 1994.[31]

The Second Barrier – Discriminatory Selection

By the 1960s, as discriminatory exclusion from jury lists and venires waned somewhat, the main front of the jury discrimination battle was shifting to the jury selection process at

trial. Jury selection begins with a jury panel or "venire," which usually contains between 40 and 150 potential jurors drawn from a master list. Trial lawyers question the potential jurors (a process called "voir dire") to determine possible bias and may then challenge "for cause" any juror they believe will not be able to try the case fairly and impartially. After removals for cause, the lawyers exercise "peremptory strikes" to remove additional jurors for any reason. The actual jury is chosen from the group that remains after "for cause" and peremptory strikes.

Gains in minority inclusion on jury lists and venires in the 1960s and 70s were immediately counteracted by discrimination in the use of peremptory challenges. In 1965, the Supreme Court addressed this issue for the first time in *Swain v. Alabama*.[32] Robert Swain, a black man, was sentenced to death in 1962 by an all-white Alabama jury for the rape of a white woman. Some African Americans were included on jury panels in Talladega County but were removed by peremptory strikes, so that no African American had served on a trial jury since 1950.[33] The six African Americans on Mr. Swain's jury panel were struck by the prosecutor, over the objections of Mr. Swain's attorneys.[34]

The 1965 decision in *Swain v. Alabama* set the bar so high for proving discriminatory intent that no litigant was able to win a jury discrimination claim for 20 years.

The Supreme Court found no constitutional violation. Conceding it would be illegal to use peremptory strikes to intentionally exclude African Americans from jury service because of their race, the Court found that the facts in Mr. Swain's case did not prove the prosecutor intentionally discriminated against black potential jurors.[35] It set the bar so high for proving discriminatory intent that no litigant won a *Swain* claim for 20 years.[36] As a result, defendants continued to be convicted and executed based on verdicts by all-white juries.

After years of heavy criticism of the *Swain* standard and its repudiation by several state courts, the Supreme Court reconsidered the question in a 1986 case called *Batson v. Kentucky*.[37] In *Batson*, the Court overruled *Swain* and held that a prosecutor cannot use peremptory strikes to exclude a potential juror because of his or her race.[38] It lowered the standard of proof by holding that, where the circumstances at trial support a mere inference of discrimination in the use of peremptory strikes, the prosecutor must explain why he or she removed black potential jurors. If the prosecutor fails to give a legitimate, nonracial reason for each strike, the trial court can conclude that the prosecutor acted on the basis of race and put the struck jurors back on the jury venire.[39]

***Batson* held that a prosecutor cannot exclude any potential juror because of his or her race.**

Batson created a new legal standard and a new opportunity to challenge discrimination in jury selection. But *Batson* did not apply retroactively, so that death row prisoners and capital defendants whose appeals were completed before 1986 could not benefit from the new rule, even if they were tried by all-white juries selected in blatant violation of the Constitution.[40]

Scores of people have been executed despite dramatic evidence of illegal racial bias in jury selection.

Some defendants convicted in such unreliable trials are still serving prison sentences and many have been executed. Edward Horsley, a black man, was convicted of murder and sentenced to death by an all-white jury in Monroe County, Alabama – which is 39% black – after the prosecutor struck all eight African Americans from the jury venire.[41] In 1988, the Alabama Court of Criminal Appeals ruled that Mr. Horsley could not raise a *Batson* challenge.[42] He was executed in 1996.[43] In Utah, William Andrews was executed after his jury discrimination claims were rejected in a case where a member of his all-white jury handed the bailiff a drawing of a man hanging from a gallows with the inscription, "Hang the Nig--rs."[44] Clarence Brandley, a black man, was convicted by an all-white jury of murdering a white child in Texas amid evidence of racial bias by the prosecution.[45] Because he was convicted before *Batson*, Brandley could not challenge this discrimination effectively. He was saved from execution and exonerated only after the TV program *60 Minutes* brought to light serious problems with the evidence in his case.[46]

In the modern era, scores of people have been executed despite dramatic evidence of illegal and unconstitutional racial bias in jury selection that was never addressed because of the Court's decision not to apply *Batson* retroactively. Dozens of condemned persons still face execution despite unreviewed evidence of racially biased jury selection. Thousands more remain incarcerated despite their discriminatory convictions.[47]

Herbert Richardson was convicted and sentenced to death by an all-white jury in Houston County, Alabama, which is 27% black, after African Americans were excluded from jury service on the basis of race. The prosecutor made racial remarks during closing arguments, including an appeal for a death sentence because Mr. Richardson was "a Black Muslim from New York." Mr. Richardson was executed in 1989 after courts ruled that laws requiring new trials because of illegal jury discrimination did not apply retroactively.

THE CONTINUING LEGACY OF ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION

Today, peremptory strikes are used to exclude African Americans and other racial minorities from jury service at high rates in many jurisdictions, particularly in the South. In courtrooms across the United States, people of color are dramatically underrepresented on juries as a result of racially biased use of peremptory strikes. This phenomenon is especially prevalent in capital cases and other serious felony cases. Many communities have failed to make juries inclusive and representative of all who have a right to serve.

From 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service.[48] As a result, half of these juries were all-white and the remainder had only a single black member, despite the fact that Houston County is 27% African-American.

Prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service.

In 2003, the Louisiana Crisis Assistance Center found that prosecutors in Jefferson Parish felony cases strike African-American prospective jurors at more than three times the rate that they strike white prospective jurors.[49] Louisiana allows convictions in many cases even if only 10 of 12 jurors believe the defendant is guilty. The high rate of exclusion means that in 80% of criminal trials, there is no effective black representation on the jury because only the votes of white jurors are necessary to convict, even though Jefferson Parish is 23% black.[50]

The high rate of exclusion in Jefferson Parish, Louisiana, has meant that in 80% of criminal trials, there is no effective black representation on the jury.

In the years before and after *Batson*, Georgia prosecutors in the Chattahoochee Judicial Circuit used 83% of their peremptory strikes against African Americans, who make up 34% of the circuit's population.[51] As a result, six black defendants have been tried by all-white juries.[52]

In Dallas County, Alabama, the State has used the majority of its peremptory strikes against black potential jurors in 12 reported cases since *Batson* was decided. In those cases, the prosecutor used 157 of 199 peremptory strikes (79%) to eliminate black veniremembers.[53] In cases where the death penalty was imposed, the data shows the Dallas County district attorney used peremptory strikes to exclude 76% of African Americans qualified for jury service.[54]

These extremely high rates of exclusion indicate that, even today, African Americans continue to be denied the right to sit on juries because of their race.

Even today, African Americans continue to be denied the right to sit on juries because of their race.

Tutwiler Prison, Wetumpka, Alabama. The United States has the highest rate of incarceration in the world.

Why the Problem Continues

To understand why racial bias in jury selection persists, it is important to understand the framework courts use to analyze claims of discrimination. In *Batson v. Kentucky*,[55] the Supreme Court outlined a three-step process for a defendant to establish that the prosecutor removed jurors based solely on their race. If the defense suspects that the prosecutor's peremptory strikes are racially biased, it must first establish that the prosecutor's actions during jury selection, along with any other relevant circumstances, raise an inference or "prima facie" case of discrimination.[56] The defense may rely on evidence such as the prosecutor's pattern of strikes against veniremembers of color and suspicious questions or statements made by the prosecutor during voir dire.[57] To rebut the inference of discrimination, the prosecutor must then offer nonracial or "race-neutral" explanations for its challenged strikes.[58] This burden is exceedingly low. The Supreme Court has emphasized that the prosecutor's race-neutral reason need not be plausible, let alone persuasive.[59] At the final stage, the trial court must assess all relevant circumstances and determine if the defense has proven that the prosecutor intentionally discriminated against veniremembers of color.[60]

1. Inference of discrimination

2. Reason for strike

3. Find intentional discrimination

Though *Batson* recognized it is unconstitutional for a prosecutor to exclude even a single juror on the basis of race, the decision fell short of providing the tools to adequately combat racial discrimination during jury selection. Justice Thurgood Marshall, the first of only two African Americans appointed to the Supreme Court, noted in his concurring opinion in *Batson*, "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."[61]

John Spencer of Eufaula, Alabama, above with his wife Ruby, was one of 20 African-American potential jurors illegally struck from the capital murder trial of Jesse Lee Morrison in Barbour County. Mr. Morrison is black; the victim in the case was white. In 1996, a federal appeals court reversed his conviction, finding that the South Alabama prosecutor failed even to question the black veniremembers before systematically using his first 20 peremptory strikes to remove all but one African American qualified to sit on Mr. Morrison's jury.

Experience has borne out Justice Marshall's concerns.[62] In a number of jurisdictions across the country, district attorney's offices have trained prosecutors how to mask their efforts to exclude racial minorities from jury service. Almost immediately after the 1986 *Batson* decision, Philadelphia assistant district attorney Jack McMahon recorded a training session for Pennsylvania prosecutors on how to question African Americans during voir dire in order to later provide race-neutral reasons for their strikes.[63] Similarly, prosecutors in Dallas County, Texas, maintained a decades-long policy of systematically excluding African Americans from jury service in criminal cases and codified it in a training manual.[64] For the district attorney's office in Tuscaloosa County, Alabama, relying on peremptory strikes and other tactics to exclude black potential jurors was "standard operating procedure" and led to African Americans being underrepresented in 70% of the county's criminal trials.[65] Thus, despite *Batson*'s mandate, prosecutors continue to succeed in excluding large numbers of African Americans from jury service.

District attorney's offices specifically train prosecutors how to mask their efforts to exclude racial minorities from jury service.

Prosecutors Often Assert Pretextual "Race-Neutral" Reasons

In cases where the exclusion of African Americans from juries has been challenged, many of the reasons given by prosecutors for striking African-American potential jurors obviously are a guise for race-based exclusion of potential jurors.

A Georgia prosecutor struck a juror because he was black and had a son in an interracial marriage.

Sometimes these "race-neutral" reasons explicitly incorporate race. In a recent Louisiana case, the prosecutor said he removed a juror because he was a "single black male with no children."[66] An Alabama prosecutor said he struck African Americans because he wanted to avoid an all-black jury[67] and asserted in other cases that he struck African Americans because he wanted to ensure other jurors, who happened to be white, served on the jury.[68] In a Georgia case, the prosecutor stated he struck a juror because he was black and had a son in an interracial marriage.[69] Faced with such blatantly race-based reasoning, appellate courts in these cases were forced to conclude that these peremptory strikes were the result of illegal racial discrimination. Where the prosecutor's reason does not explicitly mention race, however, enforcement of anti-discrimination law has been much more difficult.

A startlingly common reason given by prosecutors for striking black prospective jurors is a juror's alleged "low intelligence" or "lack of education."[70] Courts have recognized this "is a particularly suspicious explanation given the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries."[71] In several cases, appellate courts have struck down this type of reason because there is no evidence of low intelligence. A federal court reversed an Arkansas conviction where the prosecutor claimed a black juror was illiterate based solely on his statement that he had not read about the case in the newspaper, without ever asking about his reading ability.[72] In other cases, however, strikes based on "low intelligence" have been upheld, including a Louisiana case in which the prosecutor said the excluded black prospective juror was "too stupid to live much less be on a jury."[73]

Prosecutors claimed they struck potential juror Isralean Chambers for wearing her glasses, which are tinted, in a Montgomery, Alabama courtroom. An appeals court later found that Mrs. Chambers was one of four African Americans illegally struck from the jury of a black defendant on trial for a drug charge. Prosecutors offered reasons such as gum-chewing and traffic tickets for other illegal strikes. In reversing the conviction, the appeals court noted that Montgomery County prosecutors have a history of illegally excluding black prospective jurors.

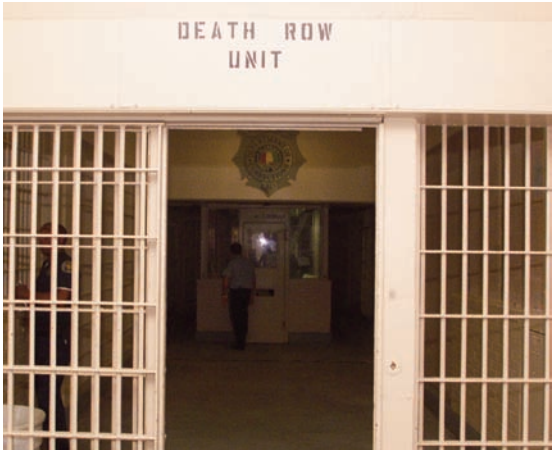
Prosecutors' other reasons for striking African Americans often correlate strongly with racial stereotypes. Prosecutors frequently claim to strike African Americans because they live in a "high crime area"[74] (meaning a predominantly black neighborhood); are unemployed or receive food stamps;[75] or had a child out of wedlock.[76] These types of reasons are not always recognized as pretexts for discrimination. An Alabama court upheld as race-neutral a prosecutor's strike based on the juror's affiliation with an historically black university.[77] But other courts have struck down as illegal racial discrimina-

An Alabama court upheld as race-neutral a prosecutor's strike based on the juror's affiliation with an historically black university.

tion prosecutors' assertions that they struck jurors who believed police sometimes engage in racial profiling[78] and a juror who had filed a civil suit alleging racial discrimination at his job.[79]

Another stereotype-based reason given by prosecutors to justify excluding black jurors is the assumption that the potential jurors are related to other African Americans with similar but very common last names who have been prosecuted by the district attorney's office. Prosecutors chose not to simply ask prospective jurors if they knew individuals involved in other cases before striking them. This behavior has been upheld in some courts and struck down in others as a pretext for discrimination.[80]

Prosecutors frequently justify strikes by making unverifiable assertions about African-American potential jurors' appearance and demeanor. In one South Carolina case, the prosecutor stated he struck a black veniremember because he "shucked and jived" as he walked.[81] A Georgia prosecutor explained his removal of a black prospective juror only by vaguely asserting he was unable to "establish a rapport"[82] with the juror.



Prosecutors' stereotypes about African Americans and fears about allowing them on juries are exacerbated in capital trials because, in most states, juries decide not only whether the accused is guilty or innocent but, if convicted, also decide the sentence. This has meant that racially discriminatory jury selection is especially prevalent – and often extreme – in capital cases. For example, in Albert Jefferson's capital trial in Chambers County, Alabama, prosecutors segregated potential jurors into lists titled "strong," "medium," "weak," and "black," and then struck all 26 African Americans on the black list. The trial judge found insufficient evidence of racial bias. Mr. Jefferson was tried by an all-white jury and sentenced to death.[87]

In a South Carolina case, the prosecutor struck a black potential juror because he "shucked and jived" as he walked.

A Louisiana court allowed the prosecutor to strike a black prospective juror because the prosecutor thought he "looked like a drug dealer."[83] An Arkansas prosecutor was permitted to rely on a "hunch" that an African American would be unfavorable to the State, without asking the juror about her actual views.[84] Courts have upheld the exclusion of black jurors for "race-neutral" reasons such as having dyed red hair[85] and wearing a large white hat and sunglasses.[86]

A Louisiana court allowed the prosecutor to strike a black juror who he thought "looked like a drug dealer."

These thinly-veiled excuses for removing qualified African Americans from juries show that many prosecutors have failed to take seriously the Constitution's requirement that every citizen has an equal right to sit on a jury.

African Americans who appear for jury service must walk past Confederate symbols and markers that adorn courthouses in some Southern counties, many of which were erected in the 1950s and 60s in opposition to civil rights and anti-discimination laws. Caddo Parish Courthouse, Shreveport, Louisiana, 2010.

Appellate Courts Have Not Reviewed Claims of Racial Bias Consistently

Appellate court cases from the Deep South states investigated for this report attest to the undeniable existence of racial discrimination in jury selection. Alabama provides the most disturbing example, as racially-tainted jury selection required reversal of over 80 trials, nearly 98% of which were criminal cases.[88] Alabama's "struck-jury system"[89] makes racially discriminatory use of peremptory strikes much more common. In Alabama, there is no prescribed limit on peremptory strikes in criminal cases. The parties strike down to a jury from the veniremembers that remain after for-cause challenges. This process requires the parties to alternate their strikes of veniremembers until only 12 individuals remain.[90] Alabama's process maximizes the potential exposure of its citizens to discriminatory strikes.

The highest state courts in Mississippi and Arkansas have openly acknowledged that racial discrimination in jury selection remains widespread since *Batson*.

But other states are not far behind. In Florida, 33 criminal convictions have been invalidated because the prosecutor struck jurors based on race. The highest state courts in Mississippi and Arkansas, with ten reversals each, have openly acknowledged that racial discrimination in jury selection has remained widespread since *Batson*.[91] Louisiana has seen 12 criminal verdicts reversed because prosecutors violated *Batson*, including in a recent decision from the United States Supreme Court.[92] Georgia, with eight *Batson* reversals in criminal cases, similarly has struggled to eliminate race-biased jury selection by prosecutors. The clear outlier in this analysis is Tennessee, whose appellate courts have never granted *Batson* relief in a criminal case.[93]

Tennessee courts have never reversed a conviction on a claim of racially biased jury selection under *Batson*.

This anomaly can be traced to defense attorneys' failure to object properly to prosecutors' racially biased strikes – making it harder for reviewing courts to review prosecutors' behavior – and a reluctance by appellate judges to find racial bias when claims are presented.[94]

Most *Batson*-related reversals came immediately following the decision. During this period, prosecutors frequently offered blatantly race-based reasons for their strikes. In *Goggins v. State*,[95] a Mississippi case decided two years after *Batson*, the prosecutor admitted he struck two African-American potential jurors from serving in an armed robbery trial because he had been instructed to do so at a training course on jury selection.

A Mississippi prosecutor admitted he struck two African American jurors because he had been trained to do so at a course on jury selection.

Cherry Finley was born in Selma, Alabama. Her great-grandparents were enslaved. Her grandparents and parents were sharecroppers in the Black Belt region. Ms. Finley began picking cotton when she was six years old. She endured the brutal realities of Jim Crow and racial segregation: white and colored drinking fountains; having to step off the sidewalk when white people passed; the constant threat of racial violence. Her family was threatened with eviction and joblessness by white landowners in the 1950s if they associated with civil rights workers. Ms. Finley registered to vote after the Voting Rights Act passed in 1965. She has lived in Dallas County her entire life but has never served on a jury. She was called for jury service and illegally excluded on the basis of race by the prosecutor, who said she should not serve because she was "separated from her husband" even though whites who were divorced or separated were permitted to serve.

Congdon v. State[96] dealt with a prosecutor in a murder case who struck all four African Americans in the venire because they lived in Ringgold, Georgia. The prosecutor based his strikes on the advice of Ringgold's sheriff, who testified he had a troubled relationship with some members of the town's African-American community and was uncomfortable with any of his town's black residents serving on the jury. In the Louisiana case of *State v. Lewis*,[97] the appellate court reversed a conviction for cocaine distribution after the prosecutor acknowledged he struck an African-American juror in order to seat a white juror.

Several Alabama cases display similarly unnerving expressions of racial bias. At a federal court hearing to review a capital murder conviction, a Birmingham prosecutor admitted his office followed a policy of striking African Americans because of their race.[98] A Montgomery

County prosecutor confessed in response to a *Batson* motion that he struck a 23-year-old black male veniremember for fear that "he might assimilate [sic] with the [African-American] defendant . . . [and] there were no other young black males that I could see on the jury venire."[99] In *McCray v. State*, a capital case in Houston County, the prosecutor used seven strikes to remove African Americans because "if I hadn't have [sic], we would have had an all black jury."[100]

In an Alabama capital murder case, the prosecutor removed African Americans because he did not want too many black people to serve on the jury.

Such unvarnished racial bias drove the higher rate of reversals in the few years following *Batson*, though comparably extreme cases have arisen in recent years.[101] Unfortunately, these glaring violations may have distracted courts from the necessity of policing more embedded forms of racial bias, while simultaneously suggesting to *Batson*-weary prosecutors the level of savvy necessary to avoid detection. The lower rate of reversals following this initial period can be attributed to prosecutors carefully disguising their racial bias, a practice regrettably abetted by trial and appellate courts' abdication of their duty to combat racial discrimination in the justice system.

Exacerbating this problem is that, when appellate courts find that the State has illegally excluded people of color from jury service, prosecutors face few, if any, personal consequences for their malfeasance. Prosecutors who engage in illegal racial discrimination rarely receive public scrutiny, which leaves the general public ignorant that their district attorney's office has intentionally excluded African Americans from jury service. Perhaps because of this silence, repeat violators of *Batson* remain in office – like the district attorney for Montgomery County, Alabama. The Alabama Supreme Court has criticized her office's history of racial discrimination and state and federal appellate courts have reversed her cases 13 times for *Batson* violations, but she remains in office.[102] In Houston County, Alabama, the district attorney's office continues to secure all-white or nearly all-white juries in capital cases despite five *Batson* reversals by the Alabama courts in just a seven-year period from 1991 to 1998.[103] Similarly, the district attorney in Jefferson Parish, Louisiana, has retained his position despite five *Batson* reversals since his initial election in 1996.[104]

Prosecutors who illegally exclude people of color from juries face few, if any, consequences for their racially discriminatory conduct.

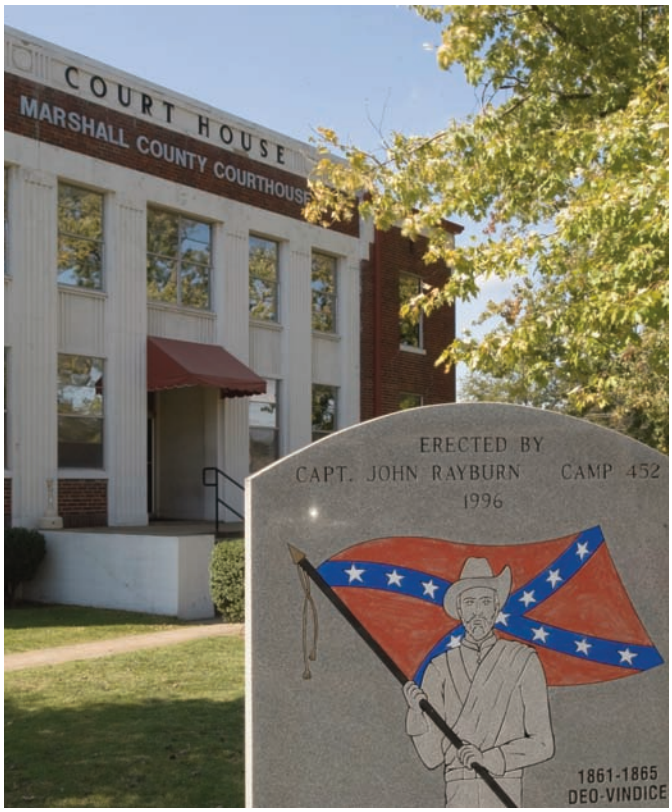
Many black residents of Southern counties have never been called for jury service or permitted to serve.

Continued tenure by prosecutors who have demonstrated racial bias reveals an indifference to racial discrimination in jury selection that allows it to persist. Absent vigilant enforcement of *Batson* by the courts, citizens of color are left powerless to combat their deliberate exclusion from the justice system.

Absent vigilant enforcement of anti-discrimination law by the courts, citizens of color are left powerless to combat their deliberate exclusion from the justice system.

Variation Among State Courts

The states analyzed for this report are addressing claims of racially biased jury selection in a variety of ways. Although in every state there is evidence of general indifference to the seriousness of excluding people from jury service based on race and of impunity for discriminatory actors who rarely are held accountable for bias, some states seem particularly resistant to enforcing every citizen's right to serve on a jury. Moreover, courts are inconsistent and can be skeptical about the presence of racial bias even when the history and evidence strongly suggest that relief should be granted. As techniques to avoid detection of discriminatory practices have grown more sophisticated, so has the need grown for greater accountability from prosecutors, trial judges, and appellate courts that review claims of racially discriminatory jury selection and too often tolerate racial bias.



Marshall County Courthouse, Alabama, 2008

Near-Total Deference to Prosecutors in Tennessee

More than 100 criminal defendants have raised *Batson* claims on appeal in Tennessee, but this state's courts have *never* reversed a criminal conviction because of racial discrimination during jury selection. While this might seem to indicate that Tennessee is free from race discrimination, the reality is that proving discrimination in Tennessee is extraordinarily difficult because state courts tend to accept at face value prosecutors' explanations for striking jurors of color – even reasons that are implausible or not supported by the record. In the 2007 case of *State v. Hill*, the prosecutor struck all but one African American, leaving a black man to be tried by a nearly all-white jury.[105] The prosecutor claimed he struck one African-American man

because he was "not very bright" and "went on some diatribe" during voir dire. The appellate court found no such "diatribe" in the record, but still upheld the case.[106] In a similarly disturbing case from 2006, *State v. Tyler*, the prosecutor struck only African Americans, and both the trial and appellate courts accepted his explanation that he struck one black juror for being "tentative and timid" and another for wearing a large hat and sunglasses.[107] These cases demonstrate a failure by Tennessee courts to critically evaluate whether a prosecutor's explanations are mere pretexts for discrimination and a tendency, instead, to accept almost any reason that is not openly or concededly discriminatory.

Lee Bowdry was illegally excluded from jury service on the basis of race in Lee County, Mississippi. The prosecutor attempted to mask the racial basis for Mr. Bowdry's exclusion by telling the court that he was excluded because he "looked hostile."

Building Blocks for Meaningful Review in Florida

Florida has crafted unique provisions under its own state laws to protect jurors from racial discrimination. Indeed, Florida law is more protective than federal anti-discrimination law in several respects. Once a prosecutor has given a race-neutral reason for striking a particular juror, Florida judges must assess whether the reason is "genuine" by considering factors such as whether (1) the prosecutor actually questioned the excluded juror; (2) the juror was singled out during voir dire or manipulated into providing answers that would tend to disqualify him from jury service; (3) the prosecutor's reason for the strike was related to the facts of the case, and (4) other jurors gave similar answers but were not struck. Under Florida law, the prosecutor's reason for the strike *must be supported by the record*, which makes it much harder for the prosecutor to manufacture explanations after the fact.[108] Florida's rule stands in stark contrast with states like Tennessee where prosecutors are allowed to rely on reasons that are not supported by the record.

Florida's protections effectively discourage overt discrimination in jury selection, but the state is far from perfect. In recent years, Florida courts in a fair number of cases have failed to recognize shocking examples of racial discrimination in jury selection.[109] Relative to its Southern neighbors, though, Florida's state law framework creates a much better environment for remedying racial discrimination in jury selection.

Ongoing Problems in Louisiana

Historically, Louisiana has not been particularly receptive to jury discrimination claims. A recent United States Supreme Court decision criticizing the state courts' failure to carefully

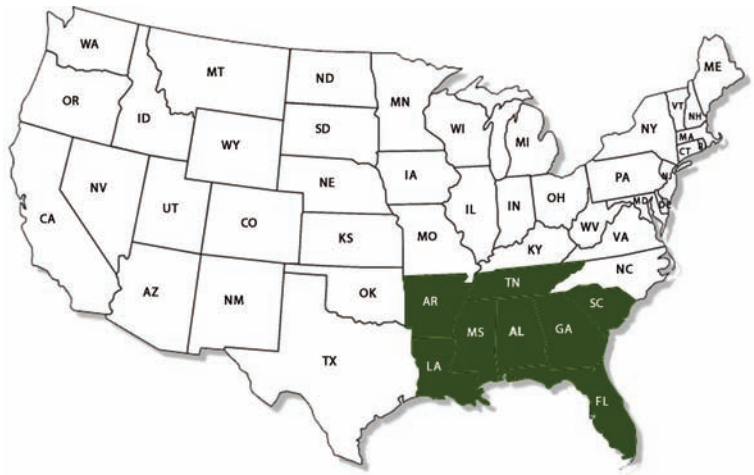
scrutinize a prosecutor's exclusion of African-American jurors highlighted the problems of racially biased jury selection there. In 2008, the Court decided *Snyder v. Louisiana*, in which a black college student was excluded from jury service along with all other African Americans in the venire.[110] The Court found the prosecutor's asserted reason for striking the student – he "looked nervous" and was concerned the trial might interfere with his student teaching obligations – was a pretext for discrimination, and it implicitly recognized that Louisiana courts failed to appropriately scrutinize the prosecutor's explanation.[111] Since *Snyder*, the Louisiana Supreme Court has reversed a case after finding racial bias in jury selection.[112] However, that court also reinstated a conviction after an intermediate court had found illegal discrimination in jury selection.[113] While there are signs that courts in Louisiana have become slightly more attentive to discrimination claims since *Snyder*, a great deal of work clearly is needed to effectively deter and eliminate racially biased jury selection in this state.

Continued Racial Discrimination in Mississippi, Georgia, and Arkansas

The Mississippi Supreme Court has recognized that racial discrimination in jury selection continues to be a serious problem in Mississippi. In 2007, the court expressed frustration that "attorneys of this State persist in violating the principles of *Batson* by racially profiling jurors" and found that "racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down."[114] The court threatened to change its system of peremptory challenges if things did not improve.[115] Among other remedies, it would consider limiting the number of peremptory strikes or enhancing voir dire.[116]

In 2007, the Mississippi Supreme Court expressed frustration that "racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down."

It is encouraging that the Mississippi Supreme Court has acknowledged the problem, admitted that *Batson* has not ended juror discrimination, and proposed other remedies. But Mississippi courts continue to credit highly dubious explanations for prosecutor's exclusion of jurors of color. In a 2008 case where the prosecutor used his first eight peremptory challenges against African Americans, Mississippi courts credited the prosecutor's claim that he struck two black jurors because they had "only" a twelfth-grade education and struck an African-American engineer because she was "inattentive" and dyed her hair.[117] In another 2008 case, state courts accepted a prosecutor's explanation that he excluded an African-American woman because she had lived in the county for "only" 22 months and did not make eye contact with



EJI studied jury selection practices in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee.

him and that he struck a black information technology specialist because he might blame the state for the lack of audio and video evidence in the case.[118] The deference given to these prosecutors reveals that, despite the Mississippi Supreme Court's strong language regarding the need to end juror discrimination, the state's trial and appellate courts are failing to exercise meaningful oversight.

Individuals seeking to raise *Batson* claims in Georgia face even higher barriers to relief. It is particularly difficult to show that a poor person has been the victim of racial discrimination in Georgia because state courts have upheld strikes based on income-related characteristics, such as a juror's place of residence, perceived lack of education, and perceived lack of employment history. In *Smith v. State*, Georgia courts accepted the prosecutor's explanation that he struck two African-American jurors because they lived in public housing projects with prevalent gang activity and might be prejudiced against state witnesses who were gang members.[119] In the 2005 case of *Taylor v. State*, the prosecutor used all five peremptory strikes to remove African Americans from the jury, explaining that he struck people who lacked education or work experience, and that one juror also "seemed odd."[120] Georgia courts upheld this explanation as race-neutral, noting that the one African American who served on the jury was a college student, consistent with the prosecutor's stated desire for a well-educated jury. The court did not explain why jurors needed such a high level of education to sit on a straightforward case in which the defendant was accused of robbing and shooting a man he believed had raped his girlfriend.[121] Georgia courts' willingness to uphold strikes based on residence in a particular neighborhood, a perceived lack of education, or a perceived lack of employment history provides a shield for prosecutors to strike poor people and may lead to the disproportionate exclusion of people of color from juries.

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Arkansas courts have upheld strikes of African Americans based on a prosecutor's descriptions of the jurors' demeanor, body language, tone, or other amorphous characteristic that cannot be disproved by the record.

Arkansas similarly is resistant to successful *Batson* claims, and Arkansas law has several features which make it particularly difficult to prove racial discrimination in jury selection. First, an Arkansas court typically will credit a prosecutor's explanation for a peremptory strike even when the strike is based on information known only to the prosecutor's office which cannot be verified by the record.[122] In *Thornton v. State*, the prosecutor claimed to have struck a juror because of a "hunch" that the juror was related to a criminal defendant in another case, and this strike was upheld as race-neutral.[123] In several other cases, Arkansas courts have accepted strikes of African-American jurors based in part on a prosecutor's descriptions of the jurors' demeanor, body language, tone, or other amorphous characteristic

that cannot be disproved by the record.[124] Finally, Arkansas courts repeatedly have found that the presence of any African American on a jury is strong evidence that the prosecution has not engaged in racial discrimination.[125] This overly simplistic approach ignores Supreme Court precedent holding that the presence of a single African-American juror does not disprove discriminatory intent on the part of the prosecutor,[126] and that removing even a single juror on the basis of race violates the Equal Protection Clause.[127] Moreover, when coupled with the Arkansas courts' deference to prosecutors and acceptance of peremptory strikes not supported by the record, it effectively exempts prosecutors from any meaningful review of peremptory strikes.

Lamar County Courthouse, Alabama, 2008

The Role of Disparate Treatment in Alabama and South Carolina

Throughout the South, a common method of demonstrating racial discrimination in jury selection is to show that the prosecutor treated jurors of color differently from similarly situated white jurors.[128] When the prosecution claims it struck an African-American juror for a race-neutral reason – such as the juror's industry or profession – but does not strike white jurors who share the same characteristic, this "disparate treatment" provides strong evidence of discrimination.[129] Disparate treatment may be the only sign as to whether a prosecutor's explanation for a peremptory strike is genuine.

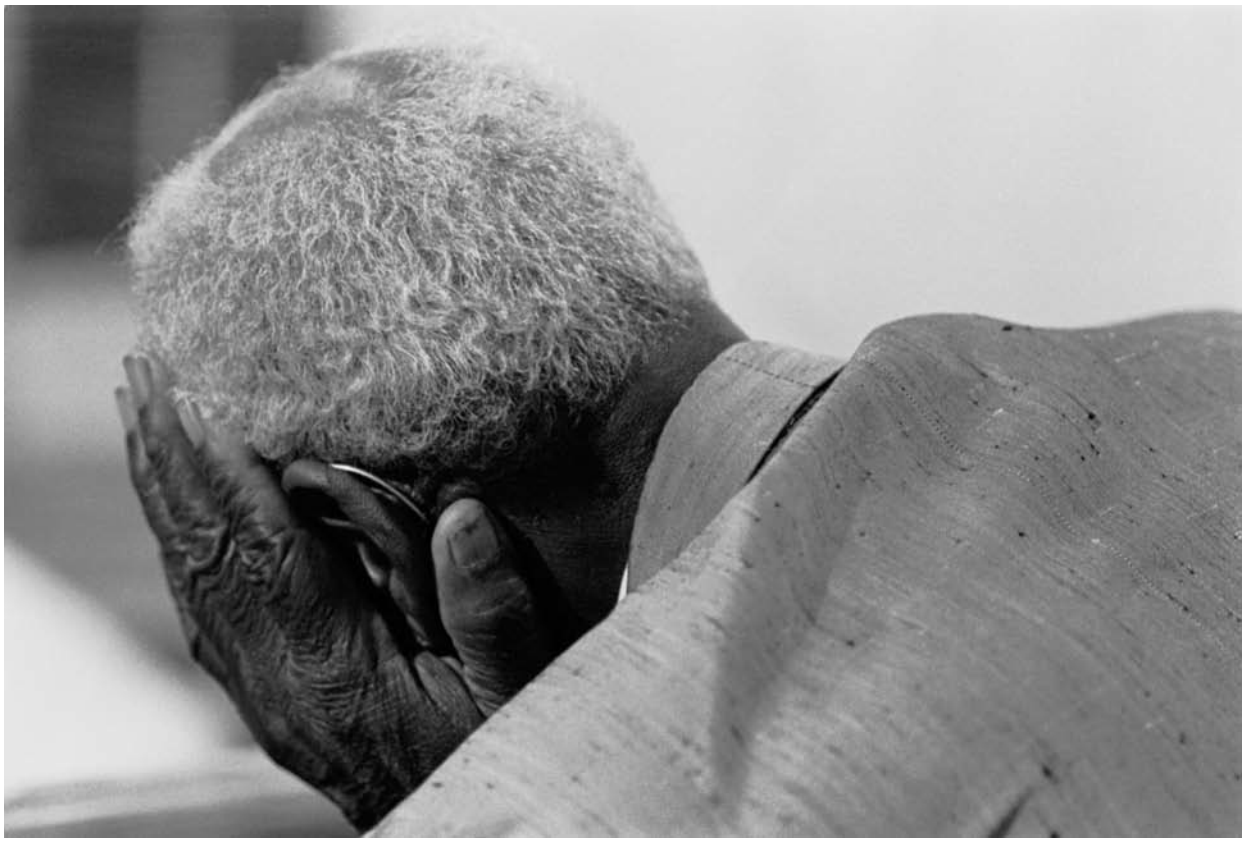
Alabama and South Carolina take opposite approaches to *Batson* challenges based on disparate treatment. South Carolina initially refused to uphold reasons for striking black jurors that applied equally to whites,[130] but in the early 1990s the South Carolina Supreme Court retreated from enforcement of anti-discrimination laws. In *Sumpter v. State*, that court considered the prosecutor's strike of a black veniremember who had a "prior DUI involvement" in light of evidence that the prosecutor did not strike a white juror with a DUI conviction.[131] The court upheld the strike as race-neutral, noting the African-American juror's case, but not the white juror's case, was handled by the same prosecutor's office.[132] In *State v. Dyar*, the prosecutor claimed he struck an African American because he had prosecuted the potential juror, but did not strike two white jurors who also had criminal charges.[133] The South Carolina Supreme Court again upheld the strike, accepting the prosecutor's explanation that, unlike the white jurors, he personally prosecuted the black juror.[134] In dissent, two justices wrote, "It does not require a deep analysis to realize that today's rule is fraught with enough practical problems to render a defendant powerless to counter invidious discrimination."[135] The dis-

sent called this departure from South Carolina precedent "alarming."[136] Indeed, no criminal defendant has won a *Batson* challenge in the state since 1992.

Even when prosecutors use all or almost all of their peremptory strikes to exclude people of color, Alabama courts often refuse to find a *Batson* violation.

Alabama courts, in contrast, have been reluctant to grant *Batson* relief in recent years *without* evidence of disparate treatment.[137] This has meant that even when a prosecutor uses all or almost all of his or her peremptory strikes to exclude people of color, Alabama courts often refuse to find a *Batson* violation unless a clear case can be made that an excluded African-American veniremember was similarly situated to a white juror. In the 2008 case of *Floyd v. State*,[138] the prosecutor peremptorily struck 10 of 11 African Americans in the venire; the black defendant was tried by an all-white jury with one African-American alternate juror. When asked to explain his peremptory strikes, the prosecutor asserted he struck one juror because of her body language and demeanor, struck another juror because she was quiet during voir dire, and could not fully recall the reason for a third strike.[139] Finding no disparate treatment, the Alabama courts accepted these reasons as race-neutral even though the prosecutor had excluded a shocking number of African Americans from Mr. Floyd's jury.[140]

It is clear that, without greater consistency and commitment to enforcing anti-discrimination laws, racially discriminatory use of peremptory strikes will continue. Lack of enforcement is a primary reason why exclusion of people of color from juries remains widespread in nearly all of the states studied for this report.



RACE DISCRIMINATION'S OTHER VICTIMS: JURORS WRONGLY EXCLUDED

Racial discrimination in jury selection violates the constitutional rights of the jurors themselves. In *Powers v. Ohio*,[141] the United States Supreme Court held that jurors have a right not to be excluded based on their race, yet race-based exclusion continues to stigmatize growing numbers of Americans. EJI staff interviewed scores of people of color who had been excluded from jury service across the Southeast to document the impact of discrimination on citizens denied the right to serve. These African-American citizens dutifully reported for jury service only to be turned away because their race created a false presumption that they could not be fair, could not follow the law, or are somehow unworthy for full civic life. Many had overcome the legacy of the Jim Crow South to serve in the military, own businesses, and send their children to college, only to find discrimination still as close as their county courthouse.

African Americans dutifully reported for jury service only to be turned away because their race created a false presumption that they could not be fair or were unworthy for full civic life.

The sting of mistreatment can linger for years. Byron Minnieweather was wrongly struck in 2004 and has since moved away from his hometown of Columbia, Mississippi. Memories of the racially-charged trial still trouble him. He told EJI, "It was my civil right to participate as a juror."

Melodie Harris had lived in Lee County, Mississippi, for a decade and worked for the same local company for six years when a prosecutor claimed she had "no ties to the community" and struck her from a jury. Ms. Harris knew she and most of the other black jurors had been treated unfairly. "It was just so blatant," she said. Instead of turning away, Ms. Harris chose to bear witness and take action. She returned to the courthouse every day for the trial of Alvin Robinson, a black man who had been chased and assaulted by a white man following a traffic altercation, then charged with murder for retaliating in fear.[142] Ms. Harris was aghast as she watched three jurors sleep through portions of the trial, then vote guilty. A former bank teller in her 40s who has worked two jobs most of her life, Ms. Harris considered herself a supporter of law enforcement. "I like the police. I'll dial 911 in a second," she said. But watching the discriminatory tactics used to ensure Mr. Robinson would go to prison has shaken her faith in a system she wanted to trust. "I thought justice was supposed to be blind, and just sitting there, how could anybody vote guilty listening to the evidence with those jury instructions?" After the trial, Ms. Harris visited Mr. Robinson in prison and helped him with his appeal. Eventually, the Mississippi Court of Appeals confirmed her suspicions. The court reversed Mr. Robinson's manslaughter conviction because of race-based strikes in selecting the jury. The reasons offered by the State were "so contrived, so strained, and so improbable," the court found, that they were unquestionably pretexts for purposeful discrimination.[143]

Excluded jurors and their families spoke about suffering shame and humiliation as a result of false inferences that criminal activity made them unfit to serve. In Montgomery County, Mississippi, Vickie Curry was illegally struck by a prosecutor who claimed her husband had a felony record.[144] The prosecutor mistook her husband for someone else, and the falsehood resurfaces each time the case appears in media reports. Charles Curry, retired from the National Guard after 23 years of service, is deeply disturbed that the district attorney suggested he does not respect the law. This common tactic thoughtlessly tarnishes the reputations of African Americans living lives of quiet decency. A prosecutor in Talladega County, Alabama, sought to characterize Ruth Garrett, a deeply religious woman who works as a school bus driver, as unfit for jury service because she was related to criminals.[145] In fact, Mrs. Garrett had never met the family who shared her last name, but the prosecutor never bothered to ask her.

Another common theme among illegally struck jurors is the sad recognition that their individual experiences were small pieces in the structure of racism that envelops their communities. "I'm not surprised because that's how the system is around here," said Gerald Mercer, who was struck from a Russell County, Alabama, jury because he had traffic tickets and expressed hesitation about the death penalty, while white jurors with similar circumstances remained on the jury.[146] "They do a lot of stuff around here that is unequal justice." Vickey Brown was illegally struck from a jury in Houston County, Alabama, by a prosecutor who admitted he wanted to avoid "an all-black jury."[147] Although Mrs. Brown had encountered racist treatment in job interviews, she was

Brenda Greene and her husband Homer worked hard their whole lives at a small-town textile mill in Talladega County, Alabama – humble, honest work that was not easy. In his 50s, Mr. Greene took on a second job at McDonald's. The Greenes tried to instill color-blind attitudes in their children and grandchildren – not a small task in Sylacauga, where racial divisions limit opportunities in business, schools, and local government, which are dominated by whites. For their efforts, the Greenes were falsely portrayed as active members of the drug culture by a prosecutor grasping for reasons to keep blacks off a capital jury. The prosecutor said he struck Mrs. Greene because her husband sold drugs and was involved with stolen property and she was friends with drug dealers prosecuted by his office.[148] Before being contacted by EJI, Mrs. Greene was unaware of these false accusations. She was shocked by the information. "You're kidding me! That's a lie! At our house?" she said after reading the court record. Mrs. Greene desperately wanted to clear her family's name, even though the statements were made in 1992. Her family's shared history with the prosecutor reaches back even further. Her mother was employed by his family and cleaned his boyhood home. Still, the truth did not get in the way of the prosecutor's efforts to secure a mostly white jury. Mrs. Greene recalled the only contact she actually had with a drug investigation: when police were chasing a suspect through the neighborhood, she pointed in the direction he fled.

Excluded jurors and their families spoke about suffering shame and humiliation from false inferences that criminal activity made them unfit to serve.

particularly offended at the district attorney's suggestion that she would be lenient on a black defendant because she is black. "I was shocked when I found out," she said. Alice Branham, a 31-year veteran of the Florida Department of Corrections, was illegally struck from a jury in Jefferson County, Florida. When forced to provide a race-neutral reason for excluding her, the prosecutor noted only her work for the State.[149] Ms. Branham was so accustomed to institutional racism that she had no idea this was a violation of her rights. After all, when she started working for the prison system, her supervisor informed her he did not like black people, and only grew to accept her after she started bringing homemade cookies and collard greens to the office.

Alice Branham, a 31-year veteran of the Florida Department of Corrections, was illegally struck from a jury in Jefferson County, Florida. When forced to provide a race-neutral reason for excluding her, the prosecutor noted only her work for the State.

Ruth Scurry, along with all eight other qualified African-American potential jurors, was excluded from serving on a felony trial jury in Jefferson County, Florida. A 20-year veteran of the Department of Corrections, Ms. Scurry expressed surprise about the prosecutor's accusations but noted the continuing challenges of racial bias in her community.

For many excluded black jurors, the pretexts provided to refute claims of discrimination add another layer of injury. A Baldwin County, Alabama, prosecutor characterized potential juror Allen Mason as "not very well educated" and having "difficulty understanding the concepts that the state asked him" even though Mr. Mason answered every question, "Yes, sir" or "No, sir," and clearly explained his beliefs.[150] Nearly 20 years later, Mr. Mason grew emotional as he recalled how the prosecutor's racist actions made him feel unworthy. Elsewhere, prosecutors have countered *Batson* claims by describing African Americans in the jury pool as inattentive, unresponsive, or hostile.[151] Black men have been struck for wearing jeans or an earring.[152] A Mobile, Alabama, prosecutor claimed he struck Carolyn Hall because "she works at a retarded place" and he did not want jurors who were sympathetic to the disadvantaged.[153] While Mrs. Hall remains committed to the mentally disabled people she cares for, she told EJI staff that her work would not have affected her ability to be fair.

Hester Webb (*right*) owns a successful child care center. She was struck from a jury in Montgomery, Alabama. When asked for a race-neutral reason, the prosecutor said Ms. Webb was chewing gum and was hesitant to answer questions, which led him to suspect she had prior knowledge of the case.[154] Ms. Webb was stunned at the suggestion she did something so wrong: "It needs to stop. It's not right. It's not fair."

"It needs to stop."

– Hester Webb

Earl McGahee

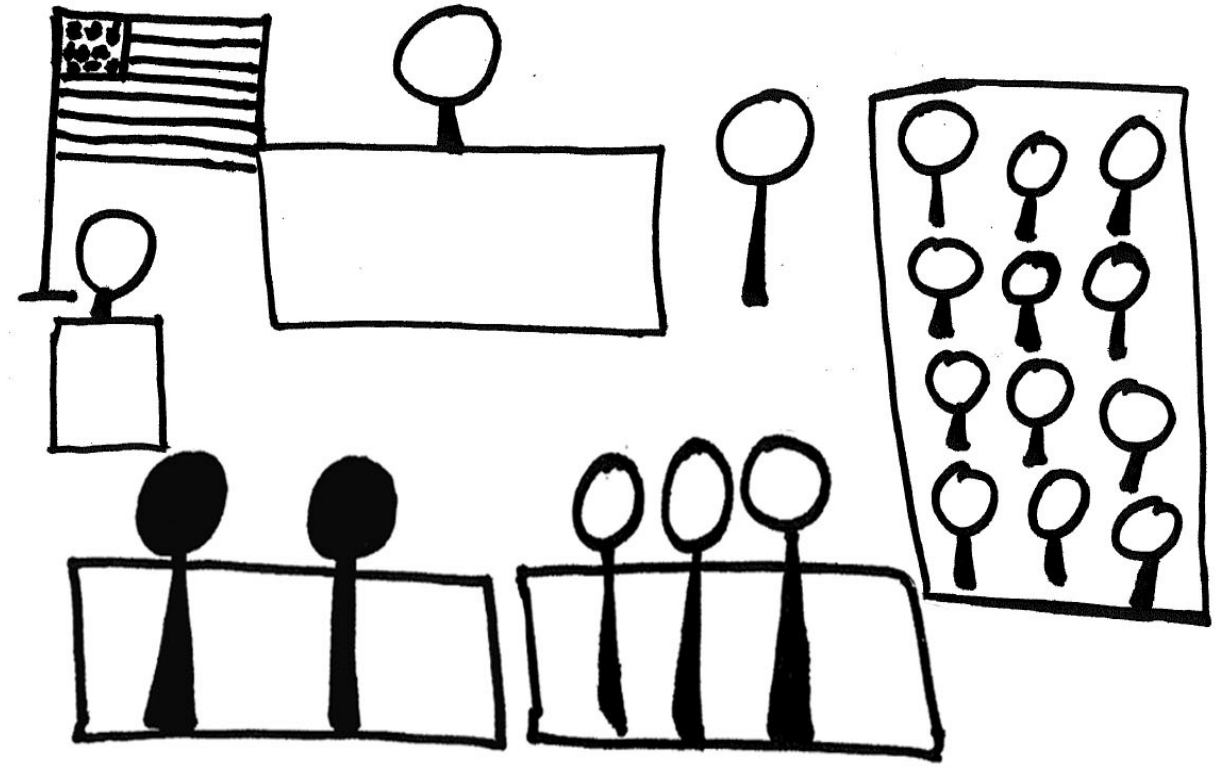
In 1986, Earl Jerome McGahee, who is black, was charged with two counts of capital murder in the deaths of his ex-wife and her classmate in Selma, Alabama. Mr. McGahee was tried by an all-white jury in a county that was more than 55% African-American after Dallas County District Attorney Ed Greene removed every one of the 24 African Americans who qualified for jury service.[155]

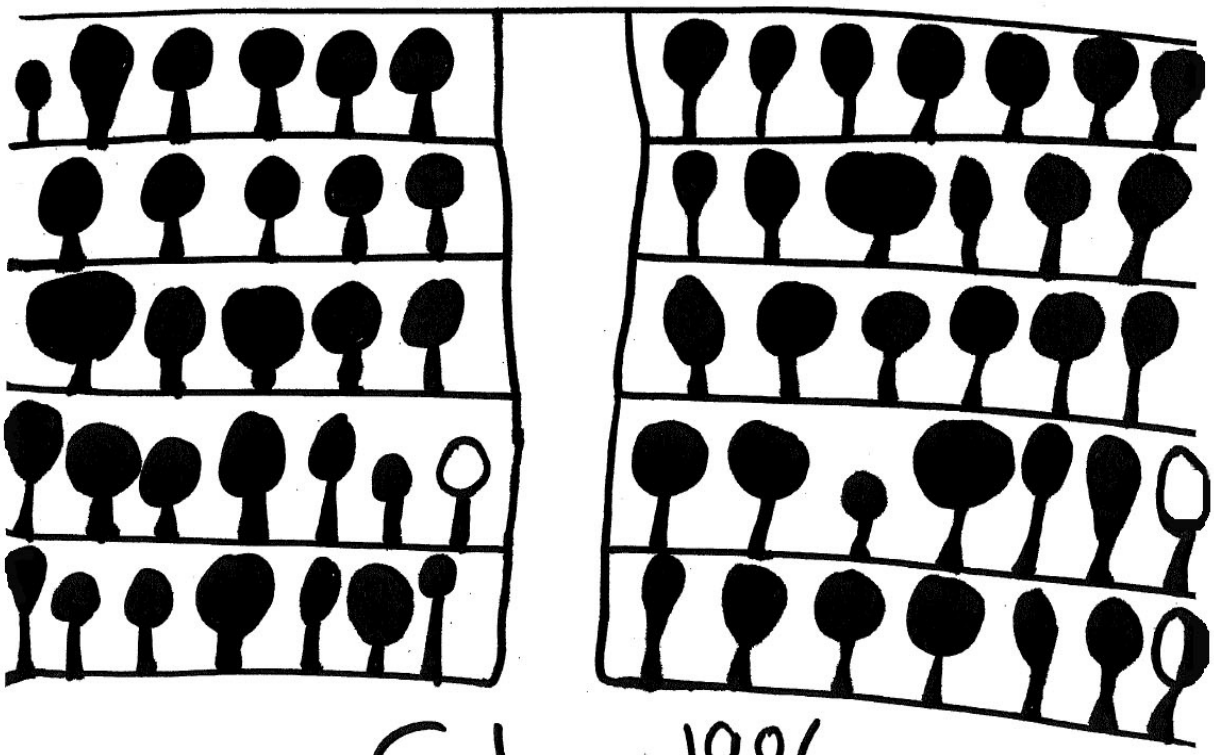
When asked to explain why he removed so many African Americans from Mr. McGahee's jury, the district attorney said he believed many of these people were of "generally low intelligence," despite the lack of any evidence suggesting this was the case.

When asked to explain why he removed so many African Americans from Mr. McGahee's jury, the district attorney stated that he believed many of these individuals were of "low intelligence," despite the lack of any evidence suggesting this was the case.[156] Indeed, the prosecutor did not ask these veniremembers any questions about their educations and most of the questions he asked were answered by a show of hands.[157] His baseless assertion of "low intelligence" as a reason to exclude African Americans from Mr. McGahee's jury was particularly insulting because similar claims historically have been used to prevent African Americans from serving on juries.[158] Remarkably, the prosecution asserted that more than one-third of the African Americans called for jury service in Mr. McGahee's case were of "low intelligence."[159] The struck jurors included mechanics, ministers, and community leaders, many of whom participated in the Selma Civil Rights Movement.

Edith Ferguson was barred from jury service in Dallas County, Alabama, along with all 23 other African Americans who were called for Earl McGahee's trial. Ms. Ferguson was one of six black prospective jurors struck by the prosecutor because, he asserted, they were of "low intelligence."[163] Ms. Ferguson had worked for the Selma Police Department for many years as a crossing guard. Her son, Charles Morton (above), served 27 years in the United States Army before retiring. Both expressed great anguish over the prosecutor's exclusion of African Americans and insulting comments, as well as the continuing problem of racial bias in their community. In 2009, a federal appeals court found the racially biased exclusion of jurors in this case to be "astonishing."[164]

In 2009, Mr. McGahee was granted a new trial after a federal court relied on the district attorney's "astonishing pattern" of removing qualified African-American jurors as evidence of racially discriminatory jury selection.[160] This was not the first time the Dallas County District Attorney had been caught engaging in racial discrimination during jury selection: in 12 reported cases from 1988 to 2001, he used 79% of his peremptory strikes to exclude African Americans from jury service, resulting in many all-white or nearly all-white juries in a majority black county.[161] Since 1990, five individuals have won new trials because African Americans were illegally excluded from jury service in Dallas County.[162]





Selma, 1986

Robert Tarver

In 1984, Robert Tarver *(right)*, a 36-year-old black man, was charged with the robbery-murder of a 63-year-old white male convenience store owner in Cottonwood, Alabama. Mr. Tarver consistently maintained his innocence, even passing a polygraph test when denying he killed the victim.[165] Only one witness placed Mr. Tarver at the scene of the crime: his co-defendant, Andrew Lee Richardson.[166] As the United States Court of Appeals for the Eleventh Circuit acknowledged, "very little evidence made Robert Tarver a better candidate than Richardson to be found the actual killer."[167] At trial, the State's main evidence against Mr. Tarver was Richardson's testimony. Though the district attorney denied that a deal had been struck with Mr. Richardson, shortly after Mr. Tarver's trial ended, Mr. Richardson pleaded guilty to a single count of robbery and received a 25-year sentence.[168]

Russell County is nearly 40% African-American, but Mr. Tarver was tried and convicted of capital murder by a jury comprised of 11 white jurors and only one black juror. The prosecutor later admitted that black people had been excluded on the basis of race.

Russell County is nearly 40% African-American, but Mr. Tarver was tried and convicted of capital murder by a jury comprised of 11 white jurors and only one black juror.[169] During jury selection, the prosecutor used peremptory strikes to exclude 13 of 14 black people who were qualified for jury service.[170] The assistant district attorney later admitted that the prosecutor intended to exclude black people from Mr. Tarver's jury because of their race.[171] After Mr. Tarver challenged the prosecutor's race-based discrimination, the trial judge found the prosecutor had discriminated against black jurors but refused to grant a new trial because Mr. Tarver's lawyer had failed to properly object at trial.[172] Despite the recognized merits of the claim, the lawyer's failure to object meant that subsequent courts similarly refused to grant relief.[173]

After convicting Mr. Tarver of capital murder, the jury sentenced him to life in prison without parole by a vote of seven to five. Alabama's override provision nonetheless allowed the trial judge to sentence Mr. Tarver to death.[174] On April 14, 2000, Mr. Tarver was executed by the State of Alabama in the electric chair.[175]

Frances Watson

Prosecutors are not alone in disregarding the law prohibiting race-based jury selection. Judges have displayed similar reluctance to address race bias in the courtroom. In 1991, Little Rock, Arkansas, resident Frances Watson was tried for battery.[176] When the prosecution used a peremptory strike to remove a black woman from the jury, Ms. Watson's African-American attorney objected that the juror was removed exclusively because of her race, citing *Batson*.[177] Over defense counsel's protests, the trial judge encouraged the prosecutors to explain, in front of the jury, that they were not discriminating.[178] The judge silenced defense counsel, who moved for a mistrial, arguing that the determination of racial bias should "be made by the Court and solely by the Court *outside the hearing of the jury*."[179] The judge overruled the motion and Ms. Watson was convicted and sentenced to 14 years in prison. On appeal, the Arkansas Supreme Court found the trial judge's behavior "unacceptable," noted that race is a "combustible and volatile issue," and held that an accusation of racism by one attorney against another could easily prejudice the jurors for or against the defendant.[180] Ms. Watson was granted a new trial.[181]

Ciudadanos de los EE.UU. que son bilingües no deben ser excluidos de los jurados porque tienen capacidades lingüísticas adicionales.

U.S. citizens who are bilingual should not be excluded from jury service because they have additional language skills.

Bilingual citizens have the right to serve on juries. Latinos and foreign-born citizens often are excluded from juries because of their race or ethnicity, but prosecutors successfully have used language as a "race-neutral" reason to justify their exclusion. In 1991, the United States Supreme Court upheld the exclusion of Latinos based on the prosecutor's assertion that Spanish speakers would refuse to defer to the official translation of trial testimony.[187] Noting the "harsh paradox that one may become proficient enough in English to participate in trial, only to encounter disqualification because he knows a second language as well,"[188] the Court nonetheless allowed the prosecutor to exclude Latino prospective jurors. The Court tolerated this bias because the prosecutor carefully avoided saying he did not want Spanish-speaking jurors.[189] The Court's indifference to the State's discriminatory behavior allowed its exclusionary conduct to go uncorrected.

Ada Tomlin

Some trial judges not only fail to prevent race discrimination but become collaborators with state prosecutors, as in the trial of Ada Tomlin, a black woman charged with driving under the influence.[182] When Ms. Tomlin's attorney argued that the prosecutor's removal of four qualified black jurors was racially biased, the prosecutor explained he struck one black female juror because she was "slow, talked low, and was somewhat aged" and he doubted she could endure or understand deliberations.[183] Although the juror was only 43 years old, the judge agreed that the woman was "sluggish" and would be mere "filler" on the jury.[184] Neither did the judge question the prosecutor's assertion that he struck a black man because he "shucked and jived" when he walked to the witness box.[185] The prosecutor and trial judge's reliance on racial stereotypes to justify the dismissal of otherwise qualified African-American jurors later was declared illegal by the South Carolina Supreme Court.[186]

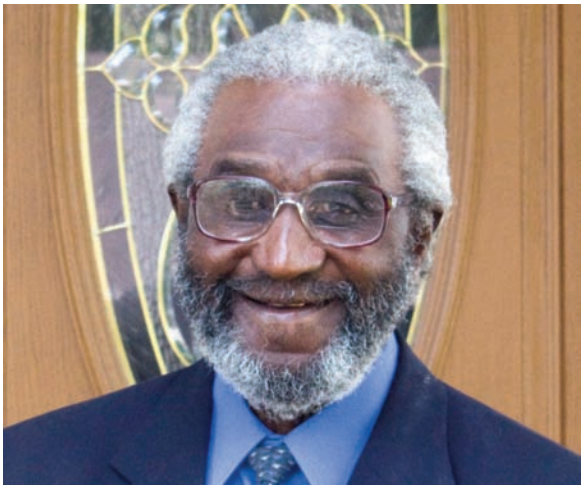
ADDITIONAL BARRIERS TO REPRESENTATIVE JURIES

In addition to peremptory strikes, other mechanisms work to keep juries unlawfully homogenous. The jury in a particular case is drawn from a larger pool of potential jurors, and frequently this pool (or "jury box") does not adequately reflect the entire community. Underrepresentation in the jury pool creates yet another barrier to jury service among people of color, women, and other minorities.

Underrepresentation of Racial Minorities in Jury Pools

The Constitution requires that the jury pool be fairly representative of the community.[190] The process for selecting the jury pool must not systematically exclude any cognizable group.[191] A group is cognizable when it is sufficiently distinctive from the rest of society.[192] Women and African Americans are cognizable groups.[193] Such groups also include other racial or ethnic minorities, daily wage earners, and unregistered voters.[194] Despite the Supreme Court's long-established rule requiring the jury pool to fairly reflect the community, disparities between the racial make-up of the jury pool and the community persist.

The problem stems in part from the way courts evaluate whether a particular group is underrepresented in the jury pool. Courts generally look at the difference between the percentage of a particular group in the community and the percentage of that group in the pool, often called the "absolute disparity."[195] Historically, courts have required an absolute disparity of greater than 10% to find a group is underrepresented.[196] The absolute disparity actually reveals little about the degree of underrepresentation because it does not show how large a portion of the cognizable group is being excluded.



At 61, Rev. Bernard Martin had never been called for jury duty in Elmore County, Alabama, where he had lived nearly all his life. In 1999, with seven other life-long residents, he filed a federal lawsuit challenging the county's unlawful exclusion of African Americans from the jury pool.[197]

Henrietta Hunt, a 64-year-old African-American woman, joined the suit. In the 1950s, she was one of the first black citizens in Elmore County to register to vote, but not before she was forced to pass a "poll test" designed to prevent African Americans from voting.[198] *Over 40 years later, Ms. Hunt had never been called for jury service.*[199]

Though African Americans comprised about 22% of the county's population, they were only 15% of the jury pool.[200] *About 30% of black residents were not represented in the jury pool.*[201] *Confronted with this compelling evidence of discrimination, state officials agreed to expand the jury lists and the Alabama Supreme Court changed its rules to allow counties like Elmore to supplement their jury selection procedures to create representative jury pools.*[202]

Given that it fails to take into account the size of the excluded group, use of the absolute disparity test may permit almost complete exclusion of small groups, while invalidating moderate underrepresentation of large groups. Indeed, if a group constitutes less than 10% of the population, the 10% absolute disparity requirement allows even the most blatant and intentional exclusion of every member of that group to go unremedied.[203] This means it is impossible for African Americans to challenge underrepresentation in 75% of counties in the United States.[204] For Latinos and Asian Americans, such challenges are impossible in more than 90% of counties, and for other people of color this constitutional protection is practically non-existent.[205]

It is impossible for African Americans to challenge underrepresentation in 75% of counties in the United States. For Latinos and Asian Americans, challenges are impossible in more than 90% of counties.

A better method for measuring underrepresentation is to divide the absolute disparity by the percentage of the group in the broader community. This ratio is referred to as the "comparative disparity" and reveals the percentage of the cognizable group that is excluded, ranging from 0% (perfect representation) to 100% (total exclusion).[206] The comparative disparity

test may overstate the significance of disparities where the total population of a cognizable group is very small, such that a difference of only a few individuals can create a large disparity.[207] But such situations are not difficult to identify, and comparative disparity remains the only method to accurately measure the degree of underrepresentation. Although the comparative disparity reveals much more than the absolute disparity about whether a jury pool fairly represents the community, few courts have embraced it and some have explicitly mandated exclusive use of the absolute disparity test.[208]

Unfortunately, the Supreme Court recently declined an opportunity to make clear that the comparative disparity should be considered in determining whether a group is underrepresented in the jury pool.[209] In *Berghuis v. Smith,* the Court rejected a challenge to a jury pool with an 18% comparative disparity in the representation of African Americans because it found the African-American defendant (who had been convicted by an all-white jury) had not presented sufficient evidence that a particular practice used by the county had caused the underrepresentation.[210] In the wake of *Berghuis*, even where significant underrepresentation persists, it remains difficult to remedy.

Excusing Jurors "For Cause"

The composition of the jury pool also may be affected greatly by the way each jurisdiction decides whom to excuse from jury service. States set statutory qualifications for jury service and judges also excuse jurors from serving if it would be a hardship for the juror. The youngest and oldest members of the community are often excluded. In some states, the minimum age for jury service is 21, even as increasingly younger children are facing criminal jury trials.[211] Many states also exempt individuals over age 70 from jury service, even if they are able to serve.[212]

Many local court practices tend to deny people with low incomes and people of color the opportunity to serve on a jury.

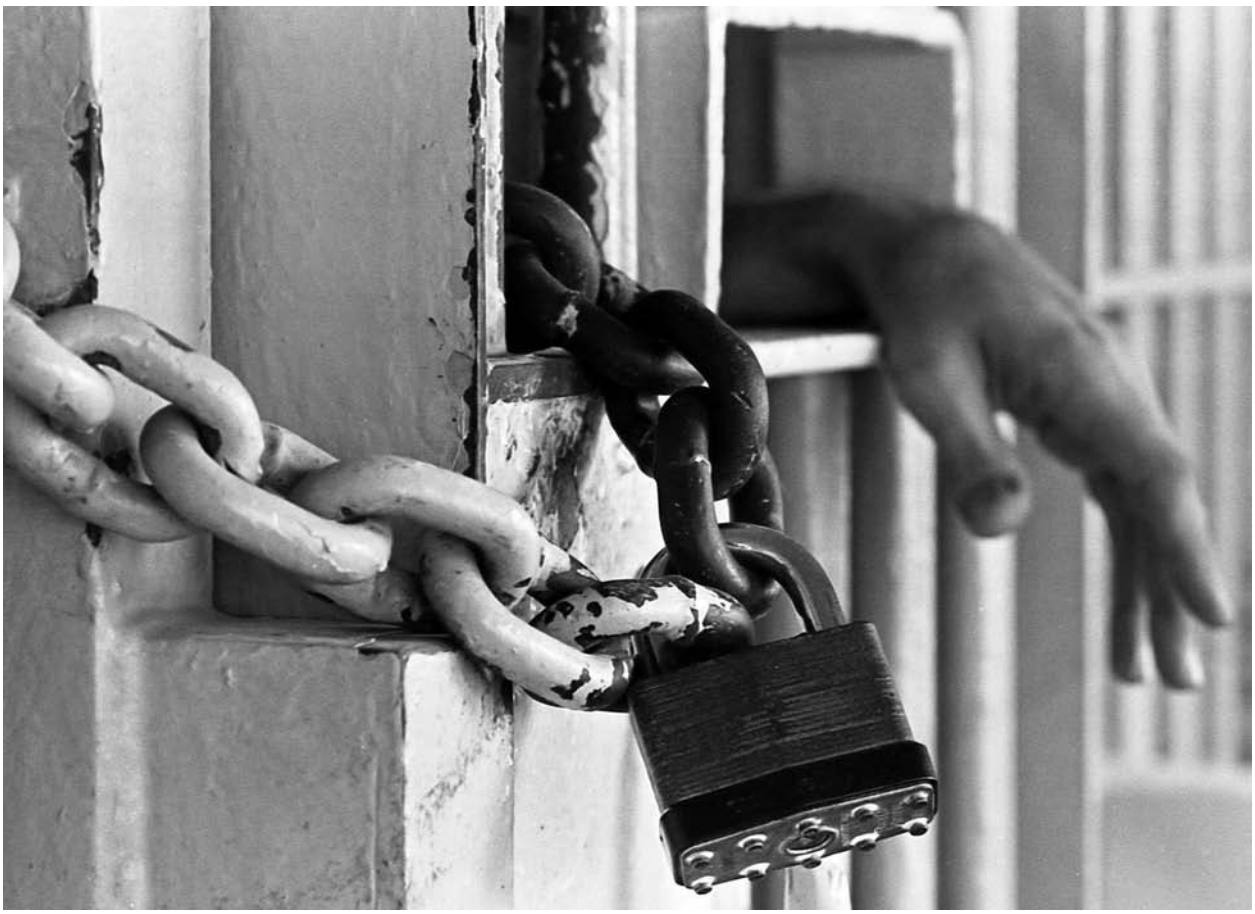
Other exemptions tend to deny people with low incomes the opportunity to serve on a jury.[213] Individuals who work for an hourly wage cannot afford to miss work because they will not get paid. Parents who are the sole caregivers for their children cannot serve unless they have access to affordable child care. People living in poverty often are unable to obtain transportation, or their addresses are not current in court files, so they do not receive a summons or appear in court unless additional efforts are made to serve them.

Only rarely do lawyers seek an order to provide accommodations to low-income prospective jurors, such as providing child care or other assistance. As a result, many poor and low-income people and parents without child care options never serve on a jury and an important perspective is excluded from civil and criminal proceedings.

THE PERCEIVED AND ACTUAL INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

Excluding racial minorities from juries causes serious collateral consequences: the credibility, reliability, and integrity of the criminal justice system is compromised when there is even an appearance of bias and discrimination. Communities of color across the country have rejected and continue to reject criminal verdicts handed down by all- or predominantly-white juries. During the 1980s, race riots twice erupted in Miami after all-white juries acquitted police officers charged with shooting African-American men. In 1980, an all-white jury acquitted four white Dade County policemen in the beating death of Arthur McDuffie, a black insurance salesman.[214] The trial had been moved to Tampa in order to give the defendants "a fair trial."[215] The all-white jury's acquittal of the officers outraged people of color in Miami and triggered violent unrest. Riots lasted for three days and left 18 people dead and $200 million in property damage.[216] A biracial committee appointed by the Governor of Florida later concluded the riots resulted from "racism and the blacks' perception of racism."[217]

Riots in Miami lasted for three days and left 18 people dead and about $200 million in property damage.



In 1984, another all-white jury acquitted police officer Luis Alvarez in the shooting death of Nevell Johnson, Jr., in Miami.[218] Protests began after the police shooting, and though there was less violence, unrest after the verdict led to hundreds of arrests.[219] One community leader reported, "[t]he community has gotten to the point where it expects an all-white jury when we have this kind of killing."[220]

The Rodney King verdict led to three days of protests, 60 deaths, 16,000 arrests, and almost $1 billion in property damage.

Perhaps the best known example of racial conflict and violence after a verdict by a non-diverse jury is the 1992 Los Angeles Riots. The trial of one of the white police officers accused of beating Rodney King, a black man, was moved from Los Angeles to majority-white, rural Simi Valley.[221] No African Americans served on the jury, comprised of ten whites, one Asian American, and one Latino.[222] The jury's verdict finding police not guilty of excessive force in a beating that lasted 81 seconds and included 56 blows[223] led to three days of violent protests, 60 deaths, more than 16,000 arrests, and almost $1 billion in property damage.[224]

More recently, an all-white jury acquitted a white former Hartford, Connecticut, police detective who shot and killed Jashon Bryant, 18, and injured Brandon Henry, 21, African American youths from Hartford's predominantly black North End.[225] A police investigation revealed that Bryant and Henry were unarmed at the time of the shooting.[226] The acquittal brought shock and outrage from the victims' families and demonstrations by community members questioning the legitimacy of the verdict and the judicial process.[227] The *Hartford Courant* reported that "[t]he case stirred lingering frustration and mistrust of police and the criminal justice system among residents of the city's North End, including questions about why no minorities were selected for the jury."[228]

A Hartford police shooting case "stirred lingering frustration and mistrust of police and the criminal justice system among residents of the city's North End, including questions about why no minorities were selected for the jury."

While acquittals might have been produced by juries that fairly represented African Americans and other racial minorities, the absence of diversity makes a questionable jury verdict unacceptable. In Long Island, New York;[229] Jena, Louisiana;[230] Powhatan, Virginia;[231] Panama City, Florida;[232] and Milwaukee, Wisconsin,[233] recent verdicts by all-white juries or by juries perceived as unrepresentative have triggered widespread unrest and outrage in poor and minority communities where serious concerns about the fairness and reliability of the justice system have emerged.

Social science research helps to explain these and other examples from around the country of community rejection of criminal verdicts handed down by unrepresentative juries. As a general matter, people are willing to accept the legitimacy of an authority and defer to the

decisions made by that authority when they perceive the decision-making procedures as fair.[234] Conversely, decisions seen as the result of an unfair – biased, dishonest, or inconsistent – process are more likely to be rejected.[235] This is true of people's perceptions of jury verdicts in criminal cases.

Thousands of people traveled to Jena, Louisiana, in September 2007 to protest the appearance of racial bias in the outcomes of criminal trials involving six black teens who became known as the "Jena Six." (AP Photo/Frank Franklin II)

Research has shown that observers are more likely to conclude that a trial is unfair when an all-white jury finds a defendant guilty.[236] Token representation by minorities is similarly inadequate to address the problem. African Americans serving on white-dominated juries – especially when they are in a "minority of one" – are more likely to remain quiet and give in to the pressures of the majority.[237] The few African Americans who actually manage to serve on capital juries may be "especially discontented with their own experiences" and critical of the jury's deliberative process.[238]

Beyond perceptions about the criminal trial process and the negative experience of lone minority jurors, the racial composition of juries also influences the reliability of outcomes. In death penalty cases, the absence of diversity appears to shape sentencing outcomes, making them less reliable and credible.[239] The effect is greater for non-white defendants, especially when the defendant is black and the victim is white.[240]

Research suggests that, compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives.[241] Moreover, even though bifurcated capital trials require separate deliberations regarding guilt/innocence and sentencing, it is not uncommon for all-white juries to decide on punishment during guilt/innocence deliberations, before they have heard any mitigation evidence.[242]

Research suggests that, compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives.

The nature and quality of jury deliberations is better when jury diversity is greater:[243]

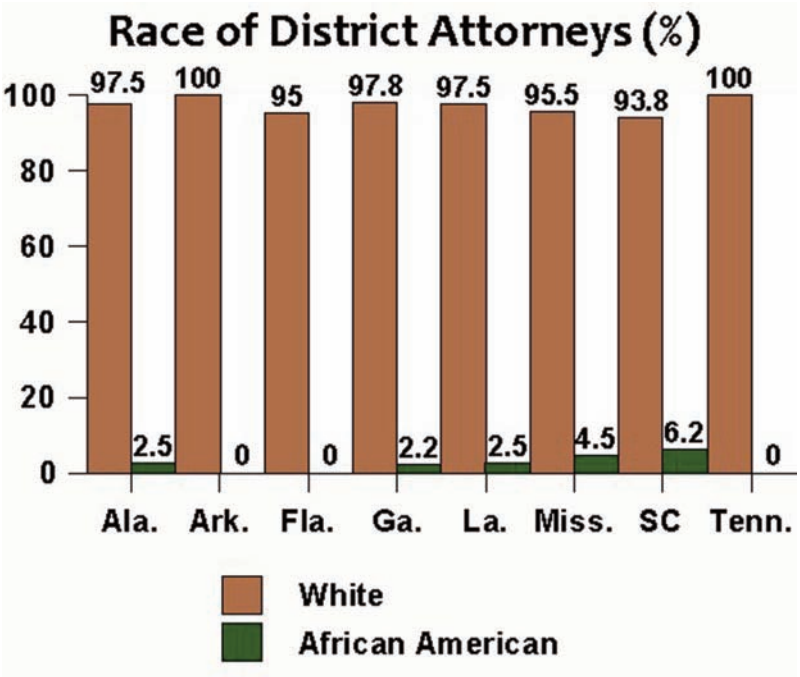
> By every deliberation measure . . . heterogeneous groups outperformed homogeneous groups. First, diverse groups spent more time deliberating than did all-White groups. . . . us[ing] their extra time productively, discussing a wider range of case facts and personal perspectives. . . . Even though they deliberated longer and discussed more information, diverse groups made fewer factual errors than all-White groups. Moreover inaccuracies were more likely to be corrected in diverse groups. . . . [D]iverse groups were also more open-minded in that they were less resistant to discussions of controversial race-related topics.[244]

Racial diversity improves a jury's ability to assess witness testimony, evaluate cross-racial identifications, avoid presumptions of guilt, and fairly judge a criminally accused.

Racial diversity significantly improves a jury's ability to assess the reliability and credibility of witness testimony, evaluate the accuracy of cross-racial identifications, avoid presumptions of guilt, and fairly judge a criminally accused.[245] Accordingly, the reliability and accuracy of the criminal justice system is greatly enhanced when juries represent a fair cross-section of the community as the Constitution requires.[246]

THE ABSENCE OF RACIAL DIVERSITY IN OTHER DECISION-MAKING ROLES

Racial diversity on juries is especially critical because the other decision-making roles in the criminal justice system are held mostly by people who are white, from police officers who decide whom to stop and arrest, to prosecutors who decide what charges are brought against which defendants, to trial and appellate judges whose decisions impact powerfully on outcomes at each stage of the criminal justice process. As a National District Attorney's Association publication put it:



"In criminal courtrooms across the nation the outlook can be daunting for people of color.

The accused is typically a person of color, who is often arrested, prosecuted and sentenced by a courtroom of white men and women."[247]

While black employment in law enforcement has increased during the last three decades in major metropolitan departments, racial diversity remains virtually nonexistent in some smaller Southern jurisdictions. In Houston County, Alabama, where the population is 27% African-American, the local police department is nearly 94% white.[248]

A gathering of innocent people formerly sentenced to death, 1998.

"I looked around the courtroom. The judge was white. The prosecutor was white. My lawyer was white. The jury was white. Even though I was innocent, I knew I had no chance."

- Exonerated Death Row Prisoner

State and federal prosecutors also are mostly white. Approximately 98% of district attorneys in states that apply the death penalty are white.[249] As the chart opposite shows, African Americans are vastly underrepresented among district attorneys in each of the eight Southern states analyzed in this report.[250] The latest data show no black district attorneys in Arkansas, Florida, or Tennessee.[251]

Nationwide, of over 12,000 state and federal judges, 90% are white, even though the population is more than 25% minorities. None of Alabama's 19 appellate judges is black.

Data on the racial diversity of the American judiciary reveal that it continues to be overrepresented by whites in both the federal and state courts. Nationwide, of a total of over 12,000 state and federal judges, approximately 90% are white, even though racial minorities make up more than 25% of the population nationwide.[252]

People of color are most underrepresented in the state courts. African Americans constitute 12% of the United States population but fewer than 6% of the bench at all state court levels.[253] Underrepresentation among appellate judges in the states EJI studied is significant. African Americans comprise 26% of Alabama's population but none of the state's 19 appellate judges is black.[254] According to the American Bar Association's National Database on Judicial Diversity in State Courts, Alabama has the smallest percentage of black judges statewide of the studied states, followed by Tennessee.[255]

Just 4.2% of lawyers and judges in the United States are African-American,[256] which means that, in addition to being arrested, prosecuted, and judged by whites, defendants typically are represented by white lawyers.

Too often, the only opportunity for racial minorities to influence decision-making in America's criminal justice system is to serve on a jury. Exclusion of qualified citizens of color from jury service amounts, then, to the near-complete absence of minority perspective, influence, and power in the criminal justice system.

The Role of Defense Counsel

While the criminal defense bar also is not as racially diverse as the communities in which many public defenders and appointed counsel work, the defense attorney has an uniquely important responsibility to protect the rights of the criminally accused and people of color whose trials may be subject to illegal racial discrimination in jury selection. Whether the accused is white, black, or a member of some other racial or ethnic group, counsel must be attentive to challenging racially biased jury selection.[257] The United States Supreme Court has empowered defense counsel to represent the interests of excluded jurors as well as the accused when facing discriminatory conduct by prosecutors and non-responsive trial judges.[258] However, in too many cases the defense lawyer does not object to racially biased jury selection, or fails to challenge adequately the discriminatory use of peremptory strikes or underrepresentation of cognizable groups in the jury pool.

Illegally excluding racial groups from jury service not only violates the rights of excluded jurors but also diminishes the opportunity for a criminally accused person to receive a fair trial. The criminal defense bar can and should do much more to eliminate racially biased jury selection practices by prosecutors and court officials. In some jurisdictions, the low number of court decisions reversing discriminatory conduct reflects a lack of diligence by the criminal defense bar and reluctance by some lawyers to challenge conduct that involves the sensitive issues of race and discrimination.

The criminal defense bar can and should do much more to eliminate racially biased jury selection practices by prosecutors and court officials.

The entire community – including prosecutors, judges, court administrators, civil rights and community groups, and elected officials – has a role to play in addressing this issue, but racial bias in the courtroom cannot be confronted effectively without vigilance and advocacy by defense lawyers. Criminal defense attorneys who need support and assistance in confronting racially discriminatory jury selection should contact the Equal Justice Initiative.

RECOMMENDATIONS

There is much work to be done to eliminate illegal racial discrimination in jury selection. The following recommendations outline some concrete steps that can be taken by court officials, administrators, legislators, judges, prosecutors, defense attorneys, civil and human rights groups, community groups, and ordinary citizens to end racially biased jury discrimination. This is not a complete or comprehensive list; many other tasks and initiatives must be considered and undertaken to fully address this problem. For additional information about implementing the recommendations below and for other ideas about ending jury discrimination, please contact the Equal Justice Initiative. It is critical to increase coordinated efforts to eliminate illegal exclusion and discrimination in jury selection.

1. Dedicated and thorough enforcement of anti-discrimination laws designed to prevent racially biased jury selection must be undertaken by courts, judges, and lawyers involved in criminal and civil trials, especially in serious criminal cases and capital cases.

The principle of anti-discrimination in jury selection has been well-established for some time, but realizing that principle on the ground has been too slow in coming. And while macro-level decision-makers, such as legislatures and appellate courts, must continue to establish and enforce anti-discrimination norms, the responsibility to end discrimination in our courtrooms necessarily rests in large part with the professionals who spend their daily lives in those courtrooms. The documented and continued exclusion of people of color from juries in many places in this country – more than 20 years after *Batson v. Kentucky* – is evidence of the indifference with which too many actors in the criminal justice system regard the exclusion playing out in courts across America today. Discrimination in jury selection will end when every decision-maker with a role in the process values diversity, commits to enforcing the right of all community members to participate equally in civic life, and prioritizes the enforcement of anti-discrimination rules.

2. The rule banning racially discriminatory use of peremptory strikes announced in *Batson v. Kentucky* should be applied retroactively to death row prisoners and others with lengthy sentences whose convictions or death sentences are the product of illegal, racially biased jury selection but whose claims have not been reviewed because they were tried before 1986.

Two months after its historic 1986 decision in *Batson v. Kentucky*, the United States Supreme Court decided a lesser-known case, *Allen v. Hardy*, ruling summarily (without the ordinary process of briefing and argument) that *Batson* would not apply retroactively. As a result, *Batson* does not apply to defendants whose trials were final before 1986. Many of these defendants still sit in prisons and on death rows across the country, even though indisputable evidence of racially biased jury selection exists. The Court in *Allen* stated that prosecutors in pre-1986 trials had relied justifiably on pre-*Batson* law when conducting jury selection. But using peremptory strikes to discriminate based on race has been illegal since *Swain v. Alabama* was decided in 1965. The Court should not sanction illegal discrimination simply because a

prosecutor selecting a jury during the period of time between *Swain* and *Batson* reasonably may have expected to *get away with* illegal discrimination.

The *Allen* Court also worried that allowing pre-1986 claims to be brought would unduly burden the justice system. Even if this concern – aptly described in a similar case as "a fear of too much justice" – was reasonable at the time, there remains only a small cohort of egregious cases in which prisoners are incarcerated (and in some cases facing execution) based on decades-old, illegal convictions. Correcting these injustices would not unduly burden the system. Moreover, *Allen* was decided under federal law and provides no obstacle to state legislatures' or state courts' actions under state law. States should remedy the lingering injustice of racially discriminatory convictions by retroactively applying *Batson* under state law and providing procedures to hear claims of illegal conviction.

3. To protect the credibility and integrity of criminal trials, claims of illegal racial discrimination in the selection of juries should be reviewed by courts on the merits and exempted from procedural bars or technical defaults that shield and insulate from remedy racially biased conduct.

Across the country, hundreds of well-documented claims of racial discrimination in jury selection are unremedied because of procedural defaults (or "procedural bars"). Procedural defaults are rules that prevent a party from raising a claim in a legal case if a court determines that the party had a prior opportunity to raise the claim but failed to do so. These rules apply to claims of racially discriminatory jury selection as they would any other claim. But jury- selection claims are fundamentally different. Procedural bars are used to weigh the State's interest in finality against the defendant's individual rights. Yet the Supreme Court has recognized that the injury caused by racially discriminatory jury selection extends beyond the individual criminal defendant because it harms the excluded minority jurors and their communities. Accordingly, the rationale of procedural bar does not apply to racial bias claims as it does to ordinary claims, such as those involving erroneous jury instructions, denials of due process, or illegal searches. When documented acts of illegal discrimination against minority citizens go unremedied, the integrity and credibility of the criminal justice system itself suffers, and excluded jurors and communities lose faith in the system. Because these long-term, systemic issues are at play, procedural default rules should be modified to allow courts to review illegal discrimination claims on the merits at any time. Such changes should be implemented by courts and/or legislatures as required by the law of each jurisdiction.

4. Prosecutors who are found to have engaged in racially biased jury selection should be held accountable and should be disqualified from participation in the retrial of any person wrongly convicted as a result of discriminatory jury selection. Prosecutors who repeatedly exclude people of color from jury service should be subject to fines, penalties, suspension, and other consequences to deter this practice.

One of the most vexing aspects of the continuing problem of racial discrimination in jury selection is *impunity*. In most cases where a court finds that a prosecutor intentionally has engaged in racial discrimination while selecting a jury, the prosecutor suffers no adverse

consequences. Indeed, the same attorney often represents the State at a retrial. Once an attorney is found to have intentionally discriminated in the jury selection process, barring his or her participation in any subsequent proceedings should be the *minimum* consequence, yet no jurisdiction is known to have even this basic rule. Beyond this bare minimum, prosecutors who repeatedly misuse their public authority to stigmatize and humiliate citizens because of their race by excluding them from jury service should be subject to more serious consequences, including fines, penalties, suspension from practice, public shaming, and in extreme cases, criminal prosecution.

Courts, bar associations, and legislatures should play a role in enforcing anti-discrimination norms and deterring misconduct. But discipline should be focused on the district attorney's office itself. No district attorney committed to upholding the law should tolerate violations of the law by his or her prosecutors. In no other circumstances could a state agent be caught intentionally discriminating on the basis of race and keep his or her job without adverse consequences, and the district attorney's office should be no exception. Under current practices, young prosecutors too often absorb the lessons that racial discrimination is a regular part of the business of obtaining convictions and that findings of discrimination are an incidental cost of doing business. Applying proper discipline to prosecutors who violate the law would send the opposite message: racial discrimination in jury selection constitutes shameful professional misconduct that could cost a prosecutor his or her reputation and career.

5. The Justice Department and federal prosecutors should enforce 18 U.S.C. § 243, which prohibits racial discrimination in jury selection, by pursuing actions against district attorney's offices with a history of racially biased selection practices.

The provisions codified at 18 U.S.C. § 243 have existed in substantially the same form since they were enacted in 1875, but there have been few documented prosecutions under the statute.[259] The statute forbids the racially discriminatory exclusion of any person from a grand jury or a trial jury in any state or federal court by any "officer or other person charged with any duty in the selection or summoning of jurors."[260] The United States Department of Justice and United States Attorneys should prioritize enforcement of this statute against district attorney's offices that engage in systematic denial of citizens' civil rights. Congress should increase the current penalty of $5000 per violation – which has not been adjusted since 1875[261] – but even this modest amount may allow for fines sufficient to deter future misconduct when multiplied by each juror excluded on the basis of race. More importantly, such prosecutions possess immense symbolic value and would send a message to excluded communities that no one is above the law and that recourse is available when the law is broken by those responsible for enforcing it.

6. States should provide remedies to people called for jury service who are illegally excluded on the basis of race, particularly jurors who are wrongly denigrated by state officials. States should implement strategies to disincentivize discriminatory conduct by state prosecutors and judges, who should enforce rather than violate anti-discrimination laws.

The personal profiles in this report demonstrate that citizens excluded from participation in civic life on account of their race suffer humiliation and denigration, which often causes lasting psychological harm. Excluded jurors, who suffer measurable and real victimization at the hands of government prosecutors, should have access to civil remedies. The availability of such remedies would engender respect for the system as a whole by providing relief when the system is misused. At a minimum, potential jurors subject to discrimination are owed a public apology from the discriminating prosecutor.

7. Community groups, civil and human rights organizations, and concerned citizens should attend court proceedings and monitor the conduct of local officials with regard to jury selection practices in an effort to eliminate racially biased jury selection.

Top-level commitment to diversity from legislatures, appellate courts, and high executive officials is needed, but discrimination in individual courtrooms also is a local problem for which local solutions can be highly effective. One factor enabling the continued cycle of exclusion in jury service, particularly in criminal trials, is the insularity of the setting: criminal courtrooms often are populated by the same small group of participants day after day, and these participants may become immune to "business as usual," even when it involves illegal discrimination. Committed organizations and groups of citizens can shine a light on what transpires in local courtrooms by exercising their constitutional right to attend public criminal trial proceedings. Local groups should attend court proceedings and document the exclusion of minorities from jury service. Because court proceedings can be opaque, uninitiated monitors should undergo basic training in local court procedures in order to provide accurate and complete reports. Especially in jurisdictions with a history of systematic exclusion, documenting and bearing witness to the conduct of local officials is a powerful and necessary step in holding those officials accountable and ultimately changing their behavior.

8. Community groups, civil and human rights organizations, and concerned citizens should question their local district attorneys about policies and practices relating to jury selection in criminal trials, secure officials' commitment to enforcing anti-discrimination laws, and request regular reporting by prosecutors on the use of peremptory strikes.

District attorneys committed to upholding the law should not tolerate discrimination in jury selection by any of their prosecutors. Local organizations and citizens should ask their district attorneys about what steps are taken to ensure non-discrimination and to guarantee citizens full and equal access to jury service. Citizens have a right to expect from all public officials a commitment to enforce anti-discrimination laws and to transparency, and should demand from their officials regular data documenting prosecutorial use of peremptory strikes.

9. States should strengthen policies and procedures to ensure that racial minorities, women, and other cognizable groups are fully represented in the jury pools from which jurors are selected. States and local administrators should supplement source lists for jury pools or utilize computer models that weight groups appropriately. Full representation of all cognizable groups throughout the United States easily can be achieved in the next five years.

The Constitution mandates that a jury pool be fairly representative of the broader community. Racial minorities, women, and other cognizable groups nonetheless continue to be underrepresented at the initial stage of the jury selection process. This is especially problematic because minority groups, particularly people of color, are more vulnerable to removal at a later stage of the process through the use of peremptory strikes. Effective administrative procedures to ensure that all citizens are fairly represented in jury pools are now well-known and are not burdensome to implement. States should commit to ending underrepresentation in every county within five years.

By drawing juries from a diverse pool, states and local communities will increase the probability that trial juries will represent a fair cross-section of the community. State and local communities therefore should commit to achieving diversity at the initial stage of the jury selection process. Representative jury pools are achievable in the short term in every state with the use of simple, non-burdensome reforms. For example, rather than relying solely on voter registration rolls as the source for the jury pool, juries in Minnesota are randomly drawn from a source list generated by compiling voter registration, driver's license, and state identification lists, which more accurately reflects a fair cross-section of the community.[262] In Dallas County, Texas, officials implemented new computer programs to address the "skewed" jury pool after recognizing in 2005 that Latino prospective jurors comprised only 11% of those reporting for jury duty in felony court but made up 26% of adults in the county.[263] The new reforms include updating addresses annually, removing repeat addresses, using computer-based jury forms and questionnaires, and raising juror's daily pay from $6 to $40.[264]

10. Reviewing courts should abandon absolute disparity as a measure of underrepresentation of minority groups and utilize more accurate measures, such as comparative disparity, to prevent the insulation from remedy of unfair underrepresentation.

Courts evaluating underrepresentation challenges have applied the "absolute disparity" measure, which compares the percentage of a minority group in the community to the percentage of that group in the jury venire, and have required an absolute difference of 10% to conclude the minority group is underrepresented in the jury pool. This approach leaves minorities in most communities with no remedy for discrimination because no absolute disparity of 10% is possible when the group comprises less than 10% of the county's population. Courts should abandon this method and adopt measures that more accurately assess underrepresentation in the jury pool, such as comparative disparity (obtained by dividing the absolute disparity by the minority group's percentage of the population).

11. State and local justice systems should provide support and assistance to ensure that low-income residents, sole caregivers for children or other dependents, and others who are frequently excluded from jury service because of their economic, employment, or family status have an opportunity to serve.

In *Thiel v. Southern Pacific Co.*,[265] the United States Supreme Court struck down the systematic exclusion of low-income wage earners from jury service, holding that sanctioning such intentional exclusion would "encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status [and] breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged."[266] Today, many potential jurors who earn low incomes continue to be excluded from jury service because of their child care responsibilities, lack of transportation, and inability to obtain reimbursement from work. Exclusion of individuals in this category has a heightened adverse impact on communities of color, whose members disproportionately are low-income wage earners.

State and local justice systems should provide the assistance necessary to allow all citizens, including those earning a low wage, the opportunity to serve. By paying jurors an adequate daily wage, courts will increase the likelihood that low-income wage earners can serve on juries. This reform currently is in place in several states[267] and recently was implemented in Dallas County, Texas.[268] The federal judicial system pays jurors $40 per day (which increases to $50 per day after more than 30 days of service).[269] Some states, like Connecticut, offer to reimburse eligible jurors for out-of-pocket expenses associated with jury service, such as child care, parking, and transportation costs.[270] Eliminating economic barriers to jury service is absolutely critical to ensure that juries are representative and fair.

12. Court administrators, state and national bar organizations, and other state policymakers should require reports on the representativeness of juries in serious felony and capital cases to ensure compliance with state and federal laws barring racial discrimination in jury selection.

The legal community must monitor court processes to ensure that juries, particularly those in felony and capital cases, are representative of the community, as required by state and federal anti-discrimination laws. National and state bar associations, community leaders, nonprofit organizations, and other interested parties should request that court officers in their jurisdictions monitor and report demographic information to facilitate tracking of underrepresentation of minority groups on juries. Data on the number of juries selected in felony and capital cases and the racial, ethnic, and gender composition of each jury will permit policymakers to measure and document diversity ratings for individual cases and for each county.

13. The criminal defense bar should receive greater support, training, and assistance in ensuring that state officials do not exclude people of color from serving on juries on the basis of race, given the unique and critically important role defense attorneys play in protecting against racially biased jury selection.

Anti-discrimination law that protects against racially biased jury selection likely will not be enforced without criminal defense attorneys aggressively challenging discriminatory jury selection. Many attorneys have not received adequate training and preparation to confront biased jury selection and need additional support and education. State defender organizations should make challenging racially biased jury selection a priority. State and federal governments should encourage criminal defense attorneys and reinforce the critical role they play in protecting the integrity of the criminal justice system by providing the defense bar with funding for training and assistance on this issue. State bar organizations also should lend support to indigent defense providers and defender organizations who report continuing problems with racially discriminatory jury selection in particular communities. Since defense lawyers frequently are the only witnesses to discriminatory jury selection, defender organizations should consider reporting and documenting bias in jurisdictions where the problem persists.

14. Greater racial diversity must be achieved within the judiciary, district attorney's offices, the defense bar, and law enforcement to promote and strengthen the commitment to ensuring that all citizens have equal opportunities for jury service.

In many counties across the country, no people of color serve as prosecutors and few sit as trial judges, which leaves the jury as the singular decision-making role in which people of color can participate and shape the judicial process. It is essential that the judiciary, prosecutor's offices, the criminal defense bar, and law enforcement become more diverse. Greater minority participation in these roles will reduce pressure on minority jurors, who should not be burdened with the impossible task of equalizing a system so unbalanced by the absence of people of color in decision-making roles.

NOTES

1. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (quoting William Blackstone's Commentaries describing right to trial by jury as "bulwark of [citizens'] liberties").
2. *See Duncan v. Louisiana*, 391 U.S. 145, 151-53 (1968).
3. *See* Neil Vidmar & Valerie P. Hans, *American Juries* 71-72 (2007); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 884, 894 (1994).
4. *See generally, e.g.*, James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 910, 914-20 (2004); Michael J. Klarman, *From Jim Crow to Civil Rights* 39-40 (2004); Mary Ellen Curtin, *Black Prisoners and Their World, Alabama, 1865-1900* 59-60 (2000).
5. *See, e.g.*, Klarman, *supra* note 4, at 10, 39; Eric Foner, *Reconstruction* 362-63 (1988).
6. *See* Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336 (codified as amended at 18 U.S.C. § 243).
7. 100 U.S. 303, 306-10 (1880).
8. *See, e.g.*, Randall Kennedy, *Race, Crime, and the Law* 39-47 (1997); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 Tex. L. Rev. 1401, 1407-12 (1983).
9. *See* Kennedy, *supra* note 8, at 172.
10. *See, e.g.*, Schmidt, *supra* note 8, at 1419-20.
11. *See, e.g.*, Klarman, *supra* note 4, at 41-42; Vidmar & Hans, *supra* note 3, at 71-72.
12. *See* Vidmar & Hans, *supra* note 3, at 72.
13. *See* Kennedy, *supra* note 8, at 182; Klarman, *supra* note 4, at 41-42, 55.
14. *See* Kennedy, *supra* note 8, at 182-84.
15. *See, e.g.*, Kennedy, *supra* note 8, at 175-76; Klarman, *supra* note 4, at 55-56; Schmidt, *supra* note 8, at 1419, 1482-83.
16. *See* Kennedy, *supra* note 8, at 175; Klarman, *supra* note 4, at 42.
17. *See* Klarman, *supra* note 4, at 119-20.
18. *See* Mark Curriden & Leroy Phillips, Jr., *Contempt of Court: The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism* xiv, 12-15 (Anchor Books 2001) (1999).
19. *Id.* at 195-96, 213-14.
20. *Id.* at 214. The note read in full: "To Justice Harlan. Come get your nigger now." Johnson's case was also notable because he was represented after trial by two African American lawyers who were willing to challenge the racial makeup of the jury.
21. 294 U.S. 587 (1935).
22. *See generally* Dan T. Carter, *Scottsboro: A Tragedy of the American South* (rev. ed. 1979); *Scottsboro: An American Tragedy* (Social Media Productions 2000).
23. *Norris*, 294 U.S. at 596.
24. *Id.* at 598.
25. *Id.* at 599.
26. *Id.* at 599; *see also Patton v. Mississippi*, 332 U.S. 463 (1947); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hollins v. Oklahoma*, 295 U.S. 394 (1935).
27. *See* Kennedy, *supra* note 8, at 177-80; Klarman, *supra* note 4, at 154-55.
28. *Akins v. Texas*, 325 U.S. 398 (1945).
29. *See Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).
30. *See Amadeo v. Zant*, 486 U.S. 214 (1988).
31. *See* Kennedy, *supra* note 8, at 274-75.
32. 380 U.S. 202 (1965).
33. *Id.* at 205.
34. *Id.* at 210.
35. *Id.* at 224-26.
36. *See* Jeffrey Abramson, *We, The Jury* 134 (1994).
37. 476 U.S. 79 (1986).
38. *Id.* at 100 & n.25.
39. *Id.* at 100.

40. *See Allen v. Hardy*, 478 U.S. 255, 257-58 (1986).
41. *See Horsley v. State*, 527 So. 2d 1355, 1356 (1988).
42. *See id.* at 1356-57 (holding that *Batson v. Kentucky* did not apply to Horsley's case because Horsley's appeal was final two months before *Batson* was decided).
43. Stephen B. Bright, *The Electric Chair and the Chain Gang: Choices and Challenges for America's Future*, 71 Notre Dame L. Rev. 845, 854-55 (1996) (describing Horsley's execution).
44. *See Andrews v. Shulsen*, 485 U.S. 919 (1988) (Marshall, J., dissenting from denial of certiorari). Because the court refused to hold a hearing, it was never determined if the drawing was by one of the jurors, or delivered to them in an attempt to influence their verdict. Bright, *supra* note 43, at 855.
45. *See* Abramson, *supra* note 36, at 235-37; Kennedy, *supra* note 8, at 125-27.
46. *See* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 Ga. St. U.L. Rev. 817, 827-28 (1998).
47. *See* Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 Wash. & Lee L. Rev. 509, 518 n.36 (1994).
48. *State v. McKinnis*, CC-06-1431 (Houston County Cir. Ct.); *State v. Sale*, No. CC-06-112 (Houston County Cir. Ct.); *State v. Gobble*, No. CC-05-299 (Houston County Cir. Ct.); *State v. McCray*, No. CC-05-1532 (Houston County Cir. Ct.); *State v. Floyd*, No. CC-04-167 (Houston County Cir. Ct.); *State v. Wilson*, CC-04-112 (Houston County Cir. Ct.).
49. Richard Bourke, Joe Hingston, & Joel Devine, Louisiana Crisis Assistance Center, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office* 2 (2003), *available at* http://www.blackstrikes.com.
50. *Id.*
51. Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 455-56 (1995).
52. *Id.*
53. *See McGahee v. Allen*, 560 F.3d 1252, 1257 & nn.4, 5 (11th Cir. 2009); *Lee v. State*, 898 So. 2d 790, 812-13 (Ala. Crim. App. 2001); *Drake v. State*, 668 So. 2d 877, 878 (Ala. Crim. App. 1995); *Stokes v. State*, 648 So. 2d 1179, 1181 (Ala. Crim. App. 1994); *Ex parte Thomas*, 601 So. 2d 56, 57 (Ala. 1992); *Thomas v. State*, 611 So. 2d 416, 417 (Ala. Crim. App. 1992); *Duncan v. State*, 612 So. 2d 1304, 1307 (Ala. Crim. App. 1992); *Johnson v. State*, 601 So. 2d 1147, 1148 (Ala. Crim. App. 1992); *Clark v. State*, 621 So. 2d 309, 311 (Ala. Crim. App. 1992); *Huff v. State*, 596 So. 2d 16, 23 (Ala. Crim. App. 1991); *Marks v. State*, 581 So. 2d 1182, 1186-87 (Ala. Crim. App. 1990); *Pollard v. State*, 549 So. 2d 593, 595 (Ala. Crim. App. 1989).
54. *McGahee*, 560 F.3d at 1257 & n.5; *State v. Lee*, No. CC-99-21 (Dallas County Cir. Ct.); *State v. Reeves*, CC-97-31 (Dallas County Cir. Ct.).
55. 476 U.S. 79, 96-98 (1986).
56. *Id.* at 96.
57. *Id.* at 97.
58. *Id.* at 97.
59. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).
60. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).
61. *Batson*, 476 U.S. at 106 (Marshall, J, concurring).
62. *Miller-El*, 545 U.S. at 268-69 (Breyer, J, concurring); *see also, e.g.*, Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2015, 2021 (1998) (noting that courts have declined to find racial discrimination under *Batson* by accepting "a sweeping scope of permissible neutral explanations for prosecutorial strikes" even though such explanations "often [were] correlated to some degree with race").
63. Nancy S. Mander, *The Jurisprudence of Justice Stevens: Justice Stevens, the Peremptory Challenge, and the Jury,* 74 Fordham L. Rev. 1683, 1726 (2006).
64. *Miller-El*, 545 U.S. at 264.
65. *Jackson v. Thigpen*, 752 F. Supp. 1551, 1554-55 (N.D. Ala. 1990).
66. *State v. Harris*, 2001-0408 (La. 6/21/02); 820 So. 2d 471, 477.
67. *McCray v. State*, 738 So. 2d 911, 912-13 (Ala. Crim. App. 1998).
68. *Id.*
69. *McCastle v. State*, 622 S.E.2d 896, 897-98 (Ga. Ct. App. 2005).

70. *McGahee v. Allen*, 560 F.3d 1252, 1265 (11th Cir. 2009); *Jackson v. State*, 5 So. 3d 1144, 1147 (Miss. Ct. App. 2008); *State v. Hill*, No. M2005-02347-CCA-R3-CD, 2007 WL 1774275, at *6 (Tenn. Crim. App. June 20, 2007); *Taylor v. State*, 620 S.E.2d 363, 366-67 (Ga. 2005); *State v. Crawford*, 03-1494 (La. App. 5 Cir. 4/27/04); 873 So. 2d 768, 784; *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995); *Givens v. State*, 619 So. 2d 500, 501-02 (Fla. Dist. Ct. App. 1993); *Conerly v. State*, 544 So. 2d 1370, 1371-72 (Miss. 1989); *State v. Tomlin*, 384 S.E.2d 707, 708 (S.C. 1989).
71. *McGahee v. Allen*, 560 F.3d 1252, 1265 (11th Cir. 2009).
72. *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995).
73. *State v. Crawford*, 03-1494 (La. App. 5 Cir. 4/27/04); 873 So. 2d 768, 784.
74. *Bogan v. State*, 811 So. 2d 286, 288 (Miss. Ct. App. 2001); *Robinson v. State*, 773 So. 2d 943, 948 (Miss. Ct. App. 2000); *Jessie v. State*, 659 So. 2d 167, 168 (Ala. Crim. App. 1994); *Cox v. State*, 629 So. 2d 664, 666 (Ala. Crim. App. 1992); *Bui v. State*, 627 So. 2d 849, 851 (Ala. Crim. App. 1992); *Sims v. State*, 587 So. 2d 1271, 1276-77 (Ala. Crim. App. 1991); *Ex parte State (Harrell v. State)*, 555 So. 2d 263, 265 (Ala. 1989); *Williams v. State*, 548 So. 2d 501, 505 (Ala. Crim. App. 1988).
75. *Robinson v. State*, 858 So. 2d 887, 895 (Miss. Ct. App. 2003); *Berry v. State*, 728 So. 2d 568, 572 (Miss. 1999); *Files v. State*, 613 So. 2d 1301, 1304 (Fla. 1992); *State v. Tomlin*, 384 S.E.2d 707, 708-09 (S.C. 1989).
76. *Bogan v. State*, 811 So. 2d 286, 288 (Miss. Ct. App. 2001); *Robinson v. State*, 773 So. 2d 943, 947-48 (Miss. Ct. App. 2000).
77. *Scott v. State*, 599 So. 2d 1222, 1227 (Ala. Crim. App. 1992).
78. *Turnbull v. State*, 959 So. 2d 275, 276-78 (Fla. Dist. Ct. App. 2006).
79. *State v. Coleman*, 2006-0518 (La. 11/2/07); 970 So. 2d 511, 514-15.
80. *State v. Smith*, No. E2004-02272-CCA-R3-CD, 2005 WL 1827848, at *3 (Tenn. Crim. App. Aug. 3, 2005) (upheld); *Griffin v. State*, No. CACR 97-843, 1998 WL 744261, at *2 (Ark. Ct. App. Sept. 30, 1998) (upheld); *Ridely v. State*, 510 S.E.2d 113, 116 (Ga. Ct. App. 1998) (struck down).
81. *Tomlin*, 384 S.E.2d at 708-09.
82. *George v. State*, 588 S.E.2d 312, 316 (Ga. Ct. App. 2003).
83. *State v. Crawford*, 03-1494 (La. App. 5 Cir. 4/27/04); 873 So. 2d 768, 783.
84. *Thornton v. State*, CACR 93-452, 1994 WL 114350, at *3-4 (Ark. Ct. App. Mar. 30, 1994).
85. *Jackson v. State*, 5 So. 3d 1144, 1149-50 (Miss. Ct. App. 2008).
86. *State v. Tyler*, No. M2005-00500-CCA-R3-CD, 2006 WL 264631, at *8 (Tenn. Crim. App. Feb. 1, 2006).
87. Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 Wash. & Lee L. Rev. 509, 520, 523 (1994).
88. *See, e.g.*, Bryan A. Stevenson, *Pro Se Litigation Ten Years After AEDPA: Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L.L. Rev. 339, 347-48 (2006) (detailing 23 Alabama death penalty cases reversed because of racially discriminatory jury selection at trial).
89. *Swain v. Alabama*, 380 U.S. 202, 210 (1965).
90. *Ex parte Branch*, 526 So. 2d 609, 617-18 (1987).
91. *Flowers v. State*, 947 So. 2d 910, 937-39 (Miss. 2007); *Ward v. State*, 733 S.W.2d 728, 731 (Ark. 1987).
92. *Snyder v. Louisiana*, 552 U.S. 472 (2008).
93. Data on the reversed cases in each state is on file with the Equal Justice Initiative.
94. *See, e.g.*, *State v. Logan*, No. W2008-00736-CCA-R3-CD, 2009 WL 782757, at *3 (Tenn. Crim. App. Mar. 25, 2009) (defendant failed to make prima facie showing of racial discrimination and did not elaborate on reasons for objections to prosecutor's strikes); *Williams v. State*, No. M2007-02070-CCA-R3-PC, 2008 WL 5272556, at *7 (Tenn. Crim. App. Dec. 19, 2008) (defendant failed to raise *Batson* objection at trial or on direct appeal, forfeiting the claim); *State v. Howard*, No. E2007-00178-CCA-R3-PC, 2008 WL 1805758, at *16 (Tenn. Crim. App. Apr. 22, 2008) (defendant failed to raise *Batson* objection at trial and only did so on motion for new trial, forfeiting issue on appeal).
95. 529 So. 2d 649 (Miss. 1988).
96. 424 S.E.2d 630 (Ga. 1993).
97. 01-155 (La. App. 5 Cir. 8/28/01); 795 So. 2d 468.
98. *Cochran v. Herring*, 43 F.3d 1404, 1410-11 (11th Cir. 1995).
99. *Carrick v. State*, 580 So. 2d 31, 31-32 (Ala. Crim. App. 1990).
100. 738 So. 2d 911, 912 (Ala. Crim. App. 1998).

101. *See, e.g.*, *Flowers v. State*, 947 So. 2d 910 (Miss. 2007); *McCastle v. State*, 622 S.E.2d 896 (Ga. Ct. App. 2005); *Lucy v. State*, 785 So. 2d 1174 (Ala. Crim. App. 2000).
102. *Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003); *Ex parte Yelder*, 630 So. 2d 107 (Ala. 1992); *Ex parte Bird*, 594 So. 2d 674 (Ala. 1991); *Pruitt v. State*, 871 So. 2d 101 (Ala. Crim. App. 2004); *Freeman v. State*, 651 So. 2d 576 (Ala. Crim. App. 1994); *Moss v. City of Montgomery*, 588 So. 2d 520 (Ala. Crim. App. 1991); *Sims v. State*, 587 So. 2d 1271 (Ala. Crim. App. 1991); *Carrick v. State*, 580 So. 2d 31 (Ala. Crim. App. 1990); *Parker v. State*, 568 So. 2d 335 (Ala. Crim. App. 1990); *Powell v. State*, 548 So. 2d 590 (Ala. Crim. App. 1988); *Williams v. State*, 548 So. 2d 501 (Ala. Crim. App. 1988); *Williams v. County of Montgomery*, 525 So. 2d 831 (Ala. Crim. App. 1987).
103. *McCrary v. State*, 738 So. 2d 911 (Ala. Crim. App. 1998); *Ashley v. State*, 651 So. 2d 1096 (Ala. Crim. App. 1994); *Andrews v. State*, 624 So. 2d 1095 (Ala. Crim. App. 1993); *Williams v. State*, 620 So. 2d 82 (Ala. Crim. App. 1992); *Bush v. State*, 615 So. 2d 137 (Ala. Crim. App. 1992); *Roger v. State*, 593 So. 2d 141 (Ala. Crim. App. 1991).
104. *Snyder v. Louisiana*, 552 U.S. 472 (2008); *State v. Harris*, 2001-0408 (La. 6/12/02); 820 So. 2d 471; *State v. Myers*, 1999-1803 (La. 4/11/00); 761 So. 2d 498; *State v. Cheatteam*, 07-272 (La. App. 5 Cir. 5/27/08); 986 So. 2d 738; *State v. Lewis*, 01-155 (La. App. 5 Cir. 08/28/01); 795 So. 2d 468.
105. *State v. Hill*, No. M2005-02437-CCA-R3-CD, 2007 WL 1774275, at *5-7 (Tenn. Ct. Crim. App. June 20, 2007).
106. *Id.* at *6.
107. No. M2005-00500-CCA-R3-CD, 2006 WL 264631, at *8 (Tenn. Crim. App. Feb. 1, 2006).
108. *See*, e.g., *Cobb v. State*, 825 So. 2d 1080 (Fla. Dist. Ct. App. 2002).
109. *See, e.g.*, *Files v. State*, 613 So. 2d 1301, 1304 (Fla. 1992); *Cobb v. State*, 825 So. 2d 1080, 1085-86 (Fla. Dist. Ct. App. 2002).
110. 552 U.S. 472 (2008).
111. *Id.* at 482-85.
112. *State v. Cheatteam*, 07-272 (La. App. 5 Cir. 5/27/08); 986 So. 2d 738.
113. *State v. Jacobs*, No. 2009-K-1304, 2010 WL 1286899 (La. Apr. 5, 2010).
114. *Flowers v. State*, 947 So. 2d 910, 939 (Miss. 2007).
115. *Id.*
116. *Id.*
117. *Jackson v. State*, 5 So. 3d 1144, 1147-49 (Miss. Ct. App. 2008).
118. *Newberry v. State*, 19 So. 3d 752, 754-55 (Miss. Ct. App. 2008).
119. 448 S.E.2d 179, 181-82 (Ga. 1992).
120. 620 S.E.2d 363, 366 (Ga. 2005).
121. *Id.*
122. *See, e.g.*, *Cleveland v. State*, 930 S.W.2d 316, 319 (Ark. 1996); *Jackson*, 954 S.W.2d 894, 895-96 (Ark. 1997); *Griffin v. State*, No. CACR 97-843, 1998 WL 744261, at *2 (Ark. Ct. App. Sept. 30, 1998).
123. No. CACR 93-452, 1994 WL 1143350, at *3 (Ark. Ct. App. Mar. 30, 1994).
124. *See, e.g.*, *Stokes v. State*, 194 S.W.3d 762, 765 (Ark. 2004) ; *London v. State*, 125 S.W.3d 813, 817 (Ark. 2003); *MacKintrush v. State*, 978 S.W.2d 293, 297-98 (Ark. 1998).
125. *See, e.g.*, *Ratliff v. State*, 199 S.W.3d 79, 83 (Ark. 2004); *Jackson v. State*, 954 S.W.2d 894, 895 (Ark. 1997); *Mitchell v. State*, 913 S.W.2d 264, 268 (Ark. 1996).
126. *See Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005).
127. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).
128. *See, e.g.*, *Preachers v. State*, 963 So. 2d 161, 167-70 (Ala. Crim. App. 2006); *Burnett v. State*, 27 S.W.3d 454, 458-59 (Ark. Ct. App. 2000); *Randall v. State*, 718 So. 2d 230, 232-33 (Fla. Dist. Ct. App. 1998); *Ford v. State*, 423 S.E.2d 245, 247 (Ga. 1992).
129. *See, e.g.*, *Mayes v. State*, 550 So. 2d 496, 498-99 (Fla. Dist. Ct. App. 1989).
130. *State v. Oglesby,* 379 S.E.2d 891, 892 (S.C. 1989).
131. 439 S.E.2d 842, 844 (1994).
132. *Id.*
133. 452 S.E.2d 603, 603-04 (S.C. 1994).
134. *Id.* at 604.
135. *Id.* at 605 (Toal, J., dissenting).
136. *Id.*
137. *See, e.g.*, *Preachers v. State*, 963 So. 2d 161, 167-70 (Ala. Crim. App. 2006); *Yancey v. State*, 813 So. 2d 1, 5 (Ala. Crim. App. 2001); McElemore *v. State*, 798 So. 2d 693, 700-01 (Ala. Crim. App. 2000).

138. No. CR-05-0935, 2007 WL 2811968 (Ala. Crim. App. Aug. 29, 2008) (opinion on return to remand).
139. *Id.*
140. *Id.*
141. 499 U.S. 400 (1991).
142. *Robinson v. State,* 773 So. 2d 943, 944-45 (Miss. Ct. App. 2000).
143. *Id*. at 949-50.
144. *Flowers v. State*, 947 So. 2d 910, 923-26 (Miss. 2007).
145. *Walker v. State*, 611 So. 2d 1133, 1136 (Ala. Crim. App. 1992). The appeals court found that the prosecutor illegally struck Mrs. Garrett and other potential jurors after presuming they were related to people involved in illegal activity because of their last names, and never asking follow-up questions to confirm or refute the presumptions.
146. *Yancey v. State*, 813 So. 2d 1, 5-7 (Ala. Crim. App. 2001).
147. *McCray v. State*, 738 So. 2d 911, 914 (Ala. Crim. App. 1998).
148. *Walker v. State*, 611 So. 2d 1133, 1135. (Ala. Crim. App. 1992). The prosecutor's explanations for striking Mrs. Greene were based on information he told the court he had received from a police investigator. The appeals court found that none of this information matched the prosecutor's own notes taken during voir dire. Because the prosecutor failed to provide race-neutral reasons for striking Mrs. Greene and nine other black jurors, the conviction was reversed.
149. *Bellamy v. Crosby*, No. 4:05-cv-00182-MP-EMT, 2008 U.S. Dist. LEXIS 68208, at *4 (N.D. Fla. Sept. 8, 2008).
150. *Neal v. State*, 612 So. 2d 1347, 1349-50 (Ala. Crim. App. 1992).
151. *See, e.g.*, *State v. Williams*, 89-KA-31 (La. App. 5 Cir. 6/7/89); 545 So. 2d 651, 655.
152. *See Shelley v. State*, No. 2008-KA-01284-COA, 2010 WL 702606, at *3 (Miss. Ct. App. Mar. 2, 2010); *State v. Johnson*, 00-KA-1552 (La. App. 5 Cir. 3/28/01); 783 So. 2d 520, 526.
153. *See* Transcript of Record at 81, *Jessie v. State*, 659 So. 2d 167 (Ala. Crim. App. 1994).
154. *Sims v. State*, 587 So. 2d 1271, 1276 (Ala. Crim. App. 1991).
155. *McGahee v. Allen*, 560 F.3d 1252, 1265 (11th Cir. 2009).
156. *Id.* at 1267.
157. *Id.*
158. *Id.*
159. *Id.* at 1265; *see also* Transcript of Record at 1277-80, *McGahee v. State*, 554 So. 2d 454 (Ala. Crim. App. 1989).
160. *McGahee*, 560 F.3d at 1270.
161. *See supra* note 53.
162. *McGahee*, 560 F.3d at 1270; *Ex parte Thomas*, 601 So. 2d 56, 59 (Ala. 1992); *Lucy v. State*, 785 So. 2d 1174, 1178 (Ala. Crim. App. 2000); *Kynard v. State*, 631 So. 2d 257, 270 (Ala. Crim. App. 1993); *Duncan v. State*, 612 So. 2d 1304, 1311 (Ala. Crim. App. 1992).
163. *McGahee*, 560 F.3d at 1265.
164. *Id.* at 1270.
165. *Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999).
166. *State v. Tarver*, 629 So. 2d 14, 19 (Ala. Crim. App. 1994).
167. *Tarver*, 169 F.3d at 716.
168. *Tarver*, 629 So. 2d at 19.
169. Robin DeMonia, *Tarver Executed for 1984 Slaying*, Birmingham News, Apr. 14, 2000.
170. Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, *Tarver v. State*, No. CC84-450.62 (Russell County Cir. Ct. Apr. 5, 2000).
171. *Id.*, Attached Affidavit at 2.
172. *Tarver v. State*, No. CC84-450.01 (Russell County Cir. Ct. May 19, 1999); *Tarver*, 169 F.3d at 712.
173. *Tarver*, 169 F.3d at 714; *Tarver*, 629 So. 2d at 17-18.
174. *Tarver v. State*, 500 So. 2d 1232, 1241 (Ala. Crim. App. 1986).
175. DeMonia, *supra* note 169. For more information about the Robert Tarver case, *see Race to Execution* (Lioness Media Arts, Inc. 2007) and *Black Death in Dixie* (RTE 2006).
176. *Watson v. State*, 825 S.W.2d 569, 570 (Ark. 1992).
177. *Id.*
178. *Id.* at 570-71.

179. *Id.* at 571.
180. *Id.*
181. *Id.* at 573.
182. *State v. Tomlin*, 384 S.E.2d 707, 708 (S.C. 1989).
183. *Id.*
184. *Id.*
185. *Id.* at 708-09.
186. *Id.* at 710.
187. *Hernandez v. New York*, 500 U.S. 352, 361, 371 (1991).
188. *Id.* at 371 (internal citation omitted).
189. *Id.* at 371-72.
190. *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979).
191. *Id.*
192. *Id.* at 364; *Casteneda v. Partida*, 430 U.S. 482, 494 (1977).
193. *See Strauder v. West Virginia*, 100 U.S. 303 (1880) (African Americans); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (women).
194. *Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954) (Mexican Americans); *United States v. Cabrera-Sarmiento*, 533 F. Supp. 799, 804 (S.D. Fla. 1982) (Latinos in Miami area); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 222 (1946) (daily wage earners); *State ex rel. Gregg v. Maples*, 239 So. 2d 198, 203 (Ala. 1970) (unregistered voters).
195. *See, e.g.*, *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965); *Floyd v. Garrison*, 996 F.2d 947, 950 (8th Cir. 1993); *United States v. Grisham*, 63 F.3d 1074, 1078-79 (11th Cir. 1995).
196. *See supra* note 195 and cases cited therein.
197. Joan Biskupic, *The Push Is On for More Diverse Juries*, USA Today, Aug. 28, 2001, at 14; *see also* Complaint at 3, *Hunt v. Reynolds*, No. 98-A-1305-N (M.D. Ala. May 10, 1999).
198. Biskupic, *supra* note 197, at 8A.
199. Complaint, *supra* note 197, at 3.
200. Biskupic, *supra* note 197, at 1A.
201. Complaint, *supra* note 197, at 6-7.
202. Biskupic, *supra* note 197, at 8A.
203. *See* Cynthia A. Williams, *Note: Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. Rev. 590, 612 (1990).
204. *See* Brief for Social Scientists, Statisticians, and Law Professors, Jeffrey Fagan, et al., as Amici Curiae Supporting Respondent, at 22, Berghuis v. Smith, No. 08-1402, 2010 WL 1189555 (Mar. 30, 2010).
205. *Id.*
206. *See* Williams, *supra* note 203, at 610.
207. *See, e.g.*, *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984); *United States v. Whitley*, 491 F.2d 1248, 1249 (8th Cir. 1974). Another possible measure could be to consider whether a given level of underrepresentation is statistically significant. *See, e.g.*, *United States v. Rioux*, 97 F.3d 648, 655 (2d Cir. 1996); *Ford v. Seabold*, 841 F.2d 677, 684 n.5 (6th Cir. 1988); *see also* Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1996). However, as most courts to consider the issue have recognized, statistical significance does not measure the degree of underrepresentation but looks only at the probability that a given degree of underrepresentation occurred by chance. It is heavily dependant on the sample size, with even small disparities being statistically significant given a large enough sample size. *See* Brief for Social Scientists, *supra* note 204, at 27-29.
208. *See, e.g.*, *United States v. Carmichael*, 560 F.3d 1270, 1280 (11th Cir. 2009) (requiring use of absolute disparity); *United States v. Yanez*, 136 F.3d 1329, *2 (5th Cir. 1998) (using absolute rather than comparative disparity); *Floyd*, 996 F.2d at 950 (declining to adopt comparative disparity); *United States v. Sanchez-Lopez*, 879 F.2d 541, 547-48 (9th Cir. 1989) (rejecting comparative disparity analysis).
209. *See Berghuis v. Smith*, No. 08-1402, 2010 WL 1189555, at *10 & n.4 (Mar. 30, 2010).
210. *Id.* at *5-6, 11-12.
211. *See* Miss. Code Ann. § 13-5-1 (West 2010); Mo. Rev. Stat. § 494.425(1) (West 2010).

212. *See, e.g.*, Fla. Stat. Ann. § 40.013(8) (West 2010); Md. Code Ann., Cts. & Jud. Proc. § 8-306(1) (West 2010); Okla. Stat. Ann. tit. 38, § 28(B) (West 2010).
213. *See* Mitchell S. Zuklie, *Comment: Rethinking the Fair Cross-Section Requirement*, 84 Calif. L. Rev. 101, 146-47 (1996).
214. George Volsky, *Miami Riot Report Gets Mixed Reaction*, N.Y. Times, Dec. 7, 1980, § 1, at 28.
215. Patrice Gaines-Carter, *McDuffie: The Case Behind Miami's Riots*, Southern Changes, Vol. 2, No. 7, at 21 (1980), *available at* http://beck.library.emory.edu/southernchanges/article.php?id=sc02-7_009&mdid=sc02-7_001.
216. Volsky, *supra* note 214.
217. *Id.*
218. Rick Atkinson, *Miami Jury Acquits Policeman in Fatal Shooting of Black*, Wash. Post, Mar. 15, 1984, at A2.
219. Reginald Stuart, *Police Occupy Tense Areas in Miami After 300 Arrests*, N.Y. Times, Mar. 17, 1984, § 1, at 6.
220. Atkinson, *supra* note 218.
221. John Riley, *Race, Defense Lapses Seen as Keys to Verdict*, Newsday, Apr. 30, 1992, at 4.
222. *Id.*
223. *Id.*
224. Mark Hansen, *Different Jury Different Verdict?*, 78 A.B.A. J. 54 (1992). A second, federal trial resulted in guilty verdicts for two of the police officers involved in the beating. Michael Rezendes, *LA Relaxes in Wake of a Riot That Wasn't*, Boston Globe, Apr. 19, 1993, at 1. The jury in this case consisted of "nine whites, two blacks and one Hispanic" from Los Angeles. *Id.* The city did not riot after these verdicts were handed down. *Id.*
225. Alaine Griffin & Vanessa De La Torre, *Anger Files; After Former Cop's Acquittal, Dead Man's Family Lets Loose*, Hartford Courant, Dec. 9, 2009, at A1.
226. *Id.*
227. *Id.*
228. *Id.*
229. In New York, John White, an African American man was found guilty of second-degree manslaughter in an incident where he and his son were threatened by a "lynch mob" outside their home in Long Island. The jury included only one black juror, who was asked by the other members to share his views on race and the use of the "N-word." The guilty verdict led Rev. Al Sharpton to plan a protest at the courthouse. Corey Kilgannon, *Jury's Deliberations May Be a Focal Point of Appeal*, N.Y. Times, Jan. 1, 2008, *available at* http://www.nytimes.com/ 2008/01/01/nyregion/01white.html.
230. In the highly-publicized Jena 6 case, Mychal Bell was convicted by an all-white jury of assault in a climate of rising racial tension triggered when three white students hung nooses from a tree on the high school campus. Howard Witt, *Louisiana Teen Guilty in School Beating Case*, Chicago Tribune, June 29, 2007, *available at* http://www.chicagotribune.com/services/chi-jena_witt.1jun29,0,4233447.story. No African Americans were on the voir dire panel. Todd Lewan, *Black and White Becomes Gray in La. Town*, FOXNEWS.com, Sept. 22, 2007, *available at* http://www.foxnews.com/printer_friendly_wires/2007Sep22/0,4675,APlaceCalledJena,00.html. The verdict was later thrown out. *Court Overturns Conviction in Jena 6 Beating*, MSNBC, Sept. 15, 2007, *available at* http://www.msnbc.msn.com/id/20779755/.
231. Two white men were acquitted of murder in Powhatan, Virginia, outside of Richmond, in the shooting death of Tahliek Taliaferro. The jury of eleven whites and one black member found the defendants guilty of involuntary manslaughter, after they testified that they had lost control of an assault rifle. About 300 protestors marched around the Powhatan County courthouse to protest the verdict. A later news story stated that the jurors were dismayed to be accused of being racists. Bill McKelway, *About 300 Marchers in Powhatan Protest Taliaferro Verdict*, Richmond Times-Dispatch, Mar. 30, 2009, at B1, *available at* http://www2.timesdispatch.com/rtd/news/local/article/POWH30_20090329-222921/243957/; Bill McKelway, *A Look Inside the Taliaferro Jury*, Richmond Times-Dispatch, June 28, 2009, *available at* http://www2.timesdispatch.com/rtd/news/local/crime/article/POWW28_20090627-221404/276839/pa.immigrant.beating/index.html.

232. In Panama City, Florida, eight boot camp officers , including one who was African American and one Asian were acquitted in a videotaped beating death of Martin Lee Anderson. The all-white jury decided in just 90 minutes that Anderson died of a previously undiagnosed blood disorder. About 150 protestors marched to the state capitol in protest. *Boot Camp Death Verdict Sparks Outrage*, ABCNews.com, Oct. 13, 2007, *available at* http://abcnews.go.com/GMA/story?id=3726041&page=1 ; Melissa Nelson, *Guards Acquitted in Boot Camp Case*, USA Today, Oct. 12, 2007, *available at* http://www.usatoday.com/news/nation/2007-10-11-3868327840_x.htm?csp=34.
233. In Milwaukee, Wisconsin three white police officers were acquitted by an all-white jury in the beating of Frank Jude, an African American man. The verdict led to a march by several thousand people. Georgia Pabst, Jesse Garza & Bob Purvis, *Thousands March to Protest Verdict*, Milwaukee Journal-Sentinel, Apr. 19, 2006, *available at* http://www3.jsonline.com/story/index.aspx?id=417026. Later federal proceedings resulted in seven officers receiving prison time. John Diedrich, *New Sentencing Ordered for Ex-Officer in Jude Beating Case*, Milwaukee Journal-Sentinel, June 8, 2009, *available at* http://www.jsonline.com/news/milwaukee/47232467.html.
234. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 Int'l J. Psychol. 117, 119-20 (2000).
235. *Id.*
236. Leslie Ellia & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1048 (2003).
237. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. Personality and Soc. Psychol. 597, 600 (2006); *see also id.* at 608 ("[S]urveys have found that people often feel marginalized or threatened by minority status in a group and are therefore skeptical that their arguments will be taken seriously."); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 98-99 (1993) (concluding that a minority of one rarely influences a jury's verdict and that "[a]dditional studies have shown that black jurors themselves believe that they have significantly less impact on deliberations than white jurors").
238. *See* William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 240 (2001) (concluding that blacks on white male dominated capital juries "were critical of the jury's decision-making process and especially discontented with their own experiences as capital jurors").
239. *See* David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 124 (2001) (studying capital trials in Philadelphia between 1981-1997 and concluding predominantly African Americans juries were less likely to impose death sentences than juries with fewer African Americans and explaining disparity due to "substantially higher death-sentencing rate in black defendant cases . . . when jury was predominantly non-black").
240. *See id.*; Bowers, *supra* note 238, at 188 (interpreting Baldus study and concluding that "tendency for Black defendants to be treated more harshly than whites ones as the number of whites on the jury increases holds especially for black-defendant/white-victim cases" (citing Baldus, *supra* note 239 at tbl. 8); *see also* Bowers, *id.* at 195 (finding that the likelihood of a death sentence in black-defendant white-victim case was "dramatically increased" with the presence of five or more white males on the jury as compared to intra racial defendant-victim cases). Like African American defendants, Latino defendants were more likely to receive harsher judgments from majority-white juries. *See* Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications and Directions for Future Research*, 2 Soc. Issues & Policy Rev. 65, 83, 84 (2008) (citing studies of actual and mock juries with white and Latino defendants).
241. Sommers, *supra* note 237, at 609. The study consisted of mock jurors recruited from an actual jury pool while on jury duty shown trial of black defendant. *Id.* at 600. *Cf.* William J. Bowers et. al, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1497, 1531 (2004) (finding tendency of jurors on diverse juries to acknowledge how race affects their perspective and that of other jurors).
242. *See* Bowers, *supra* note 241, at 1520; *see also id.* at 1532 (finding that mitigation is voiced and considered when there are African Americans or at least one African American male on a jury as opposed to on white male dominated juries where there is a lack of serious discussion of mitigation).

243. Sommers, *supra* note 237, at 608 ("Jury representativeness can be more than a moral or Constitutional ideal; it is sometimes an ingredient for superior performance."); Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* 74 (2007) (concluding that claim that diverse juries are better fact-finders is supported by research on heterogeneous decision-making groups) *quoted in Jury Pool Diversity in New York State*, Statement of Prof. Valerie Hans to Assembly Standing Comm. on Judiciary and Codes, New York State Assembly(Apr. 30, 2009), *available at* http://juries.typepad.com/files/assembly_statement_draft_4-29-09-1.pdf.
244. Sommers, *supra* note 237, at 608.
245. *See, e.g.*, Sommers, *supra* note 240, at 86-87 (discussing studies finding that diverse juries consider more factual information, were more likely to talk about missing evidence that they wished had been presented at trial, more willing to discuss controversial issues such as racial profiling, include more accurate information in deliberations); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 414-15 (2007) (discussing studies indicating that racially diverse juries may make fewer cognitive errors than homogeneous jurors); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1285-95, 1298-1300 (2000) (discussing effects of gender and race in jury deliberation); King, *supra* note 237, at 75-100 (discussing social science studies examining influence of jury discrimination on jury decisions). Studies also suggest that cross-racial facial identification is subject to error. *See Cross-Racial Facial Identification: A Social Cognitive Integration*, 18 Personality & Soc. Psych. Bulletin 296, 296 (1992); R. Richard Banks, *Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 U.C.L.A. L. Rev. 1075, 1103-04 (2001).
246. *See generally Taylor v. Louisiana*, 419 U.S. 522, 527-29 (1975).
247. Patricia L. Gatling & Majorie Heidseick, *The Effects of Diversity in the Office*, The Prosecutor, National District Attorneys Ass'n (2001), *available at* http://www.ndaa.org/publications/ndaa/effects_diversity_in_office_may_june_2001.html.
248. U.S. Dep't of Justice, Bureau of Justice Statistics, *Local Police Departments, 2003* at 7 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd03.pdf. Studies have found that, while police departments have grown much more diverse since the 1950s and 60s (especially in major cities), there is no clear evidence that black officers differ appreciably from white officers in their on-the-job behavior, including the frequency of shootings, arrests, citizen complaints, and instances of prejudice against black citizens. *See* David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. Crim. L. & Criminology 1209, 1224-25 (2006); *see also* U.S. Dep't of Justice, Bureau of Justice Statistics, *Law Enforcement Management and Admin. Statistics, 1993*, at Table 4a (1993), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/tab4.pdf.
249. Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DePaul L. Rev. 741, 752 (2009) ("as of 1994, 97.5% of district attorneys in states that apply the death penalty were white and male, while African Americans made up only 3.9% of all lawyers in death penalty cases"); *see also* Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1811, 1817-18 (1998) (indicating that approximately 98% of all death penalty prosecutors are white, 1% is black, 1% is Latino and in the 38 death penalty states, prosecutors are exclusively white).
250. Pokorak, *supra*.
251. *Id.* In Florida, 5% of the prosecutors are Latino. *Id.* at 1817.
252. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 Wash. U. L. Rev. 1117, 1125 (2009); *see also* A.B.A. Comm'n on Racial and Ethnic Diversity in the Profession, *Statistics about Minorities in the Profession from the Census* (2000), at http://www.abanet.org/minorities/links/2000census.html (last visited Apr. 22, 2010) (nationwide, more than 83% of judges, magistrates, and other judicial workers are white, and 62% are male). National demographic data from U.S. Census Bureau, *Fact Sheet: United States, 2006-2008 American Community Survey 3-Year Estimates*, *at* http://factfinder.census.gov/ servlet/ACSSAFFFacts?_submenuId=factsheet_1&_sse=on (last visited Apr. 19, 2010).
253. Chew & Kelley, *supra* note 252, at 1122.
254. *Id.*
255. A.B.A. National Database on Judicial Diversity in State Courts, at http://www.abanet.org/judind/diversity/states.html (last visited Apr. 23, 2010).

256. A.B.A. Comm'n on Racial and Ethnic Diversity in the Profession, *Goal IX Report 2005-2006,* at 8 (compared to 12.9% of the general population, African Americans account for 4.2% of lawyers and judges), *available at* http://www.abanet.org/minorities/publications/g9/GoalIX_0506.pdf.
257. *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (criminal defendant may object to race-based exclusion of jury members, whether or not defendant and jurors share the same race, "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.").
258. *Powers*, 499 U.S. at 413 (reaffirming that defendant has standing to challenge discriminatory jury selection, noting that "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom."); *see also Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (defense attorneys prohibited from engaging in discriminatory jury selection).
259. *Rose v. Mitchell*, 443 U.S. 545, 558 (1979) (describing such prosecutions as "rare"); *see also, e.g.*, *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986) (citing statistics showing no prosecutions under statute in preceding nine years).
260. 18 U.S.C. § 243.
261. *See* Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336.
262. *See, e.g.*, Minnesota Judicial Branch Website, http://www.mncourts.gov/?page=1341#HowWasISelected (last visited Apr. 26, 2010).
263. Jennifer Emily, *Jury Pool System Gets an Upgrade, More Notices, Improved Tracking Designed to Boost Participation*, Dallas Morning News, Sept. 14, 2009, at 1B.
264. *Id*.
265. 328 U.S. 217 (1946).
266. *Id.* at 223-24.
267. *See, e.g.*, Colorado State Judiciary Website, http://www.courts.state.co.us/Jury/FAQs.cfm (last visited Apr. 26, 2010) ($50 per day); New York State Uniform Court System Website, http://www.nyjuror.gov/users/wwwucs/juryQandA.shtml (last visited Apr. 26, 2010) (explaining that jurors are paid $40 per day, and that for jurors whose wage for time missed from work is lower than this jury fee, the State pays the difference between the wage and the jury fee); Clark County, Nevada Court Website, http://www.clarkcountycourts.us/ejdc/juror-information/ (last visited Apr. 26, 2010) ($40 per day).
268. Jennifer Emily, supra note 263 (documenting Dallas County raising juror pay from $6 to $40 per day).
269. Federal Judiciary Website, http://www.uscourts.gov/jury/jurypay.html (last visited Apr. 26, 2010).
270. State of Connecticut Judicial Branch Website, http://www.jud.ct.gov/jury/faq.htm (last visited Apr. 26, 2010) (explaining that State will pay all jurors $50 per day starting with sixth day of jury service, and will reimburse jurors up to $50 per day for out of pocket expenses for the first five days of jury service); *see also, e.g.*, Iowa Judicial Branch Website, http://www.iowacourts.gov/Jury_Service/Frequently_Asked_Questions/ (last visited Apr. 26, 2010) (allowing reimbursement for travel expenses).

CREDITS

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Preventing Bias in Jury Selection A Prosecutor's 7 Step Guide 2020

STEP ONE: **KNOW THE RISK FACTORS**

CONSCIOUS BIAS

Assumptions about how certain groups behave as jurors

Feeling of comfort or affinity with jurors who look like you

Stress, cynicism, and burnout can lead to hostility and stereotyping

IMPLICIT BIAS

Pressured decision making– stress, distraction

Emotional state – anger, disgust, fatigue

Ambiguity – decisions based on vague criteria or too little information

Easily-accessible social categories such as race and gender– implicit bias more likely where a trait is easy to see

STEP TWO: **TAKE NOTES**

Take notes as you go and retain them in your file.

Rely on your notes over your memory.

Where possible, have a note-taker who can capture exact responses

STEP THREE: **SLOW DOWN**

Pause between each question to reflect on your distractions, stress, and time pressure.

Slow down. Take your time.

STEP FOUR: **ASK EQUITABLE, GOAL-DIRECTED QUESTIONS**

DO

Think actively about your jury selection goal. Keep your questions goal-directed.

Ask questions to discover jurors' implicit and conscious biases. For example: define implicit bias and ask them their views and experiences related to it. Ensure that jurors with evident bias do not serve on jury.

DON'T

Don't ask questions prohibited by policy; don't ask different questions of jurors of color, women, or other groups; don't ask more questions of members of such groups.

STEP FIVE: **CLARIFY YOUR REASONING BEFORE RAISING CHALLENGE OR MAKING STRIKE**

(1) Why are you challenging or striking the juror? Write it down.

(2) Does it apply to any other jurors?

(3) Is your reason goal-directed or is it based on a personal characteristic?

STEP SIX: **BIAS CHECK**

- ✓ Are you making any assumptions? Do you have enough information?
- ✓ Would it change your decision if this juror's answers were given by a juror of another demographic group?
- ✓ Are you requiring more assurance of fairness from this juror than you would from others?

YOUR GOAL:

REMOVE JURORS WITH RACIAL OR OTHER IMPROPER BIASES; SELECT ALL JURORS WHO CAN BE FAIR TO THE PROSECUTION AND THE DEFENSE.

STEP SEVEN: **FEEDBACK**

Review outcome.

Consult with others.

Track data.

If challenged, rely on reason noted in file.

No Records, No Right: Discovery & the Fair Cross-Section Guarantee

Nina W. Chernoff[*]

ABSTRACT: Every criminal defendant has the right to a jury selected from a "fair cross-section" of the community—a pool of people reflecting the community's racial and ethnic makeup. Yet there is substantial evidence that juries in state courts across the country do not reflect a fair cross-section of their communities, in violation of the Sixth Amendment and federal and state statutes. This Article exposes and analyzes one cause of racially unrepresentative juries: state courts' failure to grant criminal defendants access to jury selection records.

Jury selection records are critical because fair cross-section violations are frequently hidden from view. For example, a computer error caused the federal jury selection system in Connecticut to read the "d" in Hartford to mean "deceased," and accordingly failed to call anyone from Hartford for jury service. This hidden error eliminated 63 % of eligible African-Americans from the jury system and thereby produced a racially unrepresentative jury pool in violation of the fair cross-section guarantee. The flaw went undetected until a federal defendant obtained access to jury records under federal law. Yet under Connecticut law, a state defendant in that district would be prohibited from accessing the records that revealed the error. As a result of state laws like Connecticut's, defendants are often denied access to the information they need to discover violations of the fair cross-section right.

This Article provides the first scholarship analyzing the role of access to records in constitutional and statutory fair cross-section doctrine. It reveals the way in which the celebrated constitutional and statutory right to an impartial jury

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[*] Associate Professor, City University of New York (CUNY) School of Law. I am grateful for the research assistance and thoughtful contributions of Joseph Schofield, Kelly M. Burnett, and Michael Wynn, and for the insights of Ruthann Robson and Mark Raymond Sylvester. I also benefited from the feedback of Erin Collins, Miriam Baer, and Anders Kaye at the A.B.A. Criminal Justice Section Faculty Workshop; Kim Thomas, Amber Baylor, Vida Johnson, and Richard Frankel at the New York University Law School Clinical Law Review Writers' Workshop; Samantha Buckingham, Cortney Lollar, and Andrew Ferguson at the PDS in the Legal Academy Symposium; and the attendees of the James T. Gathii Faculty Workshop Series at Albany Law School and the CUNY Law scholarship workshop. I welcome all feedback and can be reached at nina.chernoff@law.cuny.edu.

depends entirely on the ostensibly minor decision to grant or deny criminal defendants access to jury selection records.

This Article begins by illustrating why fair cross-section violations are both invisible and harmful, and describes how federal law has responded by guaranteeing federal defendants a right to discovery. It uses an original 50-state survey to reveal that, in contrast to the federal system, the majority of states keep the door to the fair cross-section right locked by denying defendants access to the discovery key. In fact, 39 of the 50 states fail to provide access to the one set of records that defendants must have in order to enforce the right. This Article analyzes and critiques state court doctrine that elevates administrative concerns over the fair cross-section right, and concludes by proposing solutions that could accommodate courts' concerns without jeopardizing the fair cross-section guarantee.

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I. INTRODUCTION

Every criminal defendant has the right to a jury selected from a "fair cross-section" of the community—a pool of people reflecting the community's racial and ethnic makeup. Yet substantial evidence suggests that jury pools across the country often do *not* represent a fair cross-section of communities.[1] As a result, criminal defendants—who are disproportionately African-American and Latino—may routinely face juries that are disproportionately white.[2]

These disproportionately white juries are inconsistent with constitutional requirements for the proper operation of juries. They are inconsistent with social science data on the actual operation of juries. And racially underrepresentative juries are inconsistent with the laws of all 50 states that guarantee criminal defendants a jury selected from a fair cross-section of the community.

This Article exposes and analyzes one reason the problem of underrepresentative juries has gone unchecked: the failure of states to grant defendants access to discovery about the jury selection system. To understand why discovery is the key to unlocking the fair cross-section right, consider the following example of a fair cross-section violation in Connecticut.

Luis Osorio was facing criminal charges in the Hartford Division of the United States District Court for Connecticut.[3] Mr. Osorio suspected the jury pool underrepresented Hispanics and African-Americans. He alleged a violation of his Sixth Amendment right to a jury selected from a fair cross-section of the community.[4] To make out a fair cross-section claim a defendant must do three things: First, identify a "'distinctive' group" or groups in the community, such as African-Americans.[5] Second, demonstrate that the representation of this distinctive group in the jury pool "is not fair and reasonable in relation to" the group's representation in the community.[6] For example, a defendant could compare census data showing African-Americans make up 50% of the community, with jury data showing African-Americans

1. *See infra* Part II.

2. This Article uses the terms "Hispanic" and "Latino" interchangeably, because although many of the original sources discussed in this Article use the term "Hispanic," that term has been criticized for being underinclusive and Eurocentric. *See, e.g.*, Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 WASH. L. REV. 897, 965 (2007) ("The term 'Hispanic' is representative of Latin America's connections and history as it relates to Spain and Europe exclusively, and does not recognize the influence on Latin America and Latinos of the history and cultures of indigenous peoples and people of African descent.").

3. United States v. Osorio, 801 F. Supp. 966, 968 (D. Conn. 1992).

4. *Id.*

5. Duren v. Missouri, 439 U.S. 357, 364 (1979).

6. *Id.*

make up only 30% of the jury pool. Third, demonstrate that the underrepresentation is "due to systematic exclusion."[7] In other words, the underrepresentation is "inherent in the particular jury-selection process utilized."[8]

In order to pursue and substantiate the second and third elements of his cross-section claim, Mr. Osorio requested and was granted access to discovery on the operation of the jury selection system.[9] That discovery revealed an egregious flaw in the jury selection system—one that eliminated almost two-thirds of potential African-American and Hispanic jurors.

The flaw was rooted in the fact that, as in many jurisdictions, Connecticut's federal jury office uses computer programs to assemble and manage the lists of potential jurors.[10] The computer program filters through a large pool of Connecticut residents' names, and randomly selects people from that pool to receive jury summonses.[11] Unbeknownst to the jury office, an inadvertent error caused the computer program to erroneously read the "d" in the capital city of Hartford to mean "deceased."[12] The computer program accordingly never selected anyone from Hartford to receive a jury summons.[13] For nearly three years,[14] during which time the jury office sent out 4631 jury questionnaires, "[n]ot one questionnaire ha[d] been mailed to and thus returned from anyone residing in . . . Hartford."[15] As a result, no one in Hartford was ever called for jury service. And African-American residents of Connecticut are primarily clustered in just a few towns and cities, one of which is Hartford.[16]

The computer program also failed to send jury summons to anyone in the neighboring city of New Britain, the second largest city in the jury

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7. *Id.*

8. *Id.* at 364, 366. If the defendant satisfies the three prongs, he has established a fair cross-section violation unless the government can show that the aspect of jury system that caused the underrepresentation "manifestly and primarily" advances "a significant state interest." *Id.* at 367.

9. *Osorio*, 801 F. Supp. at 971.

10. *Id.* at 970.

11. *Id.*

12. United States v. Jackman, 46 F.3d 1240, 1242–43 (2d Cir. 1995) ("At the time of the decision in *Osorio*, there was no explanation for the omission of Hartford and New Britain residents from the jury pool. Subsequently, it was discovered that no jury questionnaires were sent to Hartford residents because a computer programming error had caused the letter 'd' in 'Hartford' to communicate to the computer that all potential jurors from Hartford were deceased and thus unavailable for jury service.").

13. *Osorio*, 801 F. Supp. at 972.

14. Matthew Kauffman, *Overhaul of Jury Selection Planned: Reform of Federal Jury Selection Backed by Judges*, HARTFORD COURANT (Nov. 25, 1992), http://articles.courant.com/1992-11-25/news/0000109405_1_jury-pools-jury-system-grand-jury.

15. *Osorio*, 801 F. Supp. at 972.

16. CONNECTICUT AFRICAN-AMERICAN DEMOGRAPHICS, AFRICAN AMERICAN AFFAIRS 2, http://www.cga.ct.gov/aaac/pdfs/Demographic_Profile.pdf (documenting that in 1990, Hartford was the Connecticut town with the highest percentage of African-Americans in the state, at 38.8%) (last visited May 12, 2016).

district.[17] The New Britain citizens were left out of the jury pool because the source list of names from New Britain was accidentally misplaced and was never entered into the computer program.[18]

As a result of everyone in Hartford being "dead" and everyone in New Britain being "missing," the jury pool for the district court in Connecticut became significantly whiter. Those two cities alone accounted for 63% of the voting-age African-American population and 68% of the voting-age Hispanic population in the jury district.[19]

It is indisputable that this accidental error violated criminal defendants' right to a jury selected from a fair cross-section of the community. The critical point is that this violation *would never have been discovered* if Mr. Osorio had not been granted access to records of the jury selection system.[20] Indeed, the jury office had sent over 4000 jury questionnaires by the time Mr. Osorio filed his claim, and no one had noticed "[t]he complete absence of either city" from the jury pool.[21] The violation was only revealed by Mr. Osorio's review of the jury office's records.[22]

This Article exposes how the celebrated right to an impartial jury largely depends on the ostensibly minor decision to grant or deny discovery of jury records to criminal defendants. To be sure, there are a number of reasons why jury systems may underrepresent African-Americans and Latinos,[23] and improving access to discovery will not resolve them all. But only discovery can *reveal* them.

Part II of this Article explains why fair cross-section violations are constitutionally distinct, usually invisible, and always harmful. Part III discusses how federal law has responded by guaranteeing defendants a right to discovery. Part IV presents an original 50-state survey to reveal that—in contrast to the federal system—39 of 50 states fail to provide access to the records defendants need to enforce the fair cross-section right. Part V then examines why access to records is mandated by the fair cross-section purpose of state statutes and constitutions. Part VI critiques state court doctrine that elevates administrative concerns over the fair cross-section right, and the article concludes in Part VII with proposals that could accommodate courts' concerns without jeopardizing the fair cross-section guarantee.

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17. *Osorio*, 801 F. Supp. at 972.

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. United States v. Jackman, 46 F.3d 1240, 1244 (2d Cir. 1995) ("*Osorio* alerted the clerk to the fact that the old Qualified Wheel seriously underrepresented residents of Hartford and New Britain and consequently underrepresented Blacks and Hispanics.").

23. For example, the master list may underrepresent people of color if it is drawn from voter registration rolls in jurisdictions where African-Americans register to vote at a lower rate. *See, e.g.*, HIROSJI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 18–21 (1993).

II. THE CONTEXT: A UNIQUE PROTECTION, AN INVISIBLE VIOLATION, AND A REAL HARM

The problems with Connecticut's jury system illustrate three important points that in turn explain why in 39 states the fair cross-section right is almost impossible to enforce. First, the Sixth Amendment fair cross-section right guarantees a defendant a unique protection that is distinct from the right to equal protection. Second, a fair cross-section violation is usually completely invisible to the only person with standing to challenge it—the criminal defendant. Third, this unique and invisible constitutional violation causes real-world harm, jeopardizing one of the most critical safeguards of the criminal system as well as public confidence in the justice system.

A. *DISCRIMINATION IS THE DISTINCTION BETWEEN THE FAIR CROSS-SECTION AND EQUAL PROTECTION GUARANTEES*

The litigation of the Connecticut computer error demonstrates why the distinction between a claimed violation of the fair cross-section right and a violation of equal protection is a difference that matters.

Mr. Osorio, the defendant who exposed the Hartford computer error, alleged that the jury system violated both his fair cross-section and equal protection rights.[24] The District Court did not reach the equal protection issue,[25] but if it had, it would have been forced to conclude that there was no equal protection violation because there was no discriminatory intent. The computer programming error was a mistake—and the jury office personnel were not even aware of it until the litigation began.[26] There was no evidence that the misplaced list of New Britain jurors was the product of anything more than human error. These kinds of mistakes cannot give rise to an equal protection claim.

Put simply, equal protection is concerned with *means*, whereas the Sixth Amendment is concerned with *ends*. The Fourteenth and Fifth Amendments guarantee a process that is free from discrimination, and without proof that the process was infected with discrimination, there is no equal protection claim. In contrast, the Sixth Amendment guarantees the defendant several outcomes, such as "a speedy and public trial," the "assistance of counsel," and "an impartial jury."[27] You either have a speedy trial or you do not. You either have a defense attorney or you do not. And you either have an impartial jury—which the Supreme Court has interpreted to mean a jury selected from a fair cross-section[28]—or you do not. Under the Sixth Amendment, it does not

24. *Osorio*, 801 F. Supp. at 968.

25. *Id.* at 980 n.14.

26. *See id.* at 968–73.

27. U.S. CONST. amend. VI.

28. Taylor v. Louisiana, 419 U.S. 522, 528 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.").

matter if the *reason* you do not have a speedy trial, a lawyer, or an impartial jury is malice or accident. The distinction between the two constitutional protections "[i]s important. An Equal Protection challenge concerns the process of selecting jurors, or the allegation that selection decisions were made with discriminatory intent. The Sixth Amendment, on the other hand, is concerned with impact . . . ."[29] As a result, ethical and unbiased people can still accidentally operate a jury selection system that violates the Sixth Amendment.

Indeed, as illustrated in the next Part, racial and ethnic disparities can result from a range of accidental or benign actions by the jury office. The resulting racial underrepresentation may violate the fair cross-section guarantee, but absent discrimination, there is no equal protection violation. As the Second Circuit observed in the context of the Connecticut jury litigation, "as often happens in overburdened courts (like other institutions), the failure" to fix errors in the system might result "simply from the unwarranted assumptions by all concerned" that the system is operating as it should.[30]

B. A Fair Cross-Section Violation Is Invisible and thus Leaves Defendants Dependent on the Government

1. An Invisible Violation

The second point illustrated by the exclusion of Connecticut jurors is that a violation of the fair cross-section right is essentially invisible. In this way it is different from any of the other Sixth Amendment rights. Imagine a defendant, say Mr. Osorio in Connecticut, enters the courtroom where he will be tried. Even if Mr. Osorio is not familiar with the Sixth Amendment, he will be able to tell if he is standing before the court without a lawyer, and he will know if he has languished in jail for a year before being tried. But Mr. Osorio will have no idea if his jury was *selected from* a fair cross-section of the community. The only thing he can see—the jury venire assembled in the courtroom for the voir dire process—is legally irrelevant.

This is because the Sixth Amendment and jury statutes guarantee a defendant a jury selected from a fair cross-section of the community, but not a jury that actually includes a fair cross-section of the community.[31]

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29. United States v. Green, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (emphasis omitted), *overruled on other grounds by In re* United States, 426 F.3d 1 (1st Cir. 2005); *see also infra* Part II.B.2. The scope of the two standards also differs: equal protection extends to would-be jurors who are denied the opportunity to serve on juries by discriminatory state actors, while the Sixth Amendment protects only criminal defendants.

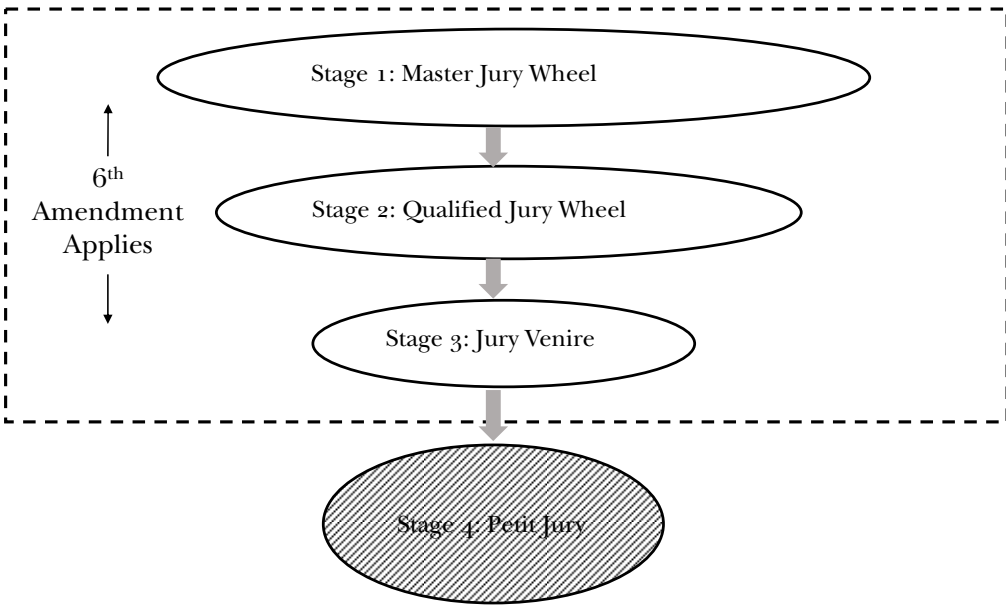
30. United States v. Jackman, 46 F.3d 1240, 1245 (2d Cir. 1995).

31. Lockhart v. McCree, 476 U.S. 162, 173 (1986) ("We have never invoked the fair-cross-section principle . . . to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.").

Understanding this limitation requires a basic understanding of the four stages of the jury selection process, illustrated in Figure 1 below.

In the four stages of jury selection, the population of all the possible jurors in the community is winnowed down to a panel of 12 jurors.[32] The fair cross-section right—under either the Sixth Amendment or statute—applies only to the first three stages of that process.

Figure 1. The Stages of Jury Selection



Stage 1: Creating a pool of potential jurors from all the possible jurors in the community: At stage 1, the jurisdiction creates a pool of potential jurors by using a source list (or lists) of names. For example, if Connecticut uses the voter registration rolls as its source list, the potential jury pool is made up of residents of the Connecticut judicial district who are registered to vote. This initial potential jury pool is referred to as the "master jury wheel."[33]

Stage 2: Creating a list of qualified jurors from the master jury wheel: At stage 2, the jurisdiction winnows down the jury pool identified at stage 1 to only those jurors who are qualified to serve. Qualifications for jury service vary slightly by jurisdiction, but typically jurors are required to be citizens, at least 18 years old, proficient in English, and without a felony conviction.[34] The

32. Although there is no constitutional requirement that a jury consists of 12 persons, Williams v. Florida, 399 U.S. 78, 86 (1970), 12 is the historical and typical number of jurors on a criminal jury (not including alternates).

33. Or "master list," "jury wheel," or "source list."

34. *See, e.g.*, N.Y. JUD. LAW § 510 (McKinney 2003).

system first randomly selects a number of persons on the master jury wheel and then sends them a questionnaire, asking qualification questions to determine their eligibility.[35] This second, smaller pool is usually referred to as the "qualified jury wheel."

Stage 3: Creating a jury venire from the qualified jury wheel: At stage 3, the jurisdiction summons members of the qualified jury wheel to the courthouse, where they become part of the "jury venire" if they have not been granted a deferral or are not excused on request.[36] The "jury venire" is the group of people at the courthouse who are available to serve as jurors on a given day.[37]

Stage 4: Creating individual jury panels from the jury venire: At stage 4, the court sends some members of the jury venire to various courtrooms where jury panels are selected through the voir dire process. Some of these people become members of a petit jury for an individual case. Others are excluded through the voir dire process or are never questioned during voir dire because the petit jury is filled before they are examined. Other members of the jury venire are never sent to a courtroom and are simply excused after showing up at the courthouse.

The fair cross-section right applies to the master jury wheel (stage 1), the qualified jury wheel (stage 2), and the jury venires from which petit juries are selected (stage 3), but not to the petit jury panels (stage 4).[38] In other words, it applies only to the invisible stages of jury selection that occur before Mr. Osorio sees the jury venire for his own trial. As the Supreme Court has explained, "[d]efendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[39]

Because of the limitation on the cross-section right, the only thing Mr. Osorio can actually see is the one part of the jury selection process that is irrelevant to the Sixth Amendment analysis. And every stage of the process that is protected by the Sixth Amendment occurs behind the closed doors of the jury office, and often inside of a computer. Mr. Osorio might have seen an all-white jury that *suggested* there was a problem with the jury selection

35. Sometimes this questionnaire also doubles as the summons to come to court on a specific day.

36. Again, in some jurisdictions stage 2 and stage 3 are combined when the jurisdiction sends out a combined questionnaire and summons.

37. United States v. Savage, Nos. 07-550-03, -04, -05, -06, 2013 WL 797417, at *5 (E.D. Pa. March 5, 2013) (recognizing that a request for "venire panels . . . is a request for the list of jurors that appeared at the courthouse to attend juror orientation").

38. *See* Lockhart v. McCree, 476 U.S. 162, 174 (1985) ("The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn." (quoting Pope v. United States, 372 F.2d 710, 725 (8th Cir. 1967))).

39. Taylor v. Louisiana, 419 U.S. 522, 538 (1974).

system,[40] but that observation is legally irrelevant.[41] Importantly, Mr. Osorio could not look at his jury and "see" the legally relevant fact that the computer program in the jury office was reading the "d" in Hartford as "deceased," nor could he "see" the legally relevant omission of the list of potential New Britain jurors.

Consider the following similar examples—while not all ultimately led to successful fair cross-section claims, they all demonstrate how the racial diversity of jury pools can be unintentionally undermined in stages of the selection process that are invisible to defendants.

Using alphabetical order in Indiana: African-Americans in Allen County, Indiana were underrepresented in the jury pool because of an "Accident of the Alphabet."[42] The computer program used to select jurors in Allen County was programmed to work through an alphabetical list of townships, selecting persons from each successive township to be summoned for jury duty.[43] It was also programmed to stop pulling names from the pool when it reached 10,000 names.[44] Year after year, the program identified the requisite 10,000 potential jurors before reaching the end of the alphabetical list of townships.[45] Residents of Wayne Township, at the end of the computer's list, were thus dramatically underrepresented in the jury pool.[46] This made a difference because 75% of African-Americans in Allen County lived in Wayne Township.[47] As a result, "African-Americans as a group had roughly *half the chance of being included on a jury panel* than a truly random system would have produced."[48]

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40. Ambrose v. Booker, 684 F.3d 638, 646 (6th Cir. 2012) ("It may be true that a venire panel's composition may put a petitioner on notice of a procedural irregularity in some instances, for example in areas where the minority population is so high that the probability of an all-white panel is minuscule."). Lawyers who routinely practice in the same jurisdiction often notice the underrepresentation of distinctive groups in the jury pool, but again, this observation is alone legally insufficient. *See, e.g.*, Matthew Kauffman, *Race Mix of Jury at Issue*, HARTFORD COURANT, (Oct. 30, 1995), http://articles.courant.com/1995-10-30/news/9510300014_1_jury-duty-jury-pools-representative-jury ("[M]any defense attorneys in Hartford . . . say they are puzzled by the dearth of minorities and city residents among jury pools.").

41. *See Ambrose*, 684 F.3d at 645 (recognizing that criminal defendants "could not have known that minorities were underrepresented in the *jury pool* by looking at the *venire panel*").

42. Azania v. State, 778 N.E.2d 1253, 1258 (Ind. 2002); *see also* Presley v. State, 9 So. 3d 442, 443 (Miss. Ct. App. 2009) (Venire that "did not contain any potential jurors whose surnames began with the letters [T through Z] . . . resulted from . . . [a] system" where a computer selected the requisite number of jurors from an alphabetical list "midway through the letter 'S.'").

43. *Azania*, 778 N.E.2d at 1257.

44. *Id.*

45. *Id.* at 1259.

46. *Id.*

47. *Id.*

48. *Id.* at 1260 (emphasis added).

Allocating jurors in Michigan: African-Americans in Kalamazoo, Michigan were underrepresented in the jury pool because of the manner in which the jury office allocated jurors to different courts.[49]

Kalamazoo residents were first allocated to circuit courts and then the remaining names were sent to district courts.[50] Because their names were sent first to district courts, "few residents of the City of Kalamazoo . . . were available for allocation to the circuit court venires."[51] This made a difference "because the largest population of African-Americans eligible for jury service resided in the City of Kalamazoo," and their exclusion "from the circuit court venires resulted in approximately *seventy-five percent of the African-American adults eligible for jury service being excluded from service in the circuit court.*"[52]

Dividing the district in Illinois: African-Americans in Cook County, Illinois were underrepresented in the jury pool because of the manner in which the jury office split up the district for administrative purposes.[53]

Illinois law permitted jury offices in large judicial circuits to divide up the circuit for the purpose of summoning jurors.[54] The jury office in Cook County did so, essentially splitting the county in a Northern and Southern half, drawing the line where it would leave roughly half the population in each division.[55] Jurors in the Northern half of the circuit were sent to one court; jurors in the Southern half to another court.[56] But "only 25.4% of the county's black registered voters live in the northern half of the county, while 75.4% live in the southern half."[57] As a result, a jury "venire that was randomly drawn from the northern half of Cook County would be expected to contain only *half as many black venirepersons* as a venire drawn from Cook County as a whole."[58]

Eliminating duplicates in California: Hispanics in a California county were underrepresented in the jury pool because of the manner in which the jury office eliminated duplicate names.[59]

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49. People v. Hubbard, 552 N.W.2d 493, 504 (Mich. Ct. App. 1996), *overruled on other grounds by* People v. Bryant, 822 N.W.2d 124 (Mich. 2012) *and* People v. Harris, 845 N.W.2d 477 (Mich. 2014).

50. *Hubbard*, 552 N.W. 2d at at 500 (The court appears to have inadvertently switched the words "district" and "circuit" in the first sentence on page 500, but the following three sentences establish that residents were sent first to circuit courts.).

51. *Id.* ("Consequently, residents of . . . Kalamazoo were being significantly underrepresented in the circuit court venires.").

52. *Id.* (emphasis added).

53. People v. Peeples, 616 N.E.2d 294, 305 (Ill. 1993).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 306.

58. *Peeples*, 616 N.E.2d at 306 (emphasis added) (citing but not adopting testimony of defense expert).

59. People v. Ramirez, 139 P.3d 64, 94–95 (Cal. 2006).

The jury office ran a computer program to eliminate duplicate names after merging multiple source lists of potential jurors.[60] This ensured that, for example, someone who was listed on the voter registration list and the list of licensed drivers would not be listed twice in the jury pool. The program identified duplicates "by comparing the full last name and the first four letters of the first name."[61] But "[b]ecause many members of the Hispanic community share common surnames and first names," there was an increased chance that "Hispanics might be erroneously deleted."[62] Indeed, there was evidence that although Hispanics made up roughly 26% of the community, they were only 19% of the jury pool.[63] But when an improved approach to removing duplicate names was introduced, it "resulted in an increase from 19 to 26 percent" of Hispanic representation in the jury pool.[64]

Using telephones in Montana: Native Americans in Cascade County, Montana were underrepresented in the jury pool because the jury office used the telephone to summon prospective jurors.[65]

Summoning jurors by phone led to the disparity because, while only 5% of "Anglo American" households in the county were without phone service, 29% of Native American households lacked a phone.[66] As a result of the telephone notification process, in a "200-juror panel randomly drawn, over *one-third* (70) of the prospective jurors were excluded from possible jury service."[67]

Saving money on software in Michigan: African-Americans in Kent County, Michigan, were underrepresented in the jury pool because a computer error caused fewer jury summons to be sent to African-American districts.[68]

"[I]n an effort to save money spent on software fees," the jury office in Kent County "switched . . . from using a vendor's software for summoning jurors to software developed by its information technology department."[69] But "the new [in-house] computer program had an erroneous setting," and instead of selecting potential jurors from the pool of 456,435 names, it selected jurors from a subset of 118,169 of those names.[70] "Because the 118,169 individuals selected came disproportionately from certain zip codes,

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60. *Id.* at 94.

61. *Id.*

62. *Id.*

63. *Id.* The government produced evidence of a smaller disparity. *Id.*

64. *Ramirez*, 139 P.3d at 94.

65. State v. LaMere, 2 P.3d 204, 207 (Mont. 2000); *see also* United States v. Nakai, 413 F.3d 1019, 1022 (9th Cir. 2005) (noting that nearly half of jurors whom clerk failed to reach by telephone were Native American).

66. *LaMere*, 2 P.3d at 207.

67. *Id.* at 221 (emphasis added).

68. People v. Bryant, 822 N.W.2d 124, 128–29 (Mich. 2012).

69. *Id.* at 129.

70. *Id.* at 129–30.

jury questionnaires were disproportionately sent to those zip codes."[71] This made a difference because it "resulted in . . . disproportionately fewer questionnaires going to zip codes with larger African-American populations."[72] Ultimately, this "unintentional computer glitch" was responsible for "*systematic underrepresentation of African-Americans* in the jury pools" of that county.[73]

The representation of African-Americans and Latinos in jury pools has similarly been diminished in other jurisdictions by programming errors or malfunctions that eliminate towns or zip codes from the jury pool,[74] or otherwise accidentally eliminate eligible jurors.[75] In addition, the racial make-up of jury pools can be affected by benign efforts to send jurors to courthouses closer to their homes[76] or grant their deferral requests,[77] or the numeric

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71. *Id.* at 130.

72. *Id.*

73. Ambrose v. Booker, 684 F.3d 638, 640 (6th Cir. 2012) (emphasis added).

74. *See, e.g.*, Griffin v. State, 695 N.E.2d 1010, 1013–14 (Ind. Ct. App. 1998) (A "computer error excluded a large portion of a township from the county jury pool," and that township "contained the largest percentage of the county's African-American population."); State v. Cross, 887 S.W.2d 789, 791 (Mo. Ct. App. 1994) ("Two zip codes were inadvertently excluded . . . .").

75. For example, a computer program error in Washington, D.C., discussed in more detail at Part V.A, erroneously eliminated from the jury pool anyone with a misdemeanor conviction although such persons are eligible for jury service. United States v. Powell, 136 Daily Wash. L. Rptr. 2149, 2154 (D.C. Super. Ct. 2008); *see also* ALASKA SUPREME COURT, 2007 STATUS REPORT OF THE ALASKA SUPREME COURT FAIRNESS AND ACCESS IMPLEMENTATION COMMITTEE 20 (2007), http://courts.alaska.gov/appellate/docs/fairaccess2007.pdf (A task force review "revealed that many villages had been excluded [from the jury pool] by mistake or because they had always been excluded even though there were no longer good grounds for the exclusion."). In one jurisdiction, a computer error resulted in a jury summons being sent to a dog. Snejana Farberov, *Justice's Gone to the Dogs! IV the German Shepard Called for Jury Duty Because of a Computer Glitch*, DAILY MAIL (April 15, 2014, 9:31 PM), http://www.dailymail.co.uk/news/article-2605364/Justices-gone-dog-IV-German-shepard-summoned-jury-duty-computer-glitch.html. When questioned about the dog's pending jury service, the responsible official pointed out the truism that "jury duty notices are generated by a computer, which is not immune to errors." *Id.*

76. *See, e.g.*, Alvarado v. State, 486 P.2d 891, 900 (Ala. 1971) (Because "the system of jury selection employed . . . restricted eligibility for jury service to residents of the area within a 15-mile radius of [the courthouse], virtually all residents of Native villages were excluded from the jury panel."); Spencer v. State, 545 So. 2d 1352, 1353–54 (Fla. 1989) (The division of the jury district, which was designed to "reduce substantial travel time for jurors and alleviate unnecessary expense to the state[,] . . . removed from the jury pool for the [district] a significant concentration of the black population of [the] County, specifically 17% of that population."); People v. Henderson, 490 N.Y.S.2d 94, 96–97 (Buffalo City Ct.1985) (The decision not to require jurors to travel to regional courts resulted in "Blacks [being] called [as jurors] 61% less frequently" than if jurors were sent to all courts in the county.); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 256–58 (1994) (A Los Angeles' rule providing that jurors would be able to serve at a courthouse within 20 miles of their home meant that up to "70.9% of Black registered voters have been left out of these outlying districts."); *see also* People v. Jenkins, 997 P.2d 1044, 1100 (Cal. 2000) (describing effects of Los Angeles' 20 mile rule).

77. *See, e.g.*, United States v. Clay, 159 F. Supp. 2d 1357, 1362–64, 1369 (M.D. Ala. 2001) ("[T]here is uncontroverted evidence that the . . . disparity between the percentage of African-

increment used to randomly select jurors from the jury pool.[78] These and other examples demonstrate that mundane administrative decisions can produce racially underrepresentative jury pools—and that these decisions or errors are invisible to defendants.

This point was underscored by the Sixth Circuit when evaluating a defendant's ability to "see" the computer error in Kent County, Michigan:

> The glitch was a mistyped parameter in the software, buried in a mountain of computer code, that was only discovered after a broad statistical analysis led to an extensive internal investigation. . . . The difficulty of detecting this problem is underscored by the fact that the glitch persisted for nearly two years without detection by defendants, judges, or Kent County officials.[79]

As a result, the court held that "[t]his is not the type of error that would be reasonably discoverable by a defendant at jury selection."[80]

2. Defendants Are Dependent on the Government

There is only one entity with access to information about whether the initial, invisible stages of the jury selection process are infected with these types of errors: the court, which is represented by the government.[81] A defendant like Mr. Osorio is therefore dependent on the government for information about whether the government is violating his rights.

The extent to which criminal defendants depend on the government for information about a violation of their fair cross-section right is illustrated by

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Americans on [the defendant's] venire and in the divisional wheels" was the result of administrative decision to grant all deferral requests and group the deferred jurors together for later jury selection, when deferral requests were disproportionately made by whites.); People v. Jackson, 920 P.2d 1254, 1267 (Cal. 1996) ("[U]nderselection of [various groups including] Hispanics" was caused by "inconsistent methods for excusing prospective jurors, duplications and dated information used in forming the jury pool, and lack of follow-up with those persons not responding to the jury summons." (footnote omitted)).

78. *See, e.g.*, Washington v. People, 186 P.3d 594, 597–98 (Colo. 2008) (An effort "[t]o reduce the likelihood that some prospective jurors in the jury wheel will be selected for jury duty more often than others" by assigning jurors a rank based on times of service had the inadvertent result of underrepresenting African-Americans and Hispanics.); State v. Long, 499 A.2d 264, 269 (N.J. Super. Ct. Law Div. 1985) ("The sorting of the master [jury] list by utilization of the fifth letter alphabetization system . . . results in a homogeneity that tends to skew the panel against a true cross section of the community."); State v. Hester, 324 S.W.3d 1, 44 (Tenn. 2010) (Changes to "the increment used to draw names from the driver's license list . . . . have a significant effect on the drawing of names from the list. . . . [A]ssuming that [the county's] Hispanic population generally is at the end of the list because Hispanics disproportionately have higher driver's license numbers . . . . decreasing the increment will have a tendency to increase the possibility that Hispanics will not be considered for jury service.").

79. Ambrose v. Booker, 684 F.3d 638, 645 (6th Cir. 2012). "The problem came to light in 2002, when a local high school teacher, Wayne Bentley, completed a study of minority representation on Kent County juries." *Id.* at 641.

80. *Id.* at 645.

81. Gause v. United States, 6 A.3d 1247, 1249 (D.C. 2010) (en banc).

the different outcomes in a pair of claims made in the same court in Washington, D.C. One defendant, Mr. Larry Gause, suspected that the jury pool in D.C. was underrepresenting African-Americans and asked the trial court for access to the jury selection records to investigate.[82] The trial court denied his request, and the trial proceeded—with the implicit assumption that Mr. Gause's right to a jury selected from a fair cross-section was protected.[83] Around the same time, a second defendant, Mr. Odell Powell, had the same concerns about the same jury pool and made the same request.[84] Mr. Powell's trial judge, in contrast, granted the motion and ordered the government attorneys to disclose the court's jury selection records.[85]

Mr. Powell's discovery request revealed a host of problems—invisible without discovery—that had the power to disproportionately exclude African-Americans. For example, a computer programming error was excluding all potential jurors with misdemeanor convictions, even though those people were legally eligible for jury service.[86] The program was also *permanently* excluding potential jurors who were only *temporarily* ineligible. Thus, any potential juror who had a pending criminal charge at the time he filled out the juror questionnaire was never called for jury service again, even when the charge had been dismissed or resolved.[87] Another programming error permanently disqualified any potential juror with a felony conviction, even though the ban on jury service only applies for ten years after conviction. Eligible jurors with "expired" felony convictions were therefore never called for jury service again.[88] There was every indication that no one, not even the jury administrators, knew these errors existed until Mr. Powell discovered them.[89] Each of these problems was similarly affecting Mr. Gause's jury pool—but they were invisible to him because Mr. Gause's requests for discovery had been denied.[90]

Discovery makes the difference, as these parallel D.C. claims demonstrate. For without the government's information about jury selection, defendants' fair cross-section challenges are destined to fail. Courts routinely reject fair cross-section claims that are based on a defendant's "speculation" or "guesswork" about the jury process.[91] Defendants not only need the

82. *Id.*

83. *Id.* at 1250.

84. United States v. Powell, 136 Daily Wash. L. Rptr. 2149, 2150 (D.C. Super. Ct. 2008). Both Mr. Gause and Mr. Powell were represented by attorneys in the Public Defender Service for the District of Columbia. Gause v. United States, 959 A.2d 671, 687 (D.C. 2008).

85. *Powell*, 136 Daily Wash. L. Rptr. at 2150.

86. *Id.* at 1254.

87. *Id.*

88. *Id.*

89. *See id.* at 2150–54.

90. Gause v. United States, 6 A.3d 1247, 1250 (D.C. 2010) (en banc). The trial judge's failure to grant discovery was eventually reversed. *See infra* Part V.A.

91. State v. Tremblay, No. P1 97-1816AB, 2003 WL 23018762, at *5–6 (R.I. Mar. 19, 2003)

government's data about the race of potential jurors, they need sufficient access to the operation of the system to understand the *source* of the disparity, as courts require defendants "to offer more than just speculation or surmise as to the reason for the alleged impermissible exclusion."[92] As one court explained—faced with a defendant who "submitted no competent evidence of underrepresentation or of systematic exclusion" where "[n]o exhibits were appended to the motion" and "no data was provided concerning past . . . jury panels"—"[t]he absence of such evidence is fatal to any attempt to establish a constitutional violation."[93]

Moreover, courts hold that only the jury system's *own* data is sufficiently reliable. For example, a defendant in Illinois seeking to establish a fair cross-section violation presented data compiled by the jury supervisor for the district.[94] The jury supervisor testified that "he recorded the racial composition of venires based on his observations" at the courthouse over a ten-month period.[95] The Supreme Court of Illinois concluded that the data was properly excluded because the supervisor "did not testify that he observed *every* venire at the courthouse" and the supervisor "identified the race of venirepersons based on his personal observations, without any degree of scientific certainty."[96] Surveys conducted by public defender offices and testimony by outside experts have likewise been deemed inadequate.[97]

In sum, because fair cross-section violations are usually invisible, defendants seeking to mount a successful fair cross-section challenge must have access to the jury system's own data about the racial make-up of the jury pool and the operation of the selection system. The absence of such data, or an attempt to produce substitute data from other sources, is "fatal" to any attempt to establish a cross-section violation.

(Defendants "cannot discharge their burden of demonstrating systematic exclusion merely by offering statistical evidence and perceived percentages of the alleged disparity." They need adequate statistics "together with at least a reliable indication as to *when* and *why* the alleged systematic exclusion occurred."); *see also* People v. Burgener, 62 P.3d 1, 21 (Cal. 2003) ("Speculation as to the source of the disparity is insufficient to show systematic exclusion."); Goins v. Commonwealth, No. 2008-SC-000718-MR, 2009 WL 3165539, at *1 (Ky. Oct. 1, 2009) ("A showing of underrepresentation must be predicated on more than mere guesswork. Such a showing requires competent proof (usually statistical in nature).").

92. *Tremblay*, 2003 WL 23018762, at *6.

93. *Goins*, 2009 WL 3165539, at *2.

94. People v. Peeples, 616 N.E.2d 294, 307–08 (Ill. 1993).

95. *Id.*

96. *Id.* at 308.

97. *See, e.g.*, People v. Broadnax, 532 N.E.2d 936, 942–43 (Ill. App. Ct. 1988) (concluding that defendant's evidence of disparity "is not methodologically valid or adequate" where defendant submitted "testimony of the staff members of the public defender's office and the affidavits of the three private attorneys"); Commonwealth v. Smith, 694 A.2d 1086, 1094–96 (Pa. 1997) (rejecting fair cross-section claim where defendant "relies upon an informal survey conducted by the Public Defender's Office" and "an expert in jury selection or composition" that the "survey results show that the average number of African-Americans in the jury pool in [the] County is well below the percentage of African-Americans in the population of [the] County at large").

C. *A FAIR CROSS-SECTION VIOLATION CAUSES REAL HARM*

The third point illustrated by the Connecticut jury litigation is that invisible fair cross-section violations have real and injurious consequences. The Connecticut errors eliminated almost two-thirds of African-Americans and Hispanics from the jury pool.[98] A significant amount of social science research has concluded that the underrepresentation of those groups undermines the very purpose of the jury, as that purpose has been articulated by the Supreme Court.

1. The Purpose of the Jury Is to Reflect Community's Judgment

The primary purpose of the Sixth Amendment right to an impartial jury is to protect criminal defendants "from oppression by the Government."[99] The jury protects the defendant from the mistakes, malice, or apathy of government actors (prosecutors, judges, and police) by reserving the ultimate question of guilt or innocence to "a body of [the defendant's] peers."[100] Therefore, "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[101] The jury cannot play its "prophylactic" role "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[102]

The Framers' focus on a jury of "peers or equals"[103] has evolved into the modern requirement that a jury be selected "from a fair cross section of the community."[104] This evolution reflects changes in our country's sense of who counts as a part of our community.[105] The founders were adamant about interposing the community's commonsense judgment, but their definition of community was largely limited to white, male, property owners.[106] Now our definition of peers has evolved to include persons of any race, ethnicity, or

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98. *See supra* note 17 and accompanying text.

99. Duncan v. Louisiana, 391 U.S. 145, 155 n.23 (1968) (quoting Singer v. United States, 380 U.S. 24, 31 (1965)); *see also* Powers v. Ohio, 499 U.S. 400, 411 (1991) ("The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) ("[T]he key role of the jury was to protect ordinary individuals against governmental overreaching.").

100. Williams v. Florida, 399 U.S. 78, 87 (1970).

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

102. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

103. *Id.* at 537 n.19.

104. *Id.* at 537.

105. *Id.* ("Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.").

106. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 2 (1994) (noting that no African-American served on a jury until 1860, and no woman served until 1898).

gender who meets the eligibility requirements for jury service.[107] In light of these developments, the Supreme Court has accordingly concluded that the impartial jury required by the Framers "necessarily contemplates an impartial jury drawn from a cross-section of the community."[108] So although the Court did not begin using the term "cross-section of the community" until 1942,[109] it did so in the context of describing "the established tradition . . . that the jury be a body truly representative of the community."[110] The fair cross-section standard is thus a relatively new way of conceiving of a very old right.[111]

Indeed, a historian would be hard-pressed to exaggerate the criminal jury trial's importance to the founders of our country or the framers of the Constitution. The First Congress of the American Colonies identified the jury trial as an essential right;[112] the Declaration of Independence described the denial of jury trials as part of the justification for revolution;[113] and the Framers not only wrote the criminal jury trial right directly into the Constitution,[114] but went on to ensure that it was guaranteed in the Sixth

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107. *See Taylor*, 419 U.S. at 533; *Strauder*, 100 U.S. at 310. The popular reference to a "jury of one's peers" likely has its root in the Magna Carta, which states that "[n]o freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land." *Featured Documents*, NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/featured_documents/magna_carta (last visited May 12, 2016).

108. Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946). As the Supreme Court explained in *Holland v. Illinois*, the fair cross-section requirement is "not explicit in [the] text" of the Sixth Amendment, "but is derived from the traditional understanding of how an 'impartial jury' is assembled. That traditional understanding includes a representative venire, so that the jury will be . . . 'drawn *from* a fair cross section of the community.'" Holland v. Illinois, 493 U.S. 474, 480 (1990) (emphasis in original) (quoting Taylor v. Louisiana, 419 U.S. 522, 527 (1975)).

109. Glasser v. United States, 315 U.S. 60, 86 (1942).

110. Smith v. Texas, 311 U.S. 128, 130 (1940); *see* ABRAMSON, *supra* note 106, at 29–30 (noting that at the time of the Constitution's drafting, the supporters of the localized jury "were not perfect populists, [but] . . . they saw in the jury an embodiment of local people representing local values").

111. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTING PANELS 9 (1977) ("The jury's legitimacy has always rested in its capacity to express fairly the community's conscience; what has changed over the centuries is *how* a jury best expresses the community's conscience.").

112. The criminal jury trial had been in place in England for several centuries before the British colonists arrived in America, and "[t]hose who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance.'" Duncan v. Louisiana, 391 U.S. 145, 154 (1968) (quoting Thompson v. Utah, 170 U.S. 343, 349–50 (1898)). Accordingly, when the First Congress of the American Colonies sought to identify "the most essential rights and liberties of the colonists," it resolved "that trial by jury is the inherent and invaluable right of every British subject in these colonies.'" *Duncan*, 391 U.S. at 152 (quoting SOURCES OF OUR LIBERTIES 270 (Richard L. Perry, ed. 1959)).

113. The Declaration of Independence lists the injuries that justified revolt, including the charge that the King of England "depriv[ed] us in many cases, of the benefits of Trial by Jury." THE DECLARATION OF INDEPENDENCE (U.S. 1776).

114. Article III provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2, cl. 3.

Amendment.[115] As the Supreme Court concluded, even a "skeletal history" of the right makes it clear that "trial by jury in criminal cases is fundamental to the American scheme of justice."[116]

The fundamental role of the criminal jury right is also reflected in the history of states' constitutions. As the Supreme Court has observed, "[t]he constitutions adopted by the original States guaranteed jury trial . . . . [and] the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases."[117] Many state constitutions use the Sixth Amendment's "impartial jury" language and have similarly interpreted it to entitle defendants to a jury selected from a "fair-cross-section" of the community.[118]

Finally, the fair-cross-section right is enshrined in a federal statute— the Jury Selection and Service Act—and extends to all litigants in civil or criminal cases, as discussed in more detail in Part III. All 50 states, as discussed in Part IV, have enacted statutes or have interpreted their state laws to guarantee criminal defendants the right to be tried by a jury selected from a fair cross-section of the community.

As the drafters of the federal and state constitutions and statutes recognized, and as the Supreme Court has consistently reinforced, a jury's commonsense judgment acts as an "inestimable safeguard,"[119] interposing community members between the defendant and unworthy prosecutions. But a jury can come to such a commonsense judgment only "as long as it consists of a group of laymen representative of a cross section of the community."[120]

2. Racially Unrepresentative Juries Fail to Reflect a Community's Judgment

The Supreme Court's fair cross-section mandate is based on the recognition that jurors' deliberations are substantively enriched by the diverse perspectives of people with different life experiences. The absence of any distinctive group "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented," for "the effect is to remove from the jury room qualities of human nature and varieties

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115. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the state and district wherein the crime shall have been committed . . . ." (emphasis added)); *see also* Amar, *supra* note 99, at 1183 ("Guaranteed in no less than three amendments, juries were at the heart of the Bill of Rights. The Fifth safeguarded the role of the grand jury; the Sixth, the criminal petit jury; and the Seventh, the civil jury."). As Professor Amar has observed: "If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury." *Id.* at 1190.

116. *Duncan*, 391 U.S. at 149, 153; *see also* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1115–33 (2014).

117. *Duncan*, 391 U.S. at 153; *see also* Amar, *supra* note 99, at 1183 ("[T]he only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases.").

118. *See, e.g.*, State v. Fredericks, 507 N.W.2d 61, 64–65 (N.D. 1993) ("[W]e . . . read the Sixth Amendment's impartiality and fair-cross-section requirements into our state constitution.").

119. *Duncan*, 391 U.S. at 156.

120. Apodaca v. Oregon, 406 U.S. 404, 410 (1972).

of human experience, the range of which is unknown and perhaps unknowable."[121] This is particularly important because jurors do not simply decide the existence of objective facts, they make subjective judgments that depend on discretion, morality, determinations of credibility, and life experiences.[122]

For example, a jury might be called on to evaluate whether a defendant is guilty of Assault on a Police Officer based on the officer's testimony that the defendant resisted being handcuffed.[123] A representative jury's evaluation of the officer's testimony can involve what jury scholar Jeffrey Abramson calls a "conversation informed by diversity," where the conduct of the officer and the defendant can be "studied from competing angles and different perspectives until the jury achieves the impartiality" that the Sixth Amendment demands.[124] After all, jurors do not simply cast individual votes and go home; they have a conversation that cumulates in consensus. So although "demographics matter as to where jurors start," the deliberation process requires jurors to listen to others' perceptions of the same evidence.[125] The inclusion of these different perspectives "add[s] to the thoroughness and accuracy of deliberation."[126]

This relationship between diverse juries and the quality of deliberation was substantiated in "a rare empirical test of the prediction that information exchange during deliberation differs depending on the composition of a jury."[127] The "[a]nalysis of . . . deliberations indicated that the racial composition of the jury influenced the content and scope of the discussions."[128]

Specifically, "[c]ompared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial (e.g., physical evidence that was not presented, witnesses who did not testify)."[129] The study showed that "[r]acially mixed juries were also more likely to discuss racial issues such as racial

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121. Peters v. Kiff, 407 U.S. 493, 503–04 (1972).

122. *See* Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 140 (1996) ("To the extent that jury questions are subjective, representative panels make for better decision-makers. Objective questions do not require diversity; a homogeneous, unrepresentative panel can answer an objective question correctly. Where subjective answers are required, however, diversity is essential. Only a representative jury can accurately anticipate what society itself would deem to be just were all of its members privy to trial information." (footnotes omitted)); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 997–98 (1998).

123. *See* Coghill v. United States, 982 A.2d 802, 808 (D.C. 2009).

124. Jeffrey Abramson, *Two Ideals of Jury Deliberation*, U. CHI. LEGAL F. 125, 131 (1998).

125. *Id.* at 133

126. ABRAMSON, *supra* note 106, at 11.

127. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1027–28 (2003).

128. *Id.* at 1028.

129. *Id.*

profiling during deliberations, and more often than not, Whites on these heterogeneous juries were the jurors who raised these issues."[130] A representative jury is thus an "impartial" jury, not because the different prejudices of individual jurors cancel one another out,[131] but because the jury "is greater than the sum of its respective parts."[132] It is the process of deliberation rather than the presence of diversity that produces a verdict scrubbed clean of partiality and biases.[133]

African-American and Latino underrepresentation, in particular, diminishes the quality of deliberation about issues frequently relevant in criminal trials. Whites and people of color, as a general rule, have different life experiences based in part on race. And, as explained earlier, the fair cross-section analysis is concerned only with the "general rule," as it applies only to the aggregate representation of groups in jury pools—not to the representation of individuals on specific juries.

Some of those aggregate differences include that black people are more likely than white people to have been victimized by crime.[134] African-Americans and Latinos also tend to have different experiences in the criminal justice system; even controlling for other factors, they are more likely to be stopped by police,[135] more likely to be searched,[136] more likely to be

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130. *Id.*

131. The Supreme Court originally appeared to credit this conception of the jury in some cases, see, e.g., *Ballew v. Georgia*, 435 U.S. 223, 233 (1978), but this conception of the jury as a representative, rather than deliberative body has been subsequently explicitly rejected by the Supreme Court in *Lockhart v. McCree*, 476 U.S. 162, 177–78 (1986).

132. State v. LaMere, 2 P.3d 204, 212 (Mont. 2000) (recognizing that "diversity begets impartiality").

133. ABRAMSON, *supra* note 106, at xi ("Representative juries are better able to 'mix it up' during deliberation, the preconceptions of some calling into doubt the predisposition of others.").

134. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 10 (2014), http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf [hereinafter "RACE AND PUNISHMENT"] ("In 2008, African Americans were 78% more likely than whites to experience household burglary, 133% more likely to experience motor vehicle theft, and experienced other types of theft at about the same rate." (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES (2010))); *id.* ("Hispanics were 46% more likely than non-Hispanics to be victims of property crimes." (citing BUREAU OF JUSTICE STATISTICS, *supra*)); *id.* ("In 2012, blacks were 66% more likely than whites to be victims of sexual assault, robbery, aggravated assault, and simple assault." (citing JENNIFER TRUMAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2012 (2013))); *id.* ("Hispanics were 37% more likely than whites to experience these crimes." (citing JENNIFER TRUMAN ET AL., *supra*)).

135. *Id.* at 28 ("In 2011, blacks were 30% more likely than whites and Hispanics to report a recent traffic stop, though this disparity has faded in some recent years.") (citing LYNN LANGSTON & MATTHEW DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 3 (2013)); CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 7 (2011).

136. RACE AND PUNISHMENT, *supra* note 134, at 28 ("Once pulled over, blacks and Hispanics were three times as likely as whites to be searched (6% and 7% versus 2%).") (citing LANGSTON & DUROSE, *supra* note 135, at 9).

arrested,[137] more likely to be charged with a serious offense,[138] more likely to be detained pending trial,[139] more likely to be convicted,[140] more likely to be incarcerated,[141] and more likely to receive a severe sentence.[142] African-

137. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 11 (2015) [hereinafter "BLACK LIVES MATTER"] ("A recent investigation of all arrests . . . in over 3,500 police departments across the country found that 95% of departments arrested black people at a higher rate than other racial groups.") (citing Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA TODAY (Nov. 19, 2014, 2:24 PM), http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207); RACE AND PUNISHMENT, *supra* note 133, at 28 (stating that "blacks were twice as likely as whites to be arrested during a traffic stop") (citing EITH & DUROSE, *supra* note 132, at 7); THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICY MAKERS 6 (stating that African-Americans constituted only 14% of drug users in 2006, but represented 35% of those arrested for drug offenses).

138. RACE AND PUNISHMENT, *supra* note 134, at 25 ("Prosecutors are more likely to charge people of color than whites with crimes that carry heavier sentences under mandatory minimum and habitual offender laws.") (citing Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 80 (2013)); Charles Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481 (1998)).

139. BLACK LIVES MATTER, *supra* note 137, at 11 ("Blacks are more likely than whites to be confined awaiting trial.") (quoting NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 93 (2014)).

140. *Id.* at 12 (stating that "people of color . . . are more likely to be convicted") (citing NAT'L RESEARCH COUNCIL, *supra* note 138, at 93–94); *see also* OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM 3 (1994) (stating that "the evidence suggests that, as compared to similarly situated nonminorities: . . . minorities are more likely to be convicted").

141. BLACK LIVES MATTER, *supra* note 137, at 11 (stating that "[b]lacks are more likely than whites . . . to receive incarcerative rather than community sentences") (quoting NAT'L RESEARCH COUNCIL, *supra* note 139, at 93).

142. RACE AND PUNISHMENT, *supra* note 134, at 26 ("Judges are also more likely to sentence people of color than whites to prison and jail and to impose longer sentences, even after accounting for differences in crime severity, criminal history, and educational level.") (citing Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145 (2001)); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?* 65 AM. SOC. REV. 705 (2000)); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427 (2000).

Americans are also more likely to report unfair[143] or physically threatening[144] experiences with the police than are whites. To the extent that parallel statistics exist regarding the perspectives of Latinos as a group, the results are similar.[145]

There is substantial evidence, presumably as a result of those experiences, that African-Americans and whites (again, as groups if not as individuals) have different perspectives on courts and the justice system.[146] Specifically, African-Americans are less likely than whites to have confidence in the police,[147] and are more likely to think police engage in brutality[148] and racism.[149] Most significantly, African-Americans are more likely than white

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143. RACE AND PUNISHMENT, *supra* note 134, at 29 ("[O]ne of every three African Americans reported being treated unfairly by the police because of their race, whereas closer to only one of ten whites reported unfair treatment for any reason at all.") (citing MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 41–42 (2010)); *id.* at 29 n.158 ("Similarly, a 1999 Gallup survey found that blacks are nearly twice as likely as whites to report personal unfair treatment by the police (43% versus 24%, respectively), and nearly four times as likely to report experiencing unfair police treatment because of their race (34% versus 9%, respectively.") (citing Mark Gillespie, *One Third of Americans Believe Police Brutality Exists in Their Area*, GALLUP (Mar. 22, 1999), http://www.gallup.com/poll/4003/one-third-americans-believe-police-brutality-exists-their-area.aspx)); Ronald Weitzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME AND DELINQUENCY 494, 505 (1999) [hereinafter "Perceptions of Discrimination"] (In a study based on a combination of three nationally representative telephone surveys of adults in the U.S. in 1995 and 1995, for a total of 3934 respondents, 38% of Black respondents answered "yes" to the question "Have you personally ever felt treated unfairly by the police or by a police officer specifically because you are [White/Black]?" as compared to only 7.3% of whites.).

144. RACE AND PUNISHMENT, *supra* note 134, at 29 ("Several surveys conducted between 2002 and 2008 have shown that Hispanics were up to twice as likely, and blacks were up to three times as likely as whites to experience physical force or its threat during their more recent contact with the police.") (citing CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 6, 12 (2011)).

145. *See supra* notes 136–46.

146. ABRAMSON, *supra* note 106, at 167 (observing that "whites and blacks occupy different places in American society and that these differences affect attitudes toward the death penalty, police officers, and the criminal justice system. Because such differences exist, we strive to recruit jurors from a cross section of the community.").

147. Yesilernis L. Peña et al., *Race and Support for the Criminal Justice System: A Matter of Asymmetry* 14 (Russell Sage Found., Working Paper No. 181, N.D.), https://www.russellsage.org/sites/all/files/u4/Pena,%20Federico,%20%26%20Sidanius_Race%20%26%20Support%20for%20the%20Criminal%20Justice%20System.pdf (A study that collected data from four consecutive administrations (1997 through 2000) of telephone survey of L.A. County adults demonstrated that "Blacks take a less positive view of the police than Whites do . . . even after conservatism, fear of crime and random violence, and a variety of demographic variables are taken into consideration.").

148. RACE AND PUNISHMENT, *supra* note 134, at 29 ("[W]hen a 1999 Gallup survey asked Americans about perceptions of police brutality in their neighborhoods, 58% of non-whites believed police brutality took place in their area, in contrast to only 35% of whites.") (citing Gillespie, *supra* note 143).

149. *Id.* ("[A] 2002 survey found that while three-quarters of blacks and half of Hispanics expressed that the police treated blacks and Hispanics worse than whites in their city, three-quarters of whites stated that the police treated all of these groups equally.") (citing Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1009–30 (2005));

people to describe the criminal justice system as unfair and racially biased.[150] Indeed, in a 2013 Gallup poll, 68% of African-Americans said that "they saw the criminal justice system as biased against blacks," as compared to only 25% of whites.[151]

Whites are more likely to overestimate the percentage of crimes committed by African-Americans,[152] are more supportive of harsh penalties in

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id. at n. 144 ("Similarly, Pew's 2013 survey found that seven-in-ten blacks and one-third of whites said that blacks are treated less fairly than whites in their dealings with the police while 68% of blacks and 27% of whites said blacks are not treated as fairly as whites in the courts.") (citing *King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RESEARCH CTR. (Aug. 22, 2013), http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities).

150. *Id.* at 29 (A 2013 poll found "the majority of blacks describing the justice system as discriminatory and the majority of whites rejecting this characterization.") (citing Frank Newport, *Gulf Grows in Black–White Views of U.S. Justice System Bias*, GALLUP (July 22, 2013), http://www.gallup.com/poll/163610/gulf-grows-black-white-views-justice-system-bias.aspx); *see also* NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS 8 (2009) (National survey data showed that "[a]lthough most Americans (83%) feel that 'people like them' are treated either better or the same as others, that perception is not shared by African-Americans. Two-thirds of African-Americans feel that 'people like them' are treated somewhat or far worse than other people [by the courts]."); *id.* ("Almost 70% of African-American respondents think that African-Americans, as a group, get 'Somewhat Worse' or 'Far Worse' treatment from the courts, whereas over 40% of White/Non-Hispanic and Hispanic respondents have that opinion."); *id.* at 30 (National survey data showed that "as compared to Whites/Non-Hispanics, both African-Americans and Hispanics were significantly less likely to agree" that "[j]udges are generally honest and fair in deciding cases."); Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762–83 (2005); Weitzer & Tuch, *supra* note 143, at 498 (Data from a combination of three nationally representative telephone surveys of adults in the U.S. in 1995 and 1995, for a total of 3934 respondents, demonstrated that "[m]ore than 7 in 10 Blacks, but fewer than 4 in 10 Whites, think that Blacks receive harsher treatment" in the operations of the criminal justice system.); Karen McGuffee et al., *Is Jury Selection Fair? Perceptions of Race and the Jury Selection Process*, 20 CRIM. JUST. STUD. 445, 452 (2007) (A national sample of 1182 respondents revealed that "68% of African-Americans believe the courts give harsher sentences to African-Americans compared to only 14% of whites who endorse this view" and "[w]hile over one-half (56%) of whites believe the system treats people as fair, only about one-fourth (26%) of African-Americans view the system as such. Even more striking, only 39% of African-Americans trust the courts to provide a fair trial while 74% of whites endorse a view of fairness in the courts.") (citing Jon Hurwitz & Mark Peffley, Racial Polarization on Criminal Justice Issues: Sources and Political Consequences of Fairness Judgments (n.d.) (unpublished manuscript) http://www.uky.edu/AS/PoliSci/Peffley/pdf/PeffleyHurwitzAPSAPaper_8-22-01_.PDF).

151. RACE AND PUNISHMENT, *supra* note 134, at 33 (noting that "this represented the largest gap on this question since the early 1990s") (citing Newport, *supra* note 150).

152. *Id.* at 13 ("A national survey conducted in 2010 asked white respondents to estimate the percentage of burglaries, illegal drug sales, and juvenile crime committed by African Americans. The researchers found that the respondents overestimated actual black participation in these crimes—measured by arrests—by approximately 20 to 30 percent (between 6.6 to 9.5 percentage points).") (citing Justin T. Pickett et al., *Reconsidering the Relationship Between Perceived Neighborhood Racial Composition and Whites' Perceptions of Victimization Risk: Do Racial Stereotypes Matter?*, 50 CRIMINOLOGY 145, 155–56, 160 (2011)).

the criminal system,[153] and are also more likely to think that people of color are adequately represented in the jury system.[154]

Accordingly, the primary problem with the all-white jury is not that the white jurors are racist, although, as Justice O'Connor has observed: "It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials . . . ."[155] Nor is the problem that an all-white jury would deprive an African-American defendant of a number of "guaranteed" pro-defense votes from African-American jurors, because aggregate data about white and black perspectives cannot predict how individual people will vote on a particular case.[156] Rather, the real problem with an all-white jury is that its deliberations are impoverished by the absence of the different perspectives that African-Americans and Latinos might bring to the table. In particular, the jury's role as a hedge against government oppression is undermined by the absence of a perspective that may be particularly attentive to how the government can abuse its power.

Consider a dramatic study conducted by Duke University researchers of over 700 criminal trials over a ten year period.[157] The researchers compared conviction results when there was at least one African-American in the jury pool, with the results when there were no African-Americans in the jury

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153. *Id.* at 9 ("When asked on another national survey whether 'the courts in this area deal too harshly or not harshly enough with criminals,' 73% of whites responded 'not harshly enough' in contrast to 64% of blacks during the 2000s.") (citing James D. Wright et al., *Crime, Punishment, and Social Disorder: Crime Rates and Trends in Public Opinion over More than Three Decades*, *in* SOCIAL TRENDS IN AMERICAN LIFE: FINDINGS FROM THE GENERAL SOCIAL SURVEY SINCE 1972, at 146, 158 (Peter V. Marsden ed., 2012)).

154. NAT'L CTR. FOR STATE COURTS, *supra* note 150, at 7. ("Fifty-six percent of respondents agree that 'Most juries are not representative of the community' and, as compared to Whites/Non-Hispanics, both African-Americans and Hispanics were more likely to agree.").

155. Georgia v. McCollum, 505 U.S. 42, 68–69 (1992) (O'Connor, J., dissenting) ("[T]he outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors."); *see also id.* at 60–61 (Thomas, J., concurring) (asserting that it remains true "that the racial composition of a jury may affect the outcome of a criminal case," and that as a result, "securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial"); Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, A.B.A. J., Aug. 1993, at 70, 70–71 (A 1992 survey of 401 state and federal judges revealed that 34% of them "concluded that race probably affects the verdict of an all-white jury when one of the parties on trial is black."). For a discussion of the role of implicit bias in courtroom, see Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 835–42 (2012).

156. *See, e.g.*, Sommers & Ellsworth, *supra* note 127, at 1018 ("In many of the mock juror studies reviewed above, Black jurors rated Black defendants as more likely to be guilty than not and demonstrated conviction rates as high as 80%."); *see also* Peters v. Kiff, 407 U.S. 493, 503–04 (1972) ("It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.").

157. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1027–28 (2012).

pool.[158] And the results were striking. When there was at least one black juror, juries convicted black and white defendants at almost equal rates.[159] But when the trial was heard by juries from a pool lacking any African-Americans, the all-white juries convicted African-American defendants 81% of the time, but convicted white defendants only 66% percent of the time.[160] This study and others[161] "rais[e] obvious concerns about whether black defendants receive a fair trial in jurisdictions with a small proportion of blacks in the jury pool."[162]

3. Government Interest in Racially Representative Juries

The government shares the criminal defendant's interest in racially representative juries.[163] As the Supreme Court has recognized, trial by a lay jury is "critical to public confidence in the fairness of the criminal justice system."[164] Why do we generally not run into the streets and riot when the government drags away one of our neighbors and locks him up? In part, we refrain because the jury's role increases our faith in the correctness of the outcome.[165] Our fears that our neighbor's conviction was unjust (because the policeman was biased, or the prosecutor had only weak evidence, or the judge cares only about reelection) are mitigated when we know that members of our

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158. *Id.* at 1019.

159. *Id.*

160. *Id.*

161. McGuffee et al., *supra* note 150, at 451 (noting that although studies of the relationship between racial composition of juries and trial outcomes have produced contradictory evidence, "[t]he vast majority of . . . studies report that white mock jurors are more apt to view a black defendant than a white defendant as guilty"); Sommers & Ellsworth, *supra* note 127, at 1010 ("[N]o consensus has been reached regarding the influence of a defendant's race on White mock jurors. Some studies have suggested that White jurors are biased against Black defendants, others have yielded no evidence of bias, and a few researchers have found that White jurors are biased against White defendants. But substantial evidence exists to support the conclusion of many legal scholars that, at least under some conditions, White jurors exhibit racial bias in their verdicts and sentencing decisions.").

162. Anwar et al., *supra* note 157, at 1021.

163. Only the defendant has standing to enforce the constitutional fair cross-section guarantee, but the JSSA and many state statutes extend standing to the government.

164. Taylor v. Louisiana, 419 U.S. 522, 530 (1975); *see also* Powers v. Ohio, 499 U.S. 400, 407 (1991) ("Jury service . . . ensures continued acceptance of the laws by all of the people."); Peters v. Kiff, 407 U.S. 493, 502–03 (1972) ("[U]nconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well."). Indeed, one national survey revealed that "[c]onfidence in local police and in the U.S. Supreme Court is associated with confidence in the courts in the community." NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS 13 (1999).

165. "Procedural justice research establishes that the perception of being treated fairly is more important than a favorable outcome in predicting whether a person views authority as legitimate." K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 274 (2009).

own community were the ones to reach the ultimate conclusion that our neighbor was guilty.[166]

Juries that are racially representative are particularly critical to public confidence in the justice system.[167] "One of the goals of our jury system is 'to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.'"[168] That goal can only be realized by a representative jury system, as the evidence shows that people believe that racially representative juries are more fair than racially homogenous juries.[169] Indeed, some of the modern era's largest civil protests and disturbances stemmed from public outrage over verdicts rendered by juries that were not racially representative,[170] or the failure to subject racially charged events to jury

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166. *See* McGuffee et al., *supra* note 150, at 456 (citing a study of 138 respondents in Tennessee county who received and responded to a jury summons, in which "[t]he overwhelming majority of respondents (92%) believe that most jury verdicts are correct, and 96% of the respondents believe that juries try hard to do the right thing").

167. ABRAMSON, *supra* note 106, at 202–03 ("The jury gives legitimacy to an accused's imprisonment, even execution, because ordinary persons like ourselves give the verdict. But the jury's ability to maintain public confidence in the administration of justice is fragile. It depends in part on drawing the jury from the community at large so that all groups have a potential say in how justice is done."); *see also* OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, *supra* note 140, at 78 ("The perception of fairness can be critical, and it is difficult to achieve that without racial or ethnic diversity among the jurors who are deciding a case, particularly when one of the litigants is a member of a racial or ethnic minority. Therefore, it is hard to overstate the significance of the lack of diversity on jury panels . . . .").

168. Georgia v. McCollum, 505 U.S. 42, 49 (1992) (quoting Powers v. Ohio, 499 U.S. 400, 413 (1991)).

169. Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1184 (1994) ("[T]here is some support for the claim that jury representativeness is one of those [procedural] features that matters most to people when assessing the fairness of jury proceedings."); *see also* Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1049 (2003) (citing a survey of 320 jury-eligible individuals that demonstrated "when the jury did not include minority members, observers viewed the trial as less fair when it produced a guilty verdict than when it produced a not guilty verdict. . . . [and] when the process fails to produce a heterogeneous jury (i.e., the all-White jury), then observers are more likely to find a trial that produced a negative outcome for the defendant to be unfair"); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 662, 665 tbl. I (1997) (citing a telephone survey of California residents conducted in 1995 in the wake of the O.J. Simpson trial, in which two-thirds (67%) agreed that the "decisions reached by racially diverse juries are more fair than decisions reached by single race juries"). Even Justice Thomas has recognized that "[t]he public, in general, continues to believe that the makeup of juries can matter in certain instances." *McCollum*, 505 U.S. at 61 (Thomas, J., concurring).

170. The reaction to the acquittal of the police officers accused of beating Rodney King—by a jury that included no African Americans—is the most striking example. *See* Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL'Y & L. 445, 450 n.21 (1994) (reviewing HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993) (citing Lou Cannon, *National Guard Called to Stem Violence After L.A. Officers' Acquittal in Beating; Justice Dep't to Review Case*, WASH. POST (Apr. 30, 1992),

scrutiny.[171] Consider the civil disturbances that followed the Ferguson, Missouri shooting of Michael Brown by Darren Wilson, a white police officer. One of the largest protests that followed the announcement that Wilson would not be indicted was in St. Louis, where "about 200 protesters staged a mock trial of Darren Wilson,"[172] thereby inserting the community judgment that is missing in the absence of trial by a representative jury.

The justice system particularly needs the legitimizing power of representative juries in light of the gross overrepresentation of people of color in our jails and prisons.[173] As explained above, these figures cannot be explained by disproportionate criminal involvement.[174] Public confidence in the justice system, as highlighted by a concurring judge evaluating a fair cross-section claim, is likely undermined by "the failure of a criminal law system, before which is tried a large number of persons from an ethnic group, to include within its mechanisms the peers of those charged, at least in some reasonable measured proportion to their membership in the population."[175] "Given the requirements of the Sixth Amendment and the importance of both the reality and the appearance of fairness in our criminal justice system,

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https://www.washingtonpost.com/archive/politics/1992/04/30/national-guard-called-to-stem-violence-after-la-officers-acquittal-in-beating/90304d56-6bab-4b94-80f7-5a95657c1db8). Another striking example is the deadly riots in Miami following the acquittal by an all-white jury of the white officers charged with the fatal beating of Arthur McDuffie, a black motorist. *See id.* (citing Keith Harrison, *Reaction to Verdict Is Another Hung Jury*, WASH. POST, Aug. 11, 1990, at A10). More recently, national protests occurred in the wake of the not-guilty verdict by a majority-white jury for George Zimmerman, charged with the shooting death of Trayvon Martin. *See* Michael Pearson et al., *Verdict Doesn't End Debate in Trayvon Martin Death*, CNN (July 15, 2013, 9:36 PM), http://www.cnn.com/2013/07/15/justice/zimmerman-verdict-protests ("[D]emonstrators from a wide variety of races. . . . expressed the same belief: that Martin's death was spurred by racial profiling and that Zimmerman's acquittal was unjust.").

171. For example, nationwide protests occurred after a grand jury failed to indict police officers in the police killing of Eric Garner in New York. *See* J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0. Another recent example is the police killing of Michael Brown in Ferguson, Missouri. *See* Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html.

172. Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES (Nov. 26, 2014), http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html (emphasis added).

173. *See* RACE AND PUNISHMENT, *supra* note 134, at 5 ("While blacks and Latinos together comprise 30% of the general population, they account for 58% of prisoners.") (citing *QuickFacts*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/00 (last visited May 11, 2016)); *see also* E. ANN CARSON & DANIELA GOLINELLI, U.S DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012 (2014), http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf.

174. *See generally* BLACK LIVES MATTER, *supra* note 137 (describing sources of racial disparity in the criminal justice system).

175. United States v. Pion, 25 F.3d 18, 27 (1st Cir. 1994) (Torruella, J., concurring) (emphasis added).

creating a jury pool that represents a fair cross section of the community is a compelling governmental interest."[176]

4. American Juries May Not Be Racially Representative

Although racially representative juries are a compelling government interest and a critical constitutional entitlement, there is substantial evidence that jury pools across the county are disproportionately white.

Much of that evidence comes directly from court-appointed committees tasked with assessing the role of race in the justice system.[177] Indeed, court-appointed committees "throughout the country have found minority underrepresentation in jury composition, most notably in the makeup of the jury pool from which the jury ultimately is selected."[178] As one state supreme

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176. United States v. Ovalle, 136 F.3d 1092, 1106 (6th Cir. 1998).

177. *See, e.g.*, ALASKA SUPREME COURT ADVISORY COMM. ON FAIRNESS & ACCESS, REPORT OF THE ALASKA SUPREME COURT ADVISORY COMMITTEE ON FAIRNESS AND ACCESS 83 (1997) ("Ethnic minority respondents were under-represented in some communities when compared to the proportion of ethnic minorities counted in census data."); FLA. SUPREME COURT RACIAL & ETHNIC BIAS COMM'N, "WHERE THE INJURED FLY FOR JUSTICE": REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 13 (Deborah Hardin Wagner ed., 1991) ("The present system of selecting jurors . . . does not result in juries which are racial and ethnic composites of the community."); MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT S-13 (1993) ("[J]ury pools rarely, if ever, are representative of the racial composition of our communities."); N.D. COMM'N TO STUDY RACIAL & ETHNIC BIAS IN THE COURTS, FINAL REPORT AND RECOMMENDATIONS 18 (2012) ("Minority under-representation on North Dakota juries is a continuing concern for state courts."); OHIO COMM'N ON RACIAL FAIRNESS, THE REPORT OF THE OHIO COMMISSION ON RACIAL FAIRNESS 34 (1999) ("The under-representation of minorities, especially those of low socioeconomic status has been found to be the rule throughout the United States. More than likely, Ohio experiences similar patterns of under-representation. . . . We received evidence of such under-representation . . . ."); OR. SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYS., *supra* note 40, at 3 (1994) ("Too few minorities are called for jury duty, and even fewer minorities actually serve on Oregon juries."); PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, CTR. FOR JURY STUDIES, NAT'L CTR. FOR STATE COURTS, COURT SERVS. DIV., THIRD JUDICIAL CIRCUIT OF MICHIGAN JURY SYSTEM ASSESSMENT i (2006) ("[T]he proportion of African-Americans in the . . . jury pool was approximately half of what was expected given their representation in the community."); PA. SUPREME COURT COMM. ON RACIAL & GENDER BIAS IN THE JUSTICE SYS., FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 54 (2003) ("[Jury selection policies] fail at each step of the process to include a representative number of minorities."); S.D. EQUAL JUSTICE COMM'N, FINAL REPORT AND RECOMMENDATIONS 8 (2006) ("Juries in South Dakota rarely represent the racial composition of a community."); Ga. Supreme Court Comm'n on Racial & Ethnic Bias in the Court Sys., *Let Justice Be Done: Equally, Fairly, and Impartially*, 13 GA. ST. U. L. REV. 687, 808–09 (1996) ("Information from eleven counties . . . shows that the proportion of [non-black] ethnic minorities serving in these communities are generally less than the proportion [reported in the census]."); J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1476 (1996) ("The . . . experience of judges and counsel in Los Angeles is that the jury panels assigned to courtrooms are not truly representative of the community."); N.Y. State Judicial Comm'n on Minorities, *Report of the New York State Judicial Commission on Minorities*, 19 FORDHAM URB. L.J. 181, 242 (1992) ("Minorities are significantly underrepresented on many juries in the court system.").

178. NEB. MINORITY & JUSTICE TASK FORCE, FINAL REPORT 17 (2003) ("[M]any researchers

court commission observed: "People of color waiting for justice or judgment abound. Yet, somehow, people of color on the other side of the courtroom—in the jury box—are very hard to find. In fact, jury pools rarely, if ever, are representative of the racial composition of our communities."[179] Even judges have acknowledged that the fair cross-section challenges raised by criminal defendants demonstrate "real problems with the representation of African-Americans on our juries, and the crisis of legitimacy it creates,"[180] and describe the evidence of underrepresentation as "disquieting,"[181] "troubling,"[182] and "worthy of concern."[183]

So this is the problem: criminal defendants have a unique constitutional entitlement that does not require proof of discrimination, the violation of which is both invisible and damaging, and there is evidence that this constitutional right is in jeopardy. This Article examines the difference between the federal and state legislatures' responses to that same problem. While Congress responded by enacting a robust statute that provides defendants with the tools to enforce the fair cross-section right, most states have enacted only incomplete substitutes. Many of these anemic state statutes miss the very components of the federal law that make it possible for defendants to enforce their cross-section rights.

III. THE FAIR CROSS-SECTION RIGHT IN FEDERAL COURTS: AN EXPLICIT RIGHT TO DISCOVERY

The Sixth Amendment's fair cross-section entitlement was translated into a statutory right in 1968 with the federal Jury Selection and Service Act

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have found that this is 'the rule' rather than the exception." (citation omitted)).

179. MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., *supra* note 177, at S-13.

180. United States v. Green, 389 F. Supp. 2d 29, 80 (D. Mass. 2005).

181. United States v. Royal, 174 F.3d 1, 12 (1st Cir. 1999) (describing the statistics offered regarding the representation of African-Americans as "disquieting" and the jury system at issue as "a situation leaving much to be desired"); *see also* State v. Tremblay, No. P1 97-1816AB, 2003 WL 23018762, at *15 & n.19 (R.I. Mar. 19, 2003) (finding the material presented by the defendant "unsettling" and "disquieting").

182. United States v. DeFries, 129 F.3d 1293, 1301 n.5 (D.C. Cir. 1997) ("The import of appellants' evidence is troubling . . . and . . . the statistical disparities, if supported by [additional evidence], could support an inference that a jury venire was not composed of a fair cross-section of the community.").

183. United States v. Shine, 571 F. Supp. 2d 589, 599 (D. Vt. 2008); *see also* People v. Currie, 87 Cal. App. 4th 225, 235 (Cal. Ct. App. 2001) ("[U]nderrepresentation of African-Americans on . . . jury venires . . . is a long-standing problem."); Commonwealth v. Tolentino, 663 N.E.2d 846, 851 (Mass. 1996) ("[Evidence] does not negate totally the possibility that jury venires . . . do not adequately reflect the racial and ethnic composition of the county populations."); State v. Williams, 525 N.W.2d 538, 544 (Minn. 1994) ("[T]he evidence—both anecdotal and statistical—indicates that there is some underrepresentation in fact."); State v. Ramseur, 524 A.2d 188, 239 (N.J. 1987) ("[T]he results are still far from optimal. Greater representativeness on the jury panels is obviously desirable.").

("JSSA)".[184] Drafted and enacted in the throes of the civil rights movement, the JSSA was explicitly designed to advance and protect the fair cross-section right.

A. *THE JSSA: PURPOSE AND PLAIN LANGUAGE PROTECT THE FAIR CROSS-SECTION RIGHT AND PROVIDE ACCESS TO JURY RECORDS*

1. The Purpose of the JSSA Is to Protect the Fair Cross-Section Right

The JSSA's first objective is articulated in the "Declaration of Policy," and echoes the Sixth Amendment in asserting that: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."[185] The JSSA's second objective echoes the Fourteenth Amendment's prohibition on discriminatory jury selection.[186]

The JSSA's remaining sections provide for the implementation and enforcement of the two objectives. First, the implementation section requires each district to "specify detailed procedures . . . [that] shall be designed to ensure the random selection of a fair cross section of the persons residing in the community . . . ."[187] Second, the enforcement section allows a criminal defendant to "move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of [the JSSA] in selecting the grand or petit jury."[188]

2. Plain Language of the JSSA Provides Access to Jury Records

The enforcement provision of the JSSA provides criminal defendants with a critical tool for enforcing the fair cross-section right: the statute entitles defendants to access the records of the jury selection system. This is the core component that is missing in most states; in the absence of access to jury selection records, the fair cross-section right is essentially unenforceable.

As discussed in Part II, defendants cannot look at a jury and determine whether their fair cross-section right is being violated. Instead, defendants need to be able to examine the steps of the jury selection process that occur before the jury appeared. The only way to conduct that examination is to access jury selection records.

The JSSA explicitly provides for access in two ways: First, the JSSA explicitly provides for access in the section entitled "Challenging compliance

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184. 28 U.S.C. §§ 1861–1878 (2012).

185. *Id.* § 1861.

186. *Id.* § 1862 ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.").

187. *Id.* § 1863(b)(3).

188. *Id.* § 1867(a).

with selection procedures."[189] When a defendant is preparing a motion to dismiss the indictment or to stay the proceedings—on the grounds that the jury office has substantially failed to comply with the JSSA—the defendant is entitled to access "[t]he contents of records or papers used by the jury commission or clerk in connection with the jury selection process."[190] Specifically, "[t]he parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion."[191]

Second, the same section of the JSSA explicitly describes a criminal defendant's entitlement to records as one of the limited exceptions to the general rule of non-disclosure. The JSSA states:

> The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation of a motion [by a criminal defendant] under subsection (a) . . . of this section . . . .[192]

In addition to those two explicit entitlements to records before filing a cross-section claim, the JSSA's description of what happens after a claim is filed implicitly recognizes the defendant's right of access. After a defendant reviews the otherwise confidential jury selection records (at the discovery stage),[193] he or she must decide whether that information would support a prima facie fair cross-section challenge. If the defendant decides to challenge the selection process, the JSSA provides that the motion must include "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the JSSA]."[194] And in support of that motion, the defendant "shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence."[195]

In sum, the JSSA explicitly provides that before filing a fair cross-section challenge, a criminal defendant must be permitted to "inspect, reproduce, and copy" the records used in connection with the jury selection process.[196]

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189. *Id.* § 1867.
190. *Id.* § 1867(f).
191. *Id.* (emphasis added).
192. *Id.* (emphasis added).
193. *See supra* Part III.B.1.
194. 28 U.S.C. § 1867(d).
195. *Id.* (emphasis added).
196. *Id.* § 1867(f).

B. Supreme Court Recognizes Entitlement to Jury Records

1. Supreme Court Relies on JSSA's Purpose and Plain Language in Granting Access to Records

Seven years after the JSSA was enacted, the Supreme Court held the JSSA gives a litigant "an unqualified right to inspection."[197] The Court recognized this unqualified right in *Test v. United States*, where the defendant alleged that the jury selection process violated both the Sixth Amendment and the JSSA because it did not include a fair cross-section of the community.[198] Mr. Test requested "permission to inspect and copy the jury lists" for both the grand and petit jury, "assert[ing] that inspection was necessary for discovering evidence to buttress his claims."[199] Notably, the Solicitor General joined with the petitioner in arguing that the JSSA "requires that a defendant be provided access to jury records as a matter of right."[200]

The Court concluded that the defendant had "essentially an unqualified right to inspect jury lists,"[201] and the "essentially" caveat was only an acknowledgement that "[t]he statute does limit inspection to 'reasonable times.'"[202] The "essentially unqualified" nature of the right of access meant that the defendant did not have to make any threshold showing before being granted access to the jury records. He simply had to make the timely request.[203]

The Supreme Court held there were two sources for the "essentially unqualified" right of inspection: the statute's text and its purpose. First, "an unqualified right to inspection is required . . . by the plain text of the statute."[204] Specifically, the Court held that the JSSA's two explicit provisions

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197. Test v. United States, 420 U.S. 28, 30 (1975).

198. *Id.* at 28–29. Specifically, the defendant objected to the underrepresentation of "persons under the age of thirty-five, the Spanish-surnamed, Negroes, and students." Brief for Petitioner at 3, *Test*, 420 U.S. (No. 73-5993).

199. *Test*, 420 U.S. at 29. The trial judge denied the request, Test was convicted, and the denial of discovery was affirmed without discussion by the Tenth Circuit.

200. Brief for the United States at 5–6, *Test*, 420 U.S. (No. 73-5993); *see also id.* at 10 ("[W]e submit that the Act provides an unqualified right of inspection of jury records.").

201. *Test*, 420 U.S. at 30 (emphasis omitted).

202. *Id.* at 30 n.4 (1975); United States v. Layton, 519 F. Supp. 946, 958 (N.D. Cal. 1981) ("This right is virtually absolute: the only limitation on this right of access is that the inspection must be done at 'reasonable times.'") (quoting 28 U.S.C. § 1867(f)); *see also* United States v. Alden, 776 F.2d 771, 773 (8th Cir. 1985) ("The [Supreme] Court further stated that the only limitation authorized by Congress on the disclosure of this information is that the disclosure be at reasonable times." (emphasis omitted)).

203. Accordingly, because the defendant "was denied an opportunity to inspect the jury lists," the Court remanded the case back to the trial court "so that [the defendant] may attempt to support his challenge to the jury-selection procedures." *Test*, 420 U.S. at 30; *see also* Brief for the United States at 18, *Test*, 420 U.S. 28 (No. 73-5993) (discussing how the United States agreed that the lower courts had made materially erred in "depriv[ing the defendant] of an opportunity to develop the requisite facts bearing on his" fair cross-section claim).

204. *Test*, 428 U.S. at 30.

for access "mak[e] clear that a litigant has essentially an unqualified right to inspect jury lists."[205]

Second, the Supreme Court held that "an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community.'"[206] As the Court explained, "without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge."[207] The United States conceded this point in its brief, recognizing that "such an unqualified right of discovery appears to be necessary to the effective use of the challenge procedures specified in the Act."[208]

The Court recognized that the JSSA "grants access in order to aid parties in the 'preparation' of motions challenging jury-selection procedures" and that it was only after inspection that a defendant could decide whether a fair cross-section claim was warranted.[209]

2. Lower Federal Courts Recognize that JSSA's Purpose Requires Access to Records

Similarly, every federal circuit court to consider the issue has likewise concluded that a litigant has an essentially unqualified right under the JSSA to inspect the jury selection records.[210] The federal courts therefore

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205. *Id.* (emphasis omitted) (footnote omitted).

206. *Id.* (quoting 28 U.S.C. § 1861). The brief for the United States similarly asserted that the right to discovery was required both by the plain language of the statute and by the JSSA's fair cross-section objective. Brief for the United States at 6, *Test*, 420 U.S. 28 (No. 73-5993) (The Act's "language and legislative history both indicate that Congress required jury selection plans to be formulated to achieve the goal of selection from a cross section of the community.").

207. *Test*, 420 U.S. at 30.

208. Brief for the United States at 8, *Test*, 420 U.S. 28 (No. 73-5993).

209. Test v. United States, 420 U.S. 28, 30 (1975). Indeed, the defendant had asked the Supreme Court to hold both that he had been improperly denied access to records and that he had made out a prima facie claim. *Id.* at 29 n.2. But the Court remanded on the distinct ground that he had erroneously been denied access, and declined to consider whether the evidence he was able to assemble "was sufficient to establish a prima facie case." *Id.* at 30 n.2.

210. *See, e.g.*, United States v. Stanko, 528 F.3d 581, 587 (8th Cir. 2008) ("[A] litigant has essentially an unqualified right to inspect jury lists." (emphasis omitted) (quoting *Test*, 420 U.S. at 30)); United States v. Orlando-Figueroa, 229 F.3d 33, 41 (1st Cir. 2000) ("Criminal defendants have an absolute right to inspect jury selection records . . . ."); United States v. Miller, 116 F.3d 641, 658 (2d Cir. 1997) ("[A] defendant plainly has a right to discovery . . . ."); United States v. Curry, 993 F.2d 43, 44 (4th Cir. 1993) (defendant is "entitled to inspect, reproduce, and copy the master jury list to support a motion for a new trial based upon a substantial failure to comply with the provisions of [the JSSA] in selecting the grand or petit jury"); United States v. Studley, 783 F.2d 934, 938 (9th Cir. 1986) ("The right to inspect jury lists is essentially unqualified."); United States v. McLernon, 746 F.2d 1098, 1123 (6th Cir. 1984) ("The right to inspection extends to all jury selection materials relevant to a complete determination of whether a grand or petit jury has in fact been selected 'at a random from a fair cross-section of the community.'" (quoting *Test*, 420 U.S. at 30)); United States v. Koliboski, 732 F.2d 1328, 1331 (7th Cir. 1984) ("Criminal defendants have the unqualified right to inspect jury lists."); United States v. Lawson,

consistently reaffirm that "[t]o avail himself of the right of access to jury selection records, a litigant need only allege that he is preparing a motion to challenge the jury selection process."[211] And the unqualified nature of a litigant's discovery rights means that a "court may not premise the grant or denial of a motion to inspect upon a showing of probable success on the merits of a challenge to the jury selection provisions."[212] Nor may a court "require a defendant requesting access to jury selection records to submit with that request 'a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act].'"[213] In short, a "court is not free to establish additional requirements that defendants must meet in order to gain access to jury selection records."[214]

Most importantly, the federal decisions recognize that the purpose of the statute requires the disclosure of jury system records.[215] For only after such

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670 F.2d 923, 926 (10th Cir. 1982) ("The Supreme Court characterizes a litigant's right to inspect jury lists as essentially unqualified."); Gov't of Canal Zone v. Davis, 592 F.2d 887, 889 (5th Cir. 1979) ("The Supreme Court's decision in [*Test*] is dispositive of the issue."); *see also* United States v. Pritt, 458 F. App'x 795, 800 (11th Cir. 2012) (implicitly recognizing that defendant has a right to access "the requisite material to ascertain the facts that, under our precedent, are essential to his jury composition claims"); United States v. Dean, 367 F. App'x 83, 87 (11th Cir. 2010) (Defendant "correctly contends that a defendant is always entitled to inspect jury records according to [*Test*]."); United States v. Hsia, No. C. 98–0057, 2000 WL 194982, at *1 (D.D.C. Feb. 2, 2000) ("Defendant therefore is entitled to inspect, reproduce and copy records or papers related to the selection of the grand jury, as authorized by 28 U.S.C. § 1867(f).").

211. United States v. Royal, 100 F.3d 1019, 1025 (1st Cir. 1996) (emphasis added).

212. United States v. Royal, 174 F.3d 1, 4 (1st Cir. 1999).

213. *Royal*, 100 F.3d at 1025 (quoting 28 U.S.C. § 1867(d)); *see, e.g.*, *Stanko*, 528 F.3d at 587 ("A defendant may not be denied this unqualified right even when he fails to allege facts which show a probability of merit in the proposed jury challenge, because [g]rounds for challenges to the jury selection process may only become apparent after an examination of the records.") (quoting United States v. Beaty, 465 F.2d 1376, 1380 (9th Cir. 1972)); United States v. Layton, 519 F. Supp. 946, 958 (N.D. Cal. 1981) ("No probability of merit need be shown. To avail himself of this right of access to otherwise nonpublic jury selection records, a litigant need only allege that he is preparing a motion challenging the jury selection procedures. There is no doubt on this point whatsoever.") (citation omitted); *see also Curry*, 993 F.2d at 44 (Litigant does not need to submit a "sworn affidavit showing why the [jury] list would be necessary."); United States v. Alden, 776 F.2d 771, 773–74 (8th Cir. 1985) ("A defendant's motion may not be denied because it is unsupported by a 'sworn statement of facts' . . . . Nor may a motion to inspect be denied because the defendant fails to allege facts which show a probability of merit in the proposed jury challenge.") (citations omitted); United States v. Marcano-Garcia, 622 F.2d 12, 18 (1st Cir. 1980) ("[T]he district court erroneously required [appellants] to provide a 'sworn statement of facts' in support of their motion to inspect the court's jury selection records.").

214. *Alden*, 776 F.2d at 775. And if a defendant does submit some showing of a problem with the jury system—as the Fifth Circuit explained, "[s]ince the appellants' right to inspection [i]s unqualified, whether or not the accompanying affidavit establishe[s] a prima facie case of defective jury selection process is of no import." *Canal Zone*, 592 F.2d at 889.

215. *See, e.g.*, *Royal*, 100 F.3d at 1025 (unqualified right to discovery because "without such access, a litigant will be unable to determine whether he has a meritorious claim"); *Alden*, 776 F.2d at 775 ("Grounds for challenges to the jury selection process may only become apparent after an examination of the records," thus "[e]ven if the defendant's anticipated challenges to the jury selection process, as articulated at the time of his motion for inspection, are without

discovery is granted will defendants "be in a position to make informed decisions as to whether the jury selection process warrants challenge and as to whether they prefer trial by a representative jury or before the court."[216]

The federal courts' application of the JSSA is not seamless,[217] but discovery requests are routinely granted.[218] This is in sharp contrast with the majority of states, whose laws fail to provide meaningful protection for the fair cross-section right.

IV. THE FAIR CROSS-SECTION RIGHT IN STATE COURTS: INSUFFICIENT ACCESS TO RECORDS

All 50 states provide defendants with the same right protected by the Sixth Amendment and the JSSA: the right to a jury selected from a fair cross-section of the community. In almost half the states (23), that right is protected by a statute that has the explicit goal of providing criminal defendants (and other litigants) a jury selected from a fair cross-section—just like the JSSA.[219] In the remaining 27 states that right is protected through case law holding

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merit, the defendant may still inspect the jury records."); *Marcano-Garcia*, 622 F.2d at 18 (holding that lower court erred when it denied a "motion to inspect the court's jury selection records, and thus prevented [appellants] from establishing a factual basis for their motion to strike the jury").

216. *Canal Zone*, 592 F.2d at 890.

217. Some federal judges read the entitlement of access too narrowly, and deny access to information defendants need to determine if a fair cross-section challenge is warranted. *See, e.g.*, United States v. Miller, 116 F.3d 641, 658 (2d Cir. 1997) (granting discovery "only to records and papers already in existence," even though court had failed to collect the race data defendant needed to determine if jury pool complied with fair cross-section guarantee).

218. Most importantly, jury systems are required to disclose demographic information regarding the distinctive groups at issue. Courts consistently order the release of race, ethnicity, and gender data for each stage of the jury selection process. *See, e.g.*, United States v. Savage, Nos. 07-550-03, -04, -05, -06, 2013 WL 797417, at *4 (E.D. Pa. Mar. 5, 2013) (granting access to "[s]preadsheets with statistical breakdowns by race and ethnicity" for jurors on the master wheel, qualified wheel, who were summoned, and who served). When a court has failed to collect race and ethnicity data, courts regularly allow defendants access to otherwise confidential jury questionnaires. *See, e.g.*, United States v. Percival, 756 F.2d 600, 614 (7th Cir. 1985). Courts have even permitted defense teams to contact jurors directly to collect race and ethnicity information. *See, e.g.*, Ramseur v. Beyer, 983 F.2d 1215, 1230 (3d Cir. 1992). Courts also routinely order the disclosure of the master jury wheels. *See, e.g.*, United States v. McLernon, 746 F.2d 1098, 1123 (6th Cir. 1984) (including the names on jury lists); United States v. Rice, 489 F. Supp.2d 1312, 1318 (S.D. Ala. 2007). Courts additionally require the disclosure of data and documents related to excuses, deferrals, or disqualifications. *See, e.g.*, Savage, 2013 WL 797417, at *5. Courts also typically order disclosure of data and documents related to the summonsing process and responses to summons. *See, e.g.*, United States v. Holy Land Found. for Relief and Dev., No. 3:04-CR-240-G, 2007 WL 1452489, at *1–2 (N.D. Tex. May 15, 2007), and of other types of jury selection records, such as information about proposed changes to the jury system. *See, e.g.*, United States v. Williams, CR. No. 06-000079 DAE, 2007 WL 1223449, at *6 (D. Haw. Apr. 23, 2007). Finally, courts frequently order jury system administrators to participate in depositions designed to improve the defendant's understanding of the jury selection system. *See, e.g.*, United States v. Harvey, 756 F.2d 636, 643 (8th Cir. 1985).

219. *See infra* Appendix, Part 1.

that criminal defendants are entitled to a fair cross-section, interpreting either the state jury selection statute or the state or federal constitution.[220]

Notwithstanding the shared fair cross-section goal, an original 50-state survey reveals that states are not providing the same access to jury records as the JSSA provides for federal defendants. As a result, criminal defendants in state courts are being denied access to the very records that the federal courts have deemed essential to a fair cross-section challenge. In other words, criminal defendants in state courts are being denied the fair cross-section guarantee. Because without the records, you cannot discover a violation of your right.

A. *STATE STATUTES: INADEQUATE PROTECTION FOR FAIR CROSS-SECTION RIGHT*

The alarming fact revealed by the survey is that, although all 50 states share the same fair cross-section goal as the JSSA, only nine states have a version of the JSSA's explicit statutory entitlement to access jury selection records.[221] And in only two states has the highest court held that a defendant is entitled to access jury records.[222] Therefore, as illustrated in Figure 2, there are 39 states where a defendant has a fair cross-section right, but no clear entitlement to access the records necessary to enforce that right.[223]

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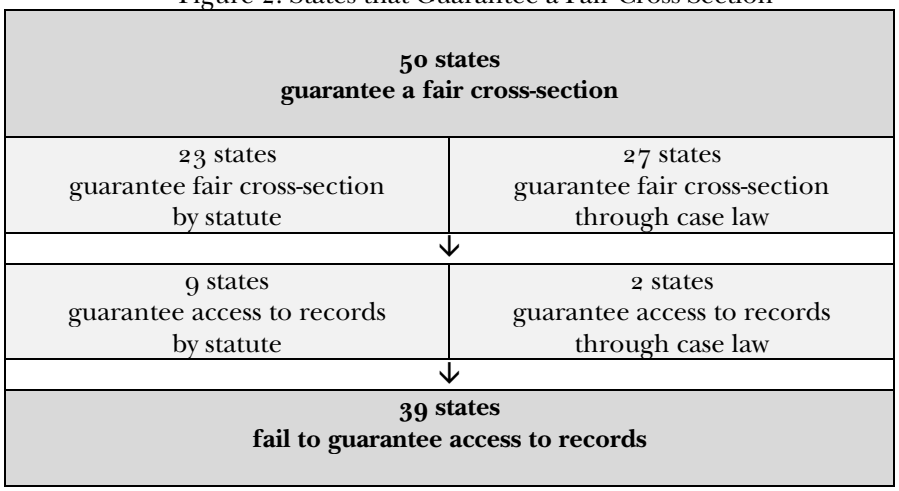
220. *See infra* Appendix, Part 2.

221. *See infra* Appendix, Part 3. Of those nine state statutes, only four mirror the JSSA in that they include they include the two explicit entitlements to records in the federal statute (Hawaii, Idaho, Nebraska, and North Dakota). *Id.* The other five state statutes include one of the JSSA's two explicit discovery provisions, but not both (Delaware, Indiana, Kentucky, Maryland, and Pennsylvania). *Id.*

222. Those two states are Missouri and Nevada, and their state supreme court decisions are discussed in Part V.B.

223. *See infra* Appendix, Part 4.

Figure 2: States that Guarantee a Fair Cross-Section



B. *State Courts: Imposing Burden of Proof in Absence of Statutory Entitlement to Discovery*

States' failure to provide an explicit statutory entitlement to jury records has two problematic consequences. The first is the probability that defendants and defense attorneys are less likely to request records in the absence of express statutory authority. Although it is impossible to measure the number of unfiled claims, it seems as a matter of logic that fewer defense attorneys will independently generate a request for jury records, than would make it if the unqualified entitlement was in the text of the statute.

The second problematic consequence is that, in the absence of an explicit statutory entitlement, state courts generally deny the requests for records defendants do make. State judges frequently base those denials on the absence of an initial showing of proof—the very proof requirement that has been uniformly rejected by the federal courts.[224] State courts are therefore putting the proverbial cart before the horse by requiring defendants to demonstrate a problem with the jury selection system in order to access the records that would tell them whether there is a problem with the jury selection system.

In several states, courts have established a threshold proof requirement that defendants must satisfy to obtain jury records. In California, for example, a defendant seeking to access records must make "a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion."[225] Only after such a showing must the court "make a reasonable effort to

224. *See supra* Part III.B.2.

225. People v. Jackson, 920 P.2d 1254, 1268 (Cal. 1996).

accommodate the defendant's relevant requests for information."[226] A defendant in Kansas must likewise "assert facts that tend to raise a doubt as to whether the panel may be improperly constituted."[227] Only "[t]hen follows the inquiry to see if such suspicion, duly alleged, is supported by proof."[228] Similarly, in Florida, a defendant must make a "sufficient factual showing to raise a reasonable suspicion that the panel was improperly drawn" to get access to records.[229] Each of these standards requires a defendant to prove a problem with the jury system before accessing the only records that can reveal a problem.

Perhaps the best contrast with the JSSA is provided by Connecticut—the state where Mr. Osorio's federal right to discovery revealed the exclusion of two-thirds of African-American and Hispanic jurors. A state defendant in Connecticut would need "independent evidence" of "reasonable grounds to suspect that the panel is improperly constituted" before being permitted to inspect the jury system records.[230] But it is difficult to imagine what "independent evidence" a litigant could have uncovered when they jury officials themselves had not noticed either the problem or its striking racial impact.[231]

In other states, courts have not uniformly imposed a proof requirement, but individual judges deny defense requests for jury records on the grounds that the defendant has not proved a need for the records. For example, a Texas defendant requested access to jury selection records, claiming that, although the trial judge granted him a hearing on the composition of the jury pool, the hearing was "meaningless" without the records.[232] The trial judge denied the records request, concluding "[o]nly if [defendant's] class is substantially underrepresented on the indicting grand jury" will the court release information about previous grand jury panels.[233] The jury selection records were, of course, the only evidence of the grand jury's underrepresentation.

Judges have similarly rejected record requests in Alabama (no access to records "in the absence of some evidence [of a problem]");[234] Colorado (no access to records where "[d]efendant made no record . . . that would require further inquiry" into the randomness of jury selection);[235] Ohio (no access to

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226. *Id.*

227. State v. Holt, 612 P.2d 570, 574 (Kan. 1980) (emphasis omitted) (quoting Rojas v. State, 288 So. 2d 234, 237 (Fla. 1973)).

228. *Id.* (quoting *Rojas*, 288 So. 2d at 237).

229. *Rojas*, 288 So.2d at 237.

230. State v. Avcollie, 453 A.2d 418, 423 (Conn. 1982).

231. *See supra* notes 19–20 and accompanying text.

232. Pimentel v. State, 710 S.W.2d 764, 777 (Tex. App. 1986).

233. *Id.*

234. Griffin v. State, 790 So. 2d 267, 312 (Ala. Crim. App. 1999), *rev'd on other grounds*, *Ex parte* Griffin, 790 So. 2d 351 (Ala. 2000).

235. People v. Brown, 218 P.3d 733, 740–41 (Colo. App. 2009) (denying claim that "the trial

records without "[d]istinct[ive] evidence" in support of the request and that "evidence must be more than mere statements of counsel of what they hope they will be able to prove");[236] New York (no access to records where defendant "failed to set forth the necessary factual basis to establish a claim that the procedure utilized . . . to select the jury venire does not provide for selection of individuals from a fair cross-section of the community");[237] Tennessee (no access to records unless defendant "makes a prima facie showing of a statutory or constitutional violation with regard to the preparation of lists of prospective jurors or the selection of jury venires or petit juries");[238] Washington (no access to records where defendant made only "bare allegation that the jury list is not representative");[239] and West Virginia (no access to records where defendants "have offered to produce virtually no evidence to support their claim of a Sixth Amendment violation").[240]

Ironically, courts frequently underscore that the defendant's request must rest on more than a "hope," "desire," or "expectation" [241] "that the requested discovery would establish that his right to a jury consisting of a fair cross section of the community was violated."[242] For example, the Texas judge's decision described above was affirmed on appeal when the appellate court noted that there was "only a desire to examine records for possible violations."[243] But, as the Supreme Court has recognized, that "desire" is not only a sufficient basis to demand discovery, it reflects the limits of a defendant's knowledge before the discovery request has been granted.

State legislatures acted illogically when they enacted statutes with the fair cross-section promise, without the language granting access to jury records. But that failure has been compounded where state courts have filled the statutory void with a threshold proof requirement. Demanding proof without giving defendants access to proof makes the fair cross-section right essentially unenforceable.

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court erred by not allowing further inquiry into [defendant's] 'concerns' about the 'randomness' of the jury panel" where "[d]efendant produced no evidence that would even suggest a fair cross-selection violation" and "made no record . . . that would require further inquiry").

236. United States v. Hoffa, 349 F.2d 20, 30 (6th Cir. 1965).

237. People v. Lynch, 654 N.Y.S.2d 562, 564 (N.Y. Cty. Ct. 1997).

238. State v. Hester, 324 S.W.3d 1, 52 (Tenn. 2010).

239. State v. Cienfuegos, 25 P.3d 1011, 1017 (Wash. 2001).

240. State v. Hobbs, 282 S.E.2d 258, 270 (W. Va. 1981).

241. Griffin v. State, 790 So. 2d 267, 311–12 (Ala. Crim. App. 1999), *rev'd on other grounds*, *Ex parte* Griffin, 790 So. 2d 351 (Ala. 2000) (affirming denial of request for "access to, inspection of, and copying of all of the jury system records" on grounds that defendant "provided no documentary or statistical evidence in support of his motion" and defendant's argument instead "rests on the 'expectation' that the requested discovery would establish that his right to a jury consisting of a fair cross section of the community was violated").

242. *Id.* at 312.

243. Pimentel v. Texas, 710 S.W.2d 764, 777 (Tex. App. 1986) (emphasis added).

V. STATE COURTS ERR IN IMPOSING BURDEN OF PROOF: CROSS-SECTION PURPOSE DEMANDS DISCOVERY

As the Supreme Court recognized, access to jury records is necessary for enforcing the fair cross-section guarantee: "Without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge."[244] Thus, ensuring a fair cross-section is alone a sufficient basis for an unqualified right to discovery; even if there is no explicit statutory entitlement. Because selecting a jury from a fair cross-section is the purpose of either a statute or constitutional provision in all 50 states, it follows that state courts should recognize that the fair cross-section goal gives every state defendant a right to discovery.

Yet the majority of state courts appear to be denying discovery requests without considering the relationship between the request for records and the fair cross-section right. Instead, they have denied defendants' discovery claims without referencing the fair cross-section purpose at all—even when the defendant has made that argument. Indeed, of the cases I examined for this article where the court denied discovery, I did not see any opinions where the court considered the relationship between the records request and the fair cross-section goal. Nor did any of those cases cite the absence of statutory language (as in the JSSA) explicitly granting discovery. Instead, in those cases, the courts simply imposed a threshold burden of proof, concluded that the defendant failed to meet it, and denied the request. Of course, this is not a case law survey, so no conclusions can be extrapolated from that observation. But it is striking that courts in a number of states have denied defendants access to records in the face of the fair cross-section guarantee, without ever articulating a rationale for doing so.

Just as striking are the few decisions that have considered the fair cross-section purpose of state statutes or constitutions in the absence of explicit statutory entitlements: Each one concluded that the purpose alone mandates discovery. Those cases illustrate this Article's thesis: just as the Supreme Court recognized that the fair cross-section purpose of the JSSA requires access to records, so too should state courts recognize the fair cross-section purpose of their statutes or constitutions mandates "essentially unqualified" access to jury selection records.

A. *FAIR CROSS-SECTION PURPOSE OF STATE STATUTES MANDATES DISCOVERY*

As described in Part III and illustrated in Figure 2, there are 39 states that are missing a statutory right to access records, and in 14 of those states a statute guarantees defendants a jury selected from a fair cross-section. These states have enacted the statutory guarantee, but lack the statutory language granting access. Defendants in those states should be able to rely on the statute's purpose alone to obtain jury records. This point was illustrated by

244. Test v. United States, 420 U.S. 28, 30 (1975).

the case of *Gause v. United States*, which explicitly articulates why the fair cross-section goal takes precedence over the possibility that the state legislature purposefully omitted the discovery entitlement.[245]

Gause, an en banc decision from the D.C. Court of Appeals (the D.C. equivalent of a state supreme court), interpreted the D.C. Jury Act.[246] The D.C. Jury Act has the stated purpose of ensuring juries are selected from a fair cross-section of the community, but is missing the JSSA's explicit provision that the defendant "shall be allowed to inspect, reproduce, and copy [jury selection] records or papers at all reasonable times."[247]

Larry Gause requested access to jury selection records in the trial court, and the trial judge denied the motion because the defendant "failed to present a *prima facie* case in support of his claim that the [District's jury] system for the selection of jurors violate[d] the . . . Sixth Amendment[] and the" District's jury selection statute.[248] Mr. Gause was convicted and appealed, arguing the trial judge erred in imposing a threshold burden of proof before granting him access to the jury records.[249] A panel of the D.C. Court of Appeals upheld the conviction, holding that the absence of an express statutory entitlement to jury records left room for the trial judge to impose a threshold burden of proof.[250]

The en banc court was therefore squarely presented with the key question: does the statute's purpose give a defendant an unqualified right to access records or does the missing statutory entitlement give the court discretion to require some evidence of a problem before granting access? The court ultimately "decline[d] to impose a threshold showing requirement, because to do so would *undermine the [D.C. statute's] stated purpose* by creating an unnecessary hurdle for litigants seeking discovery of jury pool information in connection with a challenge to the fairness of the jury selection process."[251]

The court did not ignore the missing language in the state jury statute, and began its analysis by comparing the D.C. Jury Act with the JSSA.[252] The court observed that "the statutes are nearly identical in their stated purposes," but the court "acknowledge[d] and analyze[d] the absence in the [D.C. statute] of explicit language stating that litigants may inspect jury records."[253] The court concluded that, "*given the virtually identical purposes of both statutes*, . . . this difference alone, without any clear legislative history or intent,

245. Gause v. United States, 959 A.2d 671, 673 (D.C. 2008).
246. *Id.*
247. 28 U.S.C. § 1867(f) (2012).
248. *Gause*, 959 A.2d at 673 (describing the trial court's decision).
249. *Id.*
250. *Id.* at 679.
251. Gause v. United States, 6 A.3d 1247, 1249 (D.C. 2010) (en banc) (emphasis added).
252. *Id.*
253. *Id.*

is insufficient to accord less protection to District of Columbia litigants" than would be provided under the JSSA.[254]

In holding that the statute's purpose of ensuring a fair cross-section required unfettered access, the en banc court cited *Test* for the rule that the JSSA's "Declaration of Policy," ("nearly identical" to the policy of the state statute) "confers an independent basis for the 'unqualified right to inspection.'"[255] The court recognized that the imposition of even a modest threshold burden of proof "contravenes the very purpose of the [D.C. jury statute] by forcing a litigant to put the proverbial cart before the horse."[256] Such a burden would impose a legal catch-22: "[A] threshold requirement places the burden on the litigant to prove—or prove to a lesser degree—the merits of his or her constitutional claims in order to garner access to the nonpublic and confidential information necessary to prove the merits of his or her claim."[257] In sum, the en banc court concluded that "like the Supreme Court in *Test*, [we] are unwilling to import into the statute a threshold showing requirement, which in our view would serve only to impose an unnecessary hurdle for litigants in contravention of the stated purpose of the [D.C. jury statute]."[258]

Based on the state statute's fair cross-section goal, the court held that "a litigant preparing a possible motion challenging the jury selection process may inspect certain materials that are used 'in connection with the [jury] selection process' *without* a threshold showing that there is reason to believe such discovery will ultimately substantiate a statutory or constitutional violation."[259] Instead, "[t]he only qualification is that the litigant's request must be 'in connection with the preparation or presentation' of such a motion."[260]

The *Gause* court's analysis is directly applicable to the states that similarly have a governing statute that guarantees a fair cross-section but lacks the express entitlement to discovery.

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254. *Id.* (emphasis added). "From 1968 until 1986, the jury selection system in the District of Columbia was governed by the [JSSA]. Then, in 1986, Congress enacted the [D.C. Jury Statute] 'to provide for the establishment of an independent jury system for the District of Columbia Superior Court.'" *Id.* at 1250 (citation omitted).

255. *Id.* at 1252 n.8 (quoting Test v. United States, 420 U.S. 28, 30 (1975)).

256. *Id.* at 1256.

257. *Id.* ("[T]he practical implication of even the 'very modest' threshold showing requirement that our dissenting colleagues would impose is inconsistent with the reality that 'without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.'") (quoting *Test*, 420 U.S. at 30).

258. *Id.* at 1258.

259. *Id.* at 1257 (emphasis added).

260. *Id.* (citation omitted).

B. *FAIR CROSS-SECTION PURPOSE OF STATE OR FEDERAL CONSTITUTION MANDATES DISCOVERY*

As described in Part III and illustrated in Figure 2, there are 27 states that do not have a jury statute, but have recognized in case law that defendants have a constitutional right to a jury selected from a fair cross-section of the community. The highest courts of two of those states have held that defendants have an attendant right to access records.[261] Thus there are 25 states that have issued decisions guaranteeing a fair cross-section, but have yet to issue a binding decision guaranteeing a right to access jury records.

The point that the constitutional fair cross-section purpose is alone sufficient to justify access to records is illustrated by cases from four courts—the Supreme Courts of Missouri and Nevada, an appellate New Jersey court, and the pre-JSSA Fifth Circuit—where, in contrast to *Gause*, there was no applicable state statute. In each case the court held that the constitutional right to a fair cross-section required unqualified access to discovery.

The courts in Missouri, Nevada, and New Jersey were each faced with a criminal defendant's request for data on the racial and ethnic composition of the jury pool.[262] Each court acknowledged that their state had no statutory equivalent to the JSSA, and each granted the defendant's request for jury data on purely constitutional grounds, recognizing that access was necessary to enforcement of the fair cross-section right.[263]

Access was necessary because, as the Supreme Court of Missouri stated, the "cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right."[264] The Nevada Supreme Court similarly based its holding on the reality that "[w]ithout this information, [the defendant's] ability to show a potential violation of his constitutional right to a grand jury drawn from a fair cross-section of the community is limited."[265] And the New Jersey court, which "reject[ed] the

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261. State *ex rel.* Garrett v. Saitz, 594 S.W.2d 606, 608 (Mo. 1980); Afzali v. State, 326 P.3d 1, 3 (Nev. 2014).

262. *Saitz*, 594 S.W.2d at 607 (Defendant requested the "disclosure of data maintained by the (circuit) clerk of the court relating to the master grand jury list" that he could use to determine race and ethnicity data.); *Afzali*, 326 P.3d at 1 (Defendant made a pre-trial request for "information that would identify the racial composition" of grand jury venires.); State v. Ciba-Geigy Corp., 573 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1990) (Defendant requested "information concerning the race and ethnic background" of grand jurors.).

263. *Saitz*, 594 S.W.2d at 608 ("The court is bound, however, by the United States Supreme Court's determination of a state court defendant's constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community."); *Afzali*, 326 P.3d at 3 ("[T]his court is bound by Supreme Court precedent, and . . . a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community."); *Ciba-Geigy*, 573 A.2d at 946 (affirming defendants' claim to right to information based "upon both federal and state constitutional precepts").

264. *Saitz*, 594 S.W.2d at 608.

265. *Afzali*, 326 P.3d at 1. The court found that the defendant was "entitled to information relating to the racial composition of the grand jury so that he may assess whether he has a viable

state's contention that defendants are entitled to the discovery they seek only if they meet the good cause standard," likewise reasoned that "[i]t would be virtually impossible for defendants who are endeavoring to ascertain if a successful attack on the grand jury selection process can be advanced if the facts necessary to prove a defect in the selection process are withheld."[266]

The Fifth Circuit similarly concluded that discovery is constitutionally required in a case that arose prior to the enactment of the JSSA—an analogous context to a state without a jury selection statute.[267] The Fifth Circuit held a right to discovery was "imposed by the Constitution," and accordingly granted the defendant access to confidential jury questionnaires that included race data.[268] The court concluded that the defendant needed access to the government's records because the court "must have all the facts in order to make an intelligent determination."[269] And without the race information contained on the jury questionnaires, "we do not have all the facts which appellant alleges are necessary to a decision in this case—facts which he asserts would assist us in deciding whether there has been a violation of his constitutional rights."[270] The constitutional protections mandated an entitlement to discovery because without the data the court was unable to conduct an intelligent analysis.

These cases recognize that the constitutional fair cross-section right is meaningless without access to the government's records about the jury selection system. Their analysis is directly applicable to the states that have recognized a defendant's right to a jury selected from a fair cross-section, but have yet to hold that defendants have an attendant right to access records.

VI. ANALYSIS AND CRITIQUE OF STATE COURTS' RATIONALES FOR DENYING ACCESS

Why have state courts imposed threshold proof requirements on defendants when the federal courts have uniformly recognized that the fair cross-section right cannot be enforced unless defendants have access to jury records? This question is particularly confounding given the absence of legislative history suggesting that any state purposefully eliminated the right to access jury records contained in the JSSA. And, as explained in the previous

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constitutional challenge," because, "[a]s the Supreme Court of Missouri noted when considering this same issue, '[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right.'" *Id.* at 3 (quoting *Saitz*, 594 S.W.2d at 608). Moreover, "[i]n analyzing [the JSSA], the United States Supreme Court stated that its purpose was to ensure grand juries were selected at random from a fair cross-section and noted that 'without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.'" *Id.* (quoting Test v. United States, 420 U.S. 28, 30 (1975)).

266. *Ciba-Geigy Corp.*, 573 A.2d at 947, 950.

267. Mobley v. United States, 379 F.2d 768, 773 (5th Cir. 1967).

268. *Id.* at 772–73.

269. *Id.* at 773.

270. *Id.* at 772.

Part, the courts that *have* considered a records request in light of the fair cross-section goal have *granted* access to those records. The courts that deny those requests have not referenced the cross-section goal of their state statutes or constitutions. It is therefore impossible to know why the purpose-driven logic of *Test* and the federal courts has not been consistently adopted at the state level.

This Part analyzes and critiques possible reasons courts may be denying access. In doing so, I distinguish between: (1) concerns that are legitimate, but are not actually threatened by defendants' discovery requests; (2) concerns based on a misunderstanding of the law; and (3) problems caused by inadequate advocacy.

A. *Courts May Deny Discovery Based on Legitimate Concerns That Are Not Actually Threatened by Defendants' Discovery Requests*

When courts articulate a reason for denying discovery to defendants, they typically refer to: (1) the secrecy and privacy traditionally associated with the jury; (2) the threat to judicial efficiency and the related administrative burden of complying with discovery requests, particularly when the jury system has not collected or compiled race and ethnicity data; and (3) the fear that successful fair cross-section claims could bring the criminal system to a halt. Each rationale is rooted in a legitimate concern, but the practical application of jury record discovery entitlement does not threaten these interests in a meaningful way.

1. Concerns About Protecting the Privacy of the Jury Are Legitimate, but Not Threatened by Discovery

Many aspects of the jury process are secret: deliberations are protected from scrutiny,[271] the work of jury commissions is typically kept confidential,[272] and jury selection records are generally not publicly available.[273] The traditional secrecy of the jury system is augmented by more modern concerns with the misuse of personal data, as well as the fear that jurors' service may put them in physical danger.[274] Even in the face of a clear statutory entitlement (and certainly in the absence of one), granting defendants access to jury records and information about jurors can feel inconsistent with the well-established tradition of secrecy.

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271. *See, e.g.*, 705 ILL. COMP. STAT. 315/1(a) (2007).

272. *See, e.g.*, GA. CODE ANN. § 15-12-23(a) (2010).

273. *See, e.g.*, ARK. CODE ANN. §16-32-103(e)(2) (Supp. 2015).

274. *See, e.g.*, United States v. Gotti, No. S8 02CR743(RCC), 2004 WL 2274712, at *6 (S.D.N.Y. Oct. 4, 2004) ("[Defendant] is not entitled to unencumbered access to juror information, and given the concerns about juror safety expressed above, he will not have it."); State v. Simms, 518 A.2d 35, 40 (Conn. 1986) (citing "historical reluctance to interfere with the secrecy of grand jury proceedings").

The desire to protect the anonymity of jurors and the secrecy of jury deliberations is supported by significant law and sound policy. But granting defendants access to discovery does not jeopardize these interests. After all, defendants are routinely granted discovery in the federal system and jurors' privacy and safety interests have not been noticeably jeopardized. Nor is there evidence that the 11 states that allow access to records have jeopardized the privacy or safety of potential jurors.

There are four reasons why granting discovery does not threaten jurors' privacy or safety. First, the data defendants need is *aggregate* data about the race of potential jurors over multiple venires. The identity of individual jurors, or even the group of jurors on a petit jury, is legally irrelevant to a cross-section claim, so defendants will never need to access that kind of information. Second, both constitutional and statutory cross-section claims must be filed before the trial begins, so there is no possibility that defendants will have access to otherwise secret jury deliberations.[275]

Third, as in other contexts where sensitive information is at issue, courts have the power to issue protective orders to provide additional safeguards.[276] For example, a court can release jury data pursuant to an order that requires the attorneys and experts accessing the data to keep the information confidential.[277] A court can even release data pursuant to an order that provides the attorneys with access, but prevents the defendant from seeing the data.[278]

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275. Under the JSSA, a motion must be made "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. § 1867(a) (2006). State statutes often have similar timing requirements. *See, e.g.*, COLO. REV. STAT. ANN. § 13-71-139(1) (West 2015). Constitutional fair cross-section challenges must be raised before trial, pursuant to Federal Rule of Criminal Procedure 12(b) or state equivalent. *See, e.g.*, United States v. Ovalle, 136 F.3d 1092, 1108 (6th Cir. 1998). Nor do defendants need information about jury deliberations to raise a cross-section claim. *See, e.g.*, *Ciba-Geigy Corp.*, 573 A.2d at 947 (rejecting the argument that secrecy afforded grand jury proceedings limited defendant's access to jury records because "[i]t is clear that defendants are not inquiring into why they were indicted by the grand jury; they want to know the composition of the grand jury which indicted them").

276. *See, e.g.*, IOWA CT. R. 2.14 (6)(a) ("Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate.").

277. *See* United States v. Rice, 489 F. Supp.2d 1312, 1324 (S.D. Ala. 2007). Courts can require the defendant's expert to provide an affidavit of confidentiality before accessing confidential juror information. United States v. Savage, Nos. 07-550-03, -04, -05, -06, 2013 WL 797417, at *5 (E.D. Pa. Mar. 5, 2013). Courts also often circumscribe the use of disclosed information without executing a formal protective order. *See, e.g.*, United States v. Causey, Criminal No. H-04-025, 2004 WL 1243912, at *15 (S.D. Tex. May 25, 2004).

278. *See, e.g.*, United States v. Shapiro, 994 F. Supp. 146, 148 (E.D.N.Y. 1998) ("The Supreme Court made it clear in [*Test*] that a litigant has 'essentially an *unqualified* right to inspect jury lists' . . . . However, in light of [the defendant's] well documented history of behavioral problems . . . the Court clearly acted within the exercise of its discretion in determining, for security reasons, that the information should not be turned over to [the defendant], but to [his] attorney . . . ." (citations omitted)).

Fourth, many state statutes that fail to explicitly provide for discovery make other jury records publicly accessible. For example, some states make the master list of jurors available to the public upon request.[279] These records are (unfortunately) not the race and operational data defendants need to pursue a cross-section claim, but the public availability of some jury records undercuts the argument that all juror information must be kept secret. Some states also coordinate the jury selection process with the federal courts located in that state.[280] So a single jury selection process might produce one list of jurors for the state court and a second list for the federal court. The importance of keeping the state list secret is diminished where federal defendants have an unqualified right to access the same data sent to the federal court.

2. Concerns for Judicial Efficiency and Administrative Burdens Are Legitimate, but Not Threatened by Discovery

Courts are often concerned that granting defendants' discovery requests will "consume enormous amounts of time and energy of our already overburdened trial courts, with concomitant delays in their calendars."[281] This is a particularly live concern when granting the request would first require the jury office to generate the data for the first time. Indeed, a number of state courts do not collect race data on potential jurors,[282] and a request for such data therefore necessitates a new and time-consuming research effort.[283]

Courts appropriately pay attention to the risk of incurring administrative and judicial costs and delays. But again, the federal system has hardly ground

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279. *See, e.g.*, ALA. CODE § 12-16-57(a) (LexisNexis 2012) ("The jury commission for each county shall compile and maintain an alphabetical master list of all persons in the county who may be called for jury duty, with their addresses and any other necessary identifying information."); *Id.* § 12-16-57(c) ("The master list shall be open to the public for inspection at all reasonable times.").

280. *See Handbook on Jury Use in the Federal District Courts*, FED. JUDICIAL CTR. 12 (1989), http://www.fjc.gov/public/pdf.nsf/lookup/juryuse.pdf/$file/juryuse.pdf.

281. State v. Avcollie, 453 A.2d 418, 423 (Conn. 1982) (quoting Rojas v. State, 288 So. 2d 234, 237 (Fla. 1973)).

282. *See, e.g.*, State v. Moore, No. CR10112785, 2012 WL 6785194, at *3 (Conn. Super. Ct. Dec. 10, 2012) ("None of the [jury official] witnesses who testified had any way of knowing the racial make-up of the jurors summoned for jury duty in this or any other case . . . ."); State v. Carter, No. 23246-8-III, 2005 WL 2672772, at *9 (Wash. Ct. App. Oct. 20, 2005) ("Here, there was no evidence presented concerning the representation of racial minorities in Benton County jury pool lists. Although defense counsel called E. Kay Staples, Benton County Clerk, to testify as to the number of African American and Hispanic residents in any given year that are called for jury service, Ms. Staples stated she could not provide a number because such statistics were not kept in Benton County.").

283. *See, e.g.*, State *ex rel.* Garrett v. Saitz, 594 S.W.2d 606, 608 (Mo. 1980) (Directing court clerk to "make available to [the defendant] the demographic information sought . . . as soon as is practicable. If the clerk does not have in his possession information on race and gender, he should, to comply with this order, obtain it forthwith and thereafter provide relator with that data.").

to a halt, despite the routine grants of discovery. And there is similarly no evidence that the 11 states with an explicit right to discovery are overburdened. As is true for privacy, a closer look at the actual burden of discovery reveals that requests can be easily accommodated.

First, a number of states already require jury offices to collect data on the racial representativeness of their jury systems.[284] In those states, responding to a discovery request could be as simple as turning over (or posting online) a pre-existing document that reports on the percentage of, say, African-Americans and Hispanics in the jury pool over a two-year period. This is the model used by the federal system: federal courts are required to complete an "AO–12" form that lists the percentage of jurors by race, ethnicity, and gender in the jury pool, alongside parallel census data for the jurisdiction.[285] A federal defendant's discovery request begins, and may end, with a copy of the AO–12 form.[286]

Second, and relatedly, courts retain the power to reject requests for information if the defendant has not yet made adequate use of the information that is available. So if a jurisdiction posted accurate data on the racial make-up of the jury pool, and a defendant ignored that data and instead requested the opportunity to delve into the jury system's database, a court could deny that request without impairing the cross-section right.[287] For

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284. *See, e.g.*, MASS. GEN. LAWS ch. 234A, § 79 (2014) ("On or before the first day of April of each year, the jury commissioner shall issue an annual report for the previous calendar year . . . . The report shall contain demographic and financial data and data on juror management and jurors' satisfaction with the jury system."); *see also* MINN. STATE GEN. PRACTICE R. 803(b)(1); N.Y. JUDICIARY LAW § 528 (McKinney Supp. 2015); UTAH CODE ANN. § 78B-1-106 (LexisNexis 2012); W. VA. CODE ANN. § 52-1-16 (West 2002).

285. 28 U.S.C. § 1863(a) (2012) ("Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify."). "According to instructions provided by the Administrative Office on the form, the AO–12 form 'is required to be completed upon . . . [t]he periodic refilling of the master wheel . . . .'" United States v. Hernandez-Estrada, No. 10cr0558 BTM, 2011 WL 1119063, at *11 (S.D. Cal. March 25, 2011) (alterations in original) (quoting Form AO–12: Jury Representativeness Statistics, Data Collection Instructions, General).

286. The Ao–12 has some limitations as a model because some courts fail to produce timely reports. *See, e.g.*, United States v. Hernandez-Estrada, 704 F.3d 1015, 1022 (9th Cir. 2012) (recognizing that the district "has been derelict in completing the AO–12s on time"). Some courts' AO–12 forms have a large proportion of missing entries for race and ethnicity data. *See id.* at 1024 ("The percentages of those in the qualified wheel who did not answer the race and ethnicity questions—11.56% and 33.81% respectively—are significant.").

287. *See, e.g.*, United States v. Pritt, 458 F. App'x 795, 800 (11th Cir. 2012) (denying defendant's request for additional discovery when "[he] was given access to records that enabled him to calculate the relevant absolute disparities. . . . [and] was thus given the requisite material to ascertain the facts that, under our precedent, are essential to his jury composition claims"); State v. Ciba-Geigy Corp., 573 A.2d 944, 950–51 (N.J. Super. Ct. App. Div. 1990) ("[D]efendants may not come before a court and ask for the court's aid to obtain information as to the race and ethnicity of the pool of jurors who comprised the jury which indicted them without showing they have in good faith exhausted available data and that their request for further data is not made for delay, harassment, or for impermissible intrusion upon others and upon public resources.").

example, at least one federal district court has issued an administrative order that recognizes that a defendant is entitled to "juror number; race; and Hispanic ethnicity" information upon request, but that a party seeking "more detailed information and records" must first show good cause.[288]

Third, the database for jury systems is typically refreshed every two or four years.[289] Accordingly, the jury office would only have new data to collect and disclose every two or four years. In other words, the jury office would not need to generate new data for each individual discovery requests—all requests made during the "life" of a single jury wheel could be answered with the same set of data.[290]

Fourth and finally, suggesting that the *defendant's* request imposes a burden on the court ignores the court's own, pre-existing responsibility to maintain a representative jury system, as well as the government's shared interest in such a system. Courts must collect race and ethnicity on jurors to properly administer the jury system, independent of any request by defendants.[291] A defendant's request only constitutes a new, additional burden when the jury system has failed to collect the information it needs.

3. Concerns About the Scope of Remedies Are Legitimate, but Not Threatened by Discovery.

Courts also worry about opening the floodgates to baseless discovery requests,[292] as well as to successful challenges that may require overturning numerous convictions. In one case, cited frequently in opinions denying discovery, the court suggested that in light of the speedy trial requirement, "requir[ing] our trial courts to expend endless hours exploring attacks on the

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288. United States v. Patel, No. 11-CR-20468, 2012 WL 1959563, at *2 (E.D. Mich. May 30, 2012) (citing Eastern District of Michigan Administrative Order No. 00–AO–060).

289. *See, e.g.*, IDAHO CODE §2-213(4) (2015).

290. *See, e.g.*, State v. McDowell, 832 S.W.2d 333, 335 (Mo. Ct. App. 1992) ("In regard to defendant's challenge to the composition of the petit jury, a stay of all jury trials in the City of St. Louis was granted in another case upon an identical motion. Approximately two weeks before defendant's trial, the trial court adopted an administrative order issued by the St. Louis City Circuit Court which corrected the perceived deficiencies. Defendant presented no evidence that the new procedures were inadequate. Thus, the administrative order adopted by the trial court addressed defendant's concerns prior to defendant's trial. Defendant's point is denied." (footnote omitted)).

291. *See ABA Principles for Juries & Jury Trials*, AM. BAR. ASS'N, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_juryaddendum.html (last visited May 11, 2016) ("The court should maintain demographic information as to its source lists, summonses issued, and reporting jurors."); MINN. GEN R. PRAC. 806(e) ("The jury commissioner shall review the jury source list . . . for its inclusiveness and the jury pool for its representativeness of the adult population in the county and report the results to the chief judge of the judicial district."); *see also* N.Y. JUDICIARY LAW § 528 (McKinney 2003); UTAH CODE ANN. § 78B-1-106 (LexisNexis 2012).

292. *See, e.g.*, State v. Avcollie, 453 A.2d 418, 423 (Conn. 1982) (expressing concern about "open[ing] every grand jury panel, no matter how perfectly impartial and representative, to a full-scale investigation") (emphasis omitted) (quoting Rojas v. State, 288 So. 2d 234, 237 (Fla. 1973)).

grand jury panel which are without factual basis of any kind might well result in needlessly freeing felons without trial."[293] And because fair cross-section challenges are to the jury venire or pool—and not an individual petit jury—one defendant's successful fair cross-section challenge can have implications for every defendant whose jury was selected from that same pool.

Courts appropriately consider the systemic effects their decisions in individual cases may have on every jury pulled from the violative venire. But even to the extent that "fear of too much justice" constitutes a legitimate concern, courts can limit their holdings' retroactivity. For example, courts that found fair cross-section violations have limited the retroactive application of their decisions.[294] It is thus possible to grant defendants' discovery requests without having "a disastrous effect on the administration of justice."[295]

B. Courts May Deny Discovery Based on a Misunderstanding of the Law

A close review of many fair cross-section cases suggests a few unspoken rationales for denying jury discovery requests that may reflect a misunderstanding of the law. Courts may be: (1) confusing the discovery stage of the cross-section claim with the subsequent merits stage; (2) confusing fair cross-section claims with equal protection claims; and (3) resisting the operation of a burdenless request as inconsistent with the general rule that there is not a right to discovery in criminal trials, and therefore dismissing legitimate discovery requests as disingenuous "fishing expeditions." To the extent that these problems undergird the denial of discovery requests, they indicate a misunderstanding of the fair cross-section right.

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293. *Rojas*, 288 So. 2d at 237 ("[T]his we will not permit.").

294. *See, e.g.*, People v. Hubbard, 552 N.W.2d 493, 504–05 (Mich. Ct. App. 1996) ("Having concluded that the Kalamazoo County jury array procedure was systemically flawed between the mid-1980s and 1992, we further conclude that this decision shall have retrospective application only to the extent of direct appeals currently pending, or filed after the issuance date of this decision, where the jury array issue was specifically and seasonably raised in the trial court and properly preserved for appellate review."), *overruled on other grounds by* People v. Bryant, 822 N.W.2d 124 (Mich. 2012), *and* People v. Harris, 845 N.W.2d 477 (Mich. 2014); *see also* State v. Long, 523 A.2d 672, 676–77 (N.J. Super. Ct. App. Div. 1987) (discussing that this is in part because "a retroactive rule would have a disastrous effect on the administration of justice" and "[w]e concur that the reform of the jury selection process should have prospective application only"); State v. Long, 499 A.2d 264, 273–74 (N.J. Super. Ct. Ch. Div. 1985) (holding decision should have only prospective application and that "[t]rials may proceed while the jury commission moves with alacrity to comply with the mandate of the law"); State *ex rel.* Stanley v. Sine, 594 S.E.2d 314, 321 (W. Va. 2004) ("Given that our decision herein involves a determination of a matter of first impression with far-reaching application to all jury trials previously had in Berkeley County since approximately 1998 and those jury trials currently pending in that county's courts, we conclude that the rulings we announce today should apply prospectively only.").

295. *Long*, 523 A.2d at 676–77.

1. Confusing the Discovery Stage with the Merits Stage

Courts that impose a proof requirement may be confusing the discovery stage of a fair cross-section claim (where there is no proof requirement—a defendant need only allege he is preparing a motion) with the merits stage of the claim (where a defendant has the burden of proof and must satisfy the three elements of a prima facie case).

In one illustrative case, a defendant in Alabama made a discovery request for "access to, inspection of, and copying of all of the jury system records," asserting that the documents were necessary to determine whether the jury lists underrepresented African-Americans.[296] In other words, the defendant was making a discovery request, not seeking to establish a prima facie claim. But the court denied the request for failure to meet the prima facie standard. According to the court, the defendant "provided no documentary or statistical evidence in support of his motion" even though "the burden of establishing a prima facie case rests on the defendant."[297] The court noted the defense request "rests on the 'expectation' that the requested discovery would establish that his right to a jury consisting of a fair cross section of the community was violated," but denied the request because the defendant "failed to establish these groups were underrepresented or that there was systematic exclusion of these groups in the jury selection process."[298] The court's analysis merged the two separate stages of discovery and proof—distinct stages according to the Supreme Court in *Test* and the logic of discovery's role in the ultimate claim.

Relatedly, the states that have a jury selection statute often reference a section borrowed from the JSSA that requires a defendant to support his prima facie challenge with a written motion and affidavit "specifying the supporting facts and demographic data."[299] Courts routinely cite this provision in denying the discovery request, failing to recognize that this language actually applies to the subsequent merits stage,[300] or that the JSSA's proof requirement is intertwined with the statute's discovery entitlement.

2. Confusing Fair Cross-Section with Equal Protection

Judges may also be confusing fair cross-section and equal protection doctrine, and erroneously denying records requests that do not allege discrimination. Equal protection claims require proof of discrimination, while fair cross-section claims do not—yet many courts have incorrectly imported

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296. Griffin v. State, 790 So.2d 267, 311 (Ala. Crim. App. 1999).

297. *Id.* at 312.

298. *Id.* at 312–13.

299. People v. Brown, 218 P.3d 733, 741 (Colo. App. 2009).

300. *Id.* (rejecting discovery request when "Defendant made no record . . . that would require further inquiry under either the Constitution or the Colorado Uniform Jury Selection and Service Act").

the discrimination requirement into fair cross-section analysis.[301] Indeed, my survey of 167 state and federal cross-section cases decided between 2000 and 2010 revealed that one-third of the claims were denied because of the defendant's failure to demonstrate discrimination.[302] This widespread misunderstanding of the scope of the fair cross-section right could be playing a role in state courts' misapplication of the law.

3. Discomfort with a Burdenless Request and Distrust of Defense Motives

Courts' concerns with judicial efficiency and administrative burdens are aggravated in the absence of a threshold proof requirement. The idea that a defendant can make demands on the court system without any factual basis makes the attendant burdens feel even more onerous. One can almost hear the outrage in opinions that describe the defendant's request to "[conduct] a full-scale investigation of the . . . jury panel solely upon a mere assertion, not supported by so much as an affidavit . . . that the panel was improperly drawn,"[303] or "require our trial courts to expend endless hours exploring attacks on the . . . jury panel which are without factual basis of any kind."[304] This resistance to granting a burdenless request[305] may be in keeping with the sense that such requests are usually disfavored in criminal trials, where there is no general right to discovery.[306] Yet it is inconsistent with the unqualified nature of the right to access jury records.

Relatedly, some courts deny discovery requests based on a suspicion that the requests are disingenuous. For example, one court stated that a defendant's request for discovery could be "perhaps more accurately" described as "a fishing expedition of broad range."[307] Indeed, both fish and geese play a prominent role in denying defendants' discovery requests, as courts refuse to permit either "a fishing expedition,"[308] or "a wild goose chase at public expense."[309] Of course, fishing is exactly what is required,[310] because

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301. Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 167–70 (2012).

302. *Id.* at 166.

303. State v. Avcollie, 453 A.2d 418, 423 (Conn. 1982) (quoting Rojas v. State, 288 So. 2d 234, 237 (Fla. 1973)).

304. *Rojas*, 288 So. 2d at 237.

305. *See, e.g.*, *Avcollie*, 453 A.2d at 422; State v. Anaya, 456 A.2d 1255, 1264 (Me. 1983).

306. Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 561 (citing Wardius v. Oregon, 412 U.S. 470, 474 (1973)).

307. *Avcollie*, 453 A.2d at 423 (quoting *Rojas*, 288 So. 2d at 237).

308. *Id.* at 422 ("Counsel for the defendant made no attempt to lay a foundation for the general allegations in the defendant's motion to dismiss. When questioned by the court, he admitted he could be accused of being on a fishing expedition and was unable to say what class was being discriminated against.").

309. *Anaya*, 456 A.2d at 1264 (denying defendant's request for funding for an expert to research underrepresentation because "[t]he criminal defendant's right to an adequate defense does not include a right to go on a wild goose chase at public expense").

310. *See* United States v. Gotti, No. S8 02CR743(RCC), 2004 WL 2274712, at *6 (S.D.N.Y.

"without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge."[311]

C. *INADEQUATE ADVOCACY MAY CONTRIBUTE TO ERRONEOUS DISCOVERY DENIALS BY COURTS*

Inadequate advocacy by defense attorneys and prosecutors also contributes to state courts' failure to recognize that their legitimate concerns are not threatened by granting discovery requests.

Prosecutors sometimes contribute to judicial errors by arguing incorrectly that fair cross-section claims require proof of discrimination,[312] or that discovery requests require some initial proof of a problem with the jury system.[313] But discovery request denials are more frequently facilitated by defense attorneys who object to the jury composition only upon entering the courtroom. Because the composition of the petit jury is irrelevant to a cross-section claim, and because successful claims require evidence from more than one venire, lodging objections to the venire in the courtroom is futile. When defense attorneys fail to request the discovery they need to substantiate a fair cross-section claim, courts appropriately deny their objections, which are made without evidence on the day of trial.[314] The law is thus replete with cases where African-American and Latino defendants despair at their ability to

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Oct. 7, 2004) ("Although [the defendant] offers absolutely no basis for his purported belief that the jury lists will reveal impropriety in the selection process, and the Court views the motion as no more than a frivolous fishing expedition, the law dictates that [his] motion must be granted." (citing Test v. United States, 420 U.S. 28, 30 (1975))).

311. *Test*, 420 U.S. at 30.

312. The Attorneys General of 14 states signed onto an amicus brief to the Supreme Court, incorrectly asserting that in order to prove a fair cross-section violation, a defendant has to prove that "the juror selection procedure is administered in [a] discriminatory manner," by providing "evidence of actual discriminatory or exclusionary practices." Brief of the States of Connecticut, Arizona, Colorado, Idaho, Maryland, New Mexico, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah and Wisconsin as Amici Curiae in Support of Petitioner at 32–33, Berghuis v. Smith, 559 U.S. 314 (2010) (No. 08-1402), 2009 WL 4247967, at *32–33.

313. *See, e.g.*, State v. Ciba-Geigy Corp., 573 A.2d 944, 947 (N.J. Super. Ct. App. Div. 1990) ("[T]he State argues that before there may be contact with any of the persons who served as grand jurors, defendants must establish a likelihood that bias in the selection process exists.").

314. *See, e.g.*, Riley v. State, 496 A.2d 997, 1007 (Del. 1985) ("On the eve of trial and the Court's conduct of *voir dire*, defendant . . . claimed that . . . the venire had become 'unconstitutionally disproportionate' for the trial of a young black charged with killing a middle-aged white shopkeeper," but "[d]efendant's motion contained no supporting affidavit showing either statistics as to the racial composition of other jury panels within the county or vital statistics as to the county's population by race."); People v. Bradley, 810 N.E.2d 494, 497 (Ill. App. Ct. 2004) ("[T]he jury venire marched into the St. Clair County criminal courtroom and counsel saw only one black person in the entire venire. Unnerved by a notable absence of black people on the panel, trial counsel commented upon the oddity and asked the trial judge to discharge the panel because of the obvious underrepresentation of blacks. . . . [T]his request for the panel's discharge was denied, based upon the absence of any showing that the panel's composition was the result of a systematic exclusion of African Americans from St. Clair County jury service.").

secure a fair trial from white jury panels[315]—echoing the Supreme Court's own pronouncements about why the cross-section right is critical—but the objection is lodged at the legally irrelevant petit jury.

In an illustrative example, an African-American defendant in a Florida court argued that "since all the members of the venire from which his jury was chosen were white, he had no chance to get a 'jury of his peers' that was a fair cross-section of the community in [that] [c]ounty."[316] His claim was doomed, however, because "after the venire entered the courtroom, [defense] counsel simply commented to the court that 'despite the fact that both of our clients are black, there are no blacks on the jury panel,'" and made a fair cross-section objection.[317] The court properly denied the claim, holding that "[s]ince counsel was presumably aware of the fair cross-section requirement and the *Duren* test for establishing a prima facie violation, it made no sense to claim, off the cuff, that there was an unrepresentative venire if . . . counsel did not have any supporting data."[318] Courts like this one properly deny fair cross-section claims that are made without any supporting data, and obviously, courts cannot possibly "get it right" with regard to discovery requests that are never made.

VII. CONCLUSION AND PROPOSED SOLUTIONS

The Supreme Court has repeatedly emphasized the importance of a representative jury pool for criminal trials. And the right to a jury selected from a fair cross-section of the community is protected by the Constitution, the JSSA, and the statutes or constitutions of all 50 states. But for criminal defendants in many states, this fundamental right is an empty promise because courts withhold the information necessary for enforcement. Courts' refusal to allow access to jury selection records cannot be squared with each state's fair cross-section guarantee, whether enshrined in a statute or constitution. The denial of access to records renders the fair cross-section right meaningless.

How can the cross-section guarantee be made meaningful in all states? The most effective solution is for states to add or enact statutory provisions that include the JSSA's explicit right to discovery. This process might be facilitated if the American Bar Association were to draft and promote model language, although the text of the JSSA itself provides a sufficient model. Passing legislation, however, seems unnecessarily laborious when the

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315. *See, e.g.*, Mash v. Commonwealth, 376 S.W.3d 548, 551 (Ky. 2012) ("From the start of the proceedings, Appellant believed that he would not get a fair trial in McCracken County because of his race. At a hearing on his motion for change of venue, Appellant argued that the fact that he was a middle-aged African-American man and the victim was a nineteen-year-old white man would prejudice a white jury against him.").

316. Gordon v. State, 704 So. 2d 107, 110 (Fla.1997).

317. *Id.* at 112.

318. *Id.* at 111.

Supreme Court has recognized that the fair cross-section purpose alone mandates discovery.

A more practical solution—one that does not require legislative action—is for courts to simply make the aggregate data publicly available. Again, the federal system provides a potential model: the AO–12 form lists the percentages of racial and ethnic groups in the jury pool, alongside census data reporting on the percentages of those groups in the community.[319] New York state has also begun collecting and posting this data in an online report.[320] Posting this simple data set on the court's website would preclude the need to make or grant any discovery requests unless the data revealed the underrepresentation of a distinctive group.[321] In some jurisdictions that do not currently collect or count race and ethnicity date, this would require generating the information, which has the added benefit of equipping the jury system to monitor itself. An effort to make aggregate data publicly available could be encouraged by local bar associations,[322] civil groups,[323] or national leaders on the issue such as the American Bar Association Commission on the American Jury Project,[324] or the National Center for State Courts.[325] In addition, most jurisdictions have a board of judges who implement the district's jury plan and who can require the jury office personnel to produce and post this data.[326]

But even if states do not change their legislation and jury offices do not post the aggregate data, courts should still grant discovery requests and should be exhorted to do so through better advocacy by prosecutors and criminal defense attorneys. First, prosecutors must recognize, as did the United States in the *Test* litigation, that a defendant requesting discovery does not need to satisfy a threshold proof requirement, and the government

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319. *See supra* notes 285–86.

320. ANN PFAU, CHIEF ADMIN. JUDGE OF THE STATE OF N.Y., FIRST ANNUAL REPORT PURSUANT TO SECTION 528 OF THE JUDICIARY LAW 8–9 (2011), http://www.nycourts.gov/publications/pdfs/528_ReportNov2011.pdf. The report provides simple charts and graphs that illustrate the representation of distinctive groups in the jury pool, as compared to the community.

321. For a detailed description of what and how data could be presented, see Nina W. Chernoff & Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, 33 JUST. SYS. J. 47 (2012). This article was adapted for and reprinted in JURYWORK: SYSTEMATIC TECHNIQUES § 5:40 (2013–2014 ed.).

322. *See, e.g.*, OHIO COMM'N ON RACIAL FAIRNESS, *supra* note 177.

323. *See, e.g.*, *Improving Justice for the D.C. Community*, COUNCIL FOR COURT EXCELLENCE, http://www.courtexcellence.org (last visited May 11, 2016).

324. *See Commission on the American* Jury, AM. BAR ASS'N, http://www.americanbar.org/groups/judicial/american_jury.html (last visited May 11, 2016).

325. "The National Center for State Courts is an independent, nonprofit court improvement organization" widely recognized as the preeminent authority on and resource for state jury systems. *About Us: From Clearinghouse to Full-Service Solution Provider*, NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org (last visited May 11, 2016).

326. *See, e.g.*, D.C. CODE 11-1904(b)(2012) ("The jury system plan shall be administered by the clerk of the Court under the supervision of the Board of Judges.").

cannot object to records requests on this basis.[327] This recognition is consistent with the government's independent interest in racially representative jury pools, and the attendant public confidence in jury verdicts.[328]

Second, defense attorneys need to request the discovery necessary to substantiate a fair cross-section claim *before* walking into the courtroom. Defense attorneys need to help judges understand when denying discovery is based on a misunderstanding of the law, or why defendants' discovery requests can be granted without jeopardizing privacy or efficiency. Equipping attorneys to make these requests and arguments requires resources for training, and could be facilitated by continuing legal education classes.[329] It would also be useful if clear, accessible descriptions of the law were made available in practitioners' publications, such as the newsletters of bar associations or defense organizations.[330] Additional trainings for judges would also be valuable.[331]

Finally, scholarly attention to this issue will help illuminate the incongruity of guaranteeing a defendant a fair cross-section and yet refusing to grant discovery of the records crucial to enforcing that right. Ideally, legal scholarship would inform both judges' and attorneys' understanding of the fair cross-section right.

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The importance of a trial by a jury of one's peers was first recognized in England in 1215,[332] and is no less important in modern America. Today we are confronted with "an enormous racial chasm in responses toward the U.S. criminal justice system,"[333] based in part on the enormous chasm of experiences with the police officers, prosecutors, judges, and courts who

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327. Brief for the United States, Test v. United States, 1974 WL 186121, at *5–6 (Oct. 22, 1974).

328. *See supra* Part II.C.3.

329. *See, e.g.*, S.D. EQUAL JUSTICE COMM'N, *supra* note 177, at 9 ("The State Bar should regularly offer continuing legal education topics on challenging jury panels and the use of peremptory strikes.").

330. For example, the National Center for State Courts has a straightforward, seven-page description of the fair cross-section right on its website. *See* NAT'L CTR. FOR STATE COURTS, JURY MANAGERS' TOOLBOX: A PRIMER ON FAIR CROSS SECTION JURISPRUDENCE (2010), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/A%20Primer%20on%20Fair%20Cross%20Section.ashx; *see also* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, CHAMPION 4 (Dec. 2013), https://www.nacdl.org/Champion.aspx?id=31215&terms=the+16+things.

331. *See, e.g.*, UTAH JUDICIAL COUNCIL'S TASK FORCE ON RACIAL & ETHNIC FAIRNESS IN THE LEGAL SYS., RACIAL AND ETHNIC FAIRNESS: REPORT ON THE STATE OF THE CRIMINAL AND JUVENILE JUSTICE SYSTEM 69 (2000), http://www.utcourts.gov/specproj/retaskforce/Reportfinal.pdf ("Judges should receive training on the rights of individuals to serve on juries and defendants to have a jury that reflects a cross section of the community.").

332. MAGNA CARTA (1215).

333. RACE AND PUNISHMENT, *supra* note 134, at 33 (quoting MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 5 (2010)).

operate in that system.[334] As a result, juries must include a fair cross-section of African-Americans and Latinos, both in order to protect criminal defendants who are disproportionately people of color from "oppression by the government,"[335] and "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."[336] And that fair cross-section right is meaningless unless criminal defendants can access jury system records.

Criminal defendants are the only actors in the criminal justice system with both the standing and motivation to enforce the fair cross-section guarantee, and they can only do so after accessing jury system records. Therefore, states must recognize the "essentially . . . *unqualified*"[337] right of discovery that exists in the federal system. Only then will defendants be able to discover whether their juries are "truly representative of the community"[338] as the Constitution and the laws of all 50 states require.

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334. *See supra* Part II.C.2.

335. Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

336. Georgia v. McCollum, 505 U.S. 42, 49 (1992) (quoting Powers v. Ohio, 499 U.S. 400, 413 (1991)).

337. Test v. United States, 420 U.S. 28, 30 (1975).

338. Smith v. Texas, 311 U.S. 128, 130 (1940).

Appendix

Part 1: Explicit Statutory Right to Fair Cross-Section

	State	Statutory Provision
1	AL	ALA. CODE § 12-16-55 (2015)
2	AZ	ARIZ. REV. STAT. ANN. § 21-302 (2015)
3	AR	ARK. CODE ANN. § 16-32-303 (2015)[339]
4	CO	COLO. REV. STAT. § 13-71-104(2) (2015)
5	DE	DEL. CODE ANN. tit. 10, § 4501 (2015)
6	HI	HAW. REV. STAT. § 612-1 (2015)
7	ID	IDAHO CODE § 2-202 (2015)
8	IN	IND. CODE § 33-28-5-9 (2015)
9	IA	IOWA CODE § 607A.1 (2015)
10	KS	KAN. STAT. ANN. § 43-155 (2015)
11	ME	ME. STAT. tit. 14 §1201-A (2015)[340]
12	MD	MD. CODE ANN. CTS. & JUD. PROC. § 8-104 (2016)
13	MN	MINN. STAT. § 593.31 (2015)[341]
14	MS	MISS. CODE. ANN. § 13-5-2 (2015)
15	MO	MO. REV. STAT. § 494.400 (2015)
16	NE	NEB. REV. STAT. ANN. § 25-1601.03(1) (West 2015)
17	NY	N.Y. JUDICIARY LAW § 500 (McKinney 2015)
18	ND	N.D. CENT. CODE ANN. § 27-09.1-01 (West 2015)
19	PA	42 PA. CONS. STAT. § 4501(1) (West 2016)[342]
20	SD	S.D. CODIFIED LAWS § 16-13-10.1 (2015)
21	UT	UTAH CODE ANN. 1953 § 78B-1-103(1)(a) (West 2015)
22	WA	WASH. REV. CODE ANN. § 2.36.080(1) (West 2015)
23	WV	W. VA. CODE ANN. § 52-1-1 (West 2015)

339. Reference is to "adequate cross-section."
340. Reference is to "broadest feasible cross-section."
341. Reference is to "broadest feasible cross-section."
342. Reference is to "a representative cross-section."

Part 2: Case Law Recognizes Constitutional Right to Fair Cross-Section

	State	Citation
1	AK	Tugatuk v. State, 626 P.2d 95, 99–100 (Alaska 1981)
2	CA	People v. Jackson, 920 P.2d 1254, 1267 (Cal. 1996)
3	CT	State v. Griffin, 741 A.2d 913, 929 (Conn. 1999)
4	FL	Gordon v. State, 704 So. 2d 107, 110–11 (Fla. 1997)
5	GA	Ingram v. State, 323 S.E.2d 801, 810 (Ga. 1984)
6	IL	People v. Flores, 549 N.E.2d 1342, 1345 (Ill. 1990)
7	KY	Mash v. Commonwealth, 376 S.W.3d 548, 552 (Ky. 2012)
8	LA	State v. Daigle, 344 So. 2d 1380, 1389 (La. 1977)
9	MA	Commonwealth v. Soares, 387 N.E.2d 499, 510 (Mass. 1979)
10	MI	People v. Hopson, 743 N.W.2d 926, 927 (2008)
11	MT	State v. LaMere, 2 P.3d 204, 213 (Mont. 2000)
12	NV	Aesoph v. State, 721 P.2d 379, 381 (Nev. 1986)
13	NH	State v. Addison, 13 A.3d 214, 222 (N.H. 2010)
14	NJ	State v. Timmendequas, 737 A.2d 55, 79 (N. J. 1999)[343]
15	NM	State v. Singleton, 28 P.3d 1124, 1127 (N.M. 2001)
16	NC	State v. Rogers, 562 S.E.2d 859, 877 (N.C. 2002)
17	OH	State v. Mack, 653 N.E.2d 329, 335 (Ohio 1995)
18	OK	Mitchell v. State, 884 P.2d 1186, 1195 (Okla. 1994)
19	OR	State v. Haugen, 243 P.3d 31, 38 (Or. 2010)
20	RI	State v. Lawless, 996 A.2d 166, 168–69 (R.I. 2010)
21	SC	State v. Stanko, 741 S.E.2d 708, 722 (S.C. 2013)
22	TN	State v. Hester, 324 S.W.3d 1, 51 (Tenn. 2010)
23	TX	Singleton v. State, 881 S.W.2d 207, 211 (Tex. App. 1994)
24	VT	State v. Jenne, 591 A.2d 85, 88–89 (Vt. 1991)
25	VA	Prieto v. Commonwealth, 721 S.E.2d 484, 506 (Va. 2012)
26	WI	State v. Coble, 301 N.W.2d 221, 237 (Wis.1981)[344]
27	WY	Espinoza v. State, 969 P.2d 542, 547 (Wyo. 1998)

343. Reference is to "a representative cross-section."
344. Reference is to "a broad cross-section."

Part 3: Explicit Statutory Right to Access Records

	State	Statutory Provision	
		Explicit Right of Access	Access as Exception to General Rule of Non-Disclosure
1	DE		DEL. CODE ANN. TIT. 10 § 4513(b) (2015). Disclosure and preservation of records Records used in the selection process shall not be disclosed, except in accordance with the jury selection plan or as necessary in the preparation or presentation of a motion challenging compliance with this chapter.
2	HI	HAW. REV. STAT. §612-23(d) (2015). The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (a).	HAW. REV. STAT. §612-23(d) (2015). The contents of any records or papers used by the clerk in connection with the selection process shall not be disclosed, except as provided by other provisions of this chapter, in connection with the preparation or presentation of a motion under subsection (a), or upon order of the court.
3	ID	IDAHO CODE § 2-213(4) (2015). The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (1) of this section.	IDAHO CODE § 2-213(4) (2015). The contents of any records or papers used by the jury commissioner or the clerk in connection with the selection process and not made public under section 2-206(4), Idaho Code, shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection (1) of this section.
4	IN	IND. CODE. § 33-28-5-21(e) (2015).	

		The parties to the case may inspect, reproduce, and copy the records or papers of the jury administrator at all reasonable times during the preparation and pendency of a motion under subsection (a).	
5	KY		KY. REV. STAT. ANN. § 29A.110 (2015). The contents of any records or papers used by the Administrative Office of the Courts or the clerk in connection with the selection process and not required to be made public under this chapter shall not be disclosed, except in connection with the preparation or presentation of a motion under the Rules of Civil Procedure or the Rules of Criminal Procedure or upon order of the Chief Justice.
6	MD	MD. CODE ANN. CTS. & JUD. PROC. § 8-105 (2015). Information needed for challenges (b) The rules shall provide for access to, and copying of, information needed for a challenge under § 8-408 or § 8-409 of this title.	
		MD. CODE ANN. CTS. & JUD. PROC. § 8-409 (2015). Access to records (c) On a showing that a party needs access to a record to prepare for a hearing on a motion	

		pending under this section, a trial judge may allow the party to inspect and copy a record as needed to prepare. *See also* Lewis v. State, 632 A.2d 1175, 1176 (Md. 1993) ("The issue here is one of statutory construction. The question is whether [state law] confers on a litigant in a civil action or criminal cause that is to be tried to a jury a relatively unqualified right to inspect, reproduce, and copy records relating to the selection of prospective grand and/or petit jurors for the period of jury service relevant to the civil action or criminal cause. Applying the plain meaning of the statute, we shall hold that it does.")	
7	NE	NEB. REV. STAT. ANN. § 25-1637(4) (West 2015) "The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (1) of this section."	NEB. REV. STAT. ANN. § 25-1637(4) (West 2015) The contents of any records or papers used by the jury commissioner or the clerk in connection with the selection process and not made public under Chapter 25, article 16, shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection (1) of this section, until after all persons on the revised proposed juror list have been discharged . . . .

8	ND	N.D. CENT. CODE ANN. § 27-09.1-12 (West 2015): Challenging compliance with selection procedures (4) "The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection 1."	N.D. CENT. CODE ANN. § 27-09.1-12: Challenging compliance with selection procedures (4) The contents of any records or papers used by the clerk in connection with the selection process and not made public under this chapter shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection 1, until after all persons selected to serve as jurors have been discharged. . . .
9	PA		42 PA. CONS. STAT. ANN. § 4526(d) (West 2016) Records.–The contents of any records or papers used by the jury commissioners or their clerks in connection with the selection process and not made public under this subchapter shall not be disclosed (except in connection with the preparation or presentation of a petition filed under subsection (a)) until after the list of qualified jurors or jury wheel has been emptied and refilled and all persons selected to serve as jurors before the list of qualified jurors or jury wheel was emptied have been discharged.

Part 4: Summary of States' Access to Records

	Right to Fair Cross-Section		Explicit Right to Access Records
	Guaranteed by Statute	Guaranteed by Case Law	
AL	✓		**No**
AK		✓	**No**
AZ	✓		**No**
AR	✓		**No**
CA		✓	**No**
CO	✓		**No**
CT		✓	**No**
DE	✓		Statutory right to access records
FL		✓	**No**
GA		✓	**No**
HI	✓		Statutory right to access records
ID	✓		Statutory right to access records
IL		✓	**No**
IN	✓		Statutory right to access records
IA	✓		**No**
KS	✓		**No**
KY		✓	Statutory right to access records
LA		✓	**No**
ME	✓		**No**
MD	✓		Statutory right to access records
MA		✓	**No**
MI		✓	**No**
MN	✓		**No**
MS	✓		**No**
MO	✓		Constitutional right to access records[345]
MT		✓	**No**
NE	✓		Statutory right to access records
NV		✓	Constitutional right to access records
NH		✓	**No**
NJ		✓	**No**[346]
NM		✓	**No**
NY	✓		**No**

345. The Missouri Supreme Court decision was issued before the state had enacted a jury selection statute. State *ex rel.* Garrett v. Saitz, 594 S.W.2d 606, 608 (Mo. 1980) ("Missouri is not bound by [the JSSA] and has no such state legislation."). Missouri now has a statute guaranteeing a fair cross-section. *See infra* Appendix, Part 1.

346. As explained in Part V.B, a lower court in New Jersey has recognized the constitutional right to access records.

	Right to Fair Cross-Section		Explicit Right to Access Records
	Guaranteed by Statute	Guaranteed by Case Law	
NC		✓	**No**
ND	✓		Statutory right to access records
OH		✓	**No**
OK		✓	**No**
OR		✓	**No**
PA	✓		Statutory right to access records
RI		✓	**No**
SC		✓	**No**
SD	✓		**No**
TN		✓	**No**
TX		✓	**No**
UT	✓		**No**
VT		✓	**No**
VA		✓	**No**
WA	✓		**No**
WV	✓		**No**
WI		✓	**No**
WY		✓	**No**

A Call to Criminal Courts: Record Rules for *Batson*

Catherine M. Grosso & Barbara O'Brien[1]

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[1] Associate Professors of Law at Michigan State University College of Law.

INTRODUCTION

No one paying attention needs to be told the verdict on *Batson v. Kentucky*.[1] *Batson* intended to eliminate the influence of race on jury selection,[2] which is essential both to conducting fair and just trials[3] and to protecting the reputation of the justice system.[4] *Batson* failed.[5] A growing collection of empirical studies documents this failure.[6] Dozens of articles analyze the reasons for the failure,[7] and at least one report documents the humiliation suffered when qualified jurors appear

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[1] *See generally* 476 U.S. 79 (1986).

[2] *See id.* at 84–85, 84 n.3 (noting that *Batson* builds upon an earlier case that "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination" from jury selection).

[3] *Id.* at 86–87 (reviewing the important role of citizens in the system of justice).

[4] *Id.* at 87–88.

[5] *See* David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425, 1427 & n.1 (2012) [hereinafter Baldus et al., *Statistical Proof of Racial Discrimination*] (collecting cases and articles reaching this conclusion).

[6] *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 22–28 (2001) [hereinafter Baldus et al., *Use of Peremptory Challenges in Capital Murder Trials*] (reporting on the first "five [academic] empirical studies of the use of peremptory challenges in actual cases"); Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, NE. U. L.J. (forthcoming) (manuscript at 24, 26, 32–41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2832370 (follow "Download this Paper" hyperlink) (reporting findings of an empirical study of the use of peremptory challenges in South Carolina capital cases); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533–34, 1542–43, 1548–50 (2012) [hereinafter Grosso & O'Brien, *A Stubborn Legacy*] (reporting findings in an empirical study of the use of peremptory challenges in North Carolina capital cases); *see also* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1078, 1090–93 (2011) (reporting on a survey of federal judicial decisions reviewing *Batson* challenges).

[7] Based on February 13, 2017, WestLaw search, over 3,000 law reviews and journals cite *Batson v. Kentucky*.

for jury service only to be excluded in a situation that appears to be driven by race.[8] Many have called for the abolition of peremptory challenges as the only fix.[9]

The United States Supreme Court seems fully aware of *Batson*'s shortcomings.[10] In fact, the Court has been more open to cases alleging race discrimination in the exercise of peremptory strikes, and more likely to rule in favor of criminal defendants in these cases, than in any other context.[11] Yet, the Court has not abolished the peremptory challenge. Supreme Court decisions in recent years—starting with the *Miller-El* cases more than ten years ago and continuing through *Foster v. Chatman* in 2016—have tried instead to strengthen the *Batson* framework by recognizing valid claims and expanding the evidentiary framework.[12] In light of this history, our Article seeks to rouse criminal courts to accept a modest but fundamental proposal to expand the standard trial court record to include jury

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[8] *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 28–31 (2010), http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf/ (providing testimonies of African Americans "excluded from jury service across the Southeast to document the impact of discrimination on citizens denied the right to serve"). In contrast, actually serving on a jury may improve citizens' impressions of the judiciary and lead them to report greater confidence in the government. Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, N.Y. ST. B. ASS'N J., Oct. 2006, at 10, 12 ("Invariably the most satisfied jurors are those who have actually served to verdict on a well-run trial—they are more likely to have a favorable impression of service and feel that they have made a contribution."); Judith S. Kaye, *Shaping State Courts for the New Century: What Chief Judges Can Do*, 61 ME. L. REV. 355, 359–60 (2009) ("Jury service offers us a unique opportunity to show a cynical, distrustful public a government institution that really does work well and values them. It is truly a rare opportunity in today's world to promote public trust and confidence in our courts—an opportunity we simply cannot squander.").

[9] Grosso & O'Brien, *supra* note 6, at 1535 & nn.19–20 (collecting calls for the abolition of peremptory challenges by judges and scholars).

[10] *See* Miller-El v. Dretke, 545 U.S. 231, 239–40 (2005) ("Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain's* wide net, the net was not entirely consigned to history, for *Batson's* individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give.").

[11] *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2467–68 (2003) (arguing that the Court "has departed from its [c]onventional [e]qual [p]rotection rules . . . in cases involving racial discrimination in the selection of jurors" and "exhibited a greater suspicion of discretion than is evident in other areas of equal protection law") (internal citations omitted). *Compare, e.g.*, United States v. Armstrong, 517 U.S. 456, 463–64 (1996) (establishing a high evidentiary threshold for defendants alleging selective prosecution even to get discovery on relative prosecution rates), *and* McCleskey v. Kemp, 481 U.S. 279, 312–13 (1987) (holding that Georgia's capital sentencing system did not violate equal protection despite evidence of its racially disparate impact), *with* Foster v. Chatman, 136 S. Ct. 1737, 1748, 1755 (2016) (finding the prosecutor's race-neutral explanations for peremptory strikes against potential black jurors pretextual and refusing to "blind" themselves to all the relevant evidence), *and* Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (emphasizing that "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted" (citing Miller-El v. Dretke, 545 U.S. 231, 239–40 (2005))).

[12] *Foster*, 136 S. Ct. at 1754–55; *Snyder*, 552 U.S. at 477, 485–86; *Miller-El v. Dretke*, 545 U.S. at 239, 265–66; Johnson v. California, 545 U.S. 162, 173 (2005); Miller-El v. Cockrell, 537 U.S. 322, 342–47 (2003).

selection data. This narrow expansion is necessary to give these decisions proper influence.

The Court's rulings applying *Batson*, among other things, clarified the scope of evidence that can be used to challenge a peremptory strike as discriminatory.[13] In particular, these rulings made clear that, in addition to comparative juror analyses, statistical analyses of the pattern and practice of jury selection in a given jurisdiction are relevant to establishing a prima facie case of discrimination, and also should inform a court's evaluation of any race-neutral response the proponent offers.[14] Overall, these cases invite use of statistical proof and archival data.

It is not possible, however, to implement these rulings or to test their effectiveness in diminishing the influence of race without a clear record of jury selection. Yet, to date, jury selection data is available only in rare circumstances and through extraordinary efforts of counsel and researchers.[15] In fact, the five Supreme Court decisions expanding *Batson's* evidentiary framework involved capital cases and some of the best capital defense lawyers in the country. These lawyers often got the jury selection information necessary to support the *Batson* claims through discovery motions, persistence, and luck—not as a matter of course.[16] It would be surprising to learn of more than a handful of criminal courts that have a system for tracking this basic trial information.[17]

This reality exposes a failure on the part of criminal courts and runs counter to fundamental principles of public access to the justice system and the right to a fair and public trial.[18] The Supreme Court has noted the value of transparency generally, and in the jury selection process particularly, both for enhancing the fairness of trials and for fostering the appearance of fairness that is necessary for

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[13] *See* Baldus et al., *Statistical Proof of Racial Discrimination*, *supra* note 5, at 1429–46 (explaining the analytical and evidentiary model established by *Batson* and subsequent cases).

[14] *Id.* at 1439–46.

[15] *See, e.g.*, Baldus et al., *Use of Peremptory Challenges in Capital Murder Trials*, *supra* note 6, at 46 (reporting issues with missing jury records and unavailable files in the Philadelphia judicial system); Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954–56 (2011) (reporting the poor quality of juror data available from courts).

[16] *See generally* ALYSON A. GRINE & EMILY COWARD, UNC SCH. OF GOV'T, INDIGENT DEFENSE MANUAL SERIES, 7-23 to 7-26, 7-28 to 7-29, (John Rubin ed., 2014), http://defendermanuals.sog.unc.edu/sites/defendermanuals.sog.unc.edu/files/pdf/20140457_chap%2007_Final_2014-10-28.pdf (explaining various methods defense attorneys can use to better present and support their *Batson* claims through jury selection information).

[17] Our review of court rules did not find any rule defining this information as part of the standard court record. Indeed, silence in the record about the race of potential jurors can present a problem for litigants who later challenge racially biased jury selection on appeal. *See, e.g.*, United States v. Atkins, 843 F.3d 625, 629 n.1 (6th Cir. 2016) (noting that the record did not disclose the seated jurors' races, which defense counsel determined and disclosed during oral argument on the defendant's *Batson* claim).

[18] Batson v. Kentucky, 476 U.S. 79, 87–88 (1986).

public confidence in the criminal justice system.[19] The failure to preserve and provide public access to jury selection data marginalizes fairness and harms the reputation of the justice system.

Moreover, access to data about jury selection may help *Batson* achieve its goals. If so, the duty of criminal courts to preserve and provide access to this data is even more pressing. In 2009, the North Carolina General Assembly passed the North Carolina Racial Justice Act ("RJA"), which created a statutory claim for sentencing relief based on statistical evidence demonstrating that race was a significant factor in the exercise of peremptory challenges during jury selection.[20] This focus on statistical evidence stimulated the data collection necessary for evaluating patterns of racial discrimination in jury selection in past cases. The underlying data is also relevant, however, to assessing whether *Batson* is more effective when the Court's evidentiary guidelines are taken seriously.

Lawyers in North Carolina have used analyses based on updated RJA data to bring attention to the constitutional prohibition on race-based peremptory challenges and to fortify *Batson* claims.[21] Their cases provide an ongoing case study on the utility of the Court's strengthened evidentiary framework. In the next section of this Article we present modest evidence from the North Carolina case study, which suggests that the regular availability of statistical evidence might mitigate racial disparities in jury selection.

If this is true, the need for trial courts to meet the duty of preserving and providing access to jury selection data crystalizes and becomes more pressing. A basic statistical study of the role of race in the exercise of peremptory challenges in a given jurisdiction requires a complete record of jury selection not only in the case in which the *Batson* motion is being litigated, but also in other similar cases within the jurisdiction. Trial courts should preserve this information as a matter of course.

The third section of this Article examines why courts should play this role and why court records can accommodate this modest expansion. Courts "are uniquely

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[19] Press-Enterprise Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501, 509 (1984) "[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected."); *see also* Presley v. Georgia, 130 S. Ct. 721, 724 (2010) (stating that "the accused does have a right to insist that the *voir dire* of the jurors be public" and that "[exceptions to this right] will be rare" (quoting Waller v. Georgia, 467 U.S. 39, 45 (1984))); United States v. Hasting, 461 U.S. 499, 505 (1983) (explaining how courts are permitted to create rules that promote the maintenance of the judicial process's integrity).

[20] *See* North Carolina Racial Justice Act ("RJA"), N.C. GEN. STAT. ANN. §§ 15A-2010, 15A-2011 (West, effective Aug. 11, 2009) (repealed 2013), § 15A-2012 (West, effective Aug. 11, 2009) (repealed 2012). Specifically, § 15A-2011(b) authorized reliance on statistical evidence to show race "was a significant factor in . . . seek[ing] or impose[ing]" death sentences.

[21] E-mail from Gretchen Engel, Exec. Dir., Center for Death Penalty Litigation, to authors (Sept. 30, 2016) (on file with authors) (listing North Carolina capital cases in which authors provided affidavits on the influence of race on jury selection).

structured to afford . . . a fair forum[.]"[22] Court records play a central (if humble) role in this undertaking. Most fundamentally, complete and consistent court records can document fidelity to the core values of "[e]quality, fairness, and integrity."[23] As the Court recognized in *Batson*, equality, fairness, and integrity in jury selection matter to individual cases and to our court system as a whole.[24] Including jury selection data in court records furthers these core purposes.

It also seems that this reform would impose little cost. While piecing together the jury selection process after the fact is time consuming and expensive, retaining this information as a matter of course is not. Court clerks typically prepare jury selection data during trial.[25] The question then becomes how to convince courts to move in this direction. The final section of this Article explores several avenues for reform.

I. FORTIFYING *BATSON* CLAIMS WITH STRIKE DATA: A CASE STUDY

The North Carolina General Assembly's recognition of *Batson*'s limitations as a tool for eradicating the influence of race in jury selection in North Carolina created a path to begin evaluating the impact of allowing stronger evidence to support *Batson* claims. Specifically, the RJA provided a state statutory claim for defendants facing the death penalty[26] and initially authorized claimants to use "statistical or other evidence" to prove discrimination by showing that race influenced peremptory challenges in the county, prosecutorial district, Superior Court division, or state at the time of the trial.[27] This focus on data also allowed us to launch an ongoing case study examining whether *Batson* can be more effective when bolstered with clear statistical data. This section presents the next set of data and developments in this project.

Our 2011 North Carolina jury selection study (the RJA jury study) provides an important backdrop to this case study. The RJA jury study found that black qualified jurors consistently faced a significantly higher risk of peremptory challenge than all other qualified jurors.[28] This disparity remained consistent over time and location.[29] The disparity also persisted when we controlled for

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[22] Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2062 (2016).

[23] NAT'L CTR. FOR STATE COURTS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NCJ 161570, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 16 (1997), https://www.ncjrs.gov/pdffiles1/161570.pdf [hereinafter NAT'L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS].

[24] *See Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

[25] *See* ROGER HAYDOCK & JOHN SONSTENG, TRIAL ADVOCACY BEFORE JUDGES, JURORS, AND ARBITRATORS 235, 240–43 (5th ed. 2015) (describing jury selection procedures).

[26] N.C. GEN. STAT. ANN. §§ 15A-2010, 15A-2011.

[27] § 15A-2011(a), (b)(3).

[28] Grosso & O'Brien, *A Stubborn Legacy*, *supra* note 6, at 1548.

[29] *Id.* at 1533–34.

information about qualified jurors that potentially bore on the decision to strike them.[30]

In a previous article, we sought to assess whether the passage of the RJA mitigated the influence of race in jury selection and reported relative strike rates in the first seven cases tried after the RJA.[31] The RJA allows for evidence that parallels the Court's expanded evidentiary framework. Evidence that heightened attention to the RJA mitigated racial disparities in jury selection may implicitly support the Court's approach. North Carolina juries have sentenced five defendants to death since that article went to press.[32] Section *A* presents analysis for four of the five capital cases and updates the data presented in the earlier article to reflect the current trend.[33] The evidence in Section *B* addresses more directly the important role of complete data in *Batson*. This section presents partial data and some anecdotal evidence showing the impact of introducing systemic jury selection data during jury selection at capital trials on the influence of race.

Despite the admittedly small sample of cases analyzed in Sections *A* and *B*, our results indicate that use of archival and statistical data in jury selection really may reduce the influence of race.

A. Analogizing the RJA

This section compares the influence of race in peremptory strikes in cases before and after the passage of the RJA. We use the RJA in this section as a proxy for *Batson* and ask what might happen if a trial court focused systematically and persistently on the influence of race in jury selection.[34]

Our original RJA jury study analyzed jury selection in 173 capital cases reflecting a total of 7,421 strike decisions.[35] A second study in 2013 presented disparities based on five additional cases for a total of 178 cases reflecting a total of 7,641 strike decisions.[36] The analysis presented in this Article for the first time

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[30] *Id.* at 1533–34, 1550–54.

[31] *See generally* Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson's *Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623 (2013).

[32] Death Row Roster, N.C. DEP'T PUBLIC SAFETY, https://www.ncdps.gov/Adult-Corrections/Prisons/Death-Penalty/Death-Row-Roster (last visited Feb. 20, 2017) (Mario McNeil, Juan C. Rodriguez, Jonathon Richardson, and Antwan Anthony). One more person, Bernard Lamp, received a death sentence in 2014 and died of natural causes in 2016. List–Removed from Death Row, N.C. DEP'T PUBLIC SAFETY, https://www.ncdps.gov/our-organization/adult-correction/prisons/death-penalty/list-removed-death-row (last visited May 30, 2017).

[33] We had not been able to get jury selection data for Antwan Anthony's case by the time this Article went to press.

[34] *See* Crespo, *supra* note 22, at 2092–93 (noting the potential of courts to bring systematic facts to bear on jury selection).

[35] Grosso & O'Brien, *A Stubborn Legacy*, *supra* note 6, at 1543.

[36] O'Brien & Grosso, *supra* note 31 at 1637.

includes jury selection data for four additional cases for a total of 182 cases and 7,810 strike decisions.[37]

This research focuses on prosecutor strike decisions. We, therefore, analyzed prosecutorial strike patterns for only the 7,804 venire members whom the state had an opportunity to strike.[38] The overwhelming majority of strike-eligible venire members were either white (6,361, 81.5%) or black (1,277, 16.4%). Just 2.0% (155) were other races. We are missing race information for 11 (0.1%) venire members.

Prosecutors continue to exercise peremptory challenges at a significantly higher rate against black venire members than against all other venire members. Across all strike-eligible venire members in the 182 cases, prosecutors struck 52.3% (668/1,277) of eligible black venire members, compared to only 25.9% (1,688/6,516) of all other eligible venire members. This reflects a strike ratio of 2.02. This difference is statistically significant ($p < .001$). (See Table 1, Row 1.)

Table 1

	A	B Black	C Non-Black	D Difference (B–C)	E Ratio (B/C)	F *p*
1.	All Cases (182 cases)	52.3% (668/ 1,277)	25.9% (1,688/ 6,516)	26.4	2.02	<.001
2.	Pre-RJA Cases (171 cases)	52.7% (633/ 1,202)	25.7% (1,572/ 6,117)	27.0	2.05	<.001
3.	Post-RJA Cases (11 cases)	46.7% (35/ 75)	29.1% (116/ 399)	17.6	1.60	< .01

The pattern is somewhat different when we compare strikes in cases predating the RJA in Row 2 to strikes in cases after its passage in Row 3. In the 171 pre-RJA cases, prosecutors struck 52.7% (633) of the 1,202 strike-eligible black venire members, compared to 25.7% (1,572) of the 6,117 strike-eligible venire members of other races. This difference is statistically significant ($p < .001$).

The disparity falls in the eleven post-RJA cases. Prosecutors struck 46.7% (35) of the 75 strike-eligible black venire members, compared to 29.1% (116) of their 399 counterparts of other races. This difference remains statistically significant ($p <$

[37] We intentionally use parallel language to describe the statistical findings in each of the three articles. This makes following the evolving dataset easier.

[38] *Id.* at 1636–37.

.01). A comparison of the magnitude of the disparity in Rows 2 and 3 in Table 1 lends some support to the hypothesis that the presence of the RJA mitigated the effect of race on prosecutorial strike decisions. Black venire members face strikes six percent less frequently in Post-RJA cases than in Pre-RJA cases (52.7%–46.7%). (Compare Column B, Rows 2 and 3.) The difference in strike rates reported in Column D drops from 27.0 pre-RJA to 17.6 after the RJA was passed, a difference of 9.4 points. Moreover, the ratio between the strike rates in Column E drops from 2.05 to 1.60, a more than 20% drop.

One might expect that race would play a less prominent role in the decision to strike over time, but the racial disparities in prosecutorial strikes we observed in the RJA jury study were consistent over the twenty years preceding the RJA.[39] Nevertheless, cases litigated in the years just before the RJA's passage may provide a more appropriate point of comparison to those tried later. We therefore conducted the same analysis described above, but limited the pre-RJA cases to those tried during the five years before its passage. These results appear in Table 2.

The analysis includes thirteen cases tried between 2005 and the RJA's passage in August 2009. In these thirteen cases, prosecutors struck 52.5% (62) of the 118 eligible black venire members, and 26.4% (147) of the 556 venire members of other races, a ratio of 2:1 ($p < .001$). In the cases tried after the RJA, as noted above, they struck 46.7% (35) of the 75 eligible black venire members, and 29.1% (116) of the 399 venire members of other races, a ratio of 1.6 ($p < .01$). (Compare Table 2, Line 1 with Table 2, Line 2.) Again the rate at which black qualified venire members faced a prosecutorial strike (Column B) and the relative rate at which black versus all non-black qualified venire members faced strikes (Column E) declined. This drop is consistent but weaker.

Table 2

	A	B Black	C Non-Black	D Difference *(B – C)*	E Ratio *(B/C)*	F *p*
1.	Five Years Pre-RJA (January 2005-August 2009) (13 cases)	52.5% (62/118)	26.4% (147/556)	26.1	1.99	<.001
2.	Post-RJA Cases (August 2009 – present) (11 cases)	46.7% (35/75)	29.1% (116/399)	17.6	1.60	< .01

[39] *Id.* at 1640 & n.73 (citing Grosso & O'Brien, *A Stubborn Legacy*, *supra* note 6, at 1548 n.88).

Given the small number of capital trials in the years since the RJA, we interpret the modest reduction in the racial disparity cautiously. Many counties included in the study held only one post-RJA capital trial, and there are differences in the relative strike rates across counties. Nevertheless, these numbers provide modest support for the proposition that analyzing the data and paying close attention to the influence of race in jury selection might strengthen *Batson*.

B. Using Archival and Statistical Evidence at Trial

In the shadow of the RJA, we began to look for opportunities to introduce this kind of evidence earlier in the capital trial process. With the cooperation of the Center for Death Penalty Litigation and the ACLU Capital Punishment Project, we have provided detailed statistical evidence on the influence of race on the exercise of peremptory challenges for specific counties to defense counsel before jury selection in every capital trial in North Carolina since early 2014.

We have provided affidavits in approximately two dozen capital cases. We have only limited information about how any single affidavit was used or even the extent to which the court and prosecutor were made aware of its presence. At least ten of these cases either reached a plea agreement that removed the possibility of a death sentence or were declared not death eligible before trial, but after we provided the affidavit. At least eleven cases with affidavits went to jury selection and trial with the state seeking a death sentence. Three of the eleven resulted in a death sentence (27%). For a rough comparison, consider that 44.5% of the cases where the state went to trial seeking a death sentence in North Carolina between 1990 and 2009 resulted in death.[40]

Our affidavits include tables showing the past use of peremptory challenges by race for the county and, where possible, the individual prosecutor.[41] They also include fully controlled regression analyses where the data permits it.[42] The Center for Death Penalty Litigation and the ACLU Capital Punishment Project train and consult with trial attorneys to help them use this evidence pre-emptively as jury selection begins. This is not easy. There is no procedural spot where it clearly belongs. Nonetheless, attorneys have succeeded in making this evidence visible during the jury selection process. Attorneys in North Carolina reported to us that

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[40] *See* Barbara O'Brien, Catherine M. Grosso, George Woodworth, & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997, 2010–11, 2036 (2016) (reporting the penalty trial sentencing rate as equal to the capital trial sentencing rate because of the study design).

[41] *Cf.* Office of Indigent Defense Servs., *Peremptory Challenges: Affidavit of Catherine M. Grosso & Barbara O'Brien Regarding MSU Study*, RACE MATERIALS BANK 20–23, http://www.ncids.org/racebank/Sentencing/Affidavit%20of%20Catherine%20M%20%20Grosso%20%20Barbara%20OBrien%20Regarding%20MSU%20Study.pdf (last visited Mar. 14, 2017) (providing examples of tables included in affidavit).

[42] *See generally id.* (providing an example of the data included in the authors' affidavits).

attorneys found a procedural avenue to use the affidavits during trial in at least six cases.

In at least one instance, a defense lawyer used an affidavit we provided to support a *Batson* objection.[43] The venire in that case included very few black members. When the state moved to strike the first black juror seated, the defense lawyer objected and cited the archival and statistical evidence in our affidavit in support of his objection. Our affidavit showed that race had a significant role historically in the prosecution's exercise of peremptory challenges. The judge found that defense counsel had established a prima facie case for a *Batson* violation and asked the state to respond. Though the motion was ultimately unsuccessful, this example is noteworthy because judges almost never find a prima facie case when defense counsel raises a *Batson* objection so early in jury selection.[44] Historic evidence provided context and fortified the objection.

In a second case, defense counsel gave formal notice of his intent to object to "any peremptory challenges in violation of the law" and provided all parties with a copy of our county- and prosecutor-specific affidavit before trial.[45] The prosecutor objected and asked the court to seal the motion and the affidavit. The court initially denied the request, but then sealed it with the defense's consent when the prosecutor, clearly upset, raised the issue again several hours later.

Jury selection began with a concern about discrimination prominent in the parties' minds. The state passed the first black juror seated. Defense counsel credited the affidavit under seal. This was really only the beginning. Jury selection continued for weeks. The state struck eight of the first eleven black jurors seated (73%), compared with six of the first 43 qualified white jurors (14%). The ratio between these numbers (5:1) exceeds the 2.26:1 ratio reported in our statewide analysis of jury selection.[46]

Defense counsel monitored this disparity and continued to update the court. When it came time to select the final juror, a black person came forward for questioning. The judge asked the prosecutors to tell him in advance if they intended to strike. Defense counsel heard this as an expression of concern that striking this juror might violate *Batson*. The state passed. The seated jury included three black members and nine white members.

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[43] Email from Gretchen Engel, Exec. Dir., Center for Death Penalty Litigation, to authors (Feb. 26, 2016) (on file with authors).

[44] The state provided a "race neutral" explanation for the strike. The judge then overruled the objection.

[45] Email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (May 10, 2014) (on file with authors); email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (May 12, 2014) (on file with authors); Email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (May 20, 2014) (on file with authors); Email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (June 19, 2014) (on file with authors); Email from Gretchen Engle, Exec. Dir., Center for Death Penalty Litigation, to authors (July 23, 2014) (on file with authors).

[46] Grosso & O'Brien, *A Stubborn Legacy*, *supra* note 6, at 1548–49.

It is difficult to measure the impact of clear statistical evidence on jury selection in a case like this. Certainly, race continued to influence selection at some level, given the stark unadjusted disparity. But the disparity may have been even more pronounced and the jury less diverse if the defense counsel had not had the evidence of historical discrimination at his disposal. Dismissed jurors may also have been aware of the importance counsel place on their ability to serve.

We continue to provide affidavits and to seek more information about jury selection in these cases. The ongoing case study at least suggests that attention to race and to the historic influence of race documented through archival and statistical data may create a stronger platform from which attorneys can monitor and challenge the persistent role of race. Our updated analysis of the post-RJA cases is consistent with our findings a few years after the RJA passed and provides some basis for optimism that simply signaling that racial disparities in strikes would face deeper scrutiny mitigates (although does not eliminate) disparities.[47] Our limited observations about the use of this data at trial provide some positive anecdotal evidence. This case study suggests that tracking data juror by juror, case by case, may prove to be an effective means to protect jurors from race-based strikes in a manner that is also consistent with the Court's focus on strengthening the *Batson* evidentiary framework.[48]

II. AN UNDERTAKING FOR TRIAL COURTS

Our limited evidence suggests that the regular availability of statistical evidence might mitigate racial disparities in jury selection. If this is true, criminal courts need to recognize their obligation to preserve and provide access to jury selection data for all criminal trials. The challenges and expense of accessing reliable data persist in trial courts across the nation.[49] The lack of national, or even state-level, norms and best practices for data maintenance and availability makes documenting the persistent influence of race in jury selection unnecessarily difficult. Others have raised this concern and proposed remedies from different angles.

Nancy Leong explored the benefits of encouraging struck jurors to bring civil rights claims about discriminatory peremptory strikes and reviewed several such

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[47] *See supra* Section II.*A*.; *see generally* O'Brien & Grosso, *supra* note 31.

[48] *See supra* notes 11–13 and accompanying text.

[49] *See* Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 A.B.A CRIM. JUST. 43, 45 (2016) (urging that "every jurisdiction needs to do a better job of collecting data both on the composition of the jury venires and on the use of peremptory challenges"); Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) ("*Batson* challenges occur in a virtual evidentiary vacuum—there is extremely little evidence available even in a full-blown *Batson* hearing to shed much light on the question of whether an explanation is credible."); *see also* Rose & Abramson, *supra* note 15, at 954–55 (reporting the poor quality of juror data available from courts).

cases.[50] Leong notes that "[r]egular civil discovery rules would apply," providing courts with a more complete record, including the kinds of data necessary to monitor the influence of race on the exercise of peremptory challenges.[51] She reasons, "enhanced information regarding the circumstances in which peremptory strikes take place, would create a climate . . . in which trial judges do not simply rubber stamp a lawyer's explanation for exclusion."[52]

Even with these strengths, this approach faces overwhelming "informational, motivational, and doctrinal obstacles."[53] For example, consider the challenges of organizing struck jurors as plaintiffs.[54] Potential jurors likely do not know why they were struck or that a pattern of discrimination exists, and often feel relieved upon learning they will not suffer the inconvenience of serving.[55] Civil cases raising *Batson* violations seem almost necessarily to involve institutional plaintiffs who have the capacity to address the multitude of barriers.[56]

Alafair Burke urged prosecutors' offices "to collect and publish both individual and office-wide data regarding the exercise of peremptory challenges" as a "method of identifying and neutralizing bias during the peremptory challenge process."[57] She notes prosecutors' "special role" as both advocates and ministers of justice, and argues that transparency fosters perceptions of fairness and thus bolsters the legitimacy of the convictions prosecutors get.[58] Leong echoes this suggestion, noting that "in other situations governmental actors and agencies have taken actions that favor transparency."[59] Encouraging prosecutorial self-monitoring provides the additional benefit of "rais[ing] internal awareness about the importance of race-neutral jury selection, making clear that avoiding the distorting

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[50] *See generally* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561 (2012) (proposing that suits by prospective jurors may provide an avenue for overcoming the informational obstacles to *Batson* challenges).

[51] *Id.* at 1574.

[52] *Id.* at 1574; *see id.* at 1573 (citing Jeffery Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093–96 (2011), as evidence that judges' acceptance of a wide range of allegedly race-neutral explanations may explain the dearth of *Batson* violation findings).

[53] *Id.* at 1576.

[54] *Id.* at 1577 (noting that jurors do not know why they have been struck or anything about the "larger pattern of peremptory strikes").

[55] *Id.* at 1577–78.

[56] For example, *Hall v. Valeska*, 509 F. App'x 834, 834 (11th Cir. 2012), was argued by the Equal Justice Initiative of Alabama, and *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 680–81 (D.C. Cir. 2009), was argued by students at the Duke University Appellate Litigation Clinic.

[57] Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1485 & n.97 (2012) (citing proposals in the press requiring prosecutors to maintain these statistics).

[58] *Id.* at 1474–76 (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

[59] Leong, *supra* note 50, at 1578.

influence of race . . . is a separate and valuable objective."[60] It also might counter the influence of implicit biases and facilitate institutional accountability.[61]

Similarly, we regularly urge defense counsel to maintain and monitor jury selection data in each case. Colleagues in North Carolina started by teaching defense counsel how to organize the underlying data from our RJA jury study and to supplement it, if possible, with additional data.[62] Defense counsel also can file pre-trial motions seeking *Batson* related discovery[63] and asking the court to note the race of every potential juror in the record.[64] Counsel should retain jury questionnaires and data about strikes after trial and make them available to other attorneys. Counsel can review previous *Batson* challenges in their county and be prepared to move in relevant orders from the prior cases where a court found differential treatment.[65] Focused work by counsel to develop *Batson* evidence can lead to cases like *Foster v. Chatman*, which contained a rich and detailed record to support a claim of discrimination.[66]

Again, however, these approaches face significant challenges. Neither prosecutors nor defense counsel are institutionally equipped to maintain and provide public access to this kind of data.[67] Moreover, placing the onus on the parties to litigation to maintain this data sets an adversarial tone—particularly when it is defense counsel keeping the records—toward a matter implicating core

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[60] Burke, *supra* note 57, at 1486.

[61] *See id.* at 1486–87; *see also* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 861 (2015) (collecting research on race salience and implicit bias).

[62] *See* GRINE & COWARD, *supra* note 16, at 10-11 to 10-13, http://defendermanuals.sog.unc.edu/race/106-jury-selection-peremptory-challenges.

[63] For instance, counsel should request the prosecutor's notes and pre-trial investigation for the venire members. There is no guarantee that the state will provide all of these materials, even if the court grants the motion, but it creates a record and signals that counsel will litigate *Batson* zealously. North Carolina's Indigent Defense Services website makes available model charts, motions, and orders. *See* Office of Indigent Defense Servs., *Race Materials Bank: Peremptory Challenges*, N.C. CT. SYS., http://www.ncids.org/racebank/mainlinks.htm?c=Training%20%20and%20%20Resources,%20Race%20Materials%20Bank (last visited Mar. 6, 2017) [hereinafter Office of Indigent Defense Servs., *Peremptory Challenges*].

[64] Even if the court agrees to do so, however, counsel should also track in her own files the race and gender of every person struck.

[65] Prepared jury selection charts based on previous *Batson* challenges provide concrete examples of past discrimination to facilitate comparative juror analyses in a current case. Contemporaneously recording basic information about each potential juror allows counsel to rebut the state's proffered race-neutral reason with specific facts about venire members the state chose to pass, should counsel raise a *Batson* objection later in the jury selection process. Having on hand a count of all unemployed white jurors the state passed, for example, is persuasive evidence that the state's assertion that it struck a black juror due to his lack of employment is a pretext for discrimination. Counsel in future cases can build upon this historical data in satisfying the first prong of *Batson* and potentially use it to bolster comparative juror analysis.

[66] Foster v. Chatman, 136 S. Ct. 1737, 1743–44 (2016) (detailing evidence of discrimination in the case).

[67] Note, for example, that defense counsel in North Carolina receive institutional support from the Office of Indigent Defense Services. *See generally* Office of Indigent Defense Servs., *Peremptory Challenges*, *supra* note 63. This kind of support is not typically available.

values of the system as a whole rather than a particular party's interest in a specific case.

In contrast, consider the role and function of courts and court records, that is, those "documents that remain after a case has been resolved and become part of the permanent, *public* record."[68] Courts prepare and maintain records in order to preserve "all relevant court decisions and actions" on the grounds that doing so will advance "[e]quality, fairness, and integrity."[69] The maintenance of complete and accurate files "directly affects the timeliness and integrity of case processing."[70]

Given the importance of complete records to a well-functioning system, court records have been the subject of reform efforts since at least the 1970s.[71] Proposed changes encouraged clear standardized practices, such as uniform case numbering systems and published record retention schedules.[72] A national conference on the judiciary founded the National Center on State Courts in 1971 expressly "to improve the administration of justice in the state courts."[73] By 1978, the reform movement identified "internal organization and procedures of the courts" as an important focus area.[74]

Court reform efforts have also focused on the jury and jury selection.[75] The right to trial by jury forms a cornerstone of our criminal justice system.[76] Selecting the jury forms the first stage of a public trial. As the Court has stated, "[t]he

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[68] Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 780–81 (2012) (defining court records).

[69] NAT'L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS, *supra* note 23, at 16.

[70] NAT'L CTR. FOR STATE COURTS, COURTOOLS: TRIAL PERFORMANCE MEASURES, *Measure 6: Reliability and Integrity of Case Files* (2005), http://www.courtools.org/~/media/Microsites/Files/CourTools/courtools_Trial_measure6_Reliability_And_Integrity_Of_Case_Files.ashx.

[71] *See* Sue K. Dosal et al., *"Administration of Justice Is Archaic"—The Rise of Modern Court Administration: Assessing Roscoe Pound's Court Administration Prescriptions*, 82 IND. L.J. 1293, 1301–02 (2007) (reporting on early reform efforts through court unification in Minnesota).

[72] *See* Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 515 (1991) [hereinafter Shepard, *Indiana Law*].

[73] Paul C. Reardon, *Introduction to State Court Reform*, 31 AM. U. L. REV. 207, 208–09 (1982).

[74] *Id.* at 210–11 (discussing the National Center's various reform efforts, but highlighting its 1978 conference which "focused on [i]nternal [o]rganization and [p]rocedures of the [c]ourts").

[75] *See, e.g.*, K Royal & Darra L. Hofman, *Impaneled and Ineffective: The Role of Law Schools and Constitutional Literacy Programs in Effective Jury Reform*, 90 DENV. U. L. REV. 959, 967 (2013) (noting that at least 38 states were engaged in jury reform in 2013); Judith S. Kaye, *Albany Law Review Symposium: Refinement or Reinvention, the State of Reform in New York: The Courts*, 69 ALB. L. REV. 831, 842–43 (2006) (noting that important jury reforms in New York eliminated automatic disqualifications and expanded juror source lists, thereby adding a half million potential new jurors to the rolls); Randall T. Shepard, *State Court Reform of the American Jury*, 117 YALE L.J. POCKET PART 166 (Mar. 18, 2008), http://yalelawjournal.org/forum/state-court-reform-of-the-american-jury (reporting on jury reforms in New York and Arizona designed to improve jury deliberations and include more minority citizens in the jury pool).

[76] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed.").

process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system."[77] The history of race discrimination brought to light by jury selection data makes clear the role of this information in protecting the fairness and integrity of trials.[78] Equally, if not more importantly, it protects the equal protection interests of the excluded jurors.[79]

Including jury selection records in court records would advance these interests at relatively little cost. These facts are part and parcel of the "systemic facts" of a criminal court.[80] Court clerks prepare the official record as the trial unfolds. The same people organize and document jury selection, as the data is generated in the course of selecting a jury.[81] They keep track of which jurors are called and questioned, juror questionnaires, the exercise of peremptory strikes, and excusals for cause as a matter of course.[82] Our North Carolina files are full of notes, charts, and tables prepared by court clerks. Many of these charts tabulate cause dismissals and peremptory challenges by party.

Alternately, jury selection is part of an open trial. Federal and most local statutes require that jury selection be recorded and available for transcription.[83] As long as race is reported on the record, a transcript can provide the necessary information. A court rule could require that jury selection transcripts from all criminal cases that go to a jury be available in the state law library.

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[77] Press-Enterprise Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501, 505 (1984).

[78] *See* O'Brien & Grosso, *supra* note 31, at 1626–30 (discussing how the use of statistical evidence to challenge race-based jury strikes may necessary to overcome *Batson's* inability to eliminate the detrimental effects of race in jury selection).

[79] The Court recognizes that race-based and gender-based peremptory strikes violate the excused juror's constitutional right to equal protection. *Id.* at 1625 n.3, 1631 n.37. Scholars and activists have begun to document the ways in which this constitutional violation harms individual jurors and society. *Id.* at 1628–30. We noted two levels of harm in our 2013 paper. First, we noted, "the experience of being excluded based on race and racial stereotypes harms excluded jurors individually." *Id.* at 1628–29. Second, the "exclusion of people based on their group identity undermines the criminal justice system's foundational ideals, such as individuality, citizen participation, and equal access to the government." *Id.* at 1629. Both of these harms undermine personal and shared understandings of procedural justice. *Id.*

[80] Crespo, *supra* note 22, at 2069–70 (defining systemic facts as "caches of actual data" that "reside within the official records, internal case files, transcripts, audio recordings, and administrative metadata routinely generated" by trial courts).

[81] *See* HAYDOCK & SONSTENG, *supra* note 25, at 235, 240–44 (describing the jury selection process and the court clerk's role in administering it).

[82] *Cf.* Crespo, *supra* note 22, at 2093–95, 2094 n.194 (using the Superior Court of the District of Columbia to illustrate criminal courts' data collection potential during jury selection).

[83] *See, e.g.*, 28 U.S.C. § 753(b) (2015) ("Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim . . . . Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.").

The Louisiana Uniform Rules of the Courts of Appeal Rule 2-1.9 requires that the record on appeal include the transcript of the voir dire examination of prospective jurors, if designated on appeal.[84] The rule continues in detail:

> If the voir dire examination of prospective jurors is requested, it shall be accompanied with an index setting forth the names of the prospective jurors in the order called and the volume and page numbers of their examination. This index shall also list whether the prospective juror was challenged, whether the challenge was for cause or peremptory, who raised the challenge and whether the juror was released or accepted.[85]

Judge Max Tobias at the Louisiana Fourth Circuit Court of Appeal confirmed that this rule arose from both the difficulty of enforcing *Batson* in his district and the impossibility of reviewing a *Batson* issue on appeal without data.[86] Rule 2-1.9 is the only court rule that we identified requiring a trial court to produce something close to the *Batson* data that we argue courts should routinely collect. Note, however, that the rule does not mention juror race.[87]

At a minimum, the record must include the race of potential jurors and a description of what happened to them. Comparative juror analyses or a controlled study, like our work in North Carolina, also require information about additional venire member characteristics. This information starts in the hands of the court. It seems at least possible that including this information in court records would require only minimal administrative investment.

In either case, this data need not include juror names or other identifying information if privacy is a concern. We take seriously the concerns raised by courts and scholars about the privacy and safety of jurors.[88] These concerns, however, must be understood in the context of a strong presumption for open criminal trials

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[84] *See* LA. CT. APP. UNIF. R. 2-1.9.

[85] LA. ST. A. CT. UNIF. R. 2-1.9.

[86] Telephone interview with Max Tobias, Judge, La. Fourth Circuit Court of Appeal (Oct. 17, 2016).

[87] *See* LA. ST. A. CT. UNIF. R. 2-1.9.

[88] *See* MICH. SUPREME COURT, MICHIGAN TRIAL COURT CASE FILE MANAGEMENT STANDARDS 31–35, 37 (Apr. 2016), http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf (limiting general public access to jury records). *See generally* David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807 (2015) (analyzing court records submitted to the North Carolina Supreme Court and discussing privacy issues arising from public access to court records); Conley et. al., *supra* note 68 (discussing policy and privacy issues surrounding digitized court records accessible to the public online); Kenneth J. Melilli, *Disclosure of Juror Identities to the Press: Who Will Speak for the Jurors?*, 8 CARDOZO PUB. L., POL'Y, & ETHICS J. 1, 2–5 (2009) (listing steps that should be taken in cases where there exists a potentiality of the privacy interests of jurors being subordinated to the "desires of the press"); Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004) (evaluating current rules and practices courts use to strike a balance between public disclosure of information during judicial proceedings and the safety and privacy of individuals participating in judicial proceedings).

and for free public access to criminal trials.[89] Openness "ensur[es] that our system of justice functions fairly and is accountable to the public."[90] Nancy King suggests that "[j]uror questionnaires, voir dire proceedings, and all other records and proceedings accessible to the parties, counsel, or the public . . . contain references to jurors by number rather than by name."[91] This would work well. Machine reading and modern technology reduce the costs in time and money of this approach.

A side element to our call has to do with standardization of practice.[92] We collected data from 100 courthouses in North Carolina. In some courts we found jury selection data, in others none. In some we had to file a special request to obtain the records, in others we did not.[93] Jury selection transcripts in North Carolina sometimes resided at the home of the court reporter who recorded the case.[94] In South Carolina, we could not even get a proper list of eligible cases from the court.[95] This pattern likely repeats across the country.[96]A standard that requires that complete anonymous jury selection information be included the court record and available for public review would reduce costs and increase accountability.

At the bottom line, trial courts can and should preserve this information as a matter of course. Courts both better satisfy their obligations to conduct fair and just trials, and enhance their standing in the community when they take on reforms like this one that promote transparency, enhance fairness, and protect constitutional values.

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[89] Press-Enterprise Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501, 508 (1984) ("Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.").

[90] Ardia & Klinefelter, *supra* note 88, at 1818; *see also* Conley et al., *supra* note 68, at 774 ("[C]itizens are presumed to have a right to inspect [trial records] to ensure that courts are exercising their powers not only competently and fairly but also within the limits of their mandate.").

[91] Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 135 (1996).

[92] *See* Shepard, *Indiana Law*, *supra* note 72, at 515.

[93] We collected data for the jury study and a charging and sentencing study simultaneously. *See* O'Brien, Grosso, Woodworth, & Taylor, *supra* note 40, at 2014–15 n.96-97 (detailing the data collection process).

[94] *See, e.g.*, email from Kristen Wouk, Center for Death Penalty Litigation, Legal Researcher & Investigator, to Catherine Grosso (Oct. 30, 2012) (on file with author) (detailing the data collection process including contacting the court reporter directly); *see also* N.C. OFF. OF INDIGENT SERV., Appellate Motions (Non-Capital) Motion for Production of Transcript (Model), http://www.ncids.org/MotionsBankNonCap/AppellateMotions/ProductionTranscript.doc (last visited May 30, 2017) (seeking an order directing private court reporters to prepare transcripts from trial).

[95] *See generally* Respondent's Motion for Special Interrogatories and Concomitant Requests for Production of Documents, Dickerson v. South Carolina, C/A No. 2012-CP-10-03216 (S.C. Ct. Com. Pl., Ninth Cir., Sept. 30, 2016) (on file with authors) (recounting efforts to establish the universe of cases).

[96] *See, e.g.*, Shari Seidman Diamond, *Race and Jury Selection: The Pernicious Effects of Backstrikes*, 59 HOW. L. J. 705, 714–15 (2016) (noting difficulty in locating complete race and strike information for many cases in a study of racial bias in jury selection in 476 cases in Caddo Parrish, Louisiana).

CONCLUSION: ENCOURAGING RECORD REFORMS

Turning then, to our last point: it is remarkably difficult to figure out how to advance this proposal. That is, what would be the most effective way to convince state and federal criminal courts all across the country to preserve complete anonymous jury selection information in the court record and to provide this information to the public? As lawyers, our minds turned first to litigation. We studied the New York City *Terry* stop litigation, which forced the police to keep better track of data and to make that data available.[97] The data documented the race patterns for police stops and led to the dismantling of the NYPD's stop and frisk program.[98] It is possible that well-targeted lawsuits could advance our proposal.[99]

A second approach would be to target individual jurisdictions and seek to amend court rules. Perhaps the best approach of all might be to enlist the resources of an organization like the National Center for State Courts ("NCSC") or one of its subcommittees on state court practice.[100] The NCSC works closely with state court judges and administrators, who may be in the best position to evaluate the costs and benefits of our proposal, and, if persuaded, to promote its adoption.[101]

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[97] Floyd v. City of New York, 959 F. Supp. 2d 668, 681–83 (S.D.N.Y. 2013) (ordering changes to how New York Police Department officers record information about stops and requiring that the data be retained and available for further review); Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2008 WL 4179210, at *5 (S.D.N.Y. Sept. 10, 2008) (granting plaintiffs' motion to retain data).

[98] *Floyd*, 959 F. Supp. 2d at 672, 690-91.

[99] *But see* Leong, *supra* note 50, at 1577–78 (discussing issues associated with *Batson* challenges and civil litigation).

[100] For general information about the National Center for State Courts ("NCSC"), see NAT'L CTR. FOR STATE COURTS, www.ncsc.org/About-us.aspx (last visited Mar. 6, 2017) ("The National Center for State Courts is an independent, nonprofit court improvement organization founded at the urging of Chief Justice of the Supreme Court Warren E. Burger. He envisioned NCSC as a clearinghouse for research information and comparative data to support improvement in judicial administration in state courts."). NCSC Center for Jury Studies regularly engages in training and research with state courts. *See, e.g.*, Paula Hannaford-Agor & Chris Connelly, *Jury Innovation in Practice: The Experience in New York and Elsewhere*, N.Y. ST. B. ASS'N J., Oct. 2006, at 19, 21 (discussing an NCSC jury innovation project in New York); Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts*, 28 N. ILL. U. L. REV. 407, 410–13 (2008) (discussing the NCSC State-of-the-States Survey of Jury Improvement Efforts). The NCSC Court Services Division provides training and support for CourTools, an online set of trial court performance measures. *See* Nat'l Ctr. for State Courts, *Trial Court Performance Measures*, COURTOOLS, courtools.org/Trial-Court-Performance-Measures (last visited Mar. 6, 2017). Similarly, NCSC sponsors "Courting Justice," a "multi-city town hall series that invites state supreme, appellate and trial court judges to step down from the bench and listen to new perspectives on how the United States court system can better deliver justice for all." Nat'l Ctr. for State Courts, *Judges Team Up for Courting Justice 'Listening Tour'*, NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/Conferences-and-Events/Courting-Justice (last visited Mar. 6, 2017).

[101] The NCSC advises trial courts to collect basic demographic information from potential jurors as a way to ensure that jury pools are representative. *See* William Caprathe, Paula Hannaford-Agor, Stephanie McCoy Loquvam, & Shari Seidman Diamond, *Assessing and Achieving Jury Pool Representativeness*, 55 JUDGE'S J. 16, 17 (2016).

We do not think the lack of consistency or the failure to keep data arises by design. Some jurisdictions have taken measures to promote transparency in the context of jury selection with an eye toward enforcing *Batson* more effectively.[102]

Requiring that court records include this information should cost little, but having this information systematically and predictably available from the official record might strengthen the *Batson* regime. Making this information available in this manner advances the Sixth Amendment mandate for open trials but also, more importantly, makes it possible to defend the equal protection rights of citizens who have been required to present themselves for jury duty.

These measures may not be wholly effective, but they should not be dismissed lightly.[103] Racism needs to be addressed directly and if little else, *Batson* sets up a structure in which to talk about race in jury selection.[104] Providing the means to do so with the most complete and accurate information available is essential to that conversation.

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[102] *See, e.g.*, LA. ST. A. CT. UNIF. R. 2-1.9 ("In criminal cases, the record must also contain all or any portion of the following designated by the defendant, the state, or the trial judge: . . . voir dire examination of prospective jurors . . . . If the voir dire examination of prospective jurors is requested, it shall be accompanied with an index setting forth the names of the prospective jurors in the order called and the volume and page numbers of their examination. This index shall also list whether the prospective juror was challenged, whether the challenge was for cause or preemptory, who raised the challenge and whether the juror was released or accepted).

[103] *But see* Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 60-61 (2009) (questioning the validity of *Batson* and arguing that *Batson* has created a ritual that legitimizes the removal of African American jurors rather than preventing discrimination).

[104] *See generally* Laura I. Appleman, *Reports of* Batson*'s Death Have Been Greatly Exaggerated: How the* Batson *Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607, 610 (2005) (explaining how "a legal ethics approach to *Batson* provides the best means of understanding why . . . courts have adopted this specific doctrine to enforce the two critical rights of criminal jury selection: the right of the defendant to a bias-free jury and the right of the potential juror to serve.").

THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT

By Hon. Gregory E. Mize (ret.),
Paula Hannaford-Agor, J.D. &
Nicole L. Waters, Ph.D.

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ACKNOWLEDGEMENTS

The State-of-the-States Survey began as the cornerstone component of the NCSC's National Program to Increase Citizen Participation in Jury Service Through Jury Innovations (National Jury Program). We understood from the beginning that it would be a substantial undertaking, although if we had known just how substantial we might have reconsidered the scope and depth of the surveys. As it was, the study took a great deal more time and effort than we initially imagined, and we are indebted to the many people who helped make it a reality at last.

First and foremost, we are grateful to the 68 individuals, law firms, and organizations that contributed financially to the National Jury Program. This was the first major research study by the NCSC Center for Jury Studies that was financed almost entirely through private donations. These individuals, law firms, and organizations recognized the intrinsic value of the jury trial and were willing to support efforts to document and improve how it functions in the American justice system. We are particularly grateful to the Robins, Kaplan, Miller & Ciresi Foundation, which contributed funds to get the National Jury Program underway, and to the U.S. Chamber of Commerce and the State Justice Institute, which provided funding to analyze the State-of-the-States data and to write and distribute this report. We are also indebted to NCSC President Mary McQueen, who provided bridge funding so we could continue data collection for the State-of-the-States Survey at a time when financial contributions were lagging behind project expenses. The names of all of the National Jury Program contributors are listed in Appendix A.

Endeavors of this magnitude require super-human organizational skills. For that, we are forever indebted to NCSC Research Analyst Chris Connelly, who patiently and painstakingly undertook the job of mailing surveys, answering questions from respondents, and then following up to ensure the highest possible response rates. In the process, he talked with hundreds of judges, state court administrators, clerks of court, and lawyers in every state – some of them multiple times – and then oversaw the data entry and cleaning process for the datasets. It is due to his diligence in these efforts that the State-of-the-States Survey is the most comprehensive study of jury operations and practices ever yet undertaken. We are also grateful to our colleagues Monica Wait, who cleaned and analyzed the data and produced all of the state-by-state tables for the NCSC website; Tom Munsterman and Anne Skove, who provided necessary comments on the draft report to help us separate the wheat from the chaff; and to Brenda Otto, who provided administrative support for the project.

Finally, this project could not have been completed without the cooperation of the many supreme court justices, state court administrators, and trial court chief judges who served as liaisons for us to the judges and courts within their respective states and courts. They distributed the surveys to the judges, court administrators, and lawyers for completion, provided essential contacts with private bar organizations, and encouraged all to participate in the study. Of course, the study would not have been possible without the participation of all of those judges, court administrators, clerks of court, lawyers, and, most importantly, citizens who make the American jury system work every day.

Gregory E. Mize, Paula Hannaford-Agor, & Nicole L. Waters

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I. INTRODUCTION

Over the past two decades, the American jury system has become the focus of unprecedented interest by the legal community and by the broader American public. Some of the interest is in response to criticisms about the continued utility of the jury system. The rate of civil and criminal jury trials has steadily declined in recent years, eclipsed by non-trial dispositions such as settlement, plea agreements, and summary judgment.[1] Proponents of the jury system, on the other hand, have maintained that trial by jury continues to play a critical role in the American justice system in protecting the rights of criminal defendants, in resolving intractable civil disputes, and in promoting public trust and confidence in the courts.

Beginning in the early 1990s, these debates prompted renewed efforts by judges, lawyers, and scholars to examine jury performance and to consider the potential effects of various proposals for reform. A popular approach adopted by many states were judicially created commissions or task forces that were instructed to examine various jury reform proposals and make recommendations about their suitability for implementation. National efforts also took place during this time including the 1992 Brookings Institution symposium on the civil jury[2] and the 2001 National Jury Summit in New York City.[3]

Most recently, Robert J. Grey, Jr., made the American jury the focus of his tenure as the 2004-2005 President of the American Bar Association. Under his leadership, the ABA undertook a yearlong effort to update, consolidate, and harmonize the various sets of jury trial standards developed by the ABA Criminal Justice Section, the Section on Litigation, and the Judicial Division into a unified set of principles.[4] In contrast to other legal reform efforts that have tended to focus strictly on legal principles, the new ABA *Principles for Juries and Jury Trials* rely heavily on a large body of empirical research about juror behavior.

Many of these efforts have profoundly affected court policies as evidenced by revised court rules and case law, and the development of judicial and legal education curricula. While these policy changes are fairly easy to track on a statewide level, the fact remains that they can vary from court to court. For example, in a state the size of Texas, which has over 300 different general jurisdiction courts, it is extraordinarily difficult to keep track of administrative practices, procedures, data, and local reform efforts. It becomes even more difficult to determine what actually occurs during trials themselves. In all but a handful of jurisdictions, most jury trial techniques are permitted "in the sound discretion of the trial court." But we have little idea how often judges choose to exercise that discretion. In this report, we share the findings from the State-of-the-States Survey of Jury Improvement Efforts, a national study designed to examine precisely these questions.

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[1] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEG. STUD. 459 (2004).

[2] ROBERT E. LITAN (ed.), VERDICT: ASSESSING THE CIVIL JURY SYSTEM (1993).

[3] Robert G. Boatright & Elissa Krauss, *Jury Summit 2001: A Report on the First National Meeting of the Ever-Growing Community Concerned with Improving the Jury System,* 86 JUDICATURE 144 (2002).

[4] AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS (2005).

The State-of-the-States Survey is the cornerstone of a much larger initiative by the NCSC Center for Jury Studies – the National Program to Increase Citizen Participation in Jury Service (National Jury Program).[5] The National Jury Program provides information and technical assistance to state courts about best practices in jury system management and trial procedures. Its ultimate goals are to assist courts to summons and impanel more representative juries; to manage their jury systems in an effective, efficient, and informative manner; to facilitate informed decision-making by trial jurors; to increase public trust and confidence in the jury system and in courts; and to better inform citizens about the judicial branch of government. The State-of-the-States Survey was designed to document local practices and jury operations in the context of their respective state infrastructures and thus provide a baseline against which state court policymakers could assess their own systems vis-à-vis their peers and nationally recognized standards of effective practices. The State-of-the-States Survey also examines the effectiveness of various implementation strategies for affecting change. Finally, it provides direction for future research and technical assistance efforts by the NCSC Center for Jury Studies.

The State-of-the-States Survey of Jury Improvement Efforts

The State-of-the-States Survey is the product of a multiyear effort to gauge the current status of jury improvement efforts in the nation's state courts. It derives from three separate, but related, questionnaires or "surveys." The first was the Statewide Survey completed by all 50 states and the District of Columbia to document statewide jury improvement efforts and the state infrastructure governing jury system management and trial procedures. For example, it collected contact information for jury task forces and sample copies of forms and procedures used in jury management. This survey not only identified the programmatic priorities for state courts, but also provided a mechanism to determine the types of efforts (e.g., judicial education, technical assistance, formal rule and statutory changes) that most often lead to effective implementation of jury improvements. The survey was typically completed by the Office of the Chief Justice or the Administrative Office for each participating state.

The second State-of-the-States questionnaire was the Local Court Survey. It was distributed to the states' general jurisdiction trial courts and focused on local jury operations related to qualification, summoning, terms and conditions of service, and supporting technology. This survey asked about jury improvement efforts initiated at the local level. As with the Statewide Survey, the NCSC Center for Jury Studies relied on the respective offices of the Chief Justice or the State Court Administrator to distribute the surveys to each of the local courts. In some instances, these offices also collected the surveys and returned them for data entry. In other instances, these central offices instructed local courts to mail the completed surveys directly to the NCSC.

[5] For a full description of the National Jury Program, see the NCSC Center for Jury Studies website at http://www.ncsconline.org/D_Research/cjs.

The responses for 43 of the 1,396 Local Court Surveys reflected multi-county judicial circuits, districts, or divisions. Thus, the complete local court dataset represents 1,546 individual counties from 49 states and the District of Columbia.[6] On average, these courts reflect 65 percent of their respective state populations and collectively they represent jurisdictions encompassing 70 percent of the total US population. Appendix C provides the response rates for each of the states. Heavily populated counties are slightly over-represented in the dataset compared to their actual representation. See Table 1. For example, courts representing communities of 500,000 or more people (urban areas) comprised 6.7 percent of the dataset although they make up only 3.6 percent of US localities. Courts representing communities of 100,000 to 500,000 people (large suburban areas) comprised 18.7 percent of the dataset compared to 13.2 percent of U.S. localities. Small suburban (25,000 to 100,000 population) jurisdictions were represented roughly in proportion to their numbers in the U.S., but rural areas (less than 25,000 population) were slightly underrepresented.[7] As we see in Section IV, urban courts tend to have higher levels of jury trial activity, which has important implications for jury operations for a variety of reasons.

Table 1: Local Court Response Rate

	Local Court Dataset		United States	
Population Size of Responding Courts	**# Surveys**	**%**	**# Counties**	**%**
Less than 25,000	560	41.9	1,582	50.3
25,000 to 100,000	437	32.7	1,035	32.9
100,000 to 500,000	250	18.7	415	13.2
More than 500,000	90	6.7	112	3.6
	1,337		3,144	

The final State-of-the-States component was the Judge & Lawyer Survey in which respondents were asked to describe the actual jury practices employed in their most recent jury trial. Data collection for this phase was the most challenging insofar that it required multiple distribution approaches in each state. The NCSC first requested the offices of the chief justice, the state court administrator, or the chief judge of large, metropolitan courts to distribute the surveys to trial judges through local communication networks. Occasionally this approach was supplemented with additional requests through state judicial education agencies or other trial judge organizations. In addition, NCSC staff contacted numerous state and local bar organizations, preferably electronically, to request its distribution to criminal and civil trial attorneys. The number of outreaches to mandatory and voluntary bar associations in each state ranged from a minimum of four to, in one instance, dozens. The NCSC also solicited the cooperation of several national bar organizations including sections of the American Bar Association, the American Board of Trial Advocates, and the American Trial Lawyers Association for distribution to their respective members.

Data collection for the Judge & Lawyer Survey began with requests to judge and lawyer groups in the states known to be warmly disposed toward jury trial innovations. Researchers quickly realized that, even in these states, judges, lawyers and court administrators were understandably focused upon the current tasks at hand and not readily disposed toward helping collect data, even

[6] Vermont was the only state that did not participate in this component of the State-of-the-States Survey.

[7] For the duration of this Compendium Report, we will use the terms "urban," "large suburban," "small suburban," and "rural" to refer to these four categories of population size.

for a well-respected national organization such as the NCSC Center for Jury Studies. Hence, there had to be repeated and numerous outreaches to judge associations (most states did not have an active one) and mandatory or voluntary bar associations in each state. In some states, dozens of phone calls and emails had to be sent over the course of many months. On occasion, successful results were the product of waiting a year or so until new leadership took charge of an association. In short, the State of the States survey took much longer to accomplish than originally estimated. This phenomenon suggests that future research efforts will likely be time consuming and challenging.

Table 2: Judge & Attorney Survey Characteristics

	N	%
Respondent Type		
State Trial Judge	4,081	34.7
Federal Trial Judge	255	2.2
Attorney	7,209	61.3
Other/Unknown	207	1.8
Jurisdiction		
State Court	10,395	92.2
Federal Court	884	7.8
Cases		
Criminal*	**5,622**	**47.8**
Capital Felony	343	6.1
Felony	3,868	68.8
Misdemeanor	1,341	23.9
Civil	**5,819**	**49.5**
Other	**311**	**2.6**
Attorneys		
Criminal Prosecution	917	15.6
Criminal Defense	1,345	22.9
Civil Plaintiff	1,909	32.4
Civil Defense	1,714	29.1
TOTAL	11,752	100.0

* Includes 70 trials designated as "criminal" only

The final Judge & Lawyer Survey dataset consisted of 11,752 surveys describing the practices employed in state and federal jury trials in all 50 states, the District of Columbia, and Puerto Rico. The vast majority of trials reported in the surveys took place between 2002 and 2006. See Table 2 for a description of the dataset. State trial judges accounted for more than one-third of the survey respondents. Based on national statistics in 2004, this sample of state trial judges reflects more than one-third (36.0%) of the judicial officers assigned to general jurisdiction courts.[8] Attorneys practicing in the state courts accounted for more than half of the surveys. A total of 255 federal judges[9] and 628 attorneys practicing in federal court also participated in the study, providing an unexpected opportunity to compare jury trial practices in state and federal courts. The remaining 3% of surveys were submitted by other legal practitioners or the respondent type was unknown.

One complication associated with the Judge and Lawyer Survey was the possibility that multiple respondents could describe the same case. In designing the survey, NCSC staff considered the option of asking survey respondents to provide identifying information such as a docket number about each case, but ultimately thought that the added complexity of asking respondents to remember that information as well as the loss of anonymity would discourage participation. We chose to err on the side of potentially "double counting" some trials rather than sacrifice the number of respondents. The relationship between

[8] The NCSC reports that there were 11,349 judicial officers assigned to general jurisdiction courts in 2004. RICHARD Y. SCHAUFFLER et al. (eds.), EXAMINING THE WORK OF STATE COURTS, 2005, 17 (2006). It is possible that some of the respondents were limited jurisdiction court judges, especially in trials for misdemeanor and "other" cases. But most states restrict trial by jury to courts of general jurisdiction. *See generally* DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, STATE COURT ORGANIZATION 2004, Part VIII (Court Structure Charts), 265-319 (2006).

[9] Federal district court judge respondents comprised 39% of all US federal district court judges. 28 U.S.C. § 133(a).

the percentage of Judge & Lawyer Surveys submitted to the NCSC and the county population expressed as a percentage of the state population was fairly consistent for all but seven of the 1,890 counties where jury trials took place. If the dataset did double-count some trials, it appears that the duplicate trials were distributed uniformly among those localities. Thus, it is unlikely that duplicate trials biased the findings of this study by placing disproportionate weight on the trial practices from a small number of jurisdictions.

II. THE VOLUME AND FREQUENCY OF JURY TRIALS IN STATE COURTS

A perennial challenge for policymakers and researchers concerned with jury trial procedures and operations is the difficulty in obtaining basic statistics about the number of jury trials that take place in state courts each year.[10] Some states do not publish any statistics about the number of jury trials or they may combine bench and jury trials into the same category. Other states only report jury trials that took place in their general jurisdiction courts, but not in limited jurisdiction courts. The State-of-the-States Survey provided an opportunity to estimate the number of jury trials that take place in state courts annually based on direct reports from a fairly comprehensive survey of local courts. To make these estimates, the NCSC Center for Jury Studies calculated the number of jury trials in each state, the trial rates per 100,000 population, and other basic statistics by extrapolating from the proportion of state population reflected in the Local Court Surveys. See Table 3.[11]

Table 3: National Jury Trial Rates and Characteristics	
# of Counties Represented	1,546
% of US Population Represented	70.3
Trial Rate per 100,000 population	58.6
Estimated number of jury trials annually	148,558
% Felony	46.7
% Misdemeanor	18.7
% Civil	30.6
% Other	4.0
Estimated number of summonses mailed	31,857,797
% Adult population represented (age 18+)	14.8
Estimated number of jurors impaneled	1,526,520
% Adult population represented (age 18+)	0.8

Annually, state courts conduct an estimated 148,558 jury trials each year. Federal courts conducted an additional 5,463 jury trials in 2006.[12] California has the largest volume of jury trials – approximately 16,000 per year. Vermont and Wyoming had the lowest volume (126 trials annually). These are not particularly surprising numbers given the respective populations of these states. What is surprising is the rate of jury trials. The average was 59 trials per 100,000 population, but varied substantially from a low of 15 trials in Alabama to a high of 177 trials in Alaska. Some of this variation can be explained by state law governing the circumstances under which parties may demand a jury trial (e.g., amount in controversy in civil trials, potential sentence in criminal trials), but also depends on local litigation culture including pretrial procedure, judicial management strategies, and the number of court resources available for conducting jury trials (e.g., facilities, staffing, judicial caseloads). The majority of jury trials are criminal trials – 47 percent felony and 19 percent misdemeanor. Just under one-third of trials are civil trials, and the remaining 4 percent involve family, juvenile, traffic, municipal ordinance, and "other" trials.

[10] The Court Statistics Project is a collaborative effort by the NCSC, the Conference of State Court Administrators, and the U.S. Department of Justice, Bureau of Justice Statistics, to collect and analyze data relating to the work of state courts, including the number of jury trials conducted annually in state courts. For reports and online tables, see http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

[11] See Appendix E for detailed information about the methods used to calculate figures in Table 3.

[12] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2006, Table C-7.

To secure enough jurors to hear cases, state courts mail an estimated 31.8 million jury summonses annually to approximately 15 percent of the adult American population. This figure obviously depends on the number of jury trials conducted in each state, but also on local juror utilization practices. For example, some courts are better than others at synchronizing the number of jurors needed with the number of jury trials to be held. In addition, this figure is affected by the number of jurors to be selected for each trial, which can range from as few as six to as many as twelve jurors, plus alternates.[13] Another factor is the number of peremptory challenges available to each party during jury selection, which helps determine the size of the panel to be sent to the courtroom for jury selection. The number of peremptory challenges in non-capital felony trials ranges from three per side in Hawaii and New Hampshire to twenty per side in New Jersey.[14] Capital felony trials tend to allocate more peremptory challenges to the parties, while misdemeanor and civil trials tend to allocate fewer.[15]

A large proportion of jurors summoned for jury service ultimately will not be needed. Many of those living in jurisdictions employing telephone call-in systems or other forms of communication technology (see Section V) will be told not to report for service due to last-minute settlements and plea agreements. Others will be disqualified or exempted from service, excused for hardship, removed from consideration for a particular trial due to preexisting knowledge about the case or the parties that might affect their impartiality, or removed by peremptory challenge. Despite the large quantity of summonses, only 1.5 million Americans are impaneled for service each year, less than 1 percent of the adult American population.

Although the probability of being impaneled in any given year is quite small, more than one-third of all Americans (37.6%) are now likely to be impaneled as trial jurors sometime during their lifetime. This represents is a tremendous increase in the distribution of the burden of jury service over the past three decades. In 1977, a national public opinion survey found that just 6% of adult Americans had served as trial jurors. By 1999, this figure had increased to 24%,[16] and in 2004, the American Bar Association reported that 29% of the adult American population had served as trial jurors.[17] In spite of declining numbers of jury trials,[18] a larger and larger proportion of American citizens have first-hand experience with jury service, due to more inclusive master jury lists, shorter terms or service, and other policies designed to make jury service more convenient and accessible for all citizens.

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[13] ROTTMAN &. STRICKLAND, *supra* note 7, at Table 42 (2006).

[14] *Id.* at Table 41.

[15] *Id.*

[16] NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 15 (1999).

[17] Harris Interactive, *Jury Service: Is Fulfilling Your Civic Duty a Trial?* (ABA July 2004).

[18] Galanter, *supra* note 1.

III. STATEWIDE JURY IMPROVEMENT EFFORTS

Jury trials are often perceived as local affairs, but they take place in an institutional framework established within each state. Indeed, the entire court system itself reflects statewide institutional characteristics such as the degree of local court autonomy dictated through formal statutes, rulemaking procedures, and funding mechanisms. These institutional structures and norms, in turn, affect how each state chooses to undertake comprehensive improvement efforts and the relative effectiveness of those implementation efforts. In this respect, jury improvement efforts are no exception. In this section, we examine the different approaches that states have taken to undertake jury improvement efforts, the focus and implementation strategies of those efforts, and the extent of state versus local control over jury operations.

As a preliminary matter, it is instructive to note that 20 states reported the existence of an established office or formal organization responsible for managing or overseeing jury operations for the state. In some instances, these programs have been established within the administrative office of the courts to provide automation and other forms of technical support to local courts (e.g., master jury list compilation). In other states, these offices function in an oversight capacity through permanent committees of state judicial councils. A few states delegate some of the educational and outreach functions to external organizations, such as Jury Education and Management (JEM) Forum in California; the Ohio Jury Management Association (OJMA); the New York Fund for Modern Courts, which operates the state's Citizen Jury Project; and the Pennsylvania Association for Court Management, which has a standing committee on jury management. The relatively high number of states with permanent jury offices or organizations demonstrates a high degree of state court recognition for the visibility and prominence of jury operations in court management.

With respect to more recent jury improvement efforts, the preferred approach in most states has been a statewide commission or task force to examine issues related to jury operations and trial procedures. Three-quarters of the states (38) have appointed such an entity in the past 10 years, of which nearly one-third were still active when the State-of-the-States Survey was administered. The vast majority of these commissions were established by the chief justice or under the authority of the court of last resort and consisted of 15 to 20 individuals representing a variety of constituencies. See Table 4.

Table 4: Statewide Task Force / Commission Composition

Representation by …	% of Task Forces / Commissions
Trial judges	97.3
Civil litigation lawyers	86.5
Criminal defense lawyers	78.4
Prosecutors	75.7
Court administrators	70.3
Jury managers	64.9
Clerks of court	64.9
Private citizens / Former jurors	62.2
Appellate judges	59.5
Other individuals	45.9
State legislators	43.2

Trial judges were included as members in virtually all states, and the vast majority of task forces included representation from major constituencies within the organized bar (e.g., criminal prosecutor and defense, plaintiff and civil defense) and administrative support for the jury system (e.g., court administrators, clerks of court, jury managers). A high percentage of the task forces (62%) included private citizens and former jurors. Of course, citizens and former jurors are

intimately affected by courts' jury trial policies. Because community values are represented on a jury, it is important to represent community opinions and values on a jury task force. State legislators and members representing "other" constituencies were the only groups included in less than half of the task forces.

Jury commissions and task forces generally undertook only two or three primary objectives. The most common focus involved making recommendations for legislative and rule changes related to jury operations and trial procedures. Education of judges and court staff were also reported as a frequent focus of activity. See Table 5. One-third of the states (17) reported that their commissions and task forces were engaged in program evaluations, pilot demonstrations, or survey research. Because these activities typically require substantial levels of staff expertise or other resources, these types of supplemental activities were more common in states with centralized offices or formal organizations beyond a jury task force.

Table 5: Focus of Current or Ongoing Jury Improvement or Reform Efforts

	% of States
Legislative or rule changes	65
Judicial education	41
Public education / outreach	31
Court staff education	29
Evaluations	18
Survey research	18
Pilot or demonstration programs	14
Technology	14
Other	14
Attorney education	12
Court observations	10
Juror Fees	6

State and Local Infrastructure for Jury Operations

The degree to which jury operations are directed by state law varies tremendously by jurisdiction. For example, just over half of the states (27)[19] give discretion to local courts to establish maximum terms of service. Of the 24 state-mandated jurisdictions, 10 set the maximum term of service at one day or one trial (Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Indiana, Massachusetts, and Oklahoma). Collectively, these states represent 28.6 percent of the U.S. population. See Table 6. The remaining thirteen states permit longer terms of service, some of which limit the maximum number of days that a person must serve in any given period of time. For example, Georgia law specifies that citizens cannot be required to serve more than two consecutive weeks in any given term of court or more than four weeks in any 12-month period.[20] Kentucky and North Dakota statutes have similar provisions, limiting jury service to 30 days and 10 days, respectively, within any 2-year period.[21] As we discuss in Section IV, the actual number of days that a citizen serves on jury service may be considerably less than term of service, which specifies the maximum amount of time that a person must serve.

[19] These states encompass nearly half (49.3%) of the total U.S. population.

[20] GA. CODE ANN. § 15-12-3 (2007).

[21] KY. REV. STAT. ANN. § 29A.130 (2007); N.D. CENT. CODE § 27-09.1-15 (2007).

Table 6: State-Established Maximimum Terms of Service		
Term of Service	**States**	**% US Population**
One Day or One Trial	AZ, CA, CO, CT, DC, FL, HI, IN, MA, OK	28.6
Two to five days (one week)	NY, SC	8.2
Six days to 1 month	GA, KY, ME, NH, ND, OH, RI	9.9
Greater than 1 month to 6 months	NM	.6
Longer than 6 months	MT, UT, VT, WV	2.0
		49.3

Juror Compensation

All fifty states and the District of Columbia provide compensation to jurors as reimbursement for out-of-pocket expenses as well as token monetary recognition of the value of their service. See Table 7. Traditionally, the juror fee was a flat per diem with a supplemental mileage reimbursement. Recently, states have begun to recognize the relationship between the amount of juror fees, the proportion of citizens who are excused for financial hardship, and minority representation in the jury pool.[22] As a result, a number of states have increased juror fees, but in doing so, have changed the structure of the payment system from a flat daily rate to a graduated rate in which jurors receive a reduced fee, or no fee, for the first day(s) of service with an increased fee if impaneled as a trial juror or required to report for additional days. Eight states[23] and the District of Columbia require employers to compensate employees for a limited period of time (e.g., 3 to 5 days) while they are serving. Other states specify a minimum daily fee but permit local jurisdictions to supplement it. See Table 8. Over half of the courts also pay mileage reimbursement with rates varying from $.02 to $.49 per mile; the median rate was $.325 per mile. Arizona has also implemented a Lengthy Trial Fund to compensate jurors for lost income up to $300 per day.[24]

[22] Paula Hannaford-Agor, *Jury News: The Laborer is Worthy of His Hire and Jurors Are Worthy of Their Jury Fees,* 21 CT. MGR. 38 (2006).

[23] The states are Alabama (ALA. CODE § 12-6-8(c); Colorado (COLO. REV. STAT. § 13-71-126); Connecticut (CONN. GEN. STAT. § 51-247(a); Georgia (Attorney General Unofficial Opinion # U 89-55, Attorney General Official Opinion 95-13); Massachusetts (MASS. GEN. LAWS ch. 234A § 48; Nebraska (NEB. REV. STAT. § 25-1640); New York (N.Y. JUD. LAW Art. 16 § 521); and Tennessee (TENN. CODE ANN. § 22-4-108(B)(1)).

[24] G. Thomas Munsterman & Cary Silverman, *Jury Reforms in Arizona: The First Year,* 45 JUDGES' J. 18 (Winter 2006).

Table 7: State-Mandated Juror Compensation Structure

State	Initial Rate or Flat Daily Rate	Graduated Rate	Trigger for Graduated Rate
Alabama	$ 10.00	n/a	
Alaska	$ 5.00	$ 25.00	Beginning 2nd Day
Arizona *	$ .00	$ 12.00	Beginning 2nd Day
Arkansas	$ 15.00	$ 35.00	Sworn Juror
California	$ .00	$ 15.00	Beginning 2nd Day
Colorado	$ .00	$ 50.00	Beginning 4th Day
Connecticut	$ .00	$ 50.00	Beginning 6th Day
District of Columbia	$ 30.00	n/a	
Delaware	$ 20.00	n/a	
Florida	$ .00	$ 30.00	Beginning 4th Day
Hawaii	$ 30.00	n/a	
Idaho	$ 10.00	n/a	
Iowa	$ 10.00	n/a	
Kentucky	$ 12.50	n/a	
Louisiana	$ 25.00	n/a	
Maine	$ 10.00	n/a	
Massachusetts	$ .00	$ 50.00	Beginning 4th Day
Michigan	$ 25.00	$ 40.00	Beginning 2nd Day
Minnesota	$ 20.00	n/a	
Montana	$ 12.00	$ 25.00	Sworn Juror
Nebraska	$ 35.00	n/a	
Nevada	$ .00	$ 40.00	Sworn Juror
New Hampshire	$ 20.00	n/a	
New Jersey	$ 5.00	$ 40.00	Beginning 4th Day
New Mexico	$ 41.20	n/a	
New York	$ 40.00	n/a	
North Carolina	$ 12.00	$ 30.00	Beginning 6th Day
North Dakota	$ 25.00	$ 50.00	Beginning 2nd Day
Oklahoma	$ 20.00	n/a	
Oregon	$ 10.00	$ 25.00	Beginning 3rd Day
Pennsylvania	$ 9.00	$ 25.00	Beginning 4th Day
Rhode Island	$ 15.00	n/a	
South Dakota	$ 10.00	$ 50.00	Sworn Juror
Tennessee	$ 11.00	n/a	
Texas	$ 6.00	$ 40.00	Beginning 2nd Day
Utah	$ 18.50	$ 49.00	Beginning 2nd Day
Vermont	$ 30.00	n/a	
Virginia	$ 30.00	n/a	
West Virginia	$ 40.00	n/a	

* Arizona also employs a Lengthy Trial Fund to compensate jurors up to $300 per day for lost income while on jury service. The LTF is available to jurors retroactively to the 4th day of service beginning on the 6th day of trial.

Table 8: Locally Supplemented Juror Fees							
State	State Mandated Minimum Rate	Flat Daily Rate Structure		Graduated Rate Structure			
		# Courts Reporting	Average Flat Rate	# Courts Reporting	Average Initial Rate	Average Graduated Rate	Trigger for Graduated Rate
Georgia	$ 5.00	56	$ 24.27	4	$ 16.25	$ 23.75	Beginning 2nd Day
Illinois	$ 4.00	76	$ 13.15	7	$ 9.29	$ 16.50	Beginning 2nd Day
Indiana	$ 15.00	33	$ 39.09	44	$ 16.07	$ 40.68	Sworn Juror
Kansas	$ 10.00	9	$ 10.00	1	$ 10.00	$ 20.00	Beginning 2nd Day
Maryland	$ 15.00	22	$ 17.50	n/a			
Mississippi	$ 25.00	30	$ 28.50	3	$ 25.00	$ 33.33	Sworn Juror
Missouri	$ 6.00	32	$ 15.91	32	$ 10.27	$ 20.41	Sworn Juror
Ohio	$ 10.00	1	$ 20.00	3	$ 11.67	$ 20.00	Sworn Juror
South Carolina	$ 10.00	19	$ 16.16	n/a			
Washington	$ 10.00	22	$ 11.59	1	$ 10.00	$ 25.00	Sworn Juror
Wisconsin	$ 16.00			n/a			
Wyoming	$ 10.00	2	$ 30.00	4	$ 30.00	$ 50.00	Beginning 5th Day

Jury Source Lists

Another area of jury operations in which states can either retain control or delegate authority to local courts is the choice of source list(s) that can be used to compile the master jury list. The total number of unique names derived from all source lists used to compile the master jury list defines the total population from which prospective jurors may be qualified and summonsed. Thus, the choice of source lists is an important policy decision for state courts insofar that it establishes the inclusiveness and the initial demographic characteristics of the potential jury pool.[25] Thirty states mandate that courts within the jurisdiction use only the designated source lists, while 15 states and the District of Columbia permit local courts to supplement the required lists with additional lists. The remaining five states do not mandate the use of any specific source list, but enumerate the permissible lists that can be employed for this purpose.

For those states that mandate which source lists to use, the ones that occur most frequently are the voter registration list (38 states) and the licensed driver list (35 states). See Table 9. Nineteen states mandate the use of a combined voter/driver list. Eleven mandate the use of three or more lists – typically, registered voters, licensed drivers, and state income or property tax lists, although other combinations are also common. Seven states restrict the number of source lists to a single list: Mississippi and Montana mandate the use of the registered voters list only; Florida, Michigan, Nevada, and Oklahoma mandate the use of the licensed drivers list only; and Massachusetts employs a unique statewide census for its master jury list.

[25] A substantial body of federal and state constitutional and statutory law requires that the pool from which prospective jurors are summonsed reflect "a fair cross section of the community," specifically, its racial, ethnic, and gender demographic characteristics. *See Duren v. Missouri,* 439 U.S. 357 (1979). Because a broadly inclusive list of the jury-eligible population is more likely to mirror the demographic characteristics of the community, the National Center for State Courts recommends that the master jury list include at least 85 percent of the total community population. G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT 4-5 (1996).

Table 9: Mandatory and Permissible Source Lists			
	Number of States		
Source Lists	Mandatory	Permissible	Total
Licensed Drivers	35	12	47
Registered Voters	38	7	45
State/Local Tax	8	13	21
Other	2	12	14
Unemployment Compensation	3	10	13
Public Assistance		9	9

Looking beyond the mandated lists, we find that 21 states permit courts to supplement the mandated lists with additional source lists including state and local income or property tax rolls, unemployment compensation recipient lists, public welfare recipient lists, and "other" lists. In most instances, "other" referred to state identification card holders, which is often maintained by the same agency that maintains the list of licensed drivers. But at least two states maintain unique lists to be used for the master jury list. In Massachusetts, each locality conducts an annual census – a statutory requirement dating back to the colonial period. Today, the primary purpose of the census is the master jury list. Alaska uses a list of residents who applied for payment from the Alaska Permanent Fund Corporation, which pays income to Alaskan residents from a statewide investment fund that originated from the profits from the Alaskan oil pipeline.[26]

In addition to the issue of whether to mandate or permit certain types of lists, 29 states provide direct assistance to local courts by compiling the master jury list at the state level and making it available to local courts. Where this option exists, the vast majority of local courts (78.3%) use the state-provided list rather than compile their own. Moreover, in states permitting local courts to supplement the required source lists, local courts employ just over half (57.9%) of the lists available to them. These two findings combined suggest that most local courts are either satisfied with the inclusiveness and diversity of their jury pools and do not see the need to supplement the source lists with additional lists, or they may lack the technological capability or staffing to manage multiple source lists, or both.

Statutory Exemptions

Traditionally, many states exempted whole classes of citizens from jury service on the grounds that their professional or civic obligations in the community were so essential that they should be spared from jury service (e.g., political officeholders, law enforcement, healthcare providers). In most jurisdictions, terms of service were considerably longer than today, so jury service by these individuals was considered a hardship on the community that would be deprived of the services of those individuals. The trend in recent years has been to eliminate occupational and status exemptions altogether under the theory that no one is too important or too indispensable to be summarily exempted from jury service, particularly in jurisdictions with relative short terms of service. Instead, local courts have the discretion to accommodate or excuse jurors on an individual basis. For example, New York eliminated all of its occupational exemptions in 1994, adding more than one million jury-eligible citizens to the master jury list as a result. Within the first several years, New York Governor George Pataki, New York City Mayor Rudy Guiliani, and New York Court of Appeals Chief Judge Judith Kaye were all summonsed, and reported for service, as jurors in New York State courts.

[26] See http://www.apfc.org/homeobjects/tabPermFund.cfm for more information.

In the Statewide Survey, the NCSC identified 10 distinct categories of exemptions. See Table 10. The most common category (47 states) was "previous jury service," a classification exempting citizens who have recently performed jury service, typically within the past 12 to 24 months. Another popular category (27 states) of exemption was age, typically extended to older citizens.[27] Most of the categories designated various occupational or status roles for which citizens could claim an exemption from jury service (e.g., political officeholders, judicial officers, sole caregivers of young children including nursing mothers, or sole caregivers of incompetent adults). The "Other Exemptions" category included a variety of occupations including clergy or other religious designations, journalists, mariners, public accountants, and teachers. Alaska provides an exemption to teachers from schools that fail to meet adequate progress standards under the No Child Left Behind Act.[28]

Table 10: Statutory Exemption Categories

	# States
Previous Jury Service	47
Age	27
Political Officeholder	16
Law Enforcement	12
Other Exemptions	12
Judicial Officers	9
Healthcare Professionals	7
Sole Caregiver	7
Licensed Attorneys	6
Active Military	5

Table 11: Number of Exemption Categories by State

0	LA
1	AL, AR, CO, DC, ID, IA, MT, NM, NY, UT, VT, WA, WI
2	CA, IL, IN, KS, KY, MD, NV, NH, ND, PA, SD
3	AZ, DE, MI, NC, OR, SC, WY
4	AK, MA, MN, MO, NJ, OH, TX, WV
5	CT, GA, ME, MS, NE
6	HI, RI
7	OK, TN, VA
8	
9	FL

Nevertheless, states vary considerably in the number of exemptions authorized by statute. The median number of exemption categories was 3 per state. Louisiana is the only state that has no exemptions whatsoever. Twelve states and the District of Columbia provide exemptions only for previous jury service. Florida provides exemptions in the nine out of the ten categories, the most of any state. See Table 11.

One-Step versus Two-Step Jury Qualification and Summoning

A final area of state versus local control over jury operations involves the process through which local courts qualify and summon citizens for jury service. Eighteen states and the District of Columbia specify that local courts employ a one-step process in which jurors are summoned and qualified simultaneously, while five states mandate that local courts employ a two-step process

[27] The most common age to qualify for an exemption was 70 (16 states). The exemption in the remaining states ranged from 65 (4 states) to 75 (3 states).

[28] ALASKA STAT. § 09.20.030(b).

in which citizens are first surveyed to determine their eligibility for jury service, and then only qualified jurors are summoned for service. The remaining 25 states leave this decision to the discretion of the local courts.

We see from these various examples that states vary a great deal in terms of how closely jury operations are dictated at the state level or left to the discretion of local courts. Table 12 ranks all of the states and the District of Columbia according to their respective restrictiveness or permissiveness vis-à-vis local jury operations. The rankings are based on a composite index reflecting whether all source lists are required, whether the state permits localities to supplement the jury fee, whether the term of service is mandated at the state level, whether the state authorizes more than the median number of exemptions, and whether the state mandates the summoning/qualification process. The index ranges from 0 (most permissive) to 5 (most restrictive).

Table 12: State Control Over Jury Operations	
Most Restrictive	CT, FL, ME, MA, RI
Mostly Restrictive	CO, HI, KY, MN, MT, NE, NH, NJ, NM, OK, TX, UT, WV
Somewhat Restrictive	AZ, DC, DE, IA, MS, NV, ND, SD, VT
Somewhat Permissive	AL, AK, CA, GA, ID, LA, MI, NY, OH, SC, TN, VA
Mostly Permissive	AR, IL, IN, MO, NC, OR, PA, WA
Most Permissive	KS, MD, WI, WY

Interestingly, the degree of state restrictiveness over jury operations has no significant relationship to number of jury improvement efforts underway in those states.[29] Nor does it appear to be related to the volume of jury trials or the trial rate for each state.[30] This suggests that jury reform has not followed either an exclusively top-down or exclusively grassroots approach, or even one dictated by exigencies associated with the volume or frequency of jury trials. Rather, the various approaches derive from unique institutional and political cultures in each jurisdiction. Given that reality, we now take a closer look at variations in local court operations.

[29] *Pearson* = .016, *ns.* The only restrictiveness factor that had a significant relationship to the number of jury improvement efforts was whether the term of service is determined at the state or local level. When the term of service is determined at the state level, the number of jury improvement efforts was 3.33 compared to 2.00 when the term of service is determined at the local level. F (1, 49) = 4.404, p = .041.

[30] *Pearson* (Number of jury trials) = .219, *ns*; *Pearson* (Trial rate) = -.064, *ns.*

IV. LOCAL COURT SURVEY

As discussed in the previous section, some jury operations may be dictated at the state level while others are left to the discretion of the local courts. While state statutes and court rules can define the institutional structure in which jury operations take place, they do not always provide an accurate picture of how local jury systems actually operate. Nor does the existence of statewide jury improvement efforts, or lack thereof, necessarily indicate the extent of locally initiated improvement efforts. The Local Courts Survey was designed to provide a more complete picture of jury operations nationally by highlighting local jury operations and improvement priorities in greater detail and examining the impact of state infrastructures and statewide initiatives on local operations and initiatives.

Nationally, we find that approximately half (51.8%) of courts report some type of jury improvement activities in the past five years. Over one-third (34.4%) reported some type of formal jury office or jury management committee responsible for oversight of local jury operations. Not surprisingly, these efforts tend to be concentrated in urban and large suburban courts with higher volumes of jury trials. Yet even in rural jurisdictions (e.g., population less than 25,000), more than one in three courts (36.7%) reported some type of jury improvement activity.

The single most popular focus of local jury improvements was upgrading jury automation, but other, more substantive efforts captured the attention of a substantial portion of courts. See Table 13. The majority of courts (75.2%) that reported any improvement efforts actually focused on multiple areas. The median number was three, but nearly 10% reported 7 or more different efforts underway. Courts also tended to undertake certain improvement efforts in conjunction with others. For example, courts that reported recent efforts to improve jury yield were also often engaged in specific efforts to decrease non-response rates. Other courts focused on in-court techniques to improve juror comprehension and jury instructions simultaneously.

Table 13: Local Court Jury Improvement Efforts

Focus on …	% of Courts
Upgrade Technology	58.8
Decrease Non-Response Rate	53.7
Improve Jury Yield	44.5
Improve Facilities	43.1
Improve Juror Utilization	42.2
Improve Public Outreach	35.8
Improve Jury Representation	32.8
Improve Jury Instructions	29.2
Improve Juror Comprehension	23.0
Other Improvement Effort	10.9

The existence and magnitude of local jury improvement efforts correlated, not surprisingly, with population size and jury trial volume.[31] Courts with more jury trials and those in urban communities were more likely than rural courts to initiate improvement efforts. Statewide leadership in the form of a centralized jury management office or statewide task force/commission clearly played a substantial role in motivating local court activity. For example, local courts were significantly more likely to undertake local improvement efforts in

[31] Population *Rho* = .383, Jury Trial Volume *Rho* = .210, both *p*s < .001.

states with a statewide jury task force or commission (56% of local courts) compared to those in which no statewide effort was underway (34% of local courts).[32]

This "trickle-down" effect of statewide leadership appeared to spur the existence of local court improvement efforts in some interesting ways. Certainly it affected the number of areas in which local courts try to improve jury operations. In states with a jury task force, the average number of efforts that local courts undertook was 3.2 compared to 1.6 in states with no statewide task force.[33] In particular, statewide activities focused on court staff education and on changes to legislation or court rules appeared to have an impact on how many jury improvement efforts were undertaken at the local level,[34] increasing the number of local court efforts on average by 50 to 70 percent. Whether increased activity on the local level results more from the educational efforts of the statewide task forces or in reaction to changes in state law is not known, and may not be possible to differentiate given the typical approach by many states of delivering local education about proposed or enacted changes to state law. As a practical matter, both motivations may play a part.

Jury Automation in Local Courts

As noted above at Table 13, upgrades to jury technology was the single most frequently reported focus of local jury improvement efforts, undertaken by 59 percent of courts reporting any improvement efforts. Although the Statewide Surveys didn't specifically inquire about this aspect of jury operations, several states indicated concerted efforts to improve jury system technology. In other states, it was clear from the Local Court Surveys that various automation improvements had been initiated on a statewide basis. For example, in the District of Columbia, Massachusetts, New York, and North Carolina, all or nearly all of the local courts reported ongoing upgrades to jury system technology. Other examples that suggested a coordinated statewide effort included Arizona, in which three-quarters of the local courts reported the use of video during juror orientation; Iowa, in which more than half (54%) of local courts reported that citizens can check their reporting status on-line; California, which reported a statewide effort to equip jury assembly rooms with Internet access; South Dakota, which reported a legislative mandate to improve jury management technology; Missouri, which is implementing a statewide jury management system (30% of local courts reported that this had been completed in their jurisdiction); and Alaska, which is in the process of implementing an online jury software program. The apparent discrepancy between some of the Statewide Survey descriptions of improvements in jury automation and reports by local courts about technology improvements in their jurisdictions may be due to an implementation lag in the local courts or possibly that some local courts did not report these improvements because they were initiated at the state level rather than at the local level.

Approximately two-thirds of courts use some form of commercial software for their jury management systems. This market tends to be dominated by two national vendors – Jury

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[32] F (1, 1,342) = 39.00, $p < .001$. The existence of a statewide jury office had a similar, albeit diminished, effect (57% versus 44%). F (1, 1,172) = 21.599, $p < .001$.

[33] F (1, 1,394) = 44.310, p , .001.

[34] Court Staff Education F (1 ,46) = 4,323, p = .043; Change Legislation/Court Rules F (1, 46) = 6.873, p = .012.

Systems, Inc. (based in Encino, California) and ACS Government Systems (based in Lexington, Kentucky). Combined, these two firms held 42 percent of the commercial jury management contracts in the State-of-the-States Survey courts. These national vendors also tended to dominate in more populous jurisdictions compared to other commercial vendors.[35] For example, the national vendors held 83% of the commercial contracts for courts in counties greater than 500,000 population and 59% of the commercial contracts for courts in counties with a population between 100,000 and 500,000, but only 35% of commercial contracts in courts with populations less than 100,000.

The remaining commercial vendors appear to concentrate their market on a statewide or regional basis. Just over one-third of local courts (34.8%) reported that they maintain in-house jury management systems. Courts in rural and smaller suburban jurisdictions were more likely to use commercial jury management software than those in more populous areas that, presumably, can afford to develop and support an in-house system. Not surprisingly, the use of more sophisticated forms of automation was more prevalent in courts located in urban areas compared to those in suburban and rural areas. See Table 14.

Table 14: Percent of Courts Using Various Types of Technology

	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
N =	84	233	404	526	1,247
Commercial Jury Software	56.5	59.2	62.4	76.1	65.2
Juror Qualification					
Online	47.6	19.7	9.9	1.9	11.0
IVR Technology	33.3	12.0	8.4	.8	7.5
Reporting Technology					
Telephone Call-In System	86.9	82.4	70.9	42.7	62.2
Online	40.5	22.3	12.1	1.9	11.5
Automated Call-Out System	2.4	2.3	3.5	3.5	3.2
Orientation					
Basic Information Online	61.9	36.6	17.8	61.0	19.1
Orientation Video Online	22.6	10.1	8.0	1.6	6.6
Orientation Video on Cable Television	3.6	1.2	.9	.7	1.0

The most popular form of technology, by a large margin, continues to be the telephone. Nearly two-thirds of courts employ a telephone call-in system to inform citizens about whether they should report for jury service. One-third of urban courts have implemented Interactive Voice Recognition (IVR) technology to permit citizens to respond to qualification questionnaires using their telephones. Some commercial vendors have developed an interface between the court's jury management system and the telephone system to enable courts to send an automated voice message to citizens the day before they are scheduled to report reminding them of their

[35] Chi-Square = 58.782, $p < .001$.

obligation or informing them that their service will not be needed that day,[36] but this feature does not appear to have caught on in most courts yet. Indeed, it appears that rural and smaller suburban courts are actually more likely to telephone jurors manually to inform them about reporting status than larger suburban and urban courts are to use an automated call-out system.

Although web-based technology is ubiquitous in most areas of contemporary life, local courts do not appear to have embraced it for jury management purposes. Less than 20% provide basic juror orientation information online and barely more than half that percentage use the Internet for juror qualification or informing jurors about their reporting status. This technology was somewhat more prevalent for various applications in urban courts, but with the exception of posting orientation information online, fewer than half of the courts serving populations greater than 500,000 used Internet technology. Interestingly, courts that rely on commercial jury management software were actually *less* likely to employ all of the more sophisticated types of automation, even after controlling for population size.[37]

Several factors may be influencing courts' decisions to use or not use these technologies. For example, courts employing either JSI or ACS commercial software were significantly more likely to use Internet or IVR technology for qualification, reporting, and orientation purposes than courts using state or regionally based commercial vendors.[38] This suggests that state and regionally based vendors may not have incorporated the capacity for their jury management systems to interface with the courts' telephone and Internet systems yet. Existing technology options may also be prohibitively costly for less populous courts, or possibly, those courts may be unwilling to employ technologies that they believe are not readily available to the majority of citizens in their communities due to the digital divide.

Jury Yield in Local Courts

The term "jury yield" refers to the number of citizens who are found to be *qualified* and *available* for jury service expressed as a percentage of the total number of qualification questionnaires or summonses mailed. It is a critical concept in jury system management insofar as it provides a standard measure of efficiency for jury operations. In essence, it measures the upfront administrative effort and cost that the court undertakes in securing an adequate pool of prospective jurors for jury selection. Courts employing a two-step qualification and summoning

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[36] G. THOMAS MUNSTERMAN & PAULA L. HANNAFORD-AGOR, THE PROMISE AND CHALLENGES OF JURY SYSTEM TECHNOLOGY 44-45 (NCSC 2003).

[37] This finding derives from a series of logistic regression models in which a dummy variable (Commercial Vendor) was included as an independent variable to examine the probability that various types of IVR or Internet technology were employed in the court's jury system controlling for population size. IVR Qualification Cox & Snell R Square = .098, Commercial Vendor *Wald* = 32.045, B = -1.413, $p < .001$; Online Qualification Cox & Snell R Square = .112, Commercial Vendor *Wald* = 27.855, B = -1.088, $p < .001$; Online Orientation Information Cox & Snell R Square = .134, Commercial Vendor *Wald* = 45.997, B = -1.100, $p < .001$; Online Video Orientation Cox & Snell R Square = .088, Commercial Vendor *Wald* = 61.692, B = -2.277, $p < .001$;Reporting Information Online Cox & Snell R Square = .086, Commercial Vendor *Wald* = 34.289, B = -1.125, $p < .001$; and Telephone Call-In System Cox & Snell R Square = .064, Commercial Vendor *Wald* = 8.162, B = -.415, p = .004.

[38] Qualification by IVR F (1,638) = 5.532, p = .019; Qualification Online F (1, 638) =36.878, $p < .001$; Reporting Online F (1, 638) = 12.713, p <.001; Orientation Online F (1, 638) = 23.326, p < .0o01.

process often differentiate between the qualification yield (the proportion of citizens that is qualified for jury service) and the summoning yield (the proportion of jury-eligible citizens that is available for jury service on the date summonsed). In one-step courts, qualification and summoning are combined and therefore the yield is expressed as a unitary measure.[39]

A number of factors affect jury yield. Some factors are related to the court's jury operations and procedures (e.g., qualification criteria, exemptions, term of service, follow-up procedures for non-response, and juror compensation) and others are related to local community conditions such as mobility rates, U.S. citizenship rates, and socio-economic conditions. Typically, urban and larger suburban courts experience lower jury yields than smaller suburban and rural courts. See Table 15.

Table 15: Jury Yields by Population Size

	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
One-Step Courts (n)	38.2% (60)	41.1% (134)	45.2% (207)	50.4% (265)	45.8% (666)
Two-Step Courts (n)	43.2% (18)	54.1% (76)	59.5% (170)	62.7% (210)	59.5% (474)

An important question for local courts is what happened to those people who were mailed summonses, but were not qualified or available for jury service. Some people move, but fail to leave a forwarding address, so the jury summons is returned "undeliverable." Others are disqualified due to lack of citizenship, residency, under the age of 18, previous criminal background, or English fluency or literacy. Some claim a statutory exemption from jury service and others will be excused for medical reasons, financial hardship or some other inability to serve. Some simply do not respond to the qualification questionnaire or fail to appear for jury service. See Table 16. The average rate for these categories ranges from 7 percent to 15 percent in one-step courts, and 5 percent to 9 percent in two-step courts, again with considerable variation based on population size.

[39] The Local Court Survey only inquired about jury yield with respect to summoning; therefore, most of the discussion in this section refers either to reported yields for one-step courts only, or provides separate statistics for one-step and two-step courts. For instructions on how to calculate jury yield in one-step versus two-step courts, see COURTOOLS MEASURE 8: EFFECTIVE USE OF JURORS at http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure8.pdf.

Table 16: Average Undeliverable, Disqualification, Exemption, Excusal and Non-Response Rates, by Population Size					
	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
One-Step Courts					
Undeliverable	15.1	14.4	16.0	13.5	14.6
Disqualified	12.4	10.1	7.5	7.4	8.4
Exempted	4.0	6.7	8.4	7.6	7.3
Excused	9.4	9.5	9.1	9.1	9.2
Non-Response/FTA	15.0	10.9	8.6	6.7	8.9
Two-Step Courts					
Undeliverable	6.6	10.2	8.2	10.0	9.2
Disqualified	6.5	9.6	7.8	6.6	7.5
Exempted	2.9	3.4	4.7	6.3	5.1
Excused	4.4	6.4	5.2	6.5	5.9
Non-Response/FTA	13.1	6.2	5.9	5.4	6.0

More to the point, how can courts increase the jury yield by minimizing the number of people who fall into the *not qualified* and *unavailable* categories? As a practical matter, courts have few options other than acceptance when the people who are summonsed for jury service are disqualified (e.g., non-citizen, non-resident, under age 18, previous felony conviction, not fluent in English) as these criteria are minimum qualifications for jury service established by state legislatures. However, courts have developed a number of approaches to minimize other factors that affect jury yields. With respect to undeliverable summonses, for example, many courts have borrowed techniques from commercial mail-order companies such as contracting with National-Change-of Address (NCOA) vendors to provide updated addresses for people who have moved since the master jury list was compiled. Courts using multiple source lists to compile the master jury list should use the most frequently maintained list, or the most recently updated address, when deciding which of two or more duplicate records to retain.[40] Analyses of the impact of the number and types of source lists on undeliverable rates were difficult to interpret, however. The use of state tax, unemployment compensation, and public welfare lists resulted in significantly reduced undeliverable rates in two-step courts.[41] But unemployment and public welfare lists had no effect on undeliverable rates in one-step courts, and state tax lists correlated with significantly higher undeliverable rates in one-step courts.[42] Additional research is needed to investigate these divergent findings and, if possible, to identify ways of maximizing the benefits of supplemental source lists.

Exemptions are established by state statute. As we discussed in the previous section, the number of exemption categories ranges from zero in Louisiana to nine in Florida. The number of exemption categories had a significant affect on exemption rates in one-step courts within those

[40] G. THOMAS MUNSTERMAN & PAULA L. HANNAFORD-AGOR, THE PROMISE AND CHALLENGES OF JURY SYSTEM TECHNOLOGY 20-21 (NCSC 2003).

[41] State Tax List F (1, 432) = 25.384, Unemployment List F (1, 432) = 38, 867, Public Welfare List F (1, 432) = 37.158, all ps < .001.

[42] State Tax List F (1, 633) = 17.611, p < 001.

states[43] – from an average of 4.7 percent in states with only one exemption to 14.3 percent in states with seven exemption categories. Florida, which had the highest number of exemption categories (9), had the second highest exemption rate (12.2%).

Similarly, term of service and juror compensation rates affect excusal rates. In Table 6, we saw that 28.6 percent of the U.S. population lives in states that mandate a one day or one trial term of service. Table 17 presents the actual breakdown for term of service for all of the courts represented in the Local Court Survey dataset. We find that more than one-third of local courts, and nearly two-thirds of the U.S. population,[44] live in jurisdictions that have a one day or one trial term of service. It is clear from the difference between these percentages that courts in more populous jurisdictions are more likely to adopt one day or one trial terms of service than those in less populous jurisdictions.

Table 17: Term of Service in Local Courts

Term of Service	# of Courts	% of Courts	Average # Jury Trials Annually	Estimated % of US Population
One Day or One Trial	490	35.1	129	63.4
Two to five days (one week)	213	15.3	85	17.8
Six days to 1 month	327	23.4	46	11.7
Greater than 1 month to 6 months	283	20.3	21	5.9
Longer than 6 months	82	5.9	15	0.2

As we discussed in Section III, the term of service defines the *maximum* amount of time that a person may be required to serve on jury duty. Although some courts establish the maximum term of service at six months or longer, it is clear from the average volume of jury trials conducted in these courts that very few citizens, if any, would ever actually report to their local courthouse for that period of time. Indeed, half of the courts in this category had four or fewer trials annually – less than one every three months. or many of these courts, the functional term of service is likely to be one day or one trial – or could be with little or no administrative effort on the part of the court – even if it is not stated as such.

Returning to the relationship between term of service and excusal rates, courts with a one day or one trial term of service had significantly lower excusal rates than those with longer terms of service (6.0 percent versus 8.9 percent, respectively).[45] See Table 18. Moreover, courts with juror fees exceeding the national average ($21.95 flat fee or $32.34 graduated rate) also had significantly lower excusal rates – 6.8 percent compared to 8.9 percent for courts whose juror fees were lower than the national average.[46] Courts with both a one day or one trial term of

[43] We did not calculate the exemption rate in two-step courts because presumably anyone claiming the exemption had already done so at the qualification step.

[44] Estimates for the proportion of US population were calculated using the methods described in Appendix E.

[45] $F=23.966$ (1, 1,100), $p < .001$.

[46] $F=16.445$ (1, 1,195), $p < .001$.

service and higher than average juror fees had excusal rates of 4.0 percent compared to 9.3 percent for those with longer terms of service and lower than average juror fees.

Table 18: Average Excusal Rates, by Term of Service and Juror Compensation

	One Day / One Trial	Longer than One Day / One Trial	Total
Juror Fee Exceeds National Average	4.1%	8.3%	6.6%
Juror Fee is Less than National Average	8.1%	9.3%	8.9%
Total	6.0%	8.9%	8.0%

Courts across the country have been increasingly challenged by citizens who fail to return their qualification questionnaires or who fail to appear (FTA) for jury service. Twenty percent of one-step courts reported non-response/FTA rates of 15 percent or higher. Even more remarkable, 10 percent of two-step courts, which had already located and qualified the prospective juror, reported FTA rates of 16 percent or higher. To address these problems, 80 percent of courts in the State-of-the-States Survey reported some type of follow-up program to track down non-responders and FTAs. See Table 19. The most common approach in both one-step and two-step courts was simply to send a second qualification questionnaire or summons. Two-step courts conducted order-to-show-cause (OSC) hearings about twice as often as one-step courts. Less than 15 percent of courts imposed fines on non-responders, although most state statutes permit this penalty. About one-fourth of courts had other types of follow-up programs, which often involved issuing a bench warrant ordering the local sheriff's office to physically compel the juror's presence in court.

Table 19: Non-Response and FTA Programs

	% of Courts
One-Step Courts (N=793)	
No Program	21.8
Second Summons	52.0
OSC Hearings	27.5
Fines	13.7
Other	25.0
Multiple Programs	51.8
Two-Step Courts (N=531)	
No Program	14.5
Second Summons	51.9
OSC Hearings	49.4
Fines	13.4
Other	22.0
Multiple Programs	57.6

Several factors affected the number of follow-up programs a court might employ. Two-step courts had significantly more follow-up programs, on average, than one-step courts, presumably because they have to conduct follow-up on two different stages of jury operations. Motivation also played a part – courts focusing on decreasing non-response/FTA rates reported more follow-up programs. This was especially true in urban and larger suburban courts, which tended to have higher non-response/FTA rates than less populous jurisdictions.

Follow-up programs had various degrees of effectiveness. After controlling for population size and one-step or two-step jury operations, the Local Court Survey data showed that only those follow-up programs that involved a second summons or qualification, or that involved some other approach (e.g., bench warrant),

significantly reduced non-response/FTA rates.[47] OSC hearings and fines had no effect, possibly due to the infrequency with which they are typically imposed. Courts that had no follow-up program had significantly higher non-response/FTA rates.[48]

Juror Privacy

As in other areas of contemporary life, courts have begun to recognize the need to respect jurors' legitimate expectations of privacy. Unlike judges, clerks of court, and other public officials, jurors do not deliberately seek out this particular form of public service and do not, therefore, automatically surrender all expectations of privacy. In particular, they have a right to expect that personal information will be disclosed only to those individuals with a legitimate need for it and that the information will only be used for the purposes of jury administration and jury selection. To meet those expectations, courts have increasingly placed restrictions on the types of information that prospective jurors are required to disclose, to whom that information may be subsequently released, and at what point in the trial process (e.g., pre-trial, jury selection, post-trial) it can be released.[49]

Attorneys and their clients arguably have the greatest legitimate interest in access to juror information. The extent to which courts makes juror information available to attorneys before jury selection begins is a reasonable indication of the extent to which courts have enacted policies and procedures to protect juror privacy. Table 20 indicates the percentage of local courts that reported providing attorneys with access to juror information before jury selection begins. The vast majority of courts disclose the names of prospective jurors to attorneys before voir dire, but a substantial number of courts restrict access to additional information. For example, more than one-third of courts reported that they will not provided attorneys with a full street address, making it difficult, if not impossible in many jurisdictions, for attorneys to conduct background investigations on prospective jurors. More than one-quarter (26.7%) of courts reported that they provide no address information whatsoever on prospective jurors. Nearly half of all courts restrict access to qualification information.

In many states, access to juror information is restricted by state statute or court rule. Thus, we found that access to some of these categories of information was restricted in all of the Local Court respondents. For example, access to jurors' full street address was uniformly denied in courts in Arizona, Delaware, Hawaii, New Jersey, and the District of Columbia. New Jersey and the District of Columbia do provide access to jurors' zip codes, however. Similarly, Delaware, Massachusetts, North Carolina, and the District of Columbia restrict

Table 20: Attorney Access to Juror Information Before Jury Selection Begins

Type of Juror Information	% of Courts
Juror Name	88.3%
Full Street Address	63.5%
Zip Code Only	12.8%
Qualification Information	55.2%

[47] F (7, 1,121) = 18.750, $p < .001$.

[48] One-Step Non-Response/FTA Rate F (1, 648), $p < .001$; Two-Step Non-Response/FTA Rate F (1, 470), $p = .096$.

[49] *See generally* Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001).

access to juror qualification information.

In addition to basic information such as name and address, the majority of courts obtain preliminary voir dire information from prospective jurors, such as marital status (64%), occupation (72%), number and ages of minor children (52%), and other information not directly related to juror qualification criteria or contact information (28%). To gauge the extent to which local courts provide this type of information to attorneys, the NCSC Center for Jury Studies created a numerical index ranging from 0 to 4 to indicate the number of categories (marital status, occupation, number and ages of minor children, and other) of voir dire information that courts make available to attorneys before jury selection begins. Nationally, local courts provided information on an average of 2.21 categories of voir dire information (median 3 categories), but again there was a great deal of state-to-state variation. The median index for six states (Alaska, California, Colorado, North Carolina, Oklahoma, and Utah) was less than 1, indicating very little access to juror information before voir dire. The statewide median for Hawaii, Minnesota, Massachusetts, and New Hampshire was 4, indicating that local courts routinely provide this information to attorneys.

All of these preliminary operational matters obviously have substantial implications for the efficiency and cost-effectiveness of each court's jury system. More sophisticated technologies can reduce staff time and associated costs as well as provide better management information to court administrators to assess performance and focus on problem areas. Improved jury yields essentially translate as reduced administrative costs per juror summonsed for service. Restrictions on access to juror information do not necessary reduce costs or boost efficiency, although in some instances courts that have reviewed their approach to juror privacy have declined to collect juror information for which they do not perceive a legitimate need for jury administration or selection purposes. It should not be overlooked, however, that operational matters also provide citizens with their first impressions of jury service. It establishes what they can expect from courts in terms of convenience in communication with the jury office, demands on their time, reimbursement for out-of-pocket expenses, and the levels of respect for privacy. It is clear from examining the Local Court Surveys that state courts differ a great deal across all of these dimensions. As we discuss in the next section, citizens also experience a variety of practices in the courtroom during jury selection (voir dire) and during trial.

V. JUDGE & LAWYER SURVEY

The previous section focused on local court operations such as how prospective jurors are qualified and summonsed for jury service, how long they serve, and what type of improvements efforts courts have undertaken. In this section, we examine data from the Judge & Lawyer Survey, which focused primarily on in-court procedures and trial innovations. Just as local court operations can vary from court to court, even within states, in-court practices and procedures can vary from judge to judge, even within local courts. To some extent, in-court practices are affected by court rules and case law proscribing acceptable and unacceptable procedures, but the majority of states leave a great deal of discretion in the hands of the trial judge to determine how to manage the jury trial and what tools or assistance, if any, can be provided to jurors. How this discretion is exercised often depends greatly on local litigation culture. This component of the State-of-the-States Survey is the first known study to document on a national basis the extent to which judges employ various practices and procedures during voir dire, trial, and jury deliberations.

Voir Dire

Jury selection practices vary tremendously from state to state across a number of key characteristics. For example, all courts agree that the purpose of voir dire is to identify and remove prospective jurors who are unable to serve fairly and impartially. But not all states recognize the exercise of peremptory challenges as a legitimate purpose of voir dire. Although most judges frown on the practice, many lawyers also view the voir dire as the beginning of trial advocacy – that is, their first opportunity to gain favor with the trial jurors or even present evidence if they can.

Other key differences in voir dire among states are the number of peremptory challenges available to each side; the legal criteria for ruling on challenges for cause; and the basic mechanics of voir dire such as judge-conducted or lawyer-conducted questioning, the use of general or case-specific questionnaires, and panel versus individual questioning.

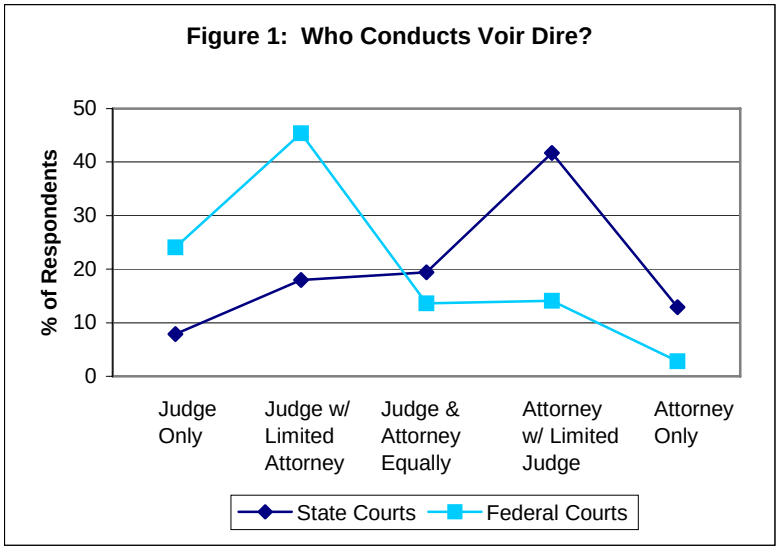

Figure 1 illustrates the continuum of voir dire questioning from an exclusively judge-conducted voir dire on the left to an exclusively attorney-conducted voir dire on the right. Although attorney-conducted voir dire is common in state courts and judge-conducted voir dire is the norm in federal courts, there is still substantial state-to-state variation. See Table 21. In addition, attorney

participation in voir dire was slightly, but significantly, higher[50] in civil trials than in criminal trials in 19 states, suggesting that judges in those jurisdictions are less restrictive in jury selection in civil trials. In two states – Massachusetts and New Jersey – the pattern was reversed, with judges exerting greater control in civil trials and giving lawyers slightly more participation in criminal trials.

Table 21: Who Conducts Voir Dire in State Courts?	
Predominantly or Exclusively Judge-Conducted Voir Dire	AZ, DC, DE, MA, MD, ME, NH, NJ, SC, UT
Judge and Attorney Conduct Voir Dire Equally	CA, CO, HI, ID, IL, KY, MI, MN, MS, NM, NV, NY, OH, OK, PA, VA, WI, WV
Predominantly or Exclusively Attorney-Conducted Voir Dire	AK, AL, AR, CT, FL, GA, IA, IN, KS, LA, MO, MT, NC, ND, NE, OR, RI, SD, TN, TX, VT, WA, WY

The balance between judge-conducted and attorney-conducted voir dire is important for several reasons. Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers.[51] Moreover, attorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges. On the other hand, many judges prefer to conduct most or all of the voir dire themselves. They argue that attorneys waste too much time and unduly invade jurors' privacy by asking questions that are only tangentially related to the issues likely to arise at trial.

Who questions the prospective jurors is not the only aspect of voir dire that can differ substantially from judge to judge and from court to court. The methods that judges and attorneys use to question jurors and to learn jurors' responses also vary considerably, both in form and in combinations of forms. See Table 22. For example, the vast majority of judges and attorneys (86%) reported that in their most recent jury trial, at least some questions were posed to the full panel, usually with instructions to answer by a show of hands. Another common approach is to question each juror individually in the jury box, moving from juror to juror until the entire venire panel has been questioned.

Table 22: Voir Dire Methods	% of Respondents	
	State Courts	Federal Courts
Questions to prospective jurors in the venire…		
Full Panel	86	86
Individuals in the Jury Box	63	52
Individuals at Sidebar / Chambers	31	31
General Questionnaire	34	33
Case Specific Questionnaire	5	10

Judges and attorneys have gradually become more aware of jurors' reluctance to disclose sensitive or embarrassing information in the presence of the entire jury panel and courtroom observers. Approximately one-third reported

[50] The average difference in ratings between criminal and civil voir dire in these states was only .45 higher on a scale of 1 (exclusively judge-conducted voir dire) to 5 (exclusively attorney-conducted voir dire). The only state with a difference greater than 1 was New York, for which survey respondents indicated that criminal voir dire was slightly dominated by judges (2.81), but civil voir dire was heavily dominated by lawyers (4.58).

[51] Susan E. Jones, *Judge versus Attorney-Conducted Voir Dire*, 11 L. & HUMAN BEHAV. 131 (1987).

that jurors were given the opportunity to answer questions in the relative privacy of a sidebar conference or in the judge's chambers. Other judges and lawyers provide jurors with written questionnaires to remove the necessity of disclosing information orally.

Most of these techniques are used in combination with one another. Fewer than one-third of jury trials relied on a single voir dire technique. In nearly half of the trials, voir dire involved direct questioning of the entire panel with supplemental individual questioning in the jury box or at sidebar. Seventeen percent (17%) of trials involved all three methods. Written questionnaires supplemented oral voir dire in 38 percent of the trials and were the only form of voir dire in 1 percent of the trials.

Capital felony trials required the greatest amount of time to impanel a jury; the median was 6 hours in state courts and 7 hours in federal courts. Non-capital felony trials and civil trials required 2 hours, and misdemeanor trials only 1.5 hours in state courts and 1 hour in federal courts. These figures mask a great deal of variation, however. For example, South Carolina consistently reported the shortest average voir dire time (30 minutes) in both felony and civil trials, with Delaware and Virginia closely following (1 hour or less). South Carolina relies heavily on the use of written questionnaires that are distributed to attorneys before voir dire, rather than oral questioning in court. Connecticut consistently had the longest voir dire time – 10 hours in felony trials and 16 hours in civil trials, ostensibly due to the statewide practice of predominantly attorney-conducted individual voir dire with each prospective juror. See Appendix F, Tables 2 and 3, for state-by-state comparisons of voir dire length in felony and civil trials.

Not surprisingly, a number of trial characteristics in addition to case type can affect the length of jury selection including the number of jurors to be impaneled, the number of peremptory challenges, and the relative level of evidentiary and legal complexity that jurors are likely to encounter during trial. Table 23 indicates the average number of minutes that are added to or subtracted from the length of voir dire by these factors as well as by the use of various voir dire practices. The values were calculated using linear regression methods, which also incorporate the level of variation to assess whether those values indicate a statistically measurable difference in voir dire length as a result of those factors (indicated with asterisks) or whether those values are more likely the result of random chance.

To illustrate how to read this table, consider the example of a civil trial in which the judge and lawyers conduct voir dire on a more-or-less equal basis by questioning jurors individually in the jury box (the Reference trial). Neither the evidence nor the applicable law is expected to be complex. The final jury will be composed of 12 jurors and each side may exercise up to 3 peremptory challenges during jury selection. Using the regression model to calculate the values in Table 23, jury selection for this type of trial would require an average of 114 minutes to complete, or just under 2 hours. Imagine now that instead of a civil trial, this is misdemeanor trial, but all of the other factors have stayed the same. As a result, voir dire would take on average 25 minutes less to complete as indicated by the -25 value next to the trial characteristic for misdemeanor. Now imagine that it is the same misdemeanor trial, but the attorneys predominantly conduct the voir dire examination of jurors, which adds 25 minutes on average to the length of voir dire.

There are two important caveats with respect to the use of this table. First, although a number of the factors included in the regression model were statistically significant, the model itself was not particularly robust – that is, these trial characteristics and voir dire procedures explain only a small proportion of the variation in voir dire length.[52] It is highly likely that this aspect of trial procedure is also affected by local legal culture, demographic and attitudinal characteristics of the local jury pool, and individual judge and lawyer preferences, which we were unable to incorporate into the regression model. Second, readers should not overlook weak (single asterisk) or non-existent (no asterisk) statistical significance for several of these factors. These indicate that the values generated by the model have greater than 5 percent probability of resulting from random chance rather than reflecting an accurate measure of the length of voir dire.

Table 23: Effect of Trial Characteristics and Voir Dire Practices on Length of Voir Dire

Trial Characteristics	# Minutes Added or Subtracted		Voir Dire Practices	# Minutes Added or Subtracted	
Casetype			**Who Conducted Voir Dire?**		
Capital Felony	707	***	Exclusively by Judge	- 47	***
Felony	8		Predominantly by Judge	- 14	
Misdemeanor	- 25	**	Equally by Judge & Attorneys	Reference	
Civil	Reference		Predominantly by Attorney	25	**
			Exclusively by Attorney	105	***
Evidentiary Complexity			**Oral Questions Posed to …**		
Not at all Complex	Reference		Entire Panel	-134	***
Moderately Complex	60	***	Individual Jurors in Jury Box	Reference	
Extremely Complex	119	***	Individual Jurors at Sidebar	82	***
Legal Complexity			**Use of Questionnaires**		
Not at all Complex	Reference		None	Reference	
Moderately Complex	43	***	General Written Questionnaires	- 13	*
Extremely Complex	85	***	Case-Specific Questionnaires	227	***
Number of Trial Jurors Impaneled					
6 Jurors	71	***			
8 Jurors	47	***			
12 Jurors	Reference				
Number of Peremptory Challenges Available to Parties					
3 per side	Reference		* $p < .10$		
6 per side	38	***	** $p < .05$		
12 per side	114	***	*** $p < .01$		

In spite of these weaknesses, these analyses do indicate a measurable relationship between several trial characteristics and voir dire practices and the average length of voir dire. Not surprisingly, as the issues to be decided at trial become increasingly serious, judges and attorneys spend greater amounts of time examining jurors. Thus, felony voir dire on average is about an

[52] Adjusted R Square=0.217.

hour longer than civil trials, and voir dire in capital felony trials more than 13 hours longer. Increasing levels of trial complexity also contribute to longer voir dire, although evidentiary complexity has a stronger impact than legal complexity. Ironically, as the size of the jury increases, the amount of time needed to impanel the jury decreases. As a general rule, judge-conducted voir dire takes less time than attorney-conducted voir dire. Oral questions posed to the entire panel takes substantially less time, while individual voir dire at sidebar and the use of case-specific questionnaires tends to increase the length of voir dire.

Trial Practices

Once the jury has been impaneled, the evidentiary portion of the trial begins. This aspect of trial practice has perhaps undergone the most dramatic changes in recent years. In particular, a sea change has occurred in the way judges and attorneys view the jury's role during trial. The traditional view is that jurors are passive receptacles of evidence and law who are capable of suspending judgment about the evidence until final deliberations, of perfectly and completely remembering all of the evidence presented at trial, and of considering the evidence without reference to preexisting experience or attitudes. This view has rapidly given way to a contemporary understanding of how adults perceive and interpret information, which posits that jurors actively filter evidence according to preexisting attitudes, making preliminary judgments throughout the trial.[53] This view of juror decision-making has spurred a great deal of support for trial procedures designed to provide jurors with common-sense tools to facilitate juror recall and comprehension of evidence, and juror confidence and satisfaction with deliberations.[54] The Judge & Lawyer Survey asked trial practitioners to report their experiences with these types of techniques in their most recent trials. Table 24 provides an overview comparing the responses of practitioners in state court to those in federal court.

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[53] *See generally* B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries,* 68 IND. L. J. 1229 (1993).

[54] G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS (2d ed. 2006); AMERICAN BAR ASSOCIATION, *supra* note 4.

Table 24: Trial Innovations	State Courts	Federal Courts
Note taking (%)		
Jurors could take notes	69.0	71.2
Jurors given paper for notes	63.7	68.4
Jurors given a notebook	5.8	11.2
Allowed juror questions during trials (%)	15.1	10.9
Criminal Trials	14.0	11.4
Civil Trials	16.1	10.9
Could discuss evidence before deliberations (%)	1.5	0.9
Criminal Trials	0.7	0.3
Civil Trials	2.2	1.3
Juror instruction methods (%)		
Preinstructed on substantive law	17.7	16.9
Instructed before closing arguments	41.2	35.5
Given guidance on deliberations	54.4	52.7
At least 1 copy of written instructions provided	68.5	79.4
All jurors received copy of written instructions	32.6	39.0

It now appears that permitting jurors to take notes is a widely accepted practice in most jurisdictions. More than two-thirds of the trials in both state and federal courts permitted juror notetaking, and the vast majority of those provided writing materials for jurors to do so. In spite of its support in many jurisdictions, as well as the overwhelming empirical research attesting to its effectiveness,[55] juror notetaking was permitted in less than half the trials in 14 states, 8 of which were located in New England or the Mid-Atlantic region of the United States. One factor in judges' decisions to permit juror notetaking was the complexity of the case; jurors serving in trials with more complex evidence were significantly more likely to be permitted to take notes and to be provided with notetaking materials than jurors in less complex trials.[56]

A second factor was the existence, or lack thereof, of statutes, court rules, or caselaw expressly stating the extent of judicial discretion to permit or prohibit juror notetaking. For example, Arizona, Colorado, Indiana and Wyoming mandate that trial judges permit jurors to take notes;[57] judges have no discretion to prohibit the practice. Only Pennsylvania and South Carolina reported on the Statewide Survey that juror notetaking was prohibited.[58]

This question of legal authority for different jury trial practices is one that has important implications for jury improvement efforts. We will highlight the general issue using juror

[55] Larry Heuer & Steven Penrod, *Juror Notetaking & Question Asking During Trials,* 18 L. & HUMAN BEHAV. 121 (1994).

[56] Jurors Permitted to Take Notes F (6, 11,351) = 25.460, Jurors Given Writing Materials F (6, 11,351) = 35.529, both ps < .001.

[57] ARIZ. R. CIV. PROC. Rule 39(p); ARIZ. R. CRIM. PROC. Rule 18.6(d); COLO. R. CIV. PROC. Rule 47(t); COLO. R. CRIM. PROC. Rule 16(f); IND. R. CT. Jury Rule 20; WYO. R.. CIV. PROC. Rule 39.1(a); WYO. R. CRIM. PROC. Rule 24.1(a).

[58] Pennsylvania prohibits juror notetaking in criminal trials only. PA. R. CRIM. PROC. Rule 644. South Carolina reported that juror notetaking was prohibited in both criminal and civil trials, but did not report the authority for the prohibition.

notetaking as an illustration, but readers should understand that the existence or absence of positive law had some impact on all of the trial techniques examined in the Judge & Lawyer Survey. The Statewide Survey requested that respondents indicate whether these trial practices were required, permitted in the discretion of the trial judge, or prohibited and to provide the legal authority (statute, court rule, or court opinion). Table 25 shows the percentage of trials in which jurors were permitted to take notes based on responses to the Statewide Survey concerning the existence of legal authority governing juror notetaking. Not surprisingly, in states where juror notetaking is required, the percentage of trials in which jurors were permitted to take notes is extremely high. Overall, jurors were permitted to take notes in more than two-thirds of the trials in states that leave the decision on juror notetaking to the discretion of the trial judge, but state-by-state rates of juror notetaking ranged from a low of 19 percent in Rhode Island to a high of 96 percent in Arkansas. See Appendix F, Table 7. What is extremely surprising is the apparent lack of compliance in those states that prohibit juror notetaking. According to the Judge & Lawyer Survey reports, of the 206 criminal trials that took place in Pennsylvania and South Carolina (the only two states that prohibit juror notetaking), more than one-fourth of the judges permitted jurors to take notes, and of the 36 civil trials that took place in South Carolina, nearly half (42%) permitted jurors to take notes! In fact, in 23% of both the criminal and civil trials, jurors were actually given writing materials with which to take notes!

Table 25: Impact of Law Governing Juror Notetaking

	% of Trials in which Jurors were Permitted to Take Notes	
Juror Notetaking …	**Civil Trials**	**Criminal Trials**
Prohibited	42	27
Permitted	70	69
Required	97	95

The apparent non-compliance with the prohibition on juror notetaking by Pennsylvania and South Carolina trial judges is quite puzzling. Certainly one possibility may be that judges and lawyers in those states have learned enough about the benefits of this technique (and the absence of any disadvantages) that they simply ignore the prohibition. As we find throughout this discussion, many of these techniques are employed in combination with one another, suggesting that judicial and lawyer education about these techniques in many jurisdictions may have begun to show measurable effects.

Yet another possibility is the extent to which the trial bench and bar may be unaware of prohibitions on different trial court practices – if, in fact, any legal authority for the prohibitions actually exists. For example, the South Carolina Statewide Survey reported that juror notetaking is prohibited in both criminal and civil trials, but it did not report the legal authority for the prohibition. A search of the South Carolina statutes, court rules, and reported judicial opinions did not reveal the source of the prohibition. In fact, the only judicial opinion that discusses juror notetaking – a 1985 appeal from a capital felony trial – indicated that juror notetaking is a matter of trial court discretion, and not prohibited at all.[59] Perhaps the individual who completed South Carolina's Statewide Survey was simply mistaken. Or perhaps the prohibition on juror notetaking in South Carolina simply reveals a widespread perception within the South Carolina

[59] *South Carolina v. South,* 331 S.E.2d 775 (S.C. 1985)("Finally, South contends the lower court erred in allowing jurors to take notes. Such was a proper exercise of discretion."). *Id.* at 778.

legal community about this technique. This possibility in South Carolina concerning juror notetaking, and in other states concerning the norms for other trial practices for which no legal authority can be found, may explain non-apparent non-compliance rates, but also the great variation in the use of these techniques in states that leave these decisions in the sound discretion of the trial judge.

Table 26: Mean Ratings of Evidentiary and Legal Complexity

	Evidentiary Complexity	Legal Complexity
All Trials	3.66	3.57
Casetype		
Capital Felony	4.90	4.80
Felony	3.50	3.49
Misdemeanor	2.47	2.58
Civil	3.98	3.78
Other	3.44	3.47
Jurisdiction		
State Court	3.62	3.51
Federal Court	4.23	4.30

We have already seen how trial complexity affects the length of voir dire. It also affects judicial decisions about trial techniques, and thus deserves some additional explanation. Two of the survey questions asked respondents to rate the level of evidentiary and legal complexity on a scale of 1 (not at all complex) to 7 (extremely complex). See Table 26. Overall, 18 percent of trials were rated as very complex (6 or 7) on at least one measure of complexity and 7 percent on both measures. It is important to recognize that in studies of trial complexity, judges and lawyers tend to perceive complexity at lower levels than jurors.[60] Therefore, when judges and lawyers rate complexity as a 6 or 7, jurors' perceptions of complexity will, quite literally, be off the scale.

Survey respondents rated trial complexity in predictable ways. On average, capital felony trials were rated the most complex on both evidentiary and legal scales. Civil trials were rated slightly more complex than non-capital felony trials. Misdemeanor trials were the least complex. On average, trials in federal court were rated more complex than those in state courts.

Trials that are highly complex – e.g., 6 or higher on a 7-point scale – are trials in which juror notebooks can be extremely helpful, but overall juror notebooks were not very popular, even in complex trials.[61] Only 11 percent of trials involving complex evidence and law provided notebooks for jurors. Notebooks were used twice as often in civil trials (8%) as in criminal trials (4%),[62] and nearly twice as often in federal court (11%) as in state court (6%).[63]

One of the more controversial techniques involves permitting jurors to submit written questions to witnesses. A substantial and growing body of empirical research has found that this practice, if properly controlled by the trial judge, improves juror comprehension without prejudicing

[60] Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, & G. Thomas Munsterman, *The Hung Jury:* The American Jury*'s Insights and Contemporary Understanding,* 39 CRIM. L. BULL. 33, 46 (2003).

[61] The content of juror notebooks can vary depending on the nature of the case, but they often contain a brief summary of the claims and defenses, preliminary instructions, copies of trial exhibits or an index of exhibits, a glossary of unfamiliar terminology, and lists of the names of expert witnesses and brief summaries of their backgrounds. MUNSTERMAN et al. *supra* note 52, at 102-03.

[62] F (1, 11,750) = 69.358, $p < .001$.

[63] F (1, 11,277) = 41.422, $p < .001$.

litigants' rights to a fair trial.[64] The crux of the controversy stems from philosophical arguments about the role of the jury in the context of an adversarial system of justice. The practice is mandated for criminal trials in three states,[65] prohibited in eleven states,[66] and left to the sound discretion of the trial court in the rest. In civil trials, juror questions are mandated in four states,[67] prohibited in ten states,[68] and left to the discretion of the trial judge in the rest.

Compliance with prohibitions juror questions was greatly improved over that for juror notetaking. None of the 1,175 criminal trials in states that prohibit juror questions violated the prohibition, and only 6 percent of the 1,394 civil trials did not follow the rule. In states that mandate that jurors be permitted to submit questions to witnesses, jurors were permitted to do so in 84% of the criminal trials and 86% of the civil trials.

Given the ongoing controversy in many jurisdictions, what is most surprising from these data is that jurors were allowed to ask questions in 14.5 percent of all trials, and 15.6 percent of civil trials. Rules or case law expressly permitting or prohibiting juror questions had a significant impact on the practice.[69] Evidentiary complexity also played a role, with judges permitting juror questions in 17 percent of the most complex cases, but only 12 percent of the least complex cases.[70] Judges were also significantly less likely to permit juror questions in federal court compared to state courts.[71]

Another controversial technique is to allow jurors in civil trials to discuss the evidence among themselves before final deliberations.[72] Arizona, Colorado, and Indiana have enacted court rules

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[64] Shari S. Diamond, Mary R. Rose, Beth Murphy, & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking,* 59 VANDERBILT L. REV. 1927 (2006); Larry Heuer & Steven Penrod, *Juror Notetaking & Question Asking During Trials,* 18 L. & HUMAN BEHAV. 121 (1994).

[65] ARIZ. R. CRIM. PROC. Rule 18.6(e); COLO. R. CIV. PROC. Rule 47(u); COLO.R. CRIM. PROC. Rule 24(g); BURNS IND. JURY R. Rule 20(7).

[66] *Matchette v. Georgia,* 364 S.E.2d 545 (1988); *Minnesota v. Costello,* 646 N.W.2d 204 (2002; *Wharton v. Mississippi,* 784 So.2d 985 (1998); *Nebraska v. Zima,* 468 N.W.2d 377 (1991); *Morrison v. Texas*, 845 S.W.2d 882 (1992). The Statewide Surveys for Illinois, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff were unable to locate the source of prohibition in the relevant state statutes, court rules, and case law. Arkansas recently prohibited juror questions by court rule. *See* ARK. R. CRIM. P. Rule 33.8. The rule was enacted after data collection for the State-of-the-States Survey was complete.

[67] ARIZ. R. CIV. PROC. Rule 39(b)(10); COLO. R. CIV. PROC. Rule 47(u); IND. R. CT. Jury Rule 20; WYO. R. CIV. PROC. Rule 39.4.

[68] *Minnesota v. Costello,* 646 N.W.2d 204 (2002); *Nebraska v. Zima,* 468 N.W.2d 377 (1991); *Morrison v. Texas*, 845 S.W.2d 882 (1992). The Statewide Surveys for Georgia, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff were unable to locate the source of prohibition in the relevant state statutes, court rules, and case law.

[69] Cox & Snell R Square = .171, Juror Qs Permitted (Criminal) *Wald*=446.098, $p < .001$; Juror Qs Permitted (Civil) *Wald* =14.274, $p < .001$.

[70] *Id.* Evidentiary Complexity *Wald* = 23.048, $p < .001$; Legal Complexity *Wald* = .510, *ns.*

[71] *Id.* State Court Wald = 9.781, $p = .002$

[72] MUNSTERMAN et al., *supra* note 52, at 124-25.

explicitly permitting this practice.[73] Maryland has caselaw that apparently condones the practice.[74] Elsewhere, the practice is implicitly permitted by virtue of the fact that no legal authority explicitly prohibits it. In most states it is prohibited altogether.[75] Overall, juror discussions were permitted in only 2 percent of state jury trials and only 1 percent of federal court trials. Surprisingly, one-third of the trials in which jurors were permitted to discuss the evidence took place in states that prohibit the practice. Given the large number of states (29) in which unauthorized juror discussions took place, it appears that this particular technique has generated enough interest to encourage a small number of judges to secure the consent of counsel and to permit juror discussions in individual cases, even though they are expressly prohibited.

A substantial amount of research suggests that juror comprehension of the law is affected by the timing and form of jury instructions. One technique growing in prevalence (18%) is to pre-instruct jurors about the substantive law – that is, to provide a basic overview of the black letter law governing the case in addition to administrative housekeeping rules and general legal principles.[76] Pre-instructions provide jurors with a legal context in which to consider the evidence, helping them better understand and evaluate evidence as they hear it and remember evidence more accurately. Eight states report that they require judges to pre-instruct jurors on the substantive law before the evidentiary portion of the trial,[77] although most of the required instructions deal with basic legal principles such as burden of proof and admonitions concerning juror conduct rather specific instructions on the elements of crimes or claims to be proven at trial. Two states – Nevada and Texas – prohibit pre-instructions.[78]

As before, the existence of rules concerning pre-instructions affected judges' decisions to pre-instruct juries.[79] Judges were also significantly less likely to pre-instruct in civil trials compared to criminal trials.[80] Federal judges were marginally more likely to pre-instruct than state judges,[81] but trial complexity was unrelated to judges' decisions to pre-instruct.[82] It does appear

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[73] ARIZ. R. CIV. PROC. Rule 39(f); COLO. JURY INSTRUCTIONS 1:4, 1:8;

[74] *Wilson v. Maryland,* 242 A.2d 194 (1968).

[75] *See* Valerie P. Hans, Paula L. Hannaford & G. Thomas Munsterman, 32 U. MICH. J.L. REFORM 349, 352-60 (1999).

[76] G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR, & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS 132-33 (2d ed. 2006).

[77] COLO. R. CIV. PROC. Rule 47(a)(2)(V), 47(a)(5); COLO. R. CRIM. PROC. Rule 24(a)(5); IND. R. CT. Jury Rules 20(a); MO. R. S. CT. Rule 27.02; N.Y. CRIM. PROC. LAW §§ 260.30, 270.40; OR. R. CIV. PROC. Rule 58B(2); OR. REV. STAT. § 136.330; TENN. R. CRIM. PROC. Rule 51.03(1); TENN. R. CIV. PROC. Rule 30(d)(1); WYO. R. CIV. PROC. Rule 39.3, WYO. R. CRIM. PROC. Rule 24.3. No legal authority could be found for the requirement in South Carolina.

[78] Neither state cited legal authority for the prohibition in their respective Statewide Surveys.

[79] Cox & Snell R Squared = .054, Pre-instruction Rule (Civil) *Wald* = 22.531, $p < .001$; Pre-instruction Rule (Criminal) *Wald* = 11.416, $p = .001$.

[80] *Id.* Criminal Trial *Wald* = 94.564, $p < .001$.

[81] *Id.* Jurisdiction *Wald* = 3.726, $p = .054$.

[82] *Id.* Evidentiary Complexity *Wald* = .851, .Legal Complexity *Wald* = .022, both *ps*, *ns.*

that many judges who pre-instructed their juries view this technique as part of a set of jury trial practices; those who did so were also significantly more likely to permit jurors to take notes, to submit questions to witnesses, to permit juror discussions before deliberations, to deliver final instructions before closing arguments, and to provide jurors with a written copy of the instructions.[83]

Other techniques to improve juror comprehension of the law involve instructing the jury before closing arguments and to provide written copies of the instructions to jurors for use during deliberations.[84] The rationale for the former is that closing arguments are more meaningful within the legal framework provided by the instructions. However, fewer than half of the trials in the study did so. Because jury instructions are often quite lengthy, written instructions ensure that jurors are able to consider all of the instructions during deliberations, not just those portions that they can remember. At least one copy of written instructions was provided to the jury in more than two-thirds of state jury trials, and nearly three-quarters of federal jury trials. However, only one-third provided copies for all jurors during deliberations.

State rules governing the timing and form of instructions were a significant factor in when and how instructions were delivered in both criminal and civil trials.[85] Evidentiary complexity was a factor in the use of both techniques, but surprisingly in different directions. Controlling for other factors, judges were less likely to instruct before closing arguments in complex trials,[86] but more likely to provide written instructions.[87] Federal judges were less likely than state judges to instruct before closing arguments,[88] but were more likely to provide written instructions to juries.[89] Like pre-instructions, much of the discretion exercised by judges appears to be affected by their awareness and support for other jury trial innovations. Judges who instructed before closing arguments were significantly more likely to pre-instruct juries, to permit juror notetaking and juror discussions, and to provide written instructions, but not to permit juror questions.[90] Judges who provided the jury with at least one copy of written instructions were marginally more likely to pre-instruct on the law, to permit jurors to take notes, and to deliver final instructions before closing arguments, but not to permit juror questions or discussions.[91]

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[83] *Id.* Juror Notetaking *Wald* = 22.471, $p < .001$; Juror Questions *Wald* = 116.235, $p < .001$; Juror Discussions *Wald* = 32.536, $p < .001$; Instructions Before Closing *Wald* = 16.867, $p < .001$; and Written Instructions *Wald* = 3.705, $p = .054$.

[84] MUNSTERMAN et al., *supra* note 52, at 142-43, 151-52.

[85] Instructions before Closing Cox & Snell R Square = .282; Rules on Timing of Instructions (Civil) *Wald* = 11.389, $p = .001$; Rules on Timing of Instructions (Criminal) *Wald* = 113.983, $p < .001$. Written Instructions Cox & Snell R Square = .283, Rules on Written Instructions (Criminal) *Wald* = 1339.244, $p < .001$.

[86] *Id.* Evidentiary Complexity *Wald* = 6.296, $p = .012$; Legal Complexity *Wald* = .238, *ns.*

[87] *Id.* Evidentiary Complexity *Wald* = 17.476, $p < .001$; Legal Complexity *Wald* = .205, *ns.*

[88] *Id.* Jurisdiction *Wald* = 22.744, $p < .001$.

[89] *Id.* Jurisdiction *Wald* = 66.056, $p < .001$.

[90] Juror Notetaking *Wald* = 132.911, $p < .001$; Juror Questions *Wald* = .176, *ns*; Juror Discussions *Wald* = 10.711, $p = .001$; Pre-Instructions *Wald* = 18.805, $p < .001$; Written Instructions *Wald* = 410,537, $p < .001$.

[91] Juror Notetaking *Wald* = 345.551, $p < .001$; Juror Questions *Wald* = .306, *ns*; Juror Discussions *Wald* = .921, *ns*; Pre-Instructions *Wald* = 2.726, $p < .099$; Instructions before Closing *Wald* = 404. 073, $p < .001$.

Local practices and trial exigencies affected some procedural aspects of the trials in this study. Juries deliberating in state courts were significantly more likely to be sequestered (25% of all trials) than juries in federal court (15% of all trials).[92] Moreover, criminal juries in state courts were more likely to be sequestered than civil juries (27% and 23%, respectively), but that pattern was reversed in federal courts with civil juries more likely to be sequestered (11% and 17%, respectively).[93] Alternates were most likely to deliberate in federal civil trials (23%).[94] Alternates deliberated in state civil trials 10% of the time, but in just 1% of criminal trials in both state and federal trials.

What effect do these techniques have on the length of jury deliberations? In Table 27 we see that the length of deliberations across all case categories is slightly shorter in state courts compared to federal courts, although some state court deliberations exceeded those in federal court. For example, Connecticut had the longest average deliberation time (7.75 hours) in felony trials. Wisconsin had the shortest (1 hour).

Table 27: Median Deliberation Time (hours)

	State Courts	Federal Courts
Capital Felony	6.0	10.0
Felony	3.0	4.0
Misdemeanor	2.0	2.5
Civil	3.0	4.0
Other	2.0	2.5

Like voir dire, the length of deliberations was affected by a number of factors, some related to trial characteristics and some related to the types of jury techniques employed by the judge. Table 28 was constructed using the same methods as Table 23 and indicates the effect of these factors on the length of jury deliberations.[95] The reference trial is again a civil trial in state court in which the evidence and law are not at all complex, twelve jurors were required to deliberate to a unanimous verdict, and no decision-making aids were provided to jurors during trial or deliberations. The average deliberation time for such a trial is 166 minutes (2.77 hours).

[92] $F = 48.617$, $p < .001$. Although statistically significant, this finding should be viewed with caution insofar that respondents may have defined the term "sequestered" to encompass deliberations in which the jury was kept together during routine breaks during deliberations (e.g., lunch), but not sequestered overnight.

[93] State Court $F = 19.355$, $p < .001$; Federal Court $F = 5.371$, $p = .021$.

[94] The Federal Rules of Civil Procedure specifies that civil juries consist of "not fewer than six and not more than twelve members" and requires that all jurors impaneled participate in deliberations. FED. R. CIV. PROC. Rule 48.

[95] Like the voir dire regression model, the deliberation model failed to include the vast majority of factors that explain deliberation length in jury trials. Adjusted R Square=0.146. It is thus subject to the same caveats discussed in the voir dire model.

Table 28: Effect of Trial Characteristics and Trial Practices on Length of Deliberations					
Trial Characteristics	**# Minutes Added or Subtracted**		**Trial Practices**	**# Minutes Added or Subtracted**	
State Court	Reference	***	**None**	Reference	
Federal Courts	123		**Jurors Permitted to Take Notes**	26	***
Casetype			**Jurors Provided a Notebook**	31	**
Capital Felony	225	***	**Jurors Permitted to Submit Questions to Witnesses**	7	
Felony	39	***		- 10	
Misdemeanor	- 7				
Civil	Reference				
Evidentiary Complexity			**Jurors Permitted to Discuss Evidence**	- 15	
Not at all Complex	Reference	***			
Moderately Complex	112	***			
Extremely Complex	223	***			
Legal Complexity			**Jurors Instructed before Closing Arguments**	- 23	***
Not at all Complex	Reference	***			
Moderately Complex	55	***			
Extremely Complex	109	***			
Number of Trial Jurors Impaneled			**Written Instructions**		
6 Jurors	- 18	**	1 Copy of Instructions for Jury	35	***
12 Jurors	Reference	**	All Jurors Provided Written Instructions	5	
Alternates Deliberated	7				
Jurors Sequestered	- 36	***			
Unanimous Verdict Required	- 20	**			

* $p < .01$
** $p < .05$
*** $p < .001$

As a general matter, trial characteristics tended to affect deliberation length more often than trial practices. On average, juries deliberate in state court less time than federal juries.[96] Juries in both capital and non-capital felony trials deliberate significantly longer than civil trial juries, but there was no significant difference between civil and misdemeanor deliberations.[97] Both evidentiary and legal complexity resulted in increased deliberations.[98] Surprisingly, the number of impaneled jurors deliberating had no effect on deliberation length, but permitting alternates to

[96] *Id.* Jurisdiction $t = -7.704$, $p < .001$.

[97] *Id.* Capital felony $t = 9.650$, $p < .001$; Non-capital felony $t = 4.223$, $p < .001$; Misdemeanor $t = -.013$, *ns.*

[98] *Id.* Evidentiary Complexity $t = 9.002$, $p < .001$; Legal Complexity $t = 7.160$, $p < .001$.

deliberate did lengthen deliberations.[99] Sequestering juries and requiring a unanimous verdict actually decreased deliberation time.[100]

Some trial practices did affect deliberation length. For example, jurors who were instructed before closing arguments deliberated for shorter periods, suggesting that they may have less difficulty understanding and applying the instructions.[101] On the other hand, jurors who were permitted to take notes, jurors who were given trial notebooks, and juries that were given at least one written copy of the instructions tended to deliberate longer, perhaps because jurors who were equipped with those tools engaged in more thorough deliberations.[102] Other techniques such as juror questions, pre-instruction on the evidence and law, and juror discussions had no effect on deliberation length.

As we noted earlier, many judges often use innovative jury trial techniques in various combinations. We wanted to gauge the extent to which statewide initiatives had an effect on judges' willingness to do so. To examine this issue, we constructed an index of key jury techniques consisting of juror notetaking, juror questions, juror discussions, pre-instructions, instructions before closing arguments, and written instructions. The index ranged from 0 (no innovative techniques employed at trial) to 6 (all key techniques employed). The median index value was 2 – that is, an average of two techniques employed per trial. Then, using regression analyses to control for the trial venue (state or federal court), evidentiary and legal complexity, and case type (criminal or civil), we measured the impact of various statewide initiatives to determine which, if any, resulted in increased use of these techniques.[103] We found that educational efforts directed at all potential audiences (judges, attorneys, and the public) resulted in increased use of innovative techniques.[104] More intensive efforts to test and evaluate these techniques (e.g., evaluations, court observations) were also associated with increased use of key innovations.[105] Surprisingly, some approaches to jury improvement correlate with lower use of these techniques, most notably, the existence of a statewide task force or commission.[106] But this may be simply a matter of timing. That is, the substantive work of these task forces may not yet have translated into measurable increases in the use of jury innovations.

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[99] *Id.* Number of Jurors $t = .695$, *ns*; Alternates deliberated $t = 2.879$, $p = .004$.

[100] *Id.* Jurors sequestered $t = -4.395$, $p < .001$; Unanimous verdict $t = -2.889$, $p = .004$.

[101] *Id.* Instructions before Closing $t = -3.539$, $p < .001$.

[102] *Id.* Juror Notetaking $t = 3.180$, $p = .001$; Juror Notebooks $t = 4.780$, $p < .001$; Written Instructions $t = 4.471$, $p < .001$.

[103] Adjusted R Square=.138; F (14, 11,006)=127.22, $p < .001$. Of the trial characteristic factors incorporated into the model, only Evidentiary complexity (t =5.919, $p < .001$) and Type of case ($t = 4.754$, $p < .001$) were statistically significant.

[104] Judge education $t = 13.841$, Attorney education $t = 7.259$, and Public education $t = 21.920$, all *p*s < .001.

[105] Evaluate ($t = 12.735$), Court observation ($t = 11.181$), all *p*s < .001.

[106] Statewide Task Force $t = -13.324$), $p < .001$.

VI. CONCLUSIONS

The State-of-the-States Survey of Jury Improvement Efforts is, to the best of our knowledge, the most comprehensive snapshot of jury operations and practices ever yet undertaken. From it, we confirmed a great deal of information about how state and local courts operate and manage their jury systems. Some of these findings were suspected, but we lacked reliable empirical documentation on which to confirm these suspicions. The statistics on jury yield, for example, fall roughly in the ranges we expected, but we anticipate that more precise statistics will provide courts with a better baseline on which to assess their own performance.

On the other hand, the State-of-the-States Survey also resulted in many surprises, not the least of which was the actual number of jury trials conducted annually in state courts. The NCSC had previously estimated the number of jury trials conducted in general jurisdiction courts,[107] but the State-of-the-States Survey indicates that a considerable proportion of jury trials – perhaps as much as 40 percent – are actually conducted by limited jurisdiction courts, which had been excluded from previous estimates. The volume of jury trial activity in these courts is certainly a surprise and suggests that recent trends to eliminate the right to trial by jury for low-level offenses and low-value civil cases in many jurisdictions has not been as widespread and successful as previously imagined. It also helps to explain the relatively high summoning rates – 15% of the adult American population each year – and the increasing proportion of Americans that report having served as trial jurors.

Certainly one finding from the State-of-the-States Survey is that, in spite of statewide efforts to regulate jury operations and trial practices in some jurisdictions, most jury operations and practices are still governed on a local, and even individual, basis. The use of general terminology to describe jury practices (e.g., term of service, statutory exemptions, one-step versus two-step summoning procedures) tends to mask a great deal of local variation. As we discovered during the long, slow process of collecting data for the State-of-the-States Survey, the extent of continued local autonomy not only makes it difficult to collect data, but also makes it difficult to define terms and to compare data across jurisdictions. It also indicates the inherent challenge – and the likelihood of substantial local resistance – that states face in attempting to implement statewide changes in jury procedures.

Another curious finding from the Judge & Lawyer Survey is the extent to which judges and lawyers reported the use (or non-use) of various trial techniques (e.g., juror notetaking, juror questions to witnesses, written copies of instructions) that apparently conflicts with existing court rules or policies. As a general matter, judges and lawyers are more likely to use these techniques in jurisdictions that prohibit them than to not use them in jurisdictions that mandate them. Some instances of these inconsistencies may be the result of mistakes or misunderstandings on the part of the individuals who completed the Judge & Lawyer Survey or the Statewide Survey. However, the strong correlations among the different trial techniques suggests that at least in some cases, judges and lawyers have concluded that the benefits of these techniques in terms of improved juror performance and satisfaction outweighs any potential

[107] BRIAN J. OSTROM, NEAL B. KAUDER & ROBERT C. LAFOUNTAIN, EXAMINING THE WORK OF STATE COURTS, 2001, 102-03 (2001).

disadvantages. This decidedly Ghandi-esque approach to jury improvement at a grassroots level is very intriguing, to say the least.

We also found it heartening to see how prominent jury operations and practices are in statewide and local court improvement efforts. To some extent, we saw that local court efforts are affected by statewide initiatives, especially those involving mandated changes in jury procedures. But the level of local court activity, even in jurisdictions that had not undertaken a statewide jury improvement initiative, was considerable. A number of factors may be driving local court efforts, including the need to reduce the cost of jury operations, to improve the efficiency and effectiveness jury operations, and to be more responsive to local community demands on juror time and resources.

So how should state and local courts use this Compendium Report and the state-by-state tables (available on the Center for Jury Studies website at http://www.ncsconline.org/D_Research/cjs/)? Certainly we hope that the comparative information and analysis will encourage courts that do not routinely collect and review data on their jury operations and practices to begin doing so. This type of information is invaluable for identifying areas of relative strength and weakness, setting improvement priorities, and formulating effective strategies for addressing weaknesses. With data from the State-of-the-States Survey, judges and court administrators can now evaluate their own practices in light of those of their peers within their respective states and across the country.

As we had hoped, the State-of-the-States Survey also provides direction to the NCSC Center for Jury Studies concerning the types of activities that we should pursue to better assist state and local court policymakers. In some respects, surprises among the State-of-the-States Survey indicate the need for additional research. For example, how effective are various techniques to improve the accuracy of addresses on the master jury list, thus improving the overall jury yield? To what extent do various voir dire methods elicit candid and complete information from jurors? What implications do these methods have on juror privacy expectations? To what extent do jurors make use of decision-making aids when they are offered to them during trial?

Other areas for future research include topics that the State-of-the-States Survey did not address, either because we believed that too few courts could easily report on these topics or because we simply overlooked the issue while designing the surveys. The former category includes the extent to which courts collect and analyze information about the demographic characteristics of their jury pools and how well those jury pools reflect a fair cross section of their respective communities. Questions concerning juror utilization was also omitted from the Local Court Survey, but is critically important to the issues not only of court efficiency, but also citizen satisfaction with jury service. Finally, the Judge & Lawyer Survey failed to include questions on trial outcomes and trial length as well as respondents' opinions about voir dire and trial techniques (regardless of whether these were used at trial). All of these issues we hope to address in the future, perhaps in a subsequent iteration of the State-of-the-States Survey.

In the meantime, we continue to pursue other components of the National Jury Program, many of which are related to issues explored in the State-of-the-States Survey. The NCSC Center for Jury Studies is currently planning a National Conference on Pattern Jury Instructions, tentatively

scheduled for April 17-18, 2008. We are also seeking funding to develop a series of performance measures and tools for courts to use in assessing their jury operations; to host an Urban Courts Workshop to provide urban and statewide jury systems an opportunity to share information about innovative approaches they have developed to address the unique issues associated with heavy volume jury systems; to document the various funding streams that support the American jury system; and to undertake a series of demonstration projects to implement the ideals of the ABA Principles for Juries and Jury Trials into actual jury practices in up to six jurisdictions. Of course, the NCSC Center for Jury Studies will continue to assist courts through education, technical assistance, and research.

APPENDICES

APPENDIX A: FINANCIAL CONTRIBUTORS TO THE NATIONAL PROGRAM TO INCREASE CITIZEN PARTICIPATION IN JURY SERVICE THROUGH JURY INNOVATIONS

APPENDIX B: STATEWIDE, LOCAL COURT, AND JUDGE & LAWYER SURVEYS FROM THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS

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APPENDIX A: FINANCIAL CONTRIBUTORS TO THE NATIONAL PROGRAM TO INCREASE CITIZEN PARTICIPATION IN JURY SERVICE THROUGH JURY INNOVATIONS

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DecisionQuest, A Bowne Company

APPENDIX B: STATEWIDE, LOCAL COURT, AND JUDGE & LAWYER SURVEYS FROM THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS

National Program to Increase Citizen Participation in Jury Service

State of the States
Statewide Survey

State: _____ **Date: _____**

1. Current Status of Jury Improvement/Jury Reform Efforts

A. Is there an office or a formal organization or entity in your state concerned with managing or overseeing jury management? Yes / No

If yes, how was that office or organization created?
- ❑ Administrative Order (e.g., by Chief Judge/Justice, by court of last resort, by statewide judicial council)
- ❑ Court rule (please cite: _____)
- ❑ Other authority (please specify: _____)

B. Is there or has there existed in the past 10 years a task force or commission on jury improvement/jury reform? Y / N

If yes, what is the name(s) of Statewide Task Force(s)/Commission(s):

_____

_____

Contact Information for Task Force/Commission Chairperson:

_____

_____

Is the Task Force/ Commission currently active? Y / N

If no, dates of operation? _____

What person or agency created the Task Force/Commission?
- ❑ Chief Judge/Justice
- ❑ State Court of Last Resort
- ❑ State Judicial Council
- ❑ Other person or agency

How large was the Task Force/Commission?_____ members

What constituencies were represented on the Task Force/Commission?

- ❑ Trial judges
- ❑ Appellate judges
- ❑ Court administrators
- ❑ Jury managers
- ❑ Clerks of court
- ❑ Prosecutors
- ❑ Criminal defense lawyers
- ❑ Civil litigation lawyers
- ❑ State legislators
- ❑ Private citizens/former jurors
- ❑ Other constituencies

Has the Task Force/Commission submitted a written report of its activities? Y / N

If yes, please provide the report title and release date: _____

_____

If the report is available online, please provide the URL: _____

D. Please indicate any current or ongoing projects concerning jury improvement/jury reform efforts in which your state is involved.

- ❑ Judicial education
- ❑ Court staff education
- ❑ Attorney education
- ❑ Changes to legislation or court rules
- ❑ Pilot or demonstration programs
- ❑ Evaluations
- ❑ Public education/outreach
- ❑ Survey research
- ❑ Court observation
- ❑ Other: _____

2. Jury Management and Administration

A. What source lists are required or permitted to be used to compile to the mast jury list?

	Required	Permitted
Registered Voter	☐	☐
Licensed Driver	☐	☐
State Tax Rolls	☐	☐
Unemployment	☐	☐
Public Assistance	☐	☐
Other: _____	☐	☐

Is the master jury list compiled at the state level or at the local level? State / Local

B. What are the juror fees in this state?

- ❑ Flat daily rate of $ _____
- ❑ Graduated rate of $ _____for first day; $ _____ for _____ days; $ _____ to the completion of service
- ❑ Reimbursement for mileage/travel at $ _____
- ❑ Other juror compensation (e.g., reimbursement for child care) $_____

Are employers required to compensate employees while on jury service? Y / N
Employer size: _____ Number of days: _____

C. Is the term of jury service determined at the state level or the local level? State / Local
If at the state level, what is the term of service? _____ days / weeks
If at the local level, what (if any) is the maximum permissible term of service?
_____ days / weeks

D. Does this state employ a standardized Qualification Questionnaire/Summons? Y / N
If yes, where can we obtain a copy? _____

E. Is summoning and qualification conducted as a one-step or two-step process?

- ❑ Qualification questionnaires and jury summonses are mailed simultaneously (one-step process) in this state.
- ❑ Qualification questionnaires are first sent to prospective jurors. Summonses are then sent only to qualified individuals (two-step process) in this state.
- ❑ Individual counties within the state use both one-step and two-step procedures for qualification and summoning.

F. Please indicate any criteria for jury service.

- ❑ U.S. Citizenship
- ❑ Residency (established after _____ days / months)
- ❑ Age: _____ years or older
- ❑ No felony conviction*
- ❑ No misdemeanor conviction*
- ❑ English fluency/proficiency
- ❑ Other qualification: _____

* Is this prior criminal conviction a temporary or permanent disqualification from jury service?

- ❑ Permanent
- ❑ Temporary

Does the state promulgate criteria or guidelines for determining the English fluency of prospective jurors? Y / N
If yes, where can these criteria or guidelines be obtained?

Does the state promulgate criteria or guidelines for deciding requests to be excused for any of the reasons above? Y / N
If yes, where can these criteria or guidelines be obtained?

G. Please indicate any statutorily recognized exemptions from jury service.

- ❑ Previous jury service (within _____ months / years)
- ❑ Over _____ years of age
- ❑ Political office holders
- ❑ Judicial officers
- ❑ Licensed attorneys
- ❑ Law enforcement personnel
- ❑ Health care providers
- ❑ Other exemptions: _____

H. Please indicate any statutory basis for excusal from jury service.

- ❑ Public necessity
- ❑ Medical hardship
- ❑ Financial hardship
- ❑ Extreme inconvenience
- ❑ Other basis: _____

3. Voir Dire Procedures and Practices

A. Has the state developed a standardized questionnaire for use in voir dire? Y / N
If yes, where can we obtain a copy? _____

Has this questionnaire been implemented on a statewide basis, on a local basis, or by individual judge?
- ❑ Statewide implementation
- ❑ Local implementation
- ❑ Individual judge implementation

B. Under state law, are juror responses to the Qualification Questionnaire a public record that may be made available to parties for voir dire purposes? Y / N
If yes, please indicate the source of legal authority: _____

C. Under state law, who is permitted to question prospective jurors?

	Criminal	Civil
❑ Judge only, no attorney participation	☐	☐
❑ Judge only, attorneys provide suggested written questions	☐	☐
❑ Judge primarily with limited oral questioning by attorneys	☐	☐
❑ Judge and attorney equally	☐	☐
❑ Attorney primarily with limited judge participation	☐	☐
❑ Attorney only	☐	☐

If attorney only, is the judge present for voir dire? Y / N

D. What grounds are recognized in positive law (e.g., statute, court rule, case law, administrative order) for removing prospective jurors from the venire for cause? Please cite relevant authority.
- ❑ Personal relationship to parties, attorneys, or witnesses_____
- ❑ Personal knowledge of case _____
- ❑ Personal or family experience with crime or civil claim _____
- ❑ Exposure to media reports _____
- ❑ Attitudes/bias regarding parties _____
- ❑ Attitudes/bias regarding police _____
- ❑ Attitudes/bias regarding case characteristics _____
- ❑ Hardship _____
- ❑ Other: _____

E. How many peremptory challenges are allotted to each side?

	State/Plaintiff	Defendant	Alternates	Multiple parties?
Capital Felony:	_____	_____	_____	_____
Felony:	_____	_____	_____	_____
Misdemeanor	_____	_____	_____	_____
Civil:	_____	_____	_____	_____

4. Trial Procedures and Practices

Please indicate whether the following procedures or practices are required, permitted, or prohibited in your state and provide the legal authority (e.g., statute, court rule, court opinion) or indicate its absence.

				Authority (indicate none, if applic)
A. **Juror note taking**				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
B. Juror submission of questions to witnesses				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
C. Juror discussion before deliberations				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
D. Preliminary instructions on law				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
E. Final instructions before closing argument				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
F. Final instructions after closing argument				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
G. Interim commentary by counsel				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____

5. Jury Deliberations

Please indicate whether the following procedures or practices are required, permitted, or prohibited in your state and provide the legal authority (e.g., statute, court rule, court opinion) or indicate its absence.

A. Guidance on conducting deliberations

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

B. Pattern instructions mandated by state

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

C. Written instructions provided

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

D. Alternates participate in deliberations

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

E. Sequestration

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

6. **Special Topics**

A. Please provide any state statutes, court rules, policies, or summaries developed or implemented to assist local courts in managing notorious trials.

_____

_____

_____

B. Please provide any statewide statutes, court rules, policies or procedures exist to protect juror privacy during jury selection, during trial, and after trial.

_____

_____

_____

C. Please describe any resources or programs that the state makes available to local courts to address instances of juror stress.

_____

_____

_____

D. Do juries sentence defendants convicted of non-capital crimes? Y / N
If yes, describe the trial process (e.g., bifurcated, not bifurcated), evidence that is admissible for the jury's consideration including sentencing guidelines, and the standards for judicial review or modification of the sentence.

_____

_____

_____

E. Is capital punishment authorized in your state? Y / N
If yes, please provide specific statutes, court rules, procedures, policies, or summaries concerning the conduct of capital jury trials.

_____

_____

_____

Please send completed responses to:

Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us

National Program to Increase Citizen Participation in Jury Service

State of the States
Local Court Survey

Court: _____ **Date: _____**
County in which court is located:
State:

1. Current Status of Local Jury Improvement/Jury Reform Efforts

A. Is there currently or has there been a jury improvement/reform effort in this court in the past five years? Yes / No

If yes, please describe how this effort has been implemented and the contact information for the person organizing this effort.

_____

_____

_____

B. Is there a local court committee or office concerned with managing or overseeing jury management? Yes / No

If yes, please describe the committee composition (e.g., trial judges, court staff, lawyers, citizens) and contact information for the committee chairperson.

_____

_____

_____

1. Please indicate any current or ongoing jury improvement efforts in this court.
   - ❑ Improve the representation in jury pool
   - ❑ Improve jury yields
   - ❑ Decrease incidence of non-respondents
   - ❑ Improve jury facilities
   - ❑ Upgrade jury system technology
   - ❑ Improve juror utilization
   - ❑ Improve juror comprehension (in-court reforms)
   - ❑ Improve jury instructions
   - ❑ Improve public outreach
   - ❑ Other _____

2. Jury Management and Administration

A. Is the master jury list for this court compiled locally or at the state level?
- ❑ Local
- ❑ State

B. What source lists are used to compile the master jury list?
- ❑ Registered Voter
- ❑ Licensed Driver
- ❑ State Tax Rolls
- ❑ Unemployment
- ❑ Public Assistance
- ❑ Other: _____

C. What are jurors paid in this court?
- ❑ Flat daily rate of $ _____
- ❑ Graduated rate of $ _____ for the first day; $ _____ for _____ days; $ _____ to the completion of service
- ❑ Reimbursement for mileage/travel at $ _____
- ❑ Other juror compensation (e.g., reimbursement for child case) $ _____

D. What is the term of jury service? _____

_____

E. Are jurors summonsed and qualified simultaneously or in two separate steps?
- ❑ Qualification questionnaires and jury summonses are mailed simultaneously (one-step process) in this jurisdiction.
- ❑ Qualification questionnaires are first sent to prospective jurors. Summonses are then sent only to qualified individuals (two-step process) in this jurisdiction.

F. Who decides juror requests to be excused from jury service and what criteria are used for deciding these requests?
- ❑ Judge _____

_____

- ❑ Jury Administrator _____

_____

- ❑ Other _____

_____

G. How does the court follow-up on persons who fail to respond to summonses or fail to appear for service?
- ❑ Follow-up or Second notice
- ❑ Order to Show Cause
- ❑ Fines (Range $_____)
- ❑ Other
- ❑ None

H. Approximately how many jury summonses are mailed each year? _____

I. Please describe the percentage of prospective jurors who are:

Summonses returned as undeliverable	_____%
Disqualified	_____%
Exempted	_____%
Excused for hardship	_____%
Deferred to another term	_____%
Non-response / FTA	_____%
Qualified and available to serve	_____%

SHOULD TOTAL TO 100%

J. Approximately how many juries are impaneled each year?

Felony:	_____
Misdemeanor	_____
Civil	_____
Other	_____

K. Does your court routinely screen prospective jurors for English language proficiency? Yes / No

If yes, please describe the procedures used?

_____

_____

_____

L. What accommodations does your court provide for prospective jurors with disabilities?
- ❑ Assisted language devices
- ❑ Sign language interpreters
- ❑ Wheelchair ramps
- ❑ Other (please describe) _____

_____

M. Please indicate the technologies that support your jury system.

Base System:

- ❑ Jury Systems, Inc. (Jury + / Jury + Next Generation)
- ❑ ACS Government Systems
- ❑ Other commercial software (please specify): _____
- ❑ Software developed in-house

Verification of qualification information
- ❑ First-class mail
- ❑ Interactive Voice Response (IVR) interface
- ❑ Internet interface
- ❑ Other (please specify): _____

Reporting technology
- ❑ Jurors receive summons only
- ❑ Jurors receive postcard informing them when to report
- ❑ Jurors receive automated telephone call informing them when to report
- ❑ Jurors call in, listen to telephone message informing them when to report
- ❑ Jurors log on to court webpage with information about when to report
- ❑ Other (please specify): _____

Orientation
- ❑ Jurors receive live orientation at courthouse
- ❑ Jurors receive informational brochure/booklet with summons
- ❑ Jurors can read orientation materials at court website
- ❑ Jurors can view orientation videotape online at court website
- ❑ Jurors can view orientation videotape on local cable television
- ❑ Jurors can view orientation videotape at local public library
- ❑ Other (please specify): _____

3. Voir Dire Procedures and Practices

A. What kinds of juror information are routinely available to attorneys prior to trial?
- ❑ Name
- ❑ Street Address
- ❑ Zip code or Neighborhood designation only
- ❑ Qualification information
- ❑ Marital status
- ❑ Occupation / Employer
- ❑ Number and ages of minor children
- ❑ Other: _____

B. Are attorneys routinely given access to jurors' qualification questionnaires? Y / N

C. Do prospective jurors complete a standardized questionnaire for voir dire purposes?
Y / N
If yes, where can we obtain a copy? _____

D. What is the typical length of voir dire in hours?
Capital Felony: _____
Non-capital felony: _____
Misdemeanor: _____
Civil: _____

E. What local court rules, policies, or procedures exist to protect juror privacy during jury selection, during trial, or after completing jury service?

_____

_____

Name and Title of Survey Respondent: _____

Telephone: _____ Facsimile: _____

E-Mail: _____

Please send completed responses to:

Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us

National Program to Increase Citizen Participation in Jury Service

State of the States
Judge & Lawyer Survey

1. Identification Information
   A. I am a:
      - ❑ State trial judge
      - ❑ Federal trial judge
      - ❑ Attorney
        - o primarily criminal prosecution
        - o primarily criminal defense
        - o primarily civil plaintiff
        - o primarily civil defense
      - ❑ Other legal practitioner

   B. Please indicate the location of the court (county, state) in which you preside (judge) or most often practice (attorney):

   _____

   C. Please indicate the type of case in your most recent jury trial.
      - ❑ Capital felony
      - ❑ Felony
      - ❑ Misdemeanor
      - ❑ Civil
      - ❑ Other jury trial

      If you are an attorney, please indicate who you represented.
      - ❑ Prosecution / Plaintiff
      - ❑ Defendant

      What was the date(s) of trial? _____

      Where was the trial held (county, state)?_____
      - ❑ State court
      - ❑ Federal court

      On a scale of 1 to 7, how complex was the evidence in that trial?
      Not at all complex 1 2 3 4 5 6 7 Very complex

      On a scale of 1 to 7, how complex was the law in that trial?
      Not at all complex 1 2 3 4 5 6 7 Very complex

For the following questions, please indicate the practices, procedures, and techniques employed in your most recent jury trial.

2. Voir Dire

A. How were questions posed to prospective jurors in the venire? (check all that apply)

- ❑ Oral questions posed to full panel
- ❑ Oral questions posed to individual jurors in jury box
- ❑ Oral questions posed to individual jurors at sidebar, in chambers, or otherwise outside the hearing of other jurors
- ❑ Written responses to standardized questionnaire
- ❑ Written responses to a case specific questionnaire
  When was the questionnaire given to prospective jurors?
  - o Prior to reporting for service
  - o Jury assembly room before jury selection
  - o In courtroom before questioning

B. What method was used to conduct the voir dire?

- ❑ **Strike & Replace Method**: Twelve or more prospective jurors are seated in the jury box and examined by judge and/or attorneys. Judge rules on challenges for cause. Attorneys exercise peremptory challenges. Seats that are vacated by struck jurors are refilled by random selection.
- ❑ **Six/Four Pack Method:** Similar to Strike & Replace Method except prospective jurors are questioned in groups of six or four until the full number of jurors is reached.
- ❑ **Struck:** The entire panel is examined by the judge and/or attorneys and the judge rules on challenges for cause and hardship. Prospective jurors equal to the number of impaneled jurors, alternates and peremptory challenges is seated. The attorneys exercise peremptory challenges alternately until the final panel is selected and sworn.
- ❑ **Individual:** Prospective jurors are examined individually outside the hearing of other jurors (e.g., at sidebar or in chambers). The judge rules on challenges for cause after each juror is questioned. After questioning outside the presence of other jurors, attorneys may be required to exercise peremptory challenges at the completion of each examination.
- ❑ **Other method (**please describe**):**

_____

_____

_____

_____

C. Who questioned the jurors during the voir dire?

- ❑ Judge only
- ❑ Judge primarily with limited attorney follow-up
- ❑ Judge and attorney equally
- ❑ Attorney primarily with limited judge
- ❑ Attorney only
  - o If attorney only, was the judge present for the voir dire? Y / N

▪ **How long was the voir dire?** _____ **(hours)**

- **Please indicate which of the following trial procedures or practices were employed in your most recent jury trial**
  - ❑ Jurors were permitted to take notes
  - ❑ Jurors were provided with writing utensils and notepaper for taking notes
  - ❑ Jurors were provided with a notebook containing one or more of the following: a glossary of unfamiliar terms, names and short biographies of witnesses, copies of documentary evidence or exhibits, preliminary or final instructions, and notepaper for taking notes
  - ❑ Jurors were permitted to submit questions in writing to witnesses
  - ❑ Jurors were permitted to discuss the evidence among themselves prior to deliberations
  - ❑ Jurors were given substantive instructions on the law prior to the evidentiary portion of the trial
  - ❑ Jurors were instructed on the law before closing argument
  - ❑ Jurors were instructed on the law after closing argument
  - ❑ Attorneys were permitted to provide interim summation to the jury during the evidentiary portion of the trial

Please describe any other procedures or practices employed during your most recent jury trial that were intended to improve juror comprehension, attention levels, performance, or satisfaction with jury service during trial.

_____

_____

_____

_____

Jury Deliberations

4. Please indicate which of the following trial procedures or practices were employed in your most recent jury trial.

- ❑ Jurors were given guidance on how to conduct deliberations
- ❑ At least one written copy of the final jury instructions was provided to the jury
- ❑ All jurors were provided with a written copy of the final jury instructions
- ❑ Alternates were permitted to participate in deliberations
- ❑ Jurors were sequestered for deliberations

How long were the jury deliberations? _____ (hours)

Please describe any other procedures or practices employed during your most recent jury trial that were intended to improve juror comprehension, attention levels, performance, or satisfaction with jury deliberations.

_____

_____

Special Issues

5. Please indicate if any of the following issues arose in your most recent jury trial and what procedures, if any, the court employed to address those issues.

- ❑ Notorious trial / High profile trial: _____

  _____

- ❑ Capital jury trial: _____

  _____

- ❑ Juror stress: _____

  _____

- ❑ Jury sentencing in non-capital trial: _____

  _____

Please send to Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us

APPENDIX C: STATE-BY-STATE RESPONSE RATES

National Program to Increase Citizen Participation in Jury Service

State	# Surveys	# Counties	% State Population
Alabama	8	8	8
Alaska	9	9	29
Arizona	12	12	97
Arkansas	30	30	56
California	52	52	98
Colorado	21	21	64
Connecticut	1	8	97
Delaware	3	3	100
District of Columbia	1	1	100
Florida	14	30	53
Georgia	60	60	53
Hawaii	4	4	100
Idaho	10	10	55
Illinois	87	87	97
Indiana	79	79	95
Iowa	28	41	52
Kansas	10	17	20
Kentucky	90	90	57
Louisiana	51	56	92
Maine	12	12	83
Maryland	22	22	95
Massachusetts	14	14	100
Michigan	27	29	73
Minnesota	17	17	66
Mississippi	33	38	38
Missouri	67	67	53
Montana	34	34	53
Nebraska	57	57	41
Nevada	9	17	100
New Hampshire	7	7	85
New Jersey	21	21	100
New Mexico	8	12	60
New York	58	58	99
North Carolina	8	8	17
North Dakota	30	30	76
Ohio	5	5	14
Oklahoma	14	14	10
Oregon	22	22	82
Pennsylvania	25	26	64
Rhode Island	1	1	36
South Carolina	19	19	45
South Dakota	9	65	92
Tennessee	12	32	43
Texas	105	112	70
Utah	16	16	91
Virginia	51	51	42
Washington	23	23	87
West Virginia	34	34	70
Wisconsin	56	56	64
Wyoming	6	6	41

APPENDIX D: NOTES ON METHODOLOGY USED TO CALCULATE NATIONAL STATISTICS

National and statewide statistics were generated from Local Court Survey data and Judge and Attorney Survey data in order to glimpse a snapshot of the nation as a whole and to compare the results from an individual state to those of the nation at large. Depending on the format of the data, national and statewide statistics were calculated in several ways.

The easiest statewide or national statistic to compute is a frequency or an average. For example, if you wanted to know the median voir dire time for Virginia State Courts you would select the subset of Judge and Attorney Surveys submitted by Virginia State Courts and compute the median. For the national percentage of state courts using a one-step qualification and summoning process, you would run a frequency on the qualification and summoning variable for all Local Court Surveys.

Some of the national and statewide statistics from the Local Court Survey used a more complicated method to aggregate individual surveys. The examples below will demonstrate how the Local Court Survey was aggregated at the state level to create statewide statistics which were then aggregated to provide national statistics. Fifty-one counties in Virginia submitted Local Court Surveys, and these will be used for the example calculations. The populations of these 51 counties were obtained from the 2000 U.S. Census American Factfinder website (http://factfinder.census.gov/home/saff/main.html?_lang=en), added together, and considered the "represented population". The percent of the state represented in the survey is the represented population divided by the total population of the state.

Example 1:
Given from Local Court Surveys:
Sum of 51 VA Local Court Surveys county populations: 2,994,313
Year 2000 Population of VA (from US Census): 7,078,515

Calculated:
Percent Represented: 2,994,313 / 7,078,515 *100 = 42.3 %

The Local Court Survey asked each locality to approximate the number of jury summonses mailed each year and the number of felony, misdemeanor, civil, and "other" juries impaneled each year. The numbers provided by the local courts were summed for the represented population of the state (or nation) and then extrapolated to provide an estimate of the entire state's (or nation's) annual summonses and jury trials. See the example below.

Example 2:
Given from Local Court Surveys
Sum of 51 VA Local Court Surveys No. of Summonses Mailed: 127,990
Sum of 51 VA Local Court Surveys No. of Felony Juries Impaneled: 779
Sum of 51 VA Local Court Surveys No. of Misdemeanor Juries Impaneled: 304
Sum of 51 VA Local Court Surveys No. of Civil Juries Impaneled: 624

Sum of 51 VA Local Court Surveys No. of Other Juries Impaneled: 19
Sum of 51 VA Local Court Surveys Total No. of Juries Impaneled: 1,726

Calculated:
Estimated No. of Summonses mailed in VA: 127,990 / 0.423 = 302,577
Estimated No. of Felony Juries Impaneled in VA: 779 / 0.423 = 1,842
Estimated No. of Misdemeanor Juries Impaneled in VA: 304 / 0.423 = 719
Estimated No. of Civil Juries Impaneled in VA: 624 / 0.423 = 1,475
Estimated No. of Other Juries Impaneled in VA: 19 / 0.423 = 45
Estimated Total No. of Juries Impaneled in VA: 1,726 / 0.423 = 4,080
Estimated Trial Rate per 100,000 Population: 4,080 / (7,078,515 / 100,000) = 57.6

The estimated number of *jurors* impaneled on a statewide or national basis was calculated from the estimated number of *juries* impaneled. Based on the minimum number of jurors required for each state by statute and depending on the trial type, the number of jurors was computed. Note that for the "other" trial category, 12 jurors were assumed across all states. Due to the large variation in number of jurors required by trial type (eminent domain, family law, juvenile, etc.) and across states, it was simplest to assume 12 jurors in all cases even though this number may be over-inclusive.

Example 3:
Given by state statute:
No. of Jurors Required by VA for a Felony Trial: 12
No. of Jurors Required by VA for a Misdemeanor Trial: 7
No. of Jurors Required by VA for a Civil Trial: 7
No. of Jurors for an Other Trial: 12
Year 2000 VA Population Age 18 and greater (from US Census): 5,340,253

Calculated:
Estimated Felony Jurors Impaneled in VA: 1,842 * 12 = 22,104
Estimated Misdemeanor Jurors Impaneled in VA: 719 * 7 = 5,033
Estimated Civil Jurors Impaneled in VA: 1,475 * 7 = 10,325
Estimated Other Jurors Impaneled in VA: 45 * 12 = 540
Estimated Total Jurors Impaneled in VA: Sum of above = 38,002
Percent of Adult Population Impaneled: 38,002 / 5,340,253 * 100 = 0.7 %

APPENDIX E: STATE TABLES ON KEY JURY OPERATION AND PRACTICE MEASUREMENTS

TABLE 1: VOIR DIRE LENGTH IN NON-CAPITAL FELONY TRIALS

TABLE 2: VOIR DIRE LENGTH IN CIVIL TRIALS

TABLE 3: WHO CONDUCTS VOIR DIRE

TABLE 4: ATTORNEY ACCESS TO JUROR INFORMATION BEFORE VOIR DIRE

TABLE 5: ATTORNEY ACCESS TO JUROR QUALIFICATION INFORMATION BEFORE VOIR DIRE

TABLE 6: JURORS EXAMINED INDIVIDUALLY AT SIDEBAR OR IN CHAMBERS DURING VOIR DIRE

TABLE 7: JURORS PERMITTED TO TAKE NOTES

TABLE 8: JURORS PROVIDED WITH WRITING MATERIALS

TABLE 9: JURORS PERMITTED TO SUBMIT QUESTIONS TO WITNESSES

TABLE 10: JURORS INSTRUCTED BEFORE CLOSING ARGUMENTS

TABLE 11: JURY PROVIDED WITH AT LEAST ONE COPY OF WRITTEN INSTRUCTIONS

TABLE 12: ALL JURORS PROVIDED WITH WRITTEN INSTRUCTIONS

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Length of Voir Dire for Felony Trials

Median length of voir dire in hours for felony trials.

State	Sample Size	Median Length (Hr)
South Carolina	32	0.5
Alabama	27	1.0
Delaware	12	1.0
Maine	15	1.0
New Hampshire	23	1.0
Virginia	118	1.0
West Virginia	28	1.3
Arkansas	22	1.5
Kentucky	74	1.5
Maryland	178	1.5
Massachusetts	70	1.5
Michigan	166	1.5
Mississippi	50	1.5
New Mexico	51	1.5
Pennsylvania	149	1.5
Wisconsin	7	1.5
Florida	186	2.0
Georgia	105	2.0
Indiana	112	2.0
Iowa	58	2.0
Kansas	56	2.0
Montana	21	2.0
Nebraska	43	2.0
North Carolina	133	2.0
North Dakota	49	2.0
Ohio	71	2.0
Oregon	117	2.0
Rhode Island	21	2.0
South Dakota	75	2.0
Tennessee	73	2.0
Texas	148	2.0
Utah	166	2.0
Vermont	29	2.0
Washington	71	2.0
Wyoming	25	2.0
Colorado	57	2.5
Idaho	14	2.5
Oklahoma	70	2.5
Arizona	90	3.0
Hawaii	24	3.0
Illinois	145	3.0
Minnesota	110	3.0
Missouri	97	3.0
Nevada	43	3.0
DC	60	3.5
Alaska	67	4.0
California	167	4.0
Louisiana	93	4.0
New Jersey	48	4.5
New York	148	5.0
Connecticut	28	10.0

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Length of Voir Dire for Civil Trials

Median length of voir dire in hours for civil trials.

State	Sample Size	Median Length (Hr)
South Carolina	42	0.5
Delaware	24	0.8
Virginia	91	0.8
Arkansas	21	1.0
Maine	43	1.0
Maryland	113	1.0
Massachusetts	87	1.0
New Hampshire	17	1.0
Vermont	13	1.0
West Virginia	56	1.0
Rhode Island	17	1.3
DC	37	1.5
Kentucky	107	1.5
Oregon	210	1.5
Tennessee	91	1.5
Michigan	402	1.7
Alabama	29	2.0
Arizona	58	2.0
Colorado	60	2.0
Georgia	202	2.0
Indiana	130	2.0
Iowa	60	2.0
Kansas	41	2.0
Minnesota	180	2.0
Mississippi	47	2.0
Missouri	222	2.0
Montana	32	2.0
Nebraska	63	2.0
Nevada	86	2.0
New Jersey	115	2.0
New Mexico	33	2.0
Ohio	174	2.0
Oklahoma	63	2.0
Pennsylvania	544	2.0
South Dakota	96	2.0
Texas	313	2.0
Utah	160	2.0
Wisconsin	93	2.0
Wyoming	19	2.0
North Dakota	62	2.3
Florida	88	2.5
Idaho	30	2.5
Hawaii	40	3.0
Illinois	519	3.0
Louisiana	54	3.0
New York	216	3.0
North Carolina	67	3.0
Washington	77	3.0
Alaska	102	3.8
California	184	4.0
Connecticut	137	16.0

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Who Questioned the Jurors During Voir Dire

Mean score from most judge-dominated voir dire (scoring a 1) to most attorney-dominated voir dire (scoring a 5) for all jury trials.

State	Sample Size	Average Score
South Carolina	83	1.05
Maine	65	1.19
Delaware	41	1.20
Massachusetts	197	1.28
New Jersey	168	1.35
Maryland	347	1.75
Utah	406	1.92
New Hampshire	45	2.00
DC	107	2.08
Arizona	161	2.27
California	446	2.57
Nevada	140	2.79
Illinois	781	2.84
West Virginia	90	2.96
Michigan	799	3.06
Virginia	226	3.08
Pennsylvania	748	3.09
Colorado	176	3.11
Oklahoma	173	3.12
Wisconsin	179	3.24
Idaho	68	3.28
Mississippi	126	3.37
Hawaii	69	3.40
Minnesota	345	3.50
Ohio	255	3.51
New Mexico	97	3.55
New York	450	3.55
Kentucky	211	3.56
Louisiana	159	3.61
Florida	405	3.62
Nebraska	150	3.64
Rhode Island	62	3.66
Arkansas	45	3.68
Washington	165	3.71
Alabama	57	3.73
Indiana	274	3.73
Tennessee	181	3.85
Kansas	111	3.91
Oregon	393	3.93
North Dakota	154	3.94
Georgia	382	3.96
Montana	66	3.98
North Carolina	245	3.98
Wyoming	47	3.98
Alaska	225	4.03
Texas	574	4.09
South Dakota	213	4.13
Iowa	168	4.16
Missouri	348	4.19
Vermont	57	4.30
Connecticut	170	4.54

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Local Court Survey Results

Center for Jury Studies

Access to Juror Information

Mean score for 4 possible categories of "other juror information" that attorneys are given access to prior to trial: marital status, occupation, children, and other. These are less typical than other types of juror information such as name, address, and

State	Sample Size	Mean Score
California	52	0.15
Alaska	9	0.56
North Carolina	8	0.63
Oklahoma	15	0.80
Colorado	21	0.81
Utah	16	0.81
DC	1	1.00
Florida	14	1.07
New Jersey	21	1.10
Alabama	8	1.13
Louisiana	51	1.20
Georgia	60	1.47
Virginia	51	1.53
Mississippi	36	1.58
Maine	12	2.08
Missouri	67	2.13
Kentucky	90	2.16
Nebraska	57	2.16
Ohio	5	2.20
Oregon	22	2.27
Texas	105	2.35
Iowa	28	2.43
Pennsylvania	25	2.48
Maryland	22	2.50
South Dakota	9	2.56
Illinois	87	2.72
North Dakota	30	2.73
New Mexico	8	2.75
Tennessee	12	2.75
Nevada	9	2.78
Washington	23	2.78
South Carolina	19	2.79
Arizona	12	2.83
Kansas	10	2.90
Montana	34	2.91
Arkansas	30	2.93
Michigan	27	2.96
Connecticut	1	3.00
Delaware	3	3.00
West Virginia	34	3.00
Idaho	10	3.10
Indiana	79	3.13
Wyoming	6	3.17
Minnesota	17	3.41
Hawaii	4	3.50
New Hampshire	7	3.57
Massachusetts	14	4.00
New York	58	n/a
Rhode Island	1	n/a
Vermont	0	n/a
Wisconsin	56	n/a

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Local Court Survey Results

Center for Jury Studies

Access to Jurors' Qualification Questionnaires

Percent of local court respondents that routinely give attorneys access to jurors' qualification questionnaires.

State	Sample Size	% of Courts
Delaware	3	0.0
Massachusetts	14	0.0
New York	58	0.0
California	52	2.8
New Jersey	21	4.8
Maryland	22	9.1
Utah	16	13.3
Minnesota	17	17.6
Arizona	12	25.0
Virginia	51	28.0
North Carolina	8	28.6
Oklahoma	15	36.4
Alaska	9	37.5
Louisiana	51	38.6
Idaho	10	44.4
Georgia	60	50.0
Florida	14	55.6
Alabama	8	60.0
Ohio	5	60.0
Pennsylvania	25	61.9
Oregon	22	63.6
Illinois	87	72.0
Michigan	27	73.1
West Virginia	34	73.5
South Carolina	19	73.7
Colorado	21	75.0
North Dakota	30	75.9
Iowa	28	81.5
Washington	23	87.0
South Dakota	9	87.5
Mississippi	36	87.9
Kansas	10	88.9
Nevada	9	88.9
Texas	105	90.4
Tennessee	12	91.7
Missouri	67	92.3
Nebraska	57	92.9
Kentucky	90	96.5
Arkansas	30	100.0
Connecticut	1	100.0
Hawaii	4	100.0
Indiana	79	100.0
Maine	12	100.0
Montana	34	100.0
New Hampshire	7	100.0
New Mexico	8	100.0
Wyoming	6	100.0
DC	1	n/a
Rhode Island	1	n/a
Vermont	0	n/a
Wisconsin	56	n/a

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Jurors Questioned at Sidebar or in Chambers

Percent of respondents who reported that jurors were questioned individually at sidebar or in chambers, outside the range of hearing of other jurors, during voir dire.

State	Sample Size	% of Respondents
Rhode Island	62	66.1
Maryland	347	63.7
Connecticut	170	62.9
Massachusetts	197	60.4
Hawaii	69	58.0
DC	107	57.9
New Hampshire	45	55.6
Maine	65	53.8
New Jersey	168	53.0
Pennsylvania	748	52.9
Alaska	225	51.1
West Virginia	90	50.0
Wyoming	47	44.7
Utah	406	44.3
Delaware	41	43.9
Texas	574	43.7
Kentucky	211	41.7
New York	450	40.2
Arizona	161	38.5
Louisiana	159	35.8
Colorado	176	35.2
Missouri	348	34.2
California	446	33.2
Florida	405	32.3
Vermont	57	31.6
Montana	66	30.3
Alabama	57	28.1
New Mexico	97	26.8
Arkansas	45	26.7
Illinois	781	26.6
Iowa	168	24.4
Wisconsin	179	24.0
Mississippi	126	22.2
Oklahoma	173	22.0
Georgia	382	20.2
South Carolina	83	19.3
Idaho	68	19.1
Virginia	226	19.0
Ohio	255	17.6
Kansas	111	17.1
Nevada	140	17.1
Nebraska	150	16.7
Washington	165	15.8
Minnesota	345	13.9
South Dakota	213	13.1
Indiana	274	12.0
North Dakota	154	11.0
Tennessee	181	8.3
Michigan	799	8.0
Oregon	393	4.8
North Carolina	245	2.4

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Jurors Permitted to Take Notes

Percent of respondents who reported that jurors were permitted to take notes.

State	Sample Size	% of Respondents
Wyoming	47	95.7
Arkansas	45	95.6
Arizona	161	95.0
Indiana	274	94.9
Colorado	176	92.6
Oregon	393	92.1
Minnesota	345	91.9
California	446	91.5
Alabama	57	91.2
Idaho	68	91.2
Maryland	347	90.5
Utah	406	90.4
Hawaii	69	88.4
Iowa	168	88.1
New Mexico	97	87.6
Illinois	781	87.3
Washington	165	87.3
Alaska	225	87.1
DC	107	86.9
Montana	66	86.4
Wisconsin	179	86.0
Nevada	140	83.6
Georgia	382	81.9
South Dakota	213	80.8
Tennessee	181	77.3
North Dakota	154	76.6
Kentucky	211	76.3
Massachusetts	197	67.0
North Carolina	245	64.9
Virginia	226	59.7
Vermont	57	59.6
Mississippi	126	57.1
Florida	405	55.1
Ohio	255	53.7
Texas	574	53.0
Michigan	799	52.1
Oklahoma	173	50.3
Connecticut	170	47.6
Delaware	41	46.3
Pennsylvania	748	46.1
West Virginia	90	44.4
Missouri	348	40.2
New Jersey	168	39.9
South Carolina	83	38.6
Kansas	111	36.0
Louisiana	159	34.6
New York	450	32.7
Nebraska	150	24.7
Maine	65	23.1
New Hampshire	45	20.0
Rhode Island	62	19.4

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Jurors Provided with Notetaking Materials

Percent of respondents who reported that jurors were provided with writing utensils and notepaper for taking notes.

State	Sample Size	% of Respondents
Wyoming	47	95.7
Indiana	274	95.3
Arizona	161	94.4
Minnesota	345	93.9
Oregon	393	93.9
California	446	93.7
Maryland	347	93.7
Arkansas	45	93.3
Nevada	140	92.1
Colorado	176	91.5
Washington	165	90.3
Hawaii	69	89.9
Iowa	168	89.3
Alaska	225	88.9
DC	107	88.8
Illinois	781	88.6
Idaho	68	88.2
Montana	66	84.8
Utah	406	82.3
New Mexico	97	81.4
Georgia	382	80.4
South Dakota	213	77.9
North Dakota	154	72.7
Tennessee	181	72.4
Massachusetts	197	66.5
Kentucky	211	64.9
Vermont	57	56.1
Ohio	255	53.7
Florida	405	52.6
Pennsylvania	748	45.9
Alabama	57	45.6
Connecticut	170	45.3
Michigan	799	43.3
West Virginia	90	42.2
Delaware	41	41.5
North Carolina	245	40.0
Oklahoma	173	39.9
Virginia	226	39.8
Mississippi	126	37.3
New Jersey	168	36.9
Missouri	348	36.5
Kansas	111	36.0
Louisiana	159	34.0
Texas	574	32.8
New York	450	26.4
Wisconsin	179	25.7
Nebraska	150	24.7
South Carolina	83	22.9
Maine	65	21.5
Rhode Island	62	21.0
New Hampshire	45	17.8

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Juror Questions to Witnesses

Percent of respondents who reported that jurors were permitted to submit questions in writing to witnesses.

State	Sample Size	% of Respondents
Arizona	161	91.3
Indiana	274	86.1
Colorado	176	62.5
New Mexico	97	58.8
New Jersey	168	35.1
Wyoming	47	34.0
Washington	165	33.9
Oregon	393	28.0
Wisconsin	179	27.4
Vermont	57	26.3
Kentucky	211	24.6
Utah	406	24.4
Idaho	68	23.5
Hawaii	69	23.2
California	446	22.9
DC	107	22.4
Tennessee	181	21.5
Nevada	140	18.6
Massachusetts	197	18.3
Florida	405	14.6
Alaska	225	14.2
Ohio	255	14.1
Arkansas	45	13.3
South Dakota	213	12.2
Michigan	799	12.1
Virginia	226	11.5
Maryland	347	9.2
New Hampshire	45	8.9
Nebraska	150	6.7
Montana	66	6.1
New York	450	4.9
Rhode Island	62	4.8
Connecticut	170	4.7
Alabama	57	3.5
North Dakota	154	3.2
Oklahoma	173	2.9
Kansas	111	2.7
Minnesota	345	2.6
West Virginia	90	2.2
Georgia	382	2.1
Texas	574	1.7
Maine	65	1.5
Iowa	168	1.2
Missouri	348	1.1
Illinois	781	1.0
Pennsylvania	748	0.8
Louisiana	159	0.6
Delaware	41	0.0
Mississippi	126	0.0
North Carolina	245	0.0
South Carolina	83	0.0

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Jurors Instructed Before Closing Arguments

Percent of respondents who reported that jurors were instructed on the law before closing arguments.

State	Sample Size	% of Respondents
Arkansas	45	93.3
West Virginia	90	91.1
Kansas	111	90.1
Montana	66	89.4
Oklahoma	173	87.3
Virginia	226	87.2
New Mexico	97	86.6
Washington	165	84.8
Maryland	347	84.4
Colorado	176	81.8
Iowa	168	80.4
Idaho	68	79.4
South Dakota	213	79.3
Utah	406	77.8
Texas	574	77.2
Wyoming	47	76.6
Nevada	140	73.6
Missouri	348	70.7
Kentucky	211	70.6
Wisconsin	179	70.4
California	446	69.7
Arizona	161	67.1
Mississippi	126	64.3
Hawaii	69	63.8
Minnesota	345	50.7
North Dakota	154	48.7
DC	107	42.1
Delaware	41	39.0
Nebraska	150	33.3
Maine	65	32.3
Alaska	225	31.6
Tennessee	181	28.7
Rhode Island	62	25.8
Oregon	393	20.6
Indiana	274	18.6
New Hampshire	45	17.8
Ohio	255	17.6
Pennsylvania	748	9.8
Illinois	781	9.7
Florida	405	9.6
New Jersey	168	8.9
Michigan	799	8.4
South Carolina	83	8.4
Louisiana	159	7.5
Alabama	57	7.0
Georgia	382	6.5
New York	450	5.6
Massachusetts	197	4.6
North Carolina	245	4.5
Connecticut	170	3.5
Vermont	57	3.5

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

At Least One Copy of Jury Instructions

Percent of respondents who reported that at least one written copy of the final jury instructions was provided to jurors.

State	Sample Size	% of Respondents
Montana	66	100.0
Wyoming	47	100.0
Iowa	168	98.8
Kentucky	211	98.6
New Mexico	97	97.9
Idaho	68	97.1
North Dakota	154	96.8
Kansas	111	96.4
Arizona	161	96.3
Illinois	781	95.5
Wisconsin	179	95.5
Delaware	41	95.1
Missouri	348	94.8
Virginia	226	94.7
Texas	574	94.6
California	446	94.2
Hawaii	69	94.2
Indiana	274	94.2
South Dakota	213	93.9
Washington	165	93.9
Colorado	176	93.8
Utah	406	93.6
Arkansas	45	93.3
Nebraska	150	93.3
Alaska	225	91.6
Minnesota	345	91.6
Nevada	140	90.0
New Hampshire	45	88.9
Vermont	57	87.7
DC	107	86.9
Oklahoma	173	86.7
Tennessee	181	86.7
Ohio	255	85.1
Mississippi	126	81.0
Florida	405	72.8
Oregon	393	61.1
West Virginia	90	56.7
Maine	65	44.6
Michigan	799	40.9
Rhode Island	62	38.7
Maryland	347	38.6
North Carolina	245	35.1
Louisiana	159	34.0
Connecticut	170	31.8
Georgia	382	28.0
New Jersey	168	26.2
Massachusetts	197	22.8
South Carolina	83	20.5
Alabama	57	12.3
Pennsylvania	748	11.1
New York	450	10.7

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

All Jurors Received a Copy of Jury Instructions

Percent of respondents who reported that all jurors received a written copy of the final jury instructions.

State	Sample Size	% of Respondents
Arizona	161	80.7
Indiana	274	77.4
Hawaii	69	72.5
Wyoming	47	70.2
Washington	165	68.5
Colorado	176	67.0
Oklahoma	173	64.2
Iowa	168	61.9
Idaho	68	58.8
Kansas	111	58.6
Vermont	57	57.9
Texas	574	57.0
Alaska	225	55.6
Utah	406	53.7
Kentucky	211	53.6
Nebraska	150	52.0
California	446	49.3
Minnesota	345	46.7
Ohio	255	46.3
Montana	66	45.5
New Mexico	97	45.4
Nevada	140	44.3
Missouri	348	43.4
Tennessee	181	38.7
Florida	405	38.3
New Hampshire	45	35.6
South Dakota	213	34.7
Delaware	41	34.1
North Dakota	154	29.9
Oregon	393	29.5
Virginia	226	28.8
Maine	65	27.7
Mississippi	126	27.0
DC	107	21.5
Rhode Island	62	19.4
Connecticut	170	17.6
North Carolina	245	17.6
Michigan	799	16.8
Illinois	781	15.1
Maryland	347	14.7
Georgia	382	14.1
New Jersey	168	13.7
Massachusetts	197	9.6
West Virginia	90	8.9
Arkansas	45	6.7
South Carolina	83	6.0
Wisconsin	179	5.6
Alabama	57	5.3
New York	450	5.3
Pennsylvania	748	5.1
Louisiana	159	0.6

n/a = Not Applicable

National Center for State Courts, 2007

WHITEWASHING THE JURY BOX

How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors

Berkeley Law | Death Penalty Clinic

JUNE 2020

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AUTHORS

The report was researched and written by Elisabeth Semel (Clinical Professor of Law and Director, Berkeley Law Death Penalty Clinic), Dagen Downard, Emma Tolman, Anne Weis, Danielle Craig, and Chelsea Hanlock (Students, Death Penalty Clinic, Berkeley Law Class of '20).

Founded in 2001, the Berkeley Law Death Penalty Clinic seeks justice for individuals facing the death penalty by providing them with high-quality representation; offers students a rich opportunity for meaningful hands-on experience in high-stakes, complex litigation; and exposes problems endemic to the administration of capital punishment. More information about the clinic is available at https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic.

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Thousands of California citizens have been denied the right to serve on juries because of their race or ethnicity, and thousands of California criminal defendants have been tried by juries from which those citizens were excluded. The authors hope this report will serve as a catalyst for reform that results in vigorous enforcement of the constitutional rights of those whose lives depend upon a fair and equitable jury selection system and of those who are eligible to serve on juries. In this regard, the authors thank Assemblymember Dr. Shirley K. Weber (Dist. 79) for her leadership in introducing Assembly Bill 3070, which offers California the opportunity to eliminate discriminatory peremptory challenges.

Cover illustration by Davide Bonazzi

EXECUTIVE SUMMARY, FINDINGS, AND RECOMMENDATIONS

Racial discrimination is an ever-present feature of jury selection in California. This report investigates the history, legacy, and continuing practice of excluding people of color, especially African Americans, from California juries through the exercise of peremptory challenges. Unlike challenges for cause, each party in a trial has the right to excuse a specific number of jurors without stating a reason and without the court's approval. In California, peremptory challenges are defined by statute.

Historically, the main vice of peremptory challenges was that prosecutors wielded them with impunity to remove African Americans from jury service. These strikes were part and parcel of the systematic exclusion of Blacks from civil society. We found that prosecutors continue to exercise peremptory challenges to remove African Americans and Latinx people from California juries for reasons that are explicitly or implicitly related to racial stereotypes.

In 1978, in *People v. Wheeler*, our state supreme court was the first court in the nation to adopt a three-step procedure intended to reduce prosecutors' discriminatory use of peremptory challenges. Almost a decade later, in *Batson v. Kentucky*, the United States Supreme Court approved a similar approach with the goal of ending race-based strikes against African-American prospective jurors. An essential feature of the "*Batson*/*Wheeler* procedure" is that it only provides a remedy for *intentional* discrimination. Thus, at step one, the objecting party must establish a sufficient showing—known as a "prima facie case"—of purposeful discrimination. At step two, if the trial court agrees that the objecting party has made such a showing, the burden of producing evidence shifts to the striking party to give a "race-neutral" reason. At step three, the trial court decides whether the objecting party has established purposeful discrimination. If the court finds that the striking party's reason was credible, it denies the *Batson* objection.

In his concurring opinion in *Batson*, Justice Thurgood Marshall warned that *Batson*'s three-step procedure would fail to end racially discriminatory peremptory strikes. He anticipated that prosecutors would easily be able to produce "race-neutral" reasons at *Batson*'s second step, and that judges would be ill-equipped to second-guess those reasons. Further, Justice Marshall doubted *Batson*'s efficacy because the procedure did nothing to curb strikes motivated by unconscious racism—known more often today as implicit bias.

Justice Marshall was prescient: 34 years after *Batson* was decided, prosecutors in California still disproportionately exercise peremptory challenges to exclude African Americans and Latinx people from juries.

The Berkeley Law Death Penalty Clinic explored the shortcomings of the *Batson* procedure. Our report investigates how the California Supreme Court went from a judiciary that championed the eradication of race-based strikes to a court that resists the United States Supreme Court's limited efforts to enforce *Batson*. We conclude that *Batson* is a woefully inadequate tool to end racial discrimination in jury selection.

FINDINGS

1. Many decades after *Wheeler* and *Batson* were decided, California prosecutors' use of peremptory challenges to exclude African Americans and Latinx citizens from juries is still pervasive.

2. Historically and still today, in California, the overwhelming number of *Batson* objections are brought by defense attorneys against prosecutors' peremptory challenges.

3. Empirical evidence overwhelmingly shows that implicit biases play a significant role in prosecutors' peremptory challenges. Strikes based on these biases most often adversely affect Black defendants and Black jurors. Implicit biases are, by definition, deeply held and reflexive. Inasmuch as each of us acts on them without awareness, lawyers most often will not recognize their biases, much less be able to acknowledge them. Judges are no better at identifying them. *Batson*'s requirement that the objecting party prove intentional discrimination allows these biases to operate unchecked.

4. Our empirical analysis of California appellate court opinions shows that prosecutors routinely and successfully cite a Black or Latinx prospective juror's distrust of law enforcement or the criminal legal system to justify a peremptory strike against the juror. Social science research demonstrates that most African Americans and Whites do not share the same views of law enforcement or the criminal legal system. The differences in attitude are long-standing and rooted in the nation's history of institutional racism, as well as the present-day differential treatment of Blacks and Latinx people by actors in the criminal legal system, including by members of law enforcement. More than 40 years ago, in *Wheeler*, the California Supreme Court announced that these differences do not support the exercise of peremptory challenges: "The representation on juries of these differences in juror attitudes is precisely what the representative cross-section standard . . . is designed to foster." California courts long ago lost sight of this goal.

5. District attorney training manuals on peremptory challenges encourage discriminatory strikes in at least three respects:

   - Prosecutors are trained to identify the "ideal juror" as a person who most resembles them—"attached to the community, educated, stable, [and] professional[]." They are likewise advised to avoid individuals who are members of groups in which people of color are overrepresented, that is, "less educated people and blue collar workers," and those who are "unemployed or underemployed" or who have family members experiencing similar economic hardship.

- Prosecutors are instructed to strike jurors based on their "gut reactions" to jurors' facial expressions, body language, clothing, and hairstyle, and to rely on lengthy stock lists of court-approved "race-neutral" reasons to explain their challenges. Social science has repeatedly shown that "gut reactions" are often the product of implicit biases that correlate with racial and ethnic stereotypes.

- Prosecutors are trained to strike prospective jurors who have had or whose relatives have had a negative experience with law enforcement or are distrustful of the criminal legal system. They are, in other words, instructed to exploit the historic and present-day differential treatment of Whites and people of color, especially African Americans and Latinx people, by the police, prosecutors, and the courts.

6. The California Supreme Court's definition of a "race-neutral" reason is so expansive that any explanation short of the admission of a discriminatory motive will suffice at *Batson*'s second step, and, ultimately, defeat a *Batson* challenge. This also allows prosecutors to rely successfully on a laundry list of judicially approved "race-neutral" reasons when they explain their peremptory challenges. Courts have consistently upheld reasons such as a juror's prior arrest, a juror's loved one's incarceration, or a juror's distrust of the criminal legal system as facially race-neutral and, overwhelmingly, sufficient to defeat a *Batson* objection.

7. We evaluated nearly 700 cases decided by the California Courts of Appeal from 2006 through 2018, which involved objections to prosecutors' peremptory challenges. In nearly 72% of these cases, district attorneys used their strikes to remove Black jurors. They struck Latinx jurors in about 28% of the cases, Asian-American jurors in less than 3.5% of the cases, and White jurors in only 0.5% of the cases.

   - Prosecutors most often gave demeanor-based justifications for their strikes. The next most common reason related to a prospective juror's relationship with someone who had been involved in the criminal legal system. This was followed almost as frequently by a prospective juror expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- and/or class-biased.

   - Prosecutors in these cases successfully used their peremptory challenges against African Americans because they had dreadlocks, were slouching, wore a short skirt and "blinged out" sandals, visited family members who were incarcerated, had negative experiences with law enforcement (often many years before they were called for jury duty), or lived in East Oakland, Los Angeles County's Compton, or San Francisco's Tenderloin.

   - Prosecutors also successfully struck Latinx prospective jurors for frowning, seeming confused, wearing large earrings, stating that a loved one had been wrongfully accused of a crime, expressing a belief that the criminal legal system treats people differently

based on their race, or being "kicked off a ladder by a border patrol officer who was chasing" undocumented people three decades earlier.

8. Between 2003 and 2019, the United States Supreme Court issued a series of decisions that signaled the need for lower courts to more rigorously enforce *Batson*. The California Supreme Court has largely disregarded those directives. Here are three examples:

   - For years, at step one of the process, the California Supreme Court required the objecting party to show that it was more likely than not that the strike was based on intentional discrimination. Unless the standard was satisfied, the striking party did not have to give reasons for the peremptory challenge. In 2005, in *Johnson v. California*, the United States Supreme Court rejected California's test as unduly burdensome and inconsistent with *Batson*'s rule that step one is a low threshold; the objecting party need only raise an inference of discrimination. Despite the United States Supreme Court's intervention, in the 42 step-one cases the state supreme court has since decided, the court has not once found *Batson* error.

   - The United States Supreme Court has left no doubt that *Batson* requires the *attorney* to provide the reasons for the strikes, and that the trial judge and reviewing courts must base their rulings on the reasons the attorney offers. However, the California Supreme Court has consistently approved speculation by trial and appellate courts about reasons the prosecution could have (but did not) offer for its strikes in order to uphold the denial of a *Batson* objection.

   - Since 2003, the United States Supreme Court has decisively endorsed a method of analyzing a *Batson* objection known as "comparative juror analysis," an approach central to each of its subsequent favorable *Batson* decisions. In over 30 years, the California Supreme Court has never used this analysis to expose discrimination. Rather, in case after case, the state supreme court has declined to engage in comparative analysis, restricted its application, or conducted the analysis but found it unpersuasive. The court's resistance to this powerful analytic tool also explains its extraordinarily high affirmance rate.

9. California courts—the California Supreme Court and Courts of Appeal—have an abysmal record in *Batson* cases. In the last 30 years, the California Supreme Court has reviewed 142 cases involving *Batson* claims and found a *Batson* violation only three times (2.1%).

10. It has been more than 30 years since the California Supreme Court found a *Batson* violation involving the peremptory challenge of an African-American prospective juror.

11. It has been more than 30 years since the California Supreme Court found that a trial court committed error in denying a defendant's objection to the prosecutor's use of peremptory challenges at the first step of the *Batson* procedure.

12. California Courts of Appeal, which follow the state supreme court's precedent, rarely find error when trial courts deny defense attorneys' *Batson* motions challenging the removal of Black and Latinx jurors. From 2006 through 2018, our appellate courts found error in just 18 out of 683 decisions (2.6%).

13. In our examination of California state cases between 1993 and 2019, which were later reviewed by the Ninth Circuit Court of Appeals in habeas corpus proceedings, the Ninth Circuit granted *Batson* relief 15% of the time—almost six times more often than the California Courts of Appeal and over seven times more frequently than the California Supreme Court. This is particularly noteworthy because the Ninth Circuit, applying federal law, is obliged to use a much stricter standard of review than that employed by our state courts.

14. In two opinions in 2019, California Supreme Court and Court of Appeal justices urged immediate, decisive action to remedy *Batson*'s failure in California. In the words of Supreme Court Justice Goodwin Liu, it is "past time for course correction." Justice Liu has repeatedly dissented from the majority in *Batson* cases since joining the court in 2011. He has criticized the court's persistent failure to apply *Batson*'s precedents with the "vigilance required by the constitutional guarantee of equal protection of the law." Justice Jim Humes, a member of the California Court of Appeal, similarly urged that "the time has come" for the state "to consider meaningful measures to reduce actual and perceived bias in jury selection." In May 2020, in another dissenting opinion, Justice Liu declared that the "*Batson* framework, as applied by this court, must be rethought in order to fulfill the constitutional mandate of eliminating racial discrimination in jury selection."

15. Across the country, members of the state and federal bench—including United States Supreme Court Justice Stephen Breyer—legal scholars, and some state supreme courts have acknowledged *Batson*'s failure as a mechanism for eliminating discriminatory peremptory challenges, and have called for or implemented reform. In 2018, the Washington Supreme Court took a leadership role when the court adopted General Rule 37 to reform *Batson*.

16. We acknowledge the California Supreme Court's interest in studying *Batson*'s shortcomings by announcing the formation of a "work group" in January. There has been no subsequent statement regarding the goals of the work group or its membership. Over the last three decades, the court has declined many opportunities to remedy these inequities. The legislature—through the passage of AB 3070—is better suited to effectively address persistent discrimination in jury selection in a timely manner. As this report makes evident, the topics identified for study by the "work group" have been amply studied. The questions posed have been answered. The time for a decisive "course correction" by the California Legislature is now.

RECOMMENDATIONS

Batson has failed in part because the California Supreme Court has declined to enforce it vigorously and consistently. But more fundamentally, *Batson* has failed because its approach was flawed from the outset. Only a drastic course correction that encompasses significant changes to the *Batson* procedure can eliminate the exercise of discriminatory peremptory challenges. For purposes of our recommendations, we use the term "protected group" to refer to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation.

We recommend the following:

1. ***Batson*'s first step should be eliminated.** If a party objects that the opposing party exercised a peremptory challenge based on discrimination against one of the protected groups, the trial court should always require the striking party to state the reason(s) for the strike. The elimination of *Batson*'s first step prevents a trial court's own implicit bias from insulating potentially discriminatory strikes from direct judicial inquiry. This reform makes the determination of whether the peremptory challenge is legally permissible more expeditious and avoids unnecessary appellate litigation.

2. **The burden of proof should rest with the party exercising the peremptory challenge.** Under *Batson*, the burden rests with the objecting party to prove that the challenging party acted with intentional discrimination. If peremptory challenges are to continue to have a legitimate place in the jury selection process, the challenging party should bear the burden of justifying challenged strikes. This reform takes into account the significant role peremptory challenges have played and continue to play in the exclusion of African-American and Latinx citizens from juries.

3. **The trial court should be required to act with awareness of the role implicit, institutional, and unconscious bias has played in the discriminatory exclusion of jurors in California.** Making explicit that which has gone unsaid and unacknowledged is an essential feature of the proposed reforms. This change will ensure that trial courts scrutinize peremptory challenges to better root out the vestiges of historical and present-day discrimination in the jury selection process.

4. **The trial court should be required to evaluate the striking party's reasons for the peremptory challenge in light of the totality of the circumstances.** A requirement that the trial court make its ruling in light of the totality of the circumstances pertaining to the objection retains *Batson*'s approach, which appropriately encourages careful and thorough decision-making.

5. **The court should sustain the objection if it determines that an objective observer could view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation as a factor in the exercise of the peremptory challenge.** *Batson*'s requirement that the objecting party prove intentional discrimination has perpetuated the use of strikes based on implicit and institutional bias and the resulting disproportionate exclusion of African-American and Latinx citizens from jury service. A wholesale reform of the standard, which this recommendation endorses, is imperative. The adoption of an objective standard ensures that the court will be attentive to bias in all its forms. At the same time, it eliminates the stigma associated with a subjective finding of intentional discrimination, e.g., that the court, in making its ruling, is labeling the striking party "racist."

6. **The trial court should be required to explain its ruling on the record**. A requirement that the trial court explain its ruling on the record encourages careful and thorough decision-making, and enables appellate courts to fully and fairly evaluate the trial court's ruling.

7. **There should be a presumption that reasons historically associated with improper discrimination are invalid.** Restricting the use of reasons historically associated with improper discrimination will reduce the influence of implicit, unconscious, and institutional biases in the jury selection process.

   a. *The following reasons should be presumptively invalid*:

      1. Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system;
      2. Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner;
      3. Having a close relationship with people who had prior contact with law enforcement or criminal legal system;
      4. A prospective juror's neighborhood;
      5. Having a child outside of marriage;
      6. Receiving state benefits;
      7. Not being a native English speaker;
      8. Having the ability to speak another language;
      9. A prospective juror's dress, attire, or personal appearance that is historically associated with a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation;
      10. Employment in a field that is disproportionately occupied or that disproportionately serves members of a protected group;

11. The prospective juror's unemployment or underemployment or that of a prospective juror's family member;
12. Friendliness with another prospective juror who is a member of the same protected group as the prospective juror; and
13. Any other reason that applies to a seated juror who is not a member of the same group as the struck juror.

b. *The following reasons are historically associated with improper discrimination. They should be presumptively invalid unless they are corroborated by the trial court or opposing counsel*:

1. A party that intends to strike a juror for specified demeanor-based reasons should provide reasonable notice to the trial court and the opposing party so that all parties can verify and address the behavior. The court should find these reasons invalid if it or opposing counsel cannot corroborate them.
2. These reasons include:
    a. Sleeping, appearing inattentive, or staring;
    b. Failing to make eye contact;
    c. Exhibiting a lack of rapport;
    d. Exhibiting a problematic attitude, body language, or demeanor; and
    e. Providing unintelligent or confused answers.

8. **Courts should be prohibited from speculating or hypothesizing about the reasons the striking party offered or did not offer, and from substituting their reasons for those of the striking party**. Trial and appellate courts should not speculate about or assume the existence of reasons for the challenge that the striking party did not offer. The appellate court should not offer its own reasons to explain the striking party's failure to challenge similarly situated jurors who are not members of the same protected group as the challenged juror. This prohibition requires parties and the trial court to make a complete record. Of equal importance, it prevents trial and appellate courts from substituting their explanation for a peremptory challenge for that of the striking party, and thereby shielding impermissible strikes from proper judicial scrutiny.

9. **Appellate courts should review trial court rulings de novo.** An appellate court should be required to review the trial court's ruling de novo, which is to say that the appellate court should do so without deferring to the trial court's ruling. However, an appellate court should be permitted to defer to the trial court's determination verifying a prospective juror's demeanor, unless clearly erroneous. This standard of review ensures that deference will not shield objectively discriminatory strikes while crediting certain factual findings that the trial court is in the best position to make.

I.

A BRIEF HISTORY OF DISCRIMINATORY EXCLUSION

African Americans have historically been, and continue to be, disproportionately excluded from juries. This exclusion, which affects both who is summoned for jury duty and who serves on the trial jury, has evolved over time, responding primarily to changes in the law that prohibit intentional racial discrimination in these processes. Prosecutors have whitewashed juries through the exercise of peremptory challenges for as long as African Americans have been eligible for jury service. The practice is still widespread today. While both the California and United States Supreme Courts sought to curb discriminatory strikes through decisions announced in 1978 and 1986, respectively, the courts' remedial mechanisms have proved ineffective. Further, the California Supreme Court has been reluctant to follow recent United States Supreme Court decisions that were meant to strengthen the procedure, further crippling this state's judicial response to racially discriminatory jury selection.

A. The Exclusion of African Americans from Juries

Prosecutors' current use of peremptory challenges to exclude African Americans from juries has its roots in the history of slavery and the wholesale exclusion of Black citizens from all aspects of civil society in many states following Reconstruction.[1] Although today African Americans have "secured a place on the jury rolls," many prosecutors continue to prevent them from serving on juries through the exercise of racially discriminatory peremptory challenges.[2]

After the nation abolished slavery, the federal government attempted to "guarantee the meaningful inclusion of African-Americans in the social, political and legal fabric of the United States" through the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment.[3] During Reconstruction, legislatures in many Southern states repealed formal race-based jury requirements.[4] The Civil Rights Act of 1875 included a provision outlawing race-based discrimination in jury service.[5] However, the provision was never effectively enforced.[6]

In 1879, in *Strauder v. West Virginia*, the United States Supreme Court held unconstitutional state statutes that, on their face, restricted jury service to Whites.[7] It was, however, becoming apparent that institutional opposition to Black enfranchisement and political participation had taken hold in the South, ushering in "the Jim Crow era of white supremacy, state terrorism, and apartheid . . . ."[8] Although laws no longer explicitly barred African Americans from jury service, in many states, "local officials achieved the same result by . . . implementing ruses to exclude black citizens."[9] For example, some jurisdictions employed jury lists in which the names of Whites and Blacks were "printed on different color paper" or instituted "vague requirements" for jury service—"such as intelligence, experience, or good moral character"—to conceal, albeit thinly, their intention of keeping African Americans off the rolls.[10] "In essence, the right not to be excluded from jury service because of one's race promised only the *possibility* of having members of one's racial group sitting on a particular jury, nothing more."[11]

In opinion after opinion following *Strauder*, the Supreme Court placed procedural barriers between local- and state-sanctioned discrimination and federal judicial review.[12] The Court concluded either that the defendant's case was insufficient to merit federal review, or that "racist

state practices were inevitability protected by a futile search for discriminatory purpose on the part of state officials."[13]

In 1935, in *Norris v. Alabama*, the Supreme Court finally addressed the total and systematic exclusion of African Americans from jury pools in the second trial of one of the "Scottsboro Boys."[14] Clarence Norris, one of nine Black teenagers falsely accused of raping two White women, was twice tried, convicted, and sentenced to death by an all-White jury.[15] The Court agreed that the "long-continued, unvarying, and wholesale exclusion" of Blacks from the grand and petit jury venires denied him equal protection under the Fourteenth Amendment.[16] The opinion "signaled a major shift: the Court would no longer tolerate the *total exclusion*, by law or by practice, of black citizens from jury rolls."[17]

Following *Norris*, "state officials became more imaginative in their efforts to limit minority participation on juries," allowing token African Americans to serve on juries to avoid total exclusion.[18] Thus, the discriminatory use of peremptory challenges "immediately counteracted" the limited gains of African-American inclusion on the jury rolls.[19] Some counties in California continued the wholesale exclusion of Black jurors, even if statutes prohibited the practice. For example, in *People v. Hines,* an all-White jury convicted a Black defendant of shooting and killing a Black man.[20] The California Supreme Court overturned Hines's conviction because, despite constituting 8% of the population, "no negro had ever been placed on the venires or called for jury service in criminal cases in Merced county."[21] The court found that discrimination did not stem from the law as written, but from the "custom of the officers to exclude negroes in selecting and impaneling juries in Merced county."[22]

The United States Supreme Court also retreated from *Norris* by deferring to state court decisions and focusing on the subjective intent of local officials rather than statistical proof.[23] For example, in *Akins v. Texas*, a death-sentenced defendant challenged the racial composition of his grand jury, which included only one Black juror.[24] He provided statistical evidence that African Americans were underrepresented on county grand juries.[25] Several grand jury commissioners had testified in the trial court that they intended to place "just one negro on the grand jury," and had deliberately done nothing to include more than one African-American member.[26] The Supreme Court, however, was "unconvinced" that the commissioners intentionally limited the number of Black grand jurors.[27]

It was not until the 1960s and '70s, when the Supreme Court adopted a "fair cross-section" standard—requiring the jury and grand jury pools to reflect the demographics of the jurisdiction—that some progress was made in increasing the representation of citizens of color in jury pools.[28]

B. The Exclusion of African Americans from California Jury Rolls

As briefly summarized above, the United States has a long history of denying full citizenship rights to African Americans, women, and members of other groups. People of color—especially African Americans—are disproportionately excluded at every stage of jury selection.[29]

Prospective jurors summoned to appear in California courts reflect that underrepresentation.[30] The exercise of peremptory challenges, which occurs at the last stage of jury selection, exacerbates the underrepresentation that occurs at the front end. However, it is essential to at least describe the disproportionate exclusion of people of color from the process by which jury rolls are assembled.

The superior court judges of each county appoint the county's jury commissioner who, at least once a year, creates a master list of prospective jurors by randomly selecting names from source lists of eligible citizens in the community.[31] As mandated by article 1, section 16 of the California Constitution, a state statute specifies that source lists be "inclusive of a representative cross section of the population of the area served by the Court."[32] Also by statute, the source list of registered voters ("ROV") and licensed drivers from the Department of Motor Vehicles ("DMV") are "appropriate source lists for selection of jurors and shall be considered inclusive of a representative cross section of the population, within the meaning of subdivision (a), which defines a fair cross section."[33] As a result of this statute, every California county uses only the ROV and DMV databases as jury source lists.[34]

Names are drawn from the source lists to create a master list.[35] The jury commissioner's office notifies individuals whose names are selected from the master list to appear in court for possible jury selection and appearance in the venire.[36]

Studies have shown that using ROV and DMV records as source lists results in the underrepresentation of African Americans.[37] One study, which surveyed a total of 1,275 community residents on a master list in Orange County, revealed that when both the ROV and DMV lists were used, African Americans were underrepresented by 18.92% relative to their numbers in the population.[38] An early, but still cited, study on jury composition estimated that the use of ROV lists automatically excludes approximately one-third of the adult population, reducing the number of people of color, including African Americans, in the master lists.[39]

The same study reported that 41.3% of jury-eligible individuals in California are not on ROV lists.[40] Of the 41.3% of jury-eligible individuals who do not appear on California ROV lists, a disproportionately large number are African American. This is due in part to felony disenfranchisement.[41] Until January 2020, Californians who had a felony conviction were not permitted to serve on juries.[42]

Of those African Americans who are eligible to vote, additional socioeconomic barriers make them less likely to register than Whites.[43] People with unstable employment experience higher rates of residential and geographic mobility.[44] These factors have been shown to decrease the likelihood that they will register to vote and therefore appear on ROV lists.[45] Using national data over a three-year period, one study found that 48% of African Americans were geographically transient, compared to only 25.2% of Whites.[46] This makes it less likely African Americans will appear on ROV lists than Whites.[47]

Several studies have demonstrated that using multiple source lists increases the percentage of African Americans in the master list.[48] The use of additional source lists such as tax lists, property lists, utility customer lists, city and telephone directories, and welfare or public benefit payment lists would increase the number of African Americans on the master list.[49] To date, only one California county uses source lists beyond the ROV and DMV; no California courts supplement their lists with welfare or unemployment records.[50]

It has been more than 35 years since the California Supreme Court found that a defendant had established underrepresentation of people of color in the composition of a jury sufficient to satisfy the state or federal constitutional fair cross-section requirement.[51] In several cases, however, courts of appeal have acknowledged findings that African Americans are underrepresented in jury venires.[52] Some California studies also confirm that these disparities exist in California jury pools. For example, a 2010 survey conducted in Alameda County showed underrepresentation of African Americans in its jury pools.[53] The survey found that African Americans "represent 18% of the eligible jury pool in the county but comprised only 8% of the people who appeared for jury duty" in the trials studied.[54] Whites comprised the same percentage of the jury pool as the percentage of jury-eligible Whites in Alameda County, suggesting that Whites may not be affected by the many legal and non-legal obstacles that result in the underrepresentation of African Americans in jury source lists.[55]

C. Peremptory Challenges: From Judicial Intervention to Judicial Retreat

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[56] The peremptory challenge has its roots in English common law.[57] As early as the 14th century, however, Parliament began to restrict the right of the King's counsel to exercise peremptory challenges.[58] In American courts, the right of the defendant to exercise peremptory challenges "was accepted as part of the common law."[59] However, the prosecution was not universally entitled to exercise peremptory challenges in the United States until the late 19th century.[60] Unlike challenges for cause, peremptory challenges are not constitutionally guaranteed.[61]

1. The United States Supreme Court's Resistance to Remedying Exclusion

The United States Supreme Court has readily acknowledged that the peremptory challenge is "'frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.'"[62] For almost two centuries, state and federal courts in this country accepted these strikes as "a necessary part of trial by jury."[63]

In 1965, in *Swain v. Alabama*, the Court ruled for the first time that the prosecution's exercise of peremptory challenges against Black prospective jurors *might*, in very specific circumstances, violate the Equal Protection Clause.[64] In *Swain*, an Alabama case in which a Black man was convicted and sentenced to death by an all-White jury for the rape of a White woman,[65] the

prosecutor struck all six of the prospective Black jurors.[66] The Court found that the utility of peremptory challenges in "the institution of the jury trial" precluded it from examining the prosecution's strikes in the specific case, much less finding that those challenges violated the Equal Protection Clause.[67] The Court expressed a willingness to entertain a constitutional argument, but only upon a showing that the prosecution exercised strikes systematically, in trial after trial, so as not "to leave a single Negro on any jury in a criminal case."[68]

2. California's Intervention in People v. Wheeler

In 1977, *American Law Reports* published a nationwide review of the use of peremptory challenges and the application of the *Swain* standard in civil and criminal cases.[69] The author analyzed every criminal case decided in the 10 years after *Swain* in which courts had considered an objection to the exercise of peremptory challenges against Black jurors.[70] The report found that, under the *Swain* standard, it was nearly impossible to prove that a peremptory challenge was based on race.[71] "[I]n all of the cases involving this issue thus far, *all of which have dealt with blacks as the group peremptorily challenged*, no defendant has yet been successful" in proving the peremptory challenges were exercised in a discriminatory manner.[72]

A year later, in *People v. Wheeler*, our state supreme court, relying on the independent force of article 1, section 16 of the California Constitution, acknowledged the injustice that the United States Supreme Court would not begin to address until eight years later.[73] In *Wheeler*, as the prosecutor struck all the prospective Black jurors, the defense attorneys repeatedly moved for a mistrial, arguing that the prosecutor's challenges made it impossible for the defendants to be tried by "'a fair cross section of the community.'"[74] The trial judge denied their motions, and the two Black defendants were tried and convicted of the murder of a White man by an all-White jury.[75] The California Supreme Court reversed their convictions.[76] The court held that, in a criminal case, when any party exercises a peremptory challenge because the juror belongs to "an identifiable group distinguished on racial, religious, ethnic, or similar grounds," the conduct "violates the right to trial by a jury drawn from a representative cross-section of the community."[77]

The court in *Wheeler* found it intolerable that, under *Swain*, defendants had a federal constitutional right to equal protection that they could not secure because the standard made it "virtually impossible" to do so.[78] A defendant could only meet the *Swain* bar by proving that the prosecutor struck every Black juror in "an undetermined number of individual trials."[79] The court observed that "numerous black defendants have attempted to comply with [the *Swain* burden of proof], but none has succeeded."[80] Criminal defendants had neither the time nor funds to conduct the research, nor was the data—including a record of the race of each struck juror in every trial—reasonably available.[81] The court cited the 1977 *American Law Reports* article, and agreed that the "California experience has been identical."[82]

The California Supreme Court in *Wheeler* acknowledged the high court's unwillingness to disturb the "nature and operation" of peremptory challenges.[83] The court recognized that the

Supreme Court would reject any challenge under any provision of the federal Constitution that might diminish the prosecution's ability to strike jurors free from scrutiny, and declared, "*Swain v. Alabama* is not to be followed in our courts."[84]

The *Wheeler* opinion announced a procedure by which a party could demonstrate that the opposing attorney was exercising a peremptory challenge based "on the ground of group bias alone."[85] In its search for a remedy, the court looked to legal scholars.[86] However, two unexamined premises restricted the court's options: (1) the assumption that retaining at least some peremptories serves a necessary function in ensuring the parties' ability to excuse some jurors who have invidious biases, but who are not so clearly biased as to be subject to a cause challenge; and (2) the assumption that prosecutors will act honestly, fairly, and free of racial prejudice in exercising strikes unless and until the defense shows the contrary.[87] Given these assumptions, proposals to eliminate peremptory challenges or allow them only for the defense were off the table.[88] Although the court's decision was grounded in the state Constitution's fair cross-section provision, the court adopted an approach that was lifted from equal protection analysis.[89] This report explains why the chosen remedy was destined to fail and how that failure has played out over the last 40-plus years.

Wheeler adopted a three-step test. First, the attorney objecting to the strike, having made a record of what has transpired, must show both that the jurors who were the subject of the strikes belong to "a cognizable group" and establish "a strong likelihood" of a fair cross-section violation, also known as a prima facie showing.[90] Second, if the judge finds a prima facie showing (which *Wheeler* also referred to as "a reasonable inference"), the burden shifts to the party who made the peremptory challenges to show that the party did not act on the basis of "group bias alone."[91] Third, the trial judge determines the validity of the reasons.[92] If the court finds that any one of the challenges was based on group bias, the fair cross-section requirement has not been met, and the judge must dismiss the venire and begin jury selection again.[93]

As we explain below, when the United States Supreme Court reversed *Swain* in *Batson* in 1986 on equal protection grounds, the Court adopted a similar three-step procedure.[94] For simplicity, when discussing objections to peremptory challenges, we refer throughout the report to the *Batson* procedure—rather than to the *Batson*/*Wheeler* procedure—unless there is a specific reason to reference *Wheeler*.[95]

3. *The United States Supreme Court Decides* Batson v. Kentucky

In 1986, the United States Supreme Court decided *Batson v. Kentucky*, announcing that *Swain*'s evidentiary burden was "crippling," and that "a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[96] The Court held that discriminatory jury selection practices "harm" the defendant, the excluded juror, and "the entire community" because they "undermine public confidence in the fairness of our system of justice."[97] The Court's identification of these three interests was foundational to its extension of *Batson*'s protections in subsequent opinions.[98]

Unlike *Wheeler*, the decision in *Batson* was grounded squarely in the Fourteenth Amendment's Equal Protection Clause.[99] But like *Wheeler*, the Supreme Court in *Batson* adopted a three-step (or three-stage) procedure for determining whether the prosecution purposefully discriminated against a Black prospective juror in the exercise of a peremptory challenge.[100] At step one, the defendant must establish a "prima facie case" of purposeful discrimination.[101] To do so, the defendant need only raise an "inference" of discrimination based upon "all relevant circumstances."[102] If the trial court agrees that the defendant has made a prima facie showing, the inquiry moves to the second step. At step two, the prosecution must "come forward with a neutral explanation for challenging black jurors," which must be "related to the particular case to be tried."[103] The majority stated that a prosecutor may not rebut the prima facie showing by simply "denying" that he had "a discriminatory motive" or insisting that he acted in "good faith."[104] At the third step, the trial court decides whether the defendant has established purposeful discrimination.[105] The Court left no doubt that, consistent with all other equal protection challenges, the defendant must establish a "'racially discriminatory purpose'" to prevail on a *Batson* motion.[106]

Justice Thurgood Marshall concurred in *Batson* to acknowledge that the Court had taken a "historic step," but cautioned that the eradication of racial discrimination in jury selection "can be accomplished only by eliminating peremptory challenges entirely."[107] He offered several reasons for his view. First, while a three-step procedure similar to the one adopted in *Batson* was already the law in states such as California and Massachusetts, the small numbers of African Americans in the venire made it exceedingly difficult for the defendant to establish a prima facie showing.[108] Second, he described the ease with which prosecutors could "assert facially [race] neutral reasons," especially when they rely on a prospective juror's demeanor, thus creating a "difficult burden" for judges who must assess the credibility of those reasons.[109] Last, Justice Marshall addressed the issue of "conscious or unconscious racism," which leads prosecutors to characterize Black jurors in negative terms—especially with regard to demeanor—and judges to credit those reasons.[110] This report shows how, in case after case, decade after decade, Justice Marshall's predictions have been borne out.

Batson only prohibited prosecutors from striking Black jurors in trials involving Black defendants.[111] In later decisions, the Supreme Court extended *Batson* to apply to civil and criminal trials, to all trials irrespective of the race of the parties, to defense attorneys as well as prosecutors, and to strikes based on ethnicity or gender.[112] Some lower federal courts and state courts have expressly extended *Batson* to other groups such as those who have in common national origin, sexual orientation, or religious affiliation.[113] Some states prohibit discrimination in jury selection under their state constitutions, by statute, or both.[114]

4. California Codifies the Prohibition Against Discriminatory Strikes

Ten years after *Wheeler*, in 1988, the California Legislature consolidated the relevant Penal and Civil Code sections into the Trial Jury Selection and Management Act, which governs "the selection of jurors, and the formation of trial juries, for both civil and criminal cases, in all trial

courts of the state."[115] California Code of Civil Procedure section 231.5 now states, "A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in section 11135 of the Government Code, or similar grounds."[116] This section codifies the *Wheeler* decision. Government Code section 11135(a) prohibits discrimination by any state entity "on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation."

5. California Declines to Enforce Batson

From 2003 through 2008, the United States Supreme Court issued a series of opinions in *Batson* cases. Several decisions clarified aspects of the *Batson* procedure in a way that signaled the need for lower courts to be more vigilant in disallowing discriminatory peremptory challenges: *Miller-El v. Cockrell* (*Miller-El I*), *Johnson v. California*, *Miller-El v. Dretke* (*Miller-El II*), and *Snyder v. Louisiana*.[117] As we detail in Section III.E, dissenting justices on the California Supreme Court often rely on those decisions to demonstrate that the majority is failing to adhere to the high court's *Batson* precedents.

In *Johnson*, the Supreme Court concluded that the test applied by California courts for determining whether a party has made out a prima facie case of purposeful discrimination at the first step of the *Batson* procedure was an "inappropriate yardstick."[118] For decades, at step one, our state courts required a party to demonstrate "'it is more likely than not'" that the peremptory challenge was based on group bias.[119] The Supreme Court in *Johnson* reaffirmed *Batson*'s stage-one requirement: a party need only show that all of the circumstances give "'rise to an inference of discriminatory purpose.'"[120] Writing for the majority, Justice John Paul Stevens explained, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[121] Therefore, when there is an inference that a peremptory challenge was based on race, the trial judge should not speculate about the purpose because "a direct answer can be obtained by asking a simple question": What was the reason for the strike?[122] Since *Johnson* was decided in 2005, the California Supreme Court has not found step-one error in a single case.[123] In Sections III.E.1 and III.E.2, we discuss how the California Supreme Court, employing a variety of analytic techniques—including hypothesizing about reasons the prosecutor never offered—continues to impose an heightened threshold at step one.

Miller-El II, a Texas death penalty case, involved the third step of the *Batson* procedure, that is, whether, considering all of the circumstances, a party intentionally exercised a peremptory challenge based on race.[124] The prosecutor in *Miller-El II* used his peremptory strikes to remove 10 of 11 African-American prospective jurors.[125] The Supreme Court commented, "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."[126] This approach, known as comparative juror analysis, was central to the Court's decision in *Miller-El II*,[127] even under

the highly deferential standard of review that applies when federal courts review state court judgments in habeas corpus proceedings.[128] The Court compared the struck Black panelists to the seated White jurors in several respects, including the similarity of their answers to specific questions and the prosecution's disparate questioning of Black and White jurors on the same topic.[129] The Court in *Miller-El II* also emphasized that this type of comparison requires only that the jurors be "similarly situated," not that they be "identical in all respects."[130] "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[131] Because the party exercising the strike bears the burden of providing an explanation, the majority warned against speculation by trial or reviewing courts that might "imagine a reason" when "the stated reason does not hold up."[132] The Court also declared that when a reason turns out to be false, unsupported by the record, or pretextual, any "new explanation" is highly suspect.[133]

In *Snyder*, a Louisiana death penalty case, the prosecution struck all the African Americans in the venire, but the Supreme Court decided the *Batson* issue based on just one of the peremptory challenges.[134] The prosecutor said that he struck Mr. Brooks, an African-American man who was studying for his teaching credential, based on his demeanor (nervousness) and his university-related obligations, which the prosecutor asserted might lead the juror to convict Snyder of a lesser included offense in order to avoid sitting through a penalty phase trial.[135] Because there was no record as to whether the trial judge credited the demeanor-based reason, the Court would not "presume" that the judge had done so, and decided the issue solely on the second reason.[136] The Court reviewed the voir dire transcript and acknowledged the "implausibility" of the reason concerning the juror's schedule.[137] The Court then compared the struck juror's situation to that of two seated White male jurors. It found that the White jurors had "conflicting obligations that appear to have been at least as serious as Mr. Brooks'," and concluded that the strike was the result of intentional discrimination.[138]

There are at least three important take-aways from *Snyder* when considering how the California Supreme Court has applied the opinion. First, the high court reaffirmed its position in *Batson* that the "Constitution forbids striking even a single prospective juror for a discriminatory purpose."[139] Second, when the party making the strike gives two reasons, one based on the juror's demeanor and the other a non–demeanor-based reason, if the trial court denied the motion "without explanation," a reviewing court may not defer to the demeanor-based reason.[140] Third, consistent with *Miller-El II*, the Supreme Court conducted a comparative juror analysis.[141] The Court contrasted the prosecutor's questioning of the struck Black juror about his obligations with his questioning of the White seated jurors about their conflicting responsibilities.[142] It concluded that the prosecution gave a "pretextual explanation."[143]

In Section III.E.5, we examine the California Supreme Court's application of *Miller-El II* and *Snyder*. We describe barriers the court has erected to the meaningful application of comparative juror analysis based on the majority's fundamental reservations about the approach. These hurdles, dissenting justices explain, cannot be reconciled with the high court's robust use of the analysis.

In two more recent decisions, *Foster v. Chatman* and *Flowers v. Mississippi*, the Supreme Court employed comparative juror analysis in deciding that the prosecution had violated *Batson*.[144] In *Foster*, for example, the prosecutor gave eight reasons for removing a Black juror, including the age of the juror's son (close to the defendant's), his "confused" view about the death penalty, and his wife's work at a hospital for "mentally ill people."[145] The Court found, however, that the prosecutor retained White jurors whose sons were young men and who also expressed "confusion about the death penalty questions," and did not strike a White juror who worked at the same hospital.[146] In *Flowers*, the state challenged a Black woman because, among other reasons, she was acquainted with members of the defendant's family. [147] The Court concluded that the explanation was pretextual because her relationship with the family was similar to that of other seated White jurors.[148] Employing "side-by-side" juror comparisons as a critical method of analysis in both cases, the Court adhered to its view that any justification that applies equally to both the struck juror and one or more seated jurors is evidence of discriminatory intent, regardless of whether the jurors were dissimilar in other respects.[149] By contrast, as Section III.E.5 explains, the California Supreme Court continues to raise the bar for finding *Batson* error using this approach by requiring that the Black struck jurors and seated White jurors be substantially similar in all respects.

This brief overview shows that, historically, California was not exempt from the wholesale exclusion of people of color—especially African Americans—from jury service and that underrepresentation in jury venires is a present-day inequity in our judicial system. Although the California Supreme Court in *Wheeler* was a leader in addressing discriminatory peremptory challenges, today's court does not adhere to the United States Supreme Court's directives aimed at enforcing *Batson*. Through our empirical investigation of court of appeal opinions and prosecution training practices, analysis of social science research on discrimination, and an examination of the California Supreme Court's jurisprudence, we expose the intractable and irremediable nature of discriminatory peremptory challenges under the *Batson* regime.

II.

EMPIRICAL FINDINGS

We conducted an empirical study to understand how prosecutors use peremptory challenges and how California courts review *Batson* claims. We found that prosecutors across California use peremptory strikes to disproportionately remove African-American and Latinx citizens. Further, California appellate courts seldom reverse trial court decisions for *Batson* error, instead upholding prosecutors' reasons for striking Black and Latinx jurors as race-neutral and credible. Taken together, these findings suggest both that California has a serious *Batson* problem and lacks an effective judicial mechanism (or the judicial will) to address it. This section first describes our empirical findings about how prosecutors in California use peremptory challenges against Black and Latinx jurors, offering examples from cases that illustrate the insidiousness of purportedly "race-neutral" justifications. Second, this section catalogues the state supreme court and court of appeal *Batson* cases, revealing the shockingly low rate at which they find *Batson* error. Finally, comparing the reversal rate in our state courts with that of the Ninth Circuit in its review of *Batson* cases under a highly restrictive standard, we show that the circuit nonetheless finds *Batson* error over seven times more often than the California Supreme Court and almost six times more often than the California Courts of Appeal.

A. California Prosecutors Use Peremptory Strikes to Disproportionately Remove Black and Latinx Jurors

We reviewed 683 decisions of the California courts of appeal involving *Batson* claims from 2006 through 2018.[150] (Appendix A sets out the methods used in the data collection and analysis). During this 12-year period, defense counsel objected to prosecutors' strikes in 670 cases, 98.0% of the total number of cases involving *Batson* claims.[151] *See* Figure 1. Of these 670 cases, 71.6% (480) involved objections to prosecutors' use of peremptory challenges to remove Black jurors. Of the remaining cases, prosecutors removed Latinx jurors in 28.4% (190) of cases, Asian-American jurors in 3.4% (23) of cases, and White jurors in three cases (0.5%). Only 14 cases (2.0% of the total) involved claims that defense counsel had exercised discriminatory peremptory strikes. Defense counsel struck Asian-American jurors in four cases, White jurors in four cases, Black jurors in three cases, and Latinx jurors in one case.[152] *See* Figure 2.

Percentage of *Batson* Motions by Party

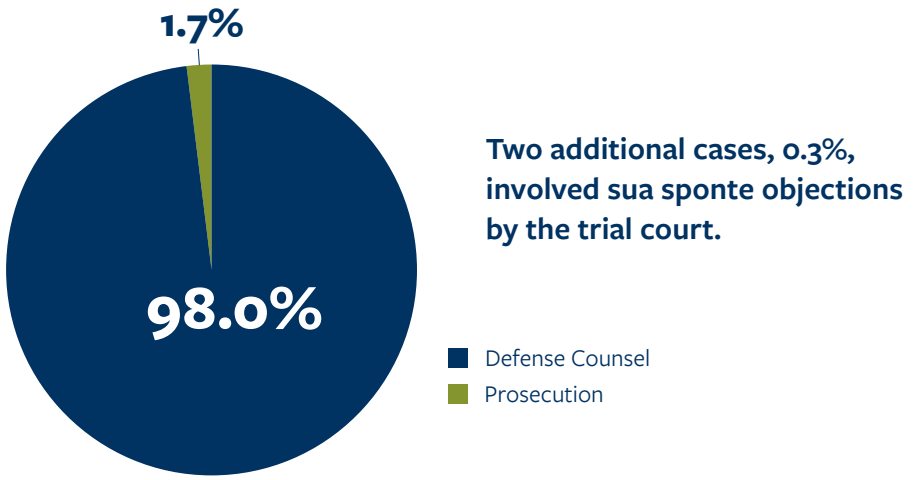

Figure 1[153]

Strikes by Race and Ethnicity

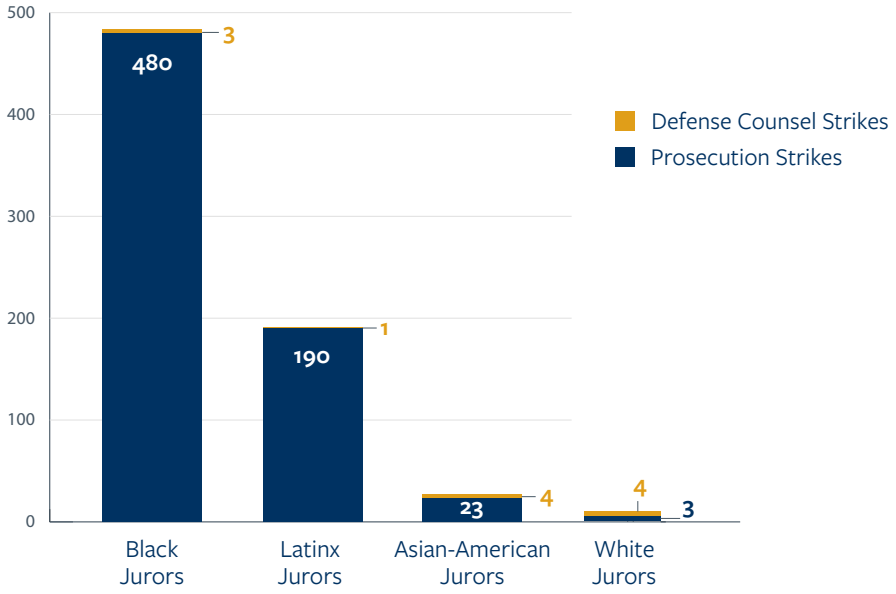

Figure 2

B. California Prosecutors Rely on Racial and Ethnic Stereotypes to Remove Black and Latinx Jurors

We coded the reasons prosecutors gave for striking jurors into six categories. These categories are nearly identical to those listed in subsections (h) and (i), respectively, of Washington Supreme Court General Rule 37 ("GR 37"): "Reasons Presumptively Invalid" and "Reliance on Conduct." We discuss GR 37 in Section IV.C. A copy of GR 37 is Appendix B to the report. GR 37 declares that the enumerated "reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State."[154] The categories are:

a. having prior contact with law enforcement officers;
b. expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
c. having a close relationship with people who have been stopped, arrested, or convicted of a crime;
d. living in a high-crime neighborhood;
e. having a child outside of marriage; and
f. demeanor-based conduct.[155]

We did not include two of GR 37's categories, (h)(vi) "receiving state benefits" and (h)(vii) "not being a native English speaker," because these were almost never used.

For most of the analysis that follows, we report data at the case level. However, we also coded the reasons offered for peremptory challenges at the juror level to accurately account

for cases in which more than one juror was struck. We use that data to report the type of challenge raised against jurors of different races and ethnicities below. For more information see Appendix A.

1. Reliance on Racial and Ethnic Stereotypes: Case-Level Data

Prosecutors' reasons for striking jurors correlate with racial stereotypes. (Sections III.A, III.C, and III.D discuss implicit and explicit racial stereotypes.) As Figure 3 below shows, prosecutors relied on demeanor as a reason for their peremptory challenges in over 40% of the cases.[156] Demeanor-based explanations were used to exclude jurors who exhibited a poor attitude, were sleeping, appeared confused, or failed to make eye contact with the prosecutor. In 35% of the cases, prosecutors relied on a juror's close relationship with people who had been stopped, arrested, or convicted of a crime. Nearly as often, in over 34% of the cases, prosecutors explained that the struck jurors distrusted law enforcement or the criminal legal system or believed that law enforcement or the criminal legal system is racially- or class-biased. Prosecutors gave prior contact with law enforcement or the criminal legal system as a reason in more than 21% of the cases. And in approximately 4% and 1.5% of the cases, respectively, prosecutors struck jurors because they lived in a high-crime neighborhood or had a child outside of marriage.

Prosecution's Reasons for Challenging Jurors by Case

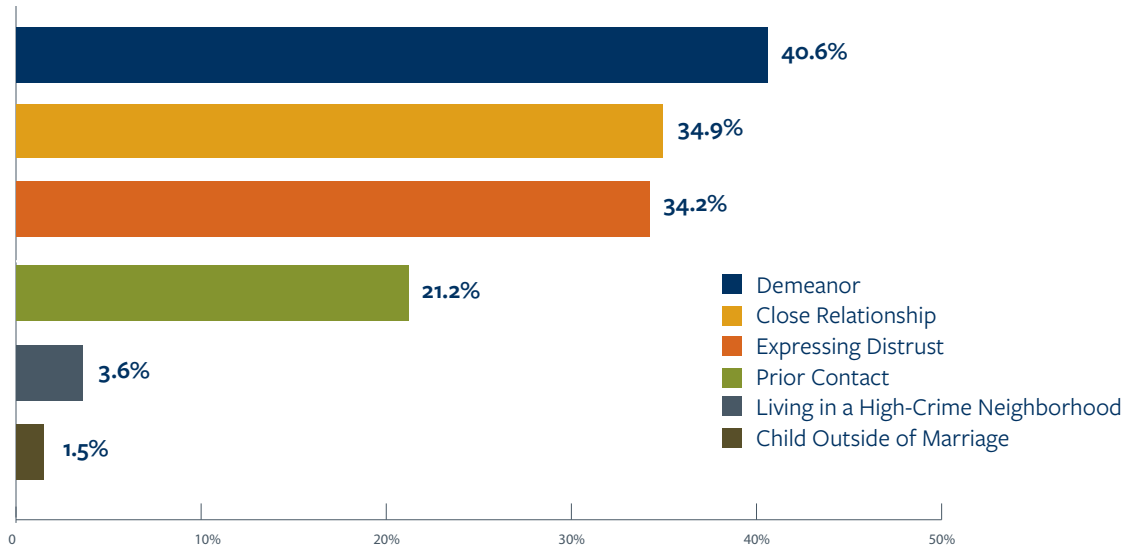

Figure 3[157]

A review of these cases leaves no doubt that prosecutors' exercise of race-based peremptory challenges is very much a present-day practice. Consistent with the findings of every other study, prosecutors in California disproportionately use peremptory challenges to exclude Blacks from juries.[158] As in other jurisdictions, prosecutors often offer many reasons—a "laundry list"—for each strike.[159] For example, an Alameda County prosecutor struck a Black juror because he was slouching, pursuing a criminal justice degree, believed the criminal legal system was unbalanced, and cited the events in Ferguson, Missouri to explain why he no longer wanted to be a police officer.[160]

2. "Race-Neutral" Reasons: Strikes of Black Jurors

Our study found that prosecutors disproportionately strike Black prospective jurors and justify these strikes because of the prospective jurors' demeanor, appearance, distrust of the criminal legal system, relationship with someone who had a negative experience with law enforcement, and place of residence. Here, we report on the reasons prosecutors gave for striking Black jurors and the frequency with which they gave these reasons for their strikes.

We determined that prosecutors most often relied on demeanor as a reason for striking Black jurors. Of the 480 cases in which prosecutors struck Black jurors, they offered a demeanor-based reason in 37.5% (180 cases) of these cases. As we discuss in Sections III.A and III.C, these reasons correlate with racial stereotypes of African Americans because we unconsciously and reflexively categorize people based on demeanor. For example, in a 2014 trial, an Alameda County prosecutor struck a Black juror, in part, because he "'had a very harsh demeanor . . . [The juror] was an imposing individual who gave short curt answers . . . [and] was falling asleep.'"[161] In a 2014 trial, a Los Angeles County prosecutor struck two Black jurors because both did not make eye contact with her, and one was "'sleeping out in the hallway" during a break.[162] In another Los Angeles County trial, a prosecutor excused a Black juror because she "'felt that he just wasn't that bright.'"[163] In yet another Los Angeles County case, a prosecutor struck a Black juror because she "had few interactions with others in the hallway and had not made friends with the other jurors, as well as seem[ed] animated and attentive to defense topics and questions, but not so animated during prosecution questions."[164] A Riverside County prosecutor struck a Black juror who he described as "'very defensive, because she had her arms crossed, and . . . seemed a little hostile by her body language.'"[165] In another Riverside County trial, a prosecutor excluded a Black juror because he was "over-eager . . . and did not stay focused."[166]

"Appearance" was not one of the GR 37 categories, and therefore we did not separately code appearance as a category. However, prosecutors also offered both demeanor- and appearance-based reasons as grounds for a single peremptory challenge with sufficient frequency to warrant mention. As we discuss in Section III.D, California prosecutors are trained to avoid successful *Batson* objections by justifying strikes based on a prospective juror's appearance. Section III.A shows that these reasons also correlate with racial stereotypes of African Americans: we unconsciously and reflexively categorize people based on their appearance. For example, a Riverside County prosecutor struck a Black juror because he was wearing dollar sign diamond earrings and, thus, was not the ideal conservative juror.[167] A Los Angeles County prosecutor explained that she struck a Black juror because his dreadlocks touched the floor, which made him incompatible with a "'cohesive group' of persons made of persons 'of the same, kind of fall into societal norms.'"[168] Another Los Angeles County prosecutor exercised a peremptory challenge against a Black woman because "'she was wearing a very short skirt, 12-inch earrings, and had on these sandals that were blinged out with . . . at least 100 cubic zirconia on each one.'"[169] Yet another Los Angeles County prosecutor said that she struck a Black juror because the juror had "'extraordinarily long pink fingernails' and braided hair" and

therefore was likely "'fairly liberal.'"[170] In a 2015 trial, a Yolo County prosecutor explained that she struck a Black juror because she was "'morbidly obese,'" stating that she has "'concern about people who are morbidly obese, how they might interact with other jurors, [and] what motivates them.'"[171] A Sacramento County prosecutor struck one Black juror because "'he was wearing dreadlocks. And it's my understanding . . . that dreadlocks are somewhat associated with a Reggae culture . . . [that] promotes drug use . . . in general.'"[172]

When a prosecutor challenges a juror based upon the juror's status (such as employment, age, education level) or statement, or based upon an inference the prosecutor has drawn from the juror's status or statement, the record—the jury questionnaire and/or the voir dire transcript—can refute or confirm the accuracy of the explanation. When a prosecutor relies on demeanor or appearance, there are only two checks on the accuracy of the reasons: (1) the defense counsel's rebuttal, if any; and (2) the court's ruling, which often does not address the accuracy of the prosecutor's description and is highly susceptible to the judge's implicit biases.[173] As Section III.A discusses, judgments based upon demeanor and appearance are particularly susceptible to implicit bias. In ruling on the motion, the trial judge is as likely as the prosecutor to be influenced by implicit bias.

Nearly as often as demeanor-based reasons, prosecutors struck Black jurors for expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- or class-biased. This occurred in 34.8% (167 cases) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors. In Sections III.A and III.C, we discuss the racialized content of these reasons, including African Americans' greater distrust—compared to Whites'—of law enforcement and the criminal legal system based on the history of anti-Black racism in the United States and their lived experiences. For instance, an Alameda County prosecutor struck a Black juror because, according to the prosecutor, the juror would not be willing to follow the law since "'she hopes the system is fair but it does need some overhaul when it comes to minorities being arrested and jailed more than non-minorities, especially in reference to drugs.'"[174] In a Los Angeles County case, a prosecutor struck a Black juror because the juror may have struggled "'to determine whether [the defendant] is guilty or not'" since the juror saw "'flaws'" in the criminal legal system, such as better outcomes for wealthy criminal defendants.[175] In another Los Angeles County trial, a prosecutor struck a Black juror because the prosecutor concluded that the juror expressed "'a lack of faith in law enforcement'" because the juror was "robbed of jewelry at gunpoint yet had failed to report the crime to the police."[176] The prospective juror, however, "claimed he had not reported the crime because he was not physically injured and only material items were taken . . . ."[177] In yet another Los Angeles County case, a prosecutor excluded a Black juror because the juror described her husband's arrest when he was a minor as a "'victim of [police] decision,'" stating, "'I feel that shows a bias.'"[178] A San Joaquin County prosecutor struck a Black juror because he stated that he had been "'falsely accused'" and spent four months in jail, which, according to the prosecutor and despite the juror's assertion otherwise, "'gave him a lot of empathy and . . . sympathy for . . . [the] defendant.'"[179]

Next, prosecutors relied on the juror's close relationship with someone who had negative contact with law enforcement—that is, a person who had been stopped, arrested, or convicted of a crime—as the reason for the strike. As Section III.C discusses, African Americans are more likely to be stopped, arrested, and convicted of a crime than any other racial or ethnic group. Prosecutors offered this reason for striking Black jurors in 33.3% (160) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors. For example, in an Alameda County case, the prosecutor explained that she struck a Black juror because the prosecutor believed that the juror could not be fair "'in light of the fact that her family members all have had dealings with the Oakland Police Department.'"[180] A Los Angeles County prosecutor struck a Black juror because "'her son was arrested for a D.U.I.'"[181] In another Los Angeles County case, a prosecutor struck six of the nine Black jurors he ultimately removed because they all had family members who were convicted of a crime or were in prison.[182] In a Sacramento County case, the prosecutor struck a Black juror because he had visited his two siblings when they were incarcerated.[183] In another Sacramento County case, a prosecutor excluded a Black juror because she reported in her questionnaire that her "son had been in jail for unlawful driving or taking of a vehicle," but noted that he had "'done wrong and had to serve time.'"[184] In another Alameda County trial, a prosecutor removed a Black juror because, according to the prosecutor, the juror stated that "'a number of her family members were involved in crimes and that she doesn't deal with them.'" [185] The prosecutor said, "'I find that kind of hard to believe that even if it were true.'"[186] In none of these instances did the jurors state that they could not be fair as a result of their relationships with individuals who had been arrested or incarcerated.

In 21.7% (104) of these cases, prosecutors struck African Americans because the juror had a negative experience with police or the criminal legal system, although the juror may not have expressed a general distrust of law enforcement or the system. A Los Angeles County prosecutor struck a Black juror because he had been, in the juror's own words, "'detained for being in the wrong part of town while black.'"[187] In an Alameda County trial, a prosecutor excused a Black juror because she "had been arrested for purse snatching and placed on probation as a juvenile, and had on another occasion . . . been arrested by the Oakland Police Department and jailed."[188] Another Alameda County prosecutor struck a Black juror because the prosecutor believed that the "traffic citation she received more than 10 years previously for driving without her seat belt . . . weighed heavily" on the juror.[189] In a 2005 Alameda County trial, a prosecutor excluded a Black juror who expressed dislike for a particular law enforcement officer who had ticketed her for running a stop sign in 1982.[190] In a 2013 trial, a Contra Costa County prosecutor explained that she struck a Black juror because of his 1962 "'experience with a police officer . . . [who] he thought . . . was being racist,'" although the juror made it clear that this event was "'in the past.'"[191]

Prosecutors also gave Black jurors' residence in a particular neighborhood as the reason for striking them.[192] Prosecutors offered this justification in 2.5% (12) of cases. Given the history of slavery, Jim Crow, redlining, and the home-ownership gap between Blacks and Whites, the neighborhood in which African Americans live highly correlates with racial stereotyping. *See* Section III.C. In a San Francisco County case, the prosecutor explained that when asked about

"quality of life," a Black juror who "'lives in the Tenderloin . . . had no response"[193] A prosecutor in Alameda County said that she struck a Black juror because the juror "appeared desensitized to violence, based on the fact [*sic*] she lived in East Oakland and had been burglarized 15 times."[194] A Los Angeles County prosecutor removed a Black juror because he was raised around gangs in Compton.[195] In another Los Angeles County case, the prosecutor struck a Black juror because the prosecutor found it "incredible" that she lived in South Central Los Angeles but had no contact with gang members.[196]

3. "Race-Neutral" Reasons: Strikes of Latinx Jurors

Prosecutors exercised peremptory challenges against Latinx jurors for reasons similar to those they gave for their strikes against African-American jurors, but not nearly as frequently. Prosecutors removed Latinx jurors in 28.4% (190) of cases. As with Black jurors, prosecutors most often, in 41.1% (78) of these 190 cases, offered demeanor-based reasons for striking Latinx jurors. For example, in a Tulare County case, the prosecutor struck two Latino jurors based on their demeanor: one because he frowned and the other because he "'seemed like he was confused.'"[197] A Fresno County prosecutor struck a Latina juror because she "did not seem very friendly or communicative."[198] In an Orange County case, the prosecutor said that they struck the Latina juror because they "'didn't like her,'" and described her as "'flippant'" and someone who spoke "'like a Valley Girl or like a teenager.'"[199] A Los Angeles County prosecutor struck three Latinx jurors because one seemed "unsure of herself," another had a "strong, aggressive personality," and the other "was anti-social and withdrawn."[200] Another Los Angeles County prosecutor struck a Latino juror because the juror had "the most dialogue" with defense counsel.[201] A San Bernardino prosecutor struck four of the six Latinx jurors he challenged because one talked and thought "slow," another was "'very timid,'" the third did not "appear 'too bright,'" and the last was "'very timid' . . . and also lacked intelligence."[202]

Prosecutors also offered appearance-based reasons for striking Latinx jurors. In a 2015 Los Angeles County case, a prosecutor struck a Latino juror because of his "'big lobe earrings. . . .'"[203] The prosecutor said, "'[I]t is almost like somebody walking in . . . with their pants falling down and showing their underwear.'"[204] A Contra Costa County prosecutor struck two Latino jurors based on their appearance—one because he wore "'a large earring'" and had "'a goatee,'" and the other because he had "'extremely long, curly hair.'"[205] In a 2011 Santa Clara County case, a prosecutor gave a Latino juror's attire as a reason:

> '[He] was wearing long shorts. Hanging out of . . . one of the shorts pockets was a red San Francisco 49ers lanyard, which is the type of lanyard you see being handed out in San Jose by the bail bonds people as a free gift . . . He had long white tube socks on pulled up to his knees and Nike Cortez sneakers on, which I know to be attire of somebody who is a gang member.'[206]

A San Mateo County prosecutor struck a Latina juror for her "youthful and untraditional appearance, which included blue nail polish and very torn jeans."[207]

Nearly as often as demeanor-based reasons, prosecutors based their strikes on a Latinx juror's close relationship with someone who had a negative experience with law enforcement, including having been stopped, arrested, or convicted of a crime. Prosecutors offered this reason in 33.7 % (64) of cases. A Riverside County prosecutor excluded three Latinx jurors because they all had family members who were incarcerated.[208] In a Contra Costa County trial, the prosecutor struck a Latina juror because someone in her family had been in prison, notwithstanding the fact that (1) the family member was a stepson who had been incarcerated 10 years earlier and with whom she had little contact, and (2) her deceased husband had been a police officer for two decades.[209] In a 2015 Los Angeles County case, the prosecutor struck two Latinx jurors because he was "concerned that they both had a close family member involved with the criminal justice system," though he acknowledged that the jurors "believed they could be fair."[210] In a 2016 Los Angeles County trial, the prosecutor struck one Latino juror because his wife had pleaded guilty to welfare fraud, even though the juror stated "that would not prevent him from being fair."[211] A Fresno County prosecutor struck a Latina juror because of possible bias from the search and arrest of her husband, despite her assertion that she would not hold this incident against the police.[212]

In 26.8% (51) of cases involving challenges to Latinx jurors, prosecutors removed them for expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- or class-biased. In a Yolo County case, the prosecutor struck a Latina juror because she had a negative experience with law enforcement that led her to conclude "'anyone can be accused of something they didn't do and are treated like a criminal even when the police report states otherwise.'"[213] A Santa Clara County prosecutor struck a Latina juror because she stated that her cousin had been treated unfairly by the criminal legal system, which the prosecutor believed gave her "sympathy for defendants."[214] In a Sacramento County case, the prosecutor struck a Latina juror because she indicated on her juror questionnaire that "the justice system treats people unfairly because of race or ethnic background."[215]

In 17.4% (33) of cases involving challenges to Latinx jurors, prosecutors cited jurors' own prior experience with law enforcement or the criminal legal system as a reason for their peremptory challenges. A Los Angeles County prosecutor struck a Latino juror because, in the 1970s, the juror and a Black friend had a negative experience with police officers in which the officers hit his friend.[216] The juror "stated that nonetheless he did not harbor any resentment toward officers."[217] In another Los Angeles County case, a prosecutor struck a Latina juror because she had an eight-year-old D.U.I. conviction, despite her belief she had been treated fairly in those proceedings.[218] In a 2008 Yolo County trial, the prosecutor removed a Latino juror because 42 years earlier, as a teenager, he "had been kicked off of a ladder by a border patrol officer who was chasing" undocumented people.[219] A Tulare County prosecutor struck a Latino juror because he had been charged with a D.U.I., which the prosecutor assumed biased him against law enforcement.[220]

In 6.3% (12) of cases involving strikes of Latinx jurors, prosecutors offered a juror's neighborhood as the reason for their peremptory challenge. For example, a Kern County prosecutor struck a Latina juror because the juror had "'just moved out of Wasco,'" and the prosecutor had a "'degree of skepticism about anybody from Wasco'" because of "'the people in that town and their criminality.'"[221] In a Riverside County case, the prosecutor struck a Latina juror because the prosecutor found it "'very difficult to believe'" that the juror was from Moreno Valley and had not seen graffiti or was not aware of gangs in the area.[222] A Contra Costa County prosecutor struck a Latino juror because the juror was "'from the San Pablo area which is a lower class area within our county.'"[223]

4. Reliance on Racial and Ethnic Stereotypes: Juror-Level Data

We coded the reasons for each of the jurors by race and ethnicity—that is, the juror was the unit of analysis. *See* Figure 4. Of the total number of Black jurors they struck, prosecutors asserted that:

1. 25.6% expressed a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- or class-biased;
2. 23.5% had a close relationship with people who had prior contact with law enforcement or the criminal legal system;
3. 23.2% had inappropriate demeanor;
4. 13.2% had prior contact with law enforcement or the criminal legal system;
5. 1.4% lived in a high-crime neighborhood; and
6. 0.6% had a child outside of marriage.[224]

Of the total number of Latinx jurors they struck, prosecutors asserted that:

1. 20.8% had inappropriate demeanor;
2. 15.8% had a close relationship with people who had prior contact with law enforcement or the criminal legal system;
3. 10.8% expressed a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- or class-biased;
4. 6.9% had prior contact with law enforcement or the criminal legal system;
5. 2.1% lived in a high-crime neighborhood; and
6. 0.9% had a child outside of marriage.[225]

Prosecution's Reasons for Challenging Jurors By Juror Race/Ethnicity

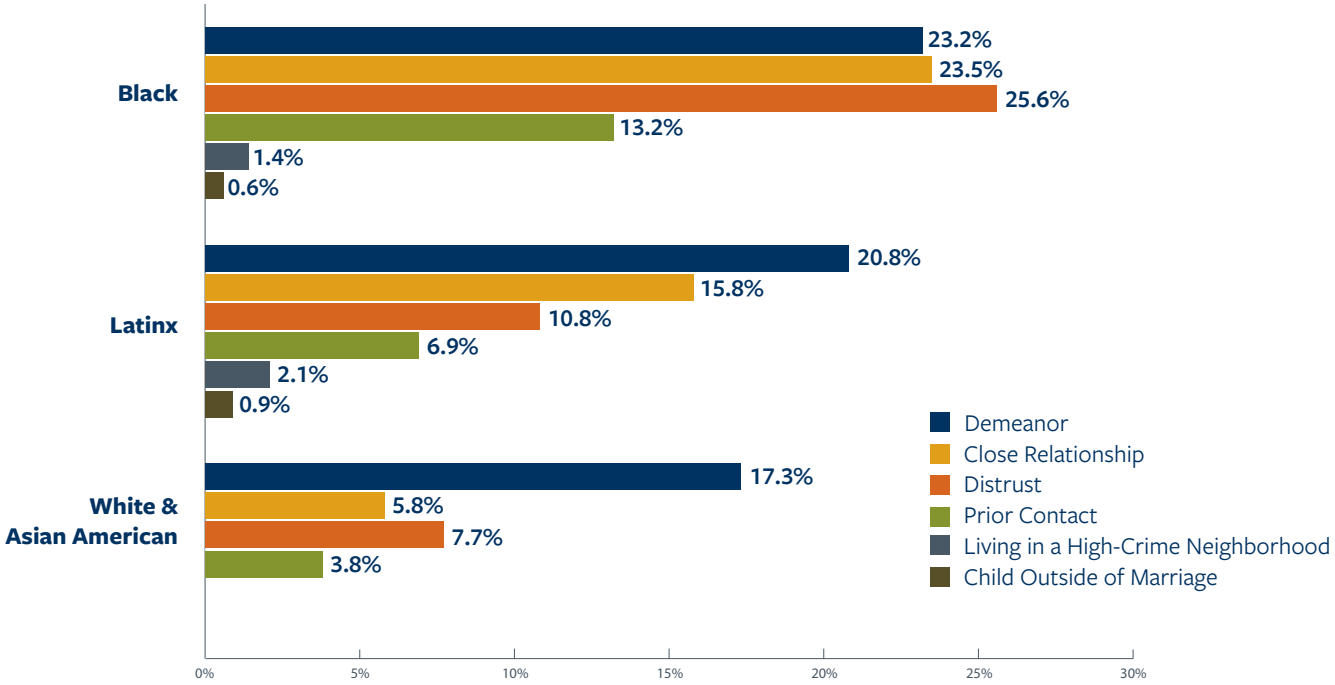

Figure 4[226]

5. Strikes of Cognizable Subgroups: Women of Color

Gender cases involving race or ethnicity are difficult to categorize. In Appendix A, we explain our decision not to report the data on the frequency of strikes against racial and ethnic subgroups. Neither the United States Supreme Court nor most lower federal courts have held that racial or ethnic subgroups—Black women, for example—are cognizable.[227] The California Supreme Court, however, has long held that subgroups can comprise a distinct cognizable class.[228] Irrespective of how defense counsel, the trial court, or the court of appeal characterizes the *Batson* objection, some California appellate opinions reveal both the sexism and racism embedded in prosecutors' reasons—either implicit or explicit.[229] When striking female jurors, prosecutors offered the following reasons with sufficient frequency to warrant mention: jurors' nail length and color, heel height and shoe color, hairstyle and color, and clothing style, including type of jewelry, especially when the prospective juror was an African-American woman. The following are representative examples of these explanations:

> "'I did not like the way she was dressed and presented herself . . . to me that's a sign of lack of maturity. Low cut clothing with sandals.'"[230]

> "'The other part of my reason is, frankly, her orange hair color which indicates to me she is not really one to conform with others.'"[231]

> "Juror B. was a single mother who had her first child at age 18 and her second at age 21, by different fathers. Juror B. seemed to have a very nontraditional and 'kind of counter cultural' lifestyle . . . . [T]he prosecutor cited her 'red streakish hair.' She believed Juror B. was 'not someone who would be . . . a conservative juror that would convict somebody.'"[232]
>
> "'I excused this person based on her physical appearance as she came in yesterday. She was wearing 5-inch heels, red pumps. She had gray, 3-inch claw nails. She had folded arms the entire time. She was wearing a spider pin. Her entire appearance seemed to me like the type of person who has her own personality, someone who is not afraid to be different, someone who may be a problem in the jury room, . . . someone who can maintain her position and, therefore, possibly hang the jury.'"[233]

The California courts of appeal are sources of precedent in *Batson* cases. Our study finds that the opinions overwhelmingly affirm the use of peremptory challenges to exclude Black and Latinx jurors. Although most of these opinions are unpublished, they serve to validate prosecutors' reliance on explicitly or implicitly discriminatory stereotypes as permissible and effective, and incentivize prosecutors to continue to employ these explanations.

C. California Courts Rarely Find *Batson* Error

Our review of California *Batson* cases revealed not only that prosecutors disproportionately use peremptory challenges to strike Black and Latinx prospective jurors, but that our state supreme court and courts of appeal rarely find that these strikes were unconstitutionally race-based. The California Supreme Court has found *Batson* error in 2.1% of the cases it reviewed in the last 30 years. The courts of appeal error rate was only 2.6% between 2006 and 2018. By, contrast, the Ninth Circuit found *Batson* error in of the 15% the California cases it decided between 1993 and 2019, and did so applying a much more stringent standard of review than our state courts employ.

1. The California Supreme Court's Abysmal Batson *Record*

The California Supreme Court's record in enforcing *Batson* is abysmal. Over a 30-year period (1989-2019), the court reviewed 142 *Batson* cases and found error only three times (2.1%).[234] *See* Figure 5. In 2019, Justice Goodwin Liu observed that it has been "more than 30 years since this court has found *Batson* error involving the peremptory strike of a black juror."[235] As he commented and our report and numerous studies show, "'Racial discrimination against black jurors has not disappeared here or elsewhere during that time."[236]

California Supreme Court *Batson* Ruling Decisions

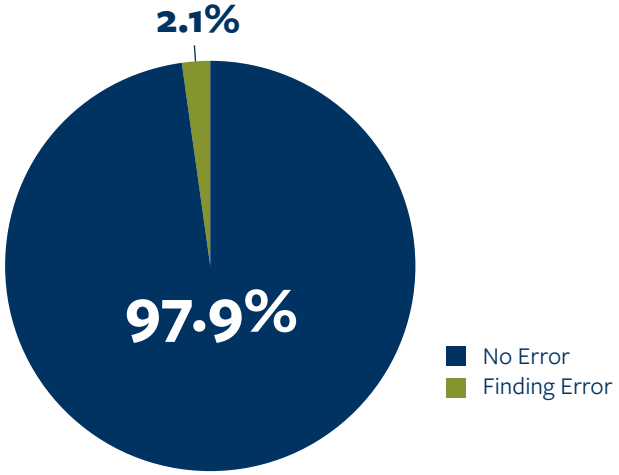

Figure 5

In Section III.E, we look closely at the opinions that produced the court's *Batson* record.

2. The California Courts of Appeal's Almost Equally Abysmal Record

The record of California's courts of appeal in *Batson* cases is only marginally better than that of the state supreme court. From January 1, 2006, through December 31, 2018, the courts of appeal issued a total of 683 opinions involving *Batson* claims. The six appellate districts found *Batson* error in only 18 cases (2.6%) and remanded three cases (0.4%) for the trial court to rehear the *Batson* motion.[237] *See* Figure 6.

Courts of Appeal *Batson* Decisions

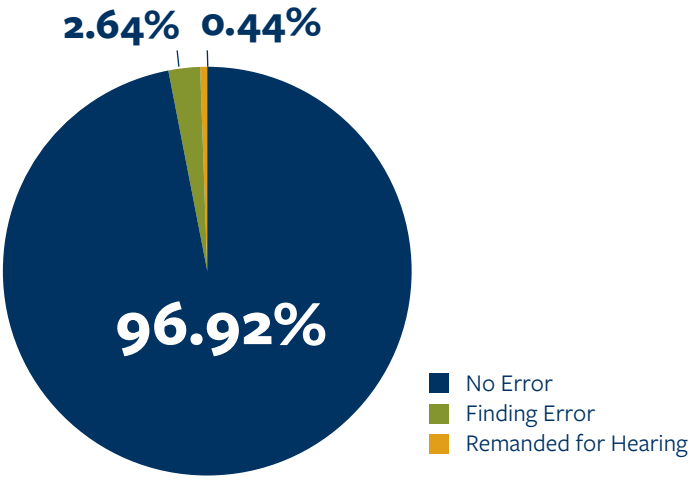

Figure 6

3. The Ninth Circuit's More Rigorous Adherence to Batson

The Ninth Circuit has been more willing than California appellate courts to apply *Batson* precedent and uphold the Equal Protection Clause.[238] The disparity between grants of *Batson* relief in the California courts and the Ninth Circuit is notable because the circuit decided 18 of the 21 habeas cases from California under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[239] As we explain, under the AEDPA, federal courts are extraordinarily constrained by the degree of deference they must afford to the state court decision.

Since 1993, the Ninth Circuit has found *Batson* error in 21 (15%) of the 140 cases the circuit reviewed in which relief had been denied by California appellate courts, including the state supreme court.[240] *See* Figure 7. In at least two other cases, the Ninth Circuit remanded the matter to the district court for a hearing, which led to a grant of relief.[241] As discussed above, the California Supreme Court granted relief in just three of 142 *Batson* cases decided between 1989-2019. Thus, the Ninth Circuit has granted *Batson* relief over seven times as often as the California Supreme Court.[242]

Ninth Circuit *Batson* Ruling Decisions

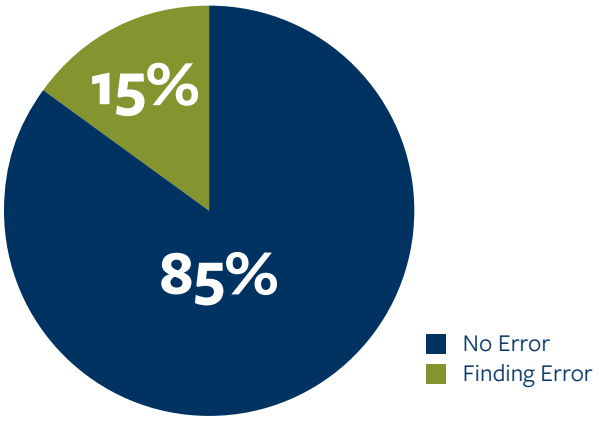

Figure 7

A defendant who has been convicted in a California court may seek relief in federal court only after the defendant has presented his or her claims in state appellate and habeas corpus proceedings.[243] Because "state courts are the principal forum for asserting constitutional challenges to state convictions," federal courts will not consider claims rejected in state court on procedural grounds or on the merits unless one of the AEDPA's statutory exceptions applies.[244] The federal habeas corpus statute reflects the view that "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal."[245]

The AEDPA imposes a "highly deferential standard" of review.[246] The federal court may not grant a habeas petition with respect to any claim decided on the merits in state court unless

the state court decision was: (1) "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'"; or (2) "'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"[247] Simply put, the AEDPA permits federal courts to grant habeas relief only in cases "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with the precedents of the United States Supreme Court.[248]

The Ninth Circuit's repeated disapproval of our state courts' failure to follow *Batson*, that is, to enforce the Equal Protection Clause, is well-illustrated by its decisions involving step one of the *Batson* procedure. For example, in *Fernandez v. Roe,* California courts failed to find that there was a prima facie case of discrimination after the prosecutor used his peremptory strikes against four of seven Latinx jurors and the only two African-American jurors in the venire.[249] The California Court of Appeal agreed with the trial judge that the defendant had not established a prima facie case because he "had not shown a 'strong likelihood' that the prosecutor had challenged the prospective jurors on account of their race or ethnicity."[250] The Ninth Circuit reversed.[251] It found that in *Fernandez* and other cases, California courts "erroneously required a defendant to show a 'strong likelihood' of discrimination in order to establish a *prima facie* case rather than just an 'inference' of discrimination as required by *Batson*."[252] The circuit remanded the case for an evidentiary hearing to apply the constitutionally proper test.[253]

Even after the Ninth Circuit disapproved of the heightened prima facie standard in cases such as *Fernandez*, California courts continued to require that defendants satisfy the higher standard. At step one, defendants still had to show that "it is more likely than not" the opposing party's strike "was based on impermissible group bias,"[254] rather than simply raise "an inference" of discrimination as *Batson* requires.[255] After years of insistence by California courts that the party making the *Batson* objection must meet this onerous standard, the United States Supreme Court intervened in *Johnson v. California*.[256] It held that California's test was an "inappropriate yardstick by which to measure the sufficiency of a prima facie case."[257] Even after *Johnson* was decided, California appellate courts, in practice, continue to require an elevated threshold at step one, contradicting clearly established federal law as determined by the high court.[258]

Below are but two examples of cases in which the Ninth Circuit, applying the AEDPA's highly deferential standard, reversed California state court convictions for *Batson* error at step three. In *Kesser v. Cambra*, the Ninth Circuit reversed the California Court of Appeal's decision that the prosecutor's removal of three Native American women from the jury did not violate the Equal Protection Clause.[259] The prosecutor offered several reasons for striking the Native American women. He described one woman as a "'darker skinned female.'"[260] He expressed concern that because the prospective juror worked for a tribe, she would be more likely to identify with the culture and beliefs of the tribe than "'the mainstream system.'"[261] The prosecutor also described Native Americans as "'resistive'" and "'suspicious'" of the criminal justice system, and stated that "there are a whole bunch of people that violate our laws that are Native Americans."[262] The state appellate court acknowledged "some degree of racial stereotyping," but concluded that the prosecution presented sincere, nonracial reasons for striking the Native American prospective jurors.[263] The California Supreme Court denied review.[264]

The Ninth Circuit in *Kesser* held that the California courts had unreasonably accepted the prosecution's "nonracial motives as genuine" by failing to consider any "evidence outside the prosecutor's own self-serving *Batson* testimony."[265] Unlike the trial court and state court of appeal, the Ninth Circuit reviewed the voir dire transcript and juror questionnaires, which "clearly and convincingly" refuted each of the prosecutor's nonracial grounds.[266] The comparative juror analysis revealed that the prosecutor's "ostensibly 'race-neutral' reasons show[ed] themselves to be only a veneer, a pleasing moss having no depth."[267] The circuit court declared that "the racial animus behind the prosecutor's strikes is clear."[268] The court concluded, "We cannot deny Kesser a representative jury by turning a blind eye to the prosecutor's pretextual, make-weight justifications for his race-based strikes. . . . [S]tate courts must review the record to root out such deceptions."[269]

More recently, in *Castellanos v. Small*, the Ninth Circuit found a *Batson* violation after a prosecutor struck four Latinx jurors.[270] The trial court did not conduct a comparative juror analysis and found no purposeful discrimination at step three.[271] The state appellate court also did not engage in a comparative juror analysis or examine the record to determine whether the prosecutor's reasons were pretextual.[272] Therefore, the Ninth Circuit conducted its own analysis of the record.[273]

The circuit court found that the prosecutor's explanation that he struck a Latina juror because she had no children was pretextual for several reasons.[274] First, the question to which the juror responded was: "Do you have adult children; if so, how many?"[275] The prosecutor's reason was "factually erroneous" because the prospective juror stated that she had two adult children.[276] Second, three other jurors who did not have adult children were ultimately seated as was another seated juror who refused to answer the question.[277] Third, the circuit court found that the prosecutor's question was "a rather odd way of getting at what the prosecutor purportedly sought to identify," which was whether jurors could understand young children such as the prosecution's child witness.[278] The Ninth Circuit held that because comparative juror analysis "reveals such significant evidence of pretext," the California court's finding to the contrary amounted to an "unreasonable determination of the facts in light of the evidence presented."[279]

Despite the heightened burden and procedural hurdles in federal habeas cases, criminal defendants have been significantly more successful in the Ninth Circuit than in our state courts because of the Ninth Circuit's willingness to more faithfully adhere to United States Supreme Court precedent.

III.

WHY RACIAL DISCRIMINATION IN JURY SELECTION PERSISTS

As Justice Marshall presaged in his concurring opinion, the procedure the Court announced in *Batson v. Kentucky* would not be adequate to eradicate the discriminatory use of peremptory challenges.[280] Justice Marshall identified three flaws in *Batson* that would destine it to fail. The first concerned the extent to which the requirement that the defendant make a prima facie showing would defeat *Batson*'s goal, especially in jurisdictions in which there are few Black jurors in the venire and fewer still who remain after cause challenges.[281]

Second, Justice Marshall warned that prosecutors could "easily assert facially neutral reasons" when challenged for striking a Black prospective juror and that "trial courts are ill equipped to second-guess those reasons."[282] Because prosecutors could so readily mask discriminatory peremptory strikes with race-neutral justifications, Justice Marshall feared that "the protection erected by the Court today may be illusory."[283]

Third, Justice Marshall doubted the efficacy of the *Batson* procedure because it failed to account for prosecutors' and judges' unconscious racism.[284] He warned, "Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet."[285] That is, even assuming that attorneys and judges make a good faith attempt not to use peremptory strikes in a discriminatory manner, the *Batson* procedure does nothing to ferret out the unconscious biases that infect nearly every person's decision-making. Justice Marshall further observed that prosecutors' "seat-of-the-pants instincts" about a juror, on which they often rely in exercising peremptory strikes, may "be just another term for racial prejudice."[286]

This section explores why, 34 years after *Batson* was decided, racial discrimination in jury selection persists in California. It reveals that Justice Marshall was prescient: the flaws in *Batson* he identified in 1986 continue to cripple its efficacy today. In Section I.B, we surfaced Justice Marshall's first concern: the ongoing underrepresentation of African Americans in California jury venires. Here, we address how unconscious racism—more commonly referred to now as implicit bias—affects the exercise of peremptory challenges and judicial rulings, and contributes to the disproportionate exclusion of African Americans from juries. We also explore prosecutors' long-standing resistance to *Batson*. We show how prosecutors' frequent use of facially "neutral" reasons, such as having a negative view of the criminal legal system, exploits the different views Blacks and Whites hold due to historical and personal experiences. We investigate how California prosecutors are trained to overcome *Batson* objections by employing the very tactics Justice Marshall anticipated, e.g., "gut instincts" and ready-made lists of "race-neutral" reasons. As Justice Marshall predicted, *Batson* allows this prosecutorial behavior to continue unchecked with pernicious results. Finally, we assess the ways in which the California Supreme Court has failed to enforce *Batson*'s mandate.

A. Implicit Bias Taints Peremptory Challenges

1. Overview of Implicit Bias and Batson

"Implicit bias" is bias based on subconscious attitudes or stereotypes.[287] Implicit biases encompass stereotypes about a range of identities, including race, ethnicity, gender, religion, body weight, and disability.[288] This section focuses on how implicit bias affects understandings of race, particularly as it concerns African Americans.

Implicit bias, in part, explains prosecutors' race-based strikes. Social science research has illuminated the direct impact that implicit biases have on the exercise of peremptory strikes. The results led one legal scholar to conclude that the *Batson* framework is "psychologically naïve" in its reliance on self-reporting.[289] She explained that because of the "wide dissociative gap between what we believe our feelings to be and what they actually are,"[290] a lawyer's inability to assess how a "juror's race has affected her decision to strike" also means that "she will be unable to explain it."[291] The commentator concluded that "*Batson* rests on outdated and inaccurate assumptions about human behavior."[292] These are the same assumptions Justice Marshall identified in 1986 as fatal to *Batson*'s prospects.[293] It is now both unrefuted and widely acknowledged that "powerful and pervasive" implicit biases affect the exercise of peremptory challenges as well as how judges rule on the lawfulness of those challenges.[294] The *Batson* procedure "both allows the implicit and explicit biases of attorneys to impact jury composition and may provide a false veneer of racial neutrality to jury trials."[295]

Writing for the majority in *Batson v. Kentucky*, Justice Lewis Powell declared that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[296] His words acknowledged the "purposeful" racial bias that the Court's three-step analysis of peremptory strikes was intended to ameliorate, if not altogether eliminate.[297] As noted elsewhere in this report, Justice Marshall concurred in the opinion, but cautioned that the Court's prescription "will not end the racial discrimination that peremptories inject into the jury-selection process."[298] Justice Marshall gave several reasons for his warning, including the following:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.[299]

Well before *Batson*, social science research had documented the stereotypic association of Black Americans as violent and criminal.[300] A year following the decision, a legal scholar wrote:

> [R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of

> what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.[301]

Within several years, another legal scholar criticized the *Batson* inquiry on the ground that it "focused almost entirely on proof of the discriminatory state of mind of the striking party," and could not effectuate its mandate of prohibiting all race-based discrimination.[302]

More than 30 years later, a wealth of empirical evidence confirms Justice Marshall's observation that individual actors in the criminal legal system are incapable of being fully aware of their race-based biases.[303] The studies leave no doubt that the "old tools of detecting racism—asking people to report on their own attitudes"—are largely ineffective.[304] Post-*Batson* research has shown that implicit biases in the exercise of peremptory challenges are unconscious and therefore impossible to elicit from the party exercising the strike.[305] These studies provide insight into modern understandings of racism as often subtle, unintentional, and unconscious, and offer one way to understand our empirical findings that race-based strikes persist in California courts.[306]

Implicit biases are particularly challenging to regulate because they occur when people "discriminate without intending to do so."[307] Simply put, "one does not have to be a Racist with a capital R . . . to harbor implicit racial bias."[308] Implicit bias "suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions."[309] These implicit biases "produce behavior that diverges from a person's avowed or endorsed beliefs or principles."[310] Such biases make the *Batson* framework, which depends upon the subjective judgments of the parties and judges, incapable of ferreting out invidious unconscious biases and stereotypes.[311]

2. A Half Century of Research on Implicit Bias

By 1954, researchers had hypothesized that racialized schemas[312] could be activated unconsciously.[313] The next major breakthrough in this research was the development of the distinction between "controlled" and "automatic" information processing made by cognitive psychologists who discovered that automatic processing is "difficult to alter, to ignore, or to suppress once learned."[314] Many studies in the following two decades demonstrated the pervasiveness of unconscious processing and found that awareness of stereotypes can manifest in social judgments and behaviors that are uncontrolled and differ from the subjects' reported attitudes.[315]

In the 1980s, research on "implicit-memory" led scholars to develop two new understandings of implicit thought development in humans: "implicit attitudes" and "implicit stereotypes."[316] Researchers defined implicit attitudes as an evaluative disposition that "indicates favor or disfavor toward some object but is not understood by the actor as expressing that attitude."[317]

They defined implicit stereotype as "a mental association between a social group or category and a trait."[318] Researchers then identified "implicit biases" as "discriminatory biases based on implicit attitudes or implicit stereotypes."[319]

A deeper understanding of implicit bias based on race was solidified in a groundbreaking study in 1989. In that study, researchers showed that even the preconscious presentation of racial material (material shown so quickly that the observer is not able to consciously register it) is sufficient to trigger the use of racial stereotypes.[320]

Development of the Implicit Association Test (IAT) in 1998 also expanded scientific understanding of the scope of implicit bias.[321] When respondents were asked about their "favoritism toward advantaged versus disadvantaged groups" across a dozen topics including race, gender, ethnicity, religion, and sexual orientation, 42% of respondents "expressed exact or near-exact neutrality" between advantaged and disadvantaged groups.[322] By contrast, data analysis of IAT results—the objective reality of those same respondents' implicit or unconscious views—revealed that "only 18% of respondents demonstrated sufficiently small implicit bias to be judged implicitly neutral."[323] These results show that implicit biases are far more pervasive than explicit biases.[324]

Studies have found that implicit bias extends beyond "in-group preference," which is defined as "favoritism toward groups to which one belongs."[325] Implicit bias establishes a general pattern of attributing positive attributes to White individuals and negative attributes to Black individuals, regardless of the race of the respondent.[326] Another study using the IAT found that there is a stronger association between the word "pleasant" and European Americans than there is between "pleasant" and African Americans.[327] The findings also demonstrate that there is a "greater favoritism to advantaged groups found in IAT measures than in explicit measures," revealing that discrimination across racial groups has a higher prevalence in an individual's implicit biases than any existing overtly racist views.[328]

A 2000 neurological study analyzed levels of activation in the amygdala—the area of the brain that controls fear—when participants were shown unfamiliar Black and White male faces with neutral, non-menacing expressions.[329] The results revealed that White participants exhibited the highest increased levels of activation in the amygdala when presented with Black faces.[330] The display of African Americans "evoke[d] differential amygdala activity" that is "related to unconscious social evaluation."[331] A later social psychological study further evaluated the associative link between African Americans and fear, and found that Whites hold strong associations between race and crime and are most fearful of the risk of crime when "in the presence of black strangers."[332] White respondents' estimates of "victimization risk" were "heavily influenced by racial composition," even though the study also made plain that actual crime risk is "not affected by racial composition."[333]

3. Pervasive Implicit Bias in the Criminal Legal System and in the Exercise of Peremptory Challenges

A growing body of social science research on implicit bias focuses on the pervasiveness of implicit biases in the criminal legal system.[334] The findings, confirmed by articles in peer-reviewed journals, are that "[i]mplicit biases—by which we mean implicit attitudes and stereotypes—are both pervasive (most individuals show evidence of some biases), and large in magnitude, statistically speaking. In other words, we are not, on average or generally, cognitively colorblind."[335] Much of the research has shown that implicit bias is widespread in all aspects of the criminal legal system, resulting in discrimination against both Black defendants and Black jurors by various actors, including police officers, attorneys, judges, and jurors.[336]

Empirical research confirms that individuals generally associate persons of color—particularly African Americans—with criminality more often than they do Whites. This association has had and continues to account for "a disproportionate amount of crime arrests" of African Americans,[337] a higher likelihood of conviction when charged with a crime jurors associate with Blacks,[338] and lengthier sentences for Black defendants than those imposed on comparable White defendants.[339] Most of the social science research has focused on the Black-White dichotomy. However, studies examining the effects of implicit bias on other people of color have produced similar results.[340]

In a five-study publication, researchers determined that the association between African Americans and criminality is bidirectional; exposure of participants to Black male faces "lowers the perceptual threshold at which they detect degraded images of crime-relevant objects (e.g., guns and knives)" and, conversely, "exposing people to crime-relevant objects prompts them to visually attend to Black male faces."[341] These findings demonstrate the "durability" of the association between African Americans and criminality.[342] In another study, researchers showed that the unconscious association of African Americans with criminality is so strong that it impacted response times in gun use against an individual viewed as a threat. Participants were quicker to "shoot" an armed Black target than an armed White target and were slower to "not shoot" an unarmed Black target than an unarmed White target.[343]

Implicit racial biases affect decision-making in jury deliberations, and studies have shown that racially diverse juries reduce deliberation inaccuracies and racially discriminatory decision-making. For example, a mock jury study found that racial diversity motivated White participants to contribute more fact-based, unbiased commentary during the deliberations, which reduced racial disparities in the outcomes.[344] Another mock jury study concluded that heterogeneous groups produced higher quality deliberations in that the jurors "deliberated longer and considered a wider range of information than did homogeneous groups."[345] In mock jury deliberation situations in which Black participants were present, White participants raised more case facts, made fewer factual errors, and "were more amenable to discussion of race related issues" than when they deliberated in a non-diverse group.[346]

Researchers have demonstrated that implicit bias against African Americans affects jury selection, specifically influencing the exercise of peremptory challenges.[347] For example, 28 practicing attorneys with jury trial experience, 90 undergraduate college students, and 81 law students participated in a study involving a hypothetical burglary case with DNA evidence.[348] They were asked to assume the role of the prosecutor and to exercise their final peremptory strike against one of two prospective jurors.[349] The juror profiles were designed to be equally unattractive to the prosecution: the first hypothetical juror had "written articles about police misconduct," and the second hypothetical juror was skeptical of statistical evidence.[350] Each participant responded to two different scenarios. In the first experiment, Juror #1 was Black and Juror #2 was White.[351] In the second experiment, the race of the juror profiles was switched.[352]

The study found that the participants' strike decisions varied sharply by race. When the first juror—the individual familiar with police misconduct—was Black, "participants challenged him 77% of the time; this same individual was challenged just 53% of the time when he was White."[353] The second juror—the individual who was skeptical of statistical evidence, like DNA testing—was challenged "47% of the time when he was Black, compared to 23% when he was White."[354] Despite these disparities, participants "rarely cited race as influential, focusing instead on the race-neutral characteristics associated with the Black prospective juror,"[355] even though the characteristics of the juror profiles remained exactly the same and only the race of the juror switched in the two scenarios. Researchers found that "a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence."[356]

Although not directly addressing the issue of race, research on implicit bias with respect to gender shows that explicit instructions against the use of gender in exercising peremptory strikes is ineffective in altering the effects of implicit bias on behavior.[357] In research involving two studies, college students were asked to assume the role of a prosecutor and exercise a single peremptory challenge against one of two prospective jurors in the mock trial of a female defendant accused of killing her husband.[358] Both studies used the same prospective juror profiles, which "included at least one characteristic that could be construed as unattractive to a prosecutor."[359] In the first study, "juror selection was driven by gender. Across conditions, 71% of participants chose to eliminate the female juror."[360] The results revealed that "jurors with otherwise identical profiles were likely to be retained when male but excused when female."[361] In the second study, the mock prosecutors in one group were given an explicit instruction that "according to the U.S. Supreme Court, you may not decide to remove a juror because of his or her gender"; the mock prosecutors in the second group did not receive this instruction.[362] This warning "failed to decrease gender bias": 59% of jurors who received the warning removed the female juror.[363] Similarly, 60% of participants in the second group—who did not receive the warning—also removed the female juror.[364] The researchers found that "warnings against bias led participants to go to greater lengths to conceal that bias."[365] In considering remedies for

discrimination in peremptory challenges discussed in Section IV, the authors concluded that instructing attorneys about implicit bias will not significantly reduce discriminatory peremptory challenges.

In the face of this growing body of research, California judges have expressed similar concerns about implicit biases and *Batson*'s inability to identify and preclude them. In September 2019, concurring in *People v. Bryant*, two California Court of Appeal justices announced that the "case highlights the serious shortcomings with the *Batson* framework," aligning with others "who are calling for meaningful reform."[366] In his concurring opinion, Justice Jim Humes wrote that the *Batson* procedure, which is limited to acts of intentional discrimination, "plainly fails to protect against—and likely facilitates—implicit bias."[367] Quoting United States Supreme Court Justice Stephen Breyer, Justice Humes explained that "it is not hard to wonder, '[h]ow . . . trial judges [can] second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor.'"[368]

Concurring last year in *People v. Smith*, Court of Appeal Justice Jon Streeter discussed courts' overreliance on the seating of jurors who are the same race as the struck jurors to legitimize a prosecutor's peremptory challenges.[369] The trial court in *Smith* found a prima facie showing of discrimination based upon the prosecutor's use of peremptory challenges to strike four Black jurors.[370] In the trial judge's view, however, the fact that one Black juror was seated and another Black juror served as an alternate constituted "'powerful evidence' supporting the credibility of the prosecutor's proffered reasons for excusing jurors."[371] Justice Streeter objected that attaching "too much significance to the prosecutor's willingness to pass the panel with one or two same-race jurors in it 'would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion.'"[372] Justice Streeter explained that because "the Constitution forbids striking even a single prospective juror for a discriminatory purpose," the question before the trial court was whether the prosecutor's reasons for excusing the four jurors "were pretextual, not whether his decision to pass on some other juror was free of discrimination." [373]

Justice Streeter turned to the psychological literature demonstrating that discrimination can be "masked by a discriminator's attempt to demonstrate lack of prejudice on a prior occasion."[374] He pointed to the same language in Justice Thurgood Marshall's opinion in *Batson* quoted at the beginning of this section as "[a]nticipating the need to apply concepts of implicit bias to the discriminatory use of peremptory challenges," as well as the influence of "[a] judge's own conscious or unconscious racism" in issuing a ruling.[375] Thus, he wrote that the prosecutor's retention of two Black jurors, "may have been indicative of good faith, but good faith in and of itself was not the issue. Many perpetrators of discrimination are sincere."[376]

B. Prosecutors' Continued Resistance to *Batson*

Prosecutors' efforts to oppose remedies to discriminatory jury selection practices are long-standing. When the United States Supreme Court was considering *Batson*, the National District Attorneys Association ("NDAA") filed a brief in support of the state of Kentucky.[377] The NDAA argued, "Prosecutorial peremptory juror challenges to remove . . . all members of a defendant's race is not violative of a defendant's right to be tried by an impartial jury . . . under the sixth amendment of the United States Constitution."[378] In Justice Marshall's concurring opinion in *Batson*, he wrote that the "misuse of the peremptory challenge to exclude black jurors has become both common and flagrant."[379] Justice Marshall referenced an instruction book used by the Dallas County, Texas District Attorney's Office, which "explicitly advised prosecutors that they conduct jury selection so as to eliminate 'any member of a minority group.'"[380] Until 2010, the NDAA refused to adopt *Batson* as a standard. Instead, the organization recommended that prosecutors "be familiar with the decisions . . . [and] closely follow other cases that develop . . . *Batson* . . . issues."[381]

Prosecutors across the country are trained in how to use peremptory strikes against African Americans and other jurors of color without violating *Batson.* A year after *Batson*, then-Philadelphia Assistant District Attorney Jack McMahon gave a videotaped training session to prosecutors in his office. He instructed them to circumvent *Batson* by thoroughly questioning Black jurors so that "you [have] more ammunition to make an articulable reason as to why you are striking them, not for race."[382] At a 1995 North Carolina Conference of District Attorneys training program, attendees received a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives."[383] It provided 10 vague reasons such as inappropriate dress, physical appearance, poor attitude, or body language. [384] In 2004, a list of purportedly race-neutral justifications was distributed to Texas prosecutors that included suggestions such as "Watched gospel TV programs" and "Agreed with O.J. Simpson verdict."[385] A 2005 edition of a national trial manual for prosecutors did not once refer to *Batson*.[386] As we show below, exploiting *Batson*'s deficiencies in order to strike jurors of color is by no means restricted to prosecutors in states other than California.

C. Prosecutors Strike Black Jurors Based on Their Different Experiences with the Criminal Legal System

Consistent with other studies, our empirical research found that prosecutors often use peremptory strikes against jurors of color who hold negative views of the criminal legal system or law enforcement.[387] The California Supreme Court has repeatedly held that these reasons are facially race-neutral, therefore sufficient to get prosecutors past *Batson*'s second step and, almost always, adequate to defeat a defense objection.[388] Indeed, as Section III.D shows, prosecution training manuals often cite these very reasons as legally sound, "race-neutral" bases for peremptory strikes, and urge prosecutors to use them as justifications.

The effect, however, of using peremptory strikes to remove jurors who hold negative views of law enforcement or have been involved with the criminal legal system is anything but "race-neutral." Overall, African Americans and Whites differ in their attitudes towards the criminal legal system.[389] African Americans are more likely than Whites to view the system as racially discriminatory and unjust, and are therefore less supportive of punitive criminal justice policies.[390] These attitudes are embedded in the nation's long history of racial oppression, and the differential treatment of African Americans by the criminal legal system, including by members of law enforcement.[391] Moreover, because of the racially discriminatory nature of policing and mass incarceration, African-American prospective jurors are more likely to have had personal or familial involvement with the criminal legal system.

Both the reality and prosecutors' perceptions of these differences in opinion between Blacks and Whites lead prosecutors to disproportionately—and successfully—exercise peremptory challenges against African Americans. Whether a challenge is based on a prosecutor's sincere (though demonstrably false) belief that the criminal legal system treats everyone fairly and equally irrespective of race or the strike is simply a tactical decision to remove a prospective juror the prosecutor instinctively believes will be unsympathetic, the result is discriminatory in at least two respects. As noted (and as will be detailed presently), African Americans generally have sound reason to doubt the fairness of the criminal justice system; thus using that as a reason to eliminate prospective jurors necessarily has a disparate impact on the proportion of their representation on the jury. Moreover, the *a priori* assumption that *every* African American is going to be hostile to law enforcement is a paradigmatic example of "group bias"—the very evil that *Wheeler* set out to cure. Yet both prosecutors and the judges who pass on the legitimacy of their peremptory challenges continue to give credence to such biased views, consciously or unconsciously, with the result that African Americans and other persons of color continue to be eliminated disproportionately.[392]

1. African Americans' Distrust of the Criminal Legal System Is Rooted in Its Racist History

When slavery was abolished, Whites turned to new methods of social and economic control. For the all-too-brief Reconstruction period (1865-77), African-American men began to gain a toehold in civil society.[393] They held elected office, gained the right to vote and serve on juries, and began to establish "businesses, churches, schools and other legacy institutions."[394] However, the White backlash against Reconstruction's civic reforms was brutal and swift.[395] Though the South was defeated in the Civil War, "white supremacist ideologies continued, unbridled and disengaged from the institution of slavery."[396] States in the South "began to look to the criminal justice system to construct policies and strategies to maintain the subordination of African Americans."[397] They found inspiration in the text of the Thirteenth Amendment, which outlawed slavery and involuntary servitude "except as a punishment for a crime."[398] Southern states enacted "Black codes" and adopted vagrancy laws, which "essentially made it a criminal offense not to work and were applied selectively to blacks."[399] Once convicted, Blacks were often "contracted out as laborers to the highest private bidder" as part

of the brutal system known as convict leasing.[400] Thus, the institution of slavery was revived in all but name for African Americans who were caught up in the criminal legal system.

Beginning around the turn of the century, an "epidemic of lynchings" engulfed the South; thousands of African Americans were tortured and killed.[401] Extrajudicial executions profoundly impacted race relations in the United States and "shaped the geographic, political, social, and economic conditions" of African Americans in ways that are still visible today.[402] Across the South, "someone was hanged or burned alive every four days from 1889 to 1929."[403] Most of the southern Black population had "witnessed a lynching in their own communities or knew people who had."[404]

The specter of lynching reached far beyond the South. During the Great Migration, which lasted from the early 1900s through the 1970s, "some six million black southerners left the land of their forefathers and fanned out across the country for an uncertain existence in nearly every other corner of America."[405] Not only were people lynched throughout the United States, including in California, but those African Americans who left the South during the Great Migration brought with them their lived experiences and fears.[406] Therefore, "a potential unintended consequence of the 'Great Migration' was a cultural transmission of the history of southern lynchings among African Americans" all over the country.[407]

The administration of the criminal law is interwoven with the history of lynching in ways that "continue to contaminate the integrity and fairness of the justice system."[408] In particular, extrajudicial lynchings in the South were increasingly replaced by state executions.[409] The decline in lynchings "relied heavily on the increased use of capital punishment imposed by court order following an often accelerated trial."[410] White leaders in the South "acknowledged that capital punishment could serve the same function as lynchings—the control and intimidation of African Americans."[411] Indeed, both White and Black Southerners viewed state executions as "legal lynchings."[412] Therefore, African Americans' widespread opposition to capital punishment is linked to this history and to the use of capital punishment by the state as a way to replace and reinvent the racial terrorism of lynching.[413]

Throughout the 20th century, the criminal legal system continued to disproportionately punish African Americans. The use of the criminal legal system as a vehicle for segregating and oppressing Blacks was far from a uniquely Southern phenomenon. On the contrary, "disparate enforcement of various laws against 'suspicious characters,' disorderly conduct, keeping and visiting disorderly houses, drunkenness, and violations of city ordinances made possible new forms of everyday surveillance and punishment in the lives of black people in the Northeast, Midwest, and West."[414] As a result of racist laws, policing, and enforcement, Whites came to associate Blacks with crime and used that harmful stereotype to justify further discriminatory policies. "The high arrest and incarceration rates of black Americans—though based on . . . racist policies . . . served to create what historian Khalil Gibran Muhammad has called a 'statisti-

cal discourse' about Black crime in the popular and political imagination, and this data deeply informed national discussions about racial differences that continue to this day."[415]

As the Jim Crow regime was slowly dismantled through the gains of the Civil Rights Movement, explicitly racist calls for White supremacy and segregation were replaced by racially coded appeals to "law and order."[416] "Proponents of racial hierarchy found they could install a new racial caste system without violating the law or new limits of acceptable political discourse, by demanding 'law and order' rather than 'segregation forever.'"[417] Public figures and the media amplified paranoia about urban crime in ways that reinforced racial stereotypes. The messaging worked: "By 1968, 81 percent of those responding to the Gallup Poll agreed with the statement that 'law and order has broken down in this country,' and the majority blamed 'Negroes who start riots' and 'Communists.'"[418]

Over the succeeding decades, mass incarceration boomed, fueled by racially discriminatory stereotypes of African-American criminality. "As law enforcement budgets exploded, so did prison and jail populations."[419] By the 1990s, "the Sentencing Project reported that the number of people behind bars in the United States was unprecedented in world history."[420] Today, the "American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories."[421]

The present-day criminal legal system is unique not just in its massive size, but its racially discriminatory character. The statistics are dizzying: "Black men comprise about 13 percent of the U.S. male population, but nearly 35 percent of all men who are under state or federal jurisdiction with a sentence of more than one year."[422] One-third of Black men born in 2001 will likely be incarcerated in their lifetime.[423] "Black people are incarcerated in state prisons at a rate 5.1 times greater than that of white people."[424] In 2010, 8% of American adults had been convicted of a felony compared to 33% of Black men.[425]

Further, African Americans and Whites have significantly different experiences with law enforcement. Recent Bureau of Justice Statistics data confirm that Black Americans are "more likely to be stopped by police than white or Hispanic residents, both in traffic and street stops."[426] Once stopped, Black drivers are "far more likely to be searched and arrested" than Whites.[427] This is true even though police find contraband at a lower rate when they search Black drivers as compared to White drivers.[428] "In 2016, Black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population."[429] Only 15% of children in the United States are Black, yet 35% of juvenile arrests in 2016 were of Black children.[430] In 2015, 25% of people arrested for drug infractions were Black, despite evidence that suggests "drug rates do not differ substantially by race or ethnicity."[431]

Blacks are also disproportionately the victims of police violence. In 2018, police "were twice as likely to threaten or use force" against African Americans and Latinx people than Whites during stops.[432] This violence can be fatal. Black men are "2.5 times more likely than White men and boys to die during an encounter with cops."[433] About one in 1,000 Black men in America will be killed by the police.[434]

The egregious racial disparities summarized here also play out in criminal case prosecutions and outcomes. Our criminal legal system continues to treat Whites and Blacks differently. For example, federal "prosecutors . . . are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than similarly situated whites."[435] And state "prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws."[436] In addition, judges are more likely to "sentence people of color than whites to prison and jail and to impose longer sentences, even after accounting for differences in crime severity, criminal history, and education level."[437]

2. Blacks and Whites Differ in Their Views of the Criminal Legal System

Decades of social science research confirms that African Americans and Whites differ in their views of the criminal legal system, with more Blacks consistently expressing the opinion that the system is racially discriminatory. The reasons for the divide in perception are embedded in the historic and present-day differences, described above, between how the two groups experience the criminal legal system, including their interactions with law enforcement.

Blacks consistently support the death penalty at lower rates than Whites. For example, "only around a third of blacks (36%) support capital punishment . . . compared with nearly six-in-ten whites (59%)."[438] Scholars have further noted that "doubts about capital punishment cut across socioeconomic, political, and religious lines within the African American community."[439] Unsurprisingly, Blacks' opposition to the death penalty is rooted at least in part in the historical awareness and/or lived experience that it is racially discriminatory.[440] A 2015 survey revealed that "77% of blacks said that minorities are more likely than whites to be sentenced to death for committing similar crimes."[441] Research confirms that, in California, African-American support for the death penalty is lower than among Whites. For example, in a 2011 survey, 45.1% of African Americans in California favored abolishing capital punishment, compared to just 25.5% of Whites.[442] Similarly, 66% of African Americans said that they preferred life imprisonment without parole over the death penalty, while 45% of Whites reported the same.[443] Two surveys conducted in Solano County in 2014 and 2016 show a clear and consistent difference between Black and White support for the death penalty.[444] In the 2016 survey, just "27% of African-American respondents supported the death penalty compared to 66% of white respondents."[445]

Importantly, African Americans' relatively higher opposition to the death penalty leads to their disproportionate removal from juries in capital cases.[446] Capital juries are almost always "death qualified," which means that prosecutors can successfully challenge for cause jurors who have reservations about the death penalty.[447] Because African Americans are more likely than Whites

to oppose the death penalty, African Americans are routinely removed from capital juries before the prosecution exercises any peremptory strikes. Death qualification is yet another part of the jury selection process that contributes to the whitewashing of juries.[448]

Research published in 2019 showed that almost 80% of African Americans—as compared with more than 30% of Whites—consider the treatment of people of color by the criminal legal system to be a significant problem.[449] Similarly, around 90% of African Americans believe that "blacks are generally treated less fairly by the criminal justice system than whites," while only about 60% of Whites hold that view.[450] A 2013 study revealed that more than two-thirds of Blacks surveyed perceived the criminal justice system as biased against Blacks, compared to just one-quarter of Whites.[451] These African Americans described their personal experiences with the criminal legal system—and the system itself—as "[u]nfair, illegitimate, and excessive."[452]

These recent findings illustrating stark differences in how Blacks and Whites view the criminal legal system are consistent with social science research conducted during the past several decades. An empirical study published in 2007 found that "African Americans and Whites do not conceptualize 'American justice' in the same terms. Whereas Whites tend to see the scales of justice as reasonably balanced, African Americans are inclined to believe that unfairness, based on race, is integral to the operation of the criminal justice system."[453] Research analyzing national data collected between late 2000 and early 2001 showed that "while 74.0% of Blacks do not agree that the justice system treats people fairly and equally, only 44.3% of whites express similar sentiments."[454] The research also revealed that 61% of Blacks, compared to 26% of Whites, "do not trust the courts to give a fair trial."[455]

Empirical studies from the 1990s, 1980s, and 1970s are consistent with these findings and reveal that skepticism of the criminal legal system among African Americans is not a new phenomenon. For instance, a national survey conducted in 1999 found that African Americans had less confidence in the performance of the courts than all other groups in the sample.[456] Based on their research, scholars writing in 1997 similarly concluded that "African Americans see the criminal justice system as racially biased, while the majority of whites generally believe the system is racially neutral and reflects the ideal of equal treatment before the law."[457] They noted that their research "results point to a deep and persisting racial cleavage in perceptions of racial injustice."[458] In 1982, John Hagan and Celesta Albonetti published the results of a study conducted in 1977 that surveyed Americans' views of the criminal legal system.[459] "The salient finding," they wrote, was "the persistent and often striking influence of race on the perception of criminal injustice."[460] The research showed that, even controlling for socioeconomic class, Blacks were far more likely than Whites to view the criminal legal system as unjust.[461]

The differences between how Whites and African Americans view the fairness of the criminal legal system apply to their opinions about law enforcement. Blacks are more likely than Whites to hold negative views of the police. For example, one study found that "Blacks are three times more likely than are whites—39% versus 12.8%—to have unfavorable opinions of their local police and four times more likely—30.3% versus 7.7%—to have unfavorable views of the state police."[462] Blacks are also less likely than Whites to say that the police do a good job of

interacting with members of their community.[463] A 2015 literature review of 92 studies found that "individuals who identified themselves as black, non-white, or minority were more likely to hold negative perceptions and attitudes toward police as compared to whites."[464]

Significantly more Whites than Blacks believe that the police in their communities treat racial and ethnic minorities equally.[465] For example, according to a 2019 Pew Research Center report, "84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites. A much smaller share of whites—though still a 63% majority—said the same."[466] A similar study in 2016 found that only about one third of Blacks—compared to three-quarters of Whites—believe that their local police do a good job "treating all racial and ethnic minorities equally."[467] A 2002 survey showed that both Blacks and Latinxs were more likely than Whites to perceive the police as racially biased.[468] According to the research, "three-quarters of blacks and half of Hispanics expressed that the police treated blacks and Hispanics worse than whites in their city."[469] By contrast, a vast majority of Whites (about 75%) said that "the police treated all of these groups equally."[470] This empirical data further support the findings discussed above: Blacks are more likely to view aspects of the criminal legal system negatively because they perceive the system to be racially discriminatory, while Whites are more trusting of the system because they believe it operates fairly.

Blacks are also much more likely than Whites to report that police have treated them unfairly and to report that they had a negative experience with the police. In a 2016 Pew Research Survey, nearly half of all African-American respondents (44%) reported that they had been "unfairly stopped by police because of their race or ethnicity."[471] Just 9% of Whites said the same.[472] According to research published in 2010, "one of every three African Americans reported being treated unfairly by the police because of their race, whereas closer to only one of ten whites reported unfair treatment for any reason at all."[473] This disparity is consistent with research published in the preceding decade. For example, in 2002, 40% of Blacks reported "having been stopped by the police because of their race."[474] The same study found that 95% of Whites said that they had never been the victim of racial profiling.[475]

Similar fissures exist between Whites and Blacks on the issue of police use of force. In a 2016 study, 75% of Whites expressed the view that "their police do an excellent or good job when it comes to using the right amount of force for each situation" compared to just 33% of Blacks."[476] Consistent with the findings cited above, this disparity has persisted for decades. For example, in a 1999 Gallup poll that surveyed Americans about police brutality in their communities, "58% of non-whites believed police brutality took place in their area, in contrast to only 35% of whites."[477]

African Americans and Whites also react differently to the high-profile police killings of unarmed Black men that have garnered media attention in recent years.[478] For about eight in 10 Blacks these killings "signal a larger problem between police and the black community," in contrast to a narrow majority of Whites.[479] Additionally, Blacks and Whites differ in their perceptions of protests in response to the killings. A substantial majority of Whites (85%) saw anti-police bias as a "significant reason" for such protests.[480] By comparison, only 56% of Blacks shared that view.[481] "Blacks are also about twice as likely as whites to attribute a great deal of the motivation for the demonstrations to the desire to hold officers accountable (55% v. 27%)."[482]

In sum, Blacks are more likely than Whites to view the criminal legal system as racially discriminatory, to hold critical views of the police, and to have personally experienced negative interactions with law enforcement. African Americans are therefore more skeptical of the fundamental fairness of the administration of justice.

As a result of the view that racial bias infects the criminal legal system, African Americans are generally less punitive than Whites, who largely believe that the system operates in race-neutral and legitimate ways.[483] Whites' support for specific criminal justice policies reflects their more punitive views. For example, a "national survey conducted between 2000 and 2001 showed that 70% of whites, in contrast to 52% of blacks, supported 'three strikes' laws that compelled life sentences for people convicted of a third serious offense."[484] The same survey asked respondents whether, in some circumstances, juveniles should be tried as adults.[485] A majority of Whites (60%) agreed that they should, while 46% of Blacks held that view.[486]

Although Whites are the victims of crime far less often than African Americans, they consistently support harsher crime policies.[487] Blacks are more likely than Whites to be the victims of household burglary, motor vehicle theft, robbery, sexual assault, aggravated assault, and homicide.[488] A 2018 survey found that "black adults were roughly twice as likely as whites to say crime is a major problem in their local community (38% vs. 17%)."[489]

Despite Blacks' greater likelihood of being crime victims, Whites are more punitive. This is because African Americans' "negative encounters with the criminal justice system and greater recognition of the root causes of crime temper their preferences for punitive policies."[490] By contrast, Whites "have less frequent and more positive criminal justice contact, endorse more individualistic causal explanations of crime, and are more likely to harbor overt racial prejudice."[491] It is clear that racial biases—and particularly misperceptions about *who* commits crime—lead Whites to be both trusting of the criminal legal system and punitive.

The stark racial nature of the American criminal legal system has led commentators to liken it to a modern racial caste system: "the New Jim Crow" or a revival of the "peculiar institution."[492] Given both its history and its current administration, it is unsurprising that many African Americans view the criminal legal system differently—and, generally, more negatively—than Whites. That view is inarguably legitimate in light of historical and modern-day circumstances; Blacks have been targeted and persecuted by the criminal legal system in ways that Whites have not. The criminal legal system has historically treated Whites and Blacks unequally and continues to do so. In the context of jury selection, however, prosecutors and judges do not treat these two viewpoints—though both are grounded in history and lived experience—equally. Rather, our study shows that prosecutors in California continue to use peremptory strikes against Black jurors based on both their perceived distrust of the criminal legal system and the specific reality of their negative experiences with that system. Our courts continue to approve the legitimacy of these strikes. As this report demonstrates, the *Batson* framework, which requires a showing of purposeful discrimination, never had the capacity to remedy these entrenched racial disparities and has most assuredly failed to do so.

D. Training Manuals Instruct Prosecutors to Conceal Race-Based Strikes

Prosecutor training is likely a key driver of California prosecutors' disproportionate removal of Black and Latinx prospective jurors through the exercise of peremptory challenges. Indeed, our review of district attorney training materials from 15 counties in California between 1990 and 2019 demonstrates that the *Batson* regime has failed in this state for the very reasons Justice Marshall predicted in his concurring opinion.[493] The training of prosecutors—as evidenced by these documents—all but ensures the continuation of the pernicious legacy of racial discrimination in jury selection in several ways. First, the materials teach prosecutors to select an "ideal juror" prototype that, explicitly or implicitly, directs them to strike Black jurors and other jurors outside of their "in-group." Second, they instruct prosecutors to rely on their gut in deciding whether to dismiss jurors, belying decades of empirical research demonstrating that implicit biases fuel intuitive or instinctive decisions.[494] Third, the materials are a playbook for contravening *Batson*. They include tips for concealing implicit and explicit bias through extensive, ready-made lists of "race-neutral" reasons for striking Black jurors and provide trial tactics to avoid the appearance of racism.

At their core, the materials instruct prosecutors to strike jurors based on "group bias," precisely the stereotypical reasoning the California Supreme Court prohibited in *People v. Wheeler*.[495] The court defined group bias as the assumption that certain jurors are biased merely because they are members of an identifiable group.[496] *Wheeler* held that exercising a peremptory challenge based on "group bias" violates the state constitutional right to trial by a jury drawn from a representative cross-section of the community.[497] The court declared, "'Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.'"[498]

The United States Supreme Court in *Batson* and subsequent opinions also condemned group bias in jury selection. In *Batson*, the Court stated, "Competence to serve as a juror ultimately depends on . . . individual qualifications and ability impartially to consider evidence presented at a trial."[499] Later, in *J.E.B. v. Alabama ex rel. T.B.*, the high court observed that reliance on a juror's membership in a group as a proxy for competence or impartiality "'open[s] the door to . . . discriminations which are abhorrent to the democratic ideals of trial by jury.'"[500]

Training prosecutors to rely on group characteristics such as occupation, age, marital status, or education allows prosecutors (consciously or unconsciously) to use those characteristics as proxies for race based on the characteristics' implicit or explicit association with race.[501] For example, the manuals do not direct prosecutors to inquire about how a prospective juror's occupation has influenced the juror's views about issues relevant to the case on trial.[502] Rather, stereotypes about how an individual who has a given profession or occupation would sympathize with a defendant or distrust the prosecution serve as the basis for a peremptory challenge.[503] Striking the juror simply *because* he is a social worker and might work or identify with Black communities, without evidence of specific bias towards the defendant or against the prosecution, constitutes the very group bias *Batson* and *Wheeler* condemned.[504]

1. Identifying the "Ideal" Prosecution Juror

An Orange County training document explains: "The law says we want 12 fair and impartial jurors" but "[i]n reality, if we had our choice, we would pick 12 biased jurors in our favor."[505] Thus, prosecutors must "ferret out [jurors'] biases and then select the jurors who are most biased for us."[506]

Prosecutors are instructed explicitly and implicitly to preference jurors who are most demographically similar to themselves. The first question many of the materials pose is: Who is the ideal juror for your case? *Ned's Compleat* [*sic*] *Voir Dire Manual*, a publication by New Prosecutor's College used in San Diego County, states that a "Prosecution Jury" will include people who "have a stake in the community," "homeowners," and people who "have children in the home" and "can work together" with other people in "'committee-like' environments."[507] It also includes a list of "GOOD PEOPLE," consisting of "middle class, middle aged homeowners," people with a "steady job," and "persons with traditional lifestyles."[508] Likewise, one Orange County directive "on whom to excuse" states that "Good" jurors are "attached to community, educated, stable, [and] professionals."[509] Other Orange County materials explain that the ideal prosecution jurors "Have a Stake in the Community," "Can Work Together," are "Mature Individuals," "Respect the System,"[510] and are "Normal, regular people."[511]

On the other hand, training documents advise prosecutors against accepting certain types of jurors. For example, a Ventura County trainer is "very cautious about . . . people who are marginalized by societal norms."[512] *Ned's Compleat* [*sic*] *Voir Dire Manual* lists "BAD PEOPLE," who are defined as those who are "unusual or weird," have themselves or their family members had "previous arrests or convictions . . . for the same/similar offense," or have "occupations sympathetic to defendants."[513]

Nearly all of the training materials emphasize that *Batson* permits prosecutors to base their strikes on membership in groups in which African Americans are overrepresented, e.g., "less educated" people, "blue collar workers," and both "ex-felons" and relatives of those who are incarcerated.[514] The message is that if a prosecutor relies on characteristics that are facially neutral but in fact apply disproportionately to members of a protected group, they will survive a *Batson* objection.[515] Directing prosecutors to use non-cognizable group labels encourages them to evade accountability under *Batson* for discriminatory peremptory challenges.

Using employment status as a basis for a peremptory challenge disproportionately excludes Black and Latinx jurors. Between 1954 and 2013, "the unemployment rate for blacks has averaged about 2.2 times that for whites," varying between 2.77 at its highest and 1.67 times higher at its lowest.[516] According to a review of multiple studies conducted between 1989 and 2015, "[o]n average, white applicants receive 36% more callbacks than equally qualified African Americans . . . representing a substantial degree of direct discrimination. White applicants receive on average 24% more callbacks than Latinos."[517] Compared to White men, Black and Latino men are less likely to be called for interviews for low-wage jobs based on their resumes,

to be hired, and to be offered a job involving customer service.[518] While more than half of Americans experience some period of poverty, 84% of African Americans "spend at least a year in poverty over their lifetime."[519]

The characteristics of the "ideal juror" are all but identical to those of most prosecutors. Almost by definition, prosecutors are well-educated, have stable employment and strong community ties, and are predominantly White. In California in 2015, 69.8% of prosecutors were White and only 5.8% of prosecutors were Black, although Whites constituted only 38.5% of the population.[520] In 2018, the national average salary for entry-level prosecutors was $56,200, and was $84,400 for prosecutors with 11 to 15 years of experience.[521] In California, district attorneys' salaries are significantly higher than the national average. For example, an entry-level district attorney in Tulare County earns between $62,277 and $75,899 annually[522] and the majority of managing deputy district attorneys in Riverside County have an annual salary of $214,649.26.[523]

Social psychologists have demonstrated the tendency for people, especially Whites, to show "implicit preferences for groups with higher social status [such as Whites,] to groups with lower social status."[524] Specifically, social scientists have shown that individuals display "implicit in-group favoritism," a phenomenon whereby "people automatically associate the in-group, or 'us,' with positive characteristics, and the out-group, or 'them,' with negative characteristics."[525] As of 2005, "nearly one hundred studies" had demonstrated the effects of "ingroup favoritism."[526] For example, people "judge same-group members more positively, see and describe failures as situational rather than dispositional, overrate achievements considerably, [and] punish more leniently."[527] Both conscious and implicit bias in favor of in-groups do not develop because of "invidious dislike of the outgroup, but rather 'because positive emotions such as admiration, sympathy, and trust are reserved for the ingroup.'"[528]

Thus, prosecutorial training embraces in-group favoritism towards White jurors explicitly through the typology of an "ideal juror." The training also does so implicitly by validating trust and respect for those in the in-group.

2. Racial Stereotyping by Reliance on "Gut Instincts"

District attorney trainings direct prosecutors to trust their gut reactions when exercising peremptory challenges. The training materials are replete with reminders that a mere hunch is a sufficient basis for a strike. For example, Monterey County uses a jury selection worksheet emblazoned with "FOLLOW GUT INSTINCTS" in large capital letters.[529] San Diego County prosecutors are told to "go with your gut."[530] Orange County prosecutors are instructed that when watching jurors' body language: "'GO WITH YOUR GUT INSTINCTS !!,'"[531] "ALWAYS, ALWAYS--TRUST YOUR INSTINCTS,"[532] and do not "ignore your personal reaction to a prospective juror."[533] Specifically, they are directed: "If you have a vague feeling that there is something wrong about a prospective juror, don't gamble."[534] Ventura County tells its prosecutors: "When in doubt, Kick 'em Out (don't let your intellect get in the way of your instincts)."[535] The same materials instruct prosecutors that "gut instincts mean everything in jury selection."[536] Unsurprisingly, absent from every training manual is any discussion of how "gut instinct" is influenced by unconscious racial biases.

Gut reactions, which have been central to prosecutorial training for decades, are now recognized as quintessential opportunities for individuals to act based upon unconscious biases.[537] Psychological research has demonstrated that the goal of our unconscious thinking system "is to detect patterns in the environment as quickly as possible and to signal the person as to whether they are good or bad."[538] One type of unconscious, "automatic thinking is the tendency to categorize and stereotype."[539] Once learned, stereotypes are applied "non-consciously, unintentionally, uncontrollably, and effortlessly."[540] Researchers have found that decision-makers increase their use of stereotypes when they have a strong motivation to "predict the behavior of a person[,] . . . 'time pressure, a need for closure, [and] moderate cognitive load.'"[541] Thus, attorneys exercising peremptory challenges under the constraints of trial are particularly susceptible to the use of stereotypes in the exercise of peremptory strikes.

Prosecutors are no different from the general public; even when they condemn overt racism, implicit biases—most often associating African Americans with negative views—remain key components of their decision-making.[542] The activation of implicit biases is such an automatic reaction that prosecutors may not even realize they are relying on race-based stereotypes in their choices.[543] Instead, they are likely to interpret evidence as supporting their gut reaction—e.g., if there are Blacks on the jury, the jury is more likely to fail to agree on a verdict.[544] This is because "once a correlation is learned, the nonconscious system tends to see it where it does not exist, thereby becoming more convinced that the correlation is true."[545] As soon as a prosecutor categorizes a prospective juror into a group, the prosecutor will "tend to remember the person's behaviors that are associated with that group."[546]

Decisions based upon demeanor and appearance are highly susceptible to implicit bias.[547] As Justice Marshall wrote in *Batson*, "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."[548] Yet, prosecutors are explicitly taught to select the "ideal jury" through the observation of jurors' nonverbal cues as well as their answers to questions. The training documents encourage prosecutors to note jurors whose body language they deem "Hostile," "Defensive,"[549] "Unfriendly" or if the juror demonstrates an "unwillingness or inability to interact with other jurors."[550] One training manual instructs prosecutors that "[t]he way a juror is dressed should give you some idea as to whether or not he or she is a conformist. It should also give you a clue as to how seriously he or she takes jury duty."[551] An Orange County training document states even more directly that "Dress and grooming can telegraph a juror's conformance with social norms" and "Race, religion, gender, socioeconomic status and culture all have their own nonverbal markers."[552] Another training guide instructs prosecutors to "[p]ay attention to the physical, non-verbal responses. 'Body language' is very telling."[553] More pointedly, a San Diego County deputy district attorney instructed her colleagues to "Watch [the jurors] whenever and wherever you can. Locate the loners, big mouths and losers; then execute them."[554]

"[S]ocial psychological research strongly supports the conclusion that . . . [w]hen a lawyer sees a potential juror, she will almost instantaneously categorize that person . . . on the basis of race."[555] This categorization activates stereotypes, not necessarily consciously, so that the

lawyer will assign the stereotypical attributes to the potential juror.[556] Even if she is not aware of the stereotypes and even if she does not believe them, she will "search for, and pay greater attention to information that confirms her expectations."[557] Then, "she will encode the information in a different way, and recall it more easily."[558]

Other research, as discussed in Section III.A, demonstrates that individuals are more likely to associate ambiguous behavior as aggressive when exhibited by a Black person.[559] Police officers have been found to "interpret ambiguous behaviors performed by blacks as suspicious [and criminal] . . . while similar behaviors engaged in by whites would go unnoticed."[560] Another study found that both Black and White students considered "relatively innocuous" acts by Black males as "more threatening than the same behaviors by white males."[561] Legal scholars have interrogated the pervasive stereotype of the "Angry Black Woman" as one who is "out of control, disagreeable, overly aggressive, physically threatening, loud (even when she speaks softly), and to be feared."[562] This scholarship all but draws a direct line between prosecutors' reliance on body language, facial expressions, or eye contact and racially discriminatory strikes. As Section II.B.1 shows, on a case-by-case basis, California prosecutors use demeanor-based reasons more often than any other explanation when exercising peremptory challenges against Black and Latinx jurors.

Prosecutors' implicit biases can also negatively impact their treatment of Black jurors, causing a Black juror to appear uncomfortable. For example, when a prosecutor questions Black prospective jurors, the interaction "might activate any of these negative stereotypes as well as more general negative implicit attitudes" causing the prosecutor to "project this negativity through body language and gestures."[563] This could, in turn, "cause jurors to avoid eye contact, provide awkward or forced answers that make the juror appear less intelligent, or simply fidget and look nervous."[564]

While the empirical evidence demonstrates that demeanor- and appearance-based reasons for striking a juror often are proxies for race or race and gender, these explanations are insulated from scrutiny under *Batson* because courts almost always find them to be facially neutral.[565] For example:

> A prosecutor looking for "deferential" jurors might interpret a venire woman's words as "aggressive," but interpret the same words stated in the same way by a man merely as "assertive," or perhaps not even notice the words at all. The prosecutor remembers this evaluation, rather than simply the words themselves, and might therefore strike the woman from the venire. But for the potential juror's gender, the prosecutor would not have exercised the strike.[566]

Even though the prosecutor unconsciously struck the juror based on her gender, a court would be unlikely to find a violation because the prosecutor "subjectively believes that she struck the juror because she was too aggressive, which is a gender-neutral reason."[567] The cases in which courts have held that demeanor- and appearance-based reasons are proxies for race are few and far between.[568] It has been almost 20 years since the California Supreme Court has discredited a prosecutor's demeanor- or appearance-based reason.[569]

Only one court has addressed these pretextual explanations. Washington Supreme Court General Rule 37 makes it more difficult for courts to credit demeanor-based reasons for "peremptory challenges [that] have historically been associated with improper discrimination in jury selection."[570] For example, if a party strikes a juror because he was "inattentive," "exhibited a problematic attitude, body language, or demeanor[,] or provided unintelligent or confused answers[,]" the opposing counsel or judge must corroborate the observation or the court will reject the reason for the strike.[571]

Consistent with the data presented in Section II.B, as long as *Batson* remains the procedure in California, prosecutors will continue to offer reasons for striking Black jurors based on their "Gut instinct" about jurors' demeanor, body language, clothing, and hairstyle.[572] Courts will continue to sanction those explanations. Continued reliance on these rationales validates Justice Marshall's warning that "'seat-of-the-pants instincts' may often be just another term for racial prejudice."[573]

3. Reliance on Stock "Race-Neutral" Reasons and Other Tactics that Facilitate Discriminatory Strikes

District attorney training materials combine "practical tips"[574] from *Batson* case law with encyclopedias of stock, court-approved "race neutral"[575] reasons and so-called proven strategies aimed at avoiding "the Wheeler problem."[576] For example, a 2019 Orange County training document offers practical tips to prosecutors: (1) keep a member of a cognizable group on the jury if possible and (2) give multiple reasons for each challenge.[577]

Prosecutors are directed to rely on their biases, both explicit and unconscious, in deciding which jurors to strike, but to conceal them by offering judicially sanctioned "race-neutral" reasons.[578] Los Angeles County goes so far as to tell its prosecutors to "bite your tongue" if their reasons for excusing a juror "sound bogus or pretextual."[579] Similarly, a California District Attorneys Association ("CDAA") publication states that "any justification that even hints at racism must be avoided . . . ; if it sounds at all offensive, do not say it."[580] The lesson: Racism—whether it is conscious or unconscious—is acceptable as long as you do not place it on the record.

Prosecutors' exhaustive lists of go-to reasons enable them to readily produce a "race-neutral" response to any imaginable *Batson* objection. For example, a Los Angeles training manual directs: "Take to court a list of acceptable justifications which have been affirmed on appeal."[581] The CDAA advises prosecutors to offer "quotations where it would be most useful to know and *emulate particular language that has been deemed proper*."[582] The manual *Mr. Wheeler Goes to Washington* includes a section titled "*Wheeler* Words That Work: A Primer on Providing Peremptory Challenge Justifications."[583] It lists 16 race-neutral reasons for dismissing jurors and an additional 18 demeanor-based explanations so that prosecutors can "give detailed verbal expression to . . . subjective instincts."[584] For each of these reasons, the manual provides extensive citations to opinions in which a reviewing court upheld the reason as race-neutral.[585] The manual explains that the "key attribute [from a case] is noted in boldface," presumably so that the prosecutor can easily identify a facially neutral reason to strike the juror.[586]

The *Inquisitive Prosecutor's Guide* lists 77 race-neutral reasons for striking a juror.[587] The list of race-neutral justifications encompasses over a fifth of the entire guide, consisting of almost 30 single-spaced pages.[588] This list instructs that a prosecutor may use both the fact that a prospective juror had too much or too little education as a race-neutral reason to strike a juror.[589] A prosecutor may strike a juror for lack of community or family ties or too many of those relationships.[590] And a prosecutor may excuse a prospective juror for having previously served on a hung jury or on a jury that acquitted, or because they never served on a jury.[591] The list aptly illustrates Justice Powell's observation in *Batson* that "peremptory challenges . . . permit—'those to discriminate who are of a mind to discriminate.'"[592]

Some counties distribute a two-page document entitled the "*Wheeler/Batson* Guide," written by an Orange County deputy district attorney, which appears to be intended for use as a quick reference during jury selection.[593] The first page lists the seminal cases, the *Batson* procedure, and other important aspects of the doctrine.[594] The second page lists each cognizable group, non-cognizable groups, and 32 race-neutral justifications.[595] Similar to other lists, this document reduces the case law into quick-reference group characteristics. This enables the prosecutor—without the need for any reflection on the competence of the individual as a prospective juror—to select a court-approved, race-neutral reason from the list when facing a *Batson* objection.

Although they can function as cover for purposeful discrimination, reliance on these pre-approved lists of race-neutral reasons does not necessarily mean that a prosecutor's strike is intentionally racist. Rather, the lists allow district attorneys to act based upon on their gut reactions, "often reflecting an attorney's own unconscious stereotypes."[596] It offers prosecutors an easy pick of facially nonracial reasons for the strike, including a "reason [that] may be covering for implicit bias."[597] As a result, "[t]he remaining jurors are likely to be those who the attorney believes fit a favorable stereotype."[598]

Although the first of the Orange County strategies perversely directs prosecutors to explicitly consider race in selecting juries in order to defeat *Batson* challenges, it has been widely employed. In 2006, the CDAA instructed: "If possible, keep on the jury one or more members of each cognizable group from which you are challenging persons" to "create a record that will justify any challenges you make."[599] That advice was already perceived wisdom among prosecutors; in 1988, a San Diego trainer wrote, "I personally favor having a defendant being told by members of his own race rather than from some other race, that they disapprove of his conduct and that they would like to see him in the state prison. So, I try never to have a jury that does not have at least one person that is a member of the defendant's race."[600]

This is, of course, simply racial discrimination in another form. It also is directly contrary to the United States Supreme Court's decision in *Miller-El II*. There, 11 African Americans remained on the panel after jurors were excused for cause or by agreement. [601] The prosecutor struck 10 of the Black prospective jurors, but made a "late-stage decision to accept a [Black] panel member willing to impose a death sentence."[602] The Court called the move an effort "to obscure the otherwise consistent pattern of opposition to seating" Black jurors.[603] But while the Supreme Court was not fooled by this transparent effort at violating *Batson* without facing

the consequences, California courts have too frequently sanctioned this tactic and held that the inclusion of one or more members of the protected group is persuasive evidence that no discrimination occurred.[604]

Often, instructional materials encourage district attorneys to offer *many* race-neutral reasons for striking a juror. For example, an Alameda County training document directs prosecutors to "be certain to state all the reasons for your challenge, beyond what is stated in your written notes."[605] Another Alameda training instructs: "Prosecutors need to give a full explanation of the reasons for their challenges. . . . One of the reasons for this thoroughness is comparative juror analysis."[606] Orange County—on a slide discussing comparative analysis—urges prosecutors, "Don't just state a single reason, but give all applicable reasons."[607] The Ventura County District Attorney's Office directs prosecutors to:

> try to show that excused panelists in the alleged subject group had similar characteristics to other excused panelists or that you had a non-discriminatory reason for excusing the juror. Do not assume one justification will suffice. Case law indicates there is strength in quantity. One should not fail to mention any justification because it seems trivial.[608]

The underlying assumption is that if a prosecutor offers many reasons, when a trial or appellate court conducts a comparative juror analysis, the court will be less likely to view the struck and seated jurors as similar.[609] A San Francisco County manual states, "If you develop multiple reasons, any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons."[610] The more justifications on the record that demonstrate dissimilarity between the two groups, the higher the chance that the judge will overrule the *Batson* motion.[611]

However, the United States Supreme Court has criticized the prosecution's use of "a laundry list of reasons" to justify a strike.[612] The California Supreme Court initially expressed concern that the "laundry list" approach "carries a significant danger," noting that a "prosecutor's positing of multiple reasons, some of which, upon examination, prove implausible or unsupported by the facts, can in some circumstances fatally impair the prosecutor's credibility."[613] However, the state supreme court has not found *Batson* error when prosecutors employed this strategy in striking jurors.[614]

The training materials compile lists of other ways to avoid *Batson* challenges. For example, the CDAA suggests strategies such as the following: (1) "using [a] juror questionnaire to avoid [a] claim of disparate questioning";[615] (2) making "notes of demeanor attributes, looking for differences between those of potential challenges and potential keepers";[616] (3) giving "a detailed verbal expression to such subjective instincts," which can be accomplished by using the 18 "acceptable attributes for demeanor challenges";[617] and (4) using "tactical voir dire dynamics reasons" such as the "desire to seat more favorable-looking members of the venire."[618]

The organization also advises district attorneys to "always kick off your most hateful juror earliest in the process, before your opponent has built up enough steam to make a successful *Wheeler* challenge."[619]

Batson may have reduced explicit directives in prosecutorial training materials to striking Black prospective jurors, other jurors of color, and women. However, as Justice Marshall predicted, *Batson* failed to account for implicit bias and the ease with which prosecutors would find work-arounds for excusing Black jurors. The training materials' reliance on ready-made, race-neutral, and judicially approved reasons should leave no doubt that California courts will not put an end to prosecutors' long-standing practice of using peremptory challenges to remove Black prospective jurors.

E. The California Supreme Court's Resistance to *Batson*

Certainly, credit goes to the California Supreme Court for its *Wheeler* opinion in 1978, adopting measures to reduce peremptory challenges motivated by group bias almost a decade before the high court's decision in *Batson*.[620] The state supreme court's ambition, however, was short-lived.

Beginning in the late 1980s, in almost every significant post-*Batson* decision, a majority of the California Supreme Court took a wrong turn. As this section shows, the court did so over the objections of dissenting justices as well as criticism by the Ninth Circuit. Rather than acknowledge the flaws in the *Batson*/*Wheeler* procedure, the majority disregarded them. For instance, when, more than a decade ago, the United States Supreme Court began to issue opinions calling upon lower courts to enforce *Batson* more rigorously, our state supreme court balked. Thus, in three decades, the California Supreme Court has all too often selected the course least likely to restrain prosecutors' use of discriminatory peremptory challenges, least likely to ensure trial court accountability, and most likely to produce one affirmance after another. Though it is by no means an all-inclusive account of the shortcomings in the court's *Batson* precedents, this sub-section serves to elucidate the course the state supreme court has pursued.

As noted in Section II.C.1, over a 30-year period (1989-2019), the court reviewed 142 *Batson* cases and found error only three times. The first two of the three reversals were in death penalty cases.[621] In these first two cases, decided in 1991 and 2001, the prosecutors' intentional removal of jurors of color through their peremptory challenges was patent. In *People v. Fuentes*, the first reversal, the prosecutor was found to have violated *Batson* only "a few months earlier," and then used "[t]en of his first 11 challenges" to remove Black jurors, leading one judge to remark that the prosecutor had "failed—or refused—to learn his lesson."[622] In the second case, *People v. Silva*,[623] "the prosecutor, believing that the jury in the first trial had 'hung . . . on racial grounds,' struck all five Hispanic members of the venire and all but announced his desire not to have any Hispanic person serve on the second jury."[624]

In *People v. Gutierrez*, a non-capital case and the third reversal, the court granted a *Batson* claim for "the first time in 16 years, and the second time in over 25 years."[625] The opinion stands out because it is difficult to distinguish the circumstances in *Gutierrez* from the many cases in which the court found no error, some of which we discuss in this section of the report. The court did not overrule its precedent; it simply looked past it. At the time of the *Batson* objection, the prosecutor had used 10 of 16 strikes to remove Latinx prospective jurors.[626] The seated jury included

one Latino.[627] The majority did not disapprove of its policy of "reflexive application of deference" (discussed in this section) to unexplained trial court rulings.[628] Rather, the court pointed to the inadequacy of the trial judge's ruling as one of the factors in its decision to scrutinize the prosecutor's peremptory challenge.[629] The majority found that the trial court "never clarified why it accepted [the prosecution's explanation] as an honest one" and had made a "global finding" that the prosecutor's reasons did not appear "to be a pretext in this particular case."[630] Taking a page from Justice Liu's critical analyses of the court's *Batson* jurisprudence (discussed in this section), the majority, *in this anomalous case*, found error, concluding it was not satisfied that the trial judge had "made a *reasoned* attempt to determine whether the justification was a credible one."[631]

1. Elevating Batson*'s Step-One Low Threshold to an Unconstitutional Burden*

As discussed in Section I.C.5, in 2005, in *Johnson v. California*, the United States Supreme Court declared that California's step-one test was unconstitutional because it imposed an undue burden on the party making the *Batson* objection.[632] The California Supreme Court last found a *Batson* violation at the first stage in 1986, more than 30 years ago.[633] To put this in perspective, it is quite likely that in thousands of California trials, judges improperly refused to require prosecutors to give reasons for their strikes, and in hundreds of appellate cases, reviewing courts improperly short-circuited *Batson* claims. Over the decades, the court's majority deflected criticism from dissenting justices and repeated admonitions by the Ninth Circuit that it had gone off course.[634] For example, in 1992, Justice Joyce Kennard took issue with the majority's view that the prosecutor's strikes against the only two Black prospective jurors was a "meager" prima facie showing.[635] Consistent with Justice Thurgood Marshall's warning in *Batson*, Justice Kennard declared that when there is a small number of African Americans in the venire, the prosecutors' removal of "all the African-American jurors who were tentatively seated" is sufficient for a prima facie showing. [636] Justice Kennard wrote, "To hold otherwise would improperly sanction the use of racially motivated challenges when only one or two members of the targeted race are present in the venire."[637]

People v. Carasi[638] is one of several cases that illustrate the state supreme court's tenacious application of an elevated standard at step one, notwithstanding *Johnson* and the court's subsequent acknowledgement that the prima facie showing involves only a "low threshold."[639] In the 2008 opinion, the court independently applied the *Johnson* test to a *Batson* claim arising out of a case tried before *Johnson*.[640] The majority found that the prosecutor's use of 20 of his 23 peremptory challenges against women prospective jurors was insufficient to raise an inference of discrimination.[641] Justice Kennard wrote separately to object to the majority's dismissal of the overwhelming statistical evidence, especially in a trial in which the co-defendant was a woman.[642] She pointed to the trial judge's observation that the percentages of the prosecutor's challenges against women were "'eyebrow-raising, to say the least,'" a comment the majority never mentioned.[643] Justice Kennard stated that had the pattern been "the only evidence on this issue," she would have found a prima facie showing of discrimination.[644] Her assessment was in line with *Johnson*'s reaffirmation that satisfying step one requires only "producing evidence" of an inference of discrimination.[645]

At the end of 2019, in *People v. Rhoades*, Justice Liu criticized the majority's "latest steps on what has been a one-way road" that "'improperly elevated the standard . . . beyond the showing that the high court has deemed sufficient to trigger a prosecutor's obligation to state the actual reasons for the strike.'"[646] The prosecutor in *Rhoades* peremptorily challenged four of eight Black prospective jurors, thereby stripping the jury box of all African Americans.[647] Justice Liu commented on the similarity between the facts in *Rhoades* and *Johnson v. California*.[648] In *Johnson*, even applying the unconstitutionally burdensome "strong likelihood" standard at step one, the trial court observed that the showing was "'very close,'" and the state supreme court agreed that the prosecutor's removal of all three Black prospective jurors from the jury "'certainly looks suspicious.'"[649] The circumstances in *Rhoades*, Justice Liu submitted, were sufficient for the majority to have found an inference of discrimination under the standard mandated by *Johnson*.[650]

Justice Liu remarked that in the 14 years since *Johnson*, the California Supreme Court had decided 42 cases involving *Batson*'s first step, all of them capital cases.[651] Although each case was tried before *Johnson*, when California trial courts were applying the heightened step-one standard, the state supreme court reviewed the cases independently using the correct test and did not find error in a single case.[652] As a result, in Justice Liu's estimation, it "is past time for a course correction."[653] In Section IV.A, we discuss Justice Liu's proposed alternatives for a change in the court's "analytical approach."[654]

2. Disregarding the High Court's Prohibition Against Judicial Speculation at Step One

In addition to disapproving of the California Supreme Court's step-one test, the Supreme Court in *Johnson* reiterated the prohibition against judicial speculation.[655] The Court explained, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[656] Thus, trial judges are precluded from hypothesizing, that is, coming up with "'good reasons'" a proponent "'might have had'" for a strike; they are limited to considering "'the real reason.'"[657] Simply put, when the strike opponent has raised an inference of discrimination, the trial court must obtain "a direct answer" from the strike proponent "by asking a simple question."[658]

Justice Liu's dissenting opinions in step-one cases also illustrate how the California Supreme Court repeatedly ignores *Johnson*'s directive against judicial speculation.[659] For example, in *People v. Harris*, the jury could not reach a verdict in the defendant's first trial, with the only Black juror voting to acquit.[660] At the second trial, the defense objected to the prosecution's strike of the first two of three Black prospective jurors.[661] Defense counsel argued that African Americans were "underrepresented in the venire, not[ing] that the holdout juror from [the defendant's] first trial was African-American" and that the prosecutor had challenged the jurors in the belief they would vote to acquit, as a Black juror in the first trial had done.[662] The trial court denied the *Batson* motion because the defense had not made a prima facie showing of purposeful discrimination.[663] The California Supreme Court affirmed, *offering its own possible reasons* for the prosecutor's strikes.[664]

Justice Liu concurred in the result, but wrote separately to explain that the majority's *Batson* precedents conflict "with principles set forth by the United States Supreme Court."[665] In *Harris*, Justice Liu described the court's "pattern of decisions" that misapply *Johnson* to defeat the United States Supreme Court's "objective" of obtaining "'actual answers'" from the prosecution at step one.[666] He explained that "the mere fact that a court can find *possible* race-neutral reasons in the record for a prosecutor's strikes does not negate an inference of discrimination at *Batson*'s first step."[667] Given the "'inherent uncertainty present in inquiries of discriminatory purpose,'" Justice Liu pointed out that *Johnson* demands refusal to "'engag[e] in needless and imperfect speculation when a direct answer can be obtained by asking a simple question'" of the prosecutor.[668] In *Harris*, Justice Liu called for reform from another body: "The fact that our jurisprudence appears quite entrenched only heightens the need for a course correction by higher authority."[669]

In *People v. Reed*, the defendant, who is Black, objected to the prosecution's use of five of its first eight peremptory challenges to remove five of the six Black prospective jurors in the jury box.[670] The trial judge, applying the "strong likelihood" test, ruled that Reed had not made a prima facie showing of discrimination and denied the *Batson* objection.[671] The California Supreme Court independently reviewed the ruling and, applying the *Johnson* test, upheld the trial judge's decision on several grounds. They included: (1) the total number of strikes the prosecutor exercised throughout jury selection (not just at the time of the objection); (2) race-neutral reasons the majority discerned from the record that would have supported the strikes; and (3) a comparison of the struck Black jurors with some of the seated White jurors.[672]

Justice Liu dissented and found fault with the court's analysis on all counts.[673] At bottom, his disagreement—shared by Justice Kennard—was both with the court's failure to adhere to the United States Supreme Court's directives in *Johnson* and the court's inconsistent application of its own precedent.[674] Here, we highlight the former, specifically the court's practice of hypothesizing reasons for a prosecutor's strike, a practice the Supreme Court "has never approved."[675] Justice Liu carefully examined the majority's hypothesized reasons, demonstrating that they did not hold up, especially when compared to the circumstances or answers of White jurors whom the prosecution retained.[676] For example, the majority speculated that the prosecutor may have had reservations about struck jurors Janice C. and Mary C. because, according to their questionnaires, their spouses "had prior contact with law enforcement.[677] The court cited its long-standing precedent that "'a negative experience with the criminal justice system is a valid neutral reason for a peremptory challenge.'"[678] Justice Liu pointed out that "at least three non-black jurors seated on the final jury had relatives who had been arrested."[679] Concluding that the trial court should have required the prosecutor to give his reasons for removing five of six Black jurors, Justice Liu wrote, "Today's opinion does exactly what the high court says we should not do: it indulges 'the imprecision of relying on judicial speculation to resolve plausible claims of discrimination.'"[680]

The same day the California Supreme Court issued its opinion in *Rhoades*, the court decided *People v. (Joe Edward) Johnson*, again upholding a trial judge's ruling that the defendant had not made a prima facie showing of discrimination.[681] The defendant, who is Black, was sentenced to

death for the murder of a White man.[682] The prosecution, in support of the death penalty, introduced evidence that the defendant had been convicted of the rape of a White woman.[683]

Before jury selection commenced, the prosecutor announced that he had run a criminal history check on "'some of the jurors.'"[684] He learned that one of the African-American prospective jurors, Kenneth M., had two misdemeanor convictions, though the juror indicated on his questionnaire that he had never been accused of or arrested for a crime.[685] The trial judge rejected the defendant's motion that the prosecution turn over the information about all the jurors it had investigated, agreeing that the prosecution might be required to do so if the defendant made a prima facie showing of a *Batson* violation.[686] Over the defendant's objection, the prosecutor used three of his first 15 peremptory challenges to remove three of the five Black jurors who, at different times, were seated in the jury box.[687] The trial court found that the defendant had not satisfied step one as to any of the objections.[688] When Kenneth M. was called to the box as a prospective alternate juror, the prosecutor struck him over the defendant's objection.[689] The trial court again ruled that the defendant had not made a prima facie showing of discrimination, and found that nothing about the prosecution's investigation of Kenneth M. supported such a showing.[690] The seated jury included three African Americans.[691] On appeal, the California Supreme Court held that there was no *Batson* error at step one. The court was not persuaded by the number of strikes against Black jurors, the rate at which the prosecutor removed African Americans, or the prosecutor's background check on Kenneth M. and some of the other jurors.[692] The majority was primarily influenced by the number of Blacks on the seated jury, i.e., the fact that the prosecutor had accepted those jurors.[693]

Justices Goodwin Liu and Mariano-Florentino Cuéllar dissented. Justice Cuéllar criticized the majority for turning "a blind eye" to discrimination against Black prospective jurors.[694] He wrote:

> The trial court had compelling evidence that the prosecutor, even before striking any African American jurors, had singled out African American jurors for special—and unlawful—scrutiny. Yet when the prosecutor sought to excuse a majority of the African American prospective jurors from the jury that would decide whether defendant Joe Edward Johnson would be subject to the death penalty, no one asked the prosecutor to explain his reasons.[695]

Justice Cuéllar faulted the majority for not taking into account four factors, which demonstrated that the record was "more than sufficient" to raise an inference of discrimination: (1) "issues of race were salient in this case"; (2) "the prosecutor appeared to single out African American jurors in conducting his extrajudicial criminal history investigation"; (3) the prosecutor excluded most Black jurors who were in the box and struck them "at a far higher rate than other jurors"; and (4) neither the record nor the majority offered reasons "that would necessarily dispel any inference of bias."[696] Justice Cuéllar called the majority opinion "a road map for ensuring that unlawful discrimination evades judicial scrutiny."[697] The decision, he explained, "encourages prosecutors to . . . single out the disfavored group for intensive investigation prior

to jury selection, use the results to disqualify as many members of that cognizable group as possible in voir dire, and then stonewall any inquiry into whether the investigation was mere racial profiling."[698]

Justice Liu, who joined Justice Cuéllar's dissenting opinion, separately described *Johnson* as "yet another case in which a black man was sentenced to death for killing a white victim after a jury selection process in which the prosecution disproportionately excused black prospective jurors," and "yet another case in which this court has refused to find any inference of discrimination in jury selection."[699] He commented: "[I]f the facts in this case do not give rise to an inference of discrimination, then I am not sure what does."[700] Justice Liu reiterated his "'serious doubts'" about the majority's adherence to "'*Batson*'s mandate.'"[701] Though he addressed each of the "three dimensions of harm" *Batson* was intended to remedy—the denial of equal protection to the Black defendant who is tried by a jury from which Blacks have been excluded, deprivation of the individual Black juror's citizenship rights, and subversion of the public's faith in the criminal legal system—here, Justice Liu emphasized the latter.[702] Justice Liu wrote, "Today, as when *Batson* was decided, it is a troubling reality, rooted in history and social context, that our black citizens are generally more skeptical about the fairness of our criminal justice system than other citizens."[703] Justice Liu's observation coheres with our findings regarding the "reality" of many African Americans' experiences and perceptions, how both are exploited by prosecutors to disproportionately strike Black jurors, and how California courts, applying the three-step procedure, largely facilitate discrimination.

3. Denying Meaningful Appellate Review of the Prosecution's Reasons for Its Strikes

The great weight of authority requires that an appellate court reach the ultimate question—did the trial court commit *Batson* error?—if the striking party gave reasons for the strike and the trial judge ruled on the *Batson* objection.[704] For decades, the California Supreme Court vacillated on this issue. In some opinions, the court followed the majority of federal and state courts, and in others, the court revisited the first step of the procedure to conclude that the defendant had not made a prima facie showing of discrimination.[705] In the latter circumstance, dissenting justices insisted that the majority was ignoring "federal constitutional law."[706]

Several years ago, in *People v. Scott*, a majority of the court, acknowledging that its decisions have "not always been entirely consistent," resolved that it would, once and for all, go its own way.[707] To clarify its past practices, the court held that when a trial judge finds no prima facie showing at step one, but "allows or invites" the prosecution to offer its explanation, and then denies the motion, a reviewing court "should begin its analysis . . . with a review of the first-stage ruling."[708] Justice Liu, joined by Justice Leondra Kruger, objected that, in so doing, the court had overruled its own recent precedent, which held that once the prosecutor states a reason and the court rules on the reason, "the first stage of the *Batson* inquiry . . . is moot."[709] As had some of his predecessors on the court, Justice Liu pointed out that the decision also put California "at odds with the majority of state high courts and federal circuit courts that have considered the issue."[710]

In *Scott*, Justice Liu also wrote that the majority's departure "scrambles . . . clear and well established [*Batson*] procedure."[711] As a result, "the court opts to resolve *Batson*'s inquiry into discriminatory purpose based on 'needless and imperfect speculation' as to why the prosecutor might have struck [the juror] even though 'actual answers' to that question were stated by the prosecutor and evaluated by the trial court."[712] Justice Liu predicted, "Under today's decision, when a prosecutor has stated a facially neutral reason that nonetheless reveals discrimination . . ., the *Batson* violation will evade appellate review so long as the trial court did not err in its first-stage ruling."[713]

4. Reflexive Deference: Allowing Trial Courts to Avoid Their Gatekeeping Responsibility

As a general rule, appellate courts afford "great deference" to trial court findings of fact, such as a finding of purposeful discrimination at step three of the *Batson* procedure.[714] This is because the ruling is largely determined by credibility assessments.[715] For about a decade after *Wheeler*, the California Supreme Court required that the trial judge make a "sincere and reasoned" attempt to evaluate a prosecutor's explanation for each peremptory challenge to which the defense objected before the court would defer to the judge's denial of a *Batson* objection.[716] Applying this standard, the court reversed for step-three *Batson* error in several cases.[717] The court's resolve, however, waned in the late 1980s, as it began to defer to trial judges' unexplained decisions while continuing to pay lip service to the rule.[718] In the 1990s, the California Supreme Court moved towards abandoning the rule.[719]

In 2001, in *People v. Silva*, the court offered the following nonbinding comment, known as "dictum": "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings."[720] Justice Liu later observed that this language had "come to comprise the rule that crucially qualifies the trial court's obligation to make a sincere and reasoned attempt to evaluate the prosecutor's explanations at *Batson*'s third stage."[721] He pointed out that, two years later, in *People v. Reynoso*, reversing the appellate court's finding of *Batson* error, the court "turned *Silva*'s dicta into doctrine."[722]

Reynoso was a 4-3 decision from which Justices Joyce Kennard, Kathryn Werdegar, and Carlos Moreno dissented.[723] Both Justice Kennard's opinion and that of Justice Moreno concluded that the majority had done grave damage to the right of Latinx citizens—the subject of the prosecution's strikes—to serve on California juries.[724] Justice Moreno wrote that the decision constituted "a significant retreat" from the court's "*Wheeler* jurisprudence and strikes a major blow against a defendant's constitutional right to a fair, impartial, and representative jury."[725] Observing that the majority's "standard of appellate review . . . effectively insulates discriminatory strikes from meaningful scrutiny at both the trial and appellate stages," Justice Kennard predicted what has come to pass at the court. [726] A decade later, Justice Liu explained that the "practical effect" of deferring to a trial court's unexplained denial of a *Batson* objection "is to hold that what a trial court leaves unsaid in denying a *Batson* claim will be construed on appeal *in favor of the prosecution*."[727] In his estimation, the impact of the majority's rule is all the more intolerable "in light of what decades of research have revealed about the stubborn role of race in jury selection."[728]

It would be a mistake to suggest that Justice Liu's criticism of the majority's "reflexive deference" to unexplained trial court *Batson* rulings is based simply on a preference for the court's rule prior to *Reynoso*. Rather, he objects to the California Supreme Court's "fail[ure] to evaluate [the] defendant's claim in the manner that high court precedent requires."[729] The following two relatively recent opinions illustrate how the court's current practice of automatic deference continues to strike a "major blow" to the rights of prospective jurors of color and those of criminal defendants.[730]

In *People v. Williams*, a capital case, defense counsel made three *Batson* motions in response to the prosecutor's use of peremptory challenges against five Black women.[731] The court asked the prosecutor to provide explanations for the first objection, involving the first three strikes, to which the prosecutor replied that each of the three Black women seemed reluctant to impose the death penalty.[732] The trial judge denied the motion without explanation.[733] The defense objected separately to the prosecution's strikes of the fourth and fifth African-American women.[734] The prosecutor gave the same reason—his belief that each would be reluctant to impose the death penalty—for excusing both women, emphasizing that he based his opinion more on the jurors' demeanor and the delivery of their responses than what they actually said.[735] The trial judge declared that she did not have any recollection of the fourth African-American woman the prosecutor struck and had not taken any notes, but "would accept the prosecutor's explanation."[736] As to the fifth, the trial court declared that it did not recall the juror, again had not taken any notes, "could only go by what the prosecutor was saying, and it accepted the prosecution's explanation."[737] Defense counsel then requested that the trial court review the statistical racial makeup of the jury.[738] The trial judge responded: "I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it difficult no matter what it is.'"[739] The California Supreme Court deferred to the trial court's ruling, and held that there was no *Batson* violation.[740]

Dissenting in *Williams*, Justice Liu found that there was no basis—such as a "'sincere and reasoned effort'" by the trial judge to analyze all of the relevant circumstances—for the California Supreme Court to defer to the judge's decision.[741] He wrote that deference where a trial judge merely announces a ruling without evaluating the prosecutor's reasons "all but drains the constitutional protection against discrimination in jury selection of any meaningful application."[742] Justice Liu concluded, "The upshot of this erroneous application of deference is the denial of defendant's *Batson* claim despite the fact that *no court*, trial or appellate, has ever conducted a proper *Batson* analysis."[743]

Justice Werdegar joined Justice Liu's dissent and wrote separately.[744] She found it unnecessary to engage in line-drawing about appellate deference because of "[t]he egregious circumstances of the present case" in which the trial judge had no notes or recollection of the fourth and fifth Black jurors, relied solely on what the prosecutor said, and supported her ruling with her observation about "Black women['s]" views on capital punishment.[745]

In *People v. Hardy*, the defendant, who is African American, was convicted and sentenced to death for the rape-murder of a White woman.[746] The prosecutor exercised her peremptory challenges to remove the only African American, Frank G., who was in the jury box during the selection of the 12 jurors who would decide the case.[747] She struck the first two Black prospective jurors from the alternate panel, though one African American remained after the parties had exhausted their challenges.[748] In response to the defendant's *Batson* motion, the trial judge found that he had not made a prima facie showing of discrimination.[749] However, the prosecutor volunteered her reasons—offering six for striking Frank G.—and the trial judge ultimately denied the motion because the prosecutor had "explained race neutral reasons for excusing the jurors."[750] On appeal, the California Supreme Court, which the year before had rejected a trial court's "global finding" in *Gutierrez*, announced it was satisfied that deference to the trial court was appropriate here because "'the prosecutor's stated reasons are both inherently plausible and supported by the record.'"[751] To the extent there was ambiguity and indeed an outright mistake about a juror's answer in one of the prosecutor's reasons, the court blamed defense counsel for neglecting to call the judge's attention to the prosecutor's error.[752]

Justice Liu dissented on several grounds, among them, the majority's willingness to defer to the trial court's ruling.[753] The majority, he explained, acknowledged that "at least two of the [prosecutor's] reasons are 'weak,' the demeanor-based reason finds no support in the record," and, upon examination, the prosecutor's reasons are also not self-evident.[754] Justice Liu further criticized the majority for assigning blame to defense counsel, writing that "this reasoning is at odds with what we said in *Gutierrez*."[755] In *Williams*, *Hardy*, and other cases, Justice Liu has urged that where a trial court bypasses its duty to explain its decision, United States Supreme Court precedent does not sanction deference.[756] In cases such as these, deference all but "dispense[s] with appellate review . . . since it is so easy to rationalize a silent record with a cacophony of presumptions."[757]

5. Constraining Comparative Juror Analysis at Step 3: Undermining Batson*'s Most Effective Tool*

> Reflexive application of deference where there is nothing in the record to defer to, judicial speculation as to the reasons for a strike where the prosecutor has offered none, and unduly limited and grudging application of comparative juror analysis *combine to erect a virtually impossible hurdle* for *Batson* claims to surmount.[758]

As discussed in Sections I.C.5, comparative juror analysis—the side-by-side comparison of struck and seated jurors—is an effective method of assessing whether discrimination has occurred. The California Supreme Court approved this approach in *Wheeler*, and employed it often in subsequent opinions such as *People v. Trevino*.[759] In 1989, in *People v.* (*James Willis*) *Johnson*, a majority of the court retrenched.[760] The court held that *Trevino* had "placed undue emphasis" on these comparisons.[761] Observing that the "majority pay[s] lip service to the *Batson* rule, but in fact violate[s] both its letter and its spirit," Justice Stanley Mosk dissented because the court found no error in a case in which "the prosecutor deliberately struck all the

Blacks, all the Asians, and all the Jews from the jury that condemned [the defendant] to death."[762] He enumerated the ways in which the majority had disregarded other *Wheeler* precedents.[763] Justice Mosk was especially baffled by the majority's "attack" on the comparative juror analysis described in *Trevino*.[764] Calling it "a highly useful analytical tool," Justice Mosk observed, "Virtually every one of our decisions both before and after *Trevino* relied on this same analytical technique."[765]

The United States Supreme Court endorsed comparative juror analysis in 2003 and 2005 in *Miller-El v. Cockrell* (*Miller-El I*) and *Miller-El v. Dretke* (*Miller-El II*).[766] As we described above, this powerful analytic approach was central to the court's grant of relief in *Miller-El II* and three subsequent *Batson* cases: *Snyder v. Louisiana, Foster v. Chatman,* and *Flowers v. Mississippi*.[767]

Three years after *Miller-El II*, the California Supreme Court, in *People v. Lenix*, reluctantly conceded that its "practice of declining to engage in comparative juror analysis [at step three] for the first time on appeal" could not be reconciled with *Miller-El II* and *Snyder* because the practice "unduly restricts review based on the entire record."[768] The court, however, wasted no words in expressing its reservations about this approach, and signaled its intention to conduct the analysis sparingly.[769] The California Supreme Court listed several reasons for its view that the approach has limited utility on appeal, e.g., comparative juror analysis is "performed on a cold record" and may miss the "nuances" of live communication; jury selection is "a fluid process" that changes until the jury is sworn; and "[v]oir dire is a process of risk assessment" about how a juror will act individually and how the group will act collectively.[770] In opinion after opinion, the court has relied on these and other like objections to constrain the efficacy of comparative juror analysis as a tool for ferreting out discriminatory peremptory challenges.[771]

The approach, as conceptualized by the United States Supreme Court, is not complicated: it involves "side-by-side comparisons" of "similarly situated" struck Black and non-Black jurors.[772] To be similarly situated, jurors need not be "identical in all respects."[773] The Court agreed that such a requirement "would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[774] If the prosecutor's reason for the strike "applies just as well" to a struck and "otherwise-similar" seated juror, "that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."[775]

The United States Supreme Court has conducted a comparative analysis of the prosecution's treatment of struck and seated jurors in a variety of circumstances, including: (1) asking most Black jurors different questions about executions than White jurors;[776] (2) eliciting assurances from White jurors who had scheduling conflicts that they could serve, but asking for no such assurances from Black jurors;[777] (3) striking an African-American juror because of his wife's employment at a hospital while retaining a White juror who worked in the same hospital;[778] (4) asking a large number of questions of the struck Black jurors and relatively few of the seated White jurors;[779] and (5) investigating the background of struck Black jurors while conducting no investigation of seated White jurors.[780]

In *Miller-El II*, the Supreme Court also reaffirmed the prohibition on speculation at the step-three determination, faulting the federal court of appeals' "substitution" of its own reason for the prosecution's strike of one of the African-American jurors.[781] The Court, wrote: "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."[782] Our state supreme court also relies on hypothesized reasons to uphold prosecutors' peremptory challenges, and in particular, to conclude that the excused Black or Latinx jurors were not sufficiently similar to the White jurors whom the prosecutor retained to warrant a finding of *Batson* error.

The court's decision in *People v. Jones*, illustrates this practice.[783] The *Batson* claim involved the prosecution's strikes against three African-American jurors.[784] The prosecutor gave several reasons for removing one of them, Juror G.G., including the fact that the juror was a bus driver in the area where the crime had occurred, and might substitute his own views about the bus routes for the witnesses' testimony.[785] He stated that he was also concerned about other jurors who were bus drivers in that area.[786] The trial judge denied the motion.[787] On appeal, Jones argued that the prosecutor did not strike two White jurors who were bus drivers in the area.[788] The California Supreme Court concluded that "[t]he record strongly suggests race-neutral reasons why he chose to accept the others despite his concern that they were bus drivers."[789] The court found that the two seated jurors were "'strongly in favor'" of the death penalty—a reason the prosecutor never offered for striking Juror G.G. —whereas the struck juror was "'moderately in favor.'"[790] Notwithstanding *Miller-El II*'s rule against speculation, the court concluded that the United States Supreme Court's decisions presented no obstacle to substituting reasons never offered by the prosecutor that might explain why he did not peremptorily challenge the seated jurors to whom the struck juror was compared.[791]

The state supreme court has done more than hypothesize reasons a prosecutor might have had to strike a juror of color. The court has also speculated about characteristics never offered by the prosecution as reasons for its strike that "*would have made* [*the seated jurors*] *more attractive 'in the eyes of a prosecutor* seeking a death sentence.'"[792] The court's practice defies the Supreme Court's requirement that "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives."[793]

Increasingly, the California Supreme Court has required that the seated jurors expressed "'a substantially similar *combination* of responses,' in all material respects, to the jurors excused."[794] In *People v. Winbush*, Justice Liu cautioned that the majority's approach "appears in tension" with *Miller-El II*, *Snyder*, and *Foster*.[795] He pointed out that in the Supreme Court cases, the prosecutor had given more than one reason for each disputed peremptory challenge, but that in making its analysis, the high court "drew inferences of discrimination by comparing struck and seated jurors with respect to one or more of the stated reasons *considered individually*."[796]

The United State Supreme Court's approach in *Foster* is illustrative. There, the court called the prosecutor's 11 reasons for striking Marilyn Garrett, an African-American woman, a "laundry list."[797] It is noteworthy that most of the prosecution's explanations were similar to those (1) California district attorney training manuals recommend; (2) California prosecutors routinely give; and (3) California courts endorse as "race neutral."[798] They included the juror's employment as a teacher's aide for "disadvantaged youth," the fact that she "kept looking at the ground during voir dire," the shortness of her answers, her "nervous" appearance; her youth; "misrepresent[ation of] her familiarity with the location of the crime," her failure to "disclose that her cousin had been arrested on a drug charge," and the fact that she was divorced and had two children.[799] The Supreme Court engaged in a thorough analysis of each of the 11 explanations, and found that a number of the reasons were "contradicted by the record," and others "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror."[800] The court went through the same careful examination of the eight reasons the prosecution gave for striking Eddie Hood, an African-American man, with the same result; most of the justifications were unsupported by the evidence or applied equally to seated White jurors.[801] The Supreme Court, however, did not examine whether each of the seated White jurors matched Ms. Garrett or Mr. Hood in all respects. Instead, taking the prosecution's explanations one after another, the court identified seated White jurors who were similarly situated to Ms. Garrett or Ms. Hood as to *that particular reason*.[802] The court held: "Two peremptory strikes on the basis of race are two more than the Constitution allows."[803]

In *People v. Hardy*, introduced above in our discussion of "reflexive deference," the court agreed that the prosecutor's strikes merited "close scrutiny" because she had removed every African American she could strike and the "case had definite racial overtones."[804] The majority concluded, however, that Frank G., who the prosecutor struck and who was the only Black prospective juror on the main panel, was distinguishable from the seated White jurors to whom Justice Liu, in dissent, compared him.[805]

Justice Liu also parted company with the majority opinion on its comparative juror analysis.[806] Examining several of the prosecutor's explanations for removing Frank G., Justice Liu identified at least two other seated non-Black panelists whose answers to specific questions were no more favorable to the prosecution than those of Frank G.[807] Consider the prosecution's concern that Frank G., who is not a lawyer, supervised civil litigation for a major car rental company, knew many attorneys, and spoke with lawyers on a daily basis.[808] The majority was satisfied that no seated non-Black jurors were similarly situated.[809] Yet, as Justice Liu showed, the seated jury included a legal secretary who "knew 'too [many] lawyers to name,'" two jurors whose family members are lawyers, and one juror who was studying to be a paralegal and had "close lawyer acquaintances."[810] Consider also the prosecutor's objections to Frank G.'s death-penalty views. Her sixth reason for striking Frank G. was his belief that "life without the possibility of parole [is] . . . a worse punishment than death."[811] Justice Liu pointed to two seated non-Black jurors whose questionnaire responses were "substantially similar."[812] Both also explained why they held this view, whereas "Frank G., who favored the death penalty and thought it was used 'too seldom,'" also stated that "he could accept that death was the worse penalty, as the law

required."[813] Justice Liu wrote that the majority's insistence that the comparator jurors "exactly match[]" the struck jurors "'leave[s] *Batson* inoperable; potential jurors are not products of a set of cookie cutters.'"[814]

In *People v. Smith*, citing *Foster*, the California Supreme Court suggested that a prosecutor's strategy of offering "multiple reasons," may "fatally impair the prosecutor's credibility" as some prove to be "implausible or unsupported by the facts."[815] The court cautioned against replicating a trial court's "shortcut" by "picking one plausible item from the list and summarily accepting it without considering . . . the prosecutor's explanation as a whole."[816] Despite the opportunity to disapprove of the use of a "laundry list" in several cases, the court has taken the opposite tack. For example, the prosecutor in *People v. Armstrong* gave eight reasons for excusing Juror E.W.[817] Rather than evaluate all of them, the trial court and the majority focused on the juror's two statements about capital punishment, dismissing the other six as "lesser factors," which could "fairly" cause the prosecutor to hesitate to retain E.W. on the jury.[818]

The dissent in *Armstrong*—Justice Liu, joined by Justice Cuéllar and by Justice Dennis Perluss of the Court of Appeal—began by acknowledging the "'definite racial overtones'" that "'raise[] heightened concerns about whether the prosecutor's challenge was racially motivated.'"[819] First, the defendant, a Black man, was sentenced to death for the rape-murder of a White woman.[820] Second, "[i]n the capital trial of Armstrong's confederate, Warren Hardy, the same prosecutor struck every black juror she could have removed and gave six reasons for striking a black man, Frank G., from the main panel."[821] Third, here, the prosecutor's peremptory challenges against four African-American male jurors left no Black men on the jury.[822] The majority noted these facts, but did not include them in their consideration of "all relevant circumstances" at step three as *Batson* requires.[823]

With regard to the strike of E.W., the third African-American man removed by the prosecutor, the dissent in *Armstrong* reviewed each of her eight reasons.[824] The dissent concluded that the majority's handpicking of just two of the prosecutor's explanations was inconsistent with the court's statement in *Smith*, which in turn was grounded in the Supreme Court's holding in *Foster*.[825] Concluding, the dissent returned to the deficiencies in the record—explanations that were "implausible, misleading, contradicted by the record, or difficult to credit in light of the prosecutor's disparate treatment of similarly situated jurors" and the trial court's failure to "press[] the prosecutor on these points."[826] The record, Justice Liu wrote, showed "'it was more likely than not that the challenge was improperly motivated.'"[827]

In *People v. Chism*, the California Supreme Court imposed yet another limitation on comparative juror analysis that runs counter to the plain language of United States Supreme Court precedent, and, as Justice Liu explained, conflicts with the state supreme court's precedent. The majority in *Chism* announced that an appellate court will only compare a struck juror to jurors seated at the time the judge ruled on the *Batson* objection unless the defendant renews the objection to allow for a comparison to jurors who were seated after the ruling.[828] This constraint defies the Supreme Court's mandate that reviewing courts, as well as trial judges, are obliged to evaluate a *Batson* claim based on "'*all* of the circumstances that bear upon the issue of racial animosity.'"[829]

Justice Liu observed that the majority's "new law" in *Chism* will restrict the use of comparative juror analysis in cases in which that approach would substantially support a *Batson* claim.[830] In *People v. Manibusan*, for example, the prosecutor struck a Black woman who had previously served on a jury that was unable to reach a verdict, stating that he had "'an absolute policy of getting rid of people whose only jury experience resulted in a hung jury.'"[831] After the trial court denied the *Batson* motion, jury selection continued, and the prosecutor accepted two non-Black jurors whose only prior jury experience was serving on juries that did not reach a verdict.[832] Under *Chism*'s crabbed approach, the truth about the prosecutor's "policy" would escape judicial review. Justice Liu observed that *Chism* was the second opinion in one year in which the court had rejected a defense objection to the prosecution's removal of Black women from the jury.[833] He wrote, "Our *Batson* jurisprudence . . . leaves one to wonder whether any circumstances, short of an outright admission by the prosecutor . . . will ever suffice to prove a violation."[834]

In case after case, the California Supreme Court has devised rationales to avoid comparative analysis, to restrict its application, to speculate about jurors' similarities and differences rather than adhere to the record, or to find the analysis itself unpersuasive. The court's hostility to and parsimonious application of this approach cannot be reconciled with the Supreme Court's generous use of the analysis.

IV.

REFORM OPTIONS

Ultimately, our empirical findings that prosecutors continue to disproportionately strike Black and Latinx prospective jurors despite *Batson* should not be surprising. To the extent that *Batson* can make some progress in reducing discriminatory strikes, it requires vigorous judicial enforcement, which our state courts have not provided.

Batson has failed and was destined to fail. Prosecutors across the state persist in disproportionately striking Black and Latinx jurors. They justify these strikes on the basis of "race-neutral" reasons that are often thinly veiled ethnic or racial stereotypes, which courts at every level tolerate. The California Supreme Court has found *Batson* error only three times in the last three decades. *Batson* is an ineffective judicial mechanism. We agree with Justice Goodwin Liu that it is "past time for a course correction."[835]

Members of the bench and legal scholars have called for an end to the *Batson* procedure, or at least, for dramatic reform. In this section, we explore those critiques and the various reform options proposed by judges, legal scholars, social scientists, and public figures. We examine actions taken by other states to remedy discrimination in jury selection—most notably, Washington Supreme Court General Rule 37 ("GR 37").[836] We note that the California Supreme Court recently announced that it will convene a "workgroup" to study peremptory challenges. We urge, however, that comprehensive legislation is the only realistic, expeditious means of eliminating the discriminatory jury selection practices detailed in this report.

A. Judicial Calls for *Batson* Reform

Recognizing its deficiencies, justices in California have called for substantial *Batson* reform.[837] Dissenting from the California Supreme Court's final *Batson* opinion of 2019, Justice Liu proposed several concrete measures to move the majority in the direction of enforcing the Equal Protection Clause.[838] First, he proposed that the United States Supreme Court "could make clear that reliance on hypothesized reasons in first-stage *Batson* analysis is generally impermissible."[839] Thus, a trial judge could no longer offer his or her own race-neutral reasons to explain a prosecutor's peremptory challenge. Rather, the trial court would have to rely on the prosecutor's reasons in ruling on the *Batson* objection.

Second, Justice Liu suggested that the California Supreme Court, the California Judicial Council, or the California Legislature "follow the lead of several state high courts that have essentially eliminated *Batson*'s first step."[840] Once a party objects, the party making the strike would have to provide reasonably "'specific and clear race-neutral explanations for the strike.'"[841] This reform, Justice Liu explained, would serve the goals of "promoting transparency, creating a record for appellate review, and ensuring public confidence in our justice system, while imposing 'the comparatively low cost of requiring a party to state its actual reasons for striking a minority prospective juror.'"[842] He wrote that "our Legislature has passed laws expanding protections against discrimination in jury selection (see, e.g., Code of Civ. Proc., § 231.5), and it can do so again."[843] Justice Liu's proposal to eliminate the first step of the *Batson* procedure is a core feature of AB 3070.

In September 2019, two Justices of the California Court of Appeal published an unusual opinion urging that "[t]he time has come" for California government, including the legislature, "to consider meaningful measures to reduce actual and perceived bias in jury selection."[844] The opinion's author, Justice Jim Humes, pointed to several possible reforms, including Washington Supreme Court General Rule 37—the model for AB 3070—discussed below.[845]

Justice Humes observed that there are "good reasons to question whether [*Batson*'s] promise is being realized."[846] He focused on several significant deficiencies in the California Supreme Court's *Batson* precedents, and, more broadly, the *Batson* procedure itself. First, Justice Humes noted that because *Batson* is limited to identifying "intentional discrimination in jury selection, it plainly fails to protect against—and likely facilitates—implicit bias. Implicit bias is increasingly accepted as pervasive throughout the criminal justice system, and it is particularly pernicious in the context of peremptory challenges."[847]

Second, Justice Humes wrote that because *Batson* tolerates explanations that appear to be facially non-discriminatory, the procedure "makes it easy to assert justifications that mask bias" and "makes it nearly impossible for trial courts to meaningfully evaluate those justifications."[848] Here, Justice Humes singled out the reasons prosecutors frequently give for exercising peremptory challenges against Black jurors, such as "negative experience with law enforcement or skepticism about the fairness of the criminal justice system."[849] He explained that, in view of "the undeniable evidence" of racial bias by law enforcement and in the criminal legal system more broadly, "[r]eflexively allowing these strikes compounds institutional discrimination" by removing jurors of color, "diminish[ing] public confidence" in the legal system, and "undermin[ing] the value of having juries that represent a fair cross-section of the community."[850]

Third, Justice Humes explained that the "inadequacies of the *Batson* framework at the trial-court level are, in turn, exacerbated on appeal" because appellate courts must defer to the trial court's step-three credibility determination.[851]

B. Alternatives to *Batson*

In addition to the judicial call for *Batson* reform, legal scholars and social scientists have proposed wide-ranging alternatives to remedy the pervasive race-based discrimination the *Batson* procedure has failed to eliminate. These reforms vary greatly in their approach. Some focus on "category-conscious" jury selection.[852] The strongest of these category-conscious options calls for a "certain minimum number or percentage of minorities" on the seated jury,[853] ranging from a proposal that at least half of the members of the jury be of the same race as the defendant on trial[854] to a minimum number of three same-race jurors.[855] However, it is reasonably likely that, given its recent equal protection jurisprudence, the current Supreme Court would find this race-conscious approach unconstitutional.[856]

Other reforms focus on affirmative selection of the jury, rather than the dismissal-based structure of the current peremptory challenge scheme.[857] Parties in this jury selection structure would have the "right to choose affirmatively some or all of the potential jurors, and generally could use race" as a basis for their selection.[858] Again, race-conscious selection procedures would likely not survive a challenge under the federal Constitution.[859]

Other proposals include expanded voir dire[860] and greater use of jury questionnaires.[861] It does not require a study to predict that both proposals would likely impose new costs on the judicial system. One team of researchers suggested requiring attorneys to "articulate before voir dire the juror characteristics they prefer for their case."[862] This would "permit more meaningful scrutiny of peremptory challenge use" and make it more challenging for a prosecutor to justify a strike that goes against those prior stated goals.[863] This proposal will be largely ineffective as long as the courts are limited by the *Batson* procedure, particularly its tolerance for "race-neutral" reasons and its requirement that the objecting party prove intentional discrimination. As Section III.D discusses, district attorneys know precisely "the juror characteristics they prefer for their case." And they are well-schooled in how to eliminate prospective jurors who do not have those characteristics by relying on "race-neutral" explanations approved by the California Supreme Court and Courts of Appeal.

Scholars have also called for a series of incentive-based reforms that would impose severe sanctions on the attorney responsible for exercising a racially discriminatory peremptory challenge. These proposals include: an ethical rule that a *Batson* violation is professional misconduct;[864] providing additional peremptory challenges to the non-striking party or reducing the number of available challenges to the party who improperly exercised a peremptory challenge;[865] and considering disciplinary actions against prosecutors, such as complaint citations, censure, or suspension.[866] However, California courts already have latitude in devising remedies for *Batson* violations, including sanctioning attorneys, and there is no evidence to suggest alternative remedies have reduced discrimination.[867] The most extreme of these proposals is "'dismissal of the criminal prosecution with prejudice' arguing by analogy to the exclusionary rule" when a prosecutor exercises a discriminatory peremptory challenge.[868] The authors see no real prospect that the legislature or the courts are prepared to adopt such a severe penalty.[869]

C. The Washington State Supreme Court's *Batson* Reform

One state supreme court, acknowledging *Batson*'s failings, has taken an active role in pursuing reforms. In 2018, the Washington Supreme Court adopted General Rule 37 ("GR 37"), which altogether replaces the *Batson* procedure.[870] In response to a proposal by the American Civil Liberties Union to create an alternative to the *Batson* framework, the Washington Supreme Court convened a "workgroup" to draft a rule that would significantly reduce, if not end, discriminatory jury selection procedures.[871] The Connecticut Supreme Court followed Washington's example, and announced in December 2019 that it will convene a task force to examine racial discrimination in jury selection in that state.[872]

Washington's *Batson* reform has four key features. First, GR 37 eliminates *Batson*'s first step; once there is an objection, the party who made the peremptory challenge must offer an explanation.[873] Second, the trial court serves as "an objective observer . . . aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors."[874] Third, the court must deny the peremptory challenge if it finds that "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."[875] Fourth, GR 37 lists reasons for peremptory strikes that are presumptively invalid because they have been historically associated with racial or ethnic discrimination, and acknowledges the role demeanor-based reasons have played in the exercise of discriminatory strikes.[876]

D. Assembly Bill 3070 and the California Supreme Court

Assembly Bill (AB) 3070 was introduced by Asssemblymember Dr. Shirley Weber on February 21, 2020.[877] Passage of AB 3070 would support growing efforts in all branches of California government to reduce the impacts of implicit bias in the criminal legal system, particularly as they adversely affect African Americans. In 2016, California Supreme Court Chief Justice Tani Cantil-Sukuaye told a joint session of the legislature that "implicit bias is a factor in the national discussion about race and justice."[878] The Chief Justice highlighted "implicit bias education and training" for judges.[879] Just last year, the legislature enacted a law requiring mandatory trainings on implicit bias for lawyers and judges.[880] Acknowledging the need for these measures, the legislature stated that "most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent."[881] In addition to our Chief Justice, other members of the bench have commented on the need to address implicit bias in the criminal legal system, including in the jury selection process.[882]

The California Supreme Court recently expressed interest in examining *Batson*'s limitations. On January 29, 2020, Chief Justice Cantil-Sakauye announced that a jury selection work group would "study whether modifications or additional measures are needed to guard against impermissible discrimination in jury selection."[883] According to the news release, "[i]n the coming weeks," the Chief Justice would "appoint a diverse group of members" to consider issues such as: whether an alternative to *Batson*'s purposeful-discrimination standard is appropriate; the role of "unconscious bias" in jury selection; whether exclusion of prospective jurors on grounds such as their negative experience with law enforcement leads to "disproportionate exclusion of jurors of certain backgrounds;" and whether there are "other impediments to eliminating impermissible discrimination."[884] We note that, as of the publication of this report, the Chief Justice has not publicly named anyone to the work group. The authority, if any, of the group to be a catalyst for change is at best unknown. The work group is not under the umbrella of the Judicial Council, which is the "policy making body of the California courts"[885] that operates "primarily through the work of its advisory committees and task forces."[886]

We acknowledge the state supreme court's interest in studying *Batson*'s shortcomings. However, the legislature—through the passage of AB 3070—is better suited to effectively address persistent discrimination in jury selection in a timely manner. In our view, and as this report makes evident, the topics identified for study by the work group have been amply studied. The questions posed have been answered. The time for a decisive "course correction" by the California Legislature is now.[887] We need look no further than Washington's example to make this point. Studies leading to the adoption of GR 37 identified the same intractable discriminatory jury selection practices under *Batson* as this report has detailed.[888] The Washington Supreme Court implemented a practical, workable solution through GR 37, which is the basis for AB 3070. There is a bill before the legislature that will effectively remedy the long-standing deficiencies of the *Batson* procedure. It is past time for a work group to spend years re-examining this issue.

APPENDICES

A. California Courts of Appeal Research Method

Our primary research objective was to determine whether there were patterns of racial, ethnic, and gender discrimination in jury selection in California non-capital felony trials. This study investigated the following questions: (1) from 2006 to 2018, how many times did the courts of appeal decide a *Batson* claim in cases involving non-capital felony convictions; (2) in these cases, how frequently did defense attorneys make *Batson* objections to prosecution strikes and how frequently did prosecutors make *Batson* objections to defense strikes; (3) in how many of these cases did prosecutors and defense attorneys exercise peremptory challenges to exclude Black, Latinx, Asian-American, White, women, and men jurors; and (4) when examining the reasons for these strikes, did prosecutors and defense attorneys offer some reasons more frequently than others when required to explain their challenges?

In California, trial records and appellate briefs for felony trials not resulting in a death sentence are not readily accessible or easily reviewable.[889] Therefore, the data set for the study consisted of the opinions—mostly unpublished[890]—of the courts of appeal.[891] Employing the search parameters discussed below, we identified every appellate opinion issued between January 1, 2006, and December 31, 2018, in which the court decided a claim of *Batson* error. Of the 767 opinions, 683 were relevant for the purposes of the study.[892] *See* Section II. From this group of cases, we determined the following: (1) the number of cases in which prosecutors and defense attorneys exercised strikes against prospective jurors of a specific race, ethnicity, and/or gender;[893] (2) the identity of the party exercising the strike(s) (defense or prosecution); (3) the reason(s) for the peremptory challenge given by the party exercising the strike; and (4) whether the appellate court found a *Batson* violation.[894]

Although the data set was constant, the unit of analysis varied depending upon the query. In our investigation of how frequently the courts of appeal decided *Batson* claims between 2006 and 2018, the unit of analysis was the case, specifically the court of appeal case. In our investigation of the number of prosecution and defense strikes, the unit of analysis was the case, i.e., the court of appeal case. In our determination of how frequently jurors of color and women were struck, the unit of analysis was also the case. In our examination of the number of cases in which the parties offered the defined categories as reasons for their strikes, the unit of analysis was the case. In our examination of how often the parties offered the defined categories as reasons for their strikes of jurors by race and ethnicity, the unit of analysis was the juror.

In some appellate cases, multiple peremptory challenges were at issue and multiple reasons were offered. The following explains how we coded the data in these circumstances: (1) the *Batson* motions of both the prosecution and defense were at issue on appeal, resulting in one *Batson* motion code for both sides (a total of two) for a single case; (2) both a Black and Latinx juror were struck, resulting in codes for both a race- and ethnicity-based strike for a single case; (3) in a given case, each reason offered, regardless of frequency, was coded to the case once; and (4) for a given juror, if multiple reasons were offered for the strike that fit into the defined categories, each reason was coded to that juror.

Question 1: From 2006 to 2018, how many times did the courts of appeal decide a *Batson* claim in cases involving non-capital felony convictions?

We used Thomson Reuters Westlaw to conduct the search. We limited the search to opinions that mentioned "*Batson/Wheeler*" or "*Wheeler/Batson*,"[895] included both published and unpublished opinions, set the date range from January 1, 2006, through December 31, 2018, and restricted the search to California courts of appeal opinions.[896] The search returned 767 opinions. We omitted from the study opinions in which the appellate court did not reach a decision on the merits of the *Batson* claim, e.g., the claim was not properly preserved. We counted as a single opinion cases that were appealed more than once, e.g., a decision was appealed, remanded for a *Batson* hearing, and appealed again following the hearing. After eliminating duplicates, we determined that the courts of appeal decided 683 opinions involving *Batson* claims between 2006 and 2018.

Question 2: In how many cases did defense counsel object to prosecution strikes, and in how many cases did prosecutors object to defense strikes?

We coded all observations, i.e., cases, based upon which party's *Batson* motion was at issue on appeal.[897] In 670 of our observations, defense counsel had objected to prosecutors' strikes. Therefore, we coded 98.0% of the total number of cases involving *Batson* claims as prosecution strikes. *See* Section II.A. Only 14 cases involved claims that defense counsel had exercised racially discriminatory peremptory strikes. *See* Section II.A. The 14 cases included two in which the trial court found *sua sponte* that defense counsel's peremptory strikes were based on race or ethnicity, two cases in which the prosecution objected to defense strikes based on gender, and one case in which the defense objected to some of the prosecution's strikes based on race and vice versa. Because each side made a *Batson* objection that was at issue on appeal in this last instance, there are a total of 684 "cases" in the study as opposed to the 683 relevant "opinions." This is why adding the count for both sides results in one more than the total number of opinions issued.

Question 3: In how many of these cases did prosecutors and defense attorneys exercise peremptory challenges to exclude Black, Latinx, Asian-American, White, women, and men jurors?

In determining the number of cases in which White jurors, jurors of color, men, and women were struck, the unit of analysis was the case. We coded these observations by race and ethnicity. Below and in Section II.B.5, we explain the difficulty of teasing out the number of cases in which gender, uncoupled from race or ethnicity, was the basis for a strike. Therefore, we did not report the data on any gender-based strikes.

Using each case as a unit of analysis, we determined the number of cases in which a party made at least one peremptory strike to remove a juror of color. Four hundred fifty cases involved challenges to multiple jurors.

We acknowledge that race and ethnicity are social constructs and are mindful that these categories can be misleading, especially as the number of people who identify as multiracial or

multiethnic increases.[898] For purposes of the data analysis, the study categorizes as "Latinx" individuals who self-identified or have a Spanish surname or whom the trial or appellate court identified as "Latino," "Chicano," or "Hispanic."[899] The study categorizes as "Asian American" individuals who self-identified or whom the trial or appellate court identified as Filipino, Samoan, Pacific Islander, Vietnamese, South Asian, or Indian.[900]

We explored the option of analyzing the frequency of peremptory challenges against racial or ethnic subgroups by gender, e.g., Black women, and determined that we could not do so reliably based upon the available source material, which was limited to appellate court cases.[901] There was insufficient consistency in how attorneys (almost always defense counsel) characterized their objection to strikes of racial or ethnic subgroups, how trial judges ruled on the objection, and how appellate courts framed their decisions. For example, even if the attorney objected to strikes against "Hispanic women," more often than not, the trial judge's ruling was based on either the race/ethnicity or the gender of the struck jurors, but not on both. Even when the appellate court acknowledged that the objection was based on a racial or ethnic subgroup by gender, the appellate court analyzed the trial judge's determination in the way in which the trial judge characterized the ruling, which most often was solely race or ethnicity. Therefore, we decided that the only reliable measure for the study was race or ethnicity rather than racial or ethnic subgroups by gender.

Question 4: When examining the reasons for these strikes, did prosecutors and defense attorneys offer some reasons more frequently than others when required to explain their challenges?

We used subdivisions (h) and (i) of Washington Supreme Court General Rule 37 ("GR 37") as a starting point for categorizing the reasons for the peremptory challenges.[902] GR 37 is Appendix B to the report. Subdivision (h) identifies specific reasons as "presumptively invalid" when offered as explanations for a peremptory challenge because they "have historically been associated with improper discrimination in jury selection in Washington State." The reasons are: "(i) having prior contact with law enforcement; (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."[903] As we explain in Section II.B, we did not code "receiving state benefits" and "not being a native English speaker" because prosecutors almost never gave them as reasons.

We used two different approaches to answering this question. In calculating the number of cases in which these reasons appeared, the unit of analysis was the case. For example: "Prosecutors relied on demeanor as a reason for their peremptory challenges in over 40% of the cases." Because we also coded cases by the race and ethnicity of the struck jurors, we also coded the reason(s) offered for that racial or ethnic group. For the racial and ethnic breakdown by reasons per case, we calculated the percentages by dividing the number of cases/observations in which the reason appeared for that race or ethnicity by the total number of cases/observations

in which the prosecutor struck that race or ethnicity. For example: "Of the 480 cases in which prosecutors struck Black jurors, they offered demeanor in 37.5% (180 cases) of these cases." In determining how frequently parties offered the defined categories as reasons for strikes by race and ethnicity, the unit of analysis was the juror. *See* Section II.B.4, Figure 4. We coded each struck juror's race or ethnicity and the reason(s)stated for the peremptory challenge. We calculated the percentages by dividing the frequency with which reasons were offered for that race or ethnicity by the total number of times prosecutors struck jurors of that race or ethnicity. *See* Table A and Section II.B.4, Figure 4.

Reason(s) Given by Prosecutors	Black	Latinx	White & Asian American
Demeanor	23.2%	20.8%	17.3%
	(N=218)	(N=117)	(N=9)
Close Relationship	23.5%	15.8%	5.8%
	(N= 221)	(N= 89)	(N=3)
Distrust	25.6%	10.8%	7.7%
	(N=241)	(N=61)	(N=4)
Prior Contact with Law Enforcement	13.2%	6.9%	3.8%
	(N=124)	(N=39)	(N=2)
Living in a High-Crime Neighborhood	1.4%	2.1%	--
	(N=13)	(N=12)	--
Child Outside of Marriage	0.6%	0.9%	--
	(N=6)	(N=5)	--
Total N of Racial Category	940	563	52

Table A

We expanded two GR 37 categories in our study. We expanded the category "prior contact with law enforcement officers" to "prior contact with law enforcement or the criminal legal system." Using this expanded category, we coded an observation—the case and the juror—when a party struck a juror because the juror had been stopped, arrested, charged with a crime, and/or convicted of a crime. We also coded an observation when a party struck a juror because the juror had reported a crime to law enforcement and had a negative experience as a result.

We expanded the category "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling" to "expressing a distrust of law enforcement

or the criminal legal system or a belief that law enforcement officers or the criminal legal system is racially- or class-biased." We coded an observation when a party struck a juror because (1) the juror expressed distrust of law enforcement or the criminal legal system (e.g., "The system is rigged in favor of wealthy defendants."); (2) the prosecutor concluded that the juror was distrustful based upon the juror's statement (e.g., "I believe that the Black Lives Matter movement has raised a lot of important issues."); (3) the juror had a negative experience with law enforcement or the criminal legal system and the prosecutor concluded that the juror was distrustful (even where the juror said otherwise); or (4) the juror said that a family member or someone to whom the juror is close had a negative experience, and the prosecutor concluded that the juror was distrustful (even when the juror said otherwise).

We assigned the code "having a close relationship with someone who has been stopped, arrested, or convicted of a crime" to any juror struck because the juror's family member or another person to whom the juror was close had been stopped by police, arrested, or convicted of a crime.

We assigned the code "living in a high-crime neighborhood" to any juror struck because the juror lived in a neighborhood that was labeled "gang" or "low-income" or "urban."

We assigned the code "a child outside of marriage" to any juror struck because the juror had a child with someone to whom the juror was not married. This included challenges for which the prosecutor gave as a reason the fact that the juror had children below the age of 18 but was "single" or "unmarried."

There is significant overlap among the first three categories: (1) prior contact with law enforcement or the criminal legal system; (2) expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement officers or the criminal legal system engage in racial profiling; and (3) having a close relationship with someone who has been stopped, arrested, or convicted of a crime. For example, parties struck some jurors because they expressed (or the prosecutor concluded they did) distrust of law enforcement or the criminal legal system based on their own experiences and those of family members. Therefore, we coded all three of these reasons.

Subdivision (i) of GR 37 states that "the following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers."[904] We coded "demeanor" for any strike based on one or more of the reasons listed in subdivision (i).

If a party struck a juror based upon a reason that did not fit into any of the above categories, the reason was not coded. In the course of this study, however, it became evident that prosecutors offered explanations that were not included in GR 37 (h) or (i)—and therefore not part of the study design—but were also historically associated with discrimination. *See* Section II.B. These reasons include hair style or color, fingernail color or length, makeup, tattoos, clothing, jewelry, current or previous employment as a social worker or in the postal service, and gang affiliation. Prosecutors offered these reasons with sufficient frequency to warrant mention.

If the trial court, before or during the denial of the *Batson* motion, offered reasons for the strike that fit into the categories above, we did not code those reasons in the data analysis. However, if the court offered one or more of these reasons, and the striking *party* said that the court's reasons were the reasons for the party's strike(s), we coded the reason(s) for purposes of the data analysis.

B. Washington Supreme Court General Rule 37

GR 37
Jury Selection

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer 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.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(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.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: 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. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

[Adopted effective April 24, 2018.]

ENDNOTES

1 Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 9 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

2 *See People v. Miles*, No. S086234, 2020 WL 2760163, at *64 (Cal. May 28, 2020) (Liu, J., dissenting) ("With today's decision, this court extends its record of not having found *Batson* error involving the peremptory strike of a black juror in more than 30 years — despite the fact that '[t]he high court's opinion [in *Batson*] responded specifically to the pernicious history of African Americans being excluded from jury service, calling such exclusion "a primary example of the evil the Fourteenth Amendment was designed to cure."'" (alterations in original) (quoting *People v. Hardy*, 5 Cal. 5th 56, 124 (2018) (Liu, J., dissenting))); *People v. (Joe Edward) Johnson*, 8 Cal. 5th 475, 528 (2019) (Liu, J., dissenting) (describing the majority opinion as "yet another case in which a black man was sentenced to death for killing a white victim after a jury selection process in which the prosecution disproportionately excused black prospective jurors," and "yet another case in which this court has refused to find any inference of discrimination in jury selection"); *People v. Bryant*, 40 Cal. App. 5th 525, 544-46 (2019) (Humes, J., with Banke, J., concurring) (discussing the *Batson* procedure's inability to preclude strikes based on implicit bias, describing courts' "[r]eflexive[]" approval of prosecutors' reasons for striking Black jurors as "compound[ing] institutional racism," and supporting the call for "meaningful reform"); *Flowers v. State*, 947 So. 2d 910, 937, 939 (Miss. 2007) (finding that "racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down," warranting reassessment of the *Batson* inquiry and peremptory challenges, and warning prosecutors that if they continue to violate *Batson*, changes are likely); *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124 (2017) (finding that "[t]wenty-six years later it is evident that *Batson*, like *Swain* before it, is failing" to eliminate racial discrimination in jury selection)*; id.* at 335 ("In over 40 cases since *Batson,* Washington appellate courts have *never* reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge."); David Cole, No Equal Justice 120 (1999) ("*Batson* has by all accounts done relatively little to eliminate the use of race-based peremptory strikes."); Randall Kennedy, Race, Crime and the Law 208 (1997) ("Despite *Batson*, prosecutors continue to deploy racially motivated peremptory challenges."); Ursula Noye, Reprieve Austl., Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office (2015), https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf (examining data from 300 felony jury trials between 2003 and 2012, and finding that prosecutors struck Black jurors at three times the rate of non-Black jurors); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 10 (2001) (summarizing the empirical studies to date; examining 317 Philadelphia capital murder cases tried in the 1980s, and finding that, post-*Batson*, discriminatory strikes based upon race and gender remain "widespread," and prosecutors are significantly more successful than

defense counsel in "control[ling] jury composition" with the result that their conduct increased "the probability of death for all defendants," as well as the racially discriminatory application of capital punishment, and significantly decreased the chance that black men would serve as jurors in the trials of black defendants"); David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 Iowa L. Rev. 1425, 1446-65 (2012) (examining the race-based practices of one experienced Philadelphia prosecutor); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011) (examining 269 federal civil and criminal *Batson* decisions over a nine-year period, and finding that relief in the form of a new trial was granted in fewer than seven percent of the cases and that in "85.1% [of the] cases, the court rejected the *Batson* claim altogether"); Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 Wis. L. Rev. 511, 584 (1994) (examining every federal case decided post-*Batson* through May 1993, and finding the "inability" of *Batson*'s procedure, which "search[es] for discriminatory purpose and pay[s] deference to trial court findings, to eliminate or even identify race-based challenges"); Douglas L. Colbert, *Challenging the Challenge: The Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 96 (1990) ("[T]he *Batson* remedy has proven to be ineffective against prosecutors whose trial strategy involves the elimination of prospective black jurors."); Equal Justice Initiative, *supra* note 1, at 4 (presenting two years of research in eight southern states that "uncovered shocking evidence of racial discrimination in jury selection in every state"); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 1973 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1533, 1538-39 (2012) (employing a data set including more than 7,400 peremptory strikes by North Carolina prosecutors in 173 capital trials between 1990 and 2010, and finding that prosecutors struck 51% of prospective Black jurors as compared to 26% of all other jurors, resulting in a removal rate for Blacks that was 2.5 times the rate for all other jurors); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 448, 458-59 (1996) (examining "virtually every relevant reported decision of every federal and state court applying *Batson*" between mid-1986, when *Batson* was decided, and the end of 1993, and finding that criminal defendants brought more than 95% of the objections to peremptory strikes and that discrimination persists); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1959, 1962-63 (2016) (examining published cases, and finding that it had been 30 years since the North Carolina Supreme Court found a *Batson* violation, but noting that, during this period, the state's appellate court had remedied two instances of "'reverse *Batson*' claims where the court found purposeful discrimination against white jurors challenged by black defendants.") (citing *State v. Hurd*, 246 N.C. App. 281 (2016); *State v. Cofield*, 498 S.E. 2d 823 (1998)); Ronald F. Wright et al., *The Jury Sun-*

shine Project: Jury Selection Data as a Political Issue, 2018 U. Ill. L. Rev. 1407, 1425 tbl.2 (2018) (examining data on over 29,000 North Carolina prospective jurors in non-capital felony trials between 2011 and 2012, and finding that prosecutors exercised peremptory challenges against Black jurors at twice the rate as white jurors).

3 Brand, *supra* note 2, at 532-34.

4 Michael J. Klarman, From Jim Crow to Civil Rights 10, 39 (2004).

5 Ch. 114, § 4, 18 Stat. 335, 336-37 (an act to protect all citizens in their civil and legal rights).

6 *See* Equal Justice Initiative, *supra* note 1, at 9-10 (citing Kennedy, *supra* note 2, at 172.

7 *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

8 *See* Equal Justice Initiative, *supra* note 1, at 9.

9 *Id*. at 10.

10 *Id.*; *see also* Klarman, *supra* note 4, at 42.

11 Brand, *supra* note 2, at 542.

12 *Id*. at 539-49; *see* Equal Justice Initiative, *supra* note 1, at 9-10.

13 Brand, *supra* note 2, at 539-49; *see* Equal Justice Initiative, *supra* note 1, at 9-10.

14 *Norris v. Alabama*, 294 U.S. 587, 588 (1935).

15 *See generally* Dan T. Carter, Scottsboro: A Tragedy of the American South (rev. ed. 1979).

16 *Norris*, 294 U.S. at 597.

17 Equal Justice Initiative, *supra* note 1, at 11.

18 Brand, *supra* note 2, at 556; *see also* Kennedy, *supra* note 2, at 178-79.

19 Equal Justice Initiative, *supra* note 1, at 12; *see also* Brand, *supra* note 2, at 564.

20 *People v. Hines*, 12 Cal. 2d 535, 537 (1939).

21 *Id*. at 538.

22 *Id*. at 539; *but see People v. Parman*, 14 Cal. 2d 17, 19-20 (1939) (affirming a conviction and death sentence by an all-male jury where, although women were legally eligible to serve, Placer County did not place any women on the jury list in 1939, and distinguishing *Hines* because the exclusion was not based on the race of the defendant).

23 Brand, *supra* note 2, at 556; *see Swain v. Alabama*, 380 U.S. 220 (1965).

24 *Akins v. Texas*, 325 U.S. 398, 399-400 (1945).

25 *Id*. at 405.

26 *Id*. at 406-07.

27 *Id*. at 407.

28 Equal Justice Initiative, *supra* note 1, at 11; *see e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 53 (1975) (holding that the systematic exclusion of women from the venire violates the fair-cross-section requirement of the federal Constitution).

29 Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 UCLA Nat'l Black L.J. 238, 238 (1994) (finding that, at every stage of the jury selection process, there are legal and non-legal factors that play a role in excluding African Americans from petit and grand juries such that "potential jurors with specific human capital factors, such as higher income, higher education, and white racial background, were more likely to be represented on juries"); Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. Black Stud. 196, 197 (1991) (finding that African Americans are disproportionately excluded from the jury pool). The article used the word "pool" to describe, broadly, the "jury selection process." *Id.* at 199.

30 Hiroshi Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process*, 23 Int'l J. Comp. & Applied Crim. Just. 55, 74 (1999) (finding that African Americans are disproportionately excluded throughout the jury selection process in California courts).

31 Cal. Civ. Proc. Code § 198(b).

32 *Id.* § 197(a).

33 *Id.* § 197(b).

34 Judicial Council of Cal., Final Report: Task Force on Jury System Improvements 10 (2003), https://www.courts.ca.gov/documents/tfjsi_final.pdf (recommending that one or more California counties conduct a pilot study supplementing the DMV and

ROV lists with other comprehensive lists of persons living in California, such as welfare and unemployment lists).

35 Civ. Proc. § 198(a)-(b).

36 *Id*. § 198(c).

37 Fukurai & Butler, *supra* note 29, at 250; Fukurai, *supra* note 30, at 56; David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Calif. L. Rev. 776, 819 (1977) (arguing that the use of multiple source lists increases minority representation in jury pools). The article uses the term "pool" to refer to individuals who have met the "established requirements for jury service." *Id.* at 822.

38 Fukurai, *supra* note 30, at 70 tbl.2.

39 Kairys et al., *supra* note 37, 805-06.

40 *Id.* at 809, tbl.D.

41 *See* Cal. Elec. Code § 2101.

42 With the passage of S.B. 310, effective January 1, 2020, persons convicted of a felony are permitted to serve on juries unless they are incarcerated, under any form of supervision, or are a registered sex offender. *See Governor Newsom Signs Criminal Justice Bills to Support Reentry, Victims of Crime and Sentencing Reform*, Office of Governor Gavin Newsom (Oct. 8, 2019), https://www.gov.ca.gov/2019/10/08/governor-newsom-signs-criminal-justice-bills-to-support-reentry-victims-of-crime-and-sentencing-reform/.

43 Fukurai, *supra* note 30, at 2; Fukurai et al., *supra* note 29, at 201-03.

44 Fukurai et al., *supra* note 29, at 202.

45 *Id.* at 202; Fukurai, *supra* note 30, at 6.

46 Ronald J. McAllister et al., *Residential Mobility of Blacks and Whites: A National Longitudinal Survey*, 77 Am. J. Soc. 445, 448 (1971).

47 Fukurai et al., *supra* note 29, at 203.

48 Thomas G. Munsterman et al., Paula L. Hannaford-Agor & G. Marc Whitehead, Jury Trial Innovations 10 (2d ed. 2006); Paula L. Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 780 (2011) (suggesting that multiple source lists will increase "demographic representation" of minorities); Kairys et al., *supra* note 37, at 819.

49 *See* Kairys et al., *supra* note 37, at 825-26 (discussing how to increase representation of "people with lower socio-economic status and minority groups").

50 Judicial Council of Cal., *supra* note 34, at 11 ("Although no California courts supplement their source lists with welfare or unemployment lists, the Superior Court of Modoc County supplements its master list with public utility customer lists."). Senate Bill 1001, introduced in the California Senate on February 13, 2020, would have expanded the source lists beyond the ROV and DMV lists to require the inclusion of the Franchise Tax Board (FTB) as a third source list. The author withdrew SB 1001 due to the COVID-19 pandemic.

51 *People v. Harris*, 36 Cal. 3d 36, 59 (1984) (holding that the defendant met all three prongs of the *Duren* test and established a "prima facie showing of a gross disparity resulting in a violation of defendant's right to an impartial jury drawn from a fair cross-section of the community"). *Harris* was abrogated by *People v. Bell*, 49 Cal. 3d 502, 526 n.12 (1989), which concluded that "the *Harris* court erred in . . . accepting total population figures regardless of the actual availability of more refined data." Both opinions refer to two leading United States Supreme Court cases that set standards for the fair cross-section requirement. In *Duren v. Missouri*, 439 U.S. 357, 364 (1979), the high court held that in "order to establish a prima facie violation of the fair cross-section requirement, the defendant must show: (1) the group is a "distinctive group" in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process." In *Berghuis v. Smith*, 559 U.S. 314, 329 (2010), the court observed that "neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools," such as "absolute disparity, comparative disparity, and standard deviation." *See* Nina Chernoff, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, Champion 18 (2013), http://www1.cuny.edu/mu/law/files/2014/01/chernoff-kadane_december_2013_16things.pdf (explaining that the Supreme Court has declined to decide which method of measuring disparity must be used so that measures of absolute disparity, comparative disparity, standard deviation analysis, and probability analysis are all permissible). The California Supreme Court most recently considered a jury composition challenge in *People v. Henriquez*, 4 Cal. 5th 1 (2017). The court concluded that that the defendant failed to carry his burden of showing that underrepresentation of African Americans in jury pools was the product of systematic exclusion. *Id.* at 20. *See also People v. Ramos*, 15 Cal. 4th 1133, 1155 (1997) (explaining that neither the United States nor California Supreme Courts has articulated the constitutional limit of permissible disparity—either comparative or absolute—between the representation of the distinctive group and its size in the general community for the purposes of the second prong of the *Duren* test).

52 *See People v. Currie*, 87 Cal. App. 4th 225, 235 (2001) ("The underrepresentation of African-Americans on Contra Costa County jury venires . . . is a longstanding problem, dating back at least 20 years."); *People v. Jones*, 151 Cal. App. 3d 1029, 1031 (1984)

(agreeing with the evidentiary showing that African Americans over 18 years of age constituted 8.1% of Contra Costa's population in that age group, and that only 4.2% of persons called for jury service were African American); *People v. Black*, 160 Cal. App. 3d 480, 483 (1984) (Racanelli, J., concurring) (agreeing with the evidentiary showing that African Americans comprised 8.1% of Contra Costa's voter-eligible population but only 2.86% of the "prospective jurors in the jury pool for the week involved," and that this reflected the "seemingly chronic appearance of unrepresentative criminal juries in Contra Costa County").

53 ACLU of N. Cal., Racial and Ethnic Disparities in Alameda County Jury Pools 1 (2010), https://www.aclunc.org/sites/default/files/racial_and_ethnic_disparities_in_alameda_county_jury_pools.pdf (finding that the "Alameda County Superior Court suffers from systemic underrepresentation of African-American and Latino jurors in its jury pools"). The report used the word "pool" to describe groups of jurors who were summoned to appear and "sent to a court room for trial . . . including jurors ultimately dismissed for hardships." *Id*. at 2. The researchers collected the demographic data of nearly 1,500 prospective jurors in 11 felony cases set for trial from 2009 through 2010. *Id*. They used the 2000 Census data to estimate the county's jury eligible population. *Id*.

54 *Id*. at 3.

55 *Id*. The ACLU study identified several potential causes of the disparity. Among them were that "[i]ndividuals with less money are more likely to move within a year, and African Americans and Latinos are more likely to be lower income." *Id*. at 4.

56 *Swain,* 380 U.S. at 220.

57 *Id*. at 217-18.

58 Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, 1719 n.21 (1977) [hereinafter *Limiting the Peremptory Challenge*] (citing Jon Van Dyke, Jury Selection Procedures 147-48 (1977)).

59 *Id*.

60 *Id*. (citing *Hayes v. Missouri*, 120 U.S. 68 (1887); *Swain*, 380 U.S. at 220).

61 *Rivera v. Illinois* 556 U.S. 148, 152 (2009) ("The right to exercise peremptory challenges in state court is determined by state law."); *see also Swain*, 380 U.S. at 219.

62 *Swain*, 380 U.S at 220.

63 *Id*. at 219.

64 *Id*. at 223-24.

65 *Id*. at 231 (Goldberg, J., dissenting).

66 *Id*. at 205 (majority opinion).

67 *Id*. at 222.

68 *Id*. at 224.

69 James Pearson, Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3d Art. 14 (1977).

70 *Id*.

71 *Id*.

72 *Id*. at 19 (emphasis added).

73 *People v. Wheeler*, 22 Cal. 3d 258, 265-66, 272 (1978). The court made explicit its reliance on the state Constitution's fair-cross section guarantee rather than on any provision of the United States Constitution. *Id*. at 270.

74 *Id*. at 262-65.

75 *Id*.

76 *Id*. at 287.

77 *Id*. at 276-78, 282 n.29 (declining to decide whether the decision applied to civil cases).

78 *Id*. at 287.

79 *Id*. at 286.

80 *Id*.

81 *Id*. at 285-86.

82 *Id*. at 286.

83 *Id*. at 284.

84 *Id*. at 284-85, 287.

85 *Id.* at 280.

86 *Id.* at 278-80 nn.19, 23, 25 (citing the scholarly literature the Court considered in formulating a remedy).

87 *See id.* at 274-75 & n.16 (citations omitted) (explaining that the peremptory challenge also "allows a party to remove a juror whom he has offended by a probing voir dire or by an unsuccessful challenge for cause" as well as ensure that "the defendant will not be tried by anyone whom he intuitively dislikes"); *id.* at 278 (stating "the proposition . . . that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground.").

88 *Id.* at 278 n.19 (stating that recent scholarship has offered "a variety of solutions . . . that do not seem entirely satisfactory," and listing articles, including Note, *Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss. L.J. 157, 164 (1967) (proposing approaches to address discriminatory peremptory strikes, including "the total abolition of the peremptory challenge" and "giving the defendant exclusive use of the peremptory challenge"), and Lewis H. LaRue, *A Jury of One's Peers*, 33 Wash. & Lee L. Rev. 841, 873 (1976) (proposing, among other solutions, "curtail[ing] sharply, and perhaps eliminat[ing] entirely, the currently used challenge procedures")).

89 *Id.* at 280 n.25 (explaining that the "solution" adopted "is supported, with variations, by a substantial body of scholarly opinion" and listing some of the scholarship). For example, the court cited Roger Kuhn's extensive analysis on "discrimination in the selection of juries in state courts." *Id.* (citing Roger Kuhn, *Jury Selection: The Next Phase*, 41 So. Cal. L. Rev. 235, 237 (1968)). Kuhn proposed permitting the defense to question the prosecution's strikes "only when the prosecution's use of its challenges gives rise to a reasonable inference of discrimination." Kuhn, *supra,* at 294. It should be noted that the commentators on whom the court relied anticipated that the three-step inquiry would be employed much more robustly than it has been. *See Wheeler*, 22 Cal. 3d at 280 n.25 (citing *Limiting the Peremptory Challenge, supra* note 58, at 1738-41). For example, the Yale Law Journal note proposed that a trial court automatically find a prima facie showing whenever there is a statistical disproportion between the "actual rate of exclusion" and the "expected rate of exclusion" and require that the prosecution's justifications "have been applied consistently to similarly situated jurors of other groups, and [are] reasonably relevant to the particular trial or to non-group characteristics of the parties or witnesses." *Limiting the Peremptory Challenge, supra* note 58, at 1739-40.

90 *Wheeler,* 22 Cal. 3d at 280-81. The court did not define the term "cognizable group" as there was "no doubt that the blacks in the present case constitute a cognizable group." *Id.* at 280 n.26.

91 *Id.* at 281.

92 *Id.* at 280-82.

93 *Id*. at 282. The remedy was modified so that "the trial court, acting with the [injured party]'s assent, [has] discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury." *People v. Willis*, 27 Cal. 4th 811, 815 (2002) (brackets in original). *See also People v. Mata*, 57 Cal. 4th 178, 185-86 (2013) (holding that the assent may be given by counsel rather than by the party, and that failure to object to the trial court's proposed alternative remedy "when the opportunity to do so arises" constitutes an implied waiver of "the right to the default remedy of quashing the entire venire" and an implied consent to the alternative remedy).

94 *See Batson v. Kentucky*, 476 U.S. 79, 82 n.1, 95-98 (1986).

95 Courts have held that an objection brought under *Wheeler* will also be deemed an objection under *Batson*. *See, e.g.*, *Tolbert v. Gomez,* 190 F.3d 985, 987 (9th Cir. 1999) ("In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge." (citing *People v. Jackson*, 10 Cal. App. 4th 13, 21 n.5 (1992)); *People v. Lenix*, 44 Cal. 4th 602, 610 n.5 (2008) ("An objection under *Wheeler* suffices to preserve a *Batson* claim on appeal." (citing *People v. Lancaster*, 41 Cal. 4th 50, 73 (2007); *People v. Gray*, 37 Cal. 4th 168, 184 n.2 (2005))).

96 *Batson*, 476 U.S. at 92, 96.

97 *Id*. at 87.

98 *See e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242-43 (2019); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 237-38 (2005); *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Powers v. Ohio*, 499 U.S. 400, 404, 412 (1991). For more information about the way in which jury participation increases civic engagement, see generally, John Gastil, et al., The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation (2010), and The Jury and Democracy Project, https://jurydemocracy.la.psu.edu/.

99 *Batson*, 476 U.S. at 84 (declaring that the Court has "'consistently and repeatedly'" reaffirmed the amendment's prohibition against a "State's purposeful or deliberate denial" of Blacks' participation in juries (quoting *Swain*, 380 U.S. at 203-04)); *id*. at 89 ("[T]he State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause.").

100 *Id*. at 93-98.

101 *Id*. at 93-94.

102 *Id*. at 93-94, 96. The major substantive difference between *Batson* and *Wheeler* was at step one, the prima facie showing. *Batson* made it unmistakable that this showing was satisfied when the objecting party raised an "inference" of purposeful discrimination. *Batson*, 476 U.S. at 93-94, 96. In *Wheeler*, the California Supreme Court used the terms

"strong likelihood" and "reasonable inference" to describe the standard at step one. *Wheeler*, 22 Cal. 3d at 280. For decades, the California Supreme Court insisted, in the face of repeated disagreement by the Ninth Circuit, that these two phrases described the same standard, and that the standard was consistent with *Batson*. *See People v. Johnson*, 30 Cal. 4th 1302, 1312-18 (2003) (discussing the history of the court's reasoning and its dispute with the Ninth Circuit, and explaining that the term "more likely than not" has also been used by California courts to describe the stage-one test). The issue was finally resolved by the United States Supreme Court in *Johnson v. California*, 545 U.S. 162 168 (2005), discussed in Section III.E.1, which rejected the California Supreme Court's interpretation.

103 *Batson*, 476 U.S. at 97-98. The reason offered at step two need not be "'persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam)).

104 *Batson,* 476 U.S. at 98.

105 *Id.* In later opinions, the Court affirmed the trial court's duty to decide the ultimate question based upon "'all of the circumstances that bear upon the issue of racial animosity.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)); *see also Miller-El II*, 545 U.S. at 252 (directing that the step-three ruling must be made "in light of all evidence with a bearing on it").

106 *Batson*, 476 U.S. at 98 (quoting *Washington v. Davis*, 46 U.S. 229, 240 (1976)) (citing other equal protection cases). Other sections of the report discuss the application of the three-stage framework by the United States and California Supreme Courts over the decades, including opinions that curtailed *Batson*'s promise and others that arguably sought to advance it.

107 *Id*. at 102-03 (Marshall, J., concurring).

108 *Id*. at 105.

109 *Id*. at 105-06.

110 *Id.* at 106.

111 *Id.* at 92, 96-98.

112 *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* to gender-based strikes); *McCollum*, 505 U.S. 42 (holding that *Batson* applies to peremptory challenges by defense counsel in criminal trials); *Hernandez v. New York*, 500 U.S. 352 (1991) (extending *Batson* to Latinx prospective jurors); *Edmonson v. Leesville Concrete Co.*, 500

U.S. 614 (1991) (holding that *Batson* applies to civil trials); *Powers*, 499 U.S. 400 (applying *Batson* to any litigant regardless of race).

113 *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 486 (9th Cir. 2014) (recognizing "sexual orientation" as a cognizable group for *Batson* purposes); *United States v. Brown*, 352 F.3d 654, 669-70 (2d Cir. 2003) (holding that a peremptory strike based on religious affiliation violates *Batson*); *People v. Douglas*, 22 Cal. App. 5th 1162, 1172 (2016) (holding that a peremptory challenge based on sexual orientation violates California's fair cross-section guarantee and the Fourteenth Amendment); *State v. Fuller*, 862 A.2d 1130, 1132-33 (N.J. 2004) (holding that a peremptory challenge based on religious affiliation violates *Batson*).

114 Some state constitutional guarantees encompass religious groups. *See State v. Gilmore*, 511 A.2d 1150, 1159 n.3 (N.J. 1986) (decided shortly after *Batson*, but grounded solely in the state Constitution's representative cross-section rule prohibiting discrimination based on "religious principles, race, color ancestry, national origin, and sex"); *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990) (relying on the Hawaii Constitution); *Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998) (en banc) (relying on the Mississippi Constitution); *People v. Langston*, 163 Misc. 2d 400 (N.Y. Sup. Ct. 1996) (prohibiting a strike against a Muslim juror based upon the Equal Protection Clause of the New York Constitution); *State v. Eason*, 445 S.E.2d 917, 921-23 (N.C. 1994) (holding that article I, section 26 of the North Carolina Constitution prohibits exclusion "from jury service on account of sex, race, color, religion, or national origin").

115 Cal. Civ. Proc. Code § 192. The consolidation was contained in AB 2617, which created Chapter One of the California Code of Civil Procedure.

116 Passed in 2015 and effective January 1, 2016, California Assembly Bill 87 amended Code of Civil Procedure section 231.5 to prohibit a party from using a peremptory challenge to strike a juror on the basis of any characteristic listed in section 11135 of the Government Code. Prior to its amendment, section 231.5 prohibited a party from striking a juror on the basis of "his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds." *Id.* § 231.5 (2001) (amended by Stats. 2015, c. 115 (A.B. 87), §1, eff. Jan. 1, 2016).

117 *Snyder v. Louisiana,* 552 U.S. 472 (2008); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005); and *Miller-El v. Cockrell* (*Miller-El I*), 543 U.S. 322 (2003). *See infra* note 766 for an explanation of the Supreme Court's use of comparative juror analysis in *Miller-El I*. As we discuss in Section III.E., the state supreme court was out of step with *Batson* and retrenching from its own *Wheeler* precedents long before 2003.

118 *Johnson*, 545 U.S. at 168.

119 *Id.* (quoting *Johnson*, 30 Cal. 4th at 1318).

120 *Id*. at 163 (quoting *Batson*, 476 U.S. at 94).

121 *Id*. at 172.

122 *Id*.

123 *See People v. Rhoades*, 8 Cal. 5th 393, 458 (2019) (Liu, J., dissenting).

124 *Miller-El II*, 545 U.S. at 235.

125 *Id*. at 240-41.

126 *Id* at 241.

127 Justice Thomas objected to the majority's use of comparative juror analysis in *Miller-El II* because this approach was not presented by the petitioner to the Texas courts. *Id*. at 281 (Thomas, J., dissenting). The *Miller-El II* majority disagreed, holding that this analysis is entirely proper where "the evidence on which [a defendant] bases his arguments"—such as the voir dire transcript—is before the appellate court. *Id*. at 241 n.2.

128 *Id*. at 235. This type of review, which is governed by the Antiterrorism and Effective Death Penalty Act, is explained in Section II.C.3.

129 *Id*. at 244-45, 247-51, 255-63.

130 *Id*. at 247 n.6.

131 *Id*.

132 *Id*. at 252.

133 *Id*. at 246.

134 *Snyder,* 552 U.S. at 476-78.

135 *Id*. at 478.

136 *Id*. at 479.

137 *Id*. at 482-83.

138 *Id*. at 482-83, 485-86.

139 *Id*. at 478 (internal quotation marks omitted).

140 *Id*. at 479.

141 *Id*. at 485.

142 *Id*.

143 *Id*.

144 These are, respectively, 136 S. Ct. 1737 (2016) and 139 S. Ct. 2228 (2019).

145 *Foster*, 136 S. Ct. at 1751-52, 1754.

146 *Id*.

147 *Flowers*, 139 S. Ct. at 2249.

148 *Id*.

149 *See id*. at 2247, 2249; *Foster*, 136 S. Ct. at 1751-52, 1754.

150 As of 2014, "from the sentence of death to the California Supreme Court's disposition of the automatic appeal, between 11.7 and 13.7 years will have elapsed." *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1057 (C.D. 2014), *reversed by Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). The federal district court in *Jones* further explained that "much of that time" passes while defendants wait for the court to appoint counsel and schedule oral argument. *Id*. (The Ninth Circuit opinion reversing *Jones* was based on procedural grounds, and therefore did not take issue with the district court's evidentiary findings. 806 F.3d at 543.) The authors therefore thought it important to examine appellate opinions reviewing more recent trials. Many non-capital appeals are decided within a couple of years of trial. *See, e.g.*, *People v. Davis*, No. B259412, 2016 WL 3960036 (Cal. Ct. App. July 21, 2016) (stating that the trial court judgment was on October 7, 2014). We commenced our analysis in 2019, and examined California courts of appeal opinions during the preceding 12-year period. The study includes a total of 683 courts of appeal "opinions" and 684 "cases." The discrepancy between the numbers is based on one opinion in which both the prosecution and defense counsel made *Batson* objections to the others' use of peremptory challenges. For that reason, we counted this "opinion" as two "cases." *See* Appendix A.

151 Throughout this subsection and the next, the authors use "case" when referring to an appellate court opinion.

152 In a total of 12 cases, prosecutors made *Batson* motions to defense peremptory challenges. The 14 cases include two involving sua sponte *Batson* motions by the trial court challenging defense counsel's peremptory strikes, two cases in which the prosecution objected to defense strikes based on gender (not described above), and one case in which the defense objected to some of the prosecution's strikes and vice-versa. In the

latter case, the trial court denied the defendant's *Batson* motion and granted the prosecution's. On appeal following his conviction, the defendant challenged both rulings.

153 In nearly every court of appeal opinion, a *Batson* claim involves a defense objection to the prosecution's peremptory challenge(s) at trial. This finding is consistent with previous studies. *See, e.g.*, Melilli, *supra* note 2, at 448, 457 (examining "virtually every relevant reported decision of every federal and state court applying *Batson*" between mid-1986, when *Batson* was decided, and the end of 1993, and finding that more than 95 percent of the challenges were brought by criminal defendants).

154 Wash. Ct. R. General Applicability, General R. 37(h) [hereinafter GR 37]; *see* Proposed New GR 37—Jury Selection Workgroup Final Report App. 2 (2018) [hereinafter GR 37 Workgroup Final Report] (citing Task Force on Race and Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System 7 (2011), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf) (Statement of American Civil Liberties Union of Washington, et al.).

155 GR 37(h)(i)-(v), (i).

156 *See id.* 37(i).

157 *See* Appendix A.

158 *See supra* note 2.

159 *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (describing the prosecutor's 11 reasons for striking a Black juror); *see also People v. Hardy*, 5 Cal. 5th 56, 110-11 (2018) (Liu, J., dissenting) (quoting *Foster* and criticizing the court's failure to examine the prosecutor's "'laundry list'" of six reasons for striking a Black juror); Brief for Joseph diGenova et al., as Amici Curiae in Support of Petitioner, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

160 *People v. Tabron*, No. A144079, 2018 WL 6426375, at *6 (Cal. Ct. App. Dec. 7, 2018). Not every opinion contains information about the date of the trial and/or the county in which the case was tried. To the extent that the information is not in the opinion, it can be found by searching the case docket on the website of the appellate court that issued the opinion.

161 *People v. Torrence*, No. A142592, 2018 WL 1376741, at *6 (Cal. Ct. App. Mar. 19, 2018). Unless otherwise indicated, internal quotation marks in subsections II.A and II.B refer to statements by the prosecutor or the juror.

162 *People v. Russell*, No. B258669, 2017 WL 588031, at *3 (Cal. Ct. App. Feb. 14, 2017).

163 *People v. Jones*, No. B197793, 2008 WL 4060941, at *5 (Cal. Ct. App. Sept. 3, 2008).

164 *People v. Anderson*, No. B251527, 2015 WL 4477688, at *14 (Cal. Ct. App. July 22, 2015).

165 *People v. Jamison*, No. E041904, 2008 WL 2933867, at *7 (Cal. Ct. App. July 31, 2008).

166 *People v. Christian*, No. E059966, 2015 WL 5145693, at *4 (Cal. Ct. App. Sept. 2, 2015).

167 *Jamison*, 2008 WL 2933867, at *8.

168 *People v. Harris*, No. B223174, 2011 WL 925723, at *8 (Cal. Ct. App. Mar. 18, 2011).

169 *People v. Crosby*, No. B251779, 2015 WL 340803, at *16 (Cal. Ct. App. Jan. 27, 2015).

170 *Davis*, 2016 WL 3960036, at *4.

171 *People v. Soto*, No. C079705, 2016 WL 6472879, at *2 (Cal. Ct. App. Nov. 2, 2016).

172 *People v. Duncan*, No. C049739, 2006 WL 3480375, at *2 (Cal. Ct. App. Dec. 4, 2006).

173 Because the trial judge makes a credibility determination at step three, "a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986). As Section III.E.4 explains, the California Supreme Court routinely defers to the trial court's denial of a *Batson* objection, even when the trial court makes no "explicit findings or analysis" of the prosecutor's reasons. *People v. Mai*, 57 Cal. 4th 986, 1062 (2013), *as modified on denial of reh'g* (Oct. 2, 2013) (Liu, J., concurring). The state supreme court's failure to require a trial court to give a reasoned explanation of its ruling increases the likelihood that prosecutors' demeanor-based reasons will escape judicial scrutiny. *See* Section III.E.4.

174 *People v. Edwards*, No. A139460, 2018 WL 2426168, at *6 (Cal. Ct. App. May 30, 2018).

175 *People v. Austin*, No. B266558, 2018 WL 2011470, at *9 (Cal. Ct. App. Apr. 30, 2018).

176 *People v. Miller*, No. B276572, 2018 WL 1465807, at *3 (Cal. Ct. App. Mar. 26, 2018).

177 *Id.*

178 *People v. Garcia*, No. B231949, 2012 WL 3538984, at *5 (Cal. Ct. App. Aug. 17, 2012).

179 *People v. Dungo*, No. C055923, 2013 WL 4494710, at *5 (Cal. Ct. App. Aug. 21, 2013).

180 *People v. Jordan*, 146 Cal. App. 4th 232, 239-40, 242 (2006). The Oakland Police Department had arrested the juror's brother at least five times, her sister two or three times, and her son at least once. *Id.*

181 *People v. Marquez*, No. B259210, 2017 WL 3484548, at *8 (Cal. Ct. App. Aug. 15, 2017).

182 *People v. Sullivan*, No. B216780, 2011 WL 1549702, at *3-6 (Cal. Ct. App. Apr. 26, 2011).

183 *People v. Thomas*, No. C068672, 2012 WL 6604993, at *3 (Cal. Ct. App. Dec. 19, 2012).

184 *People v. Jones*, No. C058674, 2009 WL 1177055, at *1-2 (Cal. Ct. App. May 4, 2009).

185 *People v. Winters*, No. A122443, 2010 WL 2691622, at *4-5 (Cal. Ct. App. July 8, 2010).

186 *Id*.

187 *People v. Brooks*, No. B283558, 2018 WL 3153552, at *4 (Cal. Ct. App. June 28, 2018).

188 *People v. Brown*, No. A118569, 2011 WL 1197465, at *9 (Cal. Ct. App. Mar. 30, 2011).

189 *People v. Johnson*, No. A112111, 2007 WL 594355, at *1 (Cal. Ct. App. Feb. 27, 2007).

190 *People v. Jenkins*, No. A109403, 2006 WL 3042944, at *12 (Cal. Ct. App. Oct. 27, 2006).

191 *People v. Fuller*, No. A143419, 2017 WL 1131822, at *7-8 (Cal. Ct. App. Mar. 27, 2017).

192 Some courts, including the Ninth Circuit, have held that a juror's neighborhood may be a reason that is *not* racially neutral and therefore insufficient to pass muster at step two of the *Batson* analysis. *See, e.g.*, *United States v. Bishop*, 959 F.2d 820, 822 n.2 (9th Cir. 1992), *overruled on other grounds by United States v. Nevil*s, 598 F.3d 1158 (9th Cir. 2010) (where the prosecution struck a Black woman because she lived in Compton and would likely be sympathetic to those who are not "upper middle class" and also hostile to law enforcement, finding that the challenge was a proxy for race, and noting that African Americans made up about three-fourths of Compton's population) (internal quotation marks omitted). The California Supreme Court has not adopted this view. In *People v. Gutierrez*, 2 Cal. 5th 1150, 1154 (2017), a murder case involving several Latinx defendants, the prosecutor used 10 of 16 peremptory challenges to remove Latinx prospective jurors. He struck a Latina teacher on the ground that she lived in Wasco—the home base of a gang in which one of the defendants was allegedly a member—and was unaware of gang activity in her community. *Id*. at 1160. The prosecutor used the same explanation for challenging at least one other Latinx juror. *Id*. at 1161. The trial court made a "global finding that the prosecutor's strikes were neutral and nonpretextual," including the strike of this juror. *Id*. at 1157. Although the court noted that Wasco's population is more than 75% Latinx, it found "the Wasco reason to be facially neutral." *Id*. at 1167-68. However, the California Supreme Court reversed the judgment because the prosecutor's reason was "not self-evident," and the trial judge failed to state that it had credited the reason." *Id*. at 1171.

193 *People v. Walker*, No. A121341, 2009 WL 2973551, at *4 (Cal. Ct. App. Sept. 17, 2009). The prosecutor also objected that the juror, who was a "merchant seaman," lacked hygiene and "seemed disheveled," stating that some witnesses described the defendant "that way," so that the juror "may identify with the defendant." *Id*.

194 *People v. Ivey*, No. A120368, 2009 WL 1668994, at *3 (Cal. Ct. App. June 15, 2009).

195 *People v. Cox*, 187 Cal. App. 4th 337, 347-48 (2010).

196 *People v. Nino*, No. B221514, 2011 WL 5314895, at *3 (Cal. Ct. App. Nov. 7, 2011).

197 *People v. Barajas*, No. F066418, 2015 WL 3566803, at *6 (Cal. Ct. App. June 9, 2015).

198 *People v. Deanda*, No. F072163, 2018 WL 2148288, at *6 (Cal. Ct. App. May 10, 2018).

199 *People v. Medina*, No. G043130, 2011 WL 4091493, at *6 (Cal. Ct. App. Sept. 15, 2011). When the judge pointed out that the prosecutor had confused this juror with another Latina juror, the prosecutor added yet another reason: the prospective juror was "a self-professed cat lady." *Id.* The court again corrected the prosecutor's error—the juror "stated simply she is 'single, no children, single with a cat'"—and questioned the reliability of the prosecutor's note-taking. *Id.* The prosecutor then offered two additional explanations, the second based on demeanor: (1) the juror's friends dated police officers and (2) the juror did not give the prosecutor "a good vibe." *Id.* at *7.

200 *People v. Jiminez*, No. B279690, 2018 WL 1616735, at *1 (Cal. Ct. App. Apr. 4, 2018).

201 *People v. Torres*, No. B266700, 2016 WL 4150707, at *4 (Cal. Ct. App. Aug. 4, 2016).

202 *People v. Tonga*, No. E054683, 2013 WL 32143, at *5-7 (Cal. Ct. App. Jan. 3, 2013).

203 *People v. Moya*, No. B264683, 2018 WL 1081909, at *10 (Cal. Ct. App. Feb. 28, 2018).

204 *Id.*

205 *People v. Barajas*, No. A137263, 2014 WL 49856, at *1-2 (Cal. Ct. App. Jan. 7, 2014).

206 *People v. Vale*, No. H037358, 2013 WL 5278501, at *3 (Cal. Ct. App. Sept. 19, 2013).

207 *People v. Martinez,* No. A134714, 2013 WL 3777125, at *3 (Cal. Ct. App. July 18, 2013).

208 *People v. Martinez*, No. E056034, 2014 WL 970214, at *2 (Cal. Ct. App. Mar. 13, 2014).

209 *People v. Ruiz*, No. A139127, 2016 WL 1120858, at *11 (Cal. Ct. App. Mar. 22, 2016).

210 *People v. Kim*, No. B267523, 2017 WL 372008, at *5 (Cal. Ct. App. Jan. 26, 2017).

211 *People v. Celaya*, No. B270857, 2017 WL 4004371, at *3 (Cal. Ct. App. Sept. 12, 2017).

212 *People v. Fernandez*, No. F058462, 2011 WL 199510, at *1-2 (Cal. Ct. App. Jan. 24, 2011).

213 *People v. Sanchez*, No. C059763, 2011 WL 3806264, at *8 (Cal. App. Dist. Aug. 30, 2011).

214 *People v. Valdivia*, No. H038360, 2015 WL 4385858, at *8-9 (Cal. Ct. App. July 17, 2015).

215 *People v. Bee Vue*, No. C055534, 2008 WL 4412089, at *13 (Cal. Ct. App. Sept. 30, 2008).

216 *People v. Mojarro*, No. B223035, 2011 WL 3055345, at *4 (Cal. Ct. App. July 22, 2011).

217 *Id.*

218 *People v. Solis*, No. B196976, 2008 WL 3508160, at *4-5 (Cal. Ct. App. Aug. 14, 2008).

219 *Sanchez*, 2011 WL 3806264, at *7-8.

220 *People v. Salinas*, No. F058255, 2010 WL 5073340, at *3 (Cal. App. Dist. Dec. 14, 2010).

221 *People v. Parker*, No. F060839, 2012 WL 1239249, at *4 (Cal. Ct. App. Apr. 13, 2012).

222 *People v. Rodriguez*, No. G041444, 2011 WL 1885327, at *4 (Cal. Ct. App. May 18, 2011).

223 *People v. Stevenson*, No. A121825, 2010 WL 709183, at *1 (Cal. Ct. App. Mar. 2, 2010). The full text of the prosecutor's reasons amply demonstrate that the juror's neighborhood was a proxy for race: "He also was unemployed which is a reason that is common for us to kick individuals. It tends to be an indication that they do not work with the other twelve people in the panel. They're not productive members of society. He also does not have children, indicating that he is not a contributing member of society. He's from the San Pablo area which is a lower class area within our county."

224 Across the 670 cases in which their strikes were at issue, prosecutors struck 940 Black jurors.

225 Across the 670 cases in which their strikes were at issue, prosecutors struck 563 Latinx jurors.

226 *See* Appendix A.

227 The United States Supreme Court has not addressed the issue, and federal courts of appeal have yet to recognize subgroups. *See* Elisabeth Semel, Batson *and the Discriminatory Use of Peremptory Challenges in the 21st Century, in* Jurywork: Systematic Techniques 278 (2019-20 ed.).

228 *See, e.g.*, *People v. Garceau*, 6 Cal. 4th 140, 171 (1993), *abrogated on other grounds by People v. Yeoman*, 31 Cal. 4th 93, 117 (2003) (upholding the defendant's contention that Spanish-surnamed women are a distinct group); *People v. Clair*, 2 Cal. 4th 629, 652 (1992) (holding that "Black women are a cognizable subgroup for *Wheeler*"); *People v. Gray*, 87 Cal. App. 4th 781, 788-89 (2001), *as modified on denial of reh'g* (Apr. 3, 2001) (holding that African-American men are a distinct group).

229 *See* Brief for the Nat'l Cong. of Black Women & the Black Women Lawyers Ass'n of L.A., Inc., as Amici Curiae Supporting Petitioner, *Williams v. California*, 571 U.S. 1197 (2014) (No. 13-494), 2013 WL 6091783, at *11 (observing that "African-American

women are often subjected to a double dose of discrimination in jury selection") (citing *People v. Motton*, 704 P.2d 176, 181 (Cal. 1985) (in bank))); Jean Montoya, *"What's So Magic[al] About Black Women?" Peremptory Challenges at the Intersection of Race and Gender*, 3 Mich. J. Gender & L. 369, 400 (1996)).

230 *People v. Dean*, No. B258927, 2017 WL 5898578, at *7 (Cal. Ct. App. Nov. 30, 2017).

231 *People v. Ware*, No. B200018, 2008 WL 5147841, at *2 (Cal. Ct. App. Dec. 4, 2008).

232 *People v. Brooks*, No. A110696, 2007 WL 1785473, at *7 (Cal. Ct. App. June 21, 2007).

233 *People v. Bordeaux*, No. B200449, 2009 WL 323859, at *4 (Cal. Ct. App. Feb. 11, 2009).

234 The three reversals in chronological order are *People v. Fuentes*, 54 Cal. 3d 707 (1991); *People v. Silva*, 25 Cal. 4th 345 (2001); and *People v. Gutierrez*, 2 Cal. 5th 1150 (2017). To calculate the total number of decisions, we started with Justice Liu's finding that, between 1993 and 2013, the California Supreme Court reviewed 102 cases with claims of racial discrimination in jury selection, and reversed only one. *See People v. Harris*, 57 Cal. 4th 804, 892-98 (2013) (Liu, J., concurring). We determined that between 1989 and the start of Justice Liu's calculation in 1993, the court decided 12 *Batson* cases, and reversed one. We determined that between 2013 and 2019, the court decided another 28 *Batson* cases, and reversed one. Consistent with Justice Liu's method, our search parameters included all cases in which a *Batson* issue was raised in the appeal whether or not the court decided the claim on the merits. Information on file with the Berkeley Law Death Penalty Clinic.

235 *People v. Rhoades*, 8 Cal. 5th 393, 457-58 (2019) (Liu, J., dissenting) (citing *People v. Snow*, 44 Cal. 3d 216, 242 (1987)).

236 *People v. (Joe Edward) Johnson*, 8 Cal. 5th 475, 528 (2019) (Liu, J., dissenting) (quoting *People v. Hardy*, 5 Cal. 5th 56, 124 (2018) (Liu, J., dissenting)); *see supra* note 2.

237 The authors used the same data for this analysis as they used for their analysis of California prosecutors' peremptory challenges against Black and Latinx prospective jurors. *See* Section II.A & B.

238 The authors used Thomson Reuters Westlaw to conduct the search of federal habeas petitions originating in California courts involving *Batson* claims. We conducted two methods of research to produce the most exhaustive list. First, we searched the Ninth Circuit Court of Appeals cases and used the search terms "*Batson*" and "2254" and "California." We included both published and unpublished opinions, and set the date

range from January 1, 1993 until December 31, 2019. This search returned 174 opinions. Second, we ran a search based on the *Batson* citing references. We narrowed the citing references by using the search terms "2254" and "California" and limited the results to the Ninth Circuit between January 1, 1993 and December 31, 2019. After cross-listing all the cases, there were an additional 11 cases that were not included in the first search. We recorded but did not count duplicates and opinions that mentioned but did not address *Batson* claims. Duplicates include opinions in which the case and the *Batson* claim were before the circuit more than once. Opinions that mentioned but did not address *Batson* claims include opinions that mentioned *Batson* in passing and those in which the claim was not preserved during trial or raised properly on appeal. Thus, we concluded that the Ninth Circuit decided 140 unique federal habeas petitions involving *Batson* claims originating in California state court during the relevant period.

239 Antiterrorism and Effective Death Penalty Act § 107, Pub. L. 104-132, 110 Stat. 1214, 1221 (1996).

240 *Currie v. McDowell*, 825 F.3d 603 (9th Cir. 2016); *Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015); *Crittenden v. Chappell*, 804 F.3d 998 (9th Cir. 2015); *Williams v. Pliler,* 616 Fed. App'x 864 (9th Cir. 2015); *Pao Lo v. Kane*, 584 Fed. App'x 885 (9th Cir. 2014); *Castellanos v. Small*, 766 F.3d 1137 (9th Cir. 2014); *Love v. Cate*, 449 Fed. App'x 570 (9th Cir. 2011); *Reynoso v. Hall*, 395 Fed. App'x 344 (9th Cir. 2010); *Ali v. Hickman*, 584 F.3d 1174 (9th Cir. 2009); *Paulino v. Harrison*, 542 F.3d 692 (9th Cir. 2008); *Green v. LaMarque*, 532 F.3d 1028 (9th Cir. 2008); *Calhoun v. Harrison*, 225 Fed. App'x 724 (9th Cir. 2007); *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006); *Currie v. Adams*, 149 Fed. App'x 615 (9th Cir. 2005); *Thomas v. Roe*, 138 Fed. App'x 936 (9th Cir. 2005); *Lewis v. Lewis*, 321 F.3d 824 (9th Cir. 2003); *Daniels v. Roe*, 53 Fed. App'x 476 (9th Cir. 2002); *McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000); *Ricardo v. Rardin*, 189 F.3d 474 (9th Cir. 1999); *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997); *Johnson v. Vasquez*, 3 F.3d 1327 (9th Cir. 1993). Additionally, the Ninth Circuit found that California courts had committed error in other cases, but could not grant relief due to the AEDPA's highly deferential standard of review. *See, e.g.*, *Lewis v. Calderon*, 189 F. App'x 658, 659 (9th Cir. 2006) ("The issue in the context of this case is close and we may not have reached the same conclusion as the state court had we reviewed the record on direct appeal. The statutory limitations on the scope of federal court review compel affirmance of the district court's denial of relief."); *Nieblas v. Rimmer*, 203 F. App'x 56, 57 (9th Cir. 2006) ("Though petitioner makes some colorable arguments against it, under the deferential standard we are required by AEDPA to apply, we cannot conclude that the state court made 'an unreasonable determination of the facts in light of the evidence presented' or otherwise acted 'contrary to, or involved an unreasonable application of,' *Batson.*").

241 *Johnson v. Finn*, Nos. Civ. S 03-2063 JAM JFM P, Civ. S 04-2208 JM JFM P, 2012 WL 4050068, at *1 (E.D. Cal. Sept. 13, 2012); *Williams v. Runnels*, 640 F. Supp. 2d 1203 (C.D. Cal. 2009).

242 Compare the 2.1% *Batson* reversal rate in the California Supreme Court to the 15% reversal rate in the Ninth Circuit.

243 *See* 28 U.S.C. § 2254(b).

244 *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

245 *Id.* at 102–03 (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)).

246 *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (internal citation omitted).

247 *Richter*, 562 U.S. at 97-98 (quoting 28 U.S.C. § 2254(d)). A state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or arrives at a result "opposite to that reached by [the Supreme] Court" when confronted with facts "that are materially indistinguishable from a relevant Supreme Court precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court engages in an "unreasonable application" of federal law if it "identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the prisoner's case." *Id.* at 413.

248 *Richter,* 562 U.S. at 101.

249 *Fernandez v. Roe,* 286 F.3d 1073, 1075-76 (9th Cir. 2002).

250 *Id.* at 1076.

251 *Id.* at 1077.

252 *Id.* (quoting *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000)).

253 *Id.* at 1080.

254 *Johnson v. California*, 545 U.S. 162, 168 (2005); *see supra* note 102 (explaining the genesis of California's step-one standard in *Wheeler*, 22 Cal. 3d at 280, and its demise in the United States Supreme Court's *Johnson* decision).

255 *Paulino v. Castro*, 371 F.3d 1083, 1090 (2004) (internal quotations and citations omitted) (reiterating its holding that California's test "'is impermissibly stringent'" (quoting *Wade*, 202 F.3d at 1997)).

256 *Johnson*, 545 U.S. at 168.

257 *Id.*

258 *See Shirley*, 807 F.3d at 1101, *as amended* (Mar. 21, 2016) ("The California Court of Appeal acted contrary to clearly established law when it based its prima facie analysis on the discredited, pre-*Johnson,* standard articulated by the California Supreme Court. . . .") (internal citation and quotation marks omitted). The authors did not identify any published court of appeal opinions post-*Johnson* finding error at step one. After an extensive search, we found two unpublished step-one reversals involving prosecutors' objections to defense strikes. *See People v. Gonzales*, 2012 WL 413868, at *10-13 (Cal. Ct. App. Feb. 8, 2012) (finding error at both steps one and three in a case involving a prosecutor's *Batson* objection to the defendant's strike of an Asian-American juror); *People v. Nino*, 2007 WL 211011, at *8, *10 (Cal. Ct. App. July 24, 2007) (holding that the trial court erred "by incorrectly determining that no prima facie case of jury discrimination existed," and reversing without a remand because, based on the record, it was unreasonable to conclude that the prosecutor could provide reasons additional to those given at the first trial, which were "inadequate as a matter of law"). *See also Rhoades*, 8 Cal. 5th at 458 (Liu, J., dissenting) (observing that in the 14 years since *Johnson* was decided, the California Supreme Court has never found step-one error).

259 *Kesser*, 465 F.3d at 353.

260 *Id*. at 353.

261 *Id*. at 354.

262 *Id*. at 354, 356.

263 *Id.* at 357.

264 *Id*.

265 *Id*. at 358.

266 *Id*. at 360.

267 *Id*. at 362.

268 *Id*. at 357.

269 *Id*. at 371.

270 *Castellanos*, 766 F.3d at 1140.

271 *Id*. at 1143.

272 *See People v. Castellanos*, No. B190581, 2007 WL 2660214, at *5 (Cal. Ct. App. Sept. 12, 2007).

273 *Castellanos*, 766 F.3d at 1148-49.

274 *Id*.

275 *Id*. at 1141 (internal quotation marks omitted).

276 *Id*. at 1148.

277 *Id*. at 1149.

278 *Id*.

279 *Id*. at 1150.

280 *Batson v. Kentucky*, 476 U.S. 79, 102-103 (1986) (Marshall, J., concurring).

281 *Id*. at 105.

282 *Id*. at 106.

283 *Id*.

284 *Id*.

285 *Id*.

286 *Id*.

287 Cheryl Staats et al., Kirwan Inst. for the Study of Race & Ethnicity, State of the Science: Implicit Bias Review 14 (2016), http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf.

288 *See* Project Implicit, http://projectimplicit.net/ (last visited May 14, 2020). Project Implicit was founded in 1998, and is an "international collaboration between researchers who are interested in implicit social cognition." *See About Us*, Project Implicit, http://projectimplicit.net/about.html (last visited May 14, 2020). Project Implicit has been collecting the results from Implicit Association Tests (IAT). *See Education: About the IAT*, Project Implicit, https://implicit.harvard.edu/implicit/iat-details.html (last visited May 14, 2020). The project measures implicit attitudes and stereotypes on topics including race, gender, age, politics, and disability. *See* Project Implicit, https://implicit.harvard.edu/implicit/ (last visited May 14, 2020) (tests). Between 1998 and 2018, there were over 20 million visitors to the site. *See Tracking the Use of Project Implicit Data*, Project Implicit: Blog (May 30, 2018), https://implicit.harvard.edu/implicit/blog.html.

289 Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. Crim. L. & Criminology 1, 30 (2014). Morrison also explained that if lawyers are exercising strikes based on implicit bias, they "will have the double incentive of not losing the strike by admitting that race was a factor and the generally shared desire not to appear racially biased." *Id.* at 32.

290 *Id.* at 32.

291 *Id.*

292 *Id.* at 31.

293 *Id.* (citing *Batson*, 476 U.S. at 106 (Marshall, J., concurring)).

294 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, 150 (2010).

295 *Id.*

296 *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

297 *Id.* at 98-99.

298 *Id.* at 102-03 (Marshall, J., concurring).

299 *Id.* at 106. At least a decade before *Batson*, legal scholarship began to focus on the role unconscious bias plays in juror attitudes and, in turn, the relationship between unconscious bias and peremptory challenges. *See Limiting the Peremptory Challenge, supra* note 58, at 1720 & n.25 (1977); *id.* at n.28 (discussing the role of social scientists in "identifying unconscious bias in jurors in important trials during the last decade").

300 *See* Gordon W. Allport, The Nature of Prejudice (1954) (studying the nature and roots of prejudice, and theorizing that prejudice causes discrimination); Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping Blacks*, 34 J. Personality & Soc. Psychol. 590 (1976) (finding that subjects reported observed behaviors as more violent when the individual performing the behavior was Black than when he was White); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. Personality & Soc. Psychol. 590 (1980) (finding that both Black and White sixth-graders rated aggressive behavior as meaner and more threatening when the individual performing the behavior was Black than when he was White).

301 Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 323 (1987).

302 *See* Brand, *supra* note 2, at 599.

303 *See generally* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. Personality &. Soc. Psychol. 1314 (2002); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (1989); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. Experimental Soc. Psychol. 399 (2003); Anthony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155 (2005); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181 (2001).

304 Page, *supra* note 303, at 184.

305 Samuel R. Sommers & Michael J. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 Am. Psychologist 527, 533 (2008).

306 Page, *supra* note 303; Nilanjana Dashupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. Experimental Soc. Psychol. 316, 316-17 (2000) (finding that despite a decline in overt racism, "subtle and implicit forms of prejudice and discrimination remain pervasive").

307 Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 795 (2012).

308 Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1577 (2013).

309 Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 946 (2006).

310 *Id.* at 951.

311 Page, *supra* note 303, at 235; Sommers & Norton, *supra* note 305, at 533 (explaining that, in their study, "self-report measures did not reflect the significant influence of race on peremptory challenge use").

312 Page, *supra* note 303, at 189. The term "schema" has been defined by social scientists to mean an "active organization of past reactions, or past experiences, which must always be supposed to be operating in any well-adapted organic response." *Id.* at 189

n.158 (citing F.C. Bartlett, Remembering: A Study in Experimental and Social Psychology 201 (1932) (finding that memory is a process of reconstruction based on the socialization of the actor)). Schemas "serve as the basis for all human information processing, e.g. perception and comprehension, categorization and planning, recognition and recall, and problem-solving and decision-making." Ronald W. Casson, *Schemata in Cognitive Anthropology*, 12 Ann. Rev. Anthropology 429, 430 (1983).

313 Allport, *supra* note 300, at 17-27.

314 Richard M. Shiffrin & Walter Schneider, *Controlled and Automatic Human Information Processing: Perceptual Learning, Automatic Attending, and a General Theory*, 84 Psychol. Rev. 127, 127 (1977).

315 *See, e.g.*, Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. Personality & Soc. Psychol. 272, 278 (1993); Devine, *supra* note 303, at 6, 15; Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, *in* Dual-Process Theories in Social Psychology 339-60 (Chaiken & Trope eds., 1999); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psychol. Rev. 4, 15 (1995).

316 Greenwald & Krieger, *supra* note 309, at 948.

317 *Id.*

318 *Id.*

319 *Id.* at 951.

320 Devine, *supra* note 303, at 8-12 (using three studies to test automatic processes in subjects' perceptions of the personality traits of African Americans).

321 *See About Us*, *supra* note 288.

322 Greenwald & Krieger, *supra* note 309, at 955.

323 *Id.*

324 *Id.* at 959-60; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 471 (2010).

325 Greenwald & Krieger, *supra* note 309, at 951. Research has found that "those who belong to social groups deemed to be 'good' (e.g., . . . European Americans . . .) show strong preference for their own group." Kang & Lane, *supra* note 324, at 476.

326 Greenwald & Krieger, *supra* note 309, at 953.

327 *Id.*

328 *Id.* at 956, 957 tbl.1.

329 Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. Cognitive Neuroscience 729, 730 (2000).

330 *Id.* at 732.

331 *Id.* at 733.

332 Lincoln Quillian & Devah Pager, *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization*, 73 Soc. Psychol. Q. 79, 82 (2010).

333 *Id.* at 95.

334 *See* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. Davis L. Rev. 745, 784 (2018) (finding that Afrocentric features affect the length of sentences); Jennifer L. Eberhardt et al., *Looking Deathworthy, Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383, 384 (2006) (finding that, in cases involving a White victim, the more stereotypically Black defendants are perceived to be, the more likely defendants will receive a death sentence); Eberhardt et al., *supra* note 303, at 889 (finding that police officers exhibit a pattern of attitudinal bias that "associate[s] Blacks with the specific concept of crime"); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & Econ. 285, 285, 300-12 (2001) (finding that federal judges imposed sentences on Black defendants that were 12% longer than those imposed on comparable White defendants, and that Black defendants were "less likely to get no prison term when that option [was] available; less likely to receive downward departures; and more likely to receive upward adjustments"); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1196, 1221 (2009) (finding that judges harbor the same kinds of implicit biases as the general American population); Sommers & Norton, *supra* note 305, at 533 (finding that implicit biases result in the underrepresentation of Blacks on juries, in part because "prospective jurors were significantly more likely to be challenged when Black than when White").

335 Kang & Lane, *supra* note 324, at 473.

336 *See supra* note 334.

337 Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. Contemp. Crim. Just. 276, 286 (2007).

338 Christopher S. Jones & Martin F. Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision-Making and Information-Processing Strategies*, 25 Basic & Applied Soc. Psychol. 1, 9 (2003).

339 Mustard, *supra* note 334 at 306, 307 tbl.9 (finding also that "blacks and Hispanics are much less likely than whites to be assigned no prison term when that is an option").

340 *See* Jaihyun Park et al., *Implicit Attitudes Toward Arab-Muslims and the Moderating Effects of Social Information*, 29 Basic & Applied Soc. Psychol. 35, 38 (2007) (comparing reactions to Arab and Muslim names and Eurocentric White names and finding implicit bias in favor of White names); Wade C. Rowatt et al., *Patterns and Personality Correlates of Implicit and Explicit Attitudes Toward Christians and Muslims*, 44 J. for Sci. Study Religion 29, 35-36 (2005) (finding implicit prejudice towards Muslims based on comparing Muslim and Judeo-Christian names with pleasant and unpleasant words as stimuli for the IAT).

341 Eberhardt et al., *supra* note 303, at 878.

342 *Id.* at 877.

343 Correll et al., *supra* note 303, at 1315-17 (describing the test procedure); *see also* Greenwald et al., *supra* note 303, at 401-03 (finding similar results).

344 Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & Hum. Behav. 232, 232 (2019).

345 Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 606 (2006).

346 *Id.*

347 *See* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 L. & Hum. Behav. 261 (2007).

348 *Id.* at 265-66.

349 *Id.*

350 *Id.* at 265.

351 *Id.* at 266.

352 *Id.*

353 *Id.* at 267.

354 *Id.*

355 *Id.* at 269.

356 *Id.*

357 Michael J. Norton et al., *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. Behav. Decision Making 467, 475 (2007).

358 *Id.* at 473-74.

359 *Id.* at 470, 473. In the first study, participants were asked to make their strikes in two scenarios. *Id.* at 471. The researchers used the same juror profiles in each scenario, except that they switched the jurors' gender in the second scenario. *Id.*

360 *Id.* at 471.

361 *Id.*

362 *Id.* at 474. The researchers did not alter the gender of the jurors in the second study because their "interest was in exploring the impact of an explicit warning." *Id.* at 473.

363 *Id.* at 474.

364 *Id.*

365 *Id.* at 474.

366 *People v. Bryant*, 40 Cal. App. 5th 525, 544 (2019) (Humes, J., with Banke, J., concurring).

367 *Id.* at 545. In Section IV.A, we discuss the various deficiencies in the *Batson* procedure that the author, Justice Jim Humes, enumerated.

368 *Id.* (quoting *Rice v. Collins*, 545 U.S. 333, 343 (2006) (Breyer, J., concurring)).

369 *People v. Smith*, 32 Cal. App. 5th 860, 883 (2019), *as modified on denial of reh'g* (Mar. 1, 2019), *review denied* (May 15, 2019) (Streeter, J., concurring).

370 *Id.* at 871.

371 *Id.*

372 *Id.* at 881 (quoting *People v. Snow*, 44 Cal. 3d 216, 225 (1987)).

373 *Id.* at 883 (citing *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)) (describing the "net result" of the opinion as a "'zero tolerance' policy'" for discriminatory strikes).

374 *Id*. at 883.

375 *Id*. at 884.

376 *Id*. at 883.

377 Brief for the Nat'l Dist. Attorneys Ass'n as Amicus Curiae Supporting Respondent, *Batson v. Kentucky*, 476 U.S. 79 (1976) (No. 84-6263), 1985 WL 669927, at *4.

378 *Id.*

379 *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

380 *Id.* The defendant in *Miller-El v. Dretke* was tried in Dallas before *Batson*. *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 236 (2005). He presented evidence that the district attorney's office "'had adopted a formal policy to exclude minorities from jury service,'" including a training manual containing an article "'outlining the reasoning'" for the policy. *Id*. at 264 (quoting *Miller El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 334 (2003)). The manual "instructed its prosecutors to exercise peremptory strikes against minorities: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Miller-El I*, 537 U.S. at 334-35. The Court noted that the manual "remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial." *Id.* at 335.

381 NDAA, *Jury Selection Standards*, cmt., *in* National Prosecution Standards 206 (2d ed. 1991). The NDAA's current policy is found in NDAA, Nat'l National Prosecution Standards 74 (3d ed. 2010), https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf. Standard 6-2.3 provides: "A prosecutor should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law." The commentary to this standard reminds prosecutors that they represent "all of the people in [their] jurisdiction[s]" and states that "it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group." *Id.*

382 Nancy S. Marder, *The Jurisprudence of Justice Stevens: Justice Stevens, the Peremptory Challenge, and the Jury*, 74 Fordham L. Rev. 1683, 1726 (2006). McMahon offered other advice such as the following: "'My experience, young black women are very bad. There's an antagonism. I guess maybe they're downtrodden in two respects. They are women and they're black . . . so they somehow want to take it out on somebody, and you don't want it to be you.'" Barry Siegel, *Storm Still Lingers over Defense Attorney's Training Video*, L.A. Times (Apr. 29, 1997), https://www.latimes.com/archives/la-xpm-1997-04-29-mn-53632-story.html. The title refers to the fact that, after he left the District Attorney's Office, McMahon became a defense lawyer. *Id.*

383 The handout is available online through the American Civil Liberties Union. Batson *Justifications: Articulating Juror Negatives* [hereinafter Batson *Justifications*], https://www.aclu.org/legal-document/north-carolina-v-tilmon-golphin-christina-walters-and-quintel-augustine-batson (last visited May 13, 2020); *see also* Jacob Biba, *Did Prosecutors Use a "Cheat Sheet" to Strike Black Jurors in North Carolina Death Penalty Case?*, The Appeal (Sept. 4, 2018), https://theappeal.org/did-prosecutors-use-a-cheat-sheet-to-strike-black-jurors-in-north-carolina-death-penalty-case/.

384 Batson *Justifications*, *supra* note 383.

385 Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, New Yorker (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors.

386 *See generally* Prosecutors Research Inst., Basic Trial Techniques for Prosecutors (2005), https://ndaa.org/wp-content/uploads/basic_trial_techniques_05.pdf. The manual's discussion of peremptory challenges informs prosecutors that they may strike whomever they wish provided the strikes are not made "in a discriminatory manner," and that when challenging "a member of a suspect or protected class, they should be prepared to provide the court with a logical reason." *Id.* at 9.

387 *See generally supra* note 2.

388 *See, e.g.*, *People v. Winbush*, 2 Cal. 5th 402, 436-37 (2017) (affirming that "a negative attitude toward law enforcement" or "a juror's negative experience with law enforcement" is "a valid reason for exclusion" and citing earlier opinions holding the same); *id.* at 439 (stating that "[a] prospective juror's distrust of the criminal justice system is a race-neutral basis for excusal" and citing earlier opinions holding the same); *id.* (observing that "[s]kepticism about the fairness of the criminal justice system to indigents and racial minorities has also been recognized as a valid race-neutral ground for excusing a juror" and citing earlier opinions holding the same).

389 *See, e.g.*, Nazgol Ghandnoosh, Sentencing Project, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies 3 (2014), https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf; John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, Pew Res. Ctr. (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/.

390 *See, e.g.*, Gramlich, *supra* note 389.

391 *See generally* Equal Justice Initiative, *supra* note 1, at 3; Ghandnoosh, *supra* note 389, at 4.

392 *See Bryant*, 40 Cal. App. 5th at 546 (Humes, J., with Banke, J., concurring) (explaining that because of the "undeniable evidence" of racial bias in law enforcement and the criminal legal system, "[r]eflexively allowing these strikes compounds institutional discrimination").

393 Henry Louis Gates, Jr., The Stony Road: Reconstruction, White Supremacy, and the Rise of Jim Crow xi (2019).

394 *Id.* at 2, 7-8; *see also* Michelle Alexander, The New Jim Crow 36-37 (anniversary ed. 2020); Equal Justice Initiative, *supra* note 1, at 9.

395 Equal Justice Initiative, *supra* note 1, at 9 ("By 1880, a backlash against black enfranchisement and political participation was already underway in the South, and the Jim Crow era of white supremacism, state terrorism, and apartheid had begun.").

396 Gates, *supra* note 393, at 14.

397 Bryan Stevenson, *A Presumption of Guilt*, N.Y. Rev. Books, July 13, 2017, at 8.

398 U.S. Const. amend. XIII.

399 Alexander, *supra* note 394, at 35.

400 *Id.* at 38. Both states and private businesses used convict labor. Michelle Alexander describes how, in Mississippi, convict labor became the foundation of the state's prison system. *Id.* at 39. "The state of Mississippi eventually moved from hiring convict labor to organizing its own convict labor camp, known as Parchman Farm." *Id.* Parchman Prison is still operating as a maximum security facility today. *See* W. Ralph Eubanks, *Mississippi's Notorious Parchman Prison Doesn't Have to Be a Death Machine*, CNN (Feb. 8, 2020), https://www.cnn.com/2020/02/08/opinions/parchman-prison-mississippi-deaths-eubanks/index.html.

401 James D. Unnever & Francis Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 J. Res. Crime & Delinq. 124, 128 (2007).

402 Equal Justice Initiative, Lynching in America: Confronting the Legacy of Racial Terror at 3 (3d ed. 2017), https://lynchinginamerica.eji.org/drupal/sites/default/files/2019-08/lynching-in-america-3d-ed-080219.pdf.

403 Isabel Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 39 (2010).

404 *Id.*

405 *Id.* at 9.

406 Ken Gonzales-Day, Lynching in the West, 1850-1935, at 46 (2006).

407 Unnever & Cullen, *supra* note 401, at 128.

408 Equal Justice Initiative, *supra* note 402, at 3.

409 Unnever & Cullen, *supra* note 401, at 128 (citing James Clarke, *Without Fear or Shame, Lynching, Capital Punishment, and the Subculture of Violence in the American South*, 28 British J. Pol. Sci. 269 (1998)).

410 Equal Justice Initiative, *supra* note 402, at 5.

411 Unnever & Cullen, *supra* note 401, at 128.

412 *Id*.

413 *Id*. at 148 ("This firmness of the racial divide in death penalty attitudes again leads us to suggest that it may be rooted in African Americans' shared history of racial oppression—epitomized by the use of lynchings as a mechanism of racial control in the South—that causes Blacks generally to be wary of the use of lethal action by the state.").

414 Elizabeth Hinton et al., Vera Inst., An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System 2 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

415 *Id*. at 3 (quoting Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2011)).

416 Alexander, *supra* note 394, at 49-50.

417 *Id*. at 50.

418 *Id*. at 59-60.

419 *Id*. at 71.

420 *Id*.

421 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

422 Hinton et al., *supra* note 414, at 1.

423 *Id*.

424 *Id.*

425 Sentencing Project, Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance 9 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities.

426 Alexei Jones, *Police Stops Are Still Marred by Racial Discrimination, Data Shows*, Prison Pol'y initiative (Oct. 12, 2018), https://www.prisonpolicy.org/blog/2018/10/12/policing/.

427 Sentencing Project, *supra* note 425, at 5.

428 *Id.*

429 *Id.* at 2.

430 *Id.*

431 *Id.* at 3.

432 Jones, *supra* note 426.

433 Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. Times (Aug. 6, 2019), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men.

434 *Id.*

435 Sentencing Project, *supra* note 425, at 7-8.

436 *Id.*

437 Ghandnoosh, *supra* note 389, at 26.

438 Gramlich, *supra* note 389.

439 Unnever & Cullen, *supra* note 401, at 147-48.

440 *See, e.g.*, *id.* at 149 ("[W]ithin the African American community, executions are more likely to raise questions about whether justice has been served—whether the accused is truly guilty or, if guilty, whether a White offender would have received the same penalty.").

441 Gramlich, *supra* note 389.

442 Field Research Corp., Tabulations from a Survey of California Registered Voters About the Death Penalty and Life in Prison Without the Possibility of Parole 317 (2011), https://media.sacbee.com/smedia/2011/09/28/19/33/HSgPj.So.4.pdf.

443 Mark DiCamillo & Mervin Field, Support for Death Penalty Still Very Strong. But Increasing Preference for Life in Prison Without Parole for those Convicted of Serious Crimes 4 (2011), https://web.archive.org/web/20120529145007/http://www.field.com/fieldpollonline/subscribers/Rls2393.pdf.

444 Mona Lynch & Craig Haney, *Death Qualification in Black and White, Racialized Decision Making and Death-Qualified Juries*, 40 L. & Pol'y 148, 157 (2018). The Berkeley Law Death Penalty Clinic has litigated challenges to death qualification on behalf of defendants in four California counties based upon the disproportionate exclusion of African-American prospective jurors. Information on file with the Berkeley Law Death Penalty Clinic.

445 *Id.*

446 *See, e.g*, *id.* (using data from surveys of Solano County, California, jury-eligible respondents to show that death qualification disproportionately excludes African Americans based on their opposition to the death penalty); Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases*, *1997-2012*, 9 Ne. U. L.J. 299, 333-34 (2017) (finding that a majority of those Blacks removed for cause from South Carolina capital juries were excused because of their death-penalty opposition, in comparison to Whites); Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 Ind. L.J. 113, 137 (2016) (finding, in a study of Louisiana capital juries, that Blacks were 1.8 times more likely to be removed based upon their opposition to the death penalty than Whites).

447 Both the United States and California Supreme Courts have held that, while not required, "death qualification" is constitutional. *See, e.g*, *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Lockhart v. McCree*, 476 U.S. 162, 167 (1986); *Hovey v. Superior Court*, 28 Cal. 3d 1, 63 (1980). Although *Morgan*, 504 U.S. at 729, provides that death qualification is supposed to apply equally to "automatic" death penalty opponents and supporters, empirical evidence is to the contrary. Cause challenges are primarily used to remove jurors who voice opposition to, rather than support for, the death penalty. *See, e.g.*, Cover, *supra* note 446, at 133-34 (finding that "an average of 22%" of the jury was removed based upon death-penalty opposition in contrast to "an average of 12.4%" of venire members who were excluded based upon their death penalty support).

448 *See* Lynch & Haney, *supra* note 444, at 157.

449 Gramlich, *supra* note 389. While there is significantly less empirical research comparing multiple racial groups on this question, a 2002 survey revealed that both Blacks and Latinx people were more likely than Whites to perceive the police as racially biased. Ghandnoosh, *supra* note 389, at 13; *see also* H. Peck, *Minority Perceptions of the Police: A State-of-the-Art Review*, 38 Policing: An Int'l J. Police Strategies & Mgmt. 173, 173 (2015). *But see* Yuning Wu, *Race/Ethnicity and Perceptions of the Police: A Comparison of White, Black, Asian and Hispanic Americans*, 24 Policing & Soc'y 135, 148 (2014) (discussing a study conducted in Seattle, finding that Blacks are significantly more likely to experience police as biased, compared to Whites, Asians, and Latinx people, and finding that the latter three groups did not significantly differ from each other).

450 Gramlich, *supra* note 389.

451 Ghandnoosh, *supra* note 389, at 4.

452 *Id*. at 33.

453 Unnever & Cullen, *supra* note 401, at 146.

454 Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. Pol. 762, 768-69 (2005).

455 *Id.* at 769.

456 Nat'l Ctr. for State Courts, How The Public Views The State Courts: A 1999 National Survey 7, 22 (1999), https://www.flcourts.org/content/download/217619/1971660/publicop_natl.pdf.

457 Francis T. Cullen & Martha L. Henderson, *The Impact of Race on Perceptions of Criminal Injustice*, 25 J. Crim. Just. 447, 455 (1997).

458 *Id.*

459 John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 Am. J. Soc. 329, 339 (1982).

460 *Id*. at 343.

461 *Id*.

462 Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 Criminology 435, 443 (2002).

463 Gramlich, *supra* note 389.

464 Peck, *supra* note 449, at 173.

465 Gramlich, *supra* note 389.

466 *Id.*

467 Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, Pew Res. Ctr. (Sept. 29, 2016), http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/.

468 Ghandnoosh, *supra* note 389, at 29 (citing Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 Soc. Forces 1009, 1017 (2005)).

469 *Id.*

470 *Id.*

471 Gramlich, *supra* note 389.

472 *Id.*

473 Ghandnoosh, *supra* note 389, at 29 (citing Jon Hurwitz & Mark Peffley, Justice in America: The Separate Realities of Blacks and Whites 41-42 (2010)).

474 Weitzer & Tuch, *supra* note 462, at 443. The study revealed just how common it is for young African Americans to be racially profiled by the police: "nearly three quarters (72.7%) of black men in the 18-34 year age group claiming to have been victimized by racial profiling at least once." *Id.* Further, "young black women—although much less likely than young black men to report being stopped—are 13 times more likely than young white women to say that they have been stopped because of their race." *Id.*

475 *Id.*

476 Morin & Stepler, *supra* note 467.

477 Ghandnoosh, *supra* note 389, at 29.

478 In the past several years, the killings of Michael Brown and Eric Garner, for example, catalyzed a national conversation about race and policing. *See* Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, Smithsonian (July 27, 2017), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/. However, police violence against African Americans and Black communities had its origins in colonial "slave patrols." *See, e.g.*, Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, Nat'l L. Enforcement Museum: Blog: On the Beat (July 10, 2019), https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/. As we published this report, protests were taking place across the country in response to the police-killing of George Floyd. *See, e.g.*, Dionne Searcey & David Zucchino, *Protests Swell*

Across America as George Floyd Is Mourned Near His Birthplace, N.Y. Times (June 6, 2020), https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html.

479 Morin & Stepler, *supra* note 467.

480 *Id.*

481 *Id.*

482 *Id.* The study did not have participants name just one factor that might have motivated the protests, which explains why the percentages add up to greater than 100%.

483 Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 Du Bois Rev.: Soc. Sci. Res. on Race 151, 151 (2004) (discussing a 2004 study which explained that as "a result of beliefs about the extent of racial bias" in the criminal legal system, African Americans are "consistently less punitive than whites").

484 Ghandnoosh, *supra* note 389, at 8-9.

485 *Id.* at 9.

486 *Id.*

487 *Id.* at 3.

488 *Id.* at 10. Specifically, in 2008, Blacks "were 78% more likely than whites to experience household burglary, [and] 133% more likely to experience motor vehicle theft." *Id.* In 2011, the "homicide rate for blacks was 6.2 times higher than for whites." *Id.* at 11. In 2012, "blacks were 66% more likely than whites to be victims of sexual assault, robbery, aggravated assault, and simple assault." *Id.* at 10.

489 Gramlich, *supra* note 389; *see also* Ghandnoosh, *supra* note 389, at 12 ("African Americans are more likely than whites to report dissatisfaction with their level of safety: in 2003, 43% of Blacks said they were 'very satisfied' about their physical safety in contrast to 59% of Hispanics, and 63% of whites.").

490 Ghandnoosh, *supra* note 389, at 6.

491 *Id.*

492 *See* Alexander, *supra* note 394, at 13; Bobo & Johnson, *supra* note 483, at 153 (observing that "sociologist Loic Wacquant characterizes current rates of Black incarceration and changes in policing practices and policy as tantamount to a new 'peculiar institution' or fourth stage of American racial oppression aptly termed the 'carceral state'") (internal citation omitted).

493 *See* Section I.C.3. County district attorney offices provided the training materials in response to requests by the American Civil Liberties Union of Northern California ("ACLU-NC") pursuant to the California Public Records Act ("CPRA") requests. The materials are on file with the Berkeley Death Penalty Clinic. All citations to the training materials use the format "[Name of] County, at [page number]" unless otherwise noted. The Berkeley Law Death Penalty Clinic posted the training materials on a webpage: 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/california-district-attorney-training-materials/.

494 *See* Section III.A.

495 *See* Section I.C.2; *People v. Wheeler*, 22 Cal. 3d 258 (1978).

496 *Wheeler*, 22 Cal. 3d at 276. Group bias stands in contrast to specific bias, which is "a bias relating to the particular case on trial or the parties or witnesses." *Id*.

497 *Id*. at 276-77.

498 *Id*. at 268 (quoting *Thiel v. S. Pac. Co*., 328 U.S. 217, 220 (1946)).

499 *Batson*, 476 U.S. at 87 (citing *Thiel,* 328 U.S. at 223-24).

500 *J.E.B. v. Alabama ex rel. T.B*., 511 U.S. 127, 145 n.19 (1994) (quoting *Thiel*, 328 U.S. at 220).

501 *See, e.g.*, Santa Clara Cty. Dist. Attorney's Office, *The Inquisitive Prosecutor's Guide* 4-5, 73-79 (June 10, 2016) [hereinafter *The Inquisitive Prosecutor's Guide*]. This edition of the bi-weekly publication was obtained through the ACLU-NC's CPRA request. Although the guide is a Santa Clara County publication, the manual is likely used by prosecutors statewide as it is available on a password-protected portal on the CDAA website. *See also* San Francisco County, at 11; Orange County, at 8-9; San Diego County, at 112 (listing "occupations sympathetic to defendants" and "social workers," "teachers," "scientists," "cosmetologists/barbers," and "bartenders" as "BAD PEOPLE").

502 *See, e.g.*, *The Inquisitive Prosecutor's Guide*, *supra* note 501, at 73-79; San Francisco County, at 11; Orange County, at 8-9; San Diego County, at 112.

503 Alameda County, at 78 (explaining that a valid reason for dismissing a juror is that a "Juror (or Spouse of Juror) is Employed In a Job or Engages in Activities That Reflect an Orientation Towards Rehabilitation and Sympathy for the Defendants)," 404; Marin County, at 40; Riverside County, at 243; Ventura County, at 193; The Inquisitive Prosecutor's Guide, at 78.

504 *See Batson*, 476 U.S. at 87; *Wheeler*, 22 Cal. 3d at 276-77.

505 Orange County, at 412.

506 *Id.*

507 San Diego County, at 106.

508 *Id*. at 111.

509 Orange County, at 288.

510 *Id*. at 406.

511 *Id*. at 198.

512 Ventura County, at 28.

513 San Diego County, at 112.

514 *See, e.g.,* Los Angeles County, at 7; Monterey County, at 7; Orange County, at 563, 612; Riverside County, at 67, 259; San Francisco County, at 11; San Mateo County, at 209; Tulare County, at 13; Ventura County, at 70-71, 176.

515 *See Batson*, 476 U.S. at 96; *Winbush*, 2 Cal. 5th 402, 436-37 (2017); *see supra*, note 388 (discussing the California Supreme Court's well-established precedent that a juror's negative experience with or negative attitude toward law enforcement as well as a juror's skepticism about the fairness of the criminal legal system are race-neutral reasons for a peremptory challenge).

516 Drew Desilver, *Black Unemployment Rate Is Consistently Twice that of Whites,* Pew Res. Ctr. (Aug. 21, 2013), https://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/.

517 Lincoln Quillian et al., *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 Proceedings Nat'l Acad. Sci. 10870, 10871 (2017).

518 Am. Psychological Ass'n, Stress and Health Disparities: Contexts, Mechanisms, and Interventions Among Racial/Ethnic Minority and Low Socioeconomic Status Populations 13-14 (2017), https://www.apa.org/pi/health-disparities/resources/stress-report.pdf.

519 *Id*. at 15.

520 Katherine J. Bies et al., Stanford Criminal Justice Ctr., Stuck in the '70s: The Demographics of California Prosecutors 10 (2015), https://law.stanford.edu/wp-content/uploads/2015/08/Stuck-in-the-70s-Final-Report.pdf.

521 Press Release, Nat'l Ass'n for Law Placement, New Public Service Attorney Salary Figures from NALP Show Slow Growth Since 2004, at 3 (July 9, 2018), https://www.nalp.org/uploads/PSASR_7-9-18_FINAL.pdf.

522 Tulare County District Attorney Job Posting, Gov't Jobs, https://www.governmentjobs.com (last visited Apr. 13, 2020) (search job title field for "district attorney" and search city field for "Tulare, CA").

523 California Deputy District Attorney Salary Comparison for 2018, Transparent Cal., https://transparentcalifornia.com (last visited Apr. 20, 2020) (search salaries field for "managing deputy district attorney" and search year field for "2018").

524 Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System,* 66 Ala. L. Rev. 871, 878 (2015). *See also* Greenwald & Krieger, *supra* note 309, at 955-57; John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 Pol. Psychol. 881, 889-90 (2004).

525 Smith et al., *supra* note 524, at 895.

526 Page, *supra* note 303, at 196.

527 *Id*. at 195-96.

528 *Id*. at 198 (quoting Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. Soc. Issues 429, 438 (1999)).

529 Monterey County, at 21.

530 San Diego County, at 128, 178, 181.

531 Orange County, at 406.

532 *Id*. at 447.

533 *Id*. at 326.

534 *Id*.

535 Ventura County, at 129.

536 *Id*. at 154.

537 *See generally* Page, *supra* note 303, at 177, 177 n.97 (explaining that attorneys often strike jurors based on "a hunch, instinct, or gut feeling," which, in fact, is the result of implicit bias, but the attorney "will neither know what the reason actually was nor even know that she does not know").

538 Timothy D. Wilson, Strangers to Ourselves: Discovering the Adaptive Unconscious 50 (2002).

539 *Id*. at 53.

540 *Id*.

541 Page, *supra* note 303, at 212 (quoting Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 Psychol. Sci. 56, 57 (2005).

542 *See* Alexander, *supra* note 394, at 147 ("Numerous studies have shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the offender."); *see also* Page, *supra* note 303, at 190 (citations omitted) ("[P]eople's conscious (or explicit) attitudes and their unconscious (or implicit) attitudes (or associations, or beliefs) are often different, or to use the psychological term, dissociated.").

543 *See* Greenwald & Banaji, *supra* note 315, at 4; *see also* Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem and Self-Concept*, 109 Psychol. Rev. 3 (2002).

544 Wilson, *supra* note 538, at 54.

545 *Id*.

546 Page, *supra* note 303, at 220.

547 *See* Bennett & Plaut, *supra* note 334, at 785 (stating that "repeated studies" find that "Blacks with darker skin tones and stronger Afrocentric facial features 'activate automatic associations with negative behavioral stereotypes of Black men, such as aggression, violence, and criminality'"); *see also* Page, *supra* note 303, at 227 ("A prosecutor who sees a potential juror with messy hair as similar to herself may attribute the curious hairstyle to windy conditions (transient, external) whereas if she sees the potential juror as dissimilar she may attribute it to a slovenly character (stable, internal).").

548 *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

549 San Francisco County, at 58.

550 *The Inquisitive Prosecutor's Guide, supra* note 501, at 63, 64.

551 Orange County, at 325.

552 *Id*. at 437.

553 *Id*. at 326.

554 San Diego County, at 6.

555 Page, *supra* note 303, at 228.

556 *Id*.

557 *Id*.

558 *Id*.

559 Devine, *supra* note 303, at 7-8; Eberhardt et al., *supra* note 334, at 881, 883, 885-87.

560 L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 Minn. L. Rev. 2035, 2062 (2011).

561 Bennett & Plaut, *supra* note 334, at 786 (citing Sagar & Schofield, *supra* note 300, at 596).

562 Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 Iowa L. Rev. 2017, 2049 (2017).

563 Smith & Levinson, *supra* note 307, at 819.

564 *Id.*

565 *See, e.g.*, *People v. Lenix,* 44 Cal. 4th 602, 613 (2008) ("A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons."); *People v. Gutierrez*, 28 Cal. 4th 1083, 1125 (2002) ("Hostile looks from a prospective juror can themselves support a peremptory challenge"); *see* Sections II.A, II.B (discussing the authors' study of California appellate opinions in *Batson* cases); Semel, *supra* note 227, at 342-46 (citing cases and studies); *id.* at 343 (commenting that "*Batson* jurisprudence is littered with federal and state court decisions upholding demeanor-based strikes").

566 Page, *supra* note 303, at 224-25.

567 *Id*. at 225.

568 *See, e.g.*, *Kesser v. Cambra*, 465 F. 3d 351, 364 (9th Cir. 2006) (finding that the prosecutor's reason was not race-neutral where he struck a Native American juror for being "misty" because she "'teared up' when talking about her daughter's molestation"); *Clayton v. State*, 341 Ga. App. 193, 199 (2017) ("The potential iconoclasm of having gold teeth does not negate its usage in American culture as a stereotypical proxy for (or association with) the African-American race. Under these circumstances, striking the African-American juror because he had a full set of gold teeth cannot be said to be race neutral.").

569 *See People v. Silva*, 25 Cal. 4th 345, 385-86 (2001).

570 GR 37(i).

571 *Id.*

572 *Inquisitive Prosecutor's Guide*, *supra* note 501, at 15.

573 *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (internal citation omitted).

574 Orange County, at 596.

575 *Id.* at 612.

576 San Diego County, at 110.

577 Orange County, at 32.

578 *See Id.* at 35.

579 Los Angeles County, at 44.

580 San Francisco County, at 57.

581 Los Angeles County, at 44.

582 San Francisco County, at 46 (emphasis added).

583 *Id.*

584 *Id.* at 47-55, 58.

585 *Id.* at 47-56.

586 *Id.* at 49.

587 *The Inquisitive Prosecutor's Guide*, *supra* note 501, at 4-6, 51-80.

588 *Id.*

589 *Id.* at 71.

590 *Id.* at 79.

591 *Id.* at 71-72.

592 *Batson,* 476 U.S. at 96 (quoting *Avery*, 345 U.S. at 562).

593 *See, e.g.*, Orange County, at 74-75; San Mateo County, at 208-09; San Francisco County, at 10-11.

594 Orange County, at 74-75

595 *Id*.

596 Chris C. Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 Berkeley La Raza L.J. 18, 31 (2008).

597 *Id*. at 31-32.

598 *Id*. at 31.

599 San Francisco County, at 34.

600 San Diego County, at 174.

601 *Miller-El II*, 545 U.S. at 241-42.

602 *Id.* at 250.

603 *Id*. Other courts and individual judges have been critical of the reliance on the number of seated jurors in the cognizable group as a basis for denying a *Batson* motion, reasoning, for example, that "a prosecutor who intentionally discriminates against a prospective juror on the basis of race can find no refuge in having accepted others [*sic*] veni-repersons of that race for the jury." *Holloway v. Horn*, 355 F.3d 707, 729 (3d Cir. 2004). Section III.A.3 discusses Justice Jon Streeter's recent concurring opinion in *People v. Smith*, observing that courts have placed "too much significance" on the "prosecutor's willingness to pass the panel with one or two" jurors of the same race as the defendant. 32 Cal. App. 5th 860, 881 (2019), *as modified on denial of reh'g* (Mar. 1, 2019), *review denied* (May 15, 2019) (Streeter, J., concurring). Justice Streeter concluded that this undue emphasis "provide[s] an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." *Id*. (internal citation and quotation marks omitted).

604 *See, e.g.*, *People v. Lomax*, 49 Cal.4th 530, 576 (2010) ("Acceptance of a panel containing African-American jurors 'strongly suggests that race was not a motive' in the challenges of an African-American panelist.") (quoting *People v. Lenix*, 44 Cal. 4th at 629).

605 Marin County, at 27. Although this is an Alameda County training document, the Marin County District Attorney's Office included the material in response to the ACLU-NC CPRA request.

606 Marin County, at 44.

607 Orange County, at 7.

608 Ventura County, at 147.

609 *See* Bellin & Semitsu, *supra* note 2, at 1104 ("Unfortunately, any attorney smart enough to pass a bar exam can easily circumvent the comparative-analysis pitfall by 'packaging' additional characteristics in a way that makes it statistically impossible that another individual will have an identical response").

610 San Francisco County, at 34.

611 *See* Bellin & Semitsu, *supra* note 2, at 1104-06.

612 *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (using this phrase to describe the prosecutor's 11 reasons for striking a Black juror).

613 *People v. Smith*, 4 Cal. 5th 1134, 1157-58 (2018).

614 *See People v. Armstrong*, 6 Cal. 5th 735 (2019) (Liu, J., with Cuéller and Perluss, J.J., dissenting) (citing *Smith* and criticizing the majority's failure to examine each of the prosecutor's eight reasons for striking one of the jurors); *People v. Hardy*, 5 Cal. 5th 56, 110-11 (2018) (Liu, J., dissenting) (quoting *Foster* and criticizing the majority's failure to examine the prosecutor's "'laundry list'" of six reasons).

615 San Francisco County, at 57.

616 *Id.*

617 *Id.* at 58 (listing "Soft-spoken"; "Long hair"; "Unkempt/poorly groomed"; "Frowning"; "Tentative/low-keyed"; "Inappropriate laughter"; "Hostile"; "Hesitant"; "Cavalier"; "Looked away from prosecutor"; "Smiled at defendant"; "Fidgety"; "Nervous"; "Upset"; "Defensive"; "Tired"; "Overweight"; and "Weird" as acceptable attributes for demeanor-based challenges).

618 *Id.* at 58-59. With regard to the latter approach, five years ago, a California appellate court held that preference for another juror is no different than an assertion of good faith or denial of a discriminatory motive; this justification "is, in effect, no reason at all." *People v. Cisneros*, 234 Cal. App. 4th 111, 121 (2015) (citing *Batson*, 476 U.S. at 97-98). *Id.* (explaining that "in each instance . . . the prosecutor elected to strike a prospective male juror rather than one of the many prospective female jurors then seated in the jury box").

619 San Francisco County, at 45.

620 *See People v. Wheeler*, 22 Cal. 3d 258 (1978); *Batson v. Kentucky*, 476 U.S. 79 (1986).

621 *People v. Silva*, 25 Cal. 4th 345, 385-86 (2001); *People v. Fuentes*, 54 Cal. 3d 707 (1991).

622 *Fuentes*, 54 Cal. 3d at 712; *id*. at 722 (Mosk, J., concurring).

623 *Silva*, 25 Cal. 4th at 354.

624 *Harris*, 57 Cal. 4th at 885 (Liu, J., concurring) (quoting *Silva*, 25 Cal. 4th. at 375).

625 *People v. Gutierrez*, 28 Cal. 4th 1083, 1175 (2002) (Liu, J., concurring).

626 *Id*. at 1156.

627 *Id*. at 1157.

628 *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring).

629 *Gutierrez*, 2 Cal. 5th at 1171-72 (majority opinion).

630 *Id*. at 1168, 1171.

631 *Id*. at 1172. Nothing in the majority opinion suggests that the court has abandoned its "reflexive deference" approach. *See id*. at 1172 (stating, "[W]e . . . typically afford deference to a trial court's *Batson/Wheeler* rulings . . . ."). On the contrary, in *People v. Armstrong*, the court deferred to the trial judge's credibility determination, finding that he had "engaged in a reasoned examination of Armstrong's showing in light of the record . . . ." 6 Cal. 5th 735, 768, 777-78 (2019). The dissent disagreed as to struck Juror E.W. *Id*. at 802-05 (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

632 *Johnson v. California*, 545 U.S. 162, 168 (2005).

633 *People v. Turner*, 42 Cal. 3d 711, 719-20 (1986) (holding that the defendant established a prima facie showing where, over his objection, the prosecutor had peremptorily challenged the only two Black prospective jurors in the box, and later struck the only other African American called to the box).

634 For opinions by the Ninth Circuit, *see e.g., Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000) ("California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*."); *Fernandez v. Roe,* 286 F.3d 1073, 1077 (9th Cir. 2002) (citing *Wade*, and declining to defer to the California appellate court because it applied the wrong test at step one); *Paulino v. Castro*, 371 F.3d 1083, 1090 (2004) (citing *Wade* and *Fernandez*, and declining to defer to the California appellate court because it applied the wrong test at step one).

635 *People v. Howard*, 1 Cal. 4th 1132, 1154, 1202 (1992) (in bank) (Kennard, J., concurring and dissenting).

636 *Id.* at 1207 (Kennard, J., concurring and dissenting) (citing *Turner*, 42 Cal. 3d at 719); *see Batson*, 476 U.S. at 105 (Marshall, J., concurring); *see also City of Seattle v. Erickson*, 398 P.3d 1124, 1126 (Wash. 2017) (en banc) (holding that when the prosecutor exercises a peremptory challenge against the sole African American in the venire, the trial court must find a prima facie showing of discrimination).

637 *Howard*, 1 Cal. 4th at 1207 (Kennard, J., concurring and dissenting).

638 *People v. Carasi*, 44 Cal. 4th 1263 (2008).

639 *People v. Scott*, 61 Cal. 4th 363, 384 (2015).

640 *Carasi*, 44 Cal. 4th at 1292-93. *See People v. Rhoades*, 8 Cal. 5th 393, 428-29 (2019) (explaining that, in deciding cases tried before *Johnson*, the court will "'review the record independently to determine whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis'" (quoting *People v. Kelly*, 42 Cal. 4th 763, 779 (2007)) (citing other cases endorsing this approach)).

641 *Carasi*, 44 Cal. 4th at 1291, 1294-95.

642 *Id.* at 1319, 1321 (Kennard, J., concurring and dissenting).

643 *Id.* at 1318.

644 *Id.* at 1321. *Carasi* also exemplifies the layers of judicial wrangling that characterize the court's step-one opinions. None of the complexities are warranted given the extremely low threshold set by *Batson* and affirmed in *Johnson*. Here, the majority's dissection of the pattern of strikes against women required Justice Kennard to respond by explaining how the prosecutor temporarily (and strategically) accepted panels of jurors with women in them. *Id.* at 1320-21. Justice Kennard then resorted to a flawed legal technique to reach the same conclusion: she reviewed the struck jurors' answers on their questionnaires and during voir dire "to see whether those answers suggest a reason for the prosecutor's peremptory challenges." *Id.* at 1321. As we discuss immediately below, Justice Kennard's reliance on speculation at step one, an approach the court employed before *Johnson* and continues to utilize, cannot be reconciled with *Johnson*'s holding.

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

646 *Rhoades*, 8 Cal. 5th at 458 (2019) (Liu, J., dissenting) (quoting *People v. Harris*, 57 Cal. 4th 804, 864 (2013) (Liu, J., concurring)).

647 *Id*. at 456.

648 *Id*. at 460-61.

649 *Id*. at 457, 460-61 (quoting *Johnson*, 545 U.S. at 165, 173).

650 *Id*. at 459-60. Justice Liu also found that the majority exacerbated its error at step one by disregarding *Johnson*'s prohibition against speculation—positing reasons the prosecution might have removed jurors, rather than confining its analysis to the explanations actually given. *Id*. at 461-66. He also criticized the majority's rewriting of its historical unwillingness to engage in comparative juror analysis at step one, rather than forthrightly overruling its precedent. *Id*. at 468-69.

651 *Id*. at 458.

652 *Id*.

653 *Id*.

654 *Id*. at 470.

655 *Johnson*, 545 U.S. at 172.

656 *Id*.

657 *Id*. (quoting *Paulino*, 371 F.3d at 1090).

658 *Id*. at 171.

659 *See Chism*, 58 Cal. 4th 1266, 1352 (2014) (Liu, J., concurring and dissenting); *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring).

660 *Harris*, 57 Cal. 4th at 863 (Liu, J., concurring).

661 *Id*. at 834 (majority opinion).

662 *Id*.

663 *Id*.

664 *Id*. at 835-38.

665 *Id*. at 864 (Liu, J., concurring).

666 *Id*. at 880-82 (quoting *Johnson*, 545 U.S. at 172) (citing *People v. Clark*, 52 Cal. 4th 856, 907 (2011) (holding that there was no prima facie showing because "the record of voir

dire suggests race-neutral reasons for excusing each of the four jurors in question")); *People v. Hartsch*, 49 Cal. 4th 472, 487-89 (2010) (providing race-neutral reasons to justify four of the first five strikes against Black jurors); *People v. Hoyos*, 41 Cal. 4th 872, 900 (2007), *abrogated on other grounds by People v. McKinnon*, 52 Cal. 4th 610 (2011) (internal citations and quotation marks omitted) (concluding that affirmance is warranted where "the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question").

667 *Id.* at 872.

668 *Id.* at 873 (quoting *Johnson*, 545 U.S. at 172).

669 *Id.* at 880.

670 *People v. Reed*, 4 Cal. 5th 989, 998 (2018); *id.* at 1020 (Liu, J., dissenting).

671 *Id.* at 998 (majority opinion).

672 *Id.* at 1000-03.

673 *Id.* at 1020-28 (Liu, J., dissenting).

674 *Id.* at 1021 (Liu, J., dissenting). Justice Kruger dissented separately "for the reasons expressed in Justice Liu's dissenting opinion." *Id.* at 1031 (Kruger, J., dissenting). As to the court's inconsistent application of its precedent, Justice Liu first pointed out that the court's consideration of the factors in the jury selection that occurred after the *Batson* motion "is at odds" with its holding that "'the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire *as of the time the motion was made. . . .*'" *Id.* at 1021 (quoting *Scott*, 61 Cal. 4th at 384) (citing *Lenix*, 44 Cal. 4th at 624).

675 *Id.* at 1023.

676 *Id.* at 1025-28.

677 *Id.* at 1001 (majority opinion).

678 *Id.* (quoting *Harris*, 57 Cal. 4th at 836).

679 *Id.* at 1026 (Liu, J., dissenting). Justice Liu also criticized the inconsistency in the majority's reliance on a comparative juror analysis at the first *Batson* step for purposes of bolstering its decision given the court's "prior statements that comparative juror analysis in evaluating hypothesized reasons at stage one 'is inappropriate' (citation omitted) or 'has little or no use' (citation omitted)." *Id.* at 1025-26.

680 *Id*. at 1027-28 (quoting *Johnson*, 545 U.S. at 173). Justice Liu further explained that the relevant comparison is not the one the majority selected, i.e., total number of African Americans in the venire compared to the total number the prosecution struck. *Id*. at 1022-23. Rather, it is the total number of African Americans the prosecutor could have peremptorily challenged because they were seated in the box compared to the total number he excused. *Id.* Of this group, the prosecutor excused seven out of 10 African Americans, which supports, rather than diminishes, the inference of discrimination. *Id*. at 1023.

681 *People v.* (*Joe Edward*) *Johnson*, 8 Cal. 5th 475, 507-09 (2019).

682 *Id*. at 481, 510; *id*. at 528-29 (Liu, J., dissenting); *id*. at 536 (Cuéller, J. with Liu, J., dissenting).

683 *Id*. at 482-83 (majority opinion); *id*. at 529 (Liu, J., dissenting).

684 *Id*. at 503 (majority opinion).

685 *Id*.

686 *Id*. at 503-04.

687 *Id*. at 529 (Liu, J., dissenting). The prosecutor used 60% of those strikes against Black jurors and 34% against non-Black jurors in the box. *Id*.; *see also id*. 504-06 (majority opinion) (describing the sequence of peremptory challenges).

688 *Id*. at 504-06 (majority opinion).

689 *Id*. at 505.

690 *Id*.

691 *Id*. 506.

692 *Id*. at 508-509.

693 *Id*.

694 *Id*. at 546 (Cuéller, J., with Liu, J., dissenting).

695 *Id*. at 536.

696 *Id*. at 536-37.

697 *Id*. at 546.

698 *Id.*

699 *Id*. at 528 (Liu, J., dissenting).

700 *Id*. at 528-29.

701 *Id*. at 536 (quoting *Harris*, 57 Cal. 4th at 866).

702 *Id*. at 535-36 (citing *Batson*, 476 U.S. at 85, 87) (also citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238-39 (2019); *Powers v. Ohio*, 499 U.S. 400, 409 (1991)).

703 *Id*. at 535 (quoting *Harris*, 57 Cal. 4th at 865).

704 *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion) (deciding that where the trial court does not rule on the prima facie showing, but the proponent offers reasons for the strike—whether solicited or volunteered—and the court then rules on the ultimate question, the step-one ruling is moot); *Scott*, 61 Cal. 4th at 414-15 (Liu, J., with Kruger, J., concurring) (citing cases); *People v. Howard*, 42 Cal. 4th 1000, 1034 (2008) (Kennard, J., with Moreno, J., concurring and dissenting) (opining that the majority had failed to follow the weight of authority on the proper constitutional test at step one); *People v. Boyette*, 29 Cal. 4th 381, 469-70 (2002) (Kennard, J., dissenting) (citing cases and opining that the majority had failed to follow the weight of authority on the proper constitutional test at step one); *see* Semel, *supra* note 227, at 311-12 (citing cases and discussing the California Supreme Court's minority position in the split of authority).

705 *See Scott*, 61 Cal. at 386-87 (comparing opinions).

706 *Boyette*, 29 Cal. 4th at 469-70 (Kennard, J., dissenting); *see also Howard*, 42 Cal. 4th at 1034 (Kennard, J., with Moreno, J., concurring and dissenting) (citing cases).

707 *Scott*, 61 Cal. 4th at 386-87 (comparing opinions).

708 *Id.* at 391.

709 *Id*. at 409 (Liu, J., with Kruger, J., concurring) (citing *People v. Banks*, 59 Cal. 4th 1113, 1146 (2014); *People v. McKinzie*, 54 Cal. 4th 1302, 1320 (2012)).

710 *Id*. at 414.

711 *Id.* at 411, 413-14 (citing *Hernandez*, 500 U.S. at 372).

712 *Id.* at 409 (quoting *Johnson*, 545 U.S. at 172).

713 *Id.*

714 *See Batson*, 476 U.S. at 98 n.21; *see also Hernandez*, 500 U.S. at 364; *Lenix*, 44 Cal. 4th at 614.

715 *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (explaining that deference is "especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike," but unwarranted where the record does not show that determination).

716 *See People v. Hall*, 35 Cal. 3d 161, 167-68 (1983) (in bank); *Turner*, 42 Cal. 3d at 721 (in bank) (citing *Hall*); *People v. Snow*, 44 Cal. 3d 216, 222 (1987) (quoting *Hall*). In *People v. Mai*, Justice Liu mapped the downward trajectory of the court's jurisprudence on this issue. 57 Cal. 4th 986, 1067-73 (2013), *as modified on denial of reh'g* (Oct. 2, 2013) (Liu, J., concurring).

717 *Mai*, 57 Cal. 4th at 1067-71 (Liu, J., concurring) (citing *Silva*, 25 Cal. 4th at 385 (finding reversible error where the trial judge failed to examine and address the discrepancies between the record and the prosecutor's proffered explanations); *Fuentes*, 54 Cal. 3d at 721 (finding reversible error where the trial court did not analyze the prosecutor's explanations for his strikes); *Snow*, 44 Cal. 3d at 216 (finding reversible error where the trial court accepted without question the prosecutor's denial of group bias); *Turner*, 42 Cal. 3d at 727-28 (reversing the capital conviction because the trial court summarily denied the *Batson* motion)).

718 *People v.* (*James Willis*) *Johnson*, 47 Cal. 3d 1194, 1218 (1989) (in bank) (distinguishing *Hall*); *id*. at 1283, 1289-90 (Mosk, J., with Broussard, J., dissenting) (citing *Hall* and criticizing the majority for deferring to the trial judge's ruling which was "a rambling statement" that, at most, found that the prosecutor's reasons were race-neutral, but not that they were credible).

719 *Mai,* 57 Cal. 4th at 1068-70 (Liu, J., concurring) (citing *People v. Jackson*, 13 Cal. 4th 1164 (1996); *People v. Cummings*, 4 Cal. 4th 1233 (1993); (*James Willis*) *Johnson*, 47 Cal. 3d 1194).

720 *Silva*, 25 Cal. 4th at 386.

721 *Mai,* 57 Cal. 4th at 1070 (Liu, J., concurring); *see also Chism*, 58 Cal. 4th at 1349 (Liu, J., concurring and dissenting) (criticizing the majority for deferring to the trial court where the trial judge had failed to make "'a sincere and reasoned effort to evaluate'" all relevant circumstances bearing on a *Batson* claim, especially where "the prosecutor did not rely on [the struck juror's] demeanor or other intangible qualities apparent only to the trial court") (quoting *Lenix*, 44 Cal. 4th at 614)).

722 *Mai,* 57 Cal. 4th at 1070 (Liu, J., concurring) (citing *People v. Reynoso*, 31 Cal. 4th 903 (2003)).

723 *See Reynoso*, 31 Cal. 4th at 929; *id*. at 929-35 (Kennard, J., with Werdegar and Moreno, J.J., dissenting); *id*. at 935-45 (Moreno, J., with Kennard and Werdegar, J.J., dissenting).

724 *Id.* at 930 (Kennard, J., with Werdegar and Moreno, J.J., dissenting) (concluding that the majority opinion "undermines the right of Hispanics to sit on juries in California state courts and the right of criminal defendants to jury-selection procedures free of purposeful discrimination against Hispanic prospective jurors"); *id.* at 935 (Moreno, J., with Kennard and Werdegar, J.J., dissenting) ("Because today's majority opinion shelters a prosecutor's pretextual peremptory challenge of a Hispanic juror from further inquiry by the trial court, I dissent.").

725 *Id.* at 945 (Moreno, J., with Kennard and Werdegar, J.J., dissenting).

726 *Id.* at 930 (Kennard, J., with Werdegar and Moreno, J.J., dissenting).

727 *Mai,* 57 Cal. 4th at 1075 (Liu, J., concurring) (emphasis added).

728 *Id.* There is a split of authority on the requirements for appellate deference. *See People v. Williams*, 56 Cal. 4th 630, 701, 709-14 (2013) (Liu, J., dissenting) (assessing the split of authority among the state and federal appellate courts, and explaining that the California Supreme Court has "aligned itself with one side of this split, but not the side that reflects the United States Supreme Court's teachings on the careful scrutiny that trial courts and reviewing courts must apply to ferret out unlawful discrimination in jury selection"); *see also* Semel, *supra* note 227, at 336-40 (reviewing the split of authority).

729 *Mai,* 57 Cal. 4th at 1058 (Liu, J., concurring); *id.* at 1059 (pointing to "the thorough and careful inquiry at *Batson*'s third step" required by the high court's decisions in *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005), and *Snyder v. Louisiana,* 552 U.S. 472 (2008)); *see Snyder*, 552 U.S. at 479 (refusing to defer to, or even consider, the trial court's ruling where the prosecutor objected based on the struck juror's demeanor, and the trial court "simply allowed the challenge without explanation").

730 *See also Mai*, 57 Cal. 4th at 1062 (holding that appellate deference is required "so long as the prosecutor's stated reason for striking a minority juror is (1) inherently plausible and (2) supported by the record"); *id.* at 1059 (Liu, J., concurring) (concluding that the trial court's ruling did not warrant deference where the trial judge stated only that discriminatory intent was not "'inherent in the explanations'" and that "'the reasons appear to be race-neutral'").

731 *Williams*, 56 Cal. 4th at 649.

732 *Id.* at 650.

733 *Id.*

734 *Id.* at 651.

735 *Id.*

736 *Id.*

737 *Id.* at 652.

738 *Id.*

739 *Id.*

740 *Id.* at 650.

741 *Id.* at 700 (Liu, J., dissenting). *See also Chism,* 58 Cal. 4th at 1349 (Liu, J., concurring) (writing that where the trial judge made no effort to compare the struck juror to seated jurors, to "examine discrepancies" between the struck juror's statements and the prosecutor's characterization, or to ask the struck juror about one of the prosecutor's reasons—an issue about which the juror was never questioned—"it is unclear what exactly this court is deferring to here").

742 *Id.* at 700.

743 *Id.*

744 *Id.* at 698 (Werdergar, J., dissenting).

745 *Id.* at 699.

746 *People v. Hardy*, 5 Cal. 5th 56, 63 (2018); *id.* at 107 (Liu, J. dissenting).

747 *Id.* at 75.

748 *Id.*

749 *Id.*

750 *Id.*

751 *Id.* at 76 (quoting *Williams*, 56 Cal. 4th at 653) (internal citation in *Williams* omitted by the court).

752 *Id.* at 80.

753 *Id.* at 111, 113 (Liu, J., dissenting).

754 *Id.* at 111 (quoting *id.* at 82-83 (majority opinion)).

755 *Id.* at 113.

756 *People v. Manibusan*, 58 Cal. 4th 40, 107-08 (2013) (Liu, J., concurring and dissenting) (citing generally *Snyder*, 552 U.S. 472; *Miller-El II*, 545 U.S. 231). In *Manibusan*, the defendant made a *Batson* objection to the prosecution's strikes against three African-American women, one Asian-American woman, and two Latinx jurors. Denying the motion as to Juror No. 22, a Black woman, the trial court said only, "'It's a proper use of a peremptory challenge.'" *Id.* at 76. A majority of the California Supreme Court held that the ruling was sufficient for deference on appeal. *Id.* at 76-77. Justice Liu disagreed, writing that an unexplained ruling does not warrant deference because "'if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer.'" *Id.* at 107 (Liu, J., dissenting and concurring) (quoting *United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011)).

757 *Mai*, 57 Cal. 4th at 1062 (Liu, J. concurring).

758 *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring). *See also Mai*, 57 Cal. 4th at 1066-67 (Liu, J., concurring) (observing that these "habits of unwarranted deference, speculative inference, and overreliance on gap-filling presumptions have been entrenched in our *Batson* jurisprudence for some time now").

759 In *Wheeler*, the court pointed out that the prosecution might defeat an objection by showing that it peremptorily challenged "similarly situated members of the majority group on identical or comparable grounds." 22 Cal. 3d at 282. However, where the record showed the opposite, the prosecutor would not prevail. For example, in *People v. Trevino*, the prosecution, over objection, struck six Latinx jurors. 39 Cal. 3d 667, 688 (1985), *disapproved by* (*James Willis*) *Johnson,* 47 Cal. 3d at 1219-21. The court compared the struck Latinx jurors to several of the seated White jurors and found that the prosecutor's reasons for his strikes applied equally to the latter. *Id.* at 691-92. *E.g., id.* at 691 (where the prosecutor explained that he struck one Latinx juror because the juror's child was "close in age to at least one defendant," finding that he left three Whites on the jury whose sons were similar in age).

760 (*James Willis*) *Johnson*, 47 Cal. 3d at 1219-21.

761 *Id.* at 1220.

762 *Id.* at 1254 (Mosk, J., dissenting).

763 *Id.* at 1280-83 (discussing cases).

764 *Id.* at 1292.

765 *Id.* at 1292-95 (discussing the California Supreme Court's reliance on comparative juror analysis as well as its use by the state courts of appeal, the New Jersey Supreme Court, and the federal circuit courts).

766 These are, respectively, 537 U.S. 322 (2003) and 545 U.S. 231 (2005). *Miller-El I*, 543 U.S. at 326, concerned the proper standard for the issuance of a certificate of appealability under the AEDPA. Therefore, the Supreme Court's inquiry was limited to whether the Fifth Circuit had made the proper "threshold inquiry" into the merits of Miller-El's *Batson* claim, rather than whether he was entitled to relief on the claim under the AEDPA. *Id*. at 327. In answering the question, the Supreme Court analyzed some of the evidence supporting the claim, comparing, for example, the difference, "on the apparent basis of race," in how prosecutors asked prospective jurors their views about the sentence for murder under Texas law. *Id*. at 332.

767 These are, respectively, 552 U.S. 472 (2008); 136 S. Ct. 1737 (2016); and 139 S. Ct. 2228 (2019).

768 *Lenix*, 44 Cal. 4th at 622.

769 *Id*. at 622-24.

770 *Id*. at 622-24.

771 *See, e.g.*, *People v. Armstrong*, 6 Cal. 5th 735, 780-81 (2019) (quoting *Lenix*, 44 Cal. 4th at 622, 624); *Williams*, 56 Cal. 4th at 662 (quoting *Lenix*, 44 Cal. 4th at 622-23); *Chism*, 58 Cal. 4th at 1318 (relying on *Lenix*, 44 Cal. 4th at 622, to restrict comparative analysis to the jurors seated at the time the trial court ruled on the *Batson* motion unless the defendant later renews the objection).

772 *Miller-El II*, 545 U.S. at 241, 247 n.6.

773 *Id*. at 247 n.6.

774 *Id.*; *see also Flowers*, 139 S. Ct. at 2249 (citing *Miller-El II*).

775 *Miller-El II*, 545 U.S. at 241.

776 *Id*. at 255-60.

777 *Snyder*, 552 U.S. at 484.

778 *Foster*, 136 S. Ct. at 1754.

779 *Flowers*, 139 S. Ct. at 2246-47.

780 *Id*. at 2247.

781 *Miller-El II*, 545 U.S. at 252.

782 *Id.*

783 *People v. Jones*, 51 Cal. 4th 346 (2011).

784 *Id*. at 356-57.

785 *Id*. at 358.

786 *Id*.

787 *Id*. at 359.

788 *Id*. at 364.

789 *Id*. at 365.

790 *Id*.; *see id*. at 358-59 (listing the prosecutor's reasons for striking Juror G.G.).

791 *Id*. at 364-66 (reasoning that the limitations of conducting a comparative juror analysis for the first time on appeal allow the court to examine the record in this manner). *But see Miller-El II*, 545 U.S. at 252 (holding that trial and reviewing courts are precluded from hypothesizing a reason for the strike "if the stated reason does not hold up").

792 *People v. O'Malley*, 62 Cal. 4th 944, 979 (2016) (emphasis added) (quoting *Miller-El II*, 545 U.S. at 247); *id*. at 976-77 (citing *Jones*, and comparing the death penalty views of the struck jurors who were at issue with those of some of the seated jurors, even though the prosecutor did not rely on those views as a reason for his peremptory challenges).

793 *Miller-El II*, 545 U.S. at 252. In *People v. Winbush*, the majority suggested that it may be appropriate to permit a trial judge to rely on his or her own experiences as a lawyer and judge as well as "'common practices'" of the prosecutor and the prosecutor's office in exercising peremptory challenges. 2 Cal. 5th 402, 434 (2017) (quoting *Wheeler*, 22 Cal. 3d at 281). Justice Liu objected that "there is good reason not to do so." *Id*. at 491 (Liu, J., concurring). He pointed to two federal circuits that had rejected this approach because it allows the trial court to rely on information the defendant has "no opportunity to rebut" and to "'base such decisions on personal relationships outside of the courtroom.'" *Id.* at 491-92 (quoting *Coulter v. McCann*, 484 F.3d 459, 465 (7th Cir. 2007)) (citing *Adkins v. Warden*, 710 F.3d 1241, 1254 (11th Cir. 2013)).

794 *Winbush*, 2 Cal. 5th at 443 (quoting *People v. DeHoyos*, 57 Cal. 4th 79, 107 (2013)) (italics in *Winbush*).

795 *Id*. at 491 (Liu, J., concurring).

796 *Id*.

797 *Foster*, 136 S. Ct. at 1748. Section III.D introduces this topic in the context of jury selection training for California prosecutors.

798 *See* Sections II.B.1-4, II.C.1-2, III.D.

799 *Id*.

800 *Id*. at 1749-51.

801 *Id*. at 1751-54

802 *Id*. For instance, among the prosecutor's reasons for striking Mr. Hood was the fact that the prospective juror's son was close in age to the defendant. *Id*. at 1752. The court compared Mr. Hood to seated White jurors Graves and Duncan, both of whom had sons close in age to the defendant. *Id*. The prosecutor also struck Mr. Hood because he "'appeared to be confused and slow in responding to questions concerning his views on the death penalty.'" *Id*. at 1754 (internal citation omitted). Here, the court compared Mr. Hood to a different seated White juror, Huffman, who "showed similar confusion." *Id*.

803 *Id*. at 1755. The State used its peremptory challenges to remove all four African Americans who remained in the panel after cause challenges. *Id*. at 1743. Only the strikes of Jurors Garrett and Hood were at issue in the case before the Supreme Court. *Id*. at 1748. There were other egregious examples of discrimination in *Foster*, such as race-coded jury lists and additional notes in the State's file showing its "concerted effort to keep black prospective jurors off the jury." *Id*. at 1748-50, 1753, 1755.

804 *Hardy*, 5 Cal. 5th at 78.

805 *Id*. at 83-84; *id*. at 107 (Liu, J., dissenting) (explaining that the prosecutor "struck the only black prospective juror from the main panel, Frank G.").

806 Justice Liu emphasized other aspects of the *Batson* analysis in ways the majority did not, e.g., (1) the prosecutor's removal of "every African-American prospective juror she could have excused," *id*. at 108; (2) the "definite racial overtones" of the case discussed above, *id*.; (3) evidence that Frank G. "'should have been an ideal juror in the eyes of a prosecutor seeking a death sentence,'" *id*. at 109 (quoting *Miller-El II*, 545 U.S. at 231); and (4) the prosecutor's use of the "'laundry list'" approach, *id*. at 110 (quoting *Foster*, 136 S. Ct. at 1748).

807 *Id*. at 111-18 (Liu, J., dissenting). One of the six reasons—the prosecutor's assertion that Frank G. expressed in his questionnaire a belief that "'police are not always truthful and tend to exaggerate'"—was simply wrong. *Id*. at 111-12 (quoting the prosecutor). Frank G.'s questionnaire response concerned prosecutors (not police), and he wrote that he had the same view of defense lawyers. *Id*. The majority agreed that the prosecutor was mistaken about Frank G.'s statement, but, as mentioned above, rather than fault her or the trial court for the error, the majority criticized defense counsel for failing to notice the error and call it to the judge's attention. *Id*. at 79-80 (majority opinion).

808 *Id*. at 81 (majority opinion).

809 *Id*.

810 *Id*. at 114 (Liu, J., dissenting).

811 *Id*. at 82.

812 *Id*. at 117.

813 *Id*. at 117-18. (Liu, J., dissenting).

814 *Id*. at 119 (quoting *Miller-El II*, 545 U.S. at 247 n.6).

815 *People v. Smith*, 4 Cal. 5th 1134, 1157-58 (2018) (citing *Foster*, 136 S. Ct. at 1748; U*nited States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989)).

816 *Id*. at 1157.

817 *People v. Armstrong*, 6 Cal. 5th 735, 802-03 (2019) (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

818 *Id*. at 782 (majority opinion).

819 *Id*. at 801 (Liu, J., with Cuéllar and Perluss, J.J., dissenting) (quoting *Hardy*, 5 Cal. 5th at 78).

820 *Id*. at 800-01. The majority began the *Batson* discussion by stating the race of the victim and the defendants. *Id*. at 765 (majority opinion).

821 *Id*. at 801. As noted above, Justice Liu also dissented in *Hardy*.

822 *Id*. The majority acknowledged that no African-American men were on the seated jury and that, in California, Black men, a group "lying at the intersection of race *and* gender, are cognizable under *Wheeler*." *Id*. at 765, 768-69 (majority opinion).

823 The requirement flows directly from *Batson*, 476 U.S. at 96-97, in which the Court stated, "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *See also Miller-El II*, 545 U.S. at 240 (quoting *Batson*, 476 U.S. at 96-97); *Snyder*, 552 U.S. at 478 (citing *Miller-El II*, 545 U.S. at 239). The Supreme Court used this language to describe the third-step determination in the two successful post-*Snyder* cases, *Foster v. Chatman* and *Flowers v. Mississippi*. *Foster*, 136 S. Ct. at 1748 (quoting *Snyder*, 552 U.S. at 478); *Flowers*, 139 S. Ct. at 2251 (describing "all of the relevant facts and circumstances taken together" that supported a finding of *Batson* error).

824 *Armstrong*, 6 Cal. 5th at 805-15 (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

825 *Id*. at 804-05.

826 *Id*. at 815.

827 *Id*. at 816 (quoting *Johnson*, 545 U.S. at 170).

828 *Chism*, 58 Cal. 4th at 1319 (majority opinion). The court raised the prospect of forfeiture in *Lenix*, 44 Cal. 4th at 624. However, because *Lenix* did not involve a comparison with later-seated jurors, the statement was dictum. *Id*. at 1351 (Liu, J., concurring).

829 *Chism*, 58 Cal. 4th at 1351 (Liu, J., concurring) (quoting *Snyder*, 552 U.S. at 478) (italics in *Chism*); *see supra*, note 826 (tracing the requirement to *Batson*).

830 *Chism*, 58 Cal. 4th at 1350.

831 *Manibusan*, 58 Cal. 4th at 107 (Liu, J., concurring and dissenting).

832 *Id*. at 107-08.

833 *Chism*, 58 Cal. 4th at 1338 (Liu, J., concurring and dissenting) (citing *Williams*, 56 Cal. 4th at 698).

834 *Id*. at 1352.

835 *People v. Rhoades*, 8 Cal. 5th 393, 458 (2019) (Liu, J., dissenting).

836 GR 37(h).

837 In addition to these California state court judges, United States Supreme Court justices and other members of the bench have criticized *Batson* and its progeny. As discussed in Sections I.C.3 and III, Justice Marshall predicted that *Batson* would fail to achieve its objective: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished

only by eliminating peremptory challenges entirely." *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring); *id*. at 107 (citing Van Dyke, *supra* note 58, at 167-68 (proposing "tak[ing] away all peremptory challenges from the prosecution" whose duty it is to "see that the accused is tried by a fair, impartial and representative jury" instead of limiting the jury to those "approved . . . by the government's representative in court;" and noting that "good reasons exist for giving the defense peremptories.")). Justice Breyer embraced Justice Marshall's concerns in his concurring opinions in *Miller-El v. Dretke* and *Johnson v. California*, both decided in the same year. *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) ("I believe it necessary to reconsider *Batson's* test and the peremptory challenge system as a whole."); *id*. at 272 (discussing proposals to eliminate peremptory strikes); *Johnson v. California*, 545 U.S. 162, 173 (2005) (Breyer, J., concurring) (reiterating his position in *Miller-El v. Dretke*). In 2019, Iowa Supreme Court Justices Mark S. Cady and David Wiggins, writing separately, joined Justice Marshall's call to abolish peremptory challenges. *See State v. Veal*, 930 N.W.2d 319, 340 (2019) (Cady, J., concurring specially) ("[T]he solution in the future is to do away with the use of peremptory challenges."); *id.* (Wiggins, J., concurring in part and dissenting in part) ("I think it is time to abolish peremptory challenges in Iowa."). *See Flowers v. State*, 947 So. 2d 910, 937, 939 (Miss. 2007) (finding that "racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down," warranting reassessment of the *Batson* inquiry and peremptory challenges, and warning prosecutors that if they continue to violate *Batson*, changes are likely); *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124 (2017) (finding that "[t]wenty-six years later it is evident that *Batson*, like *Swain* before it, is failing" to eliminate racial discrimination in jury selection). *See also supra*, notes 88-89 (discussing the options the California Supreme Court considered in *Wheeler*).

838 *Rhoades,* 8 Cal. 5th at 459 (Liu, J., dissenting).

839 *Id*. at 456.

840 *Id*. at 469 (citing several state supreme court opinions and Washington Supreme Court General Rule 37).

841 *Id.* (citing *State v. Parker*, 836 S.W.2d 930, 939 (Mo. 1992)).

842 *Id*. at 469-70 (citing *Harris*, 57 Cal. 4th 804, 884 (2013) (Liu, J., concurring)).

843 *Id*. at 470.

844 *People v. Bryant*, 40 Cal. App. 5th 525, 548-49 (2019) (Humes, J., with Banke, J., concurring).

845 *See id*. at 548.

846 *Id*. at 544.

847 *Id*. at 545.

848 *Id*. at. 544.

849 *Id*. at 546 (internal citations and quotation marks omitted).

850 *Id*.

851 *Id*. at 545.

852 Page, *supra* note 303, at 246-51 (2005).

853 *Id*. at 247.

854 *See* Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. Marshall L. Rev. 1, 5, 45 (1994) (proposing the use of a half-and-half jury in "racially charged trials requiring a change of venue"); Derrick A. Bell, Jr., Race, Racism and American Law 273-74 (1980) (discussing race conscious selection and minimum number guarantees).

855 *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1698-99 (1985) (advocating for three same-race jurors in cases involving non-white defendants based on social psychological research indicating that this is the minimum number required to influence the remaining jurors).

856 *See generally Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1.*, 551 U.S. 701 (2007); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

857 Sommers & Norton, *supra* note 305, at 536.

858 Page, *supra* note 303, at 249 (citing Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 Stan. L. Rev. 781, 806-08 (1986) (providing a detailed description of the procedure of an affirmative selection system)); *see* Donna J. Meyer, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 Case W. Res. L. Rev. 251, 280-87 (1994) (describing a system called "peremptory inclusion" that allows defendants to use a challenge to secure a person's spot on the jury); Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. Chi. Legal F. 161, 171-74 (1998) (advocating for a system that gives each "litigant a fixed number of affirmative peremptory choices").

859 *See generally Parents Involved in Cmty. Sch.*, 551 U.S. 701; *Bakke*, 438 U.S. 265.

860 *See generally* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.-Kent L. Rev. 1179 (2003).

861 Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139, 1177 (1993) ("[T]ailored questionnaires can help the parties base their arguments for cause challenges and their exercise of peremptories on actual suspicion of race prejudice rather than simply on the color of the potential juror's skin."); Jean Montoya, *The Future of the Post-*Batson *Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. Mich. J. L. Reform 981, 1015-17 (1996) (describing a survey, which showed trial lawyers believe that voir dire by questionnaire is the best way to ensure fair and impartial juries); Sommers & Norton, *supra* note 305, at 535.

862 Sommers & Norton, *supra* note 305, at 536.

863 *Id*.

864 Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 Rev. Litig. 209, 308-09 (2003) (arguing that there should be a uniform rule providing that *Batson* violations are professional misconduct).

865 *Koo v. McBride*, 124 F.3d 869, 873 (7th Cir. 1997) (stating that granting the defendant additional peremptory challenges might be a remedy for a *Batson* violation); David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 Va. L. Rev. 811, 837 (1988).

866 Charles J. Ogletree, *Just Say No! A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1122 (1994).

867 In *Batson*, the Supreme Court expressed no "view on whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." 476 U.S. at 99 n.24. *See People v. Overby*, 124 Cal. App. 4th 1237, 1244-46 (2004) (concluding that defense counsel's request that a struck juror remain in the courtroom and statement of "submit" in response to reseating the struck juror waived any objection on appeal to the trial judge's use of an alternative remedy); *People v. Muhammad*, 108 Cal. App. 4th 313, 324-325 (2003) (overturning the trial court's monetary sanction against a prosecutor for improperly discriminating in the exercise of peremptory strikes only because of the trial court's failure to comply with the statutory provisions for imposing monetary sanctions under California Code of Civil Procedure section 177.5); *People v. Willis*, 27 Cal. 4th 811, 824 (2002) (modifying the decision in *Wheeler* to allow trial courts, with the express consent of the strike opponent, to adopt alternative measures short of

dismissal of the venire, such as reseating the struck jurors if they are available and imposing sanctions against the proponent of the strikes).

868 Page, *supra* note 303, at 253 (citing Ogletree, *supra* note 869, at 1117).

869 Professor Abbe Smith has called for an end to prosecutor peremptories in light of "the well-documented and longstanding abuse by prosecutors of peremptory challenges, the procedural asymmetry in our system of criminal justice, the different ethical roles of prosecutors and defenders, and the importance of 'buy-in' for criminal defendants." Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 Geo. J. Legal Ethics 1163, 1184 (2014). While the authors agree that Professor Smith's position is well-reasoned from both a legal history and constitutional rights perspective, they do not believe the proposal is likely to be adopted by a legislature or by the bench.

870 GR 37(h).

871 GR 37 Workgroup Final Report, *supra* note 154 at 1; *see also* Annie Sloan, "*What to do about* Batson?"*: Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Calif. L. Rev. 233, 244-53 (2020) (describing the process that led to the adoption of GR 37). Sloan notes that a plurality of the Washington Supreme Court called for meaningful *Batson* reform in a 2013 decision, *Saint v. Saintcalle*, 309 P.3d 326, 332-34 (Wash. 2013): "multiple members of the nine-justice Supreme Court expressed deep concerns that the overall *Batson* framework was not 'robust enough' to effectively combat race discrimination in jury selection." *Id.* at 245. In response to this "call to action" the ACLU drafted a new court rule, relying on "numerous studies and research identifying *Batson*'s flaws." *Id.* at 246-47. The rule eliminated *Batson*'s intentional discrimination requirement and listed presumptively invalid reasons for a peremptory strike. *Id.* at 247-48. Following a period of public comment on the proposed rule, the Washington Supreme Court convened a "workgroup" on the issue, "which included a broader array of perspectives, like those of prosecutors and additional judges." *Id.* at 250. The workgroup promulgated what is now GR 37 in April 2018 with the support of the original ACLU coalition. *Id.* at 253.

872 Dave Altimari, *State Supreme Court Calls for Commission to Study Whether Jury Selection System Is Unfair to Minorities,* Hartford Courant (Dec. 28, 2019), https://www.courant.com/news/connecticut/hc-news-supreme-court-jury-review-20191228-kg7iiay7ujfudifyeaw407inem-story.html.

873 GR 37(c)-(d).

874 *Id.* 37(f).

875 *Id.* 37(e).

876 *Id.* 37(h), (i).

877 *See* A. 3070, 2019-2020 Reg. Sess. (Cal. as amended, May 4, 2020), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3070 (Juries: Peremptory Challenges).

878 The Honorable Tani Cantil-Sakauye, Chief Justice, Cal. Supreme Court, State of the Judiciary, Address to a Joint Session of the California Legislature (Mar. 8, 2016), https://www.courts.ca.gov/34477.htm (transcript and video available on the California Courts website).

879 *Id.*

880 A. 242 (Cal. 2019) (codified at Cal. Bus. & Prof. Code § 6070.5; Cal. Gov't Code § 68088), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB242.

881 *Id.* § 1(a)(3).

882 *See* Bennett, *supra* note 294, at 150 (stating that "[j]udge-dominated voir dire and the *Batson* challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish"); Terry Carter, *Implicit Bias Is a Challenge Even for Judges*, A.B.A. J. (Aug. 5, 2016), https://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges (reporting on a program by the ABA's Judicial Division at the American Bar Association's 2016 annual meeting that addressed implicit bias among members of the judiciary); *Fighting Implicit Bias*, A.B.A., https://www.americanbar.org/groups/judicial/committees/fighting_implicit_bias/ (last visited May 4, 2020) (describing the American Bar Association's Joint Committee on Fighting Implicit Bias in the Justice System, which is chaired by the Hon. Bernice B. Donald and is publishing a book "on fighting implicit bias in the justice system"); Rachlinski et al., *supra* note 334, at 1221 (in a study co-authored by a California federal magistrate judge, finding that judges harbor implicit racial bias that can influence their judgment).

883 News Release, Supreme Court of Cal., Supreme Court Announces Jury Selection Work Group (Jan. 29, 2020), https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group.

884 *Id.*

885 *Judicial Council*, Cal. Ct., https://www.courts.ca.gov/policyadmin-jc.htm (last visited May 14, 2020).

886 *Advisory Bodies*, Cal. Ct., https://www.courts.ca.gov/advisorybodies.htm (last visited May 14, 2020).

887 *Rhoades*, 8 Cal. 5th at 470 (Liu, J., dissenting).

888 *See supra* note 885; *see generally* Research Working Grp. & Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623 (2012), http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_ 030111.pdf.

889 Pursuant to section 1239 of the California Penal Code, defendants sentenced to death in capital cases automatically appeal their conviction and death sentence to the California Supreme Court. We discuss the California Supreme Court's record in *Batson* cases in Section II.C.1. California has five appellate projects that oversee felony appeals. Each is a nonprofit office under contract with the appellate courts. *See Appellate Projects*, Cal. Ct., https://www.courts.ca.gov/13714.htm (last visited May 14, 2020). According to the directors of each appellate project, there is no central repository of trial court records or briefing in these cases. Information on file with the Berkeley Law Death Penalty Clinic.

890 *Depublication of California Court of Appeal Decisions: Rules for Publishing and Citing to Appellate Cases*, UCLA, Sch. of L. Hugh & Hazel Darling L. Libr., https://libguides.law.ucla.edu/depublication (last visited Apr. 27, 2020) ("In California, the rules regarding publication of appellate opinions is quite complex."). Ultimate authority to publish or depublish a court of appeal opinion is vested in the California Supreme Court. *See* Cal. R. Ct. 8.512 (2020), https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_512; 8.516, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_516; 8.1105(g), https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1105); 8.1110, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1110; 8.11120, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1120; 8.1125, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1125. Rule 8.1115 governs the citation of unpublished opinions, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1115. There is an extensive scholarly literature examining California's publication rules, including articles arguing that the rules permit the California Supreme Court to "set California law without actually hearing individual cases" by "chang[ing] what the law is by ordering an opinion published or depublished." Shawn J. Bayern, *Case Interpretation*, 36 Fla. St. U. L. Rev. 125, 154 (2009). *See* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loy. L.A. L. Rev. 1033 (1993) (criticizing the California Supreme Court's depublication authority as permitting it to "mak[e] judicial decisions disappear"); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process, 473, 486 & n.107 (2003) (detailing how "California . . . issues ninety-three percent of its court of appeals opinions 'unpublished' and refuses to allow their citation" and suggesting that the rule "may reflect habits of undue leisure on the part of the state's court of appeal justices."); Robert A. Mead, *Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed by Health Care Providers*, 37 Wm. Mitchell L. Rev. 206, 210, 265 (2010) (discussing how "California's appellate publication practices and the related prohibition on the citation of, or reliance upon, unpublished opinions interfere[s]" with the law's development in elder and depen-

dent adult abuse practice and proposes a general solution of permitting "lawyers, justices, and judges to openly read and cite unpublished decisions as persuasive authority but not controlling precedent"); Rafi Moghadam, *Judge Nullification: A Perception of Unpublished Opinions*, 62 Hastings L.J. 1397, 1397 (2011) (criticizing the California Supreme Court's approach as "a mechanism for questionable discrimination against unpublished decisions" that "exhibit[s] vibrant legal discourse"). While this scholarship pre-dates the California Supreme Court's recent amendments to the publication rules in 2016, the Court's minor changes do not address these scholars' broader critiques.

891 Because the data set consisted of courts of appeal opinions, a limitation of this study is the inability to count every peremptory challenge to which a *Batson* objection was made at trial. Appeals to the appellate courts from trial occur only following a conviction.

892 We use "cases" instead of "opinions" throughout the report, except where "opinions" was appropriate. The two are synonymous for purposes of the report.

893 Not every *Batson* objection made and adjudicated by the trial court is raised on appeal. The observations were limited to peremptory challenges that were made to which there was a *Batson* objection at trial, a ruling by the trial court, and a merits determination by the court of appeal.

894 In two cases, the appellate court identified the race of the struck jurors and the party (defense or prosecution) that made the objection, but did not provide the number of struck jurors.

895 The Westlaw search query was: "advanced: ("Batson/Wheeler" OR "Wheeler/Batson")."

896 Most appellate opinions are not published. *See* Cal. R. Ct. 8.1105; *see also supra* note 890. The study included published and unpublished opinions.

897 A single *Batson* objection is not necessarily equivalent to one peremptory challenge. Often, a single *Batson* objection is made in response to multiple strikes.

898 *See, e.g.*, Taeku Lee, *Between Social Theory and Social Science Practice*, *in* Measuring Identity: A Guide for Social Scientists 113, 140-44 (Rawi Ahdelal et al. eds., 2009) (noting both the acknowledgment of the social construction of race—"a social construct marked by fluidity, multiplicity, and contingency"—and the difference between how social theorists and social scientists measure race and ethnicity, and observing that "[t]his tension is further exacerbated by the gap between race or ethnicity as social theorists describe it (as a fluid and contingent social construction) and race or ethnicity as social scientists measure it (as a fixed and categorical observable reality)"); Pew Research Ctr., Multiracial in America: Proud, Diverse and Growing in Numbers (2015), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2015/06/2015-06-11_multiracial-in-america_final-updated.pdf ("Multiracial Americans are at the cutting edge of social and demographic change in the U.S. . . . and growing at a rate three times as fast as the population as a whole.").

899 The U.S. Census considers "Hispanic origin" as an "ethnicity" only. U.S. Census Bureau, Race & Ethnicity (2017), https://www.census.gov/mso/www/training/pdf/race-ethnicity-onepager.pdf. The California Supreme Court has long held that jurors who have a Spanish surname are "Latino" or "Hispanic" for purposes of determining whether they were excused by an impermissible peremptory challenge. *See, e.g.*, *People v. Davis*, 46 Cal. 4th 439, 584 (2009).

900 This group is broader than the U.S. Census's racial groups, which categorize individuals who are from or descendants of individuals from the Far East, Southeast Asia, or India as "Asian," and those who are from or descendants of individuals from Hawaii, Guam, Samoa, and the Pacific Islands as "Native Hawaiian or Other Pacific Islander." U.S. Census Bureau, *supra* note 899.

901 *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1243-44 (1991) ("[T]he experiences of women of color are frequently the product of intersecting patterns of racism and sexism. . . . Because of their intersectional identity as both women *and* of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both.").

902 GR 37(h), (i).

903 *Id.* 37(h).

904 *Id.* 37(i).

Professor Elisabeth Semel
esemel@law.berkeley.edu
tel: 510-642-0458

491 Simon Hall
Berkeley, CA 94720

Berkeley Law | Death Penalty Clinic

law.berkeley.edu/clinics/death-penalty-clinic

SUPREME COURT OF CALIFORNIA

350 McAllister Street
San Francisco, CA 94102

In *People v. Wheeler* (1978) 22 Cal.3d 258, this court held that racial discrimination in the exercise of peremptory challenges is unconstitutional — a conclusion subsequently embraced by the United States Supreme Court in *Batson v. Kentucky* (1986) 476 U.S. 79. Racial discrimination in the selection of jurors, *Batson* said, "harms not only the accused whose life or liberty they are summoned to try," but also "the excluded juror" who is denied an important opportunity to participate in civic life, as well as "the entire community" upon whose confidence the fairness of our justice system depends. This principle, which also applies to civil cases and extends to other forms of invidious discrimination, has been repeatedly affirmed by the high court and this court.

For more than 30 years, courts have applied the legal framework set forth in *Batson/Wheeler* for ferreting out impermissible discrimination in the use of peremptory challenges. In recent years, some states have adopted or begun to consider additional measures designed to address perceived shortcomings in the practical application of the *Batson* framework and to better ensure that juries represent a cross-section of their communities. Today we join this dialogue with the creation of the California Jury Selection Work Group.

The purpose of this work group is to undertake a thoughtful, inclusive study of how *Batson/Wheeler* operates in practice in California and whether modifications or additional measures are warranted to address impermissible discrimination against cognizable groups in jury selection. Key questions include but are not limited to the following:

- In light of the goal of eliminating improper discrimination in jury selection, does a purposeful discrimination standard impose an appropriate burden on litigants who attempt to show that a peremptory challenge was motivated by improper considerations or on advocates called upon to explain the basis for their peremptory challenges? What are the pros and cons of possible alternatives?

- To what extent does unconscious bias affect the jury selection process? Can this unconscious bias be effectively addressed in jury selection, and if so, how?

- Does allowing peremptory challenges based on a prospective juror's negative experiences or views of law enforcement or the justice system result in disproportionate exclusion of jurors of certain backgrounds? Does accepting other facially neutral grounds for peremptory challenges have such an effect? If so, how if at all should these practices be addressed?

- Do current standards of appellate review of peremptory challenges in California adequately serve the goals of *Batson/Wheeler* jurisprudence?

- Are there other impediments to eliminating impermissible discrimination in jury selection and better ensuring that juries represent a cross-section of their communities? If so, how can these impediments be addressed?

- What kinds of training or guidance would assist advocates and judges in promoting fairness in this area and in making a record that facilitates sound appellate review?

- Should the standard jury instructions that address bias be modified or supplemented to provide more guidance to jurors in addressing bias during the deliberation process?

In the coming weeks, the Chief Justice will appoint a diverse work group of stakeholders from across the state — including judges, prosecutors, defense counsel, and other practitioners in criminal and civil litigation — to study these questions through an inclusive process with opportunities for public input and participation.

California
LEGISLATIVE INFORM

BILL TEXT

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AB-3070 Juries: peremptory challenges.(2019-2020)

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AMENDED IN SENATE JULY 28, 2020

AMENDED IN SENATE JULY 08, 2020

AMENDED IN ASSEMBLY MAY 04, 2020

CALIFORNIA LEGISLATURE—2019–2020 REGULAR SESSION

ASSEMBLY BILL

NO. 3070

Introduced by Assembly Member Weber
(Principal coauthor: Assembly Member Rendon)
(Coauthors: Assembly Members Bonta, Gipson, Holden, Mark Stone, Ting, and

Wicks)
(Coauthor: Senator Wiener)

February 21, 2020

An act to add Section 231.7 to the Code of Civil Procedure, relating to juries.

LEGISLATIVE COUNSEL'S DIGEST

AB 3070, as amended, Weber. Juries: peremptory ~~challenges and challenges for cause.~~ *challenges.*

Existing law provides for the exclusion of a prospective juror from a trial jury by peremptory ~~challenge or challenge for cause.~~ *challenge.* Existing law prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased

merely because of the sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation of the prospective juror, or on similar grounds.

This bill would prohibit a party from using a peremptory challenge~~ or challenge for cause~~ to remove a prospective juror on the basis of the prospective juror's race,

ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups. The bill would allow a party, or the trial court on its own motion, to object to the use of a peremptory challenge~~ or challenge for cause~~ based on these criteria.~~ In the case of a peremptory challenge, upon~~ *Upon* objection, the bill would require the party exercising the challenge to state the reasons the peremptory

challenge has been exercised. ~~With respect to both peremptory challenges and challenges for cause, the~~ *The* bill would require the court to evaluate the reasons given, as specified, and, if the court grants the objection, would authorize the court to take certain actions, including, but not limited to, starting a new jury selection, declaring a mistrial at the request of the objecting party, seating the challenged juror, or providing another remedy as the court deems appropriate. The

bill would subject the denial of an objection to de novo review by an appellate court, as specified. The bill would specify that its provisions do not apply to civil cases.

DIGEST KEY

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

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BILL TEXT

THE PEOPLE OF THE STATE OF CALIFORNIA

DO ENACT AS FOLLOWS:

SECTION 1.

(a) It is the intent of the Legislature to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.

(b) The Legislature finds that peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the

existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination. In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful

discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.

(c) It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.

SEC. 2.

Section 231.7 is added to the Code of Civil Procedure, to read:

231.7.

(a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to

the improper use of a peremptory challenge under subdivision ~~(a) or the use of a challenge for cause under subdivision (e).~~ *(a).* After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is ~~sworn,~~ *impaneled,* unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d) (1) The court shall evaluate the reasons given to justify the peremptory challenge ~~or the use of a challenge for cause under subdivision (e)~~ in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall

not speculate on, or assume the existence of, other possible justifications for the use of the peremptory ~~challenge or the use of a challenge for cause under subdivision (e).~~ *challenge.* 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 in the use of the peremptory ~~challenge or the~~

~~use of a challenge for cause under subdivision (e),~~ *challenge,* then the objection shall be sustained. The court need not find purposeful discrimination to sustain the objection. The court shall explain *the reasons for* its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2) (A) For purposes of this section, an objectively reasonable person is aware that ~~implicit, institutional, and unconscious biases,~~ *unconscious bias,* in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a "substantial likelihood" ~~requires~~ *means* more than a mere possibility but less than a standard of ~~preponderance of the evidence.~~ *more likely than not.*

(C) For purposes of this section, "unconscious bias" includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, ~~are facts that may be a factor in the case.~~ *bear on the facts of the case to be tried.*

(C) The number and types of questions posed to the

prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge ~~or challenge for cause under subdivision (e)~~ engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge ~~or challenge for cause under subdivision (e)~~ asked different questions of the potential juror against whom the peremptory challenge ~~or challenge for cause under subdivision (e)~~ was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge ~~or challenge for cause under subdivision (e)~~ by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived

membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge~~ or challenge for cause under subdivision (e)~~ was contrary to or unsupported by the record.

(G) Whether the~~ party~~ *counsel or counsel's office exercising the challenge* has used peremptory challenges~~ or challenges for cause under subdivision (e)~~ disproportionately against a given race, ethnicity, gender, gender identity, sexual

orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the ~~party~~ *counsel or counsel's office* who made the challenge has a history of prior violations under Batson v. Kentucky (1986) 476 U.S. 79, People v. Wheeler (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge ~~or challenge for cause~~ for any of the following reasons is presumed to be invalid unless the party

exercising the peremptory challenge ~~or challenge for cause under this subdivision~~ can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of

members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror’s family member.

(12) A prospective juror’s apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the

same ~~protected~~ *cognizable* group as the challenged prospective juror, but were not the subject of a peremptory challenge ~~or challenge for cause under this subdivision~~ by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge ~~or challenge for cause under this subdivision~~ relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a

peremptory challenge 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.

~~(f)~~

(g) (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting ~~party, and the party~~ *party. Even with that*

confirmation, the counsel offering the reason ~~can justify~~ *shall explain* why the asserted demeanor, behavior, or manner in which the prospective juror answered questions ~~is relevant~~ *matters* to the case to be tried.

~~(g)~~

(h) Upon a court granting an objection to the improper exercise of a peremptory ~~challenge or challenge for cause under subdivision (e),~~ *challenge,* the

court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the ~~objecting party. After the jury has been impaneled in a criminal case, this remedy is available only to the defendant.~~ *defendant.*

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

~~(h)~~

(i) This section applies in all jury trials in which jury selection ~~has not been completed as of January 1, 2021.~~ *begins on or after April 1, 2021.*

~~(i)~~

(j) The denial of an objection made under this section shall be reviewed by the appellate court de ~~novo, except that~~ *novo, with* the trial court's express

factual findings ~~shall be~~ reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to

challenge similarly situated jurors who are not members of the same ~~protected~~ *cognizable* group as the challenged ~~juror.~~ *juror, regardless of whether the moving party made a comparative analysis argument in the trial court.* Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

~~(j)~~

(k) This section shall not apply to civil cases.

(l) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

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STATE OF CONNECTICUT *v.* EVAN JARON HOLMES (SC 20048)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

Convicted, after a jury trial, of the crimes of felony murder, home invasion, conspiracy to commit home invasion and criminal possession of a firearm, the defendant appealed to the Appellate Court, claiming that the trial court had improperly overruled his objection to the prosecutor's use of a peremptory challenge to excuse a prospective, African-American juror, W. During voir dire, the prosecutor questioned W, who previously had disclosed that he was employed as a social worker and performed volunteer work directly with prison inmates, regarding his interactions with the police and his opinions of the criminal justice system. In response, W indicated that he sometimes feared being stopped by the police while driving, he had family members who had been convicted of crimes and incarcerated, and he believed that certain groups of individuals are disproportionately convicted of crimes and receive disproportionate sentences. W further expressed that his concerns were largely informed by his life experiences as an African-American. In objecting to the prosecutor's peremptory challenge, defense counsel argued that it was in violation of the United States Supreme Court's decision in *Batson* v. *Kentucky* (476 U.S. 79), which prohibits a party from challenging potential jurors solely on account of their race. The prosecutor explained that the basis for the peremptory challenge was W's stated distrust of law enforcement and his concern about the fairness of the criminal justice system, as borne out by his life experiences. The prosecutor also noted that the peremptory challenge was not based on W's race but, rather, related only to the particular viewpoints that W had expressed. After the trial court overruled the defendant's *Batson* challenge, it excused W from the venire. The Appellate Court affirmed the trial court's judgment and, relying on *State* v. *King* (249 Conn. 645), concluded that the prosecutor's explanation of W's distrust of the police and concern regarding the fairness of the criminal justice system constituted a nondiscriminatory, race neutral reason for exercising the peremptory challenge. In so doing, the Appellate Court rejected the defendant's argument that the prosecutor's stated explanation was not race neutral because it had a disproportionate impact on African-Americans. The Appellate Court further concluded that there was no evidence that the prosecutor's explanation was a pretext for intentional discrimination. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court incorrectly concluded that the trial court had properly denied his *Batson* challenge and that this court should overrule *King* and its progeny and hold that distrust of the police and concern regarding the fairness of the criminal justice are not race neutral reasons for exercising a peremptory challenge in light of the disparate impact on prospective jurors of minority races. *Held*:

1. The Appellate Court properly upheld the trial court's rejection of the defendant's *Batson* challenge, and this court declined the defendant's request to overrule *King* and its progeny establishing that distrust of the police and concern regarding the fairness of the criminal justice are race neutral reasons for exercising a peremptory challenge: this court's holdings in *King* and its progeny remain consistent with federal constitutional law, which was the sole basis for the defendant's claim on appeal, and, pursuant to federal constitutional law, the distrust of law enforcement or the criminal justice system is a race neutral reason for exercising a peremptory challenge; in the present case, the prosecutor's proffered explanation for striking W from the jury was facially race neutral as a matter of law, even if it had a disparate impact on minority jurors, who are more likely to have negative interactions with the police or concerns regarding the fairness of the criminal justice system, because it was based not on W's race but, rather, on the viewpoints that he espoused, which may be shared by whites and minorities alike, and, because the

defendant did not challenge on appeal the Appellate Court's conclusion that the trial court correctly determined that the prosecutor's proffered explanation for the peremptory strike was not a pretext for purposeful discrimination, the Appellate Court properly affirmed the judgment of conviction.

2. In light of systemic concerns identified by this court regarding the failure of *Batson* to address the effects of implicit bias and the disparate impact that certain race neutral explanations for peremptory challenges have on minority jurors, this court announced that it would convene a Jury Selection Task Force, appointed by the Chief Justice and composed of relevant stakeholders in the criminal justice and civil litigation communities, to study the issue of racial discrimination in the selection of juries, to consider measures intended to promote the selection of diverse jury panels, and to propose necessary changes, to be implemented by court rule or legislation, to the jury selection process in Connecticut.

(*Two justices concurring separately in one opinion*)

Argued January 18—officially released December 24, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of New London, where the first five counts were tried to the jury before *Jongbloed*, *J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm, felony murder, home invasion, conspiracy to commit home invasion, and burglary in the first degree; thereafter, the charge of criminal possession of a firearm was tried to the court; judgment of guilty; subsequently, the court vacated the verdict as to the lesser included offense of manslaughter in the first degree with a firearm and burglary in the first degree, and rendered judgment of guilty of felony murder, home invasion, conspiracy to commit home invasion, and criminal possession of a firearm, from which the defendant appealed to this court; thereafter, the appeal was transferred to the Appellate Court, *Prescott* and *Beach*, *Js.*, with *Lavine*, *J.*, concurring, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

Alan Jay Black, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Paul J. Narducci*, senior assistant state's attorney, and, on the brief, *Michael L. Regan*, state's attorney, for the appellee (state).

ROBINSON, C. J. From its inception, the United States Supreme Court's landmark decision in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors.[1] Consistent with these long-standing criticisms of *Batson*, the defendant, Evan Jaron Holmes, asks us in this certified appeal[2] to overrule the line of cases in which this court held that a prospective juror's negative views about the police and the fairness of the criminal justice system constitute a race neutral reason for the use of a peremptory challenge to strike that juror. See, e.g., *State* v. *King*, 249 Conn. 645, 664–67, 735 A.2d 267 (1999). We conclude that the challenged line of cases, on which the Appellate Court relied in upholding the defendant's conviction of felony murder on the basis of its rejection of his *Batson* claim arising from the prosecutor's use of a peremptory challenge during jury selection; see *State* v. *Holmes*, 176 Conn. App. 156, 175–77, 169 A.3d 264 (2017); remains consistent with the federal constitutional case law that provides the sole basis for the *Batson* claim. Accordingly, we affirm the judgment of the Appellate Court in this case but 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.

The record and the Appellate Court's opinion reveal the following relevant facts and procedural history. In connection with a shooting at an apartment in New London,[3] the state charged the defendant with numerous offenses, including felony murder in violation of General Statutes § 53a-54c, and the defendant elected a jury trial.[4] "On the first day of jury selection, defense counsel noted that the entire venire panel appeared to be 'white Caucasian' and that every prospective juror who had completed a jury questionnaire had indicated that they were either white or Caucasian, or had not indicated a race or ethnicity.[5]

"On the second day of jury selection, only one prospective juror had indicated on the questionnaire that he or she was African-American. During the voir dire examination of one venireperson, W.T.,[6] he stated to defense counsel that he was African-American. W.T. indicated that he had obtained a master's degree in social work from the University of Connecticut and currently was employed by the state . . . as a supervisory social worker with the Department of Children and Families.

"He also disclosed that he performed volunteer work for the Department of Correction and had worked directly with inmates. When asked by defense counsel whether that work might affect him as a juror, W.T. responded: 'Because I work with, like I say, inmates, and also my work, I do—I mean, you see a lot of different things and you see a lot of sad situations. I'm sure as a professional and because I work with people who've been through a lot of stuff, you know, I'm sure I have an understanding of what they're doing. And also, just—just in the criminal justice system in general, I know how sometimes people are not, you know, given a fair trial or they [maybe] disproportionately have to go to jail and different things of that nature. So, part of my whole experience is as an African-American, as an American and also studying these situations, I know that there's a lot of issues [going] on in various systems. The criminal justice system, the educational system and various systems, but people are not fairly treated, so I know that much. But I don't use that, you know, I can—I could make a professional—and I think keep my composure and do my job just like—as a professional, as I work—even as I do volunteer work, but you have to know the reality in life as well, though.' In response to a subsequent question by defense counsel regarding whether, in light of his life experiences, he could be fair to both sides in the case, W.T. stated that he could.

"During the state's voir dire examination of W.T., the following exchange occurred:

" '[The Prosecutor]: Now, you've obviously had a little more dealing with the court systems than most—most people that we see in through here. Have you formulated any opinions about the criminal justice system based on your experiences? Is it too lenient, too stringent, it works, it doesn't work; any feeling about that?

" '[W.T.]: And like I said, probably already share[d] too much stuff about—that talk about in terms of I have seen people, have had family members [who] went to prison before.

" '[The Prosecutor]: Right.

" '[W.T.]: And I just think—I think that's why I became a social worker, because I wanted to make a difference, and that's why I have been doing mentoring programs—

" '[The Prosecutor]: Yep.

" '[W.T.]: —try[ing] to help young people so they won't get into trouble. So, I meant the system, all various systems, there's a lot of discrimination [that] still goes out. Even today, ladies are still not getting equal pay. So, it's a lot. We've come a long way, but we have a long way to go.

" '[The Prosecutor]: Right.

" '[W.T.]: But I think I can make—I could keep the facts and be able to look at the facts of the case and judge by the facts.

" '[The Prosecutor]: . . . We need to know how you're feeling, so we can make the appropriate assessment and you can make the appropriate assessment. . . . I think that it's not a perfect system, but it's improving every day, and [there are] not as many systems that I can think of that are, any—come anywhere close. One of the concerns that people may have is, jurors who are in the—using their time as a juror to try to fix the system. You indicated, and I think you said, that you would listen to the evidence and decide it on the evidence and you wouldn't let any concerns that you had filter in.

" '[W.T.]: That's correct.

" '[The Prosecutor]: Fair to say?

" '[W.T.]: That's correct.

" '[The Prosecutor]: Okay. And so . . . you would sit and listen to what all the evidence is and make a decision based on the evidence?

" '[W.T.]: That's correct. . . .

" '[The Prosecutor]: Okay. With respect to that, as much as you know about those situations, were you satisfied with the way the police reacted to your family . . . or friend being the victim of a crime?

" '[W.T.]: Sometimes and sometimes not.

" '[The Prosecutor]: Okay.

" '[W.T.]: So-so.

" '[The Prosecutor]: Fair to say that it's an individual situation and that the police have been—have acted in a way that was satisfactory toward your family members or friends, and in other situations they weren't satisfied with what the police did?

" '[W.T.]: That's correct.

" '[The Prosecutor]: Okay. Had you had any interactions with the police in any respect in which you developed an—either a strong, favorable impression or an unfavorable impression about the police and the way they treated you in any situation, speeding tickets, calling up to complain about [a] noisy neighbor, something with work?

" '[W.T.]: I'm, like—just growing up in this society, I fear, you know, I fear [for] my life. I got a new car, I feared that, you know, I might get stopped, you know, for being black, you know. So, you know, that's concerning and sometimes I get afraid—even me, you know, I—when I see the police in back of me, I wonder, you know, if I'm going to be stopped.

" '[The Prosecutor]: Okay. Now with—with respect to that, there will probably be police officers who will be testifying here, and the judge will tell you that [you] can't give a police officer more credibility merely because [he or she is] a police officer. Conversely, though, they don't get less credibility merely [because] they are police officers. They are to be treated like anybody else. Would you have any difficulty following the judge's instructions concerning that?

" '[W.T.]: No, I wouldn't.

" '[The Prosecutor]: Okay. And I can appreciate what you're saying. Obviously, I haven't been in that—in your shoes. I haven't been in your situation, nor do we ask the jury to put themselves in the shoes of either the police or a particular defendant. We can't ask you to do that. But having now life's experience, is that something that you think you can put aside and decide the evidence based on everything that's presented to you, or is there some concern that you might have that you might not be able to do that?

" '[W.T.]: No, I will be able to because another thing, too, is, I know good police officers who are—who are good people, nice people, mentors who work in the community. So—so, yes, I'd be able to.

" '[The Prosecutor]: Okay. Okay. And have you had . . . positive experiences with the police as well?

" '[W.T.]: Yes.

" '[The Prosecutor]: Okay. So, I guess like anybody else, there are bad lawyers and there are good lawyers. There are bad social workers, there are good social workers. . . . But what I'm driving at is, we make an individual assessment based on what we hear and what we see and what we listen to. And that is what we're going to ask you to do if you're a juror.

" '[W.T.]: Yes.

" '[The Prosecutor]: We want to make sure you don't carry in any preconceived notions one way or the other.

" '[W.T.]: Yes.

" '[The Prosecutor]: No problems with that?

" '[W.T.]: No problem.

" '[The Prosecutor]: Okay. We can count on your word on that, then?

" '[W.T.]: That's right.

" '[The Prosecutor]: Okay. I asked about being the victim of a crime and your family member. The flip side to that, have you, any member of your family or any close personal friends ever been either accused or ever convicted of crimes?

" '[W.T.]: Yes. I have family members who've been

in—who served time in jail.

" '[The Prosecutor]: Okay. This obviously is a crime of violence. Any—any family members who have been convicted of crimes of violence?

" '[W.T.]: No. . . .

" '[The Prosecutor]: You mentioned that your family members have—have served time. With respect to that, were—did you develop any feelings about the way the police had treated your family members in those situations?

" '[W.T.]: Well, I think the—like I told you earlier, my life experiences living in this world—

" '[The Prosecutor]: Right.

" '[W.T.]: —you see that things are not fair. And then you—I mean, you—you experience things, you know, and you see things happen. And some things are not fair, some things not—not all people are the same, all police are not bad or, like, you know, just like you said everybody, but when you see firsthand your own family members, then you experience something a little bit different.

" '[The Prosecutor]: Of course.

" '[W.T.]: Other people who, you know, so—

" '[The Prosecutor]: Of course. And I guess it's kind of tough, because I—you know, I could ask you questions all day long and I'm not going to get to know you as well [as] you know yourself. But there's a difference, I think, between I'm upset that my family member had to go through this versus I'm upset that the police treated my family member in such a way. Do you understand the distinction I'm trying to make, that you're not satisfied that your family member ended up in prison versus I'm not satisfied that they were treated properly by either the court system or by the police. There's a difference, and I'm not sure I'm explaining it very well.

" '[W.T.]: Are you saying more, like, for instance, like, someone may have gone to jail because they did something wrong—

" '[The Prosecutor]: Right.

" '[W.T.]: —and they had to pay the consequences.

" '[The Prosecutor]: Right. And you know, like that, but—

" '[W.T.]: So—exactly. You have to—even if it's your family member or not, you did something wrong, you need to pay the consequences.

" '[The Prosecutor]: Right.

" '[W.T.]: You need to pay the consequences for whatever you've done wrong, you know.

" '[The Prosecutor]: Right.'

"Following the voir dire examination, defense counsel stated that W.T. was acceptable to the defendant. The [prosecutor], however, exercised a peremptory challenge and asked that W.T. be excused." (Footnotes added.) *State* v. *Holmes*, supra, 176 Conn. App. 162–69.

"[Defense counsel] immediately raised a *Batson* objection to the [prosecutor's] use of a peremptory challenge, citing the fact that W.T. was the first African-American venireperson to be examined and that, in essence, W.T. had assured the court and the [prosecutor] that, regardless of his views about the criminal justice system or the police, he could be a fair and impartial juror." (Footnote omitted.) Id., 169. In his argument, defense counsel compared W.T.'s assurances that he could be fair with the voir dire of another member of the venire, a young white man from New London, who had "said that he couldn't be fair because of incidents with . . . police officers," observing that, "if he had been black or white, the kid had to go. You know, [there are] clearly some people [who] can't be jurors. I don't see why [W.T.] shouldn't be seated."

"The [prosecutor] then responded: 'I understand exactly where [defense counsel] is coming from, would agree with him for the most part with the exception of, I do believe that there are race neutral reasons for this. It was somewhat of a struggle for me, but I looked at some of the answers. And even though he responded favorably after further questioning, the concerns that I did have [were] the—the comments that—about [a] disproportionate amount of people being sent to jail, disproportionate amount of jail time, the fact that he's had family members who have been convicted and have served time, the fact that he works to rehabilitate people. And none of this is per se bad, but I think in the context of this particular case, it's important, it's race neutral. If we had a Caucasian who was in the same situation, the exercising of a peremptory challenge would be the same, I think.

" 'Additionally, the fact that he did mention . . . his concern about and his life's experience about driving and seeing a police officer behind him and his concern about police officers. Yes, he said that there are other police officers who are good and people can be good, but there is that life's experience that I would submit would make it difficult for him to be fair and impartial in this particular—in this particular case.

" 'Again, I understand exactly what [defense counsel] is saying. I believe that they are race neutral reasons, and I was exercising the peremptory based on those race neutral reasons.'

"The court then asked for argument . . . and defense counsel gave the following response: 'With respect to being, as an African-American male, fearful when the police are behind you, I mean, that's just, you

know, something that [the prosecutor] and I never have had to deal with . . . but if this gentleman sitting next [to] me is entitled to a jury of his peers, we've picked three white people already. We've accepted them. I mean, isn't he—and that's a common complaint by African-American people, that they feel that they get pulled over too often, and there are probably studies that say it's disproportionate. So, that particular reason does seem to me to be race based . . . . It was [W.T.'s] view and, I mean, again, that's—he's entitled to a jury of his peers, and we get nobody who feels that way or has those thoughts is not really his peers because that's probably the experience or experiences [that] a lot of African-Americans go through.'

"The prosecutor, when asked if he wanted to argue further, stated: 'Only briefly, and maybe it's a matter of semantics. I think [*Batson*] is, oh, I see an African-American gentleman, I see an Asian-American, I see a Hispanic, I'm going to excuse them. If an African-American comes in with a distrust of the police and will not listen to a police officer and says he will not listen to a police officer, that isn't a challenge based on that person's race or ethnicity; it's a challenge based on that person's personal views.

" 'If a white—a Caucasian person came in and said, I don't like being followed by the cops because I [have seen] a number of cops punch friends of mine in the face, it's not because he is a Caucasian, it's because of life's experiences. And I think that's what I would be arguing, that the comments that were made were not because of his ethnicity or his race, but rather his—his expressed opinions. And I think it's a distinction, I think it's a legitimate distinction, but I defer to Your Honor with respect to this.' " Id., 169–71.

The trial court then denied the defendant's *Batson* challenge, comparing W.T. to the white juror who previously had been excused because of his negative comments about the police, and stating: "I do think that, in both situations, it's an issue with regard to negative contact with the police and that, I believe, has been found to be a legitimate race neutral reason for exercising [a] peremptory challenge. So, under all the circumstances, I am going to find that the [prosecutor] has given a race neutral reason for exercising a peremptory challenge in this case, and I'm going to overrule the *Batson* challenge."[7]

"Throughout the remainder of the voir dire process, the [prosecutor] asked a uniform set of questions of all jurors. Furthermore, three African-American jurors were selected to serve in this case—two as regular jurors and one as an alternate juror." Id., 171.

After a ten day trial, the jury returned a verdict of guilty of, inter alia, felony murder. The trial court subsequently rendered a judgment of conviction and sen-

tenced the defendant to a total effective sentence of seventy years imprisonment.[8]

The defendant appealed from the judgment of conviction to the Appellate Court, claiming that the trial court improperly overruled his *Batson* objection to the prosecutor's use of a peremptory challenge on W.T.[9] The Appellate Court relied on this court's decisions in *State* v. *Edwards*, 314 Conn. 465, 102 A.3d 52 (2014), and *State* v. *King*, supra, 249 Conn. 645, among other cases, and concluded that "[d]istrust of the police or concerns regarding the fairness of the criminal justice system are viewpoints that may be shared by whites and nonwhites alike. In other words, the prosecutor's questions regarding potential jurors' attitudes about the police and the criminal justice system are likely to divide jurors into two potential categories: (1) those who have generally positive views about the police and our criminal justice system, and (2) those who have generally negative views of the police or concerns regarding the criminal justice system." *State* v. *Holmes*, supra, 176 Conn. App. 175–76. The Appellate Court further observed that "the prosecutor . . . also did not refer to race in his explanation except as necessary to respond to the *Batson* challenge" and that Connecticut case law, including this court's decisions in *State* v. *King*, supra, 644–64, *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999), and *State* v. *Hinton*, 227 Conn. 301, 327, 630 A.2d 593 (1993), supported the proposition that "such explanations are facially neutral." *State* v. *Holmes*, supra, 176; see id., 180 (emphasizing that, as intermediate appellate court, it was bound by *King*).

The Appellate Court rejected the defendant's "disproportionate impact" argument, namely, that "resentment of police and distrust of the criminal justice system are not racially neutral justifications for exercising a peremptory challenge because there is a much higher prevalence of such beliefs among African-Americans," as not legally cognizable under the second step of the *Batson* rubric, which requires only a facially valid explanation. Id., 177. The Appellate Court further concluded that there was no evidence that the prosecutor had used W.T.'s distrust of the criminal justice system as a pretext for intentional discrimination under *Batson*'s third step.[10] Id., 179; see id., 182 (emphasizing that prosecutor was not required to accept at "face value" W.T.'s assurances that, "despite his expressed concerns and fears, he believed that he could follow the court's instructions and act as an impartial juror"). Accordingly, the Appellate Court "conclude[d] that the court [correctly] determined that the [prosecutor's] use of [a] peremptory challenge to exclude W.T. from the jury was not tainted by purposeful racial discrimination, and, therefore, it properly denied the defendant's *Batson* challenge."[11] Id., 182. The Appellate Court unanimously affirmed the judgment of conviction.[12] Id., 192.

This certified appeal followed. See footnote 2 of this opinion.

I

WHETHER FEAR OR DISTRUST OF LAW ENFORCEMENT IS A RACE NEUTRAL REASON FOR A PEREMPTORY CHALLENGE UNDER *BATSON*

On appeal, the defendant urges us to modify or overrule *State* v. *King*, supra, 249 Conn. 645, and hold that fear or distrust of law enforcement is not a race neutral reason for the use of a peremptory challenge "[b]ecause it is most commonly minority races that possess such a fear . . . ." The defendant emphasizes that W.T.'s "general concerns for his safety and equality as an African-American," on which the prosecutor relied as a race neutral explanation, are neither "unique to W.T. as an individual nor . . . a direct reflection of his personal experiences but, rather, a well understood reality to the majority of African-Americans. As a result, if the explanation provided by the [prosecutor] for [his] challenge of W.T. is to be considered by the courts as race neutral, it could be used as a reason for excluding a [large number] of potential African-American venirepersons. It would be difficult to maintain acceptance of this reason as race neutral . . . ." The defendant relies on the authorities cited in Judge Lavine's concurring opinion in the Appellate Court; see footnote 12 of this opinion; and emphasizes the need for courts to be vigilant in guarding against racial discrimination in jury selection given the effects of implicit bias, disparate impact, and the relative ease by which a prosecutor can proffer a racially neutral explanation in defense of a *Batson* challenge. The defendant further argues that "[a]ny implicit racial bias housed by the [prosecutor] in this case was certainly inflated by his knowledge of W.T.'s employment, which he could have perceived, when considered alongside knowledge of W.T.'s race, to be a sign of W.T.'s 'negative' opinions of law enforcement."

In response, the state relies on *Hernandez* v. *New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), *State* v. *Gould*, 322 Conn. 519, 142 A.3d 253 (2016), and *State* v. *Edwards*, supra, 314 Conn. 465, to contend that the Appellate Court properly upheld the trial court's rejection of the *Batson* challenge because disparate impact and unconscious bias claims are not cognizable under the second step of the *Batson* analysis; instead, "discriminatory intent or purpose . . . is discerned under the third step of *Batson* based [on] 'an assessment of all the circumstances' and not simply on the basis of disparate impact alone." Relying on *State* v. *Hodge*, supra, 248 Conn. 231, and *State* v. *Smith*, 222 Conn. 1, 13–15, 608 A.2d 63 (1992), among other cases, the state also argues that fear or distrust of the police is a race neutral explanation as a matter of law because

it is a viewpoint that may be shared by whites and minorities alike. The state further argues that this is not an appropriate case in which to overrule or modify *King* because the record demonstrates that the prosecutor's questioning of all members of the venire was uniform, and, of the at least four African-American members of the venire, W.T. was the only one who expressed a negative view of the police and the only one removed.[13] We agree with the state and conclude that the Appellate Court properly upheld the trial court's rejection of the defendant's *Batson* challenge.

The framework under which we consider *Batson* claims is comprehensively set forth in *State* v. *Edwards*, supra, 314 Conn. 465. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our constitutional and statutory law permit each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. . . .

"Peremptory challenges are deeply rooted in our nation's jurisprudence and serve as one [state created] means to the constitutional end of an impartial jury and a fair trial. . . . [S]uch challenges generally may be based on subjective as well as objective criteria . . . . Nevertheless, [i]n *Batson* [v. *Kentucky*, supra, 476 U.S. 79] . . . the United States Supreme Court recognized that a claim of purposeful racial discrimination on the part of the prosecution in selecting a jury raises constitutional questions of the utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . The court concluded that [a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his [or her] view concerning the outcome of the case to be tried . . . the [e]qual [p]rotection [c]lause forbids [a party] to challenge potential jurors solely on account of their race . . . .[14]

"Under Connecticut law, a *Batson* inquiry involves three steps.[15] First, a party must assert a *Batson* claim

. . . . [Second] the [opposing party] must advance a neutral explanation for the venireperson's removal. . . . In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the [e]qual [p]rotection [c]lause as a matter of law. . . . At this stage, the court does not evaluate the persuasiveness or plausibility of the proffered explanation but, rather, determines only its facial validity—that is, whether the reason on its face, is based on something other than the race of the juror. . . . Thus, even if the [s]tate produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three. . . .

"In the third step, the burden shifts to the party asserting the *Batson* objection to demonstrate that the [opposing party's] articulated reasons are insufficient or pretextual. . . . In evaluating pretext, the court must assess the persuasiveness of the proffered explanation and whether the party exercising the challenge was, in fact, motivated by race. . . . Thus, although an improbable explanation might pass muster under the second step, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination at the third stage of the inquiry. . . .

"We have identified several specific factors that may indicate that [a party's removal] of a venireperson through a peremptory challenge was . . . motivated [by race]. These include, but are not limited to: (1) [t]he reasons given for the challenge were not related to the trial of the case . . . (2) the [party exercising the peremptory strike] failed to question the challenged juror or only questioned him or her in a perfunctory manner . . . (3) prospective jurors of one race . . . were asked a question to elicit a particular response that was not asked of other jurors . . . (4) persons with the same or similar characteristics but not the same race . . . as the challenged juror were not struck . . . (5) the [party exercising the peremptory strike] advanced an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically . . . and (6) the [party exercising the peremptory strike] used a disproportionate number of peremptory challenges to exclude members of one race . . . .

"In deciding the ultimate issue of discriminatory intent, the [court] is entitled to assess each explanation in light of all the other evidence relevant to [a party's] intent. The [court] may think a dubious explanation undermines the bona fides of other explanations or may think that the sound explanations dispel the doubt raised by a questionable one. As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances.

. . . Ultimately, the party asserting the *Batson* claim carries the . . . burden of persuading the trial court, by a preponderance of the evidence, that the jury selection process in his or her particular case was tainted by purposeful discrimination." (Citations omitted; footnote added; footnote altered; internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 483–86; see also Conn. Const., art. I, § 19, as amended by art. IV of the amendments to the constitution; General Statutes § 54-82f; Practice Book § 42-12.

With respect to appellate review of *Batson* claims, the "second step of the *Batson* inquiry involves a determination of whether the party's proffered explanation is facially race neutral and, thus, is a question of law. . . . Because this inquiry involves a matter of law, we exercise plenary review." (Citations omitted.) *State* v. *Edwards*, supra, 314 Conn. 487.

"The third *Batson* step, however, requires the court to determine if the prosecutor's proffered race neutral explanation is pretextual. . . . Deference [to the trial court's findings of credibility] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. . . . Whether pretext exists is a factual question, and, therefore, we shall not disturb the trial court's finding unless it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) Id., 489–90.

We understand the defendant's claims in this case, as clarified at oral argument before this court, to be limited to the second step of *Batson*, namely, to contend that fear or distrust of the police is not a race neutral reason for the exclusion of jurors as a matter of federal constitutional law[16] given its disparate effect on minority jurors. The defendant acknowledges that this argument requires us to overrule, or at the very least strictly limit, a line of Connecticut cases. See, e.g., *State* v. *King*, supra, 249 Conn. 666 (concluding that prosecutor's reasons for striking juror were "not motivated by discriminatory considerations" because "it was reasonable for the prosecutor to conclude that [the juror's] concerns about the fairness of the criminal justice system might make it difficult for him to view the state's case with complete objectivity" and that rejection of juror's "employment applications [by] two law enforcement agencies . . . gave rise to a legitimate concern that he might harbor some resentment toward the police and the prosecuting authorities"); *State* v. *Hodge*, supra, 248 Conn. 231 ("[The prospective juror] testified that her son, brother and cousin each had a prior arrest record and that her son had been prosecuted by the New Haven office of the state's attorney, the same office involved in prosecuting the present case. In addition, [she] characterized her cousin's treatment at the hands of the prosecutor who handled his case as unfair.");

State v. *Smith*, supra, 222 Conn. 14 (concluding that exclusion of juror with arrest record was racially neutral because "[p]rosecutors commonly seek to exclude from juries all individuals, whatever their race, who have had negative encounters with the police because they fear that such people will be biased against the government"); *State* v. *Jackson*, 73 Conn. App. 338, 350–51, 808 A.2d 388 (rejecting *Batson* challenge to peremptory strike of African-American juror who "had some relatives that had some general contact with New Haven police officers and had been involved in narcotics, and [whose] relatives have been in court," because defendant's *Batson* argument "rested solely on the disproportionate impact that the race neutral explanations the state provided could have on inner-city black males," and "[p]roof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause" [internal quotation marks omitted]), cert. denied, 262 Conn. 929, 814 A.2d 381 (2002), and cert. denied, 262 Conn. 930, 814 A.2d 381 (2002); *State* v. *Morales*, 71 Conn. App. 790, 807, 804 A.2d 902 (concluding that prospective juror's "negative opinion concerning police performance, especially with respect to drug related crime," was "a valid, nondiscriminatory reason" for excusing him given "the state's considerable dependency on police testimony . . . and the fact that the crime charged was drug related," and prosecutor was not bound to accept his statement that "he would not allow those considerations to affect his impartiality as a juror"), cert. denied, 262 Conn. 902, 810 A.2d 270 (2002); see also *State* v. *Hinton*, supra, 227 Conn. 327–28 (prospective juror's stated "sympathy to African-Americans whom she perceived were treated unfairly by the criminal justice system," as well as her exposure to pretrial media publicity and fact that she lived near crime scene, were legitimate race neutral reasons for her exclusion and not pretextual).

The defendant's disparate impact argument is foreclosed as a matter of federal constitutional law by the United States Supreme Court's decision in *Hernandez* v. *New York*, supra, 500 U.S. 352. In *Hernandez*, the United States Supreme Court concluded that a prosecutor had not violated *Batson* by using peremptory challenges to exclude Latino jurors by reason of their ethnicity when he offered as a race neutral explanation his concern that bilingual jurors might have difficulty accepting the court interpreter's official translation of multiple witnesses' testimony given in Spanish. Id., 357–58. In so concluding, the Supreme Court rejected the argument that the prosecutor's reasons, if assumed to be true, were not race neutral and thus violated the equal protection clause as a matter of law because of their disproportionate impact on Latino jurors. See id., 362–63. The court relied on "the fundamental principle that official action will not be held unconstitutional solely because it results in a racially disproportionate

impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause. . . . Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the [decision maker] . . . selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (Citations omitted; internal quotation marks omitted.) Id., 359–60, quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). The Supreme Court stated that a "neutral explanation in the context of [its] analysis . . . means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez* v. *New York*, supra, 360. Noting that the prosecutor also had relied on the prospective jurors' demeanor and his assessment of their willingness to accept the official translation relative to other bilingual jurors, the court observed that "[e]ach category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a per se violation of the [e]qual [p]rotection [c]lause." Id., 361.

The Supreme Court emphasized, however, that disparate impact is not completely irrelevant under *Batson*. Instead, "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, but it will not be conclusive in the preliminary [race neutrality] step of the *Batson* inquiry. An argument relating to the impact of a classification does not alone show its purpose. . . . Equal protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality. Nothing in the prosecutor's explanation shows that he chose to exclude jurors who hesitated in answering questions about following the interpreter *because* he wanted to prevent bilingual Latinos from serving on the jury." (Citation omitted; emphasis in original.) Id., 362. After analyzing the record under the third step of *Batson*, the Supreme Court concluded that the reason was not a pretext for intentional discrimination, deferring to the state trial judge's factual finding that the prosecutor had not used that reason as a pretext for intentional discrimination. Id., 363–64.

We have relied on *Hernandez* on multiple occasions to reject claims that a prosecutor's explanation was not

race neutral as a matter of law under the second step of *Batson* because of its claimed disparate impact on minority groups. Most recently, in *State* v. *Edwards*, supra, 314 Conn. 465, we rejected a defendant's claim that a prospective juror's racial self-identification on the juror questionnaire as "human," which the prosecutor offered as a race neutral explanation in response to the defendant's *Batson* challenge, is "a proxy for race, and, thus, the court should find discriminatory intent inherent in the prosecutor's explanation"; id., 490; because "a racial minority is more likely to identify himself or herself as an 'unusual' race, and, thus, the prosecutor's proffered reason is inherently discriminatory. This argument is, in essence, a disparate impact argument, which is not dispositive of the issue of race neutrality." Id., 492. Turning to the third step of *Batson*, we considered disparate impact as a possible indicator of pretext, but we ultimately determined that there was "insufficient evidence to find any sort of disparate impact from the prosecutor's proffered explanation," given that the social science studies proffered by the defendant proved "only that racial minorities are more likely to self-identify in creative and unusual ways, not that these same individuals would write an unusual answer in an official document. Furthermore, the prosecutor's proffered explanation related to unusual answers in the questionnaire generally, not to the race line specifically." Id., 496–97; see id., 497 (noting that "a policy of excluding all individuals who provide an answer other than the usual answer to the question of race, i.e., 'Caucasian,' 'African-American,' or other [well known] races, 'without regard to the particular circumstances of the trial or the individual responses of the [potential] jurors, may be found by the trial [court] to be a pretext for racial discrimination' "). In *State* v. *Hinton*, supra, 227 Conn. 329–31, this court rejected a state constitutional challenge based on the disparate racial impact of prospective jurors' residency near the crime scene, but we expressed caution about the possible pretextual effect of this explanation should it be left "unscrutinized" by the trial court. Cf. *State* v. *Gould*, supra, 322 Conn. 533–34 (erroneous removal of juror for cause based on judge's misperception of his English language competency did not require automatic reversal under *Batson* because there was no claim of purposeful discrimination, and "the specter of implied or unconscious bias . . . finds no support in *Batson* or its progeny").

Given the breadth of the United States Supreme Court's decision in *Hernandez*, it is not surprising that the defendant has not cited any case law for the proposition that distrust of law enforcement or the criminal justice system is not a race neutral reason under *Batson* for exercising a peremptory challenge on a juror.[17] Indeed, the only post-*Hernandez* cases we have located on this direct point have expressly rejected this disparate impact argument. For example, the United States

Court of Appeals for the Seventh Circuit recently rejected an argument that "the government's proffered justification for the strike—bias against law enforcement—is not [race neutral] because [African-Americans] are disproportionately affected by negative interactions with law enforcement. Even accepting the premise of this argument, it does not support a finding of pretext. *Batson* protects against intentional discrimination, not disparate impact. . . . Moreover, we have acknowledged that bias against law enforcement is a legitimate [race neutral] justification." (Citation omitted.) *United States* v. *Brown*, 809 F.3d 371, 375–76 (7th Cir.), cert. denied, U.S. , 136 S. Ct. 2034, 195 L. Ed. 2d 219 (2016); see *United States* v. *Arnold*, 835 F.3d 833, 842 (8th Cir. 2016) (rejecting argument that prosecutor's reliance on prospective jurors' "[exhibition of] strong agreement with the suggestion that police could be wrong" was "by itself . . . illegitimate and discriminatory because distrust of police officers is prevalent among [African-Americans]"). Similarly, in *State* v. *Rollins*, 321 S.W.3d 353 (Mo. App. 2010), transfer denied, Missouri Supreme Court, Docket No. SC91170 (October 26, 2010), cert. denied, 563 U.S. 946, 131 S. Ct. 2115, 179 L. Ed. 2d 910 (2011), the court rejected an argument under the second step of *Batson*, founded on an African-American prospective juror's negative perception of police officers, that "the court was required to take into account the disparate impact of such a supposedly facially [race neutral] reason when it means that members of a particular race or ethnicity are more likely to be affected than others" because "disparate impact does not conclusively govern in the preliminary [race neutrality] step of the *Batson* inquiry." Id., 366; cf. *State* v. *Veal*, 930 N.W.2d 319, 334 (Iowa 2019) (declining to adopt "something like a cause requirement" with respect to use of strike of last African-American juror, despite "aware[ness] of the disproportionate impact when jurors can be removed based on prior interactions with law enforcement," because "this case involved a special set of circumstances—a prosecutor's use of a peremptory strike on a juror because the same prosecutor had sent her father to prison for the rest of his life"). Thus, with no adequate claim that the Appellate Court improperly upheld the trial court's finding that the prosecutor's reasons were not pretextual under the third step of *Batson*,[18] we conclude that the Appellate Court properly affirmed the judgment of conviction.

II

BATSON REFORM IN CONNECTICUT

Although the relief that we can provide in this case is constrained by the defendant's decision to limit his *Batson* claims to the equal protection clause of the United States constitution; see footnote 16 of this opinion; the broader themes of disparate impact and implicit

bias that the defendant advances raise, as the state candidly acknowledges, extremely serious concerns with respect to the public perception and fairness of the criminal justice system.[19] As the United States Supreme Court recently observed, "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers* v. *Mississippi*, U.S. , 139 S. Ct. 2228, 2238, 204 L. Ed. 2d 638 (2019). Moreover, there is great "constitutional value in having diverse juries," insofar as "equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury. If we allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict. And it is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less." *State* v. *Saintcalle*, 178 Wn. 2d 34, 49–50, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wn. 2d 721, 398 P.3d 1124 [2017]), cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013). "From a practical standpoint, studies suggest that compared to diverse juries, [all white] juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. . . . In contrast, diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused. . . . By every deliberation measure . . . heterogeneous groups outperformed homogeneous groups. . . . These studies confirm what seems obvious from reflection: more diverse juries result in fairer trials." (Citations omitted; internal quotation marks omitted.) Id., 50; see, e.g., J. Rand, "The Demeanor Gap: Race, Lie Detection, and the Jury," 33 Conn. L. Rev. 1, 60–61 (2000) (suggesting that jury diversity is necessary to address "[d]emeanor [g]ap," which undermines accuracy of cross-racial credibility determinations). Insofar as *Batson* has been roundly criticized for its doctrinal and practical shortcomings in preventing both purposeful and unconscious racial discrimination, this appeal presents us with an occasion to consider whether further action on our part is necessary to promote public confidence in the perception of our state's judicial system with respect to fairness to both litigants and their fellow citizens.

A

Review of *Batson* Problems and Solutions

Reams of paper have been consumed by judicial opinions and law review articles identifying why *Batson* has been a toothless tiger when it comes to combating racially motivated jury selection, and numerous authorities and commentators have proposed various solutions

to those specific problems. Much of *Batson*'s perceived ineffectiveness stems from its requirement of purposeful discrimination. To begin with, the pretext and purposeful discrimination aspects of *Batson*'s third step require the trial judge to make the highly unpalatable finding that the striking attorney has acted unethically by misleading the court and intentionally violating a juror's constitutional rights. See, e.g., *State* v. *Veal*, supra, 930 N.W.2d 360 (Appel, J., concurring in part and dissenting in part) ("requiring a district court judge to, in effect, charge the local prosecutor with lying and racial motivation from the bench in the course of voir dire is unrealistic"); *State* v. *Saintcalle*, supra, 178 Wn. 2d 53 ("[i]magine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism"); J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1113 (2011) ("so long as a personally and professionally damning finding of attorney misconduct remains a prerequisite to awarding relief under *Batson*, trial courts will be understandably reluctant to find *Batson* violations"); M. 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. & Policy Rev. 149, 162–63 (2010) (noting dual difficulties that "[m]ost trial court judges will . . . find such deceit [only] in extreme situations," while other troubling cases indicated that "some prosecutors are explicitly trained to subvert *Batson*"); R. Charlow, "Tolerating Deception and Discrimination After *Batson*," 50 Stan. L. Rev. 9, 63–64 (1997) ("[S]hould courts apply *Batson* vigorously, it would be even less appropriate to sanction personally those implicated. Moreover, judges may be hesitant to find *Batson* violations, especially in close cases, if doing so means that attorneys they know and see regularly will be punished personally or professionally as a result."); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1897–98 (2015) ("[The *Batson* rule's focus on pretext] requires personally insulting prosecutors and defense lawyers in a way that judges do not take lightly, calling them liars and implying that they are racist. Technically, as some have argued, lying to the court constitutes an ethics violation that the judge should then report to the bar for disciplinary proceedings. Disconnecting the regulation of jury selection from the motives of lawyers will make judges far more likely to enforce the rule." [Footnotes omitted.]).

Second, the purposeful discrimination requirement does nothing to address the adverse effects of implicit or unconscious bias on jury selection. As the Washington Supreme Court has astutely observed: "In part, the problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and

often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus." (Footnote omitted.) *State* v. *Saintcalle*, supra, 178 Wn. 2d 46; see also T. Tetlow, supra, 56 Wm. & Mary L. Rev. 1946 ("The current *Batson* rule constitutes a placebo that purports to solve the problem of discrimination by juries but really focuses only on purported discrimination against jurors. Not only does it fail to address the real issues, it also actively distracts from them. The *Batson* rule represents the culmination of the [United States] Supreme Court's desire to solve the intractable and unconscionable problem of racism in our criminal justice system by ordering everyone in the courtroom to ignore it.").

In a leading article on implicit bias, Professor Antony Page makes the following observation with respect to a lawyer's own explanations for striking a juror peremptorily: "[W]hat if the lawyer is wrong? What if her awareness of her mental processes is imperfect? What if she does not know, or even cannot know, that, in fact, but for the juror's race or gender, she would not have exercised the challenge?" (Emphasis omitted.) A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 156 (2005). "The attorney is both honest and discriminating on the basis of race or gender. Such unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes." (Emphasis omitted.) Id., 180. Professor Page's landmark article "examines the findings from recent psychological research to conclude that the lawyer often will be wrong, will be unaware of her mental processes, and would not have exercised the challenge but for the juror's race or gender. As a result (and not because of lying lawyers), the *Batson* peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection." (Emphasis omitted.) Id., 156.

The studies reviewed by Professor Page demonstrate that "few attorneys will always be able to correctly identify the factor that caused them to strike or not strike a particular potential juror. The prosecutor may have actually struck on the basis of race or gender, but she plausibly believes she was actually striking on the basis of a [race neutral] or [gender] neutral factor. Because a judge is unlikely to find pretext, the peremptory challenge will have ultimately denied potential jurors their equal protection rights." (Footnote omitted.) Id., 235. Although Professor Page argues that the social psychology research supports addressing implicit bias by eliminating peremptory challenges entirely; id., 261; in the alternative, he proposes (1) to eliminate the

Batson procedure's requirement of subjective discriminatory intent, which also relieves judges of "mak[ing] the difficult finding that the lawyers before them are dishonest," (2) to instruct jurors about the concepts of unconscious bias and stereotyping, (3) to require educating attorneys about unconscious bias, with a requirement that they "actively and vocally affirm their commitment to egalitarian [nondiscriminatory] principles," and (4) to increase the use of race blind and gender blind questionnaires. Id., 260–61.

Similarly, Judge Mark W. Bennett, an experienced federal district judge, considers the "standards for ferreting out lawyers' potential explicit and implicit bias during jury selection . . . a shameful sham"; he, too, urges (1) the inclusion of jury instructions and presentations during jury selection on the topic of implicit bias, to adequately explore a juror's impartiality, and (2) the administration of implicit bias testing to prospective jurors. M. Bennett, supra, 4 Harv. L. & Policy Rev. 169–70. But see J. Abel, "*Batson*'s Appellate Appeal and Trial Tribulations," 118 Colum. L. Rev. 713, 762–66 (2018) (discussing *Batson*'s greater value in direct and collateral postconviction review proceedings, particularly in habeas cases that afford access to evidence beyond trial record to prove discrimination).

The second step of *Batson*, which requires the state to proffer a race neutral explanation for the peremptory challenge, has been criticized as particularly ineffective in addressing issues of disparate impact and implicit bias such as those raised by the defendant in this appeal. Specifically, the United States Supreme Court's decision in *Purkett* v. *Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), took a very broad approach to the second step, allowing virtually any race neutral explanation, however "implausible or fantastic," to pass muster; the actual merit of the explanation is considered only during the pretext inquiry of the third step. See *State* v. *Edwards*, supra, 314 Conn. 484–85. *Purkett* has been criticized for its effect in "watering down" the *Batson* inquiry. See L. Cavise, "The *Batson* Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection," 1999 Wis. L. Rev. 501, 537. Some courts and commentators have urged reforms to ensure that the reason proffered by the prosecutor relates to the case being tried in an attempt to limit post hoc reasoning for the use of the strike. See *Ex parte Bruner*, 681 So. 2d 173, 173 (Ala. 1996) (rejecting disparate impact conclusion in *Hernandez* v. *New York*, supra, 500 U.S. 352, and *Purkett* as matter of Alabama law); *Spencer* v. *State*, 238 So. 3d 708, 712 (Fla.) (under Florida law, second prong of *Batson* requires prosecutor to identify "clear and reasonably specific" race neutral explanation that is related to trial at hand, which requires trial court to "determine both whether the reason was neutral and reasonable and whether the record supported the

absence of pretext" [internal quotation marks omitted]), cert. denied, U.S. , 138 S. Ct. 2637, 201 L. Ed. 2d 1039 (2018); see also *Tennyson* v. *State*, Docket No. PD-0304-18, 2018 WL 6332331, *7 (Tex. Crim. App. December 5, 2018) (Alcala, J., dissenting from refusal of discretionary review) ("[i]f any implausible or outlandish reason that was never even discussed with a prospective juror can be accepted as a genuine [race neutral] strike by a trial court . . . and if appellate courts simply defer to trial courts . . . then *Batson* is rendered meaningless, and it is time for courts to enact alternatives to the current *Batson* scheme to better effectuate its underlying purpose"). It also has been suggested that the second step of *Batson* be modified to circumscribe the number of permissible race neutral explanations or increase their quality, which would also alleviate the more difficult discrimination finding attendant to the third step. See L. Cavise, supra, 551–52 ("If the Supreme Court is serious when it holds that the venireperson's right to serve is of such importance that it merits equal protection coverage, then surely it is merely a logical extension to prohibit a person from being improperly removed for the [nonreason] of the neutral explanation. Is the exalted right to serve merely a facade to be torn away on the sheerest of explanations? Minorities, women, and persons of cognizable ethnicity should . . . be removed [only] for legitimate reasons—which does not include those that are purely subjective, irrational, or unverifiable, much less racist or sexist."); J. Wrona, Note, "*Hernandez* v. *New York*: Allowing Bias To Continue in the Jury Selection Process," 19 Ohio N.U. L. Rev. 151, 158 (1992) (criticizing *Hernandez* for giving "little value to the disparate impact of the prosecutor's challenges" and "emphasizing the prosecutor's subjective rationale and attaching minor significance to objective evidence," which affords "prosecutors ample means to discriminate in jury selection").

Other commentators have proposed solutions that more directly consider the demographics of the jury in considering whether to allow the use of peremptory challenges in a particular case, akin to the approach suggested by Judge Lavine in his concurring opinion in the Appellate Court. See *State* v. *Holmes*, supra, 176 Conn. App. 201–202; see also footnote 12 of this opinion. One proposal is to engage in a qualitative analysis similar to that used to assess a challenge for cause, in which the trial judge would balance claims of potential juror bias against the systemic interest in diversity of the jury.[20] See L. Cavise, supra, 1999 Wis. L. Rev. 551 ("The cost of this approach would be that, in gender and race questioning, the peremptory would be transformed into a challenge for 'quasi-cause.' In other words, trial judges would be required to do with peremptories just as they have been doing with challenges for cause . . . but simply lower the standard for the challenge to allow

some exercise of the intuitive. Any judge who can say 'I may not agree but I see how you can think that' has mastered this suggestion in peremptory challenges."); A. Cover, "Hybrid Jury Strikes," 52 Harv. C.R.-C.L. L. Rev. 357, 395 (2017) ("[The author suggests the] replacement of traditional peremptory strikes with hybrid jury strikes, which could . . . be exercised [only] if the proponent first articulated reasons coming close to, but not found to satisfy, the standard for cause challenges. This reform would have important salutary effects by mandating ex ante rationality, yet preserving in modified form the most important penumbral function of the peremptory strike."); T. Tetlow, supra, 56 Wm. & Mary L. Rev. 1895 (proposing test that would balance quality of claims of juror bias against impact on diversity of striking juror, rather than their sincerity); see also T. Tetlow, supra, 1900–1906 (arguing that that *Holland* v. *Illinois*, 493 U.S. 474, 482–83, 110 S. Ct. 803. 107 L. Ed. 2d 905 [1990], holding that sixth amendment requirement of fair cross section on venire does not apply to petit jury, was wrongly decided and arguing in favor of consideration of diversity during jury selection, rather than "equat[ing] race consciousness with racism").

Other commentators have suggested that some of the concerns about *Batson* can be addressed procedurally by delaying the final decision of whether to seat a juror or to accept a strike until the conclusion of voir dire, thus allowing a provisionally stricken juror to be reseated should a pattern emerge of apparently discriminatory challenges. See J. Bellin & J. Semitsu, supra, 96 Cornell L. Rev. 1127 (suggesting that if "a trial court can invalidate a peremptory challenge after finding an unrebutted appearance of discrimination, it could be contended that the proposal is insufficiently tethered to *Batson* and, thus, the constitutional right that *Batson* enforces," and making prophylactic "analogy to *Miranda* warnings and the decades of practice that have shown that a robust enforcement of the *Batson* right must of necessity sweep more broadly than the constitutional right itself" [emphasis omitted]). Our existing *Batson* case law is compatible with this suggestion. See *State* v. *Robinson*, 237 Conn. 238, 252–53 and n.14, 676 A.2d 384 (1996) (holding that "a defendant may object to the state's peremptory challenge on *Batson* equal protection grounds at any time prior to the swearing of the jury" and noting that nothing on face of General Statutes § 51-238a precludes trial judge from recalling juror who was released from duty).

Moving beyond the courtroom itself, other commentators have suggested the reform of recordkeeping practices to allow for the evaluation of jury selection practices on a systemic level. See C. Grosso & B. O'Brien, "A Call to Criminal Courts: Record Rules for *Batson*," 105 Ky. L.J. 651, 662 (2017) ("Our limited evidence suggests that the regular availability of statistical evidence

might mitigate racial disparities in jury selection. If this is true, criminal courts need to recognize their obligation to preserve and provide access to jury selection data for all criminal trials."); id., 667–68 (suggesting retention of records, including race of potential jurors, whether they served, and "additional venire characteristics," with omission of juror names or other identifying information to protect jurors' privacy and safety); R. Wright et al., "The Jury Sunshine Project: Jury Selection Data as a Political Issue," 2018 U. Ill. L. Rev. 1407, 1442 (advocating for aggregation and collection of jury selection data across court systems to promote public policy advocacy with respect to reduction of discrimination during jury selection process); see also A. Burke, "Prosecutors and Peremptories," 97 Iowa L. Rev. 1467, 1485–86 (2012) (urging prosecutors to "collect and publish both individual and office-wide data regarding the exercise of peremptory challenges").

Finally, we cannot ignore the intersection of peremptory challenges with other areas of the law bearing on the composition of our juries, including the fair cross section requirement that we recently considered in *State* v. *Moore*, 334 Conn. , A.3d (2019), to ensure a diverse jury pool. "When we approach a case with civil rights implications, it is important to think systemically. Important issues involving the [composition] of the venire pool, the scope of voir dire of potential jurors, the use of peremptory challenges, and the instructions given to the jury intersect and act together to promote, or resist, our efforts to provide all defendants with a fair trial." *State* v. *Veal*, supra, 930 N.W.2d 344 (Appel, J., concurring in part and dissenting in part); see id., 360 (Appel, J., concurring in part and dissenting in part) ("*Batson*'s relatively free reign on peremptory challenges cuts rough against the grain of the constitutional value of achieving juries with fair cross sections of the community. By opening the valve on peremptory challenges, you close the [fair cross section] pipe and lose the benefits of diversity, which are substantial."); L. Cavise, supra, 1999 Wis. L. Rev. 549 (noting solutions to *Batson*'s shortcomings that "focus on the selection of the venire, such as supplementing the traditional method of voter registration lists with driver's license or other lists to [ensure] proportionality," sending "jury questionnaires . . . to selected areas with a higher percentage of minorities, and [having] the results of the questionnaires or the composition of the venire actually called to service be scanned by the chief judge to [ensure] diversity").

B

Implementation of *Batson* Reforms

Although *Batson* has serious shortcomings with respect to addressing the effects of disparate impact and unconscious bias, we decline to "throw up our hands in despair at what appears to be an intractable

problem. Instead, we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it." *State* v. *Saintcalle*, supra, 178 Wn. 2d 49. We hesitate to assume, however, that this court is best situated in the first instance to issue an edict prescribing a solution to what ails *Batson* on a systemic level. But see *State* v. *Holloway*, 209 Conn. 636, 646 and n.4, 553 A.2d 166 (using supervisory authority to provide greater protection than required by *Batson* by eliminating requirement under first prong of establishing prima facie case of purposeful discrimination in any case in which venirepersons of same cognizable racial group as defendant are peremptorily struck from venire), cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

Instead, the scale and variety of the potential changes that appear necessary to address the flaws in *Batson*, as shown by the menu of possible solutions such as those discussed in part II A of this opinion, beg for a more deliberative and engaging approach than appellate adjudication, which is limited to the oral and written advocacy of the parties and stakeholders appearing as amici curiae in a single case. See, e.g., *Johnson* v. *California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (recognizing that states "have flexibility in formulating appropriate procedures to comply with *Batson*"); *State* v. *Saintcalle*, supra, 178 Wn. 2d 51 ("[t]he *Batson* framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection"); accord *State* v. *Gould*, supra, 322 Conn. 535–37 (declining to require provision of translator to "prevent the underrepresentation of minorities on juries due to the English proficiency requirement" because that argument "is one that is more appropriately addressed to the legislature rather than this court," but noting that "[o]ur Judicial Branch has been proactive in addressing the issue of limited English proficiency by establishing the Committee on Limited English Proficiency and charging it with 'eliminating barriers to facilities, processes and information that are faced by individuals with limited English proficiency' ").

To this end, we find it most prudent to follow the Washington Supreme Court's approach to this problem in *State* v. *Saintcalle*, supra, 178 Wn. 2d 34, which was to uphold under existing law the trial court's finding that the prosecutor had not acted with purposeful discrimination in exercising a peremptory challenge, but also to take the "opportunity to examine whether our *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries"; id., 35; by convening a work group of relevant stakeholders to study the problem and resolve it via the state's rule-making process, which is superintended by that court.[21] Id., 55–56; see *State* v. *Jefferson*, 192 Wn. 2d 225, 243–47, 429 P.3d 467 (2018) (describing work

group's process).

The rule-making process[22] that followed *Saintcalle* recently culminated in the Washington Supreme Court's adoption of a comprehensive court rule governing jury selection, Washington General Rule 37,[23] which applies in all jury trials and is intended "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." Wn. Gen. R. 37 (a) and (b). With respect to the issues in the present case, one particularly notable feature of General Rule 37 is a declaration—targeted to the second prong of *Batson*—that certain ostensibly race neutral explanations are "presumptively invalid," including distrust of law enforcement officers, not being a native English speaker, and residing in a high crime neighborhood. Wn. Gen. R. 37 (h); see also Wn. Gen. R. 37 (i) (requiring corroboration and verification on record of certain conduct based challenges). General Rule 37 also responds to implicit bias concerns by requiring the trial judge to consider "the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge."[24] Wn. Gen. R. 37 (e); see also *State* v. *Jefferson*, supra, 192 Wn. 2d 229–30 (extending General Rule 37's modification of third prong of *Batson* with objective test to pending cases and reversing defendant's conviction because record indicated that "objective observer could view race or ethnicity as a factor in the use of the peremptory strike").

Accordingly, we refer the systemic considerations identified in part II A of this opinion to a Jury Selection Task Force that will be appointed by the Chief Justice forthwith. We anticipate that the Jury Selection Task Force will consist of a diverse array of stakeholders from the criminal justice and civil litigation communities and will be better suited to engage in a robust debate to consider the "legislative facts"[25] and propose necessary solutions to the jury selection process in Connecticut, ranging from ensuring a fair cross section of the community on the venire at the outset to addressing aspects of the voir dire process that diminish the diversity of juries in Connecticut's state courts.[26] See *State* v. *Saintcalle*, supra, 178 Wn. 2d 52–53 ("we seek to enlist the best ideas from trial judges, trial lawyers, academics, and others to find the best alternative to the *Batson* analysis"); see also *Seattle* v. *Erickson*, 188 Wn. 2d 721, 739, 398 P.3d 1124 (2017) (Stephens, J., concurring) ("The court has convened a work group to carefully examine the proposed court rule with the goal of developing a meaningful, workable approach to eliminating bias in jury selection. That process will be informed by the diverse experiences of its participants and will be able to consider far broader perspec-

tives than can be heard in a single appeal. Unconstrained by the limitations of the *Batson* framework, the rule-making process will be able to consider important policy concerns as well as constitutional issues.”).

Although we observed in *State* v. *Holloway*, supra, 209 Conn. 645, that “the issue of purposeful racial discrimination in the state’s use of peremptory jury challenges is a matter of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole,” we now have the advantage of more than three decades of research and experience since *Batson* to tell us that implicit bias may be equally as pernicious and destructive to the perception of the justice system. Accordingly, we anticipate that the Jury Selection Task Force will propose meaningful changes to be implemented via court rule or legislation, including, but not limited to (1) proposing any necessary changes to General Statutes § 51-232 (c),[27] which governs the confirmation form and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate *Batson*’s requirement of purposeful discrimination. Cf. *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 686 n.7, 142 A.3d 1095 (2016) (expressing preference that Rules Committee of Superior Court consider and adopt prophylactic rules, rather than Supreme Court exercising its supervisory powers, because “the Rules Committee of the Superior Court . . . provides a more appropriate forum in which to fully and fairly consider any potential amendment to the procedural rules”). Accordingly, we “hope . . . that our decision sends the clear message that this court is unanimous in its commitment to eradicate racial bias from our jury system, and that we will work with all partners in the justice system to see this through.”[28] *Seattle* v. *Erickson*, supra, 188 Wn. 2d 739 (Stephens, J., concurring).

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD, KAHN and ECKER, Js., concurred.

[1] See, e.g., *Batson* v. *Kentucky*, supra, 476 U.S. 106 (Marshall, J., concurring); *State* v. *Veal*, 930 N.W.2d 319, 359–61 (Iowa 2019) (Appel, J., concurring in part and dissenting in part); *State* v. *Saintcalle*, 178 Wn. 2d 34, 46–49, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wn. 2d 721, 398 P.3d 1124 [2017]), cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013); J. Bellin & J. Semitsu, “Widening *Batson*’s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney,” 96 Cornell L. Rev. 1075, 1077–78 (2011); N. Marder, “*Foster* v. *Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge,” 49 Conn. L. Rev. 1137, 1182–83 (2017); A. Page, “*Batson*’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge,” 85 B.U. L. Rev. 155, 178–79 and n.102 (2005); T. Tetlow, “Solving *Batson*,” 56 Wm. & Mary L. Rev. 1859, 1887–89 (2015).

[2] We granted the defendant’s petition for certification to appeal, limited

to the following issue: "Did the Appellate Court err in determining that the trial court properly denied the defendant's challenge under *Batson* v. *Kentucky*, [supra, 476 U.S. 96–98]?" *State* v. *Holmes*, 327 Conn. 984, 175 A.3d 561 (2017).

[3] For a detailed recitation of the underlying facts of this case, see *State* v. *Holmes*, supra, 176 Conn. App. 159–62.

[4] Specifically, the state charged the defendant with murder in violation of General Statutes § 53a-54a (a), felony murder in violation of § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (2), conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 (a) and 53a-100aa, burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217.

By agreement of the parties, the charge of criminal possession of a firearm was severed from the remaining counts and tried to the court. The parties stipulated that the defendant had a prior felony conviction, and the trial court subsequently found the defendant guilty of that offense.

[5] Defense counsel observed for the record that the defendant "is of mixed race" and that, on the basis of his observation of the questionnaires and the jury panel on the first day, "[there are] no Hispanic surnames, no African-Americans, no Asians, [there are] no Indians or [Middle] Easterners, [there are] no Pacific Islanders. It's 100 percent, from my view, [a] white Caucasian jury panel that was brought in." He indicated that he might put on the record that a prospective juror who had not answered the racial identification question on the questionnaire appeared to be white or Caucasian in the event that person was excused from service.

[6] "In accordance with our usual practice, we identify jurors by initial in order to protect their privacy interests." *State* v. *Berrios*, 320 Conn. 265, 268 n.3, 129 A.3d 696 (2016).

[7] "Following the filing of this appeal, the defendant filed with [the Appellate Court] a motion for articulation, which was referred to the trial court pursuant to Practice Book § 66-5. The trial court granted the motion and in a memorandum concluded that all of the reasons set forth by the [prosecutor] in exercising [the] peremptory challenge were race neutral." *State* v. *Holmes*, supra, 176 Conn. App. 171. Specifically, the trial court cited, inter alia, this court's decisions in *State* v. *King*, supra, 249 Conn. 664–67, *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999), and *State* v. *Smith*, 222 Conn. 1, 13–15, 608 A.2d 63 (1992), for the proposition that "negative contact with the police" is a "legitimate, race neutral reason for exercising a [peremptory] challenge." The trial court then determined that the defendant had not met his burden of persuading the court by a preponderance of the evidence that the explanations were pretextual or insufficient. The trial court also observed in its articulation that "the other reasons given by the [prosecutor] for exercising the peremptory challenge were also race neutral. Those reasons included the expressed view that the criminal justice system was not fair, the venireperson had family members who had been convicted and served time, and that he worked to rehabilitate people."

[8] Specifically, the defendant was found guilty on all of the counts tried to the jury and the count tried to the court; see footnote 4 of this opinion; except for murder, as the jury instead found the defendant guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a). In rendering its judgment of conviction, the trial court vacated the convictions of manslaughter and burglary in the first degree pursuant to *State* v. *Polanco*, 308 Conn. 242, 255, 61 A.3d 1084 (2013).

[9] The Appellate Court rejected the defendant's other claims on appeal, namely, that (1) the trial court improperly admitted a tape-recorded statement of a witness pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), and (2) the state violated his right to remain silent under *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), "when it cross-examined him at trial about his failure to disclose to the police at the time of his arrest certain exculpatory information that he later testified to at trial." *State* v. *Holmes*, supra, 176 Conn. App. 185. These claims are not before us in this certified appeal.

[10] The Appellate Court observed that the six factors articulated in *State* v. *Edwards*, supra, 314 Conn. 485–86, for determining whether the prosecutor had acted with discriminatory intent in using a peremptory challenge on W.T. all "support the [trial] court's conclusion that the [prosecutor] properly

exercised [his] right to use a peremptory challenge with regard to W.T.

"First, the [prosecutor's] reasons for excluding W.T. were his stated distrust of [the] police and the criminal justice system, which clearly related to the trial of this case because it is a criminal proceeding in which police [officers] would provide significant evidence. Second, the [prosecutor] did not exercise [his] peremptory challenge without questioning W.T. but, rather, engaged in a detailed discussion with W.T. about the views he had expressed in response to defense counsel's questions. Third, the defendant concedes, and our review of the record confirms, that the [prosecutor] asked a relatively uniform set of questions of all jurors. Accordingly, W.T. and the other African-American venirepersons were not asked questions that were not asked of other jurors or that sought to elicit a particular response. Fourth, we are unaware of any venireperson of a race different from W.T.'s, who expressed the same or similar views regarding [the] police and the criminal justice system as those of W.T. but nevertheless was permitted to serve on the defendant's jury. Fifth, the [prosecutor] did not advance any explanation that was based on an inapplicable group trait. Finally, and perhaps most significantly, the [prosecutor] did not use a disproportionate number of peremptory challenges to exclude African-Americans from the jury. In fact, as the defendant acknowledges, three African-Americans were selected to serve, two as regular jurors and one as an alternate. Although the racial composition of an empaneled jury certainly is not dispositive of the issue of impermissible motive for use of a peremptory strike as to a particular juror, it is among the various factors that a reviewing court can consider in evaluating whether the explanation for exercising a peremptory challenge is pretextual and, thus, constitutionally infirm." *State* v. *Holmes*, supra, 176 Conn. App. 178–79.

[11] The Appellate Court was by no means insensitive to the concerns raised by the defendant. In a footnote, the Appellate Court cited "studies conducted by reputable research firms" and observed that "permitting the use of peremptory challenges with respect to potential jurors who express negative views toward the police or the justice system may well result in a disproportionate exclusion of minorities from our juries, a deeply troubling result." *State* v. *Holmes*, supra, 176 Conn. App. 180–81 n.5. The Appellate Court also expressed its concern about the effect of implicit bias in decisionmaking, observing that it was making "this point not to suggest that the prosecutor conducting voir dire in this case was motivated by racial bias, but to recognize the need to be particularly vigilant in assessing a prosecutor's use of peremptory challenges, especially if the proffered explanation may have a disproportionate impact on minority participation on juries." Id., 181 n.5. Ultimately, the Appellate Court observed that, as "an intermediate state appellate court, we are, of course, bound by extensive precedent that limits our ability to remedy the weaknesses inherent in the *Batson* standard. Our cases are clear that disparate impact alone is insufficient to demonstrate a *Batson* violation. Accordingly, as [this court] did in *State* v. *Hinton*, supra, 227 Conn. 330, we are confined to reminding trial courts to be particularly diligent in assessing the use of peremptory challenges in circumstances that, if left unscrutinized for pretext, may result in 'an unconstitutionally disparate impact on certain racial groups.' " *State* v. *Holmes*, supra, 181–82 n.5.

[12] Judge Lavine issued a scholarly and insightful concurring opinion, agreeing with the Appellate Court majority's conclusion that, "in the present case, the peremptory challenge was properly exercised under prevailing law and practices" but opining that "this case brings into sharp relief a serious flaw in the way *Batson* has been, and can be, applied. *Batson* is designed to prevent lawyers from peremptorily challenging prospective jurors for manifestly improper reasons based on race, national origin, and the like. It was *not* designed to permit prosecutors—and other lawyers—to challenge members of suspect classes solely because they hold widely shared beliefs within the prospective juror's community that are based on life experiences." (Emphasis in original.) *State* v. *Holmes*, supra, 176 Conn. App. 192. Judge Lavine argued that this "blatant flaw that significantly disadvantages black defendants—and people belonging to other suspect classes—has become part of the *Batson* process itself" and urged reform of Connecticut's "jury selection process to eliminate the perverse way in which *Batson* has come to be used." (Footnote omitted.) Id., 193.

Judge Lavine conducted a thorough review of case law and commentary cataloging *Batson*'s shortcomings, including that it requires the court to find that a prosecutor committed serious ethical violations; id., 196–97 and n.4; and that, "as it has evolved, [*Batson* has come to permit] the elimination of certain categories of prospective jurors whose views are reasonable and

widely shared in their communities. The potential for the kind of categorical exclusion that *Batson* permits is simply unacceptable in a system that strives to treat everyone equally. It sends a troubling message to members of minority communities who should be encouraged—not discouraged—to actively engage in, and trust, the criminal justice system.

"[Additionally], permitting a peremptory challenge to be used under these circumstances is an affront to the dignity of the individual prospective juror who is excluded for honestly voicing reasonable and widely held views. It minimizes or negates his or her life experience in an insulting and degrading way. It must be remembered that one of the rationales for *Batson* is that the inappropriate exclusion of prospective jurors deprives the *prospective juror* of his or her constitutional right to serve on a jury—a basic right of citizenship. . . . To prohibit a significant percentage of people belonging to a suspect class from serving on a jury because they express a reasonable, [fact based], and widely held view cannot be countenanced." (Citation omitted; emphasis in original.) Id., 198.

Acknowledging "that peremptory challenges play an important function in our system because they permit lawyers to use their intuition in the very human jury selection process"; id., 199–200; Judge Lavine urged further study of this problem and also proposed an alteration to the *Batson* framework "in Connecticut to ameliorate the negative effects of the present regime." Id., 201. Specifically, Judge Lavine proposed reallocating some of the discretion in the jury selection process from the lawyers to the trial judge and granting "judges . . . the discretion to disallow the use of peremptory challenges in cases in which (1) the prospective juror is part of a suspect class; (2) the prospective juror gives an unequivocal assurance, under oath, that he or she can be fair to both sides; (3) the prospective juror expresses reasonable and [fact based] views, which, in the opinion of the judge, following argument by the lawyers, are widely shared in the prospective juror's particular community; and (4) the judge concludes that the prospective juror can, in fact, be fair." Id.

[13] The state also observes that the prosecutor had proffered other race neutral reasons—unchallenged by the defendant on appeal—for the peremptory challenge of W.T., including his concerns about racial disparities in sentencing, his work to rehabilitate prisoners, and the fact that he had close relatives who had been convicted and incarcerated.

[14] In addition to race, it is well established that *Batson* also precludes peremptory challenges that discriminate purposefully on the basis of gender, religious affiliation, and ancestry or national origin. See, e.g., *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (gender); *State* v. *Rigual*, 256 Conn. 1, 10, 771 A.2d 939 (2001) (ancestry/national origin); *State* v. *Hodge*, supra, 248 Conn. 240 (religious affiliation).

[15] "We note that a *Batson* inquiry under Connecticut law is different from most federal and state *Batson* inquiries. Under federal law, a three step procedure is followed when a *Batson* violation is claimed: (1) the party objecting to the exercise of the peremptory challenge must establish a prima facie case of discrimination; (2) the party exercising the challenge then must offer a neutral explanation for its use; and (3) the party opposing the peremptory challenge must prove that the challenge was the product of purposeful discrimination. . . . Pursuant to this court's supervisory authority over the administration of justice, we have eliminated the requirement, contained in the first step of this process, that the party objecting to the exercise of the peremptory challenge establish a prima facie case of discrimination." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 484 n.16; see *State* v. *Holloway*, 209 Conn. 636, 646 and n.4, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

[16] Our analysis is limited to the federal constitution because, as the defendant acknowledged at oral argument before this court, he has not briefed an independent state constitutional claim pursuant to *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). See, e.g., *State* v. *Saturno*, 322 Conn. 80, 113 n.27, 139 A.3d 629 (2016); see also *State* v. *Hinton*, supra, 227 Conn. 329–31 (rejecting *Batson* claim under state constitution on basis of disparate impact on jurors who reside in vicinity of crime scene at issue).

[17] Examples abound of courts accepting distrust of the criminal justice system or law enforcement officers as a race neutral explanation for peremptorily challenging a juror. See, e.g., *United States* v. *Alvarez-Ulloa*, 784 F.3d 558, 567 (9th Cir. 2015); *United States* v. *Moore*, 651 F.3d 30, 43 (D.C. Cir. 2011), aff'd sub nom. *Smith* v. *United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013); *People* v. *Hardy*, 5 Cal. 5th 56, 81, 418 P.3d 309, 233 Cal. Rptr. 3d 378 (2018), cert. denied, U.S. , 139 S. Ct. 917, 202 L.

Ed. 2d 648 (2019); *State* v. *Mootz*, 808 N.W.2d 207, 219 (Iowa 2012); *Batiste* v. *State*, 121 So. 3d 808, 849 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178 (2014); *State* v. *Nave*, 284 Neb. 477, 487–88, 821 N.W.2d 723 (2012), cert. denied, 568 U.S. 1236, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013).

[18] The state observes that the "Appellate Court majority was unable to ascertain whether the defendant was challenging the trial court's resolution of both the second and third steps of *Batson*, or whether he was challenging only the court's ultimate factual finding that the prosecutor did not act with discriminatory intent in exercising the peremptory challenge against W.T." See *State* v. *Holmes*, supra, 176 Conn. App. 175. We read the defendant's brief to this court to limit his challenge to the second step of *Batson*, insofar as he does not engage in any significant analysis of the record to demonstrate that the trial court's finding of no pretext was clearly erroneous and instead emphasizes that the prosecutor's reasons with respect to " 'negative' " interactions with law enforcement were not racially neutral "per se" because they "have a strong air of implicit racial bias, particularly with the knowledge that potential juror W.T. is of African-American descent," and "minority races are generally afraid of [the] police, a statistical conclusion that is not shocking given the amount of violence against minorities inundating recent headlines." This reading was borne out at oral argument before this court, at which counsel for the defendant candidly acknowledged that the trial prosecutor had *not acted purposefully* to exclude African-Americans or other minorities from the jury but instead had elected to question prospective jurors about a topic that would have the effect of excluding minority jurors, rendering it not race neutral as a matter of law.

The defendant argues, however, that, "based on what is known about the human inability to recognize biases and the tendency to readily provide a race neutral reason for [one's] behavior, it is easy to assume that the [prosecutor] in this case acted in accordance with his implicit racial biases in exercising a peremptory challenge against W.T., and that the trial court did not exercise sufficient prudence in making a determination as to the propriety of the challenge. Had the court . . . been more aware of the likelihood of implicit racial biases to be hidden by race neutral reasons offered by the party exercising a challenge against a potential juror, [the court] would have found pretext as it related to the [prosecutor's] proffered reasons for challenging potential juror W.T., *particularly in a situation where the* [*court itself*] *found W.T. to be impartial*." (Emphasis added.) We disagree with this characterization of the record, insofar as the defendant has not identified, and our independent review has not revealed, a specific finding that W.T. was in fact impartial. In any event, this argument—founded on implicit bias—falls short of the purposeful discrimination contemplated by *Batson*. See, e.g., *State* v. *Gould*, supra, 322 Conn. 533–34.

Finally, to the extent that the defendant does argue pretext, he relies on the decision of the United States Court of Appeals for the Second Circuit in *Mullins* v. *Bennett*, 228 Fed. Appx. 55, 56 (2d Cir.), cert. denied sub nom. *Mullins* v. *Bradt*, 552 U.S. 911, 128 S. Ct. 259, 169 L. Ed. 2d 190 (2007), to contend that the prosecutor's challenge to W.T. based on his employment as a social worker was a pretext for racial discrimination because "the central issue being contested in this case does not at all relate to social work or troubled families . . . ." We disagree, insofar as the prosecutor relied on W.T.'s volunteer work with incarcerated persons, not his social work employment as a general matter.

[19] To its great credit, the state acknowledges the importance of "understanding and appreciating the existence and potentially corrupting influence of implicit or unconscious biases" and notes that "Connecticut prosecutors regularly receive training on this subject for the purpose of gaining insight regarding this phenomenon and eliminating its corrupting influences to the full[est] extent possible." See A. Burke, "Prosecutors and Peremptories," 97 Iowa L. Rev. 1467, 1483–85 and n.93 (2012) (urging prosecutors to consider their institutional ethical obligation and to undertake "voluntary reforms designed to bolster the prosecutor's role in protecting [race neutral] jury selection and to neutralize the biases that might lead to racialized peremptory challenges," including implicit bias training and " 'switching' exercises during voir dire to assess for disparate questioning or reasoning").

[20] The state, while acknowledging that "*Batson* has been widely criticized as being ineffectual," criticizes such diversity conscious solutions as unconstitutional and discriminatory in their own right insofar as they would affirmatively treat white and minority venirepersons differently. Because neither of these solutions is directly before us for adjudication, we express no view

regarding the merits of the state's concerns.

[21] In referring *Batson* reform to the rule-making process, "[a]s a first step," the Washington court proposed to "abandon and replace *Batson*'s 'purposeful discrimination' requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion. For example, it might make sense to require a *Batson* challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory challenge or [when] the judge finds it is more likely than not that, but for the defendant's race, the peremptory challenge would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a *Batson* challenge. This in turn would simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious." *State* v. *Saintcalle*, supra, 178 Wn. 2d 53–54.

[22] The Final Report of the Jury Selection Workgroup, explaining the proposal adopted by the Washington Supreme Court as General Rule 37, provides a comprehensive "legislative history" of that rule, which resulted from consideration of proposed rules submitted by the American Civil Liberties Union and the Washington Association of Prosecuting Attorneys, with considerable comment by the bench and bar. See Jury Selection Workgroup, Washington Supreme Court, Proposed New GR 37—Jury Selection Workgroup Final Report, p. 1, available at http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221 Workgroup.pdf (last visited December 16, 2019).

[23] Rule 37 of the Washington General Rules, adopted on April 24, 2018, provides: "(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

"(b) Scope. This rule applies in all jury trials.

"(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

"(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

"(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

"(f) Nature of Observer. For purposes of this rule, an objective observer 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.

"(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

"(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

"(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

"(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

"(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

"(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

"(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

"(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.

"(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: 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. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge."

[24] We note that General Rule 37 may well be subject to consideration in at least one other jurisdiction, as a defendant has sought review by the Arizona Supreme Court of an Arizona Court of Appeals decision that relied on its intermediate role in the hierarchal system to decline an invitation to "adopt the approach to peremptory challenges established in Washington, which carves out a list of reasons presumed invalid and expands the third step of the *Batson* analysis to include an 'objective observer' standard." *State* v. *Gentry*, Ariz. , 449 P.3d 707 (App. 2019), petition for review filed (Ariz. August 23, 2019) (CR-19-0273-PR).

[25] "[I]t is well established that an appellate court may take notice of legislative facts, including historical sources and scientific studies, which help determine the content of law and policy, as distinguished from the adjudicative facts, which concern the parties and events of a particular case." (Internal quotation marks omitted.) *State* v. *Santiago*, 318 Conn. 1, 53 n.44, 122 A.3d 1 (2015). "Legislative facts may be judicially noticed without affording the parties an opportunity to be heard, but adjudicative facts, at least if central to the case, may not." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 479. Particularly because many of the relevant issues have not yet been presented to us through the crucible of the adversarial process, we deem it advisable to stay our hand in favor of the rule-making process, which is better suited to consider the array of relevant studies and data in this area, along with the interests of the stakeholders, and to promote diversity on juries in Connecticut's state courts. See id., 481–82.

[26] We note that the Jury Selection Task Force may well recommend that the applicability of some *Batson* reforms be limited to criminal cases, given the fundamental difference between a criminal trial—which brings the resources of the government to bear against a private citizen—and one between private litigants. Cf. M. Howard, "Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges," 23 Geo. J. Legal Ethics 369, 373–74 (2010) (Discussing prosecutors' "ethical duty to 'seek justice' " and noting that peremptory challenges are "a prophylactic safeguard of a constitutional right to an impartial jury" that "are subject to cost-benefit scrutiny prompting an assessment of the extent to which the practice risks unconstitutional discrimination, damaging both the actual and perceived fairness of the prosecution process, as well as the extent to which the practice actually increases the likelihood of a just conviction. And in balancing the two, is the benefit of one outweighed by the detriment to the other?" [Footnote omitted.]); see also id., 375 ("I argue for an office policy directing prosecutors to waive peremptory challenges except in narrowly defined circumstances, such as curing a failed challenge for cause by either party or excusing a juror who demonstrates an unwillingness to deliberate in good faith").

[27] General Statutes § 51-232 (c) provides: "The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and

that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record."

[28] We note that numerous commentators and jurists, including United States Supreme Court Justices Stephen Breyer and Thurgood Marshall, have suggested that nothing short of the complete abolition of peremptory challenges will suffice to address discrimination in jury selection. See, e.g., *Miller-El* v. *Dretke*, 545 U.S. 231, 273, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Breyer, J., concurring); *Batson* v. *Kentucky*, supra, 476 U.S. 107 (Marshall, J., concurring); *State* v. *Veal*, supra, 930 N.W.2d 340 (Cady, C. J., concurring); *People* v. *Brown*, 97 N.Y.2d 500, 509, 769 N.E.2d 1266, 743 N.Y.S.2d 374 (2002) (Kaye, C. J., concurring); *Davis* v. *Fisk Electric Co.*, 268 S.W.3d 508, 529 (Tex. 2008) (Brister, J., concurring); *Seattle* v. *Erickson*, supra, 188 Wn. 2d 739–40 (Yu, J., concurring); *State* v. *Saintcalle*, supra, 178 Wn. 2d 70–71 (Gonzalez, J., concurring); M. Bennett, supra, 4 Harv. L. & Policy Rev. 167; N. Marder, "*Foster* v. *Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1205 (2017). As the state aptly observes—and as Justice Mullins acknowledges in his concurring opinion, in which he advocates for "substantially reduc[ing] the number of peremptory challenges that the parties have available for their use"—this specific remedy raises serious state constitutional questions. See Conn. Const., art. 1, § 19, as amended by art. IV of the amendments to the constitution ("The right of trial by jury shall remain inviolate . . . . 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. The right to question each juror individually by counsel shall be inviolate." [Emphasis added.]); *Rozbicki* v. *Huybrechts*, 218 Conn. 386, 392 n.2, 589 A.2d 363 (1991) ("[t]he provisions concerning peremptory challenges and the individual voir dire appear to be unique to Connecticut's constitution"); see also *Rivera* v. *Illinois*, 556 U.S. 148, 152, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) ("The right to exercise peremptory challenges in state court is determined by state law. This [c]ourt has long recognized that peremptory challenges are not of federal constitutional dimension. . . . States may withhold peremptory challenges altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." [Citation omitted; internal quotation marks omitted.]). As was emphasized at oral argument before this court, the defendant has not requested that we consider abolishing peremptory challenges as a matter of law, so we do not consider further this more drastic remedy, not yet embraced by any state. See *State* v. *Saintcalle*, supra, 117 (Gonzalez, J., concurring). Accordingly, we leave it to the rule-making process to address the systemic issues identified by the defendant in this appeal.

RECOMMENDATIONS OF THE COMMITTEE ON JURY SELECTION

MARCH 2018

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Preface

On October 5, 2017, the Iowa Supreme Court ordered the appointment of a committee to review the process on the selection of jury pools and jurors in Iowa. The court appointed the Committee on Jury Selection to ensure the makeup of jury pools and jurors represent a fair cross-section of the community.

A fair and effective jury system ensures that jury pools result in a reasonable reflection of community demographic characteristics and a "jury of one's peers." The Sixth Amendment of the United States Constitution and article I, section 10 of the Iowa Constitution entitle defendants to a jury pool that represents a fair cross-section of the community.

The United States Supreme Court has reemphasized the principle "that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.' " *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). Like the Iowa Supreme Court did in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), the Supreme Court recognized

> [t]he jury is to be a "criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' " Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State."

Pena-Rodriguez v. Colorado, 137 S. Ct. at 868 (citations omitted). The Supreme Court has fashioned two recent decisions that directly and indirectly strengthen protections against racial discrimination in the selection of jurors, and both necessarily enhance the defendant's right to a jury that reflects a fair cross-section of the community.

In *Foster v. Chatmam*, 136 S. Ct. 1737, 1747–55 (2016), the Supreme Court required trial courts to engage in a searching inquiry of the prosecutor's stated justifications for striking jurors of color, requiring a comparative juror

analysis to determine whether the stated race-neutral reasons for striking black jurors were in fact even-handedly applied to white jurors.

In *Pena-Rodriguez*, the Court held a juror's racially biased comments during deliberations if reflected in his or her vote can require the trial court to overturn a jury verdict. 137 S. Ct. at 869. *Pena-Rodriguez* necessarily requires trial judges to be more attentive to disqualification for cause of prospective jurors whose racial bias has become apparent during voir dire questioning.

In *Plain*, 898 N.W.2d at 821, the Iowa Supreme Court noted,

> A jury that represents a fair cross-section of the community enables "the commonsense judgment of community [to serve] as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." It helps legitimize the legal system and is "critical to public confidence in the fairness of the criminal justice system." Finally, it encourages civic participation through the shared administration of justice.

To ensure the makeup of jury pools and jurors represent a fair cross-section of the community, the Iowa Supreme Court appointed the following persons to serve on the Committee on Jury Selection:

> Honorable David S. Wiggins, Justice of the Iowa Supreme Court, Chair
> Honorable Marlita Greve
> Senator Dan Dawson
> Senator Janet Petersen
> Representative Ashley Hinson
> Representative Helen Miller
> Dedric Doolin
> Russell Lovell
> Brian Williams
> Kent Simmons
> Todd Nuccio
> Billie Treloar

Paula Hannaford Agor, the Director of the Center for Jury Studies, National Center for State Courts (hereinafter "NCSC"), contributed to committee discussions and in the development of the committee

recommendations. The committee thanks Paula for her time and expertise on jury system management. The committee also thanks Sydney Gangestad for her work as the committee's reporter.

After thoughtfully reviewing and considering the statutes and rules of Iowa concerning the selection of jurors, taking into account current procedures and policies used throughout the state, and evaluating the advancement of technology on the jury-selection process, the committee developed recommendations to ensure the makeup of jury pools in Iowa represent a fair cross-section of the community. The Committee on Jury Selection respectfully submits the following recommendations[1] to the court for its review.

[1] After each recommendation the sources to review are listed. These sources are hyperlinked.

I. The Supreme Court Should Review Iowa Code Chapter 607A, Specifically the Sections Concerning Minimum Juror Qualifications and Juror Service.

Committee Comment

Citizens have a constitutional right to jury duty. Jury duty is both a civic responsibility and an obligation of all qualified citizens. The court should extend the privileges and responsibilities of jury service to as broad a segment of the population as is possible. The court should review eligibility requirements to determine if they adversely affect the inclusiveness of the jury-selection process. The court's goals should be as follows:

Reduce the terms of jury service

(1) Lessen the inconvenience to citizens of serving as jurors;

(2) Broaden citizen participation in the jury system;

(3) Distribute the responsibility for participation in the jury system among the qualified population in as fair a manner as possible; and,

(4) Increase the efficiency and effectiveness of district court activity. Each county has its own unique circumstances, but a term of one week/one trial, or less, should be the goal in every county.

Review jury fees

Fees should be high enough so people will serve. Other states have recognized there is a relationship among the amount of juror fees, the proportion of citizens who are excused for financial hardship, and minority representation in the jury pool. Other states have also changed the structure of payment to a graduated rate based on length of service instead of a flat rate regardless of the number of days served.

Review standards for excuses

A liberal deferral policy should be employed to reduce the number of outright excusals. Potential jurors should be able to reschedule their service once without any questions asked. Excusals should only be for statutory allowable reasons. Application of the deferral and excusal policy should be uniform throughout the state. The office of the State Court Administration

(SCA) should publish clear and objective criteria on how jurors may demonstrate financial or medical hardship and guidelines for rescheduling service more than once.

Develop a juror handbook

Develop a handbook explaining the trial process, and juror rights and responsibilities. The SCA should produce an electronic handbook outlining the role of jurors in the adjudicative process, their duties and responsibilities, and other information relevant to their service.

Sources to Review

American Bar Associatiion (hereinafter "ABA") Principles for Juries and Jury Trials

Iowa Code § 607A

NCSC Jury Managers' Toolbox Series

II. The Supreme Court Should Make the Master Jury List Available For the Public to Review, and a Citizen May Review the Master List to Determine if His or Her Name is on the List.

Committee Comment

In the past decade, the supreme court has gone to great lengths to make the Iowa court system more transparent. Information about jury management and the jury-selection process is not common knowledge among the public. Providing the public with access to the master list, coupled with information about how the master list is compiled, will continue the court's goal for greater transparency.

The office of the state court administrator ("SCA") should determine whether public inquiries may be done by querying a name or by scanning a static list. If a citizen believes the absence of a name is in error, the SCA's reference site should provide a mechanism to inquire about the potential error. This change may require amendment of Iowa Code 607A.4(2) and 607A.25. The office of the SCA should review all inquiries and provide an explanation for the absence of a name. If the office of the SCA determines it omitted a name in error, it should add the name to the master list.

Sources to review

M. R. S. § 1252-A. Source List

NCSC: Jury Manager's Toolbox, Characteristics of an Effective Master List

III. The Office of the State Court Administrator Should Seek Additional Comprehensive Source Lists to be Used When Compiling the Master Jury List.

Committee Comment

The office of the SCA does not have control over individual source lists, e.g., whether an individual chooses to register to vote or to receive a license or a state identification through the Iowa Department of Transportation. However, the office of the SCA does have control over what source lists are used to compile a master jury list.

Iowa Code section 607A.22 requires the office of the SCA to utilize the current voter registration list, the current motor vehicle operators list, and the nonoperators identification list. This section also allows the use of any other current comprehensive lists of persons residing in the county which the state court administrator or the jury manager deems useable for the purpose of a juror source list. Statutory authority exists for the state court administrator or the jury manager to receive those lists from applicable state and local government officials, upon request, at no cost.

The National Center for State Courts recommends that the master jury list should encompass 85% of the total adult population. The inclusiveness of the master list directly increases with the use of multiple source lists. Voters, licensed drivers, and state ID holders as required in Iowa are the most common combination. Other lists most commonly used are income tax filers and persons receiving unemployment compensation. Although not always yielding significant increases in the overall number of eligible jurors, income tax and unemployment lists have been shown to contain more accurate juror addresses. As such, we recommend the office of the SCA to incorporate an Iowa Department of Revenue source list as part of the master jury list. The

office of the SCA should also inquire as to whether lists from housing authorities and the Child Support Recovery Unit may be added as source lists.

Sources to Review

ABA: Principles for Juries and Jury Trials, Principle 2—Citizens Have the Right to Participate in Jury Service and Their Service Should be Facilitated

G.T. Munsterman and Paula L. Hannaford-Agor, Research Division NCSC, The Promise And Challenges Of Jury System Technology (2003)

NCSC: Jury Manager's Toolbox, Characteristics of an Effective Master List

IV. The Supreme Court Should Define the Roles and Responsibilities of the Jury Manager Including, But Not Limited To, the Relationship of the Jury Manager With the Office of the State Court Administration.

Committee Comment

The jury manager should follow the policies and procedures as set forth by the office of the SCA for the summoning, qualification, orientation, utilization, and payment of jurors. Jury managers should only use standardized forms and materials developed by the office of the SCA and follow all state-level protocols for the capturing and entering of data into the jury-management application.

Sources to Review

NCSC Jury Managers' Toolbox Series

State of North Carolina, County of Mecklenburg: Jury Commission Report (2017)

V. The Supreme Court, Through the Office of the State Court Administrator, Should Produce an Annual Plan Documenting the Policies and Procedures That All Iowa Counties Must Follow.

Committee Comment

To ensure transparency, uniformity, and accountability, the office of the SCA should prepare an annual plan documenting the policies and procedures that jury managers throughout the state must follow for the administration of jury operations in each county. The chief judge and the jury manager for each judicial district should certify they have read and will comply with all provisions set forth within the plan. The chief judge shall note any deviations needed to address special local circumstances and communicate any circumstances to the SCA for approval and counter signature. The office of the SCA and each district court should maintain a copy of the report and make it available for inspection upon request.

Sources to Review

NCSC Jury Managers' Toolbox Series

State of North Carolina, County of Mecklenburg: Jury Commission Report (2017)

VI. The Supreme Court Should (1) Review Rule 2.18(5) of the Rules of Criminal Procedure (Juries: Challenges For Cause), and (2) Establish Training for Judges on Challenges for Cause.

Committee Comment

Voir dire is the process the court and counsel uses to select a jury. A properly conducted voir dire is crucial to a fair trial. A properly conducted voir dire also promotes respect among litigants and the public for the jury's decision. Recommendations VI and VII relate to voir dire procedures.

Too often courts will not allow a challenge for cause when it should be granted. More often courts attempt to rehabilitate a juror rather than allow a challenge for cause. Courts do this because a party has peremptory challenges. Judges should be more willing to allow challenges for cause and not rely on a party using its peremptory challenge to take care of a problem juror. The court should review Rule 2.18(9) of the Iowa Rules of Criminal Procedure, and evaluate the policy and management of challenges for cause. If feasible, the court should develop consistent standards on ruling on challenges for cause.

The judicial education department should establish a curriculum that promotes judicial officer education on juror treatment and on conducting trials, in particular the jury-selection process. A stand-alone education program focused on jury selection provides judges with the knowledge, techniques, and control that are necessary to make the process fairer for the parties and efficient for the jurors who are giving up their time for jury service. This program should include a segment on rulings on challenges for cause during jury selection.

Additionally, the judicial education department and the benchbook committee should develop guidelines and procedures for trial court judges on the process of jury selection in criminal and civil cases, which may include

sample prospective juror questionnaires, a voir dire checklist, and recommendations on trial management.

All strikes should be documented, and a record of the voir dire and the composition of the jury during the course of a trial should be maintained in a consistent manner throughout the state.

Sources to Review

ABA: Principles for Juries and Jury Trials, Principle 11—Courts Should Ensure That the Process Used to Empanel Jurors Effectively Serves the Goal of Assembling a Fair and Impartial Jury

California Administrative Office of the Courts Bench Handbook: Jury Management (2013)

Iowa R. Crim. P. 2.18

Iowa R. Civ. P. 1.915

NCSC: Building a Better Voir Dire Process (2008)

NCSC: Jury Trial Innovations 2d Ed. (2006)

William G. Childs, The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error, 27 American J. Crim. Law 49 (1999)

VII. The Supreme Court Should (1) Reduce the Number of Peremptory Strikes Provided For in Rule 2.18(9) of the Rules of Criminal Procedure (Juries: Strikes), and (2) Establish Training for Judges on *Batson* and *Wheeler* Challenges, Courtroom Management, and Rehabilitation of Jurors.

Committee Comment

Advocates for discretionary or peremptory strikes contend they represent a source of public trust and confidence, and reflect a mechanism to ensure fairness for both sides in a legal proceeding. However, peremptory strikes, when exercised against minority jurors and particularly when such strikes result in an all-white jury, undermine citizen confidence in the jury system to be fair and impartial. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), and *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), have prohibited discretionary or peremptory strikes that are racially motivated for more than thirty years. However, there is a national consensus that the procedural protections to implement *Batson* have proved ineffective because, rather than focusing on the defendant's right to a jury that reflects a fair cross-section of the community, courts have required proof that the strike was intentionally discriminatory. Courts have also failed to recognize that a strike based on implicit bias is just as invidious and has the same impact as a purposeful strike.

The committee has not arrived at a consensus on the proper number in different case types, nor as to whether the prosecution should have fewer strikes than the defense, as is done in the federal criminal system. The committee noted England has removed all peremptory strikes. Although initially there was trepidation in England when peremptory strikes were abolished, those fears have vanished.

If the court makes the decision to reduce the number of peremptory strikes, the commission emphasizes the need for judicial training and education on challenges for cause, as proposed in section VI.

Recommendations VI and VII are intrinsically linked because a reduction in the number of peremptory strikes would require improvements in the procedures used for determining challenges for cause.

The judicial education department should include a segment on *Batson* and *Wheeler* challenges, and the practical limits that *Pena-Rodriguez v. Colorado* places on judicial rehabilitation of jurors whose voir dire responses suggest racial bias.

Sources to Review

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

California Administrative office of the Courts Bench Handbook: Jury Management (2013)

Iowa R. Crim. P. 2.18

Iowa R. Civ. P. 1.915

Judge Mark Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection, 4 Harv. L. & Policy Rev. 149 (2010)

Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. 809 (1997)

Nancy S. Marder, Justice Stevens, the Peremptory Challenge, and the Jury, Fordham L. Rev. 1683 (2006)

NCSC: Building a Better Voir Dire Process (2008)

NCSC: Jury Trial Innovations 2d Ed. (2006)

People v. Wheeler, 22 Cal. 3d 258 (1978)

Symposium, Batson at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy, 97 Iowa L. Rev. 1393-1744 (2012)

VIII. The Supreme Court Should Develop a Comprehensive Review of Methods to Reduce Implicit Bias in Jury Selection and Throughout the Course of the Trial.

Committee Comment

The Code of Judicial Conduct, Rule 51:2.3(C), states,

> A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

Given the critical importance of exercising fairness and equality in the court system, attorneys, judges, and jurors should be aware of implicit stereotypes and implicit attitudes. The court should require all court personnel and attorneys to receive implicit bias training. Additionally, the judicial branch should provide educational material about implicit bias on the jury web page addressing the problem of implicit bias. The court should evaluate the use of specialized jury instructions tailored for reducing racial disparities in juror judgments.

Sources to Review

ABA Achieving Impartial Jury (AIJ) Toolbox

ABA Implicit Bias Initiative, Toolbox

ABA Resolution 107

Jennifer K. Elek & Paula Hannaford-Agor, Can Explicit Instructions Reduce Expressions Of Implicit Bias? New Questions Following a Test Of A Specialized Jury Instruction (NCSC 2014)

Jennifer K. Elek & Paula Hannaford-Agor, Implicit Bias and the American Juror, 51 Court Review 116 (NCSC

Jennifer K. Elek & Paula Hannaford-Agor, First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making, 49 Court Review 190 (NCSC)

IX. The Office of the State Court Administrator Should (1) Develop a New Process for Notifying Jurors of Their Duty to Serve, and (2) Create a Jury Portal on the Website, Which Should Include an E-Juror Questionnaire and Information About Jury Duty. The Office of the State Court Administrator May Task an Implementation Committee to Assist in Developing the Questionnaires and Materials on the Portal.

Committee Comment

Changes to the mechanics of the summoning process are essential to help the public understand its jury duty obligation, respond to summonses properly, and perform the required duties. To minimize confusion and improve attendance rates, the office of the SCA should make modifications to the existing juror summons and questionnaire.

The office of the SCA should develop a new process for notifying jurors of their duty to serve and work with a jury technology vendor to create an updated noticing process. It is anticipated that potential jurors will receive notice of their service by postcard in lieu of an envelope containing a long-form summons. Each postcard will include a unique juror ID number and will direct individuals to a juror portal on our website to complete the juror questionnaire, receive instructions on where and how to report, and information on jury service. After logging in, prospective jurors complete a questionnaire, and the system then registers them as having responded. Prospective jurors without access to the internet may call the number on their postcards to request a hard copy of the questionnaire.

A field or question in the questionnaire should be included to give potential jurors with disabilities notice to request accommodations prior to their service date. Language about juror information privacy should be included on the juror portal. The office of the SCA should also include a section within the questionnaire that requires the prospective juror to provide

an email address or mobile phone number. This contact information should be used to send an email or text message reminder to the juror twenty-four to forty-eight hours in advance of their service date. The office of the SCA should consider tasking an implementation committee to help develop the questionnaire and materials on the juror portal.

The juror portal should provide comprehensive information and resources about jury service—e.g. dress code, court amenities, categories for disqualifications and excuse, and frequently asked questions. As noted previously, an electronic version of the juror handbook should be included on the juror portal. Additionally, the office of the SCA and the implementation committee should consider updating the juror orientation video and including it on the juror portal for jurors to review prior to reporting for jury service. The juror portal should also include a means to gather feedback from jurors about their jury service and the process.

In working with the jury technology vendor and Judicial Branch Information Technology, the office of the SCA should determine if the information included on the juror portal, including the questionnaire, can be accessed as a mobile application.

The process for noticing jurors about service, the content of the questionnaire and juror portal—and any existing applications—should be reviewed and updated on a regular basis.

Sources to Review

Current Iowa Jury questionnaire

Current Iowa E-Juror questionnaire

Jury Service Orientation Video—Maryland Courts

X. The Supreme Court Should Ensure That Judges Have the Ability to Move the Venue of a Trial on Their Own Accord in Exceptional Circumstances.

Committee Comment

A trial by one's peers is a fundamental principle of trial by jury. Some communities may not have the racial or ethnic population to ensure this fundamental principle. In these instances, on motion of the parties or *sua sponte*, courts should have the ability to change the venue of the trial or import jurors from other counties to ensure a jury pool that is reflective of the defendants' characteristics.

Sources to Review

Andy Hoffman, Change of Venue Granted in Murder Trial, The Hawk Eye (October 20, 2017)

Darryl K. Brown, The Role of Race in Jury Impartiality and Venue Transfers, 53 Md. L. Rev. 107 (1994)

North Carolina Defender Manual § 11.3 (Change of Venue) (Nov. 2008)

XI. The Supreme Court Should Ensure that as Much Comprehensive Jury Data as Possible—From Pools to Panels to Tracking Strikes in Voir Dire—is Maintained and Available to the Public, as Necessary, While Ensuring the Protection of Personal Information and the Safety of Jurors.

Committee Comment

The office of the SCA should work with the jury technology vendor to determine capabilities of the jury management software as it relates to tracking data elements. Any jury management software implemented should track all data elements needed to measure performance and comply with the JTC Jury Management System Requirements Adopted Standards. As much comprehensive jury data as possible should be maintained.

In *Plain*, the Iowa Supreme Court determined "[d]efendants are entitled to access the information needed to enforce their constitutional right to a jury trial by a representative cross-section of the community." 898 N.W.2d at 828. The judicial branch is required to provide defendants reasonable access to the records necessary to evaluate composition of jury pools. Comprehensive data should be available for review but not without limitation. When necessary, the protection of personal information and the safety of jurors should trump disclosure. The office of the SCA should develop a policy for the distribution and monitoring of jury data.

Sources to Review

David Weinstein, Protecting A Juror's Right to Privacy: Constitutional Constraints and Policy Options, 70 Temp. L. Rev. 1 (1997)

Nina W. Chernoff, No Records, No Right: Discovery & the Fair Cross-Section Guarantee, 101 Iowa L. Rev. 1719 (2016)

Paula Hannaford, Safeguarding Juror Privacy-A New Framework for Court Policies and Procedures, 85 Judicature 18 (2001)

XII. The Supreme Court Should (1) Develop Uniform Policies and Procedures for 'Failure to Appear' (FTA) Situations, (2) Determine if Applicable Penalties Will Increase Appearance Rates, and (3) Develop a Standard Practice for Undeliverables.

Committee Comment

Failure to Appear:

After the court summons the prospective juror, it is the individual's responsibility to appear for jury service or to provide a valid reason as to why the court should excuse him or her from service. A significant number of individuals summoned for jury service fail to respond or fail to appear (FTA). Nationally, FTA rates average 9%; in Iowa, FTA rates average 11%.

While courts have traditionally characterized nonresponses and FTA as factors beyond their control—for the purposes of fair cross-section challenges—courts inherently have the ability to enforce a jury summons because it is a court order. All states have statutory or administrative provisions detailing civil and criminal sanctions or both for failure to respond to a valid jury summons. In Iowa, under Iowa Code section 607A.7, any attempt to avoid jury service for one's self or another by making a false claim or affidavit is punishable by contempt.

Timely and consistent follow up on jurors who fail to respond to a jury questionnaire or who fail to appear for service is a key feature of a well-run jury operation. Specifically, it increases overall jury yield and improves the representativeness of the jury pool. NCSC research on summons enforcement programs found that FTA rates are 24% to 46% lower in courts that send a second notice/summons compared to courts that do not use this approach. More than half (54%) of all courts use a second notice/summons program for summons enforcement; nearly one-quarter (24%) of courts use this approach as the only form of summons enforcement.

Public perceptions about the likelihood of consequences for FTA are changed when courts take steps to enforce their jury summons. The court should review current practices and procedures for FTAs around the state, the practices and procedures utilized in other jurisdictions for FTAs, and develop best practices. The court should develop a uniform policy for FTAs and the SCA should implement the policy statewide. In addition to reviewing the practices and procedures, the court should also review the current applicable penalties, and determine if regular and uniform enforcement of these penalties will increase appearance rates or if the current statutory penalties need to be amended to increase appearance rates.

By setting forth strict, uniform guidelines for notification and enforcement of the summons, two goals are achieved: (1) an increased summoning yield and (2) the creation of renewed respect for the judiciary as a whole and jury duty in particular.

Undeliverables:

List accuracy is an additional key objective of an optimal master jury list. An entirely representative and inclusive master list is useless if prospective jurors cannot be located to receive a jury summons. Nationally, the United States Postal Service returns an average of 12% of jury summonses marked as "undeliverable." This is the single biggest factor contributing to decreased jury yields. The vast majority of undeliverable summonses are due to out-of-date addresses because the person has moved to a new address. Nationally, an estimated 12% of the nation's population moves to a new address each year. The SCA should utilize the National Change of Address system to update jury lists and reduce undeliverables.

Sources to Review

Florida Jury Managers' Manual section 2.0 Summoning Jurors (2016)

NCSC: Best Practices for Jury Summons Enforcement (2009)

XIII. The Supreme Court Should Establish a Public Awareness Campaign to Highlight the Importance of the Civic Duty of Jury Service.

Committee Comment

The judicial branch, in partnership with the executive and legislative branches, should make efforts to promote public awareness about jury service in Iowa. Increased awareness about the important civic duty of jury service may increase response rates to summonses.

In Nebraska, testimony collected through statewide public hearings and discussion with district court clerks, jury commissioners, and minority community leaders suggest that minority underrepresentation on juries is due in part to a general distrust and unfamiliarity with the justice system, resulting in a failure to respond to jury summonses. Nebraska and a number of other states have developed outreach campaigns to provide information about jury duty and promote jury service.

The importance of the jury system and duty to serve should be actively promoted through all available channels of communication. The court should review jury information on the Iowa Judicial Branch website, and ensure comprehensive information and resources are available. Public proclamations by all branches of government (e.g., an annual Iowa Juror Appreciation Week) can heighten public awareness. Jury service should be promoted through existing committees and programs that undertake outreach and education about the justice system (e.g. Access to Justice Commission). A public service campaign to promote jury service in Iowa should be developed using a variety of media including, but not limited to, radio, television, newspapers, local bulletins, and court facilities. Every effort should be made to reach out to all Iowans about the importance of the civic duty of jury service.

Sources to Review

District of Columbia Jury Project, Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington D.C. (1998)

NCSC: Jury Trial Innovations 2d ed. (2006)

Recent Efforts to Make Nebraska Juries More Representative of Their Communities (2006)

Washington State Jury Commission

Report to the Board for Judicial Administration

July 2000

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Introduction from the Chair

"The American system of trial by jury is unique. No other nation relies so heavily on ordinary citizens to make its most important decisions about law, business practice, and personal liberty—even death. Ideally, Americans take their participation seriously lest they someday stand before their peers seeking justice."

Stephen J. Adler

Courts in Washington State report that it has become more and more difficult to find prospective jurors. Citizens appear to be less willing to give their time to perform the crucial civic duty of serving on a jury. Like other states before us, we decided to look for ways to encourage more participation from our citizenry.

The Board of Judicial Administration resolved that a committee be formed to "conduct a broad inquiry into the jury system and examine issues including ... juror responsiveness, citizen satisfaction from jury service, adequacy of juror reimbursement, and improving juror participation in trials." Members were to include trial court judges; trial court administrators; county clerks; jury managers; attorneys; citizens who have served as jurors; legislators; representatives of labor unions and businesses; state, county, and municipal officials; media representatives; educators; and experts in jury management.

After a variety of organizations and associations were asked to nominate representatives, the Washington State Jury Commission was formed and met for the first time on June 18, 1999. We were fortunate to have members with a wealth of experience, enthusiasm, and diverse opinions. We began our task armed with excellent advice and direction from two leading national jury experts, Mr. Tom Munsterman and Judge Michael Dann, the reports of various jury commissions, and judicial and juror surveys recently conducted by Washington State University.

The results of our efforts are contained in this report. The focus of these recommendations is to improve the jury process while maintaining access to justice and a fair trial within realistic fiscal and administrative constraints.

The Commission has given the highest priority to increasing juror fees, although all of its recommendations are important steps towards improving jury service. Increased fees will not only address the current inequity in juror compensation, but will also contribute to more economically and ethnically diverse juries by enabling a broader segment of the population to serve.

I thank the Commission members and staff for their dedication to the improvement of jury service for the citizens of our state.

Respectfully Submitted,

Daniel J. Berschauer, Chair

Process Overview

To assure that the Commission completed its Report in one year, three subcommittees were established: Citizen Participation in the Jury System, Jury Process Improvement, and Enhancing Services for Jurors. The committees selected the issues to be pursued. A final list of issues was decided upon by the full Commission before the committees began discussing, investigating, and drafting recommendations.

Citizen Participation in the Jury System, Dr. Oscar Soule, Chair
This committee examined the broad issue of how to encourage and improve citizen participation in the jury system. In the course of its inquiry, the committee addressed such questions as: What are the best ways to promote public awareness of our jury system? How can citizens be encouraged to participate? Are our juries representative of the population? How can we improve communication between the courts and those called for jury duty?

Jury Process Improvement, Honorable Sharon Armstrong, Chair
The goal of this committee was to enhance the jury experience and to increase efficiency from the juror's standpoint. Members examined juror-related activities that take place once citizens arrive in the courthouse, with particular emphasis on how to reduce the time jurors spend waiting, improvements to juror selection, ways to increase juror participation and comprehension in the courtroom, and ways to improve the jury deliberation process.

Enhancing Services for Jurors, Honorable Heather Van Nuys, Chair
This committee explored ways to reduce the burden of service on citizens called for jury duty. Members were charged with investigating issues that represent a financial burden for jurors and their employers, such as the adequacy of juror fees; how to assist jurors with child care, commuting, and parking costs; and the feasibility of reducing the frequency and terms of service. They considered ways to provide for citizens' needs during their time at the courthouse, including emotional support to jurors during and after stressful trials.

Public Input:
In addition to the initial judicial and juror surveys conducted by Washington State University (WSU), public input was sought in a variety of ways. Several committee members participated in a public forum sponsored by WSU in Spokane. We used modern technology to provide convenient public access to the Commission's work. A Washington State Jury Commission web page was created listing the draft recommendations as they were completed. The web page provided an e-mail link allowing immediate public feedback to the Commission. During Juror Appreciation Week in May, an advertisement thanking jurors and promoting jury service was published at no cost in several daily newspapers across the state. The advertisement included traditional and electronic mail addresses for the Commission to which comments could be addressed. Means for contacting the Commission were also included in a press release and in letters to county clerks, presiding judges, and court administrators at all court levels. The Commission's final report will be published on the web page.

Proposed Implementation Committee:
After receiving the Commission's report, the Board of Judicial Administration (BJA) will appoint a committee to implement the recommendations it adopts. Committee members will propose ways of funding these recommendations, draft any legislative proposals and court rule changes necessary to their implementation, and oversee and coordinate any recommended research or educational projects. The Commission's recommendations will also be part of judicial education programs for trial judges.

Acknowledgments

The Commission acknowledges the debt we owe to the commissions who paved the way for our jury reform efforts, particularly those in Arizona, California, Colorado, the District of Columbia, and New York. We were fortunate in having respected jury reform experts, Judge B. Michael Dann of the Superior Court of Arizona, and Mr. G. Thomas Munsterman, Director of the Center for Jury Studies, as the featured presenters at our inaugural meeting. The information they imparted to our members based on their experiences provided us with invaluable groundwork for our efforts. We were fortunate in being able to refer to current research provided by Washington State University, including surveys of judges and jurors in our state completed just as the Commission began its work. We would like to compliment the District of Columbia Jury Project for its clear and concise reporting format. We liked it so much that we adopted a similar format for our own report.

The Chair also thanks Ms. Julia Appel, Mr. Robert Henderson, and Mr. Richard Neidhardt from the Office of the Administrator for the Courts for their excellent staff work. The structure and focus they provided for the Commission's work, as well as their technical input and background research, were exemplary.

Preamble

Citizens called to jury duty perform a vital service to the community. The justice system cannot function without citizens willing to serve as jurors. Citizen jurors should always be treated with respect.

Accordingly, in making these recommendations, the Commission has been guided by the following principles:

1. Jurors are entitled to be fairly compensated for their service;

2. Jurors are entitled to be treated with courtesy, respect, and consideration;

3. Jurors are entitled to freedom from discrimination;

4. Jurors are entitled to have their privacy interests carefully considered;

5. Jurors are entitled to comfortable, convenient, and legally compliant facilities;

6. Jurors are entitled to be fully informed of trial schedules;

7. Jurors are entitled to be informed of the trial process and the applicable law in plain and clear language;

8. Jurors are entitled to take notes during trial, ask questions, and have them answered as permitted by law.

9. Jurors are entitled to have questions and requests that arise or are made during deliberations fully answered and met as allowed by law.

10. Jurors are entitled to be offered appropriate assistance from the court when they experience serious anxieties or stress as a result of jury service.

11. Jurors are entitled to express concerns, complaints, and recommendations to court authorities.

Summary List of Recommendations

Increasing Summons Response:

1 A variety of procedures should be developed to address the concerns of those citizens unwilling to participate in jury service. Follow-up procedures should be developed for courts to use where there is no response to a jury summons.

2 Every opportunity should be taken to educate the public on the importance of jury service and to increase diversity on juries by extensive outreach to targeted communities. The implementation committee should coordinate efforts to accomplish this.

3 The format of the addresses in the jury source list databases should be standardized before the databases are combined. The correct county code should be assigned to the licensing data.

4 The combined list should be processed through a National Change of Address program in order to obtain updated address information before mailing.

5 The rules of general application relating to jury source lists should be modified to eliminate license and identicard holder records that have been expired for more than 90 days and to specify that only “active” registered voter records be considered for use in jury source lists.

6 The timing of the jury source list process should be re-examined to enable jurisdictions to perform their annual draw while the list data is still current.

7 All undeliverable and changed address information gathered by the courts should be delivered to the Department of Licensing as well as to county election departments for processing. The Department of Licensing and county auditors should use this information for database corrections. County clerks should be encouraged to create suspense files for chronic non-deliverable addresses.

Accommodating Citizens Called to Jury Service:

8 Courts should require jury service for the shortest period possible. Therefore, the statute should be amended to shorten the jury term to a maximum of one week and jury service to a maximum of two days or one trial.

9 Jurors should be provided with full and complete information about jury service from the time they are summoned.

10 In order to promote broad citizen participation and to send a message that courts respect the time commitments of citizens, a state-wide policy should be established to enforce and strictly limit the granting of jury excuses while liberally granting requests for postponement.

11 RCW 2.36.070 should be amended to include a pilot project allowing non-English-speaking citizens to serve on a jury with the aid of a certified interpreter.

12 The Commission views a fee increase as its highest priority. Citizens required to perform jury service should be compensated fairly and appropriately. Legislation should be drafted requiring that current fees be raised, with the increase funded by the state. Local jurisdictions are encouraged to provide or pay for transportation and parking. Jurors could donate their fees and expenses to a court jury improvement fund.

13 Courts should make every effort to utilize jurors efficiently. They should avoid calling more citizens to the court facility for jury service than needed.

14 Each court should maintain adequate facilities for jurors with the appropriate seating, work space, rest rooms, light, and temperature control necessary to facilitate jury selection and deliberations. Special consideration should be given to jurors with disabilities or other special needs. Courts must make every effort to provide the appropriate facilities to accommodate these needs.

15 Amenities to improve the experience of jury service should be provided wherever possible.

16 At the start of a jury trial, the judge should inform the jurors of the court's normal working hours, as well as the working hours that could be expected during deliberations. The judge should determine whether the jurors have any special needs that justify setting different times.

17 Judges and court personnel should assist jurors to handle the stress that may be caused by jury service.

Protecting Juror Privacy:

18 Judges should have discretion to balance a party's interest or right to know any particular information about a juror with the juror's privacy interest. Judges must exercise discretion to balance jurors' privacy interests with those of the general public.

19 The juror summons should provide useful information to the potential juror and require of the juror only that information mandated by statute. A standardized summons form should be created for use and modification by any jurisdiction.

20 The court should try to protect jurors from unreasonable and unnecessary intrusions into their privacy during jury selection. In appropriate cases, the trial court should submit written questionnaires to potential jurors regarding information that they may be embarrassed to disclose before other jurors. Before dismissing jurors from service on a trial, the court should inform jurors of their rights to discuss or refrain from discussing the case.

Improving Jury Selection Procedures:

21 Trial courts should make available to attorneys a written statement of the court's standard practices for jury selection. The court's standard practices should ensure that the parties have a full opportunity to select a fair jury while avoiding undue and unreasonable juror discomfort and embarrassment.

22 The judge should give prospective jurors a brief and neutral description of the case after consulting with the parties and before jury selection. The description should be sufficiently detailed to assist jurors in answering questions during jury selection and while performing their duties. The judge should advise the jury that the description represents the contentions of the parties and does not imply the court's view on the merits of the case.

23 A party should raise any *Batson* objections to the opposing party's peremptory challenges before the jury is impaneled. The court should exercise its discretionary power to raise *Batson* objections on its own motion. *Batson* challenges, and objections to these challenges, should be handled outside the jurors' presence.

24 Alternate jurors should be told that they are alternates at the beginning of the trial.

Improving the Trial Process for Jurors:

25 Trial judges should set reasonable overall time limits for each party at trial. To set time limits, the court should consider among other factors: the number of witnesses; the number and complexity of issues; the respective evidentiary burdens of the parties; the nature of evidence to be presented; the feasibility of shortening trial by stipulations; and pre-admitting exhibits.

26 Judges should encourage all trial participants to use plain language likely to be understood by the jury. Judges should also take steps to minimize juror confusion.

27 In both civil and criminal cases, after the jury is impaneled, the judge should instruct the jurors as to the basic elements of the claims, charges, and defenses. The judge must inform the jurors that the instructions are preliminary only and that their deliberations must be governed by the final instructions.

28 When the procedure will assist jurors, the court should distribute place cards, name tags, or seating charts identifying parties, witnesses, counsel, and other pertinent individuals in the courtroom.

29 Court rules should be amended to allow jurors to take notes in every case, regardless of the length or complexity of the trial. Jurors should be permitted to review their own notes in the jury room during recesses.

30 Juror notebooks should be provided in lengthy or complex cases and in other cases at the judge's discretion. The notebooks should contain information that will help jurors perform their duties, such as preliminary instructions, a summary of claims and defenses, and copies of key exhibits.

31 Exhibits and depositions should be marked and admitted to the greatest extent feasible before potential jurors are conducted to the courtroom for jury selection.

32 When a witness appears by written or videotaped deposition, the testimony proposed for admission should be identified and objections to admission resolved before potential jurors arrive at the courtroom. When deposition testimony is read to the jury, each juror should be provided, to the extent feasible, with a redacted transcript of the testimony for the juror's use during the reading. Redactions should not be apparent to the jury.

33 In every case, jurors should be permitted to submit written clarifying questions to witnesses, subject to careful judicial supervision. The decision of whether to permit a question rests with the judge, although counsel retain the right to object to the scope or content of any specific question. Jurors are not permitted to ask oral questions. The rules of civil procedure and criminal procedure should be amended accordingly.

34 In long trials, the court should consider allowing periodic mini-opening statements to improve juror understanding.

35 To the greatest extent feasible, each juror should be given a copy of the jury instructions before oral instruction by the court.

36 Jury instructions should be readily comprehensible by jurors. They should be case specific and stated in plain language. The number and length of instructions should be reduced to a minimum.

Improving the Deliberating Process:

37 Washington's Pattern Jury Instructions should provide jurors with suggested deliberation procedures. The suggested procedures should include selecting a presiding juror, organizing the discussion, encouraging full participation by all jurors, handling disagreements, and taking votes.

38 Trial judges should make every effort to respond fully and fairly to questions from deliberating jurors. Judges should not merely refer them to the instructions without further

comment or tell them to rely upon their memories of the evidence. In doing so, judges should be careful not to pressure the jury or state or imply any view of the case's merits.

39 The final jury instructions should explain the procedures for requesting clarification of instructions. The judge should advise the jury to submit any questions about instructions in writing to the bailiff.

40 When a jury question arises during deliberations regarding the evidence, the judge should notify the parties or their counsel of the question. The judge should read the question and solicit comments regarding the appropriate response. The response and any objections to it should be made a part of the record. This process should be mandated by court rule.

The judge should, after consulting with the parties or counsel, respond to all jury questions, even if the response is no more than a directive to rely upon their memories of the evidence. The court may allow the jury to review evidence (e.g., replaying audio or video tapes) if such review is not unfairly prejudicial to either party. The court may grant a jury's request to rehear or replay trial testimony, but should do so in a way that is least likely to constitute a comment on the evidence and that minimizes the possibility that jurors will give undue weight to the selected testimony.

41 When deliberating jurors in a civil case report that they cannot reach a verdict, the judge should take additional steps after confirming that the jury is, in fact, deadlocked. The judge should invite the jury to state, in writing, the points of law or evidence upon which it cannot agree and desires help. The judge should discuss the jury's response with counsel before deciding how to proceed. The judge can provide additional instructions, permit additional closing arguments, reread or replay testimony, reopen the trial for more evidence, or allow a combination of these. In communicating with jurors, the judge must avoid any appearance of coercing a verdict.

After the Trial:

42 The trial judge may specially schedule the time for the verdict announcement in cases in which the judge is concerned about security or widespread public reaction to the verdict.

43 Courts should administer an anonymous questionnaire to a representative sample of people called for jury service to monitor juror reaction to jury service and to identify areas of juror dissatisfaction.

Declaration of Principles for Jury Service:

44 A Declaration of Principles for Jury Service should be posted in each court facility as a reminder of the importance of the jury's role in the judicial system and to ensure that jurors are treated with respect.

WASHINGTON STATE JURY COMMISSION MEMBERS

Commission Chair:
Honorable Daniel Berschauer, *Thurston County Superior Court Judge*

Committee Chairs:
Honorable Sharon Armstrong, *King County Superior Court Judge*
Dr. Oscar Soule, *Professor, The Evergreen State College, Former Juror*
Honorable Heather Van Nuys, *Yakima County Superior Court Judge*

Commission Members:
Mr. Gabriel Acosta, *Walla Walla County Deputy Prosecuting Attorney*
Mr. Gil Austin, *Thurston County Superior Court Administrator*
Mr. Peter Camp, *Assistant City Attorney, City of Everett, Former Juror*
Representative Michael Carrell, *Washington State House of Representatives*
Representative Dow Constantine, *Washington State House of Representatives*
Ms. Maria Diamond, *Washington State Trial Lawyers Association, President Elect, Former Juror*
Honorable Lynda Eaton, *Ferry County District Court Judge*
Mr. Neil Fox, *King County Public Defender Association*
Mr. David Hardy, *Spokane County Superior Court Administrator*
Mr. Michael Kilborn, *Pierce County District Court Administrator*
Senator Adam Kline, *Washington State Senate, Former Juror*
Honorable Barbara Linde, *Seattle Division, King County District Court Judge, Former Juror*
Honorable LeRoy McCullough, *King County Superior Court Judge*
Mr. Vince O'Halloran, *Branch Agent, Sailors' Union of the Pacific, Washington State Labor Council*
Honorable Kevin Ringus, *Fife Municipal Court Judge*
Mr. Lindsay Thompson, *Washington State Bar Assoc., Board of Governors*
Mr. Rowland Thompson, *Executive Director, Allied Daily Newspapers of Washington, Former Juror*
Mr. John Vipond, *Association of Washington Businesses Board and Small Business Policy Council, Former Juror*
Honorable Siri Woods, *Chelan County Clerk, Former Juror*

Advisory Members:
Mr. Everett Billingslea, *General Counsel to the Governor, Former Juror*
Dr. David Brody, *Criminal Justice Program, Washington State University*
Mr. David Elliott, *Asst. Dir. of Elections, Office of the Secretary of State, Former Juror*
Dr. Nicholas Lovrich, *Dept. of Political Science, Washington State University*
Mr. Thomas Munsterman, *National Center for State Courts, Center for Jury Studies*

Office of the Administrator for the Courts Staff:
Ms. Julia Appel, *Jury Program Analyst*
Mr. Bob Henderson, *Communications Manager*
Mr. Rick Neidhardt, *Legal Services Analyst*

Washington State Jury Commission

Recommendations

Increasing Summons Response

1

THE WASHINGTON STATE JURY COMMISSION RECOMMENDS THAT A VARIETY OF PROCEDURES BE DEVELOPED TO ADDRESS THE CONCERNS OF THOSE CITIZENS UNWILLING TO PARTICIPATE IN JURY SERVICE. FOLLOW-UP PROCEDURES SHOULD BE DEVELOPED FOR COURTS TO USE WHERE THERE IS NO RESPONSE TO A JURY SUMMONS.

Jury Summons Non-Response

According to a recent American Judicature Society report, the average jury summons non-response rate in state courts is 20.1 percent. King County Superior Court participated in the study and has a non-response rate of approximately 20%.

Undeliverable Summons

The AJS report also estimates that 24.7 percent of non-respondents were unlikely to have received their summonses. A recent article by Richard Seltzer suggests that possibly more than one-third of jury summonses are undeliverable by the U.S. Postal Service. This will be an ongoing problem with a highly mobile populace. Recommendations 3-7 discuss methods for improving the quality of the address data on the jury source lists.

Reasons for Non-Response

There are many reasons why people sent a jury summons do not respond:

1. economic issues,
2. dependent care,
3. time constraints,
4. distrust of the judicial system,
5. dislike of the mechanics of the jury system,
6. religious issues,
7. not wishing to judge others, and
8. the understanding that failing to respond will go unpunished.

Points 1 through 5 are addressed in the Commission's recommendations: the development of an education program (Recommendation 2); a proposed increase in juror compensation (Recommendation 12); better use of a juror's time (Recommendations 8, 13, 15, 16, 25, 31, and 32), and allowing jurors to defer service to a more convenient time (Recommendation 10).

Alternative Kind of Jury Duty

Points 6 and 7 can be addressed by asking those whose beliefs prevent them from serving as a juror to perform an alternative kind of jury duty, such as preparing summons forms for mailing.

Follow-up Process

Point 8 can be addressed by courts using a follow-up procedure if no response is received within two weeks (or an appropriate period for a particular court) of mailing the summons:

- Reminder notice.
- Certified letter signed by presiding judge.
- Second notice signed by presiding judge.
- Show cause order for a hearing resulting in sanction.

Follow-up procedures instituted by many New York counties resulted in a significantly higher response rate.

Failure to Appear Penalty

Many citizens are aware that there is a lack of enforcement of the jury service summons. The Commission recommends that the courts be encouraged to enforce the penalty for non-response (RCW 2.36.170).

References:

Boatright, Robert G., *Improving Citizen Response to Jury Summonses, A Report with Recommendations,* American Judicature Society pp. ix, xi, 103, 205 (1998).

Seltzer, Richard, "The Vanishing Juror; Why Are there Not Enough Available Jurors", 20/3 The Justice System Journal, pp. 211-212 (1999).

New York State Unified Court System, *Jury Reform in New York State: A Progress Report on a Continuing Initiative* (1996).

2

EVERY OPPORTUNITY SHOULD BE TAKEN TO EDUCATE THE PUBLIC ON THE IMPORTANCE OF JURY SERVICE AND TO INCREASE DIVERSITY ON JURIES BY EXTENSIVE OUTREACH TO TARGETED COMMUNITIES. THE IMPLEMENTATION COMMITTEE SHOULD COORDINATE EFFORTS TO ACCOMPLISH THIS.

Misconceptions about Jury Duty

The arrival of a jury summons in the mailbox is rarely greeted with enthusiasm: jury duty is inconvenient; it interferes with work; it does not pay well and may cause a loss of income; and it sometimes means waiting in a less than congenial or comfortable environment. Surprisingly, however, citizens who have served on a jury in the past are rarely reluctant to serve again. Jurors are positive about their service and usually find the experience rewarding. They generally come away with a positive attitude towards the justice system.

Citizens who have not served before may lack this positive attitude due to a misunderstanding of what jury duty really entails. It is important, therefore, to reach out to the large percentage of the public that has never served on a jury and provide them with as much information as possible about the reality of jury duty.

Diversity in Jury Service

Every effort should be made to reach out to all segments of the population. Diversity in jury service increases the twin goals of recognizing that all citizens have equal rights and responsibilities and making the jury system as fair as possible. However, there is a perception that jury service has been reserved for certain segments of our society. This misperception both increases alienation of the excluded segments and increases resentment by those who believe they are summoned too many times. Accordingly, special efforts should be made to increase the participation in jury service by sectors of society that traditionally have not participated fully, particularly young people and minority communities.

Various strategies would include educational campaigns targeting high school students, new citizens, and minority communities. In addition to traditional educational methods, creative advertising campaigns would target media that cater to youth.

Committee to Create Jury-Related Materials

The Commission's implementation committee should oversee the development of a variety of jury-related materials. Those materials would augment the efforts of the many existing committees currently undertaking outreach and education programs, such as:

- The Council on Public Legal Education, a Washington Bar Association committee;
- Judges In The Classroom, a program which pairs judges with teachers to present lesson plans from grade school to high school;
- Law Week 2000, a program coordinated by the Washington State Bar Association to promote public legal education in Washington Schools;
- Public Legal Education Workgroup, an organization which is developing a comprehensive plan to educate and involve the people of Washington in the law and justice system;
- Public Trust and Confidence Committee, a group made up of legislators, the bar and the judiciary, which includes a subcommittee called Judiciary And The Media;
- State of Washington Minority and Justice Commission, a state commission that takes steps to overcome or prevent racial bias in the justice system;
- The Access to Justice Board, a state board established by the Washington State Supreme Court at the request of the Washington State Bar Association's board of governors;
- Washington State Supreme Court Gender and Justice Commission, a state committee to promote gender equality in the law and justice system;
- We The People, a national program from the Center for Civic Education teaching K-12 students about the Constitution and government;
- YMCA Mock Trial Competition, a program in which high school students portray a cast of courtroom characters.

In addition, jury service can be promoted in the following ways:

Juror Appreciation Week

- Washington State's annual Juror Appreciation Week should be more extensively promoted. Not only should all courts take the opportunity to thank jurors for their service, but they should also organize a variety of events during that week to heighten public awareness.

- Public tours of the courts and public attendance at jury trials should be promoted and encouraged.

Public Service Campaigns

- Public service campaigns should promote jury duty using a variety of media including radio, television, newspapers, and other means of public advertising, such as public transit, schools, court facilities, and local stores.

- Media partnerships should be encouraged to provide low-cost advertising space to publicize jury service. As an example, the publication of the Judicial Voter Pamphlet could alternate with the publication of a biennial tab educating the public about the justice system and including information concerning jury service.

Business and Labor Support

- Business and labor support should be encouraged at every opportunity. The judiciary should work with local Chambers of Commerce to publish articles in their bulletins, and with labor unions to publish information on labor web pages and in local union halls. Local businesses who pay their employees during jury service should be publicly acknowledged and thanked by the courts. Certificates thanking local businesses could be provided for display on their bulletin boards.

References:

David C. Brody, et al., *Juror Survey Results, 1998-1999*, p. ii (jurors have a very positive impression of the jury system, see Appendix 9).

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* pp. 33-36 (proposing a broad array of public, bar and other private educational programs).

District of Columbia Jury Project, *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington D.C.*, p. 6 (1998) (proposing educating citizenry about juries and jury service).

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 25-28 (discussing citizen education campaigns about jury service).

3 THE FORMAT OF THE ADDRESSES IN THE JURY SOURCE LIST DATABASES SHOULD BE STANDARDIZED BEFORE THE DATABASES ARE COMBINED. THE CORRECT COUNTY CODE SHOULD BE ASSIGNED TO THE LICENSING DATA.

Address Accuracy

The combination and sorting of the Department of Licensing (DOL) database and the Voter Registration databases is the basic function that occurs before any summons work. There is anecdotal evidence indicating that this combination is functioning, but that improvements can be made which will ultimately result in increased summons response. Counties indicate that their most pressing problem with the jury source list is the quality of the addresses provided, causing summonses to be undeliverable by the United States Postal Service (USPS). In addition, incorrect county codes are often included in the DOL data, causing address records to be sorted into the wrong county's list. In addition, the process to determine and eliminate duplicates between the two lists could be improved.

Coding Accuracy Support System (CASS)

The USPS has created software called the Coding Accuracy Support System (CASS). CASS software does not clean the list for bad addresses but instead standardizes the format of each address into the accepted USPS format. According to industry sources, the software is extremely sophisticated and the processing accuracy rate is 98% in standardizing addresses. It is commonly accepted that if the software cannot make sense of an address, the chances of successful delivery via USPS are very low.

Process through CASS

The Commission recommends that the statutes and procedures be changed to require that all addresses be processed by CASS system software as the first step of list creation. The output of the CASS software should be required to append two data items to the original record for each person. The first is the system corrected address and the second is an assigned county code. Appending the output of the CASS software does not reduce the amount of information available to the summoning body.

Eliminating Duplicates

Standardizing the addresses before combining the lists should provide an additional source of information for eliminating duplicates. The statutes and procedures used to determine duplicates should be modified to include an examination of the county code and address in addition to the current checks.

We recommend that the Office of the Administrator for the Courts request an increase in the source list budget allocation to cover the increase in cost.

References:

RCW 2.36.054 (rules governing the creation of the jury source list).
GR 18, Appendix, (providing the methodology for merging the registered voters list and licensed drivers/identicard holders lists).

4

THE COMBINED LIST SHOULD BE PROCESSED THROUGH A NATIONAL CHANGE OF ADDRESS PROGRAM IN ORDER TO OBTAIN UPDATED ADDRESS INFORMATION BEFORE MAILING.

In addition to standardizing addresses on the source list databases (see Recommendation 3), the merged database should be run through the National Change of Address (NCOA) program. This step would be performed before the source list is sent to each county.

Undeliverable Rates Will Drop

NCOA charges are based on the number of "hits" on a list. This means that a clean list will cost almost nothing to process. A list that has many out-of-date addresses will cost more to process, but costs will be recouped because undeliverable rates will drop. This will save staff time, postage, and supply costs because the resulting improved data will avoid summoning people that have moved out of the county.

Pilot Project Assessing Benefits Versus Costs

This proposal would result in a transfer of cost from the counties to the state as the costs of the NCOA process would be paid by the state, but the savings would accrue to the counties. The Commission recommends a pilot project to assess costs and benefits for this process. The Office of the Administrator for the Courts should request additional funding in the source list budget for this project.

Additional Lists

Courts should be given the authority to refer to additional lists at the local level in order to correct master source list addresses for the purpose of mailing summonses. Reference to additional lists may lead to the input of more current address information into the system, which would lead to more representative jury pools and a better response rate. Among the additional lists to be considered are those for unemployment compensation recipients and newly naturalized citizens.

5

THE RULES OF GENERAL APPLICATION RELATING TO JURY SOURCE LISTS SHOULD BE MODIFIED TO ELIMINATE LICENSE AND IDENTICARD HOLDER RECORDS THAT HAVE BEEN EXPIRED FOR MORE THAN 90 DAYS AND TO SPECIFY THAT ONLY "ACTIVE" REGISTERED VOTER RECORDS BE CONSIDERED FOR USE IN JURY SOURCE LISTS.

License Expired for up to Two Years

The current rule governing jury source list processing allows for the inclusion of Department of Licensing (DOL) information for people whose licenses or identicards have been expired for up to two years. However, in 1999 only 24,000 people (out of one million) renewed their licenses more than 60 days after expiration. After 90 days, only 2,000 had not renewed. The current practice leads to outdated and unreliable information being included in the list. The Commission recommends that DOL should remove all records that have been expired for more than 90 days before transmitting the data to the Department of Information Services for inclusion in the jury source list.

Voter No Longer Resides in County

The voter registration lists maintained by the counties contain both "active" and "inactive" voters. A voter is placed in an inactive status because the county elections department has information indicating that the voter no longer resides in the county, but there is no confirmation from the voter to that effect. A notice is mailed, and the voter is placed in an inactive status pending removal from the database. Inactive voters would have been eliminated from the rolls under previous processes that are now precluded by federal law. The Commission recommends that only active registered voters should be included in the jury source lists.

References:

GR 18, Appendix, (providing the methodology for merging the registered voters list and licensed drivers/identicard holders lists).
National Voter Registration Act, 42 USC 1973.

6

THE TIMING OF THE JURY SOURCE LIST PROCESS SHOULD BE RE-EXAMINED TO ENABLE JURISDICTIONS TO PERFORM THEIR ANNUAL DRAW WHILE THE LIST DATA IS STILL CURRENT.

Election Data Gathered in November

Many jurisdictions do not start using their master source lists until September of each year. This timing is probably based on the original schedule, which was put into place when the expanded source list process was implemented in 1994. The jury source lists use information gathered from the county election department in the previous December, after new voter registration information has been gathered for the November election.

Start Using the Master Source List Earlier

The Commission recommends that a new schedule should be developed so that the source list can be put into use earlier each year. The Department of Information Services (DIS) should provide the counties with data as soon as possible after the voter and driver data is received and processed. The jurisdictions should then re-synchronize their annual draw to coincide with the release of the list. They should start summoning from the new list as soon as possible.

7

ALL UNDELIVERABLE AND CHANGED ADDRESS INFORMATION GATHERED BY THE COURTS SHOULD BE DELIVERED TO THE DEPARTMENT OF LICENSING AS WELL AS TO COUNTY ELECTION DEPARTMENTS FOR PROCESSING. THE DEPARTMENT OF LICENSING AND COUNTY AUDITORS SHOULD USE THIS INFORMATION FOR DATABASE CORRECTIONS. COUNTY CLERKS SHOULD BE ENCOURAGED TO CREATE SUSPENSE FILES FOR CHRONIC NON-DELIVERABLE ADDRESSES.

Provide Undeliverable Address Information

The quality of the jury source list is only as good as the information used to create it. The courts can help to reduce the number of returned summonses by providing information to those maintaining the source databases for research and correction.

Currently, county clerks are required by statute to notify the county auditor of jury summonses that are returned by the postal service as undeliverable. It is recommended that the courts also notify DOL of undeliverable summonses and that the following process be put in place:

Procedure to Notify DOL

- The court sends DOL a copy of the address update information provided by the U.S. Postal Service (USPS).
- DOL sends a post card to the forwarding address provided by USPS requesting an address update.

Suspense File

In addition, clerks should be encouraged to create a suspense file of chronic non-deliverable addresses, those permanently excused, and deceased people. This suspense file should be checked annually against the new master source list.

References:

RCW 2.36.095(3) (providing that the county clerk shall notify the county auditor of each jury duty summons that is returned).
WAC 308-104-018(1)(b)(iii) (allowing the change of the address of record when documentation is provided by a public official or government agency).

Accommodating Citizens Called to Jury Service

8

COURTS SHOULD REQUIRE JURY SERVICE FOR THE SHORTEST PERIOD POSSIBLE. THEREFORE, THE STATUTE SHOULD BE AMENDED TO SHORTEN THE JURY TERM TO A MAXIMUM OF ONE WEEK AND JURY SERVICE TO A MAXIMUM OF TWO DAYS OR ONE TRIAL.

Jury Term and Jury Service Definitions

Currently, the Washington statutes provide the following definitions:
"*Jury term*" means a period of time of one or more days, not exceeding one month, during which summoned jurors must be available to report for juror service.
"*Juror service*" means the period of time a juror is required to be present at the court facility. This period of time may not extend beyond the end of the jury term, and may not exceed two weeks, except to complete a trial to which the juror was assigned during the two-week period.

Current Optimal Term and Service

In addition, the Washington State Jury Standards and Washington statutes currently state that the optimal jury term is two weeks or less and that optimal juror service is one day or one trial, whichever is longer.

Based on a recent survey conducted by Senate Committee Services, it appears that the majority of Washington courts have either a two-week or one-month jury term. Very few courts offer citizens the option to serve for one day or one trial.

Shorten the Jury Term to One Week

The Commission recommends that the jury term be shortened to a maximum of one week. Asking citizens to put their lives on hold for one month or even two weeks makes scheduling business and personal events difficult and sometimes impossible.

Shorten Jury Service to Two Days or One Trial

By also shortening the time potential jurors are required to be present at the court facility to two days or one trial, the hardship associated with service is reduced and thus the need for exemptions or excuses is reduced. Reducing the number of people excused increases the representativeness and inclusiveness of the jury pool. Juror satisfaction increases because courts have to make better use of a juror's time (only having the juror's services for two days). As courts have to summon more prospective jurors with a two-day or one trial service time, more citizens have the experience (usually found to be positive) of serving on a jury, and jury service is spread more evenly among the community.

The Commission recognizes that courts using a two-day or one trial jury system may have to summon greater numbers of prospective jurors resulting in increased postage and additional staff and supplies costs. However, offsetting that cost, a reduced term of service can result in an increased yield (the number of qualified potential jurors available at the court facility). For example, after Thurston County recently reduced its term of service, the yield increased to 40%, which is significantly higher than many other counties in our state.

The Commission recommends that courts gradually shorten the jury term and time of service with the goal of implementing a two-day or one trial system in every Washington State court by July 2001. This would be a significant improvement in reducing the burden of jury service on our citizens.

References:

RCW 2.36.010 (providing definitions for jury term and term of service).

RCW 2.36.080(2) and Washington Jury Standard 5 (1997) (recommending that optimal service is one day or one trial).

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 29-31 (describing the advantages, disadvantages, and procedures for one day or one trial).

9

JURORS SHOULD BE PROVIDED WITH FULL AND COMPLETE INFORMATION ABOUT JURY SERVICE FROM THE TIME THEY ARE SUMMONED.

Providing prospective jurors with as much information as possible early in the process will help alleviate much of the apprehension and confusion caused by the receipt of a summons to jury service. Information can be imparted at two stages: before arrival at the court facility and after.

Information Provided Before Arrival

Before Arrival: Optimally, information should be transmitted in several redundant media (e.g., summons; cable television; e-mail; internet; U.S. mail; toll-free telephone) to increase the likelihood of full understanding and exposure and to maximize convenience. To the extent possible, information should impart exactly what a juror will experience upon arrival at the court facility. Additionally, the information should answer these frequently asked questions:

- Term of service;
- Length of typical service;
- Fees and when paid;
- Parking (where and cost);
- Bus routes;
- Length of court day and whether evening service could be necessary;
- Lunch (who pays);
- Available amenities:
  - Dependent care;
  - Phone, computer outlets;
  - Refreshments;
  - Entertainment available at the court facility and what jurors could bring with them;
- Most common types of cases;
- Privacy issues such as the opportunity to ask for private voir dire;
- Ability to ask questions during voir dire;
- Potential punishment for failure to respond;
- How to obtain information on restoration of civil rights;
- Methods for returning the summons and questionnaire, e.g., mail, internet email, or fax;
- How to obtain more information;
- What to do upon arrival.

Information Provided After Arrival

After Arrival: Jurors should be given information about the court process and their responsibilities as jurors. They should be told why they are waiting and the likelihood of being impaneled. Being well informed will generally make jurors feel more appreciated and respected.

When a judge takes the time to greet each panel of jurors

Judges Should Talk to Jurors

personally and to answer their initial questions, it immediately sets a tone that indicates to the prospective jurors that they are an important part of the process. Once a jury has been impaneled, the judge should explain how the trial will proceed. If the jurors are kept waiting, irritation and frustration can be eliminated by the judge simply taking the time to explain, as far as possible, why they are waiting. After the trial is over, the judge should personally express appreciation for the essential service the jurors have performed.

References:

District of Columbia Jury Project, *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington D.C*., pp. 3-4 (1998) (proposing that citizens receive substantial information concerning jury service).

CrR 6.2 (providing for a general orientation for all jurors when they report for duty including a juror handbook and juror information sheet).

10

IN ORDER TO PROMOTE BROAD CITIZEN PARTICIPATION AND TO SEND A MESSAGE THAT COURTS RESPECT THE TIME COMMITMENTS OF CITIZENS, A STATE-WIDE POLICY SHOULD BE ESTABLISHED TO ENFORCE AND STRICTLY LIMIT THE GRANTING OF JURY EXCUSES WHILE LIBERALLY GRANTING REQUESTS FOR POSTPONEMENT.

Standard Process for Postponement

The Commission recommends that a standardized process for postponing jury service should be created that includes prompt responses to correspondence from prospective jurors. RCW 2.36.100(2) allows jurors to be assigned to another jury term within the same jury year.

Permanent Excuse from Jury Service

In order to avoid repeated summoning, jurors with physical or mental conditions that in the opinion of a physician are of a permanent nature should be permanently excused from service. RCW 2.36.110 allows judges to excuse people who are unfit by reason of physical or mental defect. RCW 2.36.100 allows judges to excuse people for a period of time the court deems necessary. Because the court can define the period of time, this would permit the granting of permanent excuses.

Clerks Process Routine Requests

To better utilize the judges' time, clerks should process routine requests for excuse from jury service. Excuses under RCW 2.36.100 and 2 36.110 must be ordered by a judge, except under the conditions of *State v Rice*, 120 Wn. 2d 549, 844 P.2d 416 (1993). In that case, the administrative judge sent a memorandum to the county clerk's office setting forth specific guidelines for excusing prospective jurors. (See sample juror excusal and deferral Guidelines in Appendix 2.) This was found to be consistent with RCW 2.36.100, and the selection of the venire was considered proper. This decision permits clerks to perform assigned functions on behalf of the judge.

Best Practices

The Commission recommends the following best practices:

1. Excuses for undue hardship, public necessity, and extreme inconvenience should be processed by a judge.

2. The Supreme Court should pass a rule directing the clerk to process:

   a) All excuses for disqualification under RCW 2.36.070 and all temporary requests for excuse.

   b) All requests for permanent excuse when a physician's letter states that the patient has a permanent condition.

c) All postponements:

Postponement or deferral for planned business matters, vacations, personal business and other personal inconveniences should be liberally and routinely granted when the request is made in a timely manner, rather than on the day preceding the appearance date.

Continuance to Another Time Period

Continuing people to another term is a good option for seasonal workers or for those whose personal business make them unavailable for all or most of the period for which they were drawn.

Continuance to a Specific Date

Deferring to a different day provides an alternative for those people such as doctors, dentists, hairdressers, and accountants, who have a clientele list. Rather than excusing these individuals they may be assigned to a specific date in the future.

3. Jurors requests for postponement or excuse should be answered in a timely manner.

11

RCW 2.36.070 SHOULD BE AMENDED TO INCLUDE A PILOT PROJECT ALLOWING NON-ENGLISH SPEAKING CITIZENS TO SERVE ON A JURY WITH THE AID OF A CERTIFIED INTERPRETER.

Current Statutory Disqualifications:

RCW 2.36.070(4) currently bars people who do not "communicate" in English, but who are otherwise qualified as jurors, from serving on juries. This statute provides:

A person shall be competent to serve as a juror in the state of Washington unless that person:

Current Statutory Disqualifications

(1) Is less than eighteen years of age;

(2) Is not a citizen of the United States;

(3) Is not a resident of the county in which he or she has been summoned to serve;

(4) **Is not able to communicate in the English language**; or

(5) Has been convicted of a felony and has not had his or her civil rights restored.

(Emphasis added).

Reasons Why RCW 2.36.070 Should Be Changed:

Equal Access to the Courts

As it is currently written, RCW 2.36.070(4) contradicts the policy of the State of Washington set out in RCW 2.42 and RCW 2.43 to allow for equal access to the courts for those who do not speak English. In establishing an interpreter system in Washington, the Legislature has declared:

State Policy to Provide Interpreters

> It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons, who, because of a non-English speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.
>
> RCW 2.43.010.

No Official Language in Washington State

There is no official language in the State of Washington and many members of minority communities are not fluent in English. This is especially the case in various areas in Eastern Washington where many individuals may be American citizens but are not able to communicate in English fluently. Eliminating the "English-only" requirement for jury duty recognizes that these people are equal citizens with others.

Deaf Jurors

Moreover, there is concern that the exclusion of non-English speaking jurors may affect the rights of deaf jurors to serve who must rely on a sign-language interpreter. Changing the "English-only" requirement would allow deaf jurors to continue serving on juries in Washington State in various courts. See "Proving her case: Deaf juror does duty in federal court," Morning News Tribune, August 15, 1992, and other newspaper articles, in Appendix 8.

More Inclusive Jury Panels

Amending RCW 2.36.070(4) would lead to a more diverse jury pool, which would ultimately be more likely to arrive at the truth in any decision-making process.

Greater Confidence in the Justice System

Non-English speaking litigants (and especially defendants) will have greater confidence in, and may more easily accept, jury verdicts rendered by a jury if one or more jurors also speaks the language of the litigant.

Proposed Changes to Statute

Proposed Statutory Changes:

RCW 2.36.070 should be amended to read:

A person shall be competent to serve as a juror in the state of Washington if that person:

(1) Is over eighteen years of age;

(2) Is a citizen of the United States;

(3) Is a resident of the county in which he or she has been summoned to serve;

(4) Is able to communicate in the English language, or by court-approved sign language, or by The Office of the Administrator for the Courts-certified interpretation; or

(5) Has not been convicted of a felony, or, if has been convicted of a felony, has had his or her civil rights restored.

The above-provision allowing for jurors to serve who use court-certified interpretation (RCW 2.36.070(4)) should only take effect under the following circumstances:

- One year after the end of a two-year pilot in which non-English speaking jurors were allowed to serve on juries with the assistance of court-certified interpreters in at least two separate counties or judicial districts.
- The funding for the pilot project should be from the State. The fiscal burden of providing interpreters for jurors should not be placed on the counties.
- The above-noted amendments should be effective only if funds are available.

Certified Interpreter in Jury Room

As noted above, deaf jurors are already serving on juries with the assistance of American Sign Language interpreters. Courts that have reviewed the propriety of the presence of an interpreter in the jury room have firmly held that such a practice is appropriate.

Federal Court Upholds Signer in Jury Room

In *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987), a deaf person served on the jury, with a court appointed signer interpreting the trial proceedings and also accompanying the juror to the jury room, where she interpreted the deliberation process for the juror. The 10th Circuit upheld this practice, comparing it to providing interpreters for other participants in a case (defendants or witnesses) 830 F.2d at 1088. As for the presence of the interpreter in the jury room, the court held that the oath that the interpreter took prohibiting her from interfering with the deliberations or revealing the confidences of the jury should be sufficient to protect the deliberative process. 830 F.2d at 1090. Finally, the court held:

> [W]e think this television-age society has become so accustomed to seeing interpreters for the deaf translating to sign political speeches, newscasts, and the like that virtually all of us have come to view such interpreters more as part of the background than as independent participants. Second, an important social policy argues against automatically foreclosing members of an important segment of our society from jury duty simply because they must take an interpreter into the jury room. Several states have supported this policy by specific legislation permitting deaf jurors to serve. [footnote omitted] A decision by this court that they must be excluded because of the interpreter's presence in the jury room, if deemed persuasive by other courts, would doom that legislation on the shoals of the federal constitution.
>
> 830 F.2d at 1091

Currently, the interpreter statute makes a distinction between

The Interpreter Must Be Certified

certified interpreters and qualified interpreters. There are some languages where there is no state certification, and each judge must determine if an interpreter is qualified on a case-by-case basis. This proposal limits interpretation in the jury room to certified interpreters only.

Pilot Proposed

The proposal should be tested in at least two counties or judicial districts for a two-year period.

In the pilot program, a check box should be included on the summons form to give the citizens the option to request a court-certified interpreter. This would give advance warning of the need for an interpreter.

The Commission anticipates objections to allowing non-English speaking jurors based on cost, logistics, and the concern that such jurors will not be readily able to determine which witnesses tell the truth, which witnesses equivocate, and which witnesses lie. A pilot project will enable the state's legal system to gain experience with the logistics and costs of allowing such jurors. Experience will also allay the concern regarding a non-English speaker's ability to determine the credibility of witnesses.

Other References:

Yniguez v. Arizonans for Official English, 69 F.3d 920, 947-48 (9th Cir. 1995) (en banc) (striking down Arizona's English-only policy), *vacated as moot sub. nom. Arizonans for Official English v. Arizona*, 520 U.S. 43, 137 L.Ed.2d 170, 117 S. Ct. 1055 (1997).

Hernandez v. Texas, 347 U.S. 475, 98 L.Ed. 866, 74 S. Ct. 667 (1954) (striking down exclusion of Mexican-Americans from juries).

Duren v. Missouri, 439 U.S. 357, 58 L.Ed.2d 579, 99 S. Ct. 664 (1979) (striking down statute that gave women automatic exemption from jury duty).

Meyer v. Nebraska, 262 U.S. 390, 401, 67 L.Ed. 1042, 43 S. Ct. 625 (1923) ("The Constitution extends to all, -- to those who speak other languages as well as to those born with English on the tongue.").

G. Thomas Munsterman, et al., *Jury Trial Innovations* (1997), at 41-43 ("ADA Compliance").

12

THE COMMISSION VIEWS A FEE INCREASE AS ITS HIGHEST PRIORITY. CITIZENS REQUIRED TO PERFORM JURY SERVICE SHOULD BE COMPENSATED FAIRLY AND APPROPRIATELY. LEGISLATION SHOULD BE DRAFTED REQUIRING THAT CURRENT FEES BE RAISED, WITH THE INCREASE FUNDED BY THE STATE.

LOCAL JURISDICTIONS ARE ENCOURAGED TO PROVIDE OR PAY FOR TRANSPORTATION AND PARKING.

JURORS COULD DONATE THEIR FEES AND EXPENSES TO A COURT JURY IMPROVEMENT FUND.

Jurors in most jurisdictions have not received a raise since 1959 when the $10 per day juror fee was first instituted. Adjusted for inflation, that $10 fee would have increased to $55 by 1999. The Commission considers it unacceptable that this state's citizens are required to perform one of the most important civic duties at a rate that does not remotely approach minimum wage.

In order to fairly compensate those most burdened by jury service, while still considering the current fiscal environment in the local jurisdictions, the Commission proposes the following:

Juror Fees:

1. The juror fee should remain at $10 for the first day of service.

Juror Fees Increased to $45

2. From the second day forward, juror fees should be increased to $45 per day.
3. Localities will be responsible for paying the $10 fee on the first day, and for funding $10 of the $45 fee from day 2 forward. The $35 increase, starting with day 2 of service, should be funded by the state.
4. Any portion of a day in which a juror is required to report to a court facility should be considered a full day.

Transportation Expenses:

Mileage Reimbursement

1. Jurors will continue to be reimbursed for mileage. At the court's discretion, mileage may be calculated based on their home address zip code.

Transportation and Parking

2. Courts should be encouraged to provide or pay for transportation and parking. Local governments should be encouraged to cooperate with the courts to ensure parking is available to jurors at minimal or no cost. This would be a locally implemented option.

Citizens Should Be Paid Immediately

Fee/Expense Disbursement:

1. Jurors should be paid immediately—optimally within one week after service.
2. Payments should be made immediately in cash where possible to reduce the administrative costs of generating drafts, warrants, or checks.

Jury Improvement Fund

Fee/Expense Donation:

1. Jurors may donate their fees and expenses to a court Jury Improvement Fund.
2. This fund would be used, at the local court's discretion, for jury-related improvements. This fund should not be part of the jurisdiction's general fund and should not be used to supplant the jurisdiction's jury expenses.

This state's citizen jurors are long overdue for an increase in fees. The Commission's challenge was to create a proposal that would more equitably spread the burden of this fee increase. Where the Commission would recommend that $45 be paid for each day of service, its actual recommendation is that the fee remain at $10 for the first day in an attempt to balance a citizen's responsibility to perform this civic duty with government's fiscal responsibility.

Washington State relies on citizens to make its most important decisions about law, business practice, and criminal matters. Jurors should be compensated appropriately for this crucial civic duty. Local jurisdictions should not solely bear the financial burden for funding an activity that is essential to provide justice for all.

References:

David C. Brody, et al., *Juror Survey Results, 1998-1999*, p. 9 (85% of jurors surveyed were paid by their employers during jury service*).*

13

COURTS SHOULD MAKE EVERY EFFORT TO UTILIZE JURORS EFFICIENTLY. THEY SHOULD AVOID CALLING MORE CITIZENS TO THE COURT FACILITY FOR JURY SERVICE THAN NEEDED.

Excuse Citizens Not Needed

Prospective jurors find it frustrating to spend the day sitting idly at the court facility only to be eventually informed that their services are not needed. Jurors should not be required to report to the court facility unless there is a high likelihood that they will be empanelled that day. Once called to the court facility, citizens not needed for a jury panel should be excused as soon as possible.

Maximum Panel Sizes

Proper panel sizes can be calculated on the basis of past experience to ensure that they are large enough to provide jurors and alternates while allowing for the proscribed number of challenges. The determination of appropriate maximum panel sizes can result in significant cost savings for the courts.

The Commission also recommends that, where possible, jurors should be pooled and drawn for all court levels. Pooling courts should then ensure that each citizen reporting is assigned for jury selection before any prospective juror is sent a second time.

References:

G. Thomas Munsterman, *Jury System Management*, pp. 101-106 (National Center for State Courts, 1996) (the determination of proper panel sizes can generate a great amount of jury systems savings).

Washington Jury Standard 12(4) (3rd ed. 1997) (The efficient use of jurors. A number of measures are suggested to monitor this function).

Washington Jury Standard 13 (3rd ed. 1997).

14

EACH COURT SHOULD MAINTAIN ADEQUATE FACILITIES FOR JURORS WITH THE APPROPRIATE SEATING, WORK SPACE, REST ROOMS, LIGHT, AND TEMPERATURE CONTROL NECESSARY TO FACILITATE JURY SELECTION AND DELIBERATIONS.

SPECIAL CONSIDERATION SHOULD BE GIVEN TO JURORS WITH DISABILITIES OR OTHER SPECIAL NEEDS. COURTS MUST MAKE EVERY EFFORT TO PROVIDE THE APPROPRIATE FACILITIES TO ACCOMMODATE THESE NEEDS.

SPECIAL REQUIREMENTS SHOULD BE CONSIDERED WHEN REPLACEMENT EQUIPMENT AND FIXTURES ARE PURCHASED FOR THE JURY ASSEMBLY ROOM, JURY WAITING AREAS, JUROR REST ROOMS, THE COURTROOM, AND THE DELIBERATION ROOM.

All People Should Serve

All people meeting the statutory requirements for jurors and summoned to duty should be expected to serve, except for those people excused for actual bias based on prior knowledge, prejudice, or familial relationships. Lack of the appropriate facilities should not preclude an otherwise qualified juror with a disability from serving.

Some facilities lack the basic furnishings or appropriate atmosphere for jurors to gather and deliberate around a table. The Americans with Disability Act of 1990 (ADA) and Washington Jury Standard 14 define with specificity the minimum mandatory needs for jurors to meet and reach a fair verdict.

Minimum Amenities

Jurors should expect a fully accessible court facility with accommodations compliant with ADA standards and at least the following minimum amenities:

- Humane and comfortable conditions.
- Rooms and furnishings adequate to meet the numbers and needs of jurors.
- Separation from parties and witnesses.

Ease of Use By All People

Basic furnishings and fixtures should be reviewed before purchase or replacement for ease of use by all people. *Into the Jury Box: A Disability Accommodation Guide for State Courts*, and *The Courthouse, A Planning and Design Guide for Court Facilities*, are excellent resources for courts to use when planning facility upgrades with jurors with disabilities in mind.

References:

Washington statutes and court rules: CR 47 (i); CRLJ 47(b); RCW 4.44.160 (2); RCW 4.44.170 (2) and (3); RCW 4.44.300.

Don Hardenbergh, *The Courthouse, A Planning and Design Guide for Court Facilities*, pp. 39-41 (2nd ed. 1998).

Kristi Bleyer et al., *Into the Jury Box: A Disability Accommodation Guide for State Courts,* The American Bar Association and the State Justice Institute.

15

AMENITIES TO IMPROVE THE EXPERIENCE OF JURY SERVICE SHOULD BE PROVIDED WHEREVER POSSIBLE.

Time Spent Waiting

One of the primary reasons that citizens are reluctant to serve on juries is the time spent waiting. Courts should aim to provide the following amenities so that prospective jurors may fill their time at the court facility productively and comfortably:

Juror Assembly Room:

- Business accommodations, such as quiet working areas, telephones, and power and telephone hookups for computers.
- The ability to leave the building (with a court-issued pager).
- Provision for refreshments, such as a microwave oven, vending machine, refrigeration, smoking locations, and coffee.
- Entertainment such as television, magazines, and a videotape player.
- Access to telephones for free local calls.
- Provision of a telephone number where emergency messages can be left for jurors.

Jury Box:

- The same amenities given to others in the courtroom (a writing area, writing materials, water, and comfortable chairs).
- Assisted hearing devices.

Jury Deliberation Room:

- A room suitable for the purpose that is private and adequately screened.
- Small refrigerator, microwave oven, water, and coffee.
- Adequate and comfortable seating.
- Assisted hearing devices.

References:

David C. Brody, et al., *Juror Survey Results, 1998-1999*, pp. 6-7 (The most common problem mentioned by jurors was the time spent waiting*).*

AT THE START OF A JURY TRIAL, THE JUDGE SHOULD

16

INFORM THE JURORS OF THE COURT'S NORMAL WORKING HOURS, AS WELL AS THE WORKING HOURS THAT COULD BE EXPECTED DURING DELIBERATIONS. THE JUDGE SHOULD DETERMINE WHETHER THE JURORS HAVE ANY SPECIAL NEEDS THAT JUSTIFY SETTING DIFFERENT TIMES.

Scheduling Jury Deliberations

Because trial judges sometimes exercise their authority to continue witness testimony and jury deliberations past regular working hours and into the weekend, jurors often do not know what to expect in a given trial and how to plan accordingly. This issue is particularly important for jurors who have to arrange care for dependents and for jurors whose personal commitments may be affected by lengthy deliberations. Jurors also need to know what to expect when deliberations go into mealtimes.

Reasonable Deliberation Hours

Judges need to ensure that the jurors are not overworked. Deliberating hours should be reasonable. Although jurors are not court employees, judges should be guided by federal and state laws limiting the number of hours an employee can be required to work.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 183-84 (1997).

A.B.A. Jury Standard 18(d) ("A jury should not be required to deliberate after a reasonable hour, unless the judge, after consultation with counsel, determines that evening or weekend deliberations would not impose an undue hardship upon the jurors and are required in the interest of justice.").

Washington Jury Standard 18(d) (3rd ed. 1997) (identical to the A.B.A. Standard).

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12*, pp. 115-17 (1994).

17

JUDGES AND COURT PERSONNEL SHOULD ASSIST JURORS TO HANDLE THE STRESS THAT MAY BE CAUSED BY JURY SERVICE.

Jurors should be given every assistance possible to help them cope with the stress that can be caused by jury service. If a trial is very long, if it is emotionally grueling, if the jurors must be sequestered, if the evidence is unusually unpleasant and graphic, or if there is a high level of publicity surrounding the trial, a juror may be totally unprepared for the toll this may take on his or her emotional well-being. We recommend using a variety of techniques, depending upon the nature of the trial, to assist jurors in handling stress.

Brochure on Handling Stress

As a matter of practice, a brochure can be distributed, such as “Tips for Coping After Jury Duty”, used in Maricopa County, Arizona, which illustrates techniques a juror can use to help put their experience in perspective.

Post-Verdict Meeting with Judge

At the close of the trial, we encourage judges to meet personally with the jurors in an informal setting to allow the jurors to express their concerns and discuss their feelings about the trial. Such a meeting also gives the judge the opportunity to thank the jurors for their service and to obtain other more general feedback about their reactions to jury service.

Fear of Retaliation

If the court determines that a trial poses a security risk, precautions should be taken to ensure that sufficient personnel and equipment are in place to handle that risk. If a juror expresses fear for his or her personal safety, the court should conduct a debriefing and make any necessary referrals to law enforcement.

Professional Debriefing

For trials likely to cause severe emotional distress, courts can initiate a voluntary juror debriefing program. The court may contract with a professional psychologist, social worker, or counselor (usually someone with expertise in post-traumatic stress disorder) to conduct a short group session following the conclusion of the trial. The jurors and alternates, sometimes with the judge participating, are given the opportunity to explore their reactions to the trial, and the facilitators will often discuss symptoms commonly associated with juror stress. King County Superior Court obtained a grant to conduct a pilot for such a debriefing program which was very successful.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 203-205 (3rd ed. 1997).

G. Thomas Munsterman, *Managing Notorious Trials*, pp. 97-99 (2nd ed. 1998).

District of Columbia Jury Project, *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington D.C*., p. 73 (1998*)* (provide closure to the jury experience, especially in stressful cases).

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* pp. 125-126 (become proactive in detecting and treating juror stress).

Protecting Juror Privacy

18

A JUROR'S PERSONAL PRIVACY EXPECTATION IS EXTREMELY IMPORTANT. JUDGES SHOULD HAVE DISCRETION TO BALANCE A PARTY'S INTEREST OR RIGHT TO KNOW ANY PARTICULAR INFORMATION ABOUT A JUROR WITH THE JUROR'S PRIVACY INTEREST.

WITH THE BALANCE PRESUMPTIVELY IN THE FAVOR OF JUROR PRIVACY, THE GENERAL PUBLIC HAS A RIGHT TO KNOW THAT THE JURY PROCESS IS FAIR AND HAS INTEGRITY. JUDGES MUST EXERCISE DISCRETION TO BALANCE JURORS' PRIVACY INTERESTS WITH THOSE OF THE GENERAL PUBLIC.

AT A JURY TRIAL, EACH PARTY SHOULD RECEIVE A LIST OF PANEL MEMBERS IMMEDIATELY PRECEDING VOIR DIRE. THIS LIST SHOULD INCLUDE ONLY STATUTORY QUALIFYING INFORMATION. OTHER IDENTIFYING INFORMATION MAY BE PROVIDED AT THE DISCRETION OF THE COURT.

A NEW COURT RULE OR STATUTE SHOULD SPECIFY WHICH JUROR RECORDS ARE PRIVATE AND WHICH ARE PUBLIC. IT SHOULD SPECIFY RETENTION PERIODS FOR EACH TYPE OF JUROR INFORMATION RECORD MAINTAINED BY COUNTY CLERKS.

The Commission bases this recommendation on the following premises:

Expectation of Privacy

First, jurors have a reasonable expectation of privacy. They are citizens who have responded to a court order. Their participation in the legal process is an act of good citizenship and is to be encouraged. Their right to privacy should be balanced with the interests of the general public and the litigants.

Public and Litigant's Interest

Second, the general public and litigants have legitimate interests which may compete with the privacy interests of jurors. The public has an interest in an open judicial process. Litigants have an interest in having information which will allow them more effectively to participate in the choice of a jury.

Third, the judge presiding at a jury trial has inherent

Judge Has Discretion Regarding Disclosure

discretion to allow greater or lesser disclosure of identifying information to the parties. As discussed in Recommendation 19, a more detailed questionnaire (often part of the summons) may be used by the court as standard procedure. The judge should decide whether to provide that information to the parties or the general public. There should be no presumption that it be provided automatically. The judge may set a hearing upon any party's or panel-member's request for greater or lesser disclosure, and should do so when the determination depends on a factual showing. The Commission recommends that, to the extent possible, the hearing be held before voir dire and that panel members be informed of any ruling affecting the scope of disclosure.

Presumption of Privacy

Fourth, there should be a presumption of privacy. Where personal information in addition to statutory qualification information is supplied to the court by jurors, that information should be treated as presumptively private and should not be disclosed to anyone without good cause shown. If disclosed, the court should consider whether protective orders are appropriate.

Retention of Juror Information

In addition, because the public has an interest in the fairness and integrity of the jury process, a variety of juror information records are maintained by the county clerks. No court rule or statute currently exists specifying which juror information records are private and which are available as public record. The Commission recommends that such a rule or statute be created. It should also specify retention periods for each type of record and the format in which a record may be maintained.

Note: Just before the Jury Commission completed its work, the Supreme Court amended GR 15 to establish a presumption of privacy for juror information other than juror names. The amendment allows the parties and their attorneys to petition the court for access to this information. This amendment largely addresses the privacy concerns. Unfortunately, the public's right of access to juror information is not covered. There should be a mechanism for the public to petition the court as well as counsel and the parties. The public's right of access to master jury source lists is protected by statutory law. Thus, court clerks currently permit the public to access these records.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 29-31 (privacy considerations in voir dire).
Governor's Executive Order 00-03 Public Records Privacy Protections (see Appendix 3).
GR 15(j) (regarding access to juror information, see Appendix 5).

19

THE JUROR SUMMONS SHOULD PROVIDE USEFUL INFORMATION TO THE POTENTIAL JUROR AND REQUIRE OF THE JUROR ONLY THAT INFORMATION MANDATED BY STATUTE. A STANDARDIZED SUMMONS FORM SHOULD BE CREATED FOR USE AND MODIFICATION BY ANY JURISDICTION.

Information to Provide to the Prospective Juror

The summons form is the prospective juror's introduction to jury service and often his or her first encounter with the judicial system. It is important that the summons form is clear and that it provides the prospective juror with as much information as possible about upcoming jury service. Recommendation 9 elaborates on the kinds of information that may be provided.

Service Rescheduling Information

Potential jurors should also be provided space on the summons form to request rescheduling of service as well as exemption from service. The summons should spell out under what circumstances rescheduling or exemption from service will be allowed.

Required Qualifying Information

The summons form is also an information gathering tool. Prospective jurors must answer certain *mandatory* questions to determine whether they are qualified for jury service. This information allows the summoning court to determine whether statutory requirements for service are met such as minimum age, citizenship, residency status, ability to communicate in English, and criminal conviction status.

Administrative/ Biographical Information

The summons also requests information about the juror, such as address and telephone numbers, which the court uses for administering its jury system. In addition, the summons may ask biographical questions which provide information to assist the attorneys in determining if a juror can be fair and impartial in an upcoming trial.

We recommend that any information requested by the summons other than the qualifying requirements should be listed as *optional*.

Protection of Privacy

In accordance with section (a) of the American Bar Association Standard 20 on juror privacy (see Appendix 4), the juror summons should differentiate between information collected for the purpose of juror qualification, jury administration, and jury selection. To facilitate the protection of a juror's privacy, we recommend that the summons be designed so that the different types of

information can be easily separated into sections which would then be provided only to the appropriate parties.

Retention Schedules

Appropriate retention schedules should be determined for each kind of information provided on the summons.

References:

RCW 2.36.070 (listing qualifications for jury service).
District of Columbia Jury Project, *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington D.C.*, pp. 3-4 (1998) (proposing that citizens receive substantial information concerning jury service).
CrR 6.2 (providing for a general orientation for all jurors when they report for duty including a juror handbook and juror information sheet).
American Bar Association's Jury Standard 20 (see Appendix 4 for the A.B.A.'s commentary on privacy issues related to summons and questionnaires).

20

THE COURT SHOULD TRY TO PROTECT JURORS FROM UNREASONABLE AND UNNECESSARY INTRUSIONS INTO THEIR PRIVACY DURING JURY SELECTION. IN ADDITION TO MONITORING LAWYERS' QUESTIONS, THE COURT SHOULD PROVIDE ALTERNATIVES FOR JURORS WHO DO NOT WISH TO ANSWER PARTICULAR QUESTIONS IN OPEN COURT. THE COURT SHOULD INFORM JURORS OF THESE OPTIONS BEFORE THEIR QUESTIONING.

DURING JURY SELECTION IN APPROPRIATE CASES, THE TRIAL COURT SHOULD SUBMIT WRITTEN QUESTIONNAIRES TO POTENTIAL JURORS REGARDING INFORMATION THAT THEY MAY BE EMBARRASSED TO DISCLOSE BEFORE OTHER JURORS. THE COURT SHOULD SOLICIT COUNSEL'S COMMENTS REGARDING THE APPROPRIATENESS OF SUCH A QUESTIONNAIRE AND ITS CONTENTS. THE COURT SHOULD INFORM THE POTENTIAL JURORS THAT THEIR QUESTIONNAIRES WILL REMAIN CONFIDENTIAL. THE COURT SHOULD DESTROY THE QUESTIONNAIRES OR MAINTAIN THEM, SEALED, IF NECESSARY TO PRESERVE THE RECORD. RELEVANT PORTIONS OF THE TRANSCRIPT OR TAPED RECORD SHOULD ALSO BE SEALED.

BEFORE DISMISSING JURORS FROM SERVICE ON A TRIAL, THE COURT SHOULD INFORM JURORS OF THEIR RIGHTS TO DISCUSS OR REFRAIN FROM DISCUSSING THE CASE.

Protecting Juror Privacy in Sensitive Cases

During jury selection in cases such as sexual harassment or sex crimes, counsel often will ask potential jurors whether they have ever been sexually harassed, assaulted, or molested. Jurors may find such questions embarrassing and intrusive and be less willing to speak publicly about their prior experience. In sensitive cases, the court should consider using written questionnaires and examining jurors outside the presence of other jurors. The questionnaires would identify which jurors should be separately questioned. Jurors' privacy would thereby be protected while still allowing the parties effective jury selection. The trial court has this discretion and should use it in appropriate cases.

The court should solicit comments of counsel regarding

Procedures for Juror Questionnaires

both the appropriateness of a juror questionnaire and the content of individual questions. The court should explain to the jurors the reasons for the questions. The questions should be simple, easy to read, and easy to answer.

Procedures When Dismissing Jurors

At the end of a trial, jurors are sometimes concerned about whether they should discuss the case with others. The jurors' concerns should be addressed by a brief discussion of their right of privacy. They should be informed of their right to speak, or not to speak, to anyone after trial. Further, they should be cautioned about the privacy interests of their fellow jurors and should be reminded not to disclose identifying information about other jurors.

References:

Recommendation 22, Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* Summary of Recommendations ("Protect Juror Privacy During Voir Dire: In addition to monitoring lawyer questions to prevent unreasonable and unnecessary intrusions into the privacy of jurors' lives, the trial judge should provide alternatives for jurors who do not wish to answer particular questions in open court. The jury panel should be informed of these options prior to questioning.").

G. Thomas Munsterman, et.al., *Jury Trial Innovations*, §III-4 (1997) (Privacy Considerations in Voir Dire—recommending option of responding to voir dire in camera); §III-5 (Individualized Voir Dire).

American Bar Association's Jury Standard 20 (see Appendix 4). (The Jury Commission supports all aspects of this standard except subparagraph (e), which concludes that jurors "should have the continuing protection of the court" when others persistently question them about their jury service. Jurors have other civil and criminal remedies, and although the court has authority to regulate the parties' and counsel's requests to interview jurors after the trial, the court lacks jurisdiction over third parties.).

Improving Jury Selection Procedures

21

TRIAL COURTS SHOULD MAKE AVAILABLE TO ATTORNEYS A WRITTEN STATEMENT OF THE COURT'S STANDARD PRACTICES FOR JURY SELECTION.

THE COURT'S STANDARD PRACTICES SHOULD ENSURE THAT THE PARTIES HAVE A FULL OPPORTUNITY TO SELECT A FAIR JURY WHILE AVOIDING UNDUE AND UNREASONABLE JUROR DISCOMFORT AND EMBARRASSMENT.

BEST PRACTICES SHOULD INCLUDE:

- **INVITING PARTIES TO SUBMIT GENERAL QUESTIONS TO THE COURT IN ADVANCE OF JUROR QUESTIONING;**
- **SETTING REASONABLE TIME LIMITS FOR ATTORNEY QUESTIONING WHILE REMAINING FLEXIBLE TO INCREASE LIMITS IF CIRCUMSTANCES WARRANT;**
- **NUMBERING JURORS WITHIN THE INDIVIDUAL TRIAL PANEL BEFORE THEY ENTER THE COURTROOM AND SEATING THEM IN NUMERICAL ORDER;**
- **GIVING AN INTRODUCTORY INSTRUCTION AND ASKING GENERAL QUESTIONS OF THE ENTIRE PANEL;**
- **PERMITTING JURORS TO BE QUESTIONED AS A GROUP RATHER THAN BY A SERIES OF REPETITIOUS QUESTIONS TO INDIVIDUAL JURORS;**
- **REQUIRING CHALLENGES FOR CAUSE TO BE MADE WHENEVER THE GROUNDS FOR THE CHALLENGE ARISE. THE CHALLENGE AND THE COURT'S RULING MUST BE MADE ON THE RECORD AT A TIME WHEN THE JUROR CAN BE QUESTIONED ON THE CHALLENGE. THE COURT HAS DISCRETION TO CONDUCT THE HEARING ON THE CHALLENGE OUTSIDE THE PRESENCE OF THE OTHER JURORS;**
- **TAKING PEREMPTORY CHALLENGES OUT OF THE HEARING OF JURORS, WITH THE COURT ANNOUNCING THE FINAL SELECTIONS TO THE PANEL; AND**
- **IDENTIFYING THE ALTERNATE JURORS AS SOON AS THE PANEL IS SELECTED.**

Current Jury Selection Practices Vary

Jury selection practices vary significantly from court to court. Most courts now use some version of the struck jury method, but many variations still exist.

Struck Jury Method

The struck jury method differs from the traditional method of strike-and-replace selection in that all members of the panel may be questioned by counsel at any time during jury selection; counsel need not limit questioning to a single juror in the jury box. The advantages of this method are that it saves time, reduces juror boredom and frustration because every juror is not asked the same questions, and promotes juror participation and the jurors' sharing of relevant information. The method should be used with caution, if at all, in the most serious cases where thorough questioning of individual jurors and accurate notetaking of each juror's response is critical.

Written Procedures and Best Practices

The Jury Commission believes that less time will be wasted during jury selection if the attorneys are told in advance how jury selection will be conducted. This information is easily communicated through a set of written procedures. The written procedures should adopt the "best practices" identified above. The written procedures should also specify the particular sequence of steps in the court's selection process, beginning with any pre-trial submission of questions by the attorneys, continuing through the arrival of the jury panel in the courtroom and the handling of peremptory challenges and challenges for cause, and concluding with the final selection of the jury.

References:

G. Thomas Munsterman, Roger G. Strand, and J. William Hart, "The Best Method of Selecting Jurors", The Judge's Journal (Summer 1990) (concluding that the "struck jury" method is generally superior to the "strike and replace" method).

Washington Jury Standards, Part B: Selection of a Particular Jury (3rd ed. 1997) (establishing standards for conducting voir dire, challenges for cause, and peremptory challenges).

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* p. 61 (1994) (recommending that judges be allowed to choose between the "struck" and the "strike and replace" methods).

New York court rule § 202.33 (allowing judges in civil cases to choose among a few methods for selecting a jury, including

(1) a “struck” method, (2) a method blending the “struck” and “strike and replace” approaches, and (3) other alternative methods–including “strike and replace”–only if specially approved).

Judge David A. Nichols, “Some Thoughts on How to Use the Struck System in Jury Voir Dire”, Washington State Bar News, July 1992, p. 11.

22

THE JUDGE SHOULD GIVE PROSPECTIVE JURORS A BRIEF AND NEUTRAL DESCRIPTION OF THE CASE AFTER CONSULTING WITH THE PARTIES AND BEFORE JURY SELECTION. THE DESCRIPTION SHOULD BE SUFFICIENTLY DETAILED TO ASSIST JURORS IN ANSWERING QUESTIONS DURING JURY SELECTION AND WHILE PERFORMING THEIR DUTIES.

THE JUDGE SHOULD ADVISE THE JURY THAT THE DESCRIPTION REPRESENTS THE CONTENTIONS OF THE PARTIES AND DOES NOT IMPLY THE COURT'S VIEW ON THE MERITS OF THE CASE.

Need for Case Summaries During Jury Selection

During jury selection, potential jurors often know little more than the criminal charges named in the charging document or the generally stated civil cause of action. This information is often not specific enough for jurors to give meaningful answers during jury selection. Thus, lawyers may resort to prefacing their questions with awkward, case-specific hypotheticals. These complicated questions increase objections from opposing counsel and the need for court intervention, all of which cause additional juror discomfort.

Procedures

These problems can be minimized if the judge gives potential jurors more information about the pending case before jury selection begins. Judges should give detailed information about:

- witnesses, trial participants, and other individuals who might be mentioned at trial;
- the acts that are alleged to have occurred;
- when and where the acts occurred;
- the defendant's alleged role in these acts in criminal cases; and
- the nature of the requested relief in civil cases (e.g., whether damages sought include pain and suffering).

The judge should ensure that the description is neutral and does not comment on the evidence or imply any view on the merits of the case.

At least one other state addresses this problem by allowing parties to give mini-opening statements at the beginning of jury selection. The Jury Commission considered this approach but believed that jurors would receive a more balanced summary if it were delivered by the judge.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 57-59 (3rd ed. 1997) (discussing the problems caused when jurors have insufficient information during jury selection).

Arizona Rules of Civil Procedure 47(b)(2) (authorizing parties to present brief opening statements to potential jurors before jury selection begins).

23

A PARTY SHOULD RAISE ANY *BATSON* OBJECTIONS TO THE OPPOSING PARTY'S PEREMPTORY CHALLENGES BEFORE THE JURY IS IMPANELED. THE COURT SHOULD EXERCISE ITS DISCRETIONARY POWER TO RAISE *BATSON* OBJECTIONS ON ITS OWN MOTION. *BATSON* CHALLENGES, AND OBJECTIONS TO THESE CHALLENGES, SHOULD BE HANDLED OUTSIDE THE JURORS' PRESENCE.

Batson Objections

The U.S. Supreme Court cases of *Batson v. Kentucky* and *Ford v. Georgia* provide a three-step inquiry at the trial court level to determine if prohibited race or gender discrimination in jury selection has occurred. The first step requires the objecting party to show that a peremptory challenge was exercised against a member of a constitutionally cognizable group. Second, that party must show that the use of the peremptory challenge and other relevant circumstances raise an inference of discrimination. If the objecting party is able to establish a prima facie case of discrimination, the third step requires the other party to offer a race/gender-neutral explanation for its use of the peremptory challenge.

Washington Practices

Only a handful of Washington cases address this issue. In only one of those cases, (*State v. Burch*) was the conviction reversed on *Batson* grounds. The *Burch* case noted that Washington State had not (and still has not) adopted any procedural requirements relating to *Batson* claims, although the U.S. Supreme Court stated in *Ford v. Georgia* that states may adopt these requirements. In *Ford*, the state court rule had provided that a *Batson* claim must be raised before the jurors are sworn in. The U.S. Supreme Court found the court rule to be "sensible."

Raising Issue for First Time on Appeal

In *Burch*, the defendant raised a *Batson* claim for the first time on appeal. The *Burch* court commented that the better practice is to raise a *Batson* objection in a timely manner at trial. Nevertheless, a defendant could still raise it for the first time on appeal by tying it to a claim of "ineffective assistance" of counsel.

Procedures for Judges

If a trial court judge observes that a party is exercising a peremptory challenge under circumstances where a *Batson* claim could reasonably be made, and the opposing party is not objecting to the challenge, the judge should raise the issue with trial counsel on the record outside the presence of the jurors. This way, if the case is appealed with the *Batson* claim as one of the issues, the appellate court will be able to fully address the merits of the claim.

Outside the Jury's Presence

Batson challenges should be handled outside the jury pool's presence. In the event the trial judge rules that a juror was challenged in violation of *Batson*, the challenged juror could remain on the jury with a lessened risk of the verdict being affected by jury knowledge of *Batson* discrimination being at issue.

References:

Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986).
Ford v. Georgia, 498 U.S. 411, 112 L.Ed.2d 935, 111 S.Ct. 850 (1991).
State v. Medrano, 80 Wn. App. 108, 906 P.2d 982 (1995).
State v. Wright, 78 Wn. App. 93, 896 P.2d 713 (1995).
State v. Sanchez, 72 Wn. App. 821, 867 P.2d 638 (1994).
State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993).
State v. Burch, 65 Wn. App. 828, 830 P.2d 357 (1992).
State v. Morales, 53 Wn. App. 681, 769 P.2d 878 (1989).
G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 71-75 (3rd ed. 1997).

24

ALTERNATE JURORS SHOULD BE TOLD THAT THEY ARE ALTERNATES AT THE BEGINNING OF THE TRIAL.

Designating Alternates

Although it has been suggested that alternates are less attentive than jurors, no reliable research exists to support this conclusion. Not designating alternates until the end of trial is disrespectful and may cause juror frustration and resentment.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 84-86 (1997).

Improving the Trial Process for Jurors

25

TRIAL JUDGES SHOULD SET REASONABLE OVERALL TIME LIMITS FOR EACH PARTY AT TRIAL. TO SET TIME LIMITS, THE COURT SHOULD CONSIDER AMONG OTHER FACTORS:

- **THE NUMBER OF WITNESSES;**
- **THE NUMBER AND COMPLEXITY OF ISSUES;**
- **THE RESPECTIVE EVIDENTIARY BURDENS OF THE PARTIES;**
- **THE NATURE OF EVIDENCE TO BE PRESENTED;**
- **THE FEASIBILITY OF SHORTENING TRIAL BY STIPULATIONS; AND**
- **PRE-ADMITTING EXHIBITS.**

Time Limits for Trials

As long as fairness and justice are not compromised, all participants in the legal system benefit from trials that are conducted as quickly and efficiently as possible. Therefore it is appropriate for judges to try to manage the time for trial to maximize efficiency while ensuring fairness.

Procedures

In order to set time limits that are reasonable, the court should discuss with counsel a variety of factors that affect the length of the trial. The court then should assign a total number of hours to each party to be used by that party for opening statements, direct examination of witnesses, cross examination, and closing arguments.

Improving Juror Comprehension

The purpose of time limits is to encourage counsel to present their case in the most effective and efficient way, not to micro-manage the parties' presentations. A better prepared presentation will improve juror comprehension and satisfaction.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, 91-94 (3rd ed. 1997).

26

JUDGES SHOULD ENCOURAGE ALL TRIAL PARTICIPANTS TO USE PLAIN LANGUAGE LIKELY TO BE UNDERSTOOD BY THE JURY. JUDGES SHOULD ALSO TAKE STEPS TO MINIMIZE JUROR CONFUSION.

A point can be lost by the use of a word or phrase not understood by a juror. Terms may not be readily understandable when they are not in common usage.

It will require a concerted effort on everyone's part to change the way we speak. Courses on this subject have been offered in law school and in continuing legal education classes, but more needs to be done.

Promote the Use of Plain Language

Judges have the opportunity to promote the use of plain language in trial proceedings. First, judges should take care to use plain language, such as using the term "jury selection" instead of "voir dire." Second, judges should minimize the likelihood that other trial participants will confuse the jury with language that is not clear. As examples, judges may provide jurors with a glossary of terms that are likely to arise during trial. They may also remind lawyers before and during the trial about the importance of using plain language.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 157-58 (3rd ed. 1977).

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12*, pp. 99-101 (1994).

Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries in Colorado, pp. 33-35 (1997).

27

IN BOTH CIVIL AND CRIMINAL CASES, AFTER THE JURY IS IMPANELED, THE JUDGE SHOULD INSTRUCT THE JURORS AS TO THE BASIC ELEMENTS OF THE CLAIMS, CHARGES, AND DEFENSES. THE JUDGE MUST INFORM THE JURORS THAT THE INSTRUCTIONS ARE PRELIMINARY ONLY AND THAT THEIR DELIBERATIONS MUST BE GOVERNED BY THE FINAL INSTRUCTIONS.

Pre-Instructing the Jury

Informing jurors about the applicable legal principles at the beginning of the case helps them to understand the testimony more easily and quickly. Studies confirm that pre-instructing jurors gives them a greater opportunity to focus on and remember the relevant evidence, improves their adherence to the judge's instructions, and increases juror satisfaction.

Cautioning the Jury

Jurors should be cautioned that the preliminary instructions are intended solely to assist them in evaluating the evidence during the trial. Because claims or defenses can be dropped or added during the course of a trial, the court should advise the jurors that the preliminary instructions will not necessarily be the same as the final instructions that will govern their deliberations.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 151-53 (1997) (describing studies from the American Bar Association and others).

B. Michael Dann, "Educated & Democratic Juries", 68 Indiana L.Rev. 1229, 1249 (1993).

Washington Jury Standard 16(c)(i) (3rd ed. 1997) (a trial judge "should give preliminary instructions directly following the empanelment of the jury that explain …the issues to be addressed and the basic relevant legal principles") (this standard is identical to the A.B.A.'s standard).

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12*, pp. 80-83 (1994).

California Blue Ribbon Commission on Jury System Improvement, *Final Report*, p. 95 (1996).

District of Columbia Jury Project, *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington D.C*, pp. 61-62 (1998).

28

WHEN THE PROCEDURE WILL ASSIST JURORS, THE COURT SHOULD DISTRIBUTE PLACE CARDS, NAME TAGS, OR SEATING CHARTS IDENTIFYING PARTIES, WITNESSES, COUNSEL, AND OTHER PERTINENT INDIVIDUALS IN THE COURTROOM.

Identifying Trial Participants

Identifying trial participants aids jurors in understanding and recalling the evidence and understanding the significance of courtroom events. Before trial begins, counsel should provide the court with names of parties, witnesses, and counsel who will appear in the trial. Either court staff, or counsel under the court's supervision, should prepare place cards or name tags for the relevant individuals. A seating chart may be placed in juror notebooks before trial.

Caution

In any case in which a trial participant's identity is an issue, the court should exercise caution in using this procedure.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, § IV-II, p. 123 (3rd ed. 1997).

29

COURT RULES SHOULD BE AMENDED TO ALLOW JURORS TO TAKE NOTES IN EVERY CASE, REGARDLESS OF THE LENGTH OR COMPLEXITY OF THE TRIAL. JURORS SHOULD BE PERMITTED TO REVIEW THEIR OWN NOTES IN THE JURY ROOM DURING RECESSES.

Current Practice

Although many judges in the state already allow jurors to take notes during trial, the practice is not universal. Jurors who take notes remember the evidence more accurately, apply the evidence to the law more accurately, are more attentive during trial, and are more satisfied with jury service.

Court Rules

Court rules currently allow jurors to take notes with the permission of the trial judge. These rules should be amended to allow jurors to take notes in every case.

Procedures for Taking Notes

The judge should instruct jurors using applicable pattern jury instructions. These instructions caution jurors about proper procedures for taking notes, about the importance of not allowing other jurors to see the notes before deliberations, and about notes not necessarily being more accurate than the memory or notes of other jurors. The court rules state that the notes should be destroyed immediately after the verdict is rendered.

References:

David C. Brody, et al., *Judicial View on Jury Reform in the State of Washington in 1998-99*, pp. 15 and 20 (survey results show that 86% of superior court judges and 49% of district and municipal court judges allow jurors to take notes in some or all cases).

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 141-43 (3rd ed. 1997) (discussing research findings).

CR 47(j), CRLJ 38(h), CrR 6.8, CrRLJ 6.8 (allowing jurors to take notes if the trial judge has given permission).

Washington Pattern Jury Instruction (Criminal) 4.63 (2nd ed. 1994).

Washington Pattern Jury Instruction (Civil) 6.06.01 (3rd ed. 1989).

30

JUROR NOTEBOOKS SHOULD BE PROVIDED IN LENGTHY OR COMPLEX CASES AND IN OTHER CASES AT THE JUDGE'S DISCRETION. THE NOTEBOOKS SHOULD CONTAIN INFORMATION THAT WILL HELP JURORS PERFORM THEIR DUTIES, SUCH AS PRELIMINARY INSTRUCTIONS, A SUMMARY OF CLAIMS AND DEFENSES, AND COPIES OF KEY EXHIBITS.

Importance of Juror Notebooks

Juror notebooks can be a significant aid to juror comprehension and recall of evidence. The parties should prepare the notebook with court supervision. The tabbed notebook may contain:

- a trial schedule of days and hours court will be in session
- a seating chart for the courtroom that identifies all trial participants
- preliminary jury instructions
- a summary of the parties' claims and defenses
- witnesses names, biographies, or photographs
- a glossary of technical terms
- copies of key exhibits and an index of all exhibits
- paper for taking notes
- final jury instructions

Including Exhibits

Key exhibits admitted into evidence should be displayed to the jury in some fashion. If the number of exhibits makes it impractical to put them all in a juror notebook, the more important ones should be included. If the parties do not agree on which items to include, each party should be permitted a specified number of exhibits.

Preliminary Instructions

The preliminary instructions should be replaced with final instructions before the judge reads them to the jury.

Privacy of Notebooks

Notebooks should remain in the courtroom or jury room during trial and should be secured by the bailiff during overnight recesses. Jurors should be permitted to take their notebooks to the jury room during deliberations. Judges should decide whether jurors may keep the notebooks.

References:

A.B.A. Litigation Section Report, *Jury Comprehension in Complex Cases*, 34-37 (1989).

G. Thomas Munsterman, et al., *Jury Trial Innovations*, 109-111 (1997).

John V. Singleton, “Jury Trial: History and Preservation”, 32 Trial Law. Guide 237, 279 (1988).

Ariz. R. Civ. Proc. Rule 47(g) (1999) (“In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties”).

31

EXHIBITS AND DEPOSITIONS SHOULD BE MARKED AND ADMITTED TO THE GREATEST EXTENT FEASIBLE BEFORE POTENTIAL JURORS ARE CONDUCTED TO THE COURTROOM FOR JURY SELECTION.

IF THE CASE IS ASSIGNED TO AN INDIVIDUAL JUDGE OR SUBJECT TO A PRETRIAL ORDER, EXHIBITS AND DEPOSITIONS SHOULD BE MARKED. THE PARTIES SHOULD FILE A STIPULATION THAT IDENTIFIES EXHIBITS AND GROUPS THEM INTO THREE CATEGORIES:

1. **EXHIBITS THAT MAY BE ADMITTED WITHOUT OBJECTION;**
2. **EXHIBITS THAT ARE STIPULATED TO BE AUTHENTIC, BUT A PARTY MAKES A SUBSTANTIVE OBJECTION TO ITS ADMISSION; AND**
3. **EXHIBITS THAT ARE CHALLENGED AS NOT AUTHENTIC.**

THE STIPULATION SHOULD BRIEFLY STATE THE OBJECTION TO ADMISSIBILITY AND IDENTIFY THE OBJECTING PARTY. THE MARKING OF EXHIBITS AND DEPOSITIONS AND THE FILING OF THE STIPULATION SHOULD OCCUR BEFORE THE EARLIER OF THE TRIAL DATE OR PRETRIAL CONFERENCE.

Marking Documents Delays Trials

More jurors identified time spent waiting as a problem of jury service than any other identified problem.[1] Admission of documentary evidence requires counsel to interrupt questioning to ask the clerk to mark an exhibit, to ask the court for permission to approach the witness, to ask the witness questions to establish the authenticity and relevance of the exhibit, to move the admission of the exhibit, and to respond to any objection by opposing counsel. Admission of a deposition requires a similar process, involving a motion to publish and the clerk's unsealing of the deposition.

[1] 37.8%, compared to the next "largest" problem, parking (29.6%). Brody, Lovrich, Sheldon, and Neiswinder, *Juror Survey Results, 1998-99*, Table A-12 (p. 18).

Current Practice

In practice, many exhibits are admitted without objection, and depositions are commonly published and unsealed. The federal courts have required pre-marking exhibits for years.[2]

Pre-Marked Documents

Early resolution of evidentiary issues avoids unnecessary delays and jury waiting. In addition, early disclosure of trial exhibits minimizes trial by ambush and may encourage early settlement.

References:

G. Thomas Munsterman, et.al., *Jury Trial Innovations*, §IV-2 (1997).
U.S.D.C. West. Dist. of Washington Local Rule 16.1.
Evidence Rule 104.

[2] E.g., U.S.D.C. Western Dist. of Washington Local Rule 43(g) ("Unless otherwise ordered by the court, on the morning of trial, each party appearing shall present marked and tagged trial exhibits to the clerk. Exhibits shall be marked in accordance with the Pretrial Order.") Another local requires disclosure of documentary exhibits in the Pretrial Order Drafted by the parties. *Id.* at 16.1.

32

WHEN A WITNESS APPEARS BY WRITTEN OR VIDEOTAPED DEPOSITION, THE TESTIMONY PROPOSED FOR ADMISSION SHOULD BE IDENTIFIED AND OBJECTIONS TO ADMISSION RESOLVED BEFORE POTENTIAL JURORS ARRIVE AT THE COURTROOM.

WHEN DEPOSITION TESTIMONY IS READ TO THE JURY, EACH JUROR SHOULD BE PROVIDED, TO THE EXTENT FEASIBLE, WITH A REDACTED TRANSCRIPT OF THE TESTIMONY FOR THE JUROR'S USE DURING THE READING. REDACTIONS SHOULD NOT BE APPARENT TO THE JURY.

Deposition Testimony

When a witness appears by deposition, presentation of that testimony by reading questions and answers can be time-consuming and boring, interfering with jurors' comprehension and retention. Providing copies of the testimony offered will allow jurors to better understand and retain the deposition testimony. Copies of testimony will also enable hearing-impaired jurors to comprehend the deposition testimony more easily.

Advance Identification

Parties usually know the portions of deposition testimony they intend to introduce. Advance identification of proposed testimony allows the parties and the court to resolve objections before the potential jurors arrive at the courtroom for selection, thereby minimizing juror waiting time.

Federal Court Practice

The federal court in Spokane requires advance identification, objection, and resolution of deposition testimony:

> Depositions which a party intends to use at trial in lieu of calling the witness must be purged of all repetitious and irrelevant questions and answers, all objections which have been abandoned, and irrelevant colloquy between the attorneys. Purging shall be accomplished by designating the page and line numbers of material proposed to be used. This may be accomplished by the use of a high-lighting marker. A copy of the depositions so purged, or designations thereof, shall be served upon the opposing party no later than ten days before the pretrial conference. Objections and counter-designations by the opposing party shall be served no later than five days before the pretrial conference. Objections shall be submitted to the Court for resolution at the pretrial conference and

> depositions shall be purged in accordance with the court's ruling. This subsection shall not apply to depositions used to refresh recollection, as an admission against interest, or for impeachment.

LR 32.1 (E.D. Wash. 1996).

References:

G. Thomas Munsterman, et.al., *Jury Trial Innovations*, §IV-10 (1997) (regarding use of deposition summaries).
Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* Summary of Recommendations, no. 33 (p. 24) (recommending use of deposition summaries).
U.S. Dist. Court LR 32.1 (E.D. Wash. 1996).
U.S. Dist. Court LR 32(c) (W.D. Wash. 1997).
U.S. Dist. Court LR 9.4.9 (16-9.4.9) (C.D. Cal.).

33

IN EVERY CASE, JURORS SHOULD BE PERMITTED TO SUBMIT WRITTEN CLARIFYING QUESTIONS TO WITNESSES, SUBJECT TO CAREFUL JUDICIAL SUPERVISION. THE DECISION OF WHETHER TO PERMIT A QUESTION RESTS WITH THE JUDGE, ALTHOUGH COUNSEL RETAIN THE RIGHT TO OBJECT TO THE SCOPE OR CONTENT OF ANY SPECIFIC QUESTION. JURORS ARE NOT PERMITTED TO ASK ORAL QUESTIONS. THE RULES OF CIVIL PROCEDURE AND CRIMINAL PROCEDURE SHOULD BE AMENDED ACCORDINGLY.

Allowing Jurors to Propose Questions for Witnesses

Jurors should be allowed to ask questions during civil and criminal trials, subject to careful judicial supervision. Permitting jurors' questions acknowledges the importance of the role of jurors as active learners and active participants in the search for the truth, promotes efforts to focus on the merits of a case rather than speculation, and avoids the real possibility of an erroneous verdict based on confusion or misunderstanding.

The procedure must include a number of safeguards. Before testimony begins, the court should instruct the jury that:

Cautionary Instructions

1. The sole purpose of jurors' questions is to clarify the testimony, not to express any opinion about it or to argue with the witness;
2. Jurors are to remember that they are not advocates and must remain neutral fact finders;
3. Jurors are to submit questions in writing, without discussion with fellow jurors, and are to leave them unsigned; oral questions are not allowed;
4. There are some questions that the court will not ask, or will not ask in the form that a juror has written, because of the rules of evidence or other legal reasons or because the question is expected to be answered later in the case;
5. Jurors are to draw no inference if a question is not asked—it is no reflection on either the juror or the question;
6. Jurors are not to reveal to other jurors a question that was not asked by the judge or speculate as to its answer or why it was not asked; and
7. Jurors are not to interpret this instruction as meaning that the court is encouraging jurors' questions.

The court should take the following steps when allowing jurors to propose questions:

Procedures

1. At the conclusion of each witness's testimony, the court asks if jurors have written questions, which are brought to the judge;
2. Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room;
3. The judge asks the question of the witness;
4. Counsel are permitted to ask appropriate follow-up questions; and
5. The written questions are made part of the record.

This recommendation is drawn primarily from American Bar Association standards, the recommendation of the National Center for State Courts, the Federal Judicial Center's Manual for Complex Litigation, and an Arizona rule of civil procedure, which was adopted in 1995 as part of wide-ranging jury reforms in that state.

Benefits of Allowing Jurors to Propose Questions

Judges and attorneys who have used this procedure report that the great majority of juror questions are serious, concise, and relevant to the issues of the trial. Counsel also find the questions to be a useful gauge of how clearly they are explaining their case. Jurors who have been permitted to ask questions indicate the procedure kept them engaged in the proceeding and gave them greater satisfaction with jury service. Studies verify that the advantages to jurors and the trial as a whole outweigh the feared risks.

As the courts have observed, in the context of complex cases or complicated testimony,

> [J]uror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror.

United States v. Sutton, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992). All federal appeals courts that have considered the issue and a significant number of state appellate courts have held that trial courts may permit jurors to submit questions to witnesses.

Concern Raised in the Pattern Jury Instructions

In Washington, both civil and criminal pattern jury instructions provide for written questions by jurors. The Comment to both instructions indicates, however, that while the rules of evidence neither explicitly allow nor disallow the practice of permitting jurors to question witnesses, the procedure should not be encouraged because it usually interrupts the trial.

This concern is largely alleviated by the cautionary instruction and procedures outlined above. Moreover, many of the questions posed by jurors can be handled in a manner that is even less time-consuming than a side-bar conference. The more routine questions can easily be addressed by passing the note from the judge to counsel, with each writing down their reactions on the note.

Concerns Raised in the Case Law

The Washington Court of Appeals has explicitly disapproved of the practice, but has not found that it constitutes reversible error. In *State v. Munoz*, *State v. Monroe*, and *State v. Walker*, Division I of the Court of Appeals has consistently observed that the active solicitation of juror questions is inappropriate. In each of these three cases, the court held that the court's solicitation of questions was not error of constitutional magnitude.

The *Monroe* court disapproved of the practice because of a number of potential risks: (1) questions can act as improper communication between jury and counsel and generally favor the prosecutor because a question signals the jurors' doubts and perceived weaknesses in the State's case; (2) a juror's question might provide "mental reactions" in other jurors, giving the question undue influence over the jury as a whole; (3) jurors may place undue significance on answers to questions by an influential juror; (4) one or more jurors may dominate the questioning process; and (5) questioning may cause jurors to begin the deliberative process before they have heard all the evidence.

Many of these concerns are minimized by using the cautionary instruction and procedures outlined above. The instruction cautions jurors about the proper purpose for their questions. Moreover, jurors are instructed at the beginning of the trial to withhold judgment until all evidence has been presented.

Conclusion

We believe that the experience in federal and state courts around the country confirms that juror questions are an important component of the truth-finding process. The recommended preliminary cautionary instruction to the jury and the controlled procedures described here address due process concerns. Because the Court of Appeals has disapproved the use of juror questions, we recommend that both the rules of civil procedure and criminal procedure be amended to authorize the procedure.

References:

American Bar Association, Civil Trial Practice Standards, No. 4 ("Juror Questions for Witnesses") (February 1998).
American Judicature Society, *Toward More Active Juries: Taking Notes and Asking Questions* (1991).
Ariz. R.Civ.Proc. 39 (providing a procedure for questioning by jurors).
B. Michael Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries", 68 Ind. L.J. 1229 (1993).
Federal Judicial Center, *Manual for Complex Litigation 3d* Sec. 22.42 (1995).
Larry Heuer & Steven Penrod, "Increasing Jurors' Participation in Trials: A Field Experiment with Jury Note Taking and Question Asking", 79 Judicature 256 (1996).
Saul M. Kassin & Lawrence S. Wrightsman, *The American Jury on Trial: Psychological Perspectives* (1988).
Kelso, "Final Report of the Blue Ribbon Commission on Jury System Improvement", 47 Hasting L.J. 1433, 1507 (1996).
G. Thomas Munsterman, et al., *Jury Trial Innovations*, Sec. V-7 (3rd ed. 1997).
Washington Pattern Jury Instructions: WPI 6.12, WPIC 4.66 (Questions by Jurors Addressed to Witnesses).
State v. Munoz, 67 Wn. App. 533, 837 P.2d 636 (1992).
State v. Monroe, 65 Wn. App. 245, 828 P.2d 24, review denied 119 Wn.2d 1019 (1992).
State v. Walker, 1997 WL 599169 (unpublished 1997).
State v. Brinkley, 66 Wn. App. 844, 837 P.2d 20 (1992).
United States v. Sutton, 970 F.2d 1001 (1st Cir. 1992).
For a list of appellate court decisions holding that trial courts have discretion to allow juror questioning of witnesses, see pp. 12-13 of American Bar Association's Civil Trial Practice Standards (February 1998).

IN LONG TRIALS, THE COURT SHOULD CONSIDER ALLOWING PERIODIC MINI-OPENING STATEMENTS TO

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IMPROVE JUROR UNDERSTANDING.

Mini-Opening Statements

Parties introduce evidence based on the sequence of witnesses, not necessarily in a chronological or subject matter sequence. Presentation of evidence that jumps back and forth in time or subject matter is difficult to understand and retain. Mini-openings allow the parties to explain to the jury the significance of testimony or evidence about to be presented in relation to the theories of the case. Opposing counsel should be allowed to respond.

Procedures

Each party should be given a specific amount of time. Responsive opening statements should be allowed and should count toward that party's allocated time. The court would determine when mini-openings may be made.

Increased Juror Comprehension

Mini-opening statements should increase juror comprehension and retention, allowing jurors to place evidence in the context of the theories of the case. Greater comprehension and retention results in greater confidence in the jury's decision and may well shorten the jury's decision process.

Discretion

Courts currently have the discretion to authorize mini-opening statements.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, §V-10 (3rd ed. 1997).

B. Michael Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries", 68 Ind. L.J. 1229, 1255-56 (1993).

New York State Bar Ass'n, "Improving Jury Comprehension in Complex Civil Litigation", 62 St. John's L. Rev. 549, 557-58 (1988) (description of interim commentaries in *Westmoreland v. CBS*).

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* Summary of Recommendations, no. 35 (p. 24) (encouraging use of interim summaries and mini-openings in long or complex trials).

Higginbotham, "Juries and Complex Cases: Observations About the Current Debate", The American Civil Jury 78 (1987) (advocating interim commentary in lengthy trials).

TO THE GREATEST EXTENT FEASIBLE, EACH JUROR

35

SHOULD BE GIVEN A COPY OF THE JURY INSTRUCTIONS BEFORE ORAL INSTRUCTION BY THE COURT.

Copies of Instructions for Each Juror

Giving a copy of the instructions to each juror before instruction by the court and argument of counsel substantially aids jurors' understanding of the instructions individually and as a whole. Increased comprehension of the instructions allows jurors to relate the instructions to the facts more quickly, thus expediting deliberations. The American Bar Association and New York Bar Association recommend the practice.[3] Three studies reported four advantages to providing each juror with his or her own copy of instructions before oral instruction by the court and final arguments by counsel:[4]

1. Jurors experienced less confusion about the instructions.
2. Jurors reported deliberations were aided because of the individual copies.
3. Jurors had fewer questions about the instructions during deliberations.
4. Jurors were more confident in their verdict.

Short Trials

In a very short trial having few instructions, it may not be practical or necessary to provide jurors with individual copies.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, §IV-5 (3rd ed. 1997).
B. Michael Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries", 68 Ind. L.J. 1229 (1993).
Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* Summary of Recommendations, no. 42 (p. 25).
American Bar Association, *Charting a Future For the Civil*

[3] B. Michael Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries", 68 IND. L.J. 1229, 1259 n. 203 (1993).

[4] *Id.*, citing *Jury Comprehension in Complex Cases*, 1989 A.B.A. Litig. Sec. Rep.; Committee on Federal Courts, New York State Bar Ass'n, "Improving Jury Comprehension in Complex Civil Litigation", 62 St. John's L. Rev. (1988); Sand and Reiss, "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit", 60 N.Y.U. L. Rev. 423 (1985).

Jury System: Report from an American Bar Association/Brookings Symposium 24 (1992) (recommending all jurors be provided copies of final instructions).

American Bar Association, Special Committee on Jury Comprehension, *Jury Comprehension in Complex Cases*, 51-52 (1989) (unanimous reports by jurors that copies of instructions were helpful in deliberations).

Heuer & Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions," 13 Law & Hum. Behav. 409 (1989) (finding that providing written instructions tended reduce juror disagreements about instructions and finding no support for contention that written instructions lengthen proceedings).

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JURY INSTRUCTIONS SHOULD BE READILY COMPREHENSIBLE BY JURORS. THEY SHOULD BE CASE SPECIFIC AND STATED IN PLAIN LANGUAGE. THE NUMBER AND LENGTH OF INSTRUCTIONS SHOULD BE REDUCED TO A MINIMUM.

Plain English Jury Instructions

Many studies reveal that jurors are often confused by jury instructions because of their technical nature, use of legal terms, and lack of organization. Research results strongly suggest that bench-bar jury instruction committees be expanded to include or use the services of experts in communication, psychology, and psycholinguistics as well as lay people, including former jurors. Experts agree on the following general goals for reform: (1) drafting instructions with jurors in mind, (2) making them clear, simple, and case-specific (by using the parties' names, actual fact issues, and examples from the case), and (3) reducing the number and length of instructions to the absolute minimum.

References:

Alan Reifman, et al., "Real Jurors' Understanding of the Law in Real Cases", 16 Law & Hum. Behav. 539, 547, 556 (1992) (reporting survey of former jurors that revealed they understood instructions on substantive law less than one-half of the time).

Valerie P. Hans & Neil Vidmar, *Judging the Jury* 120-122 (1986).

Jury Comprehension in Complex Cases, 1989 A.B.A. Litig. Sec. Rep. 43-52.

Lawrence J. Severance & Elizabeth F. Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions", 17 Law & Soc'y. Rev. 153, 161 (1982) (presenting the results of three studies on jury instruction comprehension).

Walter W. Steele & Elizabeth G. Thornberg, "Jury Instructions: A Persistent Failure to Communicate", 74 Judicature 249, 251 (1991).

David U. Strawn & G. Thomas Buchanan, "Jury Confusion: A Threat to Justice", 59 Judicature 478, 480-82 (1976);

G. Thomas Munsterman, et al., *Jury Trial Innovations*, 163-170.

B. Michael Dann, "Educated & Democratic Juries", 68 Indiana L.J. 1229 (1993).

Improving the Deliberating Process

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WASHINGTON'S PATTERN JURY INSTRUCTIONS SHOULD PROVIDE JURORS WITH SUGGESTED DELIBERATION PROCEDURES. THE SUGGESTED PROCEDURES SHOULD INCLUDE SELECTING A PRESIDING JUROR, ORGANIZING THE DISCUSSION, ENCOURAGING FULL PARTICIPATION BY ALL JURORS, HANDLING DISAGREEMENTS, AND TAKING VOTES.

Group Decision-Making Procedures

Many jurors are unfamiliar with group decision-making procedures. They do not know which procedures are more likely to further, and which are more likely to inhibit, their collaborative search for the truth in the evidence. They do not know that taking a vote early in their deliberations can polarize the jury and inhibit their open-minded discussion of the evidence. They do not know how to set up their discussion so that each juror fully participates and the discussion still stays on track. It is therefore not surprising that research shows that jurors spend up to one-quarter of their time trying to get organized.

Procedures in Jury Instructions

Judges can assist jurors by including in their final instructions some suggested, but not dictated, procedures for their deliberations. Other jury reform groups have made similar recommendations.

Sample Jury Instruction

Appendix 6 contains a sample instruction that incorporates instructions being developed elsewhere. We recommend that an instruction along these lines be included in Washington's pattern jury instructions.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 171-73 and Appendix 9 (3rd ed. 1997) (presenting sample jury instructions on this topic).

American Judicature Society, *Behind Closed Doors: A Resource Manual to Improve Jury Deliberations* (1999) (discussing research and proposing a 10-page booklet for jurors to use in organizing their deliberations).

Hastie, Penrod, and Pennington, *Inside the Jury* (Cambridge, MA: Harvard, 1983), pp. 230, 232-33 (concluding that "early and frequent voting is … obstructive of reaching a verdict. High rates of voting are associated with the appearance of tight-knit, defensive factions that do not devote all of their energies to an open-minded search for truth in the evidence. Jury instructions should caution the jury to avoid early or frequent polling during deliberation.").

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* p. 104 and Exhibit H (1994) (proposing a jury instruction).

District of Columbia Jury Project*, Juries for the Year 2000 and Beyond*, pp. 65-67 (1998) (proposing a jury instruction).

California Blue Ribbon Commission on Jury System Improvement, *Final Report,* p. 99 and Appendix O (1996) (proposing a jury instruction).

Washington Jury Standard 18(c) (3rd ed. 1997); A.B.A. Jury Standard 18(c) (both of which indicate that trial judges should instruct the jury on the appropriate procedures to be followed during deliberations).

WPIC 151.00, WPI 1.08 (pattern jury instructions tell jurors to select a presiding juror and to fill out the verdict forms, but do not otherwise assist with suggested procedures).

A Juror's Guide (juror's pamphlet prepared by Washington's trial judges' associations telling jurors about some of the things they shouldn't do during deliberations).

38

TRIAL JUDGES SHOULD MAKE EVERY EFFORT TO RESPOND FULLY AND FAIRLY TO QUESTIONS FROM DELIBERATING JURORS. JUDGES SHOULD NOT MERELY REFER THEM TO THE INSTRUCTIONS WITHOUT FURTHER COMMENT OR TELL THEM TO RELY UPON THEIR MEMORIES OF THE EVIDENCE. IN DOING SO, JUDGES SHOULD BE CAREFUL NOT TO PRESSURE THE JURY OR STATE OR IMPLY ANY VIEW OF THE CASE'S MERITS.

Questions from Deliberating Jurors

The failure of trial judges to be of greater assistance to jurors during deliberations is a primary source of juror confusion. Research shows that the vast majority of the time, judges answer jurors' requests for clarification of instructions by simply referring the jurors to the instructions without further comment. Questions regarding the evidence are similarly dealt with by telling jurors to rely upon their memories of the evidence.

Providing Full Responses

Although many judges and lawyers consider juror questions an inconvenience, they should be welcomed as opportunities to determine whether additional or corrective action is necessary to ensure juror comprehension. Judges should exercise their discretion to respond more fully to deliberating jurors' questions. As long as the judge does not impermissibly comment on the evidence, imply a view on the merits, or pressure the jury, the judge's response will not constitute error. This procedure will reduce the frequency of juror confusion and mistaken verdicts.

See Recommendation 39 for procedures to follow in responding to juror requests for clarifying instructions. See Recommendation 40 for procedures to follow in responding to juror requests relating to the evidence.

References:

CR 51(i), (j); CRLJ 51(i), (j); CrR 6.15(f); CrRLJ 6.15(e).
Jury Comprehension in Complex Cases, 1989 A.B.A. Litig. Sec. Rep. 43, 52-53.
Robert F. Forston, "Sense and Non-Sense: Jury Trial Communication", 1975 B.Y.U. L. Rev. 601, 628-29.
Lawrence J. Severance & Elizabeth F. Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions", 17 Law & Soc. Rev. 153, 172-73 (1982).
Vincent J. O'Neill, Jr., "Famous Last Words: Responding to Requests and Questions of Deliberating Jurors in

Criminal Cases", 11 Crim. Just. J. 381 (1989).

Stephen P. Garvey, Sheri Lynn Johnson, & Paul Marcus, "Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases", 85 Cornell L.Rev. 627 (2000) (emphasizing the importance of directly responding to jurors' questions about jury instructions instead of simply referring the jurors back to the original instructions).

Bernard S. Meyer & Maurice Rosenberg, "Questions Juries Ask: Untapped Springs of Insight", 55 Judicature 105 (1971) (explaining a system of monitoring jury deliberations through jury questions in order to better understand how civil juries bring community standards to bear in deciding the legal issues presented to them).

B. Michael Dann, "Educated & Democratic Juries", 68 Ind. L. J. 1229, 1260-61 (1993).

G. Thomas Munsterman, et al., *Jury Trial Innovations*, 177-179 (3rd ed. 1997).

39

THE FINAL JURY INSTRUCTIONS SHOULD EXPLAIN THE PROCEDURES FOR REQUESTING CLARIFICATION OF INSTRUCTIONS. THE JUDGE SHOULD ADVISE THE JURY TO SUBMIT ANY QUESTIONS ABOUT INSTRUCTIONS IN WRITING TO THE BAILIFF.

WHEN A JURY QUESTION ARISES DURING DELIBERATIONS, THE QUESTION SHOULD BE NUMBERED, DESIGNATED BY TIME AND DATE, FILED AND MADE A PART OF THE RECORD. THE JUDGE SHOULD NOTIFY THE PARTIES OR THEIR COUNSEL THAT THE JURY HAS SUBMITTED A QUESTION AND DIRECT THEM TO MEET IN THE COURTROOM OR BY TELEPHONE. THE JUDGE SHOULD READ THE QUESTION AND SOLICIT COMMENTS FROM COUNSEL REGARDING THE APPROPRIATE RESPONSE. THE RESPONSE AND ANY OBJECTIONS TO IT SHOULD BE ENTERED ON THE RECORD.

THE JUDGE SHOULD, AFTER CONSULTING WITH COUNSEL, RESPOND TO ALL JURY QUESTIONS, EVEN IF THE RESPONSE IS NO MORE THAN A DIRECTIVE FOR THE JURY TO CONTINUE ITS DELIBERATIONS. IF THE JUDGE PROVIDES ANY ADDITIONAL INSTRUCTION IN RESPONSE TO A JURY QUESTION, THE JUDGE SHOULD REMIND THE JURY NOT TO EMPHASIZE ANY PARTICULAR INSTRUCTION OR PART OF ANY INSTRUCTION, BUT RATHER TO CONSIDER THE INSTRUCTIONS AS A WHOLE. RESPONSES TO JURY QUESTIONS ON ANY POINT OF LAW SHOULD BE DELIVERED TO THE JURY IN WRITING. THE JUDGE SHOULD ENSURE THAT ANY ADDITIONAL INSTRUCTIONS ARE NOT COERCIVE OR UNFAIRLY PREJUDICIAL TO EITHER PARTY.

THE ABOVE PROCESS SHOULD BE MANDATED BY COURT RULE.

For a related discussion of this issue, see the accompanying Recommendations 38 and 40.

References:

CR 51(i), (j); CRLJ 51(i), (j); CrR 6.15(f); CrRLJ 6.15(e);
Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 896 P.2d 682 (1995) [trial court has discretion in deciding whether to give additional jury instructions].
Adcox v. Children's Orthopedic Hospital & Medical Center, 123 Wn.2d 15, 864 P.2d 921 (1993) [trial court must not

indicate its personal attitude toward evidence or merits of the case in instructing jury].

State v. Ransom, 56 Wn. App. 712, 785 P.2d 469 (1990) [supplemental instruction in response to jury question after deliberations have begun may not introduce new theory that neither party has previously advanced];

B. Michael Dann, "Educated & Democratic Juries", 68 Ind. L. J.1229, 1260-61 (1993).

Lawrence J. Severance & Elizabeth F. Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions", 17 Law & Soc. Rev. 153, 161 (1982);

Vincent J. O'Neill, Jr., "Famous Last Words: Responding to Requests and Questions of Deliberating Jurors in Criminal Cases", 11 Crim. Just. J. 381 (1989).

G. Thomas Munsterman, et al., *Jury Trial Innovations*, 177-179 (3rd ed. 1997).

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WHEN A JURY QUESTION ARISES DURING DELIBERATIONS REGARDING THE EVIDENCE, THE JUDGE SHOULD NOTIFY THE PARTIES OR THEIR COUNSEL OF THE QUESTION. THE JUDGE SHOULD READ THE QUESTION AND SOLICIT COMMENTS REGARDING THE APPROPRIATE RESPONSE. THE RESPONSE AND ANY OBJECTIONS TO IT SHOULD BE MADE A PART OF THE RECORD. THIS PROCESS SHOULD BE MANDATED BY COURT RULE.

THE JUDGE SHOULD, AFTER CONSULTING WITH THE PARTIES OR COUNSEL, RESPOND TO ALL JURY QUESTIONS, EVEN IF THE RESPONSE IS NO MORE THAN A DIRECTIVE TO RELY UPON THEIR MEMORIES OF THE EVIDENCE. THE COURT MAY ALLOW THE JURY TO REVIEW EVIDENCE (E.G., REPLAYING AUDIO OR VIDEO TAPES) IF SUCH REVIEW IS NOT UNFAIRLY PREJUDICIAL TO EITHER PARTY. THE COURT MAY GRANT A JURY'S REQUEST TO REHEAR OR REPLAY TRIAL TESTIMONY, BUT SHOULD DO SO IN A WAY THAT IS LEAST LIKELY TO CONSTITUTE A COMMENT ON THE EVIDENCE AND THAT MINIMIZES THE POSSIBILITY THAT JURORS WILL GIVE UNDUE WEIGHT TO THE SELECTED TESTIMONY.

Reviewing Evidence During Deliberations

Court rules provide that when the jury retires for deliberation, it must take with it the written instructions given, all exhibits received in evidence (except testimonial exhibits such as depositions), and the verdict form(s). However, neither court rules nor the rules of evidence specifically address the jury's ability to review evidence after deliberations have begun, although exhibits taken to the jury room generally may be used by the jury as it sees fit. In general, the court has discretion to allow an admitted, non-testimonial exhibit to go to the jury room, so long as it is not unduly prejudicial. (See references.)

Requests from Jurors to Rehear or Replay Testimony

Washington's case law has not yet addressed whether a trial judge may grant a deliberating jury's request to rehear or replay particular trial testimony. Concerns sometimes are expressed that granting these requests may be interpreted as an unconstitutional comment on the evidence or that jurors might place undue weight on the selected testimony. The general rule in other states, however, is that trial judges have discretion to grant these requests. This general rule includes cases from states in which judges are prohibited from commenting on the evidence.

Safeguards When Allowing Jurors to Rehear or Replay Testimony

The Commission believes jurors should be allowed to rehear or replay testimony as long as appropriate safeguards are in place. Judges should give a cautionary instruction advising jurors to keep in mind all the evidence in the case, not just the testimony being reheard or replayed, and advising that the judge is not making any comment on the value or credibility of the testimony at issue. The testimony should be read or played to the jurors in the courtroom and should not be given to the jurors in written form to take to the jury room. Because of concerns over commenting on the evidence, the judge ordinarily should not select additional testimony for the jury to hear along with the requested testimony.

Although judges now have discretion to allow this practice, the Commission recommends that a court rule be adopted. A more complete protocol should be developed as part of the implementation of this recommendation.

For a discussion of other issues related to this recommendation, see the accompanying Recommendations 38 and 39.

References:

CR 51(h); CRLJ 51(h); CrR 6.15(d); CrRLJ 6.15(d).

State v. Castellenos, 132 Wn.2d 94, 935 P.2d 1353 (1997) (trial judges have discretion to allow jurors to take to the jury room nontestimonial exhibits, including tape recordings and playback equipment, but tape recordings involving statements made by a witness who was not subject to cross-examination should not go to the jury room if doing so will violate a defendant's right to confront witnesses).

State v. Frazier, 99 Wn.2d 180, 661 P.2d 126 (1983).

Washington Constitution, Article IV, Section 16 (prohibiting judges from commenting on the evidence).

Annotation, "Right to Have Reporter's Notes Read to Jury," 50 A.L.R.2d 176 (concluding that a "vast majority" of cases, both criminal and civil, allow reporter's notes to be reread to juries upon request); 75B Am.Jur.2d Trial § 1685. Although some of the states following the majority rule are also states that prohibit judges from commenting on the evidence, no cases could be found that directly analyze whether this prohibition bars a judge from granting a request for testimony to be reheard.

Kalven and Zeisel, *The American Jury*, 420 (1966) (listing approximately 35 states that prohibit judges from commenting on the evidence, whether by constitution, court rule, statute, or case law).

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WHEN DELIBERATING JURORS IN A CIVIL CASE REPORT THAT THEY CANNOT REACH A VERDICT, THE JUDGE SHOULD TAKE ADDITIONAL STEPS AFTER CONFIRMING THAT THE JURY IS, IN FACT, DEADLOCKED. THE JUDGE SHOULD INVITE THE JURY TO STATE, IN WRITING, THE POINTS OF LAW OR EVIDENCE UPON WHICH IT CANNOT AGREE AND DESIRES HELP. THE JUDGE SHOULD DISCUSS THE JURY'S RESPONSE WITH COUNSEL BEFORE DECIDING HOW TO PROCEED. THE JUDGE CAN PROVIDE ADDITIONAL INSTRUCTIONS, PERMIT ADDITIONAL CLOSING ARGUMENTS, REREAD OR REPLAY TESTIMONY, REOPEN THE TRIAL FOR MORE EVIDENCE, OR ALLOW A COMBINATION OF THESE. IN COMMUNICATING WITH JURORS, THE JUDGE MUST AVOID ANY APPEARANCE OF COERCING A VERDICT.

Jury at an Impasse

Traditionally, when a deliberating jury in a civil case reports that it is unable to reach a verdict, the trial judge asks a series of questions, to be answered "yes" or "no," aimed at discovering whether the jury is actually deadlocked. After the jury confirms it is deadlocked, the court declares a mistrial, usually without further dialogue with jurors and without offering any assistance. The trial lawyers are left to wonder about, and perhaps later investigate, what caused the hung jury and what they might do differently at a retrial.

Offering Assistance

Once the court has determined that the jury is deadlocked, the judge should ascertain reasons for the impasse before declaring a mistrial. Once the jury has articulated its difficulties, the judge should take appropriate steps to assist the jury. Such steps may include clarifying instructions,[5] allowing additional arguments, rereading or replaying testimony, and allowing supplemental evidence where appropriate. See Appendix 7 for a sample instruction to use in offering assistance to a jury at an impasse.

Supplemental

The Commission recognizes that reopening a trial to allow supplemental evidence and argument is a departure from

[5] *State v. Ransom*, 56 Wn. App. 712, 785 P.2d 469 (1990) (Trial judge has discretion to further instruct jury, once deliberations have begun, but it is error to instruct on new theory of liability).

State v. Iverson, 73 Wn. 2d 973, 442 P.2d 243 (1998) (Grant of a new trial appropriate where the trial judge orally instructed jurors to try to "harmonize" their views, judge was aware of the jurors numeric voting split, and judge did not follow procedures in CR 51(i)).

CR 51(i)and CrR 6.15(f) set out the procedure the court must follow to instruct the jury further once deliberations have begun.

WPI 6.13 and WPIC 4.68 should be given.

Evidence

common practice. Concern that this gives the plaintiff an unfair second opportunity is unfounded. At the point the court determines that the jury is deadlocked, the plaintiff has the opportunity for a retrial. This practice of reopening for additional evidence and argument is likely to be used infrequently, offers the opportunity to respond to jurors questions in the first trial, and potentially saves the time and expense of a retrial.

Jury's Request to Rehear or Replay Testimony

For a discussion of the safeguards that trial judges should use when allowing jurors to rehear or replay testimony, see Recommendation 40.

Caution

It is important to be careful in all comments to the jurors to avoid any appearance of coercion or pressure.

Civil Cases Only

This recommendation is limited to civil cases. The Jury Commission considered, but rejected, extending this recommendation to criminal cases.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, 191-193 (3rd ed. 1997).

B. Michael Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries", 68 Ind. L. J. 1269-1277 (1993).

Fernandez v. United States, 329 F.2d 899 (9th Cir.), *cert. denied* 379 U.S. 832 (1964) (trial judges have discretion to reopen a case during deliberations).

United States v. Burger, 419 F.2d 1293 (5th Cir. 1969) (same holding).

Henry v. United States, 204 F.2d 817 (6th Cir. 1953) (same holding).

People v. Scott, 465 N.Y.S.2d 819 (1983) (same holding).

State v. Ransom, 56 Wn. App.712, 785 P.2d 469 (1990). See footnote 5.

State v. Iverson, 73 Wn.2d 973, 442 P.2d 243 (1998). See footnote 5.

CR 51(i), CrR 6.15(f). See footnote 5.

WPI 6.14, WPIC 4.70 (pattern jury instructions setting out the series of questions the judge asks the presiding juror to determine whether the jury is deadlocked).

WPI 6.13 and WPIC 4.68. See footnote 5.

After the Trial

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THE TRIAL JUDGE MAY SPECIALLY SCHEDULE THE TIME FOR THE VERDICT ANNOUNCEMENT IN CASES IN WHICH THE JUDGE IS CONCERNED ABOUT SECURITY OR WIDESPREAD PUBLIC REACTION TO THE VERDICT.

Scheduling Verdict Announcements

In both civil and criminal cases, people sometimes react to a verdict in a manner that threatens the safety or well-being of others. The range of potential security concerns is broad. Typically, the concern is over the emotional reaction in the courtroom and the need to protect jurors and others in the courtroom. Sometimes the concern is over the community at large. In these cases, the judge may specially schedule the verdict announcement after precautions have been taken.

References:

G. Thomas Munsterman, et al., *Jury Trial Innovations*, pp. 185-86 (3rd ed. 1997).

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COURTS SHOULD ADMINISTER AN ANONYMOUS QUESTIONNAIRE TO A REPRESENTATIVE SAMPLE OF PEOPLE CALLED FOR JURY SERVICE TO MONITOR JUROR REACTION TO JURY SERVICE AND TO IDENTIFY AREAS OF JUROR DISSATISFACTION.

Usefulness of Juror Feedback

Consistent and regular use of juror exit questionnaires provides the court with useful feedback. Jurors' responses can identify problems such as excessive waiting time for jurors and uncomfortable waiting rooms. This information will help courts improve juror satisfaction and the efficiency of jury administration.

Designing and Administering Questionnaires

The court need not administer a questionnaire to all jurors called for jury duty. The court should, however, administer a questionnaire on a regular basis to a representative sample of people called for service, including members not selected, members challenged and excused, alternates, and jurors who deliberate. The questionnaire should require fixed rather than open-ended responses. A sample questionnaire can be found in Appendix 8.

Completed Questionnaires

The questionnaire should be completed by jurors before they leave the court facility. The completed questionnaires are not public records, but rather will be used by the court, through its jury committee or court staff, to identify areas needing improvement.

References:

A.B.A. Jury Standard 12.
Washington Jury Standard 12 (3rd ed. 1997) (identical to the A.B.A.'s standard).
Brookings Institution, *Charting a Future for the Civil Jury System: A Report from an American Bar Association/Brookings Symposium* 30 (1992).
G. Thomas Munsterman, *Jury System Management* (National Center for State Courts, 1996).
G. Thomas Munsterman, et al., *Jury Trial Innovations*, 209-10 (3rd ed. 1997).

A Declaration of Principles for Jury Service

44

A DECLARATION OF PRINCIPLES FOR JURY SERVICE SHOULD BE POSTED IN EACH COURT FACILITY AS A REMINDER OF THE IMPORTANCE OF THE JURY'S ROLE IN THE JUDICIAL SYSTEM AND TO ENSURE THAT JURORS ARE TREATED WITH RESPECT.

Vital Role of Juror

Too often citizens called to jury duty are viewed as a cog in the machinery of the court's jury administration process. However, without citizens to fulfill the vital role of juror, the judicial system would grind to a halt. Prospective jurors are required to put their lives on hold while they perform this civic duty, often involving considerable inconvenience to themselves, their employers, and their families. Jurors should be treated with the respect that their important role in our system of justice deserves.

Declaration of Principles

Declaration of Principles

Citizens called to jury service should be:

1. Fairly compensated for their service.
2. Treated with courtesy, respect, and consideration.
3. Free from discrimination.
4. Entitled to have their privacy interests carefully considered.
5. Provided with comfortable and convenient facilities, with particular attention to jurors with special needs.
6. Kept fully informed of trial schedules.
7. Informed of the trial process and of the applicable law in plain and clear language.
8. Able to take notes during trial, ask questions, and have them answered as permitted by law.
9. Entitled to have questions and requests that arise or are made during deliberations fully answered and met as allowed by law.
10. Offered appropriate assistance from the court when they experience serious anxieties or stress as a result of jury service.
11. Able to express concerns, complaints, and recommendations to court authorities.

References:

Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12,* pp. 130-132 (Promulgate a Proposed Bill of Rights for Arizona Jurors).

Appendices

Appendix 1

BOARD FOR JUDICIAL ADMINISTRATION
State of Washington

RESOLUTION for the Washington State Jury Committee

WHEREAS the United States and Washington State provide citizens a right to trial by jury and,

WHEREAS there is evidence an increasing number of citizens summoned for jury service do not appear and,

WHEREAS the judges of the Washington State courts see it as an important responsibility of the courts to determine what features of jury service could be changed or improved to encourage citizens to serve; and so litigants can continue to rely on a jury system that has integrity and is fair and impartial.

THEREFORE, be it by the Board for Judicial Administration:

That, a Washington State Jury Committee be formed to examine Washington State's jury system and recommend improvements to jury operations.

The Jury Committee will conduct a broad inquiry into the jury system and examine issues including, but not limited to, juror responsiveness, citizen satisfaction from jury service, adequacy of juror reimbursement, and improving juror participation in trials.

The Jury Committee is charged to make recommendations for changes in law, court rule, and court procedures,

The Jury Committee membership shall be representative of trial court judges, trial court administrators, county clerks, jury managers, attorneys, citizens who have served as jurors, legislators, labor, business, state, county and municipal officials, media, relevant academic disciplines, and experts in jury management. The Committee will provide a means for public commentary,

The Chair of the Jury Committee shall be a trial court judge who may appoint such ad hoc members as are deemed necessary to conduct the work of the committee;

The Jury Committee at the conclusion of its study shall make a written report of its findings and recommendations to the Board for Judicial Administration.

Done by the Board for Judicial Administration the 6th day of November, 1998.

_____ Attest: Chair
Barbara Durham, Chief Justice
Washington Supreme Court

Appendix 2

(For Recommendation 10)

Disqualification, Excuse, and Deferral Guidelines

Disqualification--RCW 2.36.070 (processed by jury clerk):

1. Those under eighteen years of age.
2. Those who are not citizens of the United States.
3. Those not residents of the county.
4. Those not able to communicate in the English language.
5. Those convicted of felonies who have not had their civil rights restored.

Excuse (processed by judge):

1. Those showing undue financial hardship, outlined in writing, where a person is not compensated for jury service by an employer, or self-employed persons who would incur financial hardship.
2. A showing that excuse from jury service is a public necessity.
3. Those showing jury service would be an extreme inconvenience.

Excuse (processed by jury clerk):

1. Persons who have completed jury service within the last year as described in RCW 2.36.100(3) ("at least two weeks of jury service within the preceding twelve months.").
2. Age-related requests for excuse (proof of birth date).
3. Those with religious beliefs which would interfere with their ability to serve.

Permanent Excuse (processed by jury clerk):

1. Those with a permanent medical condition preventing jury service (verified by a doctor's letter).

Deferral (processed by jury clerk):

1. Persons with a verified temporary medical condition that prevents service as a juror if documented by a physician's statement.

2. Persons providing sole care for dependent family members.

3. Job-related requests for temporary deferral including seasonal work, but only if those persons are unable to be assigned to serve on a short jury trial. This would also apply to self-employed sole proprietors.

4. Students may have their jury service postponed to a time when courses are not being conducted.

5. Military personnel on active duty who are stationed out-of-county (with proof of military address).

6. Persons who have made reservations or plans to be out of town.

7. Persons who have appointments or obligations which cannot be cancelled without undue hardship.

Appendix 3

(For Recommendations 18-20)

EXECUTIVE ORDER 00-03
PUBLIC RECORDS PRIVACY PROTECTIONS

PREAMBLE

WHEREAS, Citizens of the state of Washington are gravely concerned about their privacy, and that concern is well founded. As the Internet comes of age, we are experiencing an explosion in the growth of commercial and government electronic databases that contain highly sensitive personal information about individuals. The businesses and governments that control those databases *must* be responsible. It is state government's added responsibility to protect the personal privacy rights of Washington's citizens and lead the private sector by example and by law.

I am a strong believer in open government and the people's right to know. The very existence of our democracy depends on the fundamental principles embodied in our laws ensuring that we never have secret government. People must be able to trust their government.

There is a critical distinction, however, between public information and private personal information that happens to be held by the government or a business. Simply because certain personal information is in the hands of a third party does not mean that it should be made public or available to anybody willing to pay for it. A taxpayer's sensitive tax information has never been subject to public scrutiny. Nor do citizens expect that their health records, bank account, or credit card numbers will be open for inspection or available to others.

Unfortunately, as citizens, our expectations may exceed the privacy protections provided in law and the practices and policies established by the private sector and public agencies to protect personal information. The information age has created an urgent need for the custodians of data to exercise special care in safeguarding that information.

With this executive order, it is my intent to ensure that state agencies comply fully with state public disclosure and open government laws, while protecting personal information to the maximum extent possible by:

Placing the government of Washington state at the forefront in protecting the personal information of its citizens; Minimizing as much as possible the collection, retention, and release of personal information by the state; Prohibiting the unauthorized sale of citizens' personal information by state government; Providing citizens with broad opportunities to know what personal information about them the state holds, and to review and correct that information; and Making certain that businesses that contract with the state use personal information only for the contract purposes and cannot keep or sell the information for other purposes – and that those who violate this trust are held accountable.

NOW THEREFORE, I, Gary Locke, Governor of the State of Washington, declare my commitment to strengthen privacy protections for personal information held by state agencies, and to the principles of open government and the people's right to know.

WHEREAS, an increasing number of citizens are concerned that personal information held by the state might be used inappropriately, that unauthorized people may have access to it, and that some information may be inaccurate, incomplete, or unnecessary.

WHEREAS, citizens have a right to know how information about them is handled by state agencies and the extent to which that information may be disclosed or kept confidential under the law.

WHEREAS, many state agencies collect, maintain, and dispose of public records that contain highly confidential and sensitive personal information that must be carefully safeguarded. These records contain sensitive and private health, financial, business, or other personally identifiable information. Their inadvertent release, careless storage, or improper disposal could result in embarrassment or harm to individuals and potential liability for the state.

WHEREAS, state agencies have an obligation to protect personal information about citizens, as required by law. They must exercise particular care in protecting records containing sensitive and private health, financial, and other personally identifiable information about individuals, such as social security numbers.

WHEREAS, the purpose of this executive order is to direct state agencies, as responsible information custodians, to institute additional privacy protections for personal information and to ensure that people who supply personal information to state agencies know how it will be handled and protected under state law.

I HEREBY ORDER as follows:

For purposes of this executive order, “personal information” means information collected by a state agency about a natural person that is readily identifiable to that specific individual.

1. Protecting the Confidentiality of Sensitive Personal Information. Each state agency shall immediately establish procedures and practices for the handling and disposal of public records and copies to provide reasonable assurances that those containing confidential personal information are properly safeguarded.

2. Protecting Social Security Numbers and other Sensitive Personal Identifiers. To the extent practicable, each state agency shall eliminate the use of Social Security numbers and other sensitive personal and financial identifying numbers from documents that may be subject to public scrutiny. Each state agency shall also take steps designed reasonably to ensure that appropriate personnel are aware of the new confidentiality requirement under Ch. 56, Laws of 2000, for credit card and debit card numbers, electronic check numbers, card expiration dates, and other financial account numbers connected with the electronic transfer of funds.

3. Prohibiting the Sale of Personal Information. Except as otherwise provided by law, state agencies may not sell personal information that they collect from the public or obtain from other public or private entities.

4. Limitation on Collection and Retention of Personal Information. State agencies shall limit the collection of personal information to that reasonably necessary for purposes of program implementation, authentication of identity, security, and other legally appropriate agency operations. Agencies shall examine their record retention schedules and retain personal information only as long as needed to carry out the purpose for which it was originally collected, or the minimum period required by law.

5. Protection of Personal Information used by Contractors. State agencies that enter into contracts or data sharing agreements with private entities and other governments that involve the use of personal information collected by the agencies shall provide in those contracts that the information may be used solely for the purposes of the contract and shall not be shared with, transferred, or sold to unauthorized third parties. A state agency that receives personal information from another state agency must protect it in the same manner as the original agency that collected the information. Each state agency shall establish reasonable procedures to review, monitor, audit, or investigate the use of personal information by contractors, including, when appropriate, the "salting" of databases to detect unauthorized use, sale, sharing, or transfer of data. Contractual provisions related to breach of the privacy protection of state contracts or agreements shall include, as appropriate, return of all personal information, termination, indemnification of the state, provisions to hold the state harmless, monetary or other sanctions, debarment, or other appropriate ways to maximize protection of citizens' personal information.

6. Prohibiting the Release of Lists of Individuals for Commercial Purposes. RCW 42.17.260 prohibits public agencies from giving, selling, or allowing the inspection of lists of individuals, unless specifically authorized or directed by law, if the requester intends to use the information for commercial purposes. The Attorney General in AGO 1998 No. 2 has interpreted "commercial purposes" broadly and has not limited those purposes only to situations in which individuals are contacted for commercial solicitation. For that reason, unless specifically authorized or directed by law, state agencies shall not release lists of individuals if it is known that the requester plans to use the lists for any commercial purpose, which includes any profit expecting business activity.

7. Internet Privacy Policies. Within 30 days of the effective date of this executive order, the Department of Information Services shall, in consultation with other state agencies and affected constituency groups as appropriate, develop a clear and concise model privacy policy for use by state agencies that operate an Internet web site. The privacy policy shall contain at least the following elements: a) the manner in which the personal information is collected; b) the intended uses of the information; c) a brief description of the laws relating to the disclosure and confidentiality of the information with a link to the state public records act and other laws, as appropriate; d) information on the purpose and anticipated effects of the web site's data security practices; e) the consequences of providing or withholding information; f) the agency's procedures for accessing personal information, verifying its accuracy, and making corrections; g) the method by which an individual may make a request or provide notice to the agency concerning the use or misuse of a person's personal information; and h) how the agency may be contacted. Within 60 days of the completion of the model policy, each state agency that operates an Internet web site shall, after consultation with affected constituency groups, adopt the model policy, modified to the minimum extent necessary to address practical and legal considerations specific to that agency. Links to agency privacy policies should be located prominently on each agency's web site home page and on any other page where personal information is collected.

8. Notification and Correction. Each state agency that collects personal information shall, to the extent practicable, provide notice to the public at the point of collection that the law may require disclosure of the information as a public record. Upon request, state agencies shall provide a written statement generally identifying a) the known circumstances under which personal information in public records may be disclosed, and b) the agency's procedures for individuals to review their personal information and recommend corrections to information that

they believe to be inaccurate or incomplete. This notice and statement may be included in an agency privacy policy, as specified in item 7 above.

9. Citizen Complaints and Oversight. Citizen complaints, questions, or recommendations regarding the implementation of this executive order or the collection and use of personal information by state agencies shall be submitted to the agency that is the custodian or collector of the information. Each agency shall designate a person to handle complaints, questions or recommendations from, and provide information to, the public regarding the collection and use of personal information and the agency's privacy policies. I will designate a person within the Governor's office to monitor and oversee the administration of this executive order and to serve as a point of contact for complaints from the public not addressed by an agency.

10. Miscellaneous. Nothing in this executive order shall be construed to prohibit or otherwise impair a lawful investigative or protective activity undertaken by or on behalf of the state. This order does not create any right or benefit, substantive or procedural, at law or in equity, that may be asserted against the state, its officers or employees, or any other person. It prohibits the release of public records only to the extent allowable under law. State agencies shall, in all cases, comply with applicable law. This order is intended only to improve the internal management of the executive branch and enhance compliance with the law. The Governor may grant exceptions to the requirements of this executive order if an agency can demonstrate that strict compliance results in excessive and unreasonable administrative burdens or interferes with effective administration of the law.

This executive order shall take effect immediately.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the State of Washington to be Affixed at Olympia this 25th day of April A.D., Two thousand.

GARY LOCKE
Governor of Washington

BY THE GOVERNOR:

_____

Secretary of State

Appendix 4

(For Recommendations 18-20)

American Bar Association Standard 20: Juror Privacy

(a) JUROR QUESTIONNAIRES SHOULD DIFFERENTIATE BETWEEN INFORMATION COLLECTED FOR THE PURPOSE OF JUROR QUALIFICATION, JURY ADMINISTRATION, AND VOIR DIRE AND PROVIDE A MEANS FOR JURORS TO RESPOND PRIVATELY TO SENSITIVE QUESTIONS.

(b) THE METHOD OF CONDUCTING VOIR DIRE SHOULD BE THAT BEST SUITED TO PROTECT THE PRIVACY OF POTENTIAL JURORS GIVEN THE NATURE OF INFORMATION SOUGHT AND THE RIGHTS INVOLVED.

(c) AFTER JURY SELECTION IS COMPLETE, THE COURT SHOULD MAKE INACCESSIBLE TO THE PUBLIC, THE PARTIES, AND THEIR ATTORNEYS ANY INFORMATION COLLECTED IN CONNECTION OR REVEALED DURING VOIR DIRE ABOUT INDIVIDUALS CALLED FOR JURY DUTY BUT NOT SELECTED FOR THE JURY. RECORD RETENTION REQUIREMENTS SHOULD SPECIFY HOW THIS INFORMATION WILL BE MADE INACCESSIBLE. INFORMATION RETAINED FOR SWORN JURORS SHOULD ONLY BE THAT REQUIRED BY STATUTE.

(d) BEFORE DISMISSING JURORS FROM JURY DUTY, THE COURT SHOULD INFORM JURORS OF THEIR RIGHTS TO DISCUSS OR TO REFRAIN FROM DISCUSSING THE CASE.

(e) JURORS SHOULD HAVE THE CONTINUING PROTECTION OF THE COURT IN THE EVENT THAT INDIVIDUALS PERSIST IN QUESTIONING THE JURORS OVER THEIR OBJECTION ABOUT THEIR JURY SERVICE.

COMMENTARY:

Jury duty is a hallmark of democratic government. Unlike elected or appointed positions of public office, however, jury service is not a position that an individual can seek or avoid by choice. Although individuals serving as jurors do not have a constitutional right of privacy, they nevertheless have certain expectations of privacy. For citizens to respond and freely participate in jury service, the court must create an atmosphere of respect for jurors that addresses their expectations of privacy to the greatest extent possible given the need of the justice system to select an impartial jury and provide a fair trial.

Paragraph (a). For each individual who reports for jury duty, the court typically collects three different types of information: qualification information; administrative information; and jury selection (voir dire) information. See generally Standard 11(c)(ii). Qualification information is used by the court to determine whether a prospective juror meets the statutory requirements for service such as citizenship and residency status, age, ability to understand and communicate in English, and criminal conviction status. Administrative information, in contrast, is information that the court needs for the efficient management of its jury system (e.g., address, telephone numbers, Social Security numbers, daily mileage to the courthouse). Finally, the court and counsel require voir dire information to determine the ability of prospective jurors to serve as

impartial and objective jurors. Some courts use case specific questionnaires for this information. See G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead, Jury Trial Innovations (NCSC 1997).

Because the court uses juror information for these different purposes, the court should consider the extent to which its policies concerning public access to each type of information should also differ. Qualification and administrative information, for example, are generally not necessary for the attorneys and litigants to make judgments about prospective jurors' ability to be fair and impartial. Nor is this information typically of vital public concern. Thus, the court may reasonably place more restrictions on public and party access to qualification and administrative information than it may on voir dire information.

Paragraph (b). During voir dire, the judge and attorneys solicit personal information about potential jurors to determine their suitability for jury service in a particular trial. Typically, jury panel members are asked to reveal demographic and biographical information; their personal knowledge of the parties, the attorneys, and the specifics about the case; their opinions about the case; and their personal beliefs, attitudes and prior life experiences that might affect their ability to serve as fair and impartial jurors.

Consistent with Standard 7(c), the court should ensure that voir dire questions are relevant to the selection of a fair and impartial jury. Much of the demographic and biographical information is likely to be innocuous and jurors can be asked to answer voir dire questions pertaining to these topics in open court. For inquiring about more personal information, including potentially embarrassing or harmful information, the court should consider alternative methods of voir dire such as *in camera* voir dire or written questionnaires. In cases likely to involve a high degree of media attention or a strong possibility of physical harm to jurors, the court should consider the use of an anonymous jury to protect juror privacy and safety.

The use of *in camera* voir dire and written questionnaires are both conducted on the record and counsel for both parties have access to all of the information revealed. Thus, they conform to the requirements of Press Enterprises v. Superior Court (I), 104 S. Ct. 819 (1984). Press Enterprises established criteria for the court to consider before closing court proceedings or sealing the record. Specifically, the court must determine whether a juror has a compelling privacy interest, including protection from physical harm or the threat of physical harm, that outweighs the presumption favoring public access to judicial proceedings. *In camera* voir dire relieves jury panel members from revealing personal information in open court and in the presence of the entire panel and other individuals, such as court staff or spectators, who may be present in the courtroom. Questionnaires permit panel members to reveal sensitive or personal information in their written responses, rather than publicly.

The use of anonymous juries should be reserved for very limited and extraordinary circumstances. In cases involving very high levels of media attention, in which the identity of jurors is likely to be of significant public interest, maintaining the anonymity of jurors may be appropriate. Similarly, anonymous juries are appropriate for cases in which the parties may attempt to influence or coerce jurors in their decision making process.

Paragraph (c). During jury selection, prospective jurors may be asked to reveal a great deal of personal information. Standard 7(a) provides that juror information collected prior to in-court voir dire should be made available in writing to each party on the day on which jury selection is to begin. From this information, the court and counsel for both parties select a specified number of prospective jurors to serve on the jury. The court then dismisses the remaining prospective jurors or directs them to return to the jury assembly room for consideration on another jury. Unless one of the parties makes a legal objection to the selection of the jury panel, the personal information

revealed by individuals not selected for the jury is not relevant to the case and should be made inaccessible to the public. To the extent practical, references to such personal information should be expunged from the formal trial record. The court should also determine the record retention requirements for juror qualification, jury administration, and voir dire.

Paragraph (d). Before they are dismissed from jury duty, jurors should understand their rights concerning post-verdict discussions about the case. See Standard 16(d). In addition to thanking jurors for their service, the court should inform jurors that they are released from their obligation to refrain from discussing the case and that they may choose to discuss or not discuss the case as they wish. As part of this information, the court should inform jurors of any restrictions on the parties or their attorneys concerning post-verdict contact with jurors. See, e.g., U.S. v. Kepreos, 759 F.2d 961 (1st Cir. 1985); U.S. v. Shakur, 1988 U.S. Dist. LEXIS 5162 (S.D. N.Y. 1988); Florida Rules of civil Procedure 1.431(h)(1996). The court may also request that jurors respect the privacy of other jurors and not reveal information disclosed or statements made by those individuals during the deliberations.

Paragraph (e). Although many jurors are willing to talk about their jury experience after the trial, others prefer not to discuss it at all and are uncomfortable if asked about it. Before dismissing the jury, the court should inform jurors that they may call on the protection of the court if individuals persist in questioning them about their jury service. The court should also explain any procedures that jurors should follow to contact the court.

Appendix 5

(For Recommendations 18-20)

GENERAL RULE 15(j)

Access to Juror Information. Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

GR 15 (j) was adopted by Supreme Court Order No. 25700-A-683, dated June 12, 2000, and is effective September 1, 2000.

Appendix 6

(For Recommendation 37)

PROPOSED JURY INSTRUCTION
PROVIDING SUGGESTED PROCEDURES FOR JURY DELIBERATIONS

You are free to manage your jury deliberations in any way that seems most suitable to you. However, I will make a few suggestions that may help you to proceed more smoothly with your deliberations. You are free to accept or reject these suggestions.*

When you return to the jury room to begin your deliberations, you might want to take a few minutes to get acquainted. You could each in turn introduce yourselves and indicate any topics or questions you want to discuss during the deliberations. I suggest, however, that you not give your opinion at this point about how you would vote.*

By first getting to know each other, you will feel more comfortable sharing your ideas, and you will have a better basis for choosing your presiding juror. Give careful consideration to this choice. Look for a juror who is a good listener and observer, who can organize the evidence and discussion, and who will see that every juror is heard fairly.*

You should then discuss the case with your fellow jurors to reach agreement if you can do so. I suggest that you:

(1) discuss the evidence and the law to your satisfaction before you take a vote;
(2) organize your discussion by separately considering each [charge] [claim] and by separately examining the evidence relating to each element of that [charge] [claim]; and
(3) identify those issues for which there are differences of opinion and then discuss each in turn.**

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence and the law, discussed the case fully with the other jurors, and listened to the views of the other jurors.***

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right. Each of you must make your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.***

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. Nothing that I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.***

---

* Paragraphs marked with a single asterisk are adapted from a sample instruction that appears in G. Thomas Munsterman, et al, *Jury Trial Innovations*, Appendix 9, Sample A (3rd ed. 1997). The sample instruction was used by other states in developing their own proposed instruction .

** This paragraph, other than item (2), is taken directly from the instructions proposed in Arizona and the District of Columbia. Item (2) is adapted from a sample instruction that appears in *Jury Trial Innovations*, *supra*, Appendix 9, Sample C.
*** These paragraphs are taken verbatim from the instructions proposed in Arizona and the District of Columbia.

Appendix 7

(For Recommendation 41)

Sample Instruction Offering Assistance to a Jury at an Impasse *

This instruction is offered to help you make a decision, not to force you to reach a verdict or to suggest what your verdict should be.

It may be helpful for you to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

If you still disagree, you may identify any questions about the evidence, the instructions of law, or the deliberation process with which you would like assistance. If you choose this option, please list your questions in writing. The court will determine whether further assistance might help you reach a verdict.

---

* Adapted from an instruction appearing in a law review article written by Judge Michael Dann of Maricopa County Superior Court in Phoenix, Arizona. B. Michael Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries," 68 Ind. L. J. 1229, 1277 (1993.)

Appendix 8

(For Recommendation 43)

JURY SERVICE EXIT QUESTIONNAIRE
(adapted from a questionnaire used by the Ninth Circuit)

Your answers to the following questions will help improve jury service. All responses are voluntary and confidential. (Please circle answers where appropriate.)

1. Approximately how many days did you report to the courthouse? _____

2. What percent of your time was spent in the jury waiting room? _____

3. How many times did you report to a courtroom for jury selection? _____

4. How many times were you actually selected to be a juror? _____

5. How would you rate each of the following factors?

	Good	Adequate	Poor
A. Initial Orientation			
B. Treatment by Court Personnel			
C. Physical Comforts			
D. Personal Safety			
E. Parking Facilities			
F. Scheduling of Your Time			

6. After having served, what is your impression of jury service? (Circle one)

   A. The same as before — Favorable
   B. The same as before — Unfavorable
   C. More Favorable than Before
   D. Less Favorable than Before

7. AGE: 18-20 21-24 25-34 35-44 45-54 55 -64 65-Over

8. SEX: Female Male

9. OCCUPATION: _____

10. RACE: Black White Other

11. Did you lose income as a result of jury service? YES NO

    Amount $ _____

12. Have you ever served on jury duty before? YES NO

13. (a) Are you a registered voter in the county? YES NO

    (b) Do you have a driver's license and/or identification card issued by the Department of Licensing? YES NO

14. In what ways do you think jury service can be improved? (Use reverse side if necessary)

_____

_____

Appendix 9

JUROR SURVEY RESULTS, 1998-99

A Report to the Office of the Administrator for the Courts

Prepared by:

David C. Brody
Washington State University, Spokane

Nicholas P. Lovrich
Washington State University

Charles H. Sheldon
Washington State University

John Neiswinder
Washington State University

Department of Political Science and Criminal Justice Program
Division of Governmental Studies & Services
Washington State University
PO Box 644870
Pullman, WA 99164-4870
Phone: (509) 335-3329
Fax (509) 335-2362

EXECUTIVE SUMMARY

The backbone of the jury system is the citizen juror. In an effort to determine what areas of the Washington State jury system can be improved, 1,329 Superior Court jurors from nine courts were administered a survey dealing with various aspects of their experience serving on a jury. The results from this survey along with the jurors written comments are reported in the pages herein.

The results show that jurors have a very positive impression of the jury system. On a scale of one-to-ten, with ten being highest, jurors rated the functioning of the jury system at over an 8. Additionally, well over 90% of the jurors said they would report for jury service if summoned again in one year.

Jurors did report some problems encountered during their service. The most complaints were raised about the time they had to spend waiting, parking, and the act that jury service interfered with their work. On the other hand, very few jurors listed the amount they were compensated for jury service, childcare issues or personal safety as problems.

While most of the jurors missed work to serve on the jury, a majority of these jurors were paid by their employers and had his or her support for their jury service. Moreover, jurors who were paid and/or had their employer's support gave the jury system high ratings and were extremely likely to serve again when summoned.

Jurors also indicated that they prefer being active participants in the trial process than merely passive listeners. When given the chance, most jurors took nots and made use of written copies of jury instructions that were provided. Additionally, a majority of jurors would have posed questions to witnesses if permitted.

Appendix 10

JUDICIAL VIEWS OF JURY REFORM IN THE STATE OF WASHINGTON

A Report to the Office of the Administrator for the Courts

Prepared by:

David C. Brody
Washington State University, Spokane

Nicholas P. Lovrich
Washington State University

Charles H. Sheldon
Washington State University

John Neiswinder
Washington State University

Department of Political Science and Criminal Justice Program
Division of Governmental Studies & Services
Washington State University
PO Box 644870
Pullman, WA 99164-4870
Phone: (509) 335-3329
Fax (509) 335-2362

EXECUTIVE SUMMARY

Over the last decade, states around the nation have either implemented or explored various reforms to their jury systems. One aspect of the court system that must be considered in an examination of a state's jury system is the state's judiciary. This study reports the results of surveys administered to the Superior Court, District Court, and Municipal Court judges in the State of Washington regarding a number of possible reforms to the jury system.

The results indicate that the judges believe that the system is working well, but can be improved. A majority of judges believe the following items would improve the workings of the criminal justice system:

Providing written copies of jury instructions to jurors for use in deliberations

Permitting note taking by jurors.

Allowing jurors to ask questions of witnesses through the trial judge.

Instructing jurors on the law several times during the course of a trial.

Increasing the pay of jurors.

Providing child care for jurors.

Having court staff make phone calls to jurors the day before they are scheduled to report for jury duty.

Issuing citations to citizens who fail to report to jury service on more than two occasions.

Two items that the judges were strongly opposed to deserve special mention. A vast majority of judges were opposed to the elimination of peremptory challenges and the use of non-unanimous verdicts in criminal trials.

The judges appeared to have given a great deal of consideration to the survey. Their responses indicate that they favor minor changes to the jury system, but in all, they believe the system is working well.

Appendix 11

(For Recommendation 11)

ASSEMBLY, No. 4275
STATE OF NEW JERSEY
219th LEGISLATURE

INTRODUCED JUNE 15, 2020

Sponsored by:
Assemblywoman SHAVONDA E. SUMTER
District 35 (Bergen and Passaic)
Assemblywoman BRITNEE N. TIMBERLAKE
District 34 (Essex and Passaic)
Assemblyman BENJIE E. WIMBERLY
District 35 (Bergen and Passaic)

Co-Sponsored by:
Assemblywoman Speight and Assemblyman Conaway

SYNOPSIS

Expands category of lists from which single juror source list is compiled to include persons who are utility customers, have non-driver identification card, or have applied for or received various types of assistance.

CURRENT VERSION OF TEXT

As introduced.

AN ACT expanding juror source lists and amending N.J.S.2B:20-2.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.2B:20-2 is amended to read as follows:

2B:20-2. a. The names of persons eligible for jury service shall be selected from a single juror source list of county residents whose names and addresses shall be obtained from a

merger of the following lists: registered voters, non-driver identification cards issued pursuant to the Motor Vehicle Commission as provided for in section 2 of P.L.1980, c.47 (C.39:3-29.3), licensed drivers, NJ FamilyCare Program eligibility identification card holders as provided for in section 1 of P.L.2005, c.156 (C.30:4J-8 et seq.), welfare plan identification card holders, public utility customers, or filers of State gross income tax returns **[**and**]**, filers of homestead rebate or credit application forms, and persons applying for or receiving unemployment insurance, cash assistance, housing assistance, medical assistance, home energy assistance or food stamps pursuant to a State program. The county election board, the **[**Division of Motor Vehicles**]** Motor Vehicle Commission **[**and**]**, the State Division of Taxation, the Board of Public Utilities in the Department of the Treasury, the Division of Unemployment Insurance in the Department of Labor and Workforce Development, the Division of Housing and Community Resources in the Department of Community Affairs, and the Division of Family Development and the Division of Medical Assistance and Health Services in the Department of Human Services shall provide these lists annually to the Assignment Judge of the county. The Assignment Judge may provide for the merger of additional lists of persons eligible for jury service that may contribute to the breadth of the juror source list. Merger of the lists of eligible jurors into a single juror source list shall include a reasonable attempt to eliminate duplication of names.

b. The juror source list shall be compiled once a year or more often as directed by the Assignment Judge.

c. The juror source list may be expanded by the Supreme Court as it deems appropriate.

(cf: P.L.2007, c.62, s.41)

2. This act shall take effect on the 365th day following enactment except that the Commissioner to the Board of Public Utilities, the Commissioner of Human Services, the Commissioner of the Department of Labor and Workforce Development, the Commissioner of the Department of Community Affairs, and the Assignment Judge of each vicinage may take such anticipatory administrative action in advance to share and merge information to supplement the juror source list, as shall be necessary for the implementation of this act.

STATEMENT

This bill expands the sources from which the single juror source list is compiled annually by the Assignment Judge of each county. Under current law, the names of persons eligible for jury services are selected from a merger of the following lists: registered voters, licensed drivers, filers of State gross income tax returns and filers of homestead rebate or credit application forms.

This bill expands that category of lists from which a single juror source list is compiled to include NJ FamilyCare Program eligibility identification card holders as provided for in section 1 of P.L.2005, c.156 (C.30:4J-8 et seq.), welfare plan identification card holders, non-driver identification cards issued pursuant to the Motor Vehicle Commission as provided for in section 2 of P.L.1980, c.47(C.39:3-29.3), public utility customers, and persons applying for or receiving unemployment insurance, cash assistance, housing assistance, home energy assistance, medical assistance, or food stamps pursuant to a State program.

Under the bill, the Division of Family Development in the Department of Human Services, the Board of Public Utilities in the Department of the Treasury, the Division of Unemployment Insurance in the Department of Labor and Workforce Development, the Division of Housing and Community Resources in the Department of Community Affairs, and the Division of Family Development and the Division of Medical Assistance and Health Services in the Department of Human Services would provide these lists annually to the Assignment Judge of each county.

This act shall take effect on the 365th day following the enactment of this bill, except that the Commissioner to the Board of Public Utilities, the Commissioner of Human Services, the Commissioner of the Department of Labor and Workforce Development, the Commissioner of the Department of Community Affairs, and the Assignment Judge of each vicinage may take such anticipatory administrative action in advance to share and merge information to supplement the juror source list, as is necessary for the implementation of this act.

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THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT

By Hon. Gregory E. Mize (ret.),
Paula Hannaford-Agor, J.D. &
Nicole L. Waters, Ph.D.

April 2007

ACKNOWLEDGEMENTS

The State-of-the-States Survey began as the cornerstone component of the NCSC's National Program to Increase Citizen Participation in Jury Service Through Jury Innovations (National Jury Program). We understood from the beginning that it would be a substantial undertaking, although if we had known just how substantial we might have reconsidered the scope and depth of the surveys. As it was, the study took a great deal more time and effort than we initially imagined, and we are indebted to the many people who helped make it a reality at last.

First and foremost, we are grateful to the 68 individuals, law firms, and organizations that contributed financially to the National Jury Program. This was the first major research study by the NCSC Center for Jury Studies that was financed almost entirely through private donations. These individuals, law firms, and organizations recognized the intrinsic value of the jury trial and were willing to support efforts to document and improve how it functions in the American justice system. We are particularly grateful to the Robins, Kaplan, Miller & Ciresi Foundation, which contributed funds to get the National Jury Program underway, and to the U.S. Chamber of Commerce and the State Justice Institute, which provided funding to analyze the State-of-the-States data and to write and distribute this report. We are also indebted to NCSC President Mary McQueen, who provided bridge funding so we could continue data collection for the State-of-the-States Survey at a time when financial contributions were lagging behind project expenses. The names of all of the National Jury Program contributors are listed in Appendix A.

Endeavors of this magnitude require super-human organizational skills. For that, we are forever indebted to NCSC Research Analyst Chris Connelly, who patiently and painstakingly undertook the job of mailing surveys, answering questions from respondents, and then following up to ensure the highest possible response rates. In the process, he talked with hundreds of judges, state court administrators, clerks of court, and lawyers in every state – some of them multiple times – and then oversaw the data entry and cleaning process for the datasets. It is due to his diligence in these efforts that the State-of-the-States Survey is the most comprehensive study of jury operations and practices ever yet undertaken. We are also grateful to our colleagues Monica Wait, who cleaned and analyzed the data and produced all of the state-by-state tables for the NCSC website; Tom Munsterman and Anne Skove, who provided necessary comments on the draft report to help us separate the wheat from the chaff; and to Brenda Otto, who provided administrative support for the project.

Finally, this project could not have been completed without the cooperation of the many supreme court justices, state court administrators, and trial court chief judges who served as liaisons for us to the judges and courts within their respective states and courts. They distributed the surveys to the judges, court administrators, and lawyers for completion, provided essential contacts with private bar organizations, and encouraged all to participate in the study. Of course, the study would not have been possible without the participation of all of those judges, court administrators, clerks of court, lawyers, and, most importantly, citizens who make the American jury system work every day.

Gregory E. Mize, Paula Hannaford-Agor, & Nicole L. Waters

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I. INTRODUCTION

Over the past two decades, the American jury system has become the focus of unprecedented interest by the legal community and by the broader American public. Some of the interest is in response to criticisms about the continued utility of the jury system. The rate of civil and criminal jury trials has steadily declined in recent years, eclipsed by non-trial dispositions such as settlement, plea agreements, and summary judgment.[1] Proponents of the jury system, on the other hand, have maintained that trial by jury continues to play a critical role in the American justice system in protecting the rights of criminal defendants, in resolving intractable civil disputes, and in promoting public trust and confidence in the courts.

Beginning in the early 1990s, these debates prompted renewed efforts by judges, lawyers, and scholars to examine jury performance and to consider the potential effects of various proposals for reform. A popular approach adopted by many states were judicially created commissions or task forces that were instructed to examine various jury reform proposals and make recommendations about their suitability for implementation. National efforts also took place during this time including the 1992 Brookings Institution symposium on the civil jury[2] and the 2001 National Jury Summit in New York City.[3]

Most recently, Robert J. Grey, Jr., made the American jury the focus of his tenure as the 2004-2005 President of the American Bar Association. Under his leadership, the ABA undertook a yearlong effort to update, consolidate, and harmonize the various sets of jury trial standards developed by the ABA Criminal Justice Section, the Section on Litigation, and the Judicial Division into a unified set of principles.[4] In contrast to other legal reform efforts that have tended to focus strictly on legal principles, the new ABA *Principles for Juries and Jury Trials* rely heavily on a large body of empirical research about juror behavior.

Many of these efforts have profoundly affected court policies as evidenced by revised court rules and case law, and the development of judicial and legal education curricula. While these policy changes are fairly easy to track on a statewide level, the fact remains that they can vary from court to court. For example, in a state the size of Texas, which has over 300 different general jurisdiction courts, it is extraordinarily difficult to keep track of administrative practices, procedures, data, and local reform efforts. It becomes even more difficult to determine what actually occurs during trials themselves. In all but a handful of jurisdictions, most jury trial techniques are permitted "in the sound discretion of the trial court." But we have little idea how often judges choose to exercise that discretion. In this report, we share the findings from the State-of-the-States Survey of Jury Improvement Efforts, a national study designed to examine precisely these questions.

---

[1] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEG. STUD. 459 (2004).

[2] ROBERT E. LITAN (ed.), VERDICT: ASSESSING THE CIVIL JURY SYSTEM (1993).

[3] Robert G. Boatright & Elissa Krauss, *Jury Summit 2001: A Report on the First National Meeting of the Ever-Growing Community Concerned with Improving the Jury System,* 86 JUDICATURE 144 (2002).

[4] AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS (2005).

The State-of-the-States Survey is the cornerstone of a much larger initiative by the NCSC Center for Jury Studies – the National Program to Increase Citizen Participation in Jury Service (National Jury Program).[5] The National Jury Program provides information and technical assistance to state courts about best practices in jury system management and trial procedures. Its ultimate goals are to assist courts to summons and impanel more representative juries; to manage their jury systems in an effective, efficient, and informative manner; to facilitate informed decision-making by trial jurors; to increase public trust and confidence in the jury system and in courts; and to better inform citizens about the judicial branch of government. The State-of-the-States Survey was designed to document local practices and jury operations in the context of their respective state infrastructures and thus provide a baseline against which state court policymakers could assess their own systems vis-à-vis their peers and nationally recognized standards of effective practices. The State-of-the-States Survey also examines the effectiveness of various implementation strategies for affecting change. Finally, it provides direction for future research and technical assistance efforts by the NCSC Center for Jury Studies.

The State-of-the-States Survey of Jury Improvement Efforts

The State-of-the-States Survey is the product of a multiyear effort to gauge the current status of jury improvement efforts in the nation's state courts. It derives from three separate, but related, questionnaires or "surveys." The first was the Statewide Survey completed by all 50 states and the District of Columbia to document statewide jury improvement efforts and the state infrastructure governing jury system management and trial procedures. For example, it collected contact information for jury task forces and sample copies of forms and procedures used in jury management. This survey not only identified the programmatic priorities for state courts, but also provided a mechanism to determine the types of efforts (e.g., judicial education, technical assistance, formal rule and statutory changes) that most often lead to effective implementation of jury improvements. The survey was typically completed by the Office of the Chief Justice or the Administrative Office for each participating state.

The second State-of-the-States questionnaire was the Local Court Survey. It was distributed to the states' general jurisdiction trial courts and focused on local jury operations related to qualification, summoning, terms and conditions of service, and supporting technology. This survey asked about jury improvement efforts initiated at the local level. As with the Statewide Survey, the NCSC Center for Jury Studies relied on the respective offices of the Chief Justice or the State Court Administrator to distribute the surveys to each of the local courts. In some instances, these offices also collected the surveys and returned them for data entry. In other instances, these central offices instructed local courts to mail the completed surveys directly to the NCSC.

[5] For a full description of the National Jury Program, see the NCSC Center for Jury Studies website at http://www.ncsconline.org/D_Research/cjs.

The responses for 43 of the 1,396 Local Court Surveys reflected multi-county judicial circuits, districts, or divisions. Thus, the complete local court dataset represents 1,546 individual counties from 49 states and the District of Columbia.[6] On average, these courts reflect 65 percent of their respective state populations and collectively they represent jurisdictions encompassing 70 percent of the total US population. Appendix C provides the response rates for each of the states. Heavily populated counties are slightly over-represented in the dataset compared to their actual representation. See Table 1. For example, courts representing communities of 500,000 or more people (urban areas) comprised 6.7 percent of the dataset although they make up only 3.6 percent of US localities. Courts representing communities of 100,000 to 500,000 people (large suburban areas) comprised 18.7 percent of the dataset compared to 13.2 percent of U.S. localities. Small suburban (25,000 to 100,000 population) jurisdictions were represented roughly in proportion to their numbers in the U.S., but rural areas (less than 25,000 population) were slightly underrepresented.[7] As we see in Section IV, urban courts tend to have higher levels of jury trial activity, which has important implications for jury operations for a variety of reasons.

Table 1: Local Court Response Rate

	Local Court Dataset		United States	
Population Size of Responding Courts	**# Surveys**	**%**	**# Counties**	**%**
Less than 25,000	560	41.9	1,582	50.3
25,000 to 100,000	437	32.7	1,035	32.9
100,000 to 500,000	250	18.7	415	13.2
More than 500,000	90	6.7	112	3.6
	1,337		3,144	

The final State-of-the-States component was the Judge & Lawyer Survey in which respondents were asked to describe the actual jury practices employed in their most recent jury trial. Data collection for this phase was the most challenging insofar that it required multiple distribution approaches in each state. The NCSC first requested the offices of the chief justice, the state court administrator, or the chief judge of large, metropolitan courts to distribute the surveys to trial judges through local communication networks. Occasionally this approach was supplemented with additional requests through state judicial education agencies or other trial judge organizations. In addition, NCSC staff contacted numerous state and local bar organizations, preferably electronically, to request its distribution to criminal and civil trial attorneys. The number of outreaches to mandatory and voluntary bar associations in each state ranged from a minimum of four to, in one instance, dozens. The NCSC also solicited the cooperation of several national bar organizations including sections of the American Bar Association, the American Board of Trial Advocates, and the American Trial Lawyers Association for distribution to their respective members.

Data collection for the Judge & Lawyer Survey began with requests to judge and lawyer groups in the states known to be warmly disposed toward jury trial innovations. Researchers quickly realized that, even in these states, judges, lawyers and court administrators were understandably focused upon the current tasks at hand and not readily disposed toward helping collect data, even

[6] Vermont was the only state that did not participate in this component of the State-of-the-States Survey.

[7] For the duration of this Compendium Report, we will use the terms "urban," "large suburban," "small suburban," and "rural" to refer to these four categories of population size.

for a well-respected national organization such as the NCSC Center for Jury Studies. Hence, there had to be repeated and numerous outreaches to judge associations (most states did not have an active one) and mandatory or voluntary bar associations in each state. In some states, dozens of phone calls and emails had to be sent over the course of many months. On occasion, successful results were the product of waiting a year or so until new leadership took charge of an association. In short, the State of the States survey took much longer to accomplish than originally estimated. This phenomenon suggests that future research efforts will likely be time consuming and challenging.

Table 2: Judge & Attorney Survey Characteristics

	N	%
Respondent Type		
State Trial Judge	4,081	34.7
Federal Trial Judge	255	2.2
Attorney	7,209	61.3
Other/Unknown	207	1.8
Jurisdiction		
State Court	10,395	92.2
Federal Court	884	7.8
Cases		
Criminal*	**5,622**	**47.8**
Capital Felony	343	6.1
Felony	3,868	68.8
Misdemeanor	1,341	23.9
Civil	**5,819**	**49.5**
Other	**311**	**2.6**
Attorneys		
Criminal Prosecution	917	15.6
Criminal Defense	1,345	22.9
Civil Plaintiff	1,909	32.4
Civil Defense	1,714	29.1
TOTAL	11,752	100.0

* Includes 70 trials designated as "criminal" only

The final Judge & Lawyer Survey dataset consisted of 11,752 surveys describing the practices employed in state and federal jury trials in all 50 states, the District of Columbia, and Puerto Rico. The vast majority of trials reported in the surveys took place between 2002 and 2006. See Table 2 for a description of the dataset. State trial judges accounted for more than one-third of the survey respondents. Based on national statistics in 2004, this sample of state trial judges reflects more than one-third (36.0%) of the judicial officers assigned to general jurisdiction courts.[8] Attorneys practicing in the state courts accounted for more than half of the surveys. A total of 255 federal judges[9] and 628 attorneys practicing in federal court also participated in the study, providing an unexpected opportunity to compare jury trial practices in state and federal courts. The remaining 3% of surveys were submitted by other legal practitioners or the respondent type was unknown.

One complication associated with the Judge and Lawyer Survey was the possibility that multiple respondents could describe the same case. In designing the survey, NCSC staff considered the option of asking survey respondents to provide identifying information such as a docket number about each case, but ultimately thought that the added complexity of asking respondents to remember that information as well as the loss of anonymity would discourage participation. We chose to err on the side of potentially "double counting" some trials rather than sacrifice the number of respondents. The relationship between

[8] The NCSC reports that there were 11,349 judicial officers assigned to general jurisdiction courts in 2004. RICHARD Y. SCHAUFFLER et al. (eds.), EXAMINING THE WORK OF STATE COURTS, 2005, 17 (2006). It is possible that some of the respondents were limited jurisdiction court judges, especially in trials for misdemeanor and "other" cases. But most states restrict trial by jury to courts of general jurisdiction. *See generally* DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, STATE COURT ORGANIZATION 2004, Part VIII (Court Structure Charts), 265-319 (2006).

[9] Federal district court judge respondents comprised 39% of all US federal district court judges. 28 U.S.C. § 133(a).

the percentage of Judge & Lawyer Surveys submitted to the NCSC and the county population expressed as a percentage of the state population was fairly consistent for all but seven of the 1,890 counties where jury trials took place. If the dataset did double-count some trials, it appears that the duplicate trials were distributed uniformly among those localities. Thus, it is unlikely that duplicate trials biased the findings of this study by placing disproportionate weight on the trial practices from a small number of jurisdictions.

II. THE VOLUME AND FREQUENCY OF JURY TRIALS IN STATE COURTS

A perennial challenge for policymakers and researchers concerned with jury trial procedures and operations is the difficulty in obtaining basic statistics about the number of jury trials that take place in state courts each year.[10] Some states do not publish any statistics about the number of jury trials or they may combine bench and jury trials into the same category. Other states only report jury trials that took place in their general jurisdiction courts, but not in limited jurisdiction courts. The State-of-the-States Survey provided an opportunity to estimate the number of jury trials that take place in state courts annually based on direct reports from a fairly comprehensive survey of local courts. To make these estimates, the NCSC Center for Jury Studies calculated the number of jury trials in each state, the trial rates per 100,000 population, and other basic statistics by extrapolating from the proportion of state population reflected in the Local Court Surveys. See Table 3.[11]

Table 3: National Jury Trial Rates and Characteristics	
# of Counties Represented	1,546
% of US Population Represented	70.3
Trial Rate per 100,000 population	58.6
Estimated number of jury trials annually	148,558
% Felony	46.7
% Misdemeanor	18.7
% Civil	30.6
% Other	4.0
Estimated number of summonses mailed	31,857,797
% Adult population represented (age 18+)	14.8
Estimated number of jurors impaneled	1,526,520
% Adult population represented (age 18+)	0.8

Annually, state courts conduct an estimated 148,558 jury trials each year. Federal courts conducted an additional 5,463 jury trials in 2006.[12] California has the largest volume of jury trials – approximately 16,000 per year. Vermont and Wyoming had the lowest volume (126 trials annually). These are not particularly surprising numbers given the respective populations of these states. What is surprising is the rate of jury trials. The average was 59 trials per 100,000 population, but varied substantially from a low of 15 trials in Alabama to a high of 177 trials in Alaska. Some of this variation can be explained by state law governing the circumstances under which parties may demand a jury trial (e.g., amount in controversy in civil trials, potential sentence in criminal trials), but also depends on local litigation culture including pretrial procedure, judicial management strategies, and the number of court resources available for conducting jury trials (e.g., facilities, staffing, judicial caseloads). The majority of jury trials are criminal trials – 47 percent felony and 19 percent misdemeanor. Just under one-third of trials are civil trials, and the remaining 4 percent involve family, juvenile, traffic, municipal ordinance, and "other" trials.

[10] The Court Statistics Project is a collaborative effort by the NCSC, the Conference of State Court Administrators, and the U.S. Department of Justice, Bureau of Justice Statistics, to collect and analyze data relating to the work of state courts, including the number of jury trials conducted annually in state courts. For reports and online tables, see http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

[11] See Appendix E for detailed information about the methods used to calculate figures in Table 3.

[12] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2006, Table C-7.

To secure enough jurors to hear cases, state courts mail an estimated 31.8 million jury summonses annually to approximately 15 percent of the adult American population. This figure obviously depends on the number of jury trials conducted in each state, but also on local juror utilization practices. For example, some courts are better than others at synchronizing the number of jurors needed with the number of jury trials to be held. In addition, this figure is affected by the number of jurors to be selected for each trial, which can range from as few as six to as many as twelve jurors, plus alternates.[13] Another factor is the number of peremptory challenges available to each party during jury selection, which helps determine the size of the panel to be sent to the courtroom for jury selection. The number of peremptory challenges in non-capital felony trials ranges from three per side in Hawaii and New Hampshire to twenty per side in New Jersey.[14] Capital felony trials tend to allocate more peremptory challenges to the parties, while misdemeanor and civil trials tend to allocate fewer.[15]

A large proportion of jurors summoned for jury service ultimately will not be needed. Many of those living in jurisdictions employing telephone call-in systems or other forms of communication technology (see Section V) will be told not to report for service due to last-minute settlements and plea agreements. Others will be disqualified or exempted from service, excused for hardship, removed from consideration for a particular trial due to preexisting knowledge about the case or the parties that might affect their impartiality, or removed by peremptory challenge. Despite the large quantity of summonses, only 1.5 million Americans are impaneled for service each year, less than 1 percent of the adult American population.

Although the probability of being impaneled in any given year is quite small, more than one-third of all Americans (37.6%) are now likely to be impaneled as trial jurors sometime during their lifetime. This represents is a tremendous increase in the distribution of the burden of jury service over the past three decades. In 1977, a national public opinion survey found that just 6% of adult Americans had served as trial jurors. By 1999, this figure had increased to 24%,[16] and in 2004, the American Bar Association reported that 29% of the adult American population had served as trial jurors.[17] In spite of declining numbers of jury trials,[18] a larger and larger proportion of American citizens have first-hand experience with jury service, due to more inclusive master jury lists, shorter terms or service, and other policies designed to make jury service more convenient and accessible for all citizens.

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[13] ROTTMAN &. STRICKLAND, *supra* note 7, at Table 42 (2006).

[14] *Id.* at Table 41.

[15] *Id.*

[16] NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 15 (1999).

[17] Harris Interactive, *Jury Service: Is Fulfilling Your Civic Duty a Trial?* (ABA July 2004).

[18] Galanter, *supra* note 1.

III. STATEWIDE JURY IMPROVEMENT EFFORTS

Jury trials are often perceived as local affairs, but they take place in an institutional framework established within each state. Indeed, the entire court system itself reflects statewide institutional characteristics such as the degree of local court autonomy dictated through formal statutes, rulemaking procedures, and funding mechanisms. These institutional structures and norms, in turn, affect how each state chooses to undertake comprehensive improvement efforts and the relative effectiveness of those implementation efforts. In this respect, jury improvement efforts are no exception. In this section, we examine the different approaches that states have taken to undertake jury improvement efforts, the focus and implementation strategies of those efforts, and the extent of state versus local control over jury operations.

As a preliminary matter, it is instructive to note that 20 states reported the existence of an established office or formal organization responsible for managing or overseeing jury operations for the state. In some instances, these programs have been established within the administrative office of the courts to provide automation and other forms of technical support to local courts (e.g., master jury list compilation). In other states, these offices function in an oversight capacity through permanent committees of state judicial councils. A few states delegate some of the educational and outreach functions to external organizations, such as Jury Education and Management (JEM) Forum in California; the Ohio Jury Management Association (OJMA); the New York Fund for Modern Courts, which operates the state's Citizen Jury Project; and the Pennsylvania Association for Court Management, which has a standing committee on jury management. The relatively high number of states with permanent jury offices or organizations demonstrates a high degree of state court recognition for the visibility and prominence of jury operations in court management.

With respect to more recent jury improvement efforts, the preferred approach in most states has been a statewide commission or task force to examine issues related to jury operations and trial procedures. Three-quarters of the states (38) have appointed such an entity in the past 10 years, of which nearly one-third were still active when the State-of-the-States Survey was administered. The vast majority of these commissions were established by the chief justice or under the authority of the court of last resort and consisted of 15 to 20 individuals representing a variety of constituencies. See Table 4.

Table 4: Statewide Task Force / Commission Composition

Representation by …	% of Task Forces / Commissions
Trial judges	97.3
Civil litigation lawyers	86.5
Criminal defense lawyers	78.4
Prosecutors	75.7
Court administrators	70.3
Jury managers	64.9
Clerks of court	64.9
Private citizens / Former jurors	62.2
Appellate judges	59.5
Other individuals	45.9
State legislators	43.2

Trial judges were included as members in virtually all states, and the vast majority of task forces included representation from major constituencies within the organized bar (e.g., criminal prosecutor and defense, plaintiff and civil defense) and administrative support for the jury system (e.g., court administrators, clerks of court, jury managers). A high percentage of the task forces (62%) included private citizens and former jurors. Of course, citizens and former jurors are

intimately affected by courts' jury trial policies. Because community values are represented on a jury, it is important to represent community opinions and values on a jury task force. State legislators and members representing "other" constituencies were the only groups included in less than half of the task forces.

Jury commissions and task forces generally undertook only two or three primary objectives. The most common focus involved making recommendations for legislative and rule changes related to jury operations and trial procedures. Education of judges and court staff were also reported as a frequent focus of activity. See Table 5. One-third of the states (17) reported that their commissions and task forces were engaged in program evaluations, pilot demonstrations, or survey research. Because these activities typically require substantial levels of staff expertise or other resources, these types of supplemental activities were more common in states with centralized offices or formal organizations beyond a jury task force.

Table 5: Focus of Current or Ongoing Jury Improvement or Reform Efforts

	% of States
Legislative or rule changes	65
Judicial education	41
Public education / outreach	31
Court staff education	29
Evaluations	18
Survey research	18
Pilot or demonstration programs	14
Technology	14
Other	14
Attorney education	12
Court observations	10
Juror Fees	6

State and Local Infrastructure for Jury Operations

The degree to which jury operations are directed by state law varies tremendously by jurisdiction. For example, just over half of the states (27)[19] give discretion to local courts to establish maximum terms of service. Of the 24 state-mandated jurisdictions, 10 set the maximum term of service at one day or one trial (Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Indiana, Massachusetts, and Oklahoma). Collectively, these states represent 28.6 percent of the U.S. population. See Table 6. The remaining thirteen states permit longer terms of service, some of which limit the maximum number of days that a person must serve in any given period of time. For example, Georgia law specifies that citizens cannot be required to serve more than two consecutive weeks in any given term of court or more than four weeks in any 12-month period.[20] Kentucky and North Dakota statutes have similar provisions, limiting jury service to 30 days and 10 days, respectively, within any 2-year period.[21] As we discuss in Section IV, the actual number of days that a citizen serves on jury service may be considerably less than term of service, which specifies the maximum amount of time that a person must serve.

[19] These states encompass nearly half (49.3%) of the total U.S. population.

[20] GA. CODE ANN. § 15-12-3 (2007).

[21] KY. REV. STAT. ANN. § 29A.130 (2007); N.D. CENT. CODE § 27-09.1-15 (2007).

Table 6: State-Established Maximimum Terms of Service		
Term of Service	**States**	**% US Population**
One Day or One Trial	AZ, CA, CO, CT, DC, FL, HI, IN, MA, OK	28.6
Two to five days (one week)	NY, SC	8.2
Six days to 1 month	GA, KY, ME, NH, ND, OH, RI	9.9
Greater than 1 month to 6 months	NM	.6
Longer than 6 months	MT, UT, VT, WV	2.0
		49.3

Juror Compensation

All fifty states and the District of Columbia provide compensation to jurors as reimbursement for out-of-pocket expenses as well as token monetary recognition of the value of their service. See Table 7. Traditionally, the juror fee was a flat per diem with a supplemental mileage reimbursement. Recently, states have begun to recognize the relationship between the amount of juror fees, the proportion of citizens who are excused for financial hardship, and minority representation in the jury pool.[22] As a result, a number of states have increased juror fees, but in doing so, have changed the structure of the payment system from a flat daily rate to a graduated rate in which jurors receive a reduced fee, or no fee, for the first day(s) of service with an increased fee if impaneled as a trial juror or required to report for additional days. Eight states[23] and the District of Columbia require employers to compensate employees for a limited period of time (e.g., 3 to 5 days) while they are serving. Other states specify a minimum daily fee but permit local jurisdictions to supplement it. See Table 8. Over half of the courts also pay mileage reimbursement with rates varying from $.02 to $.49 per mile; the median rate was $.325 per mile. Arizona has also implemented a Lengthy Trial Fund to compensate jurors for lost income up to $300 per day.[24]

[22] Paula Hannaford-Agor, *Jury News: The Laborer is Worthy of His Hire and Jurors Are Worthy of Their Jury Fees,* 21 CT. MGR. 38 (2006).

[23] The states are Alabama (ALA. CODE § 12-6-8(c); Colorado (COLO. REV. STAT. § 13-71-126); Connecticut (CONN. GEN. STAT. § 51-247(a); Georgia (Attorney General Unofficial Opinion # U 89-55, Attorney General Official Opinion 95-13); Massachusetts (MASS. GEN. LAWS ch. 234A § 48; Nebraska (NEB. REV. STAT. § 25-1640); New York (N.Y. JUD. LAW Art. 16 § 521); and Tennessee (TENN. CODE ANN. § 22-4-108(B)(1)).

[24] G. Thomas Munsterman & Cary Silverman, *Jury Reforms in Arizona: The First Year,* 45 JUDGES' J. 18 (Winter 2006).

Table 7: State-Mandated Juror Compensation Structure

State	Initial Rate or Flat Daily Rate	Graduated Rate	Trigger for Graduated Rate
Alabama	$ 10.00	n/a	
Alaska	$ 5.00	$ 25.00	Beginning 2nd Day
Arizona *	$ .00	$ 12.00	Beginning 2nd Day
Arkansas	$ 15.00	$ 35.00	Sworn Juror
California	$ .00	$ 15.00	Beginning 2nd Day
Colorado	$ .00	$ 50.00	Beginning 4th Day
Connecticut	$ .00	$ 50.00	Beginning 6th Day
District of Columbia	$ 30.00	n/a	
Delaware	$ 20.00	n/a	
Florida	$ .00	$ 30.00	Beginning 4th Day
Hawaii	$ 30.00	n/a	
Idaho	$ 10.00	n/a	
Iowa	$ 10.00	n/a	
Kentucky	$ 12.50	n/a	
Louisiana	$ 25.00	n/a	
Maine	$ 10.00	n/a	
Massachusetts	$ .00	$ 50.00	Beginning 4th Day
Michigan	$ 25.00	$ 40.00	Beginning 2nd Day
Minnesota	$ 20.00	n/a	
Montana	$ 12.00	$ 25.00	Sworn Juror
Nebraska	$ 35.00	n/a	
Nevada	$ .00	$ 40.00	Sworn Juror
New Hampshire	$ 20.00	n/a	
New Jersey	$ 5.00	$ 40.00	Beginning 4th Day
New Mexico	$ 41.20	n/a	
New York	$ 40.00	n/a	
North Carolina	$ 12.00	$ 30.00	Beginning 6th Day
North Dakota	$ 25.00	$ 50.00	Beginning 2nd Day
Oklahoma	$ 20.00	n/a	
Oregon	$ 10.00	$ 25.00	Beginning 3rd Day
Pennsylvania	$ 9.00	$ 25.00	Beginning 4th Day
Rhode Island	$ 15.00	n/a	
South Dakota	$ 10.00	$ 50.00	Sworn Juror
Tennessee	$ 11.00	n/a	
Texas	$ 6.00	$ 40.00	Beginning 2nd Day
Utah	$ 18.50	$ 49.00	Beginning 2nd Day
Vermont	$ 30.00	n/a	
Virginia	$ 30.00	n/a	
West Virginia	$ 40.00	n/a	

* Arizona also employs a Lengthy Trial Fund to compensate jurors up to $300 per day for lost income while on jury service. The LTF is available to jurors retroactively to the 4th day of service beginning on the 6th day of trial.

Table 8: Locally Supplemented Juror Fees							
State	State Mandated Minimum Rate	Flat Daily Rate Structure		Graduated Rate Structure			
		# Courts Reporting	Average Flat Rate	# Courts Reporting	Average Initial Rate	Average Graduated Rate	Trigger for Graduated Rate
Georgia	$ 5.00	56	$ 24.27	4	$ 16.25	$ 23.75	Beginning 2nd Day
Illinois	$ 4.00	76	$ 13.15	7	$ 9.29	$ 16.50	Beginning 2nd Day
Indiana	$ 15.00	33	$ 39.09	44	$ 16.07	$ 40.68	Sworn Juror
Kansas	$ 10.00	9	$ 10.00	1	$ 10.00	$ 20.00	Beginning 2nd Day
Maryland	$ 15.00	22	$ 17.50	n/a			
Mississippi	$ 25.00	30	$ 28.50	3	$ 25.00	$ 33.33	Sworn Juror
Missouri	$ 6.00	32	$ 15.91	32	$ 10.27	$ 20.41	Sworn Juror
Ohio	$ 10.00	1	$ 20.00	3	$ 11.67	$ 20.00	Sworn Juror
South Carolina	$ 10.00	19	$ 16.16	n/a			
Washington	$ 10.00	22	$ 11.59	1	$ 10.00	$ 25.00	Sworn Juror
Wisconsin	$ 16.00			n/a			
Wyoming	$ 10.00	2	$ 30.00	4	$ 30.00	$ 50.00	Beginning 5th Day

Jury Source Lists

Another area of jury operations in which states can either retain control or delegate authority to local courts is the choice of source list(s) that can be used to compile the master jury list. The total number of unique names derived from all source lists used to compile the master jury list defines the total population from which prospective jurors may be qualified and summonsed. Thus, the choice of source lists is an important policy decision for state courts insofar that it establishes the inclusiveness and the initial demographic characteristics of the potential jury pool.[25] Thirty states mandate that courts within the jurisdiction use only the designated source lists, while 15 states and the District of Columbia permit local courts to supplement the required lists with additional lists. The remaining five states do not mandate the use of any specific source list, but enumerate the permissible lists that can be employed for this purpose.

For those states that mandate which source lists to use, the ones that occur most frequently are the voter registration list (38 states) and the licensed driver list (35 states). See Table 9. Nineteen states mandate the use of a combined voter/driver list. Eleven mandate the use of three or more lists – typically, registered voters, licensed drivers, and state income or property tax lists, although other combinations are also common. Seven states restrict the number of source lists to a single list: Mississippi and Montana mandate the use of the registered voters list only; Florida, Michigan, Nevada, and Oklahoma mandate the use of the licensed drivers list only; and Massachusetts employs a unique statewide census for its master jury list.

[25] A substantial body of federal and state constitutional and statutory law requires that the pool from which prospective jurors are summonsed reflect "a fair cross section of the community," specifically, its racial, ethnic, and gender demographic characteristics. *See Duren v. Missouri,* 439 U.S. 357 (1979). Because a broadly inclusive list of the jury-eligible population is more likely to mirror the demographic characteristics of the community, the National Center for State Courts recommends that the master jury list include at least 85 percent of the total community population. G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT 4-5 (1996).

Table 9: Mandatory and Permissible Source Lists			
	Number of States		
Source Lists	Mandatory	Permissible	Total
Licensed Drivers	35	12	47
Registered Voters	38	7	45
State/Local Tax	8	13	21
Other	2	12	14
Unemployment Compensation	3	10	13
Public Assistance		9	9

Looking beyond the mandated lists, we find that 21 states permit courts to supplement the mandated lists with additional source lists including state and local income or property tax rolls, unemployment compensation recipient lists, public welfare recipient lists, and "other" lists. In most instances, "other" referred to state identification card holders, which is often maintained by the same agency that maintains the list of licensed drivers. But at least two states maintain unique lists to be used for the master jury list. In Massachusetts, each locality conducts an annual census – a statutory requirement dating back to the colonial period. Today, the primary purpose of the census is the master jury list. Alaska uses a list of residents who applied for payment from the Alaska Permanent Fund Corporation, which pays income to Alaskan residents from a statewide investment fund that originated from the profits from the Alaskan oil pipeline.[26]

In addition to the issue of whether to mandate or permit certain types of lists, 29 states provide direct assistance to local courts by compiling the master jury list at the state level and making it available to local courts. Where this option exists, the vast majority of local courts (78.3%) use the state-provided list rather than compile their own. Moreover, in states permitting local courts to supplement the required source lists, local courts employ just over half (57.9%) of the lists available to them. These two findings combined suggest that most local courts are either satisfied with the inclusiveness and diversity of their jury pools and do not see the need to supplement the source lists with additional lists, or they may lack the technological capability or staffing to manage multiple source lists, or both.

Statutory Exemptions

Traditionally, many states exempted whole classes of citizens from jury service on the grounds that their professional or civic obligations in the community were so essential that they should be spared from jury service (e.g., political officeholders, law enforcement, healthcare providers). In most jurisdictions, terms of service were considerably longer than today, so jury service by these individuals was considered a hardship on the community that would be deprived of the services of those individuals. The trend in recent years has been to eliminate occupational and status exemptions altogether under the theory that no one is too important or too indispensable to be summarily exempted from jury service, particularly in jurisdictions with relative short terms of service. Instead, local courts have the discretion to accommodate or excuse jurors on an individual basis. For example, New York eliminated all of its occupational exemptions in 1994, adding more than one million jury-eligible citizens to the master jury list as a result. Within the first several years, New York Governor George Pataki, New York City Mayor Rudy Guiliani, and New York Court of Appeals Chief Judge Judith Kaye were all summonsed, and reported for service, as jurors in New York State courts.

[26] See http://www.apfc.org/homeobjects/tabPermFund.cfm for more information.

In the Statewide Survey, the NCSC identified 10 distinct categories of exemptions. See Table 10. The most common category (47 states) was "previous jury service," a classification exempting citizens who have recently performed jury service, typically within the past 12 to 24 months. Another popular category (27 states) of exemption was age, typically extended to older citizens.[27] Most of the categories designated various occupational or status roles for which citizens could claim an exemption from jury service (e.g., political officeholders, judicial officers, sole caregivers of young children including nursing mothers, or sole caregivers of incompetent adults). The "Other Exemptions" category included a variety of occupations including clergy or other religious designations, journalists, mariners, public accountants, and teachers. Alaska provides an exemption to teachers from schools that fail to meet adequate progress standards under the No Child Left Behind Act.[28]

Table 10: Statutory Exemption Categories

	# States
Previous Jury Service	47
Age	27
Political Officeholder	16
Law Enforcement	12
Other Exemptions	12
Judicial Officers	9
Healthcare Professionals	7
Sole Caregiver	7
Licensed Attorneys	6
Active Military	5

Table 11: Number of Exemption Categories by State

0	LA
1	AL, AR, CO, DC, ID, IA, MT, NM, NY, UT, VT, WA, WI
2	CA, IL, IN, KS, KY, MD, NV, NH, ND, PA, SD
3	AZ, DE, MI, NC, OR, SC, WY
4	AK, MA, MN, MO, NJ, OH, TX, WV
5	CT, GA, ME, MS, NE
6	HI, RI
7	OK, TN, VA
8	
9	FL

Nevertheless, states vary considerably in the number of exemptions authorized by statute. The median number of exemption categories was 3 per state. Louisiana is the only state that has no exemptions whatsoever. Twelve states and the District of Columbia provide exemptions only for previous jury service. Florida provides exemptions in the nine out of the ten categories, the most of any state. See Table 11.

One-Step versus Two-Step Jury Qualification and Summoning

A final area of state versus local control over jury operations involves the process through which local courts qualify and summon citizens for jury service. Eighteen states and the District of Columbia specify that local courts employ a one-step process in which jurors are summoned and qualified simultaneously, while five states mandate that local courts employ a two-step process

[27] The most common age to qualify for an exemption was 70 (16 states). The exemption in the remaining states ranged from 65 (4 states) to 75 (3 states).

[28] ALASKA STAT. § 09.20.030(b).

in which citizens are first surveyed to determine their eligibility for jury service, and then only qualified jurors are summoned for service. The remaining 25 states leave this decision to the discretion of the local courts.

We see from these various examples that states vary a great deal in terms of how closely jury operations are dictated at the state level or left to the discretion of local courts. Table 12 ranks all of the states and the District of Columbia according to their respective restrictiveness or permissiveness vis-à-vis local jury operations. The rankings are based on a composite index reflecting whether all source lists are required, whether the state permits localities to supplement the jury fee, whether the term of service is mandated at the state level, whether the state authorizes more than the median number of exemptions, and whether the state mandates the summoning/qualification process. The index ranges from 0 (most permissive) to 5 (most restrictive).

Table 12: State Control Over Jury Operations	
Most Restrictive	CT, FL, ME, MA, RI
Mostly Restrictive	CO, HI, KY, MN, MT, NE, NH, NJ, NM, OK, TX, UT, WV
Somewhat Restrictive	AZ, DC, DE, IA, MS, NV, ND, SD, VT
Somewhat Permissive	AL, AK, CA, GA, ID, LA, MI, NY, OH, SC, TN, VA
Mostly Permissive	AR, IL, IN, MO, NC, OR, PA, WA
Most Permissive	KS, MD, WI, WY

Interestingly, the degree of state restrictiveness over jury operations has no significant relationship to number of jury improvement efforts underway in those states.[29] Nor does it appear to be related to the volume of jury trials or the trial rate for each state.[30] This suggests that jury reform has not followed either an exclusively top-down or exclusively grassroots approach, or even one dictated by exigencies associated with the volume or frequency of jury trials. Rather, the various approaches derive from unique institutional and political cultures in each jurisdiction. Given that reality, we now take a closer look at variations in local court operations.

[29] *Pearson* = .016, *ns.* The only restrictiveness factor that had a significant relationship to the number of jury improvement efforts was whether the term of service is determined at the state or local level. When the term of service is determined at the state level, the number of jury improvement efforts was 3.33 compared to 2.00 when the term of service is determined at the local level. F (1, 49) = 4.404, p = .041.

[30] *Pearson* (Number of jury trials) = .219, *ns*; *Pearson* (Trial rate) = -.064, *ns.*

IV. LOCAL COURT SURVEY

As discussed in the previous section, some jury operations may be dictated at the state level while others are left to the discretion of the local courts. While state statutes and court rules can define the institutional structure in which jury operations take place, they do not always provide an accurate picture of how local jury systems actually operate. Nor does the existence of statewide jury improvement efforts, or lack thereof, necessarily indicate the extent of locally initiated improvement efforts. The Local Courts Survey was designed to provide a more complete picture of jury operations nationally by highlighting local jury operations and improvement priorities in greater detail and examining the impact of state infrastructures and statewide initiatives on local operations and initiatives.

Nationally, we find that approximately half (51.8%) of courts report some type of jury improvement activities in the past five years. Over one-third (34.4%) reported some type of formal jury office or jury management committee responsible for oversight of local jury operations. Not surprisingly, these efforts tend to be concentrated in urban and large suburban courts with higher volumes of jury trials. Yet even in rural jurisdictions (e.g., population less than 25,000), more than one in three courts (36.7%) reported some type of jury improvement activity.

The single most popular focus of local jury improvements was upgrading jury automation, but other, more substantive efforts captured the attention of a substantial portion of courts. See Table 13. The majority of courts (75.2%) that reported any improvement efforts actually focused on multiple areas. The median number was three, but nearly 10% reported 7 or more different efforts underway. Courts also tended to undertake certain improvement efforts in conjunction with others. For example, courts that reported recent efforts to improve jury yield were also often engaged in specific efforts to decrease non-response rates. Other courts focused on in-court techniques to improve juror comprehension and jury instructions simultaneously.

Table 13: Local Court Jury Improvement Efforts

Focus on …	% of Courts
Upgrade Technology	58.8
Decrease Non-Response Rate	53.7
Improve Jury Yield	44.5
Improve Facilities	43.1
Improve Juror Utilization	42.2
Improve Public Outreach	35.8
Improve Jury Representation	32.8
Improve Jury Instructions	29.2
Improve Juror Comprehension	23.0
Other Improvement Effort	10.9

The existence and magnitude of local jury improvement efforts correlated, not surprisingly, with population size and jury trial volume.[31] Courts with more jury trials and those in urban communities were more likely than rural courts to initiate improvement efforts. Statewide leadership in the form of a centralized jury management office or statewide task force/commission clearly played a substantial role in motivating local court activity. For example, local courts were significantly more likely to undertake local improvement efforts in

[31] Population *Rho* = .383, Jury Trial Volume *Rho* = .210, both *p*s < .001.

states with a statewide jury task force or commission (56% of local courts) compared to those in which no statewide effort was underway (34% of local courts).[32]

This "trickle-down" effect of statewide leadership appeared to spur the existence of local court improvement efforts in some interesting ways. Certainly it affected the number of areas in which local courts try to improve jury operations. In states with a jury task force, the average number of efforts that local courts undertook was 3.2 compared to 1.6 in states with no statewide task force.[33] In particular, statewide activities focused on court staff education and on changes to legislation or court rules appeared to have an impact on how many jury improvement efforts were undertaken at the local level,[34] increasing the number of local court efforts on average by 50 to 70 percent. Whether increased activity on the local level results more from the educational efforts of the statewide task forces or in reaction to changes in state law is not known, and may not be possible to differentiate given the typical approach by many states of delivering local education about proposed or enacted changes to state law. As a practical matter, both motivations may play a part.

Jury Automation in Local Courts

As noted above at Table 13, upgrades to jury technology was the single most frequently reported focus of local jury improvement efforts, undertaken by 59 percent of courts reporting any improvement efforts. Although the Statewide Surveys didn't specifically inquire about this aspect of jury operations, several states indicated concerted efforts to improve jury system technology. In other states, it was clear from the Local Court Surveys that various automation improvements had been initiated on a statewide basis. For example, in the District of Columbia, Massachusetts, New York, and North Carolina, all or nearly all of the local courts reported ongoing upgrades to jury system technology. Other examples that suggested a coordinated statewide effort included Arizona, in which three-quarters of the local courts reported the use of video during juror orientation; Iowa, in which more than half (54%) of local courts reported that citizens can check their reporting status on-line; California, which reported a statewide effort to equip jury assembly rooms with Internet access; South Dakota, which reported a legislative mandate to improve jury management technology; Missouri, which is implementing a statewide jury management system (30% of local courts reported that this had been completed in their jurisdiction); and Alaska, which is in the process of implementing an online jury software program. The apparent discrepancy between some of the Statewide Survey descriptions of improvements in jury automation and reports by local courts about technology improvements in their jurisdictions may be due to an implementation lag in the local courts or possibly that some local courts did not report these improvements because they were initiated at the state level rather than at the local level.

Approximately two-thirds of courts use some form of commercial software for their jury management systems. This market tends to be dominated by two national vendors – Jury

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[32] F (1, 1,342) = 39.00, $p < .001$. The existence of a statewide jury office had a similar, albeit diminished, effect (57% versus 44%). F (1, 1,172) = 21.599, $p < .001$.

[33] F (1, 1,394) = 44.310, p , .001.

[34] Court Staff Education F (1 ,46) = 4,323, p = .043; Change Legislation/Court Rules F (1, 46) = 6.873, p = .012.

Systems, Inc. (based in Encino, California) and ACS Government Systems (based in Lexington, Kentucky). Combined, these two firms held 42 percent of the commercial jury management contracts in the State-of-the-States Survey courts. These national vendors also tended to dominate in more populous jurisdictions compared to other commercial vendors.[35] For example, the national vendors held 83% of the commercial contracts for courts in counties greater than 500,000 population and 59% of the commercial contracts for courts in counties with a population between 100,000 and 500,000, but only 35% of commercial contracts in courts with populations less than 100,000.

The remaining commercial vendors appear to concentrate their market on a statewide or regional basis. Just over one-third of local courts (34.8%) reported that they maintain in-house jury management systems. Courts in rural and smaller suburban jurisdictions were more likely to use commercial jury management software than those in more populous areas that, presumably, can afford to develop and support an in-house system. Not surprisingly, the use of more sophisticated forms of automation was more prevalent in courts located in urban areas compared to those in suburban and rural areas. See Table 14.

Table 14: Percent of Courts Using Various Types of Technology

	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
N =	84	233	404	526	1,247
Commercial Jury Software	56.5	59.2	62.4	76.1	65.2
Juror Qualification					
Online	47.6	19.7	9.9	1.9	11.0
IVR Technology	33.3	12.0	8.4	.8	7.5
Reporting Technology					
Telephone Call-In System	86.9	82.4	70.9	42.7	62.2
Online	40.5	22.3	12.1	1.9	11.5
Automated Call-Out System	2.4	2.3	3.5	3.5	3.2
Orientation					
Basic Information Online	61.9	36.6	17.8	61.0	19.1
Orientation Video Online	22.6	10.1	8.0	1.6	6.6
Orientation Video on Cable Television	3.6	1.2	.9	.7	1.0

The most popular form of technology, by a large margin, continues to be the telephone. Nearly two-thirds of courts employ a telephone call-in system to inform citizens about whether they should report for jury service. One-third of urban courts have implemented Interactive Voice Recognition (IVR) technology to permit citizens to respond to qualification questionnaires using their telephones. Some commercial vendors have developed an interface between the court's jury management system and the telephone system to enable courts to send an automated voice message to citizens the day before they are scheduled to report reminding them of their

[35] Chi-Square = 58.782, $p < .001$.

obligation or informing them that their service will not be needed that day,[36] but this feature does not appear to have caught on in most courts yet. Indeed, it appears that rural and smaller suburban courts are actually more likely to telephone jurors manually to inform them about reporting status than larger suburban and urban courts are to use an automated call-out system.

Although web-based technology is ubiquitous in most areas of contemporary life, local courts do not appear to have embraced it for jury management purposes. Less than 20% provide basic juror orientation information online and barely more than half that percentage use the Internet for juror qualification or informing jurors about their reporting status. This technology was somewhat more prevalent for various applications in urban courts, but with the exception of posting orientation information online, fewer than half of the courts serving populations greater than 500,000 used Internet technology. Interestingly, courts that rely on commercial jury management software were actually *less* likely to employ all of the more sophisticated types of automation, even after controlling for population size.[37]

Several factors may be influencing courts' decisions to use or not use these technologies. For example, courts employing either JSI or ACS commercial software were significantly more likely to use Internet or IVR technology for qualification, reporting, and orientation purposes than courts using state or regionally based commercial vendors.[38] This suggests that state and regionally based vendors may not have incorporated the capacity for their jury management systems to interface with the courts' telephone and Internet systems yet. Existing technology options may also be prohibitively costly for less populous courts, or possibly, those courts may be unwilling to employ technologies that they believe are not readily available to the majority of citizens in their communities due to the digital divide.

Jury Yield in Local Courts

The term "jury yield" refers to the number of citizens who are found to be *qualified* and *available* for jury service expressed as a percentage of the total number of qualification questionnaires or summonses mailed. It is a critical concept in jury system management insofar as it provides a standard measure of efficiency for jury operations. In essence, it measures the upfront administrative effort and cost that the court undertakes in securing an adequate pool of prospective jurors for jury selection. Courts employing a two-step qualification and summoning

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[36] G. THOMAS MUNSTERMAN & PAULA L. HANNAFORD-AGOR, THE PROMISE AND CHALLENGES OF JURY SYSTEM TECHNOLOGY 44-45 (NCSC 2003).

[37] This finding derives from a series of logistic regression models in which a dummy variable (Commercial Vendor) was included as an independent variable to examine the probability that various types of IVR or Internet technology were employed in the court's jury system controlling for population size. IVR Qualification Cox & Snell R Square = .098, Commercial Vendor *Wald* = 32.045, B = -1.413, $p < .001$; Online Qualification Cox & Snell R Square = .112, Commercial Vendor *Wald* = 27.855, B = -1.088, $p < .001$; Online Orientation Information Cox & Snell R Square = .134, Commercial Vendor *Wald* = 45.997, B = -1.100, $p < .001$; Online Video Orientation Cox & Snell R Square = .088, Commercial Vendor *Wald* = 61.692, B = -2.277, $p < .001$;Reporting Information Online Cox & Snell R Square = .086, Commercial Vendor *Wald* = 34.289, B = -1.125, $p < .001$; and Telephone Call-In System Cox & Snell R Square = .064, Commercial Vendor *Wald* = 8.162, B = -.415, p = .004.

[38] Qualification by IVR F (1,638) = 5.532, p = .019; Qualification Online F (1, 638) =36.878, $p < .001$; Reporting Online F (1, 638) = 12.713, p <.001; Orientation Online F (1, 638) = 23.326, p < .0o01.

process often differentiate between the qualification yield (the proportion of citizens that is qualified for jury service) and the summoning yield (the proportion of jury-eligible citizens that is available for jury service on the date summonsed). In one-step courts, qualification and summoning are combined and therefore the yield is expressed as a unitary measure.[39]

A number of factors affect jury yield. Some factors are related to the court's jury operations and procedures (e.g., qualification criteria, exemptions, term of service, follow-up procedures for non-response, and juror compensation) and others are related to local community conditions such as mobility rates, U.S. citizenship rates, and socio-economic conditions. Typically, urban and larger suburban courts experience lower jury yields than smaller suburban and rural courts. See Table 15.

Table 15: Jury Yields by Population Size

	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
One-Step Courts (n)	38.2% (60)	41.1% (134)	45.2% (207)	50.4% (265)	45.8% (666)
Two-Step Courts (n)	43.2% (18)	54.1% (76)	59.5% (170)	62.7% (210)	59.5% (474)

An important question for local courts is what happened to those people who were mailed summonses, but were not qualified or available for jury service. Some people move, but fail to leave a forwarding address, so the jury summons is returned "undeliverable." Others are disqualified due to lack of citizenship, residency, under the age of 18, previous criminal background, or English fluency or literacy. Some claim a statutory exemption from jury service and others will be excused for medical reasons, financial hardship or some other inability to serve. Some simply do not respond to the qualification questionnaire or fail to appear for jury service. See Table 16. The average rate for these categories ranges from 7 percent to 15 percent in one-step courts, and 5 percent to 9 percent in two-step courts, again with considerable variation based on population size.

[39] The Local Court Survey only inquired about jury yield with respect to summoning; therefore, most of the discussion in this section refers either to reported yields for one-step courts only, or provides separate statistics for one-step and two-step courts. For instructions on how to calculate jury yield in one-step versus two-step courts, see COURTOOLS MEASURE 8: EFFECTIVE USE OF JURORS at http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure8.pdf.

Table 16: Average Undeliverable, Disqualification, Exemption, Excusal and Non-Response Rates, by Population Size					
	Population Size				
	500,000 or More	100,000 to 500,000	25,000 to 100,000	Less than 25,000	All Courts
One-Step Courts					
Undeliverable	15.1	14.4	16.0	13.5	14.6
Disqualified	12.4	10.1	7.5	7.4	8.4
Exempted	4.0	6.7	8.4	7.6	7.3
Excused	9.4	9.5	9.1	9.1	9.2
Non-Response/FTA	15.0	10.9	8.6	6.7	8.9
Two-Step Courts					
Undeliverable	6.6	10.2	8.2	10.0	9.2
Disqualified	6.5	9.6	7.8	6.6	7.5
Exempted	2.9	3.4	4.7	6.3	5.1
Excused	4.4	6.4	5.2	6.5	5.9
Non-Response/FTA	13.1	6.2	5.9	5.4	6.0

More to the point, how can courts increase the jury yield by minimizing the number of people who fall into the *not qualified* and *unavailable* categories? As a practical matter, courts have few options other than acceptance when the people who are summonsed for jury service are disqualified (e.g., non-citizen, non-resident, under age 18, previous felony conviction, not fluent in English) as these criteria are minimum qualifications for jury service established by state legislatures. However, courts have developed a number of approaches to minimize other factors that affect jury yields. With respect to undeliverable summonses, for example, many courts have borrowed techniques from commercial mail-order companies such as contracting with National-Change-of Address (NCOA) vendors to provide updated addresses for people who have moved since the master jury list was compiled. Courts using multiple source lists to compile the master jury list should use the most frequently maintained list, or the most recently updated address, when deciding which of two or more duplicate records to retain.[40] Analyses of the impact of the number and types of source lists on undeliverable rates were difficult to interpret, however. The use of state tax, unemployment compensation, and public welfare lists resulted in significantly reduced undeliverable rates in two-step courts.[41] But unemployment and public welfare lists had no effect on undeliverable rates in one-step courts, and state tax lists correlated with significantly higher undeliverable rates in one-step courts.[42] Additional research is needed to investigate these divergent findings and, if possible, to identify ways of maximizing the benefits of supplemental source lists.

Exemptions are established by state statute. As we discussed in the previous section, the number of exemption categories ranges from zero in Louisiana to nine in Florida. The number of exemption categories had a significant affect on exemption rates in one-step courts within those

[40] G. THOMAS MUNSTERMAN & PAULA L. HANNAFORD-AGOR, THE PROMISE AND CHALLENGES OF JURY SYSTEM TECHNOLOGY 20-21 (NCSC 2003).

[41] State Tax List F (1, 432) = 25.384, Unemployment List F (1, 432) = 38, 867, Public Welfare List F (1, 432) = 37.158, all ps < .001.

[42] State Tax List F (1, 633) = 17.611, p < 001.

states[43] – from an average of 4.7 percent in states with only one exemption to 14.3 percent in states with seven exemption categories. Florida, which had the highest number of exemption categories (9), had the second highest exemption rate (12.2%).

Similarly, term of service and juror compensation rates affect excusal rates. In Table 6, we saw that 28.6 percent of the U.S. population lives in states that mandate a one day or one trial term of service. Table 17 presents the actual breakdown for term of service for all of the courts represented in the Local Court Survey dataset. We find that more than one-third of local courts, and nearly two-thirds of the U.S. population,[44] live in jurisdictions that have a one day or one trial term of service. It is clear from the difference between these percentages that courts in more populous jurisdictions are more likely to adopt one day or one trial terms of service than those in less populous jurisdictions.

Table 17: Term of Service in Local Courts

Term of Service	# of Courts	% of Courts	Average # Jury Trials Annually	Estimated % of US Population
One Day or One Trial	490	35.1	129	63.4
Two to five days (one week)	213	15.3	85	17.8
Six days to 1 month	327	23.4	46	11.7
Greater than 1 month to 6 months	283	20.3	21	5.9
Longer than 6 months	82	5.9	15	0.2

As we discussed in Section III, the term of service defines the *maximum* amount of time that a person may be required to serve on jury duty. Although some courts establish the maximum term of service at six months or longer, it is clear from the average volume of jury trials conducted in these courts that very few citizens, if any, would ever actually report to their local courthouse for that period of time. Indeed, half of the courts in this category had four or fewer trials annually – less than one every three months. or many of these courts, the functional term of service is likely to be one day or one trial – or could be with little or no administrative effort on the part of the court – even if it is not stated as such.

Returning to the relationship between term of service and excusal rates, courts with a one day or one trial term of service had significantly lower excusal rates than those with longer terms of service (6.0 percent versus 8.9 percent, respectively).[45] See Table 18. Moreover, courts with juror fees exceeding the national average ($21.95 flat fee or $32.34 graduated rate) also had significantly lower excusal rates – 6.8 percent compared to 8.9 percent for courts whose juror fees were lower than the national average.[46] Courts with both a one day or one trial term of

[43] We did not calculate the exemption rate in two-step courts because presumably anyone claiming the exemption had already done so at the qualification step.

[44] Estimates for the proportion of US population were calculated using the methods described in Appendix E.

[45] $F=23.966$ (1, 1,100), $p < .001$.

[46] $F=16.445$ (1, 1,195), $p < .001$.

service and higher than average juror fees had excusal rates of 4.0 percent compared to 9.3 percent for those with longer terms of service and lower than average juror fees.

Table 18: Average Excusal Rates, by Term of Service and Juror Compensation

	One Day / One Trial	Longer than One Day / One Trial	Total
Juror Fee Exceeds National Average	4.1%	8.3%	6.6%
Juror Fee is Less than National Average	8.1%	9.3%	8.9%
Total	6.0%	8.9%	8.0%

Courts across the country have been increasingly challenged by citizens who fail to return their qualification questionnaires or who fail to appear (FTA) for jury service. Twenty percent of one-step courts reported non-response/FTA rates of 15 percent or higher. Even more remarkable, 10 percent of two-step courts, which had already located and qualified the prospective juror, reported FTA rates of 16 percent or higher. To address these problems, 80 percent of courts in the State-of-the-States Survey reported some type of follow-up program to track down non-responders and FTAs. See Table 19. The most common approach in both one-step and two-step courts was simply to send a second qualification questionnaire or summons. Two-step courts conducted order-to-show-cause (OSC) hearings about twice as often as one-step courts. Less than 15 percent of courts imposed fines on non-responders, although most state statutes permit this penalty. About one-fourth of courts had other types of follow-up programs, which often involved issuing a bench warrant ordering the local sheriff's office to physically compel the juror's presence in court.

Table 19: Non-Response and FTA Programs

	% of Courts
One-Step Courts (N=793)	
No Program	21.8
Second Summons	52.0
OSC Hearings	27.5
Fines	13.7
Other	25.0
Multiple Programs	51.8
Two-Step Courts (N=531)	
No Program	14.5
Second Summons	51.9
OSC Hearings	49.4
Fines	13.4
Other	22.0
Multiple Programs	57.6

Several factors affected the number of follow-up programs a court might employ. Two-step courts had significantly more follow-up programs, on average, than one-step courts, presumably because they have to conduct follow-up on two different stages of jury operations. Motivation also played a part – courts focusing on decreasing non-response/FTA rates reported more follow-up programs. This was especially true in urban and larger suburban courts, which tended to have higher non-response/FTA rates than less populous jurisdictions.

Follow-up programs had various degrees of effectiveness. After controlling for population size and one-step or two-step jury operations, the Local Court Survey data showed that only those follow-up programs that involved a second summons or qualification, or that involved some other approach (e.g., bench warrant),

significantly reduced non-response/FTA rates.[47] OSC hearings and fines had no effect, possibly due to the infrequency with which they are typically imposed. Courts that had no follow-up program had significantly higher non-response/FTA rates.[48]

Juror Privacy

As in other areas of contemporary life, courts have begun to recognize the need to respect jurors' legitimate expectations of privacy. Unlike judges, clerks of court, and other public officials, jurors do not deliberately seek out this particular form of public service and do not, therefore, automatically surrender all expectations of privacy. In particular, they have a right to expect that personal information will be disclosed only to those individuals with a legitimate need for it and that the information will only be used for the purposes of jury administration and jury selection. To meet those expectations, courts have increasingly placed restrictions on the types of information that prospective jurors are required to disclose, to whom that information may be subsequently released, and at what point in the trial process (e.g., pre-trial, jury selection, post-trial) it can be released.[49]

Attorneys and their clients arguably have the greatest legitimate interest in access to juror information. The extent to which courts makes juror information available to attorneys before jury selection begins is a reasonable indication of the extent to which courts have enacted policies and procedures to protect juror privacy. Table 20 indicates the percentage of local courts that reported providing attorneys with access to juror information before jury selection begins. The vast majority of courts disclose the names of prospective jurors to attorneys before voir dire, but a substantial number of courts restrict access to additional information. For example, more than one-third of courts reported that they will not provided attorneys with a full street address, making it difficult, if not impossible in many jurisdictions, for attorneys to conduct background investigations on prospective jurors. More than one-quarter (26.7%) of courts reported that they provide no address information whatsoever on prospective jurors. Nearly half of all courts restrict access to qualification information.

In many states, access to juror information is restricted by state statute or court rule. Thus, we found that access to some of these categories of information was restricted in all of the Local Court respondents. For example, access to jurors' full street address was uniformly denied in courts in Arizona, Delaware, Hawaii, New Jersey, and the District of Columbia. New Jersey and the District of Columbia do provide access to jurors' zip codes, however. Similarly, Delaware, Massachusetts, North Carolina, and the District of Columbia restrict

Table 20: Attorney Access to Juror Information Before Jury Selection Begins

Type of Juror Information	% of Courts
Juror Name	88.3%
Full Street Address	63.5%
Zip Code Only	12.8%
Qualification Information	55.2%

[47] F (7, 1,121) = 18.750, $p < .001$.

[48] One-Step Non-Response/FTA Rate F (1, 648), $p < .001$; Two-Step Non-Response/FTA Rate F (1, 470), $p = .096$.

[49] *See generally* Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001).

access to juror qualification information.

In addition to basic information such as name and address, the majority of courts obtain preliminary voir dire information from prospective jurors, such as marital status (64%), occupation (72%), number and ages of minor children (52%), and other information not directly related to juror qualification criteria or contact information (28%). To gauge the extent to which local courts provide this type of information to attorneys, the NCSC Center for Jury Studies created a numerical index ranging from 0 to 4 to indicate the number of categories (marital status, occupation, number and ages of minor children, and other) of voir dire information that courts make available to attorneys before jury selection begins. Nationally, local courts provided information on an average of 2.21 categories of voir dire information (median 3 categories), but again there was a great deal of state-to-state variation. The median index for six states (Alaska, California, Colorado, North Carolina, Oklahoma, and Utah) was less than 1, indicating very little access to juror information before voir dire. The statewide median for Hawaii, Minnesota, Massachusetts, and New Hampshire was 4, indicating that local courts routinely provide this information to attorneys.

All of these preliminary operational matters obviously have substantial implications for the efficiency and cost-effectiveness of each court's jury system. More sophisticated technologies can reduce staff time and associated costs as well as provide better management information to court administrators to assess performance and focus on problem areas. Improved jury yields essentially translate as reduced administrative costs per juror summonsed for service. Restrictions on access to juror information do not necessary reduce costs or boost efficiency, although in some instances courts that have reviewed their approach to juror privacy have declined to collect juror information for which they do not perceive a legitimate need for jury administration or selection purposes. It should not be overlooked, however, that operational matters also provide citizens with their first impressions of jury service. It establishes what they can expect from courts in terms of convenience in communication with the jury office, demands on their time, reimbursement for out-of-pocket expenses, and the levels of respect for privacy. It is clear from examining the Local Court Surveys that state courts differ a great deal across all of these dimensions. As we discuss in the next section, citizens also experience a variety of practices in the courtroom during jury selection (voir dire) and during trial.

V. JUDGE & LAWYER SURVEY

The previous section focused on local court operations such as how prospective jurors are qualified and summonsed for jury service, how long they serve, and what type of improvements efforts courts have undertaken. In this section, we examine data from the Judge & Lawyer Survey, which focused primarily on in-court procedures and trial innovations. Just as local court operations can vary from court to court, even within states, in-court practices and procedures can vary from judge to judge, even within local courts. To some extent, in-court practices are affected by court rules and case law proscribing acceptable and unacceptable procedures, but the majority of states leave a great deal of discretion in the hands of the trial judge to determine how to manage the jury trial and what tools or assistance, if any, can be provided to jurors. How this discretion is exercised often depends greatly on local litigation culture. This component of the State-of-the-States Survey is the first known study to document on a national basis the extent to which judges employ various practices and procedures during voir dire, trial, and jury deliberations.

Voir Dire

Jury selection practices vary tremendously from state to state across a number of key characteristics. For example, all courts agree that the purpose of voir dire is to identify and remove prospective jurors who are unable to serve fairly and impartially. But not all states recognize the exercise of peremptory challenges as a legitimate purpose of voir dire. Although most judges frown on the practice, many lawyers also view the voir dire as the beginning of trial advocacy – that is, their first opportunity to gain favor with the trial jurors or even present evidence if they can.

Other key differences in voir dire among states are the number of peremptory challenges available to each side; the legal criteria for ruling on challenges for cause; and the basic mechanics of voir dire such as judge-conducted or lawyer-conducted questioning, the use of general or case-specific questionnaires, and panel versus individual questioning.

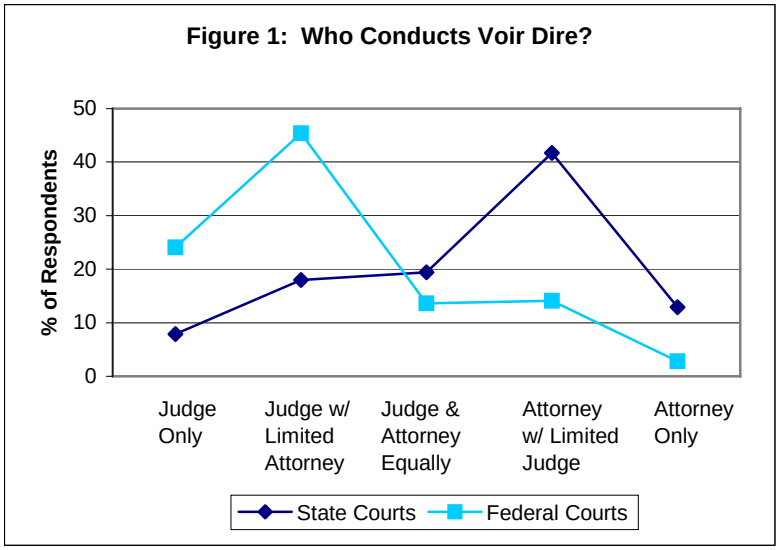

Figure 1 illustrates the continuum of voir dire questioning from an exclusively judge-conducted voir dire on the left to an exclusively attorney-conducted voir dire on the right. Although attorney-conducted voir dire is common in state courts and judge-conducted voir dire is the norm in federal courts, there is still substantial state-to-state variation. See Table 21. In addition, attorney

participation in voir dire was slightly, but significantly, higher[50] in civil trials than in criminal trials in 19 states, suggesting that judges in those jurisdictions are less restrictive in jury selection in civil trials. In two states – Massachusetts and New Jersey – the pattern was reversed, with judges exerting greater control in civil trials and giving lawyers slightly more participation in criminal trials.

Table 21: Who Conducts Voir Dire in State Courts?	
Predominantly or Exclusively Judge-Conducted Voir Dire	AZ, DC, DE, MA, MD, ME, NH, NJ, SC, UT
Judge and Attorney Conduct Voir Dire Equally	CA, CO, HI, ID, IL, KY, MI, MN, MS, NM, NV, NY, OH, OK, PA, VA, WI, WV
Predominantly or Exclusively Attorney-Conducted Voir Dire	AK, AL, AR, CT, FL, GA, IA, IN, KS, LA, MO, MT, NC, ND, NE, OR, RI, SD, TN, TX, VT, WA, WY

The balance between judge-conducted and attorney-conducted voir dire is important for several reasons. Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers.[51] Moreover, attorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges. On the other hand, many judges prefer to conduct most or all of the voir dire themselves. They argue that attorneys waste too much time and unduly invade jurors' privacy by asking questions that are only tangentially related to the issues likely to arise at trial.

Who questions the prospective jurors is not the only aspect of voir dire that can differ substantially from judge to judge and from court to court. The methods that judges and attorneys use to question jurors and to learn jurors' responses also vary considerably, both in form and in combinations of forms. See Table 22. For example, the vast majority of judges and attorneys (86%) reported that in their most recent jury trial, at least some questions were posed to the full panel, usually with instructions to answer by a show of hands. Another common approach is to question each juror individually in the jury box, moving from juror to juror until the entire venire panel has been questioned.

Table 22: Voir Dire Methods	% of Respondents	
	State Courts	Federal Courts
Questions to prospective jurors in the venire…		
Full Panel	86	86
Individuals in the Jury Box	63	52
Individuals at Sidebar / Chambers	31	31
General Questionnaire	34	33
Case Specific Questionnaire	5	10

Judges and attorneys have gradually become more aware of jurors' reluctance to disclose sensitive or embarrassing information in the presence of the entire jury panel and courtroom observers. Approximately one-third reported

[50] The average difference in ratings between criminal and civil voir dire in these states was only .45 higher on a scale of 1 (exclusively judge-conducted voir dire) to 5 (exclusively attorney-conducted voir dire). The only state with a difference greater than 1 was New York, for which survey respondents indicated that criminal voir dire was slightly dominated by judges (2.81), but civil voir dire was heavily dominated by lawyers (4.58).

[51] Susan E. Jones, *Judge versus Attorney-Conducted Voir Dire*, 11 L. & HUMAN BEHAV. 131 (1987).

that jurors were given the opportunity to answer questions in the relative privacy of a sidebar conference or in the judge's chambers. Other judges and lawyers provide jurors with written questionnaires to remove the necessity of disclosing information orally.

Most of these techniques are used in combination with one another. Fewer than one-third of jury trials relied on a single voir dire technique. In nearly half of the trials, voir dire involved direct questioning of the entire panel with supplemental individual questioning in the jury box or at sidebar. Seventeen percent (17%) of trials involved all three methods. Written questionnaires supplemented oral voir dire in 38 percent of the trials and were the only form of voir dire in 1 percent of the trials.

Capital felony trials required the greatest amount of time to impanel a jury; the median was 6 hours in state courts and 7 hours in federal courts. Non-capital felony trials and civil trials required 2 hours, and misdemeanor trials only 1.5 hours in state courts and 1 hour in federal courts. These figures mask a great deal of variation, however. For example, South Carolina consistently reported the shortest average voir dire time (30 minutes) in both felony and civil trials, with Delaware and Virginia closely following (1 hour or less). South Carolina relies heavily on the use of written questionnaires that are distributed to attorneys before voir dire, rather than oral questioning in court. Connecticut consistently had the longest voir dire time – 10 hours in felony trials and 16 hours in civil trials, ostensibly due to the statewide practice of predominantly attorney-conducted individual voir dire with each prospective juror. See Appendix F, Tables 2 and 3, for state-by-state comparisons of voir dire length in felony and civil trials.

Not surprisingly, a number of trial characteristics in addition to case type can affect the length of jury selection including the number of jurors to be impaneled, the number of peremptory challenges, and the relative level of evidentiary and legal complexity that jurors are likely to encounter during trial. Table 23 indicates the average number of minutes that are added to or subtracted from the length of voir dire by these factors as well as by the use of various voir dire practices. The values were calculated using linear regression methods, which also incorporate the level of variation to assess whether those values indicate a statistically measurable difference in voir dire length as a result of those factors (indicated with asterisks) or whether those values are more likely the result of random chance.

To illustrate how to read this table, consider the example of a civil trial in which the judge and lawyers conduct voir dire on a more-or-less equal basis by questioning jurors individually in the jury box (the Reference trial). Neither the evidence nor the applicable law is expected to be complex. The final jury will be composed of 12 jurors and each side may exercise up to 3 peremptory challenges during jury selection. Using the regression model to calculate the values in Table 23, jury selection for this type of trial would require an average of 114 minutes to complete, or just under 2 hours. Imagine now that instead of a civil trial, this is misdemeanor trial, but all of the other factors have stayed the same. As a result, voir dire would take on average 25 minutes less to complete as indicated by the -25 value next to the trial characteristic for misdemeanor. Now imagine that it is the same misdemeanor trial, but the attorneys predominantly conduct the voir dire examination of jurors, which adds 25 minutes on average to the length of voir dire.

There are two important caveats with respect to the use of this table. First, although a number of the factors included in the regression model were statistically significant, the model itself was not particularly robust – that is, these trial characteristics and voir dire procedures explain only a small proportion of the variation in voir dire length.[52] It is highly likely that this aspect of trial procedure is also affected by local legal culture, demographic and attitudinal characteristics of the local jury pool, and individual judge and lawyer preferences, which we were unable to incorporate into the regression model. Second, readers should not overlook weak (single asterisk) or non-existent (no asterisk) statistical significance for several of these factors. These indicate that the values generated by the model have greater than 5 percent probability of resulting from random chance rather than reflecting an accurate measure of the length of voir dire.

Table 23: Effect of Trial Characteristics and Voir Dire Practices on Length of Voir Dire

Trial Characteristics	# Minutes Added or Subtracted		Voir Dire Practices	# Minutes Added or Subtracted	
Casetype			**Who Conducted Voir Dire?**		
Capital Felony	707	***	Exclusively by Judge	- 47	***
Felony	8		Predominantly by Judge	- 14	
Misdemeanor	- 25	**	Equally by Judge & Attorneys	Reference	
Civil	Reference		Predominantly by Attorney	25	**
			Exclusively by Attorney	105	***
Evidentiary Complexity			**Oral Questions Posed to …**		
Not at all Complex	Reference		Entire Panel	-134	***
Moderately Complex	60	***	Individual Jurors in Jury Box	Reference	
Extremely Complex	119	***	Individual Jurors at Sidebar	82	***
Legal Complexity			**Use of Questionnaires**		
Not at all Complex	Reference		None	Reference	
Moderately Complex	43	***	General Written Questionnaires	- 13	*
Extremely Complex	85	***	Case-Specific Questionnaires	227	***
Number of Trial Jurors Impaneled					
6 Jurors	71	***			
8 Jurors	47	***			
12 Jurors	Reference				
Number of Peremptory Challenges Available to Parties					
3 per side	Reference		* $p < .10$		
6 per side	38	***	** $p < .05$		
12 per side	114	***	*** $p < .01$		

In spite of these weaknesses, these analyses do indicate a measurable relationship between several trial characteristics and voir dire practices and the average length of voir dire. Not surprisingly, as the issues to be decided at trial become increasingly serious, judges and attorneys spend greater amounts of time examining jurors. Thus, felony voir dire on average is about an

[52] Adjusted R Square=0.217.

hour longer than civil trials, and voir dire in capital felony trials more than 13 hours longer. Increasing levels of trial complexity also contribute to longer voir dire, although evidentiary complexity has a stronger impact than legal complexity. Ironically, as the size of the jury increases, the amount of time needed to impanel the jury decreases. As a general rule, judge-conducted voir dire takes less time than attorney-conducted voir dire. Oral questions posed to the entire panel takes substantially less time, while individual voir dire at sidebar and the use of case-specific questionnaires tends to increase the length of voir dire.

Trial Practices

Once the jury has been impaneled, the evidentiary portion of the trial begins. This aspect of trial practice has perhaps undergone the most dramatic changes in recent years. In particular, a sea change has occurred in the way judges and attorneys view the jury's role during trial. The traditional view is that jurors are passive receptacles of evidence and law who are capable of suspending judgment about the evidence until final deliberations, of perfectly and completely remembering all of the evidence presented at trial, and of considering the evidence without reference to preexisting experience or attitudes. This view has rapidly given way to a contemporary understanding of how adults perceive and interpret information, which posits that jurors actively filter evidence according to preexisting attitudes, making preliminary judgments throughout the trial.[53] This view of juror decision-making has spurred a great deal of support for trial procedures designed to provide jurors with common-sense tools to facilitate juror recall and comprehension of evidence, and juror confidence and satisfaction with deliberations.[54] The Judge & Lawyer Survey asked trial practitioners to report their experiences with these types of techniques in their most recent trials. Table 24 provides an overview comparing the responses of practitioners in state court to those in federal court.

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[53] *See generally* B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries,* 68 IND. L. J. 1229 (1993).

[54] G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS (2d ed. 2006); AMERICAN BAR ASSOCIATION, *supra* note 4.

Table 24: Trial Innovations	State Courts	Federal Courts
Note taking (%)		
Jurors could take notes	69.0	71.2
Jurors given paper for notes	63.7	68.4
Jurors given a notebook	5.8	11.2
Allowed juror questions during trials (%)	15.1	10.9
Criminal Trials	14.0	11.4
Civil Trials	16.1	10.9
Could discuss evidence before deliberations (%)	1.5	0.9
Criminal Trials	0.7	0.3
Civil Trials	2.2	1.3
Juror instruction methods (%)		
Preinstructed on substantive law	17.7	16.9
Instructed before closing arguments	41.2	35.5
Given guidance on deliberations	54.4	52.7
At least 1 copy of written instructions provided	68.5	79.4
All jurors received copy of written instructions	32.6	39.0

It now appears that permitting jurors to take notes is a widely accepted practice in most jurisdictions. More than two-thirds of the trials in both state and federal courts permitted juror notetaking, and the vast majority of those provided writing materials for jurors to do so. In spite of its support in many jurisdictions, as well as the overwhelming empirical research attesting to its effectiveness,[55] juror notetaking was permitted in less than half the trials in 14 states, 8 of which were located in New England or the Mid-Atlantic region of the United States. One factor in judges' decisions to permit juror notetaking was the complexity of the case; jurors serving in trials with more complex evidence were significantly more likely to be permitted to take notes and to be provided with notetaking materials than jurors in less complex trials.[56]

A second factor was the existence, or lack thereof, of statutes, court rules, or caselaw expressly stating the extent of judicial discretion to permit or prohibit juror notetaking. For example, Arizona, Colorado, Indiana and Wyoming mandate that trial judges permit jurors to take notes;[57] judges have no discretion to prohibit the practice. Only Pennsylvania and South Carolina reported on the Statewide Survey that juror notetaking was prohibited.[58]

This question of legal authority for different jury trial practices is one that has important implications for jury improvement efforts. We will highlight the general issue using juror

[55] Larry Heuer & Steven Penrod, *Juror Notetaking & Question Asking During Trials,* 18 L. & HUMAN BEHAV. 121 (1994).

[56] Jurors Permitted to Take Notes F (6, 11,351) = 25.460, Jurors Given Writing Materials F (6, 11,351) = 35.529, both ps < .001.

[57] ARIZ. R. CIV. PROC. Rule 39(p); ARIZ. R. CRIM. PROC. Rule 18.6(d); COLO. R. CIV. PROC. Rule 47(t); COLO. R. CRIM. PROC. Rule 16(f); IND. R. CT. Jury Rule 20; WYO. R.. CIV. PROC. Rule 39.1(a); WYO. R. CRIM. PROC. Rule 24.1(a).

[58] Pennsylvania prohibits juror notetaking in criminal trials only. PA. R. CRIM. PROC. Rule 644. South Carolina reported that juror notetaking was prohibited in both criminal and civil trials, but did not report the authority for the prohibition.

notetaking as an illustration, but readers should understand that the existence or absence of positive law had some impact on all of the trial techniques examined in the Judge & Lawyer Survey. The Statewide Survey requested that respondents indicate whether these trial practices were required, permitted in the discretion of the trial judge, or prohibited and to provide the legal authority (statute, court rule, or court opinion). Table 25 shows the percentage of trials in which jurors were permitted to take notes based on responses to the Statewide Survey concerning the existence of legal authority governing juror notetaking. Not surprisingly, in states where juror notetaking is required, the percentage of trials in which jurors were permitted to take notes is extremely high. Overall, jurors were permitted to take notes in more than two-thirds of the trials in states that leave the decision on juror notetaking to the discretion of the trial judge, but state-by-state rates of juror notetaking ranged from a low of 19 percent in Rhode Island to a high of 96 percent in Arkansas. See Appendix F, Table 7. What is extremely surprising is the apparent lack of compliance in those states that prohibit juror notetaking. According to the Judge & Lawyer Survey reports, of the 206 criminal trials that took place in Pennsylvania and South Carolina (the only two states that prohibit juror notetaking), more than one-fourth of the judges permitted jurors to take notes, and of the 36 civil trials that took place in South Carolina, nearly half (42%) permitted jurors to take notes! In fact, in 23% of both the criminal and civil trials, jurors were actually given writing materials with which to take notes!

Table 25: Impact of Law Governing Juror Notetaking

	% of Trials in which Jurors were Permitted to Take Notes	
Juror Notetaking …	**Civil Trials**	**Criminal Trials**
Prohibited	42	27
Permitted	70	69
Required	97	95

The apparent non-compliance with the prohibition on juror notetaking by Pennsylvania and South Carolina trial judges is quite puzzling. Certainly one possibility may be that judges and lawyers in those states have learned enough about the benefits of this technique (and the absence of any disadvantages) that they simply ignore the prohibition. As we find throughout this discussion, many of these techniques are employed in combination with one another, suggesting that judicial and lawyer education about these techniques in many jurisdictions may have begun to show measurable effects.

Yet another possibility is the extent to which the trial bench and bar may be unaware of prohibitions on different trial court practices – if, in fact, any legal authority for the prohibitions actually exists. For example, the South Carolina Statewide Survey reported that juror notetaking is prohibited in both criminal and civil trials, but it did not report the legal authority for the prohibition. A search of the South Carolina statutes, court rules, and reported judicial opinions did not reveal the source of the prohibition. In fact, the only judicial opinion that discusses juror notetaking – a 1985 appeal from a capital felony trial – indicated that juror notetaking is a matter of trial court discretion, and not prohibited at all.[59] Perhaps the individual who completed South Carolina's Statewide Survey was simply mistaken. Or perhaps the prohibition on juror notetaking in South Carolina simply reveals a widespread perception within the South Carolina

[59] *South Carolina v. South,* 331 S.E.2d 775 (S.C. 1985)("Finally, South contends the lower court erred in allowing jurors to take notes. Such was a proper exercise of discretion."). *Id.* at 778.

legal community about this technique. This possibility in South Carolina concerning juror notetaking, and in other states concerning the norms for other trial practices for which no legal authority can be found, may explain non-apparent non-compliance rates, but also the great variation in the use of these techniques in states that leave these decisions in the sound discretion of the trial judge.

Table 26: Mean Ratings of Evidentiary and Legal Complexity

	Evidentiary Complexity	Legal Complexity
All Trials	3.66	3.57
Casetype		
Capital Felony	4.90	4.80
Felony	3.50	3.49
Misdemeanor	2.47	2.58
Civil	3.98	3.78
Other	3.44	3.47
Jurisdiction		
State Court	3.62	3.51
Federal Court	4.23	4.30

We have already seen how trial complexity affects the length of voir dire. It also affects judicial decisions about trial techniques, and thus deserves some additional explanation. Two of the survey questions asked respondents to rate the level of evidentiary and legal complexity on a scale of 1 (not at all complex) to 7 (extremely complex). See Table 26. Overall, 18 percent of trials were rated as very complex (6 or 7) on at least one measure of complexity and 7 percent on both measures. It is important to recognize that in studies of trial complexity, judges and lawyers tend to perceive complexity at lower levels than jurors.[60] Therefore, when judges and lawyers rate complexity as a 6 or 7, jurors' perceptions of complexity will, quite literally, be off the scale.

Survey respondents rated trial complexity in predictable ways. On average, capital felony trials were rated the most complex on both evidentiary and legal scales. Civil trials were rated slightly more complex than non-capital felony trials. Misdemeanor trials were the least complex. On average, trials in federal court were rated more complex than those in state courts.

Trials that are highly complex – e.g., 6 or higher on a 7-point scale – are trials in which juror notebooks can be extremely helpful, but overall juror notebooks were not very popular, even in complex trials.[61] Only 11 percent of trials involving complex evidence and law provided notebooks for jurors. Notebooks were used twice as often in civil trials (8%) as in criminal trials (4%),[62] and nearly twice as often in federal court (11%) as in state court (6%).[63]

One of the more controversial techniques involves permitting jurors to submit written questions to witnesses. A substantial and growing body of empirical research has found that this practice, if properly controlled by the trial judge, improves juror comprehension without prejudicing

[60] Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, & G. Thomas Munsterman, *The Hung Jury:* The American Jury*'s Insights and Contemporary Understanding,* 39 CRIM. L. BULL. 33, 46 (2003).

[61] The content of juror notebooks can vary depending on the nature of the case, but they often contain a brief summary of the claims and defenses, preliminary instructions, copies of trial exhibits or an index of exhibits, a glossary of unfamiliar terminology, and lists of the names of expert witnesses and brief summaries of their backgrounds. MUNSTERMAN et al. *supra* note 52, at 102-03.

[62] F (1, 11,750) = 69.358, $p < .001$.

[63] F (1, 11,277) = 41.422, $p < .001$.

litigants' rights to a fair trial.[64] The crux of the controversy stems from philosophical arguments about the role of the jury in the context of an adversarial system of justice. The practice is mandated for criminal trials in three states,[65] prohibited in eleven states,[66] and left to the sound discretion of the trial court in the rest. In civil trials, juror questions are mandated in four states,[67] prohibited in ten states,[68] and left to the discretion of the trial judge in the rest.

Compliance with prohibitions juror questions was greatly improved over that for juror notetaking. None of the 1,175 criminal trials in states that prohibit juror questions violated the prohibition, and only 6 percent of the 1,394 civil trials did not follow the rule. In states that mandate that jurors be permitted to submit questions to witnesses, jurors were permitted to do so in 84% of the criminal trials and 86% of the civil trials.

Given the ongoing controversy in many jurisdictions, what is most surprising from these data is that jurors were allowed to ask questions in 14.5 percent of all trials, and 15.6 percent of civil trials. Rules or case law expressly permitting or prohibiting juror questions had a significant impact on the practice.[69] Evidentiary complexity also played a role, with judges permitting juror questions in 17 percent of the most complex cases, but only 12 percent of the least complex cases.[70] Judges were also significantly less likely to permit juror questions in federal court compared to state courts.[71]

Another controversial technique is to allow jurors in civil trials to discuss the evidence among themselves before final deliberations.[72] Arizona, Colorado, and Indiana have enacted court rules

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[64] Shari S. Diamond, Mary R. Rose, Beth Murphy, & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking,* 59 VANDERBILT L. REV. 1927 (2006); Larry Heuer & Steven Penrod, *Juror Notetaking & Question Asking During Trials,* 18 L. & HUMAN BEHAV. 121 (1994).

[65] ARIZ. R. CRIM. PROC. Rule 18.6(e); COLO. R. CIV. PROC. Rule 47(u); COLO.R. CRIM. PROC. Rule 24(g); BURNS IND. JURY R. Rule 20(7).

[66] *Matchette v. Georgia,* 364 S.E.2d 545 (1988); *Minnesota v. Costello,* 646 N.W.2d 204 (2002; *Wharton v. Mississippi,* 784 So.2d 985 (1998); *Nebraska v. Zima,* 468 N.W.2d 377 (1991); *Morrison v. Texas*, 845 S.W.2d 882 (1992). The Statewide Surveys for Illinois, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff were unable to locate the source of prohibition in the relevant state statutes, court rules, and case law. Arkansas recently prohibited juror questions by court rule. *See* ARK. R. CRIM. P. Rule 33.8. The rule was enacted after data collection for the State-of-the-States Survey was complete.

[67] ARIZ. R. CIV. PROC. Rule 39(b)(10); COLO. R. CIV. PROC. Rule 47(u); IND. R. CT. Jury Rule 20; WYO. R. CIV. PROC. Rule 39.4.

[68] *Minnesota v. Costello,* 646 N.W.2d 204 (2002); *Nebraska v. Zima,* 468 N.W.2d 377 (1991); *Morrison v. Texas*, 845 S.W.2d 882 (1992). The Statewide Surveys for Georgia, Louisiana, Maine, Michigan, North Carolina, Oklahoma, and South Carolina did not report the legal authority for this prohibition, and NCSC staff were unable to locate the source of prohibition in the relevant state statutes, court rules, and case law.

[69] Cox & Snell R Square = .171, Juror Qs Permitted (Criminal) *Wald*=446.098, $p < .001$; Juror Qs Permitted (Civil) *Wald* =14.274, $p < .001$.

[70] *Id.* Evidentiary Complexity *Wald* = 23.048, $p < .001$; Legal Complexity *Wald* = .510, *ns.*

[71] *Id.* State Court Wald = 9.781, $p = .002$

[72] MUNSTERMAN et al., *supra* note 52, at 124-25.

explicitly permitting this practice.[73] Maryland has caselaw that apparently condones the practice.[74] Elsewhere, the practice is implicitly permitted by virtue of the fact that no legal authority explicitly prohibits it. In most states it is prohibited altogether.[75] Overall, juror discussions were permitted in only 2 percent of state jury trials and only 1 percent of federal court trials. Surprisingly, one-third of the trials in which jurors were permitted to discuss the evidence took place in states that prohibit the practice. Given the large number of states (29) in which unauthorized juror discussions took place, it appears that this particular technique has generated enough interest to encourage a small number of judges to secure the consent of counsel and to permit juror discussions in individual cases, even though they are expressly prohibited.

A substantial amount of research suggests that juror comprehension of the law is affected by the timing and form of jury instructions. One technique growing in prevalence (18%) is to pre-instruct jurors about the substantive law – that is, to provide a basic overview of the black letter law governing the case in addition to administrative housekeeping rules and general legal principles.[76] Pre-instructions provide jurors with a legal context in which to consider the evidence, helping them better understand and evaluate evidence as they hear it and remember evidence more accurately. Eight states report that they require judges to pre-instruct jurors on the substantive law before the evidentiary portion of the trial,[77] although most of the required instructions deal with basic legal principles such as burden of proof and admonitions concerning juror conduct rather specific instructions on the elements of crimes or claims to be proven at trial. Two states – Nevada and Texas – prohibit pre-instructions.[78]

As before, the existence of rules concerning pre-instructions affected judges' decisions to pre-instruct juries.[79] Judges were also significantly less likely to pre-instruct in civil trials compared to criminal trials.[80] Federal judges were marginally more likely to pre-instruct than state judges,[81] but trial complexity was unrelated to judges' decisions to pre-instruct.[82] It does appear

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[73] ARIZ. R. CIV. PROC. Rule 39(f); COLO. JURY INSTRUCTIONS 1:4, 1:8;

[74] *Wilson v. Maryland,* 242 A.2d 194 (1968).

[75] *See* Valerie P. Hans, Paula L. Hannaford & G. Thomas Munsterman, 32 U. MICH. J.L. REFORM 349, 352-60 (1999).

[76] G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD-AGOR, & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS 132-33 (2d ed. 2006).

[77] COLO. R. CIV. PROC. Rule 47(a)(2)(V), 47(a)(5); COLO. R. CRIM. PROC. Rule 24(a)(5); IND. R. CT. Jury Rules 20(a); MO. R. S. CT. Rule 27.02; N.Y. CRIM. PROC. LAW §§ 260.30, 270.40; OR. R. CIV. PROC. Rule 58B(2); OR. REV. STAT. § 136.330; TENN. R. CRIM. PROC. Rule 51.03(1); TENN. R. CIV. PROC. Rule 30(d)(1); WYO. R. CIV. PROC. Rule 39.3, WYO. R. CRIM. PROC. Rule 24.3. No legal authority could be found for the requirement in South Carolina.

[78] Neither state cited legal authority for the prohibition in their respective Statewide Surveys.

[79] Cox & Snell R Squared = .054, Pre-instruction Rule (Civil) *Wald* = 22.531, $p < .001$; Pre-instruction Rule (Criminal) *Wald* = 11.416, $p = .001$.

[80] *Id.* Criminal Trial *Wald* = 94.564, $p < .001$.

[81] *Id.* Jurisdiction *Wald* = 3.726, $p = .054$.

[82] *Id.* Evidentiary Complexity *Wald* = .851, .Legal Complexity *Wald* = .022, both *ps*, *ns.*

that many judges who pre-instructed their juries view this technique as part of a set of jury trial practices; those who did so were also significantly more likely to permit jurors to take notes, to submit questions to witnesses, to permit juror discussions before deliberations, to deliver final instructions before closing arguments, and to provide jurors with a written copy of the instructions.[83]

Other techniques to improve juror comprehension of the law involve instructing the jury before closing arguments and to provide written copies of the instructions to jurors for use during deliberations.[84] The rationale for the former is that closing arguments are more meaningful within the legal framework provided by the instructions. However, fewer than half of the trials in the study did so. Because jury instructions are often quite lengthy, written instructions ensure that jurors are able to consider all of the instructions during deliberations, not just those portions that they can remember. At least one copy of written instructions was provided to the jury in more than two-thirds of state jury trials, and nearly three-quarters of federal jury trials. However, only one-third provided copies for all jurors during deliberations.

State rules governing the timing and form of instructions were a significant factor in when and how instructions were delivered in both criminal and civil trials.[85] Evidentiary complexity was a factor in the use of both techniques, but surprisingly in different directions. Controlling for other factors, judges were less likely to instruct before closing arguments in complex trials,[86] but more likely to provide written instructions.[87] Federal judges were less likely than state judges to instruct before closing arguments,[88] but were more likely to provide written instructions to juries.[89] Like pre-instructions, much of the discretion exercised by judges appears to be affected by their awareness and support for other jury trial innovations. Judges who instructed before closing arguments were significantly more likely to pre-instruct juries, to permit juror notetaking and juror discussions, and to provide written instructions, but not to permit juror questions.[90] Judges who provided the jury with at least one copy of written instructions were marginally more likely to pre-instruct on the law, to permit jurors to take notes, and to deliver final instructions before closing arguments, but not to permit juror questions or discussions.[91]

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[83] *Id.* Juror Notetaking *Wald* = 22.471, $p < .001$; Juror Questions *Wald* = 116.235, $p < .001$; Juror Discussions *Wald* = 32.536, $p < .001$; Instructions Before Closing *Wald* = 16.867, $p < .001$; and Written Instructions *Wald* = 3.705, $p = .054$.

[84] MUNSTERMAN et al., *supra* note 52, at 142-43, 151-52.

[85] Instructions before Closing Cox & Snell R Square = .282; Rules on Timing of Instructions (Civil) *Wald* = 11.389, $p = .001$; Rules on Timing of Instructions (Criminal) *Wald* = 113.983, $p < .001$. Written Instructions Cox & Snell R Square = .283, Rules on Written Instructions (Criminal) *Wald* = 1339.244, $p < .001$.

[86] *Id.* Evidentiary Complexity *Wald* = 6.296, $p = .012$; Legal Complexity *Wald* = .238, *ns.*

[87] *Id.* Evidentiary Complexity *Wald* = 17.476, $p < .001$; Legal Complexity *Wald* = .205, *ns.*

[88] *Id.* Jurisdiction *Wald* = 22.744, $p < .001$.

[89] *Id.* Jurisdiction *Wald* = 66.056, $p < .001$.

[90] Juror Notetaking *Wald* = 132.911, $p < .001$; Juror Questions *Wald* = .176, *ns*; Juror Discussions *Wald* = 10.711, $p = .001$; Pre-Instructions *Wald* = 18.805, $p < .001$; Written Instructions *Wald* = 410,537, $p < .001$.

[91] Juror Notetaking *Wald* = 345.551, $p < .001$; Juror Questions *Wald* = .306, *ns*; Juror Discussions *Wald* = .921, *ns*; Pre-Instructions *Wald* = 2.726, $p < .099$; Instructions before Closing *Wald* = 404. 073, $p < .001$.

Local practices and trial exigencies affected some procedural aspects of the trials in this study. Juries deliberating in state courts were significantly more likely to be sequestered (25% of all trials) than juries in federal court (15% of all trials).[92] Moreover, criminal juries in state courts were more likely to be sequestered than civil juries (27% and 23%, respectively), but that pattern was reversed in federal courts with civil juries more likely to be sequestered (11% and 17%, respectively).[93] Alternates were most likely to deliberate in federal civil trials (23%).[94] Alternates deliberated in state civil trials 10% of the time, but in just 1% of criminal trials in both state and federal trials.

What effect do these techniques have on the length of jury deliberations? In Table 27 we see that the length of deliberations across all case categories is slightly shorter in state courts compared to federal courts, although some state court deliberations exceeded those in federal court. For example, Connecticut had the longest average deliberation time (7.75 hours) in felony trials. Wisconsin had the shortest (1 hour).

Table 27: Median Deliberation Time (hours)

	State Courts	Federal Courts
Capital Felony	6.0	10.0
Felony	3.0	4.0
Misdemeanor	2.0	2.5
Civil	3.0	4.0
Other	2.0	2.5

Like voir dire, the length of deliberations was affected by a number of factors, some related to trial characteristics and some related to the types of jury techniques employed by the judge. Table 28 was constructed using the same methods as Table 23 and indicates the effect of these factors on the length of jury deliberations.[95] The reference trial is again a civil trial in state court in which the evidence and law are not at all complex, twelve jurors were required to deliberate to a unanimous verdict, and no decision-making aids were provided to jurors during trial or deliberations. The average deliberation time for such a trial is 166 minutes (2.77 hours).

[92] $F = 48.617$, $p < .001$. Although statistically significant, this finding should be viewed with caution insofar that respondents may have defined the term "sequestered" to encompass deliberations in which the jury was kept together during routine breaks during deliberations (e.g., lunch), but not sequestered overnight.

[93] State Court $F = 19.355$, $p < .001$; Federal Court $F = 5.371$, $p = .021$.

[94] The Federal Rules of Civil Procedure specifies that civil juries consist of "not fewer than six and not more than twelve members" and requires that all jurors impaneled participate in deliberations. FED. R. CIV. PROC. Rule 48.

[95] Like the voir dire regression model, the deliberation model failed to include the vast majority of factors that explain deliberation length in jury trials. Adjusted R Square=0.146. It is thus subject to the same caveats discussed in the voir dire model.

Table 28: Effect of Trial Characteristics and Trial Practices on Length of Deliberations					
Trial Characteristics	**# Minutes Added or Subtracted**		**Trial Practices**	**# Minutes Added or Subtracted**	
State Court	Reference	***	**None**	Reference	
Federal Courts	123		**Jurors Permitted to Take Notes**	26	***
Casetype			**Jurors Provided a Notebook**	31	**
Capital Felony	225	***	**Jurors Permitted to Submit Questions to Witnesses**	7	
Felony	39	***		- 10	
Misdemeanor	- 7				
Civil	Reference				
Evidentiary Complexity			**Jurors Permitted to Discuss Evidence**	- 15	
Not at all Complex	Reference	***			
Moderately Complex	112	***			
Extremely Complex	223	***			
Legal Complexity			**Jurors Instructed before Closing Arguments**	- 23	***
Not at all Complex	Reference	***			
Moderately Complex	55	***			
Extremely Complex	109	***			
Number of Trial Jurors Impaneled			**Written Instructions**		
6 Jurors	- 18	**	1 Copy of Instructions for Jury	35	***
12 Jurors	Reference	**	All Jurors Provided Written Instructions	5	
Alternates Deliberated	7				
Jurors Sequestered	- 36	***			
Unanimous Verdict Required	- 20	**			

* $p < .01$
** $p < .05$
*** $p < .001$

As a general matter, trial characteristics tended to affect deliberation length more often than trial practices. On average, juries deliberate in state court less time than federal juries.[96] Juries in both capital and non-capital felony trials deliberate significantly longer than civil trial juries, but there was no significant difference between civil and misdemeanor deliberations.[97] Both evidentiary and legal complexity resulted in increased deliberations.[98] Surprisingly, the number of impaneled jurors deliberating had no effect on deliberation length, but permitting alternates to

[96] *Id.* Jurisdiction $t = -7.704$, $p < .001$.

[97] *Id.* Capital felony $t = 9.650$, $p < .001$; Non-capital felony $t = 4.223$, $p < .001$; Misdemeanor $t = -.013$, *ns.*

[98] *Id.* Evidentiary Complexity $t = 9.002$, $p < .001$; Legal Complexity $t = 7.160$, $p < .001$.

deliberate did lengthen deliberations.[99] Sequestering juries and requiring a unanimous verdict actually decreased deliberation time.[100]

Some trial practices did affect deliberation length. For example, jurors who were instructed before closing arguments deliberated for shorter periods, suggesting that they may have less difficulty understanding and applying the instructions.[101] On the other hand, jurors who were permitted to take notes, jurors who were given trial notebooks, and juries that were given at least one written copy of the instructions tended to deliberate longer, perhaps because jurors who were equipped with those tools engaged in more thorough deliberations.[102] Other techniques such as juror questions, pre-instruction on the evidence and law, and juror discussions had no effect on deliberation length.

As we noted earlier, many judges often use innovative jury trial techniques in various combinations. We wanted to gauge the extent to which statewide initiatives had an effect on judges' willingness to do so. To examine this issue, we constructed an index of key jury techniques consisting of juror notetaking, juror questions, juror discussions, pre-instructions, instructions before closing arguments, and written instructions. The index ranged from 0 (no innovative techniques employed at trial) to 6 (all key techniques employed). The median index value was 2 – that is, an average of two techniques employed per trial. Then, using regression analyses to control for the trial venue (state or federal court), evidentiary and legal complexity, and case type (criminal or civil), we measured the impact of various statewide initiatives to determine which, if any, resulted in increased use of these techniques.[103] We found that educational efforts directed at all potential audiences (judges, attorneys, and the public) resulted in increased use of innovative techniques.[104] More intensive efforts to test and evaluate these techniques (e.g., evaluations, court observations) were also associated with increased use of key innovations.[105] Surprisingly, some approaches to jury improvement correlate with lower use of these techniques, most notably, the existence of a statewide task force or commission.[106] But this may be simply a matter of timing. That is, the substantive work of these task forces may not yet have translated into measurable increases in the use of jury innovations.

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[99] *Id.* Number of Jurors $t = .695$, *ns*; Alternates deliberated $t = 2.879$, $p = .004$.

[100] *Id.* Jurors sequestered $t = -4.395$, $p < .001$; Unanimous verdict $t = -2.889$, $p = .004$.

[101] *Id.* Instructions before Closing $t = -3.539$, $p < .001$.

[102] *Id.* Juror Notetaking $t = 3.180$, $p = .001$; Juror Notebooks $t = 4.780$, $p < .001$; Written Instructions $t = 4.471$, $p < .001$.

[103] Adjusted R Square=.138; F (14, 11,006)=127.22, $p < .001$. Of the trial characteristic factors incorporated into the model, only Evidentiary complexity (t =5.919, $p < .001$) and Type of case ($t = 4.754$, $p < .001$) were statistically significant.

[104] Judge education $t = 13.841$, Attorney education $t = 7.259$, and Public education $t = 21.920$, all *p*s < .001.

[105] Evaluate ($t = 12.735$), Court observation ($t = 11.181$), all *p*s < .001.

[106] Statewide Task Force $t = -13.324$), $p < .001$.

VI. CONCLUSIONS

The State-of-the-States Survey of Jury Improvement Efforts is, to the best of our knowledge, the most comprehensive snapshot of jury operations and practices ever yet undertaken. From it, we confirmed a great deal of information about how state and local courts operate and manage their jury systems. Some of these findings were suspected, but we lacked reliable empirical documentation on which to confirm these suspicions. The statistics on jury yield, for example, fall roughly in the ranges we expected, but we anticipate that more precise statistics will provide courts with a better baseline on which to assess their own performance.

On the other hand, the State-of-the-States Survey also resulted in many surprises, not the least of which was the actual number of jury trials conducted annually in state courts. The NCSC had previously estimated the number of jury trials conducted in general jurisdiction courts,[107] but the State-of-the-States Survey indicates that a considerable proportion of jury trials – perhaps as much as 40 percent – are actually conducted by limited jurisdiction courts, which had been excluded from previous estimates. The volume of jury trial activity in these courts is certainly a surprise and suggests that recent trends to eliminate the right to trial by jury for low-level offenses and low-value civil cases in many jurisdictions has not been as widespread and successful as previously imagined. It also helps to explain the relatively high summoning rates – 15% of the adult American population each year – and the increasing proportion of Americans that report having served as trial jurors.

Certainly one finding from the State-of-the-States Survey is that, in spite of statewide efforts to regulate jury operations and trial practices in some jurisdictions, most jury operations and practices are still governed on a local, and even individual, basis. The use of general terminology to describe jury practices (e.g., term of service, statutory exemptions, one-step versus two-step summoning procedures) tends to mask a great deal of local variation. As we discovered during the long, slow process of collecting data for the State-of-the-States Survey, the extent of continued local autonomy not only makes it difficult to collect data, but also makes it difficult to define terms and to compare data across jurisdictions. It also indicates the inherent challenge – and the likelihood of substantial local resistance – that states face in attempting to implement statewide changes in jury procedures.

Another curious finding from the Judge & Lawyer Survey is the extent to which judges and lawyers reported the use (or non-use) of various trial techniques (e.g., juror notetaking, juror questions to witnesses, written copies of instructions) that apparently conflicts with existing court rules or policies. As a general matter, judges and lawyers are more likely to use these techniques in jurisdictions that prohibit them than to not use them in jurisdictions that mandate them. Some instances of these inconsistencies may be the result of mistakes or misunderstandings on the part of the individuals who completed the Judge & Lawyer Survey or the Statewide Survey. However, the strong correlations among the different trial techniques suggests that at least in some cases, judges and lawyers have concluded that the benefits of these techniques in terms of improved juror performance and satisfaction outweighs any potential

[107] BRIAN J. OSTROM, NEAL B. KAUDER & ROBERT C. LAFOUNTAIN, EXAMINING THE WORK OF STATE COURTS, 2001, 102-03 (2001).

disadvantages. This decidedly Ghandi-esque approach to jury improvement at a grassroots level is very intriguing, to say the least.

We also found it heartening to see how prominent jury operations and practices are in statewide and local court improvement efforts. To some extent, we saw that local court efforts are affected by statewide initiatives, especially those involving mandated changes in jury procedures. But the level of local court activity, even in jurisdictions that had not undertaken a statewide jury improvement initiative, was considerable. A number of factors may be driving local court efforts, including the need to reduce the cost of jury operations, to improve the efficiency and effectiveness jury operations, and to be more responsive to local community demands on juror time and resources.

So how should state and local courts use this Compendium Report and the state-by-state tables (available on the Center for Jury Studies website at http://www.ncsconline.org/D_Research/cjs/)? Certainly we hope that the comparative information and analysis will encourage courts that do not routinely collect and review data on their jury operations and practices to begin doing so. This type of information is invaluable for identifying areas of relative strength and weakness, setting improvement priorities, and formulating effective strategies for addressing weaknesses. With data from the State-of-the-States Survey, judges and court administrators can now evaluate their own practices in light of those of their peers within their respective states and across the country.

As we had hoped, the State-of-the-States Survey also provides direction to the NCSC Center for Jury Studies concerning the types of activities that we should pursue to better assist state and local court policymakers. In some respects, surprises among the State-of-the-States Survey indicate the need for additional research. For example, how effective are various techniques to improve the accuracy of addresses on the master jury list, thus improving the overall jury yield? To what extent do various voir dire methods elicit candid and complete information from jurors? What implications do these methods have on juror privacy expectations? To what extent do jurors make use of decision-making aids when they are offered to them during trial?

Other areas for future research include topics that the State-of-the-States Survey did not address, either because we believed that too few courts could easily report on these topics or because we simply overlooked the issue while designing the surveys. The former category includes the extent to which courts collect and analyze information about the demographic characteristics of their jury pools and how well those jury pools reflect a fair cross section of their respective communities. Questions concerning juror utilization was also omitted from the Local Court Survey, but is critically important to the issues not only of court efficiency, but also citizen satisfaction with jury service. Finally, the Judge & Lawyer Survey failed to include questions on trial outcomes and trial length as well as respondents' opinions about voir dire and trial techniques (regardless of whether these were used at trial). All of these issues we hope to address in the future, perhaps in a subsequent iteration of the State-of-the-States Survey.

In the meantime, we continue to pursue other components of the National Jury Program, many of which are related to issues explored in the State-of-the-States Survey. The NCSC Center for Jury Studies is currently planning a National Conference on Pattern Jury Instructions, tentatively

scheduled for April 17-18, 2008. We are also seeking funding to develop a series of performance measures and tools for courts to use in assessing their jury operations; to host an Urban Courts Workshop to provide urban and statewide jury systems an opportunity to share information about innovative approaches they have developed to address the unique issues associated with heavy volume jury systems; to document the various funding streams that support the American jury system; and to undertake a series of demonstration projects to implement the ideals of the ABA Principles for Juries and Jury Trials into actual jury practices in up to six jurisdictions. Of course, the NCSC Center for Jury Studies will continue to assist courts through education, technical assistance, and research.

APPENDICES

APPENDIX A: FINANCIAL CONTRIBUTORS TO THE NATIONAL PROGRAM TO INCREASE CITIZEN PARTICIPATION IN JURY SERVICE THROUGH JURY INNOVATIONS

APPENDIX B: STATEWIDE, LOCAL COURT, AND JUDGE & LAWYER SURVEYS FROM THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS

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APPENDIX A: FINANCIAL CONTRIBUTORS TO THE NATIONAL PROGRAM TO INCREASE CITIZEN PARTICIPATION IN JURY SERVICE THROUGH JURY INNOVATIONS

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DecisionQuest, A Bowne Company

APPENDIX B: STATEWIDE, LOCAL COURT, AND JUDGE & LAWYER SURVEYS FROM THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS

National Program to Increase Citizen Participation in Jury Service

State of the States
Statewide Survey

State: _____ **Date: _____**

1. Current Status of Jury Improvement/Jury Reform Efforts

A. Is there an office or a formal organization or entity in your state concerned with managing or overseeing jury management? Yes / No

If yes, how was that office or organization created?
- ❑ Administrative Order (e.g., by Chief Judge/Justice, by court of last resort, by statewide judicial council)
- ❑ Court rule (please cite: _____)
- ❑ Other authority (please specify: _____)

B. Is there or has there existed in the past 10 years a task force or commission on jury improvement/jury reform? Y / N

If yes, what is the name(s) of Statewide Task Force(s)/Commission(s):

_____

_____

Contact Information for Task Force/Commission Chairperson:

_____

_____

Is the Task Force/ Commission currently active? Y / N

If no, dates of operation? _____

What person or agency created the Task Force/Commission?
- ❑ Chief Judge/Justice
- ❑ State Court of Last Resort
- ❑ State Judicial Council
- ❑ Other person or agency

How large was the Task Force/Commission?_____ members

What constituencies were represented on the Task Force/Commission?

- ❑ Trial judges
- ❑ Appellate judges
- ❑ Court administrators
- ❑ Jury managers
- ❑ Clerks of court
- ❑ Prosecutors
- ❑ Criminal defense lawyers
- ❑ Civil litigation lawyers
- ❑ State legislators
- ❑ Private citizens/former jurors
- ❑ Other constituencies

Has the Task Force/Commission submitted a written report of its activities? Y / N

If yes, please provide the report title and release date: _____

_____

If the report is available online, please provide the URL: _____

D. Please indicate any current or ongoing projects concerning jury improvement/jury reform efforts in which your state is involved.

- ❑ Judicial education
- ❑ Court staff education
- ❑ Attorney education
- ❑ Changes to legislation or court rules
- ❑ Pilot or demonstration programs
- ❑ Evaluations
- ❑ Public education/outreach
- ❑ Survey research
- ❑ Court observation
- ❑ Other: _____

2. Jury Management and Administration

A. What source lists are required or permitted to be used to compile to the mast jury list?

	Required	Permitted
Registered Voter	☐	☐
Licensed Driver	☐	☐
State Tax Rolls	☐	☐
Unemployment	☐	☐
Public Assistance	☐	☐
Other: _____	☐	☐

Is the master jury list compiled at the state level or at the local level? State / Local

B. What are the juror fees in this state?

- ❑ Flat daily rate of $ _____
- ❑ Graduated rate of $ _____for first day; $ _____ for _____ days; $ _____ to the completion of service
- ❑ Reimbursement for mileage/travel at $ _____
- ❑ Other juror compensation (e.g., reimbursement for child care) $_____

Are employers required to compensate employees while on jury service? Y / N
Employer size: _____ Number of days: _____

C. Is the term of jury service determined at the state level or the local level? State / Local
If at the state level, what is the term of service? _____ days / weeks
If at the local level, what (if any) is the maximum permissible term of service?
_____ days / weeks

D. Does this state employ a standardized Qualification Questionnaire/Summons? Y / N
If yes, where can we obtain a copy? _____

E. Is summoning and qualification conducted as a one-step or two-step process?

- ❑ Qualification questionnaires and jury summonses are mailed simultaneously (one-step process) in this state.
- ❑ Qualification questionnaires are first sent to prospective jurors. Summonses are then sent only to qualified individuals (two-step process) in this state.
- ❑ Individual counties within the state use both one-step and two-step procedures for qualification and summoning.

F. Please indicate any criteria for jury service.

- ❑ U.S. Citizenship
- ❑ Residency (established after _____ days / months)
- ❑ Age: _____ years or older
- ❑ No felony conviction*
- ❑ No misdemeanor conviction*
- ❑ English fluency/proficiency
- ❑ Other qualification: _____

* Is this prior criminal conviction a temporary or permanent disqualification from jury service?

- ❑ Permanent
- ❑ Temporary

Does the state promulgate criteria or guidelines for determining the English fluency of prospective jurors? Y / N
If yes, where can these criteria or guidelines be obtained?

Does the state promulgate criteria or guidelines for deciding requests to be excused for any of the reasons above? Y / N
If yes, where can these criteria or guidelines be obtained?

G. Please indicate any statutorily recognized exemptions from jury service.

- ❑ Previous jury service (within _____ months / years)
- ❑ Over _____ years of age
- ❑ Political office holders
- ❑ Judicial officers
- ❑ Licensed attorneys
- ❑ Law enforcement personnel
- ❑ Health care providers
- ❑ Other exemptions: _____

H. Please indicate any statutory basis for excusal from jury service.

- ❑ Public necessity
- ❑ Medical hardship
- ❑ Financial hardship
- ❑ Extreme inconvenience
- ❑ Other basis: _____

3. Voir Dire Procedures and Practices

A. Has the state developed a standardized questionnaire for use in voir dire? Y / N
If yes, where can we obtain a copy? _____

Has this questionnaire been implemented on a statewide basis, on a local basis, or by individual judge?
- ❑ Statewide implementation
- ❑ Local implementation
- ❑ Individual judge implementation

B. Under state law, are juror responses to the Qualification Questionnaire a public record that may be made available to parties for voir dire purposes? Y / N
If yes, please indicate the source of legal authority: _____

C. Under state law, who is permitted to question prospective jurors?

	Criminal	Civil
❑ Judge only, no attorney participation	☐	☐
❑ Judge only, attorneys provide suggested written questions	☐	☐
❑ Judge primarily with limited oral questioning by attorneys	☐	☐
❑ Judge and attorney equally	☐	☐
❑ Attorney primarily with limited judge participation	☐	☐
❑ Attorney only	☐	☐

If attorney only, is the judge present for voir dire? Y / N

D. What grounds are recognized in positive law (e.g., statute, court rule, case law, administrative order) for removing prospective jurors from the venire for cause? Please cite relevant authority.
- ❑ Personal relationship to parties, attorneys, or witnesses_____
- ❑ Personal knowledge of case _____
- ❑ Personal or family experience with crime or civil claim _____
- ❑ Exposure to media reports _____
- ❑ Attitudes/bias regarding parties _____
- ❑ Attitudes/bias regarding police _____
- ❑ Attitudes/bias regarding case characteristics _____
- ❑ Hardship _____
- ❑ Other: _____

E. How many peremptory challenges are allotted to each side?

	State/Plaintiff	Defendant	Alternates	Multiple parties?
Capital Felony:	_____	_____	_____	_____
Felony:	_____	_____	_____	_____
Misdemeanor	_____	_____	_____	_____
Civil:	_____	_____	_____	_____

4. Trial Procedures and Practices

Please indicate whether the following procedures or practices are required, permitted, or prohibited in your state and provide the legal authority (e.g., statute, court rule, court opinion) or indicate its absence.

				Authority (indicate none, if applic)
A. **Juror note taking**				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
B. Juror submission of questions to witnesses				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
C. Juror discussion before deliberations				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
D. Preliminary instructions on law				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
E. Final instructions before closing argument				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
F. Final instructions after closing argument				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____
G. Interim commentary by counsel				
	❑ Required	□ civil	□ criminal	_____
	❑ Permitted	□ civil	□ criminal	_____
	❑ Prohibited	□ civil	□ criminal	_____

5. Jury Deliberations

Please indicate whether the following procedures or practices are required, permitted, or prohibited in your state and provide the legal authority (e.g., statute, court rule, court opinion) or indicate its absence.

A. Guidance on conducting deliberations

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

B. Pattern instructions mandated by state

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

C. Written instructions provided

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

D. Alternates participate in deliberations

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

E. Sequestration

- ❑ Required □ civil □ criminal _____
- ❑ Permitted □ civil □ criminal _____
- ❑ Prohibited □ civil □ criminal _____

6. **Special Topics**

A. Please provide any state statutes, court rules, policies, or summaries developed or implemented to assist local courts in managing notorious trials.

_____

_____

_____

B. Please provide any statewide statutes, court rules, policies or procedures exist to protect juror privacy during jury selection, during trial, and after trial.

_____

_____

_____

C. Please describe any resources or programs that the state makes available to local courts to address instances of juror stress.

_____

_____

_____

D. Do juries sentence defendants convicted of non-capital crimes? Y / N
If yes, describe the trial process (e.g., bifurcated, not bifurcated), evidence that is admissible for the jury's consideration including sentencing guidelines, and the standards for judicial review or modification of the sentence.

_____

_____

_____

E. Is capital punishment authorized in your state? Y / N
If yes, please provide specific statutes, court rules, procedures, policies, or summaries concerning the conduct of capital jury trials.

_____

_____

_____

Please send completed responses to:

Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us

National Program to Increase Citizen Participation in Jury Service

State of the States
Local Court Survey

Court: _____ **Date: _____**
County in which court is located:
State:

1. Current Status of Local Jury Improvement/Jury Reform Efforts

A. Is there currently or has there been a jury improvement/reform effort in this court in the past five years? Yes / No

If yes, please describe how this effort has been implemented and the contact information for the person organizing this effort.

_____

_____

_____

B. Is there a local court committee or office concerned with managing or overseeing jury management? Yes / No

If yes, please describe the committee composition (e.g., trial judges, court staff, lawyers, citizens) and contact information for the committee chairperson.

_____

_____

_____

1. Please indicate any current or ongoing jury improvement efforts in this court.
   - ❑ Improve the representation in jury pool
   - ❑ Improve jury yields
   - ❑ Decrease incidence of non-respondents
   - ❑ Improve jury facilities
   - ❑ Upgrade jury system technology
   - ❑ Improve juror utilization
   - ❑ Improve juror comprehension (in-court reforms)
   - ❑ Improve jury instructions
   - ❑ Improve public outreach
   - ❑ Other _____

2. Jury Management and Administration

A. Is the master jury list for this court compiled locally or at the state level?
- ❑ Local
- ❑ State

B. What source lists are used to compile the master jury list?
- ❑ Registered Voter
- ❑ Licensed Driver
- ❑ State Tax Rolls
- ❑ Unemployment
- ❑ Public Assistance
- ❑ Other: _____

C. What are jurors paid in this court?
- ❑ Flat daily rate of $ _____
- ❑ Graduated rate of $ _____ for the first day; $ _____ for _____ days; $ _____ to the completion of service
- ❑ Reimbursement for mileage/travel at $ _____
- ❑ Other juror compensation (e.g., reimbursement for child case) $ _____

D. What is the term of jury service? _____

_____

E. Are jurors summonsed and qualified simultaneously or in two separate steps?
- ❑ Qualification questionnaires and jury summonses are mailed simultaneously (one-step process) in this jurisdiction.
- ❑ Qualification questionnaires are first sent to prospective jurors. Summonses are then sent only to qualified individuals (two-step process) in this jurisdiction.

F. Who decides juror requests to be excused from jury service and what criteria are used for deciding these requests?
- ❑ Judge _____

_____

- ❑ Jury Administrator _____

_____

- ❑ Other _____

_____

G. How does the court follow-up on persons who fail to respond to summonses or fail to appear for service?
- ❑ Follow-up or Second notice
- ❑ Order to Show Cause
- ❑ Fines (Range $_____)
- ❑ Other
- ❑ None

H. Approximately how many jury summonses are mailed each year? _____

I. Please describe the percentage of prospective jurors who are:

Summonses returned as undeliverable	_____%
Disqualified	_____%
Exempted	_____%
Excused for hardship	_____%
Deferred to another term	_____%
Non-response / FTA	_____%
Qualified and available to serve	_____%

SHOULD TOTAL TO 100%

J. Approximately how many juries are impaneled each year?

Felony:	_____
Misdemeanor	_____
Civil	_____
Other	_____

K. Does your court routinely screen prospective jurors for English language proficiency? Yes / No

If yes, please describe the procedures used?

_____

_____

_____

L. What accommodations does your court provide for prospective jurors with disabilities?
- ❑ Assisted language devices
- ❑ Sign language interpreters
- ❑ Wheelchair ramps
- ❑ Other (please describe) _____

_____

M. Please indicate the technologies that support your jury system.

Base System:

- ❑ Jury Systems, Inc. (Jury + / Jury + Next Generation)
- ❑ ACS Government Systems
- ❑ Other commercial software (please specify): _____
- ❑ Software developed in-house

Verification of qualification information
- ❑ First-class mail
- ❑ Interactive Voice Response (IVR) interface
- ❑ Internet interface
- ❑ Other (please specify): _____

Reporting technology
- ❑ Jurors receive summons only
- ❑ Jurors receive postcard informing them when to report
- ❑ Jurors receive automated telephone call informing them when to report
- ❑ Jurors call in, listen to telephone message informing them when to report
- ❑ Jurors log on to court webpage with information about when to report
- ❑ Other (please specify): _____

Orientation
- ❑ Jurors receive live orientation at courthouse
- ❑ Jurors receive informational brochure/booklet with summons
- ❑ Jurors can read orientation materials at court website
- ❑ Jurors can view orientation videotape online at court website
- ❑ Jurors can view orientation videotape on local cable television
- ❑ Jurors can view orientation videotape at local public library
- ❑ Other (please specify): _____

3. Voir Dire Procedures and Practices

A. What kinds of juror information are routinely available to attorneys prior to trial?
- ❑ Name
- ❑ Street Address
- ❑ Zip code or Neighborhood designation only
- ❑ Qualification information
- ❑ Marital status
- ❑ Occupation / Employer
- ❑ Number and ages of minor children
- ❑ Other: _____

B. Are attorneys routinely given access to jurors' qualification questionnaires? Y / N

C. Do prospective jurors complete a standardized questionnaire for voir dire purposes?
Y / N
If yes, where can we obtain a copy? _____

D. What is the typical length of voir dire in hours?
Capital Felony: _____
Non-capital felony: _____
Misdemeanor: _____
Civil: _____

E. What local court rules, policies, or procedures exist to protect juror privacy during jury selection, during trial, or after completing jury service?

_____

_____

Name and Title of Survey Respondent: _____

Telephone: _____ Facsimile: _____

E-Mail: _____

Please send completed responses to:

Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us

National Program to Increase Citizen Participation in Jury Service

State of the States
Judge & Lawyer Survey

1. Identification Information
   A. I am a:
      - ❑ State trial judge
      - ❑ Federal trial judge
      - ❑ Attorney
        - o primarily criminal prosecution
        - o primarily criminal defense
        - o primarily civil plaintiff
        - o primarily civil defense
      - ❑ Other legal practitioner

   B. Please indicate the location of the court (county, state) in which you preside (judge) or most often practice (attorney):

   _____

   C. Please indicate the type of case in your most recent jury trial.
      - ❑ Capital felony
      - ❑ Felony
      - ❑ Misdemeanor
      - ❑ Civil
      - ❑ Other jury trial

      If you are an attorney, please indicate who you represented.
      - ❑ Prosecution / Plaintiff
      - ❑ Defendant

      What was the date(s) of trial? _____

      Where was the trial held (county, state)?_____
      - ❑ State court
      - ❑ Federal court

      On a scale of 1 to 7, how complex was the evidence in that trial?
      Not at all complex 1 2 3 4 5 6 7 Very complex

      On a scale of 1 to 7, how complex was the law in that trial?
      Not at all complex 1 2 3 4 5 6 7 Very complex

For the following questions, please indicate the practices, procedures, and techniques employed in your most recent jury trial.

2. Voir Dire

A. How were questions posed to prospective jurors in the venire? (check all that apply)

- ❑ Oral questions posed to full panel
- ❑ Oral questions posed to individual jurors in jury box
- ❑ Oral questions posed to individual jurors at sidebar, in chambers, or otherwise outside the hearing of other jurors
- ❑ Written responses to standardized questionnaire
- ❑ Written responses to a case specific questionnaire
  When was the questionnaire given to prospective jurors?
  - o Prior to reporting for service
  - o Jury assembly room before jury selection
  - o In courtroom before questioning

B. What method was used to conduct the voir dire?

- ❑ **Strike & Replace Method**: Twelve or more prospective jurors are seated in the jury box and examined by judge and/or attorneys. Judge rules on challenges for cause. Attorneys exercise peremptory challenges. Seats that are vacated by struck jurors are refilled by random selection.
- ❑ **Six/Four Pack Method:** Similar to Strike & Replace Method except prospective jurors are questioned in groups of six or four until the full number of jurors is reached.
- ❑ **Struck:** The entire panel is examined by the judge and/or attorneys and the judge rules on challenges for cause and hardship. Prospective jurors equal to the number of impaneled jurors, alternates and peremptory challenges is seated. The attorneys exercise peremptory challenges alternately until the final panel is selected and sworn.
- ❑ **Individual:** Prospective jurors are examined individually outside the hearing of other jurors (e.g., at sidebar or in chambers). The judge rules on challenges for cause after each juror is questioned. After questioning outside the presence of other jurors, attorneys may be required to exercise peremptory challenges at the completion of each examination.
- ❑ **Other method (**please describe**):**

_____

_____

_____

_____

C. Who questioned the jurors during the voir dire?

- ❑ Judge only
- ❑ Judge primarily with limited attorney follow-up
- ❑ Judge and attorney equally
- ❑ Attorney primarily with limited judge
- ❑ Attorney only
  - o If attorney only, was the judge present for the voir dire? Y / N

▪ **How long was the voir dire?** _____ **(hours)**

- **Please indicate which of the following trial procedures or practices were employed in your most recent jury trial**
  - ❑ Jurors were permitted to take notes
  - ❑ Jurors were provided with writing utensils and notepaper for taking notes
  - ❑ Jurors were provided with a notebook containing one or more of the following: a glossary of unfamiliar terms, names and short biographies of witnesses, copies of documentary evidence or exhibits, preliminary or final instructions, and notepaper for taking notes
  - ❑ Jurors were permitted to submit questions in writing to witnesses
  - ❑ Jurors were permitted to discuss the evidence among themselves prior to deliberations
  - ❑ Jurors were given substantive instructions on the law prior to the evidentiary portion of the trial
  - ❑ Jurors were instructed on the law before closing argument
  - ❑ Jurors were instructed on the law after closing argument
  - ❑ Attorneys were permitted to provide interim summation to the jury during the evidentiary portion of the trial

Please describe any other procedures or practices employed during your most recent jury trial that were intended to improve juror comprehension, attention levels, performance, or satisfaction with jury service during trial.

_____

_____

_____

_____

Jury Deliberations

4. Please indicate which of the following trial procedures or practices were employed in your most recent jury trial.

- ❑ Jurors were given guidance on how to conduct deliberations
- ❑ At least one written copy of the final jury instructions was provided to the jury
- ❑ All jurors were provided with a written copy of the final jury instructions
- ❑ Alternates were permitted to participate in deliberations
- ❑ Jurors were sequestered for deliberations

How long were the jury deliberations? _____ (hours)

Please describe any other procedures or practices employed during your most recent jury trial that were intended to improve juror comprehension, attention levels, performance, or satisfaction with jury deliberations.

_____

_____

Special Issues

5. Please indicate if any of the following issues arose in your most recent jury trial and what procedures, if any, the court employed to address those issues.

- ❑ Notorious trial / High profile trial: _____

  _____

- ❑ Capital jury trial: _____

  _____

- ❑ Juror stress: _____

  _____

- ❑ Jury sentencing in non-capital trial: _____

  _____

Please send to Chris Connelly
Court Research Analyst
The Center for Jury Studies
National Center for State Courts
2425 Wilson Blvd Suite 350
Arlington, VA 22201
cconnelly@ncsc.dni.us

APPENDIX C: STATE-BY-STATE RESPONSE RATES

National Program to Increase Citizen Participation in Jury Service

State	# Surveys	# Counties	% State Population
Alabama	8	8	8
Alaska	9	9	29
Arizona	12	12	97
Arkansas	30	30	56
California	52	52	98
Colorado	21	21	64
Connecticut	1	8	97
Delaware	3	3	100
District of Columbia	1	1	100
Florida	14	30	53
Georgia	60	60	53
Hawaii	4	4	100
Idaho	10	10	55
Illinois	87	87	97
Indiana	79	79	95
Iowa	28	41	52
Kansas	10	17	20
Kentucky	90	90	57
Louisiana	51	56	92
Maine	12	12	83
Maryland	22	22	95
Massachusetts	14	14	100
Michigan	27	29	73
Minnesota	17	17	66
Mississippi	33	38	38
Missouri	67	67	53
Montana	34	34	53
Nebraska	57	57	41
Nevada	9	17	100
New Hampshire	7	7	85
New Jersey	21	21	100
New Mexico	8	12	60
New York	58	58	99
North Carolina	8	8	17
North Dakota	30	30	76
Ohio	5	5	14
Oklahoma	14	14	10
Oregon	22	22	82
Pennsylvania	25	26	64
Rhode Island	1	1	36
South Carolina	19	19	45
South Dakota	9	65	92
Tennessee	12	32	43
Texas	105	112	70
Utah	16	16	91
Virginia	51	51	42
Washington	23	23	87
West Virginia	34	34	70
Wisconsin	56	56	64
Wyoming	6	6	41

APPENDIX D: NOTES ON METHODOLOGY USED TO CALCULATE NATIONAL STATISTICS

National and statewide statistics were generated from Local Court Survey data and Judge and Attorney Survey data in order to glimpse a snapshot of the nation as a whole and to compare the results from an individual state to those of the nation at large. Depending on the format of the data, national and statewide statistics were calculated in several ways.

The easiest statewide or national statistic to compute is a frequency or an average. For example, if you wanted to know the median voir dire time for Virginia State Courts you would select the subset of Judge and Attorney Surveys submitted by Virginia State Courts and compute the median. For the national percentage of state courts using a one-step qualification and summoning process, you would run a frequency on the qualification and summoning variable for all Local Court Surveys.

Some of the national and statewide statistics from the Local Court Survey used a more complicated method to aggregate individual surveys. The examples below will demonstrate how the Local Court Survey was aggregated at the state level to create statewide statistics which were then aggregated to provide national statistics. Fifty-one counties in Virginia submitted Local Court Surveys, and these will be used for the example calculations. The populations of these 51 counties were obtained from the 2000 U.S. Census American Factfinder website (http://factfinder.census.gov/home/saff/main.html?_lang=en), added together, and considered the "represented population". The percent of the state represented in the survey is the represented population divided by the total population of the state.

Example 1:
Given from Local Court Surveys:
Sum of 51 VA Local Court Surveys county populations: 2,994,313
Year 2000 Population of VA (from US Census): 7,078,515

Calculated:
Percent Represented: 2,994,313 / 7,078,515 *100 = 42.3 %

The Local Court Survey asked each locality to approximate the number of jury summonses mailed each year and the number of felony, misdemeanor, civil, and "other" juries impaneled each year. The numbers provided by the local courts were summed for the represented population of the state (or nation) and then extrapolated to provide an estimate of the entire state's (or nation's) annual summonses and jury trials. See the example below.

Example 2:
Given from Local Court Surveys
Sum of 51 VA Local Court Surveys No. of Summonses Mailed: 127,990
Sum of 51 VA Local Court Surveys No. of Felony Juries Impaneled: 779
Sum of 51 VA Local Court Surveys No. of Misdemeanor Juries Impaneled: 304
Sum of 51 VA Local Court Surveys No. of Civil Juries Impaneled: 624

Sum of 51 VA Local Court Surveys No. of Other Juries Impaneled: 19
Sum of 51 VA Local Court Surveys Total No. of Juries Impaneled: 1,726

Calculated:
Estimated No. of Summonses mailed in VA: 127,990 / 0.423 = 302,577
Estimated No. of Felony Juries Impaneled in VA: 779 / 0.423 = 1,842
Estimated No. of Misdemeanor Juries Impaneled in VA: 304 / 0.423 = 719
Estimated No. of Civil Juries Impaneled in VA: 624 / 0.423 = 1,475
Estimated No. of Other Juries Impaneled in VA: 19 / 0.423 = 45
Estimated Total No. of Juries Impaneled in VA: 1,726 / 0.423 = 4,080
Estimated Trial Rate per 100,000 Population: 4,080 / (7,078,515 / 100,000) = 57.6

The estimated number of *jurors* impaneled on a statewide or national basis was calculated from the estimated number of *juries* impaneled. Based on the minimum number of jurors required for each state by statute and depending on the trial type, the number of jurors was computed. Note that for the "other" trial category, 12 jurors were assumed across all states. Due to the large variation in number of jurors required by trial type (eminent domain, family law, juvenile, etc.) and across states, it was simplest to assume 12 jurors in all cases even though this number may be over-inclusive.

Example 3:
Given by state statute:
No. of Jurors Required by VA for a Felony Trial: 12
No. of Jurors Required by VA for a Misdemeanor Trial: 7
No. of Jurors Required by VA for a Civil Trial: 7
No. of Jurors for an Other Trial: 12
Year 2000 VA Population Age 18 and greater (from US Census): 5,340,253

Calculated:
Estimated Felony Jurors Impaneled in VA: 1,842 * 12 = 22,104
Estimated Misdemeanor Jurors Impaneled in VA: 719 * 7 = 5,033
Estimated Civil Jurors Impaneled in VA: 1,475 * 7 = 10,325
Estimated Other Jurors Impaneled in VA: 45 * 12 = 540
Estimated Total Jurors Impaneled in VA: Sum of above = 38,002
Percent of Adult Population Impaneled: 38,002 / 5,340,253 * 100 = 0.7 %

APPENDIX E: STATE TABLES ON KEY JURY OPERATION AND PRACTICE MEASUREMENTS

TABLE 1: VOIR DIRE LENGTH IN NON-CAPITAL FELONY TRIALS

TABLE 2: VOIR DIRE LENGTH IN CIVIL TRIALS

TABLE 3: WHO CONDUCTS VOIR DIRE

TABLE 4: ATTORNEY ACCESS TO JUROR INFORMATION BEFORE VOIR DIRE

TABLE 5: ATTORNEY ACCESS TO JUROR QUALIFICATION INFORMATION BEFORE VOIR DIRE

TABLE 6: JURORS EXAMINED INDIVIDUALLY AT SIDEBAR OR IN CHAMBERS DURING VOIR DIRE

TABLE 7: JURORS PERMITTED TO TAKE NOTES

TABLE 8: JURORS PROVIDED WITH WRITING MATERIALS

TABLE 9: JURORS PERMITTED TO SUBMIT QUESTIONS TO WITNESSES

TABLE 10: JURORS INSTRUCTED BEFORE CLOSING ARGUMENTS

TABLE 11: JURY PROVIDED WITH AT LEAST ONE COPY OF WRITTEN INSTRUCTIONS

TABLE 12: ALL JURORS PROVIDED WITH WRITTEN INSTRUCTIONS

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Length of Voir Dire for Felony Trials

Median length of voir dire in hours for felony trials.

State	Sample Size	Median Length (Hr)
South Carolina	32	0.5
Alabama	27	1.0
Delaware	12	1.0
Maine	15	1.0
New Hampshire	23	1.0
Virginia	118	1.0
West Virginia	28	1.3
Arkansas	22	1.5
Kentucky	74	1.5
Maryland	178	1.5
Massachusetts	70	1.5
Michigan	166	1.5
Mississippi	50	1.5
New Mexico	51	1.5
Pennsylvania	149	1.5
Wisconsin	7	1.5
Florida	186	2.0
Georgia	105	2.0
Indiana	112	2.0
Iowa	58	2.0
Kansas	56	2.0
Montana	21	2.0
Nebraska	43	2.0
North Carolina	133	2.0
North Dakota	49	2.0
Ohio	71	2.0
Oregon	117	2.0
Rhode Island	21	2.0
South Dakota	75	2.0
Tennessee	73	2.0
Texas	148	2.0
Utah	166	2.0
Vermont	29	2.0
Washington	71	2.0
Wyoming	25	2.0
Colorado	57	2.5
Idaho	14	2.5
Oklahoma	70	2.5
Arizona	90	3.0
Hawaii	24	3.0
Illinois	145	3.0
Minnesota	110	3.0
Missouri	97	3.0
Nevada	43	3.0
DC	60	3.5
Alaska	67	4.0
California	167	4.0
Louisiana	93	4.0
New Jersey	48	4.5
New York	148	5.0
Connecticut	28	10.0

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Length of Voir Dire for Civil Trials

Median length of voir dire in hours for civil trials.

State	Sample Size	Median Length (Hr)
South Carolina	42	0.5
Delaware	24	0.8
Virginia	91	0.8
Arkansas	21	1.0
Maine	43	1.0
Maryland	113	1.0
Massachusetts	87	1.0
New Hampshire	17	1.0
Vermont	13	1.0
West Virginia	56	1.0
Rhode Island	17	1.3
DC	37	1.5
Kentucky	107	1.5
Oregon	210	1.5
Tennessee	91	1.5
Michigan	402	1.7
Alabama	29	2.0
Arizona	58	2.0
Colorado	60	2.0
Georgia	202	2.0
Indiana	130	2.0
Iowa	60	2.0
Kansas	41	2.0
Minnesota	180	2.0
Mississippi	47	2.0
Missouri	222	2.0
Montana	32	2.0
Nebraska	63	2.0
Nevada	86	2.0
New Jersey	115	2.0
New Mexico	33	2.0
Ohio	174	2.0
Oklahoma	63	2.0
Pennsylvania	544	2.0
South Dakota	96	2.0
Texas	313	2.0
Utah	160	2.0
Wisconsin	93	2.0
Wyoming	19	2.0
North Dakota	62	2.3
Florida	88	2.5
Idaho	30	2.5
Hawaii	40	3.0
Illinois	519	3.0
Louisiana	54	3.0
New York	216	3.0
North Carolina	67	3.0
Washington	77	3.0
Alaska	102	3.8
California	184	4.0
Connecticut	137	16.0

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Who Questioned the Jurors During Voir Dire

Mean score from most judge-dominated voir dire (scoring a 1) to most attorney-dominated voir dire (scoring a 5) for all jury trials.

State	Sample Size	Average Score
South Carolina	83	1.05
Maine	65	1.19
Delaware	41	1.20
Massachusetts	197	1.28
New Jersey	168	1.35
Maryland	347	1.75
Utah	406	1.92
New Hampshire	45	2.00
DC	107	2.08
Arizona	161	2.27
California	446	2.57
Nevada	140	2.79
Illinois	781	2.84
West Virginia	90	2.96
Michigan	799	3.06
Virginia	226	3.08
Pennsylvania	748	3.09
Colorado	176	3.11
Oklahoma	173	3.12
Wisconsin	179	3.24
Idaho	68	3.28
Mississippi	126	3.37
Hawaii	69	3.40
Minnesota	345	3.50
Ohio	255	3.51
New Mexico	97	3.55
New York	450	3.55
Kentucky	211	3.56
Louisiana	159	3.61
Florida	405	3.62
Nebraska	150	3.64
Rhode Island	62	3.66
Arkansas	45	3.68
Washington	165	3.71
Alabama	57	3.73
Indiana	274	3.73
Tennessee	181	3.85
Kansas	111	3.91
Oregon	393	3.93
North Dakota	154	3.94
Georgia	382	3.96
Montana	66	3.98
North Carolina	245	3.98
Wyoming	47	3.98
Alaska	225	4.03
Texas	574	4.09
South Dakota	213	4.13
Iowa	168	4.16
Missouri	348	4.19
Vermont	57	4.30
Connecticut	170	4.54

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Local Court Survey Results

Center for Jury Studies

Access to Juror Information

Mean score for 4 possible categories of "other juror information" that attorneys are given access to prior to trial: marital status, occupation, children, and other. These are less typical than other types of juror information such as name, address, and

State	Sample Size	Mean Score
California	52	0.15
Alaska	9	0.56
North Carolina	8	0.63
Oklahoma	15	0.80
Colorado	21	0.81
Utah	16	0.81
DC	1	1.00
Florida	14	1.07
New Jersey	21	1.10
Alabama	8	1.13
Louisiana	51	1.20
Georgia	60	1.47
Virginia	51	1.53
Mississippi	36	1.58
Maine	12	2.08
Missouri	67	2.13
Kentucky	90	2.16
Nebraska	57	2.16
Ohio	5	2.20
Oregon	22	2.27
Texas	105	2.35
Iowa	28	2.43
Pennsylvania	25	2.48
Maryland	22	2.50
South Dakota	9	2.56
Illinois	87	2.72
North Dakota	30	2.73
New Mexico	8	2.75
Tennessee	12	2.75
Nevada	9	2.78
Washington	23	2.78
South Carolina	19	2.79
Arizona	12	2.83
Kansas	10	2.90
Montana	34	2.91
Arkansas	30	2.93
Michigan	27	2.96
Connecticut	1	3.00
Delaware	3	3.00
West Virginia	34	3.00
Idaho	10	3.10
Indiana	79	3.13
Wyoming	6	3.17
Minnesota	17	3.41
Hawaii	4	3.50
New Hampshire	7	3.57
Massachusetts	14	4.00
New York	58	n/a
Rhode Island	1	n/a
Vermont	0	n/a
Wisconsin	56	n/a

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Local Court Survey Results

Center for Jury Studies

Access to Jurors' Qualification Questionnaires

Percent of local court respondents that routinely give attorneys access to jurors' qualification questionnaires.

State	Sample Size	% of Courts
Delaware	3	0.0
Massachusetts	14	0.0
New York	58	0.0
California	52	2.8
New Jersey	21	4.8
Maryland	22	9.1
Utah	16	13.3
Minnesota	17	17.6
Arizona	12	25.0
Virginia	51	28.0
North Carolina	8	28.6
Oklahoma	15	36.4
Alaska	9	37.5
Louisiana	51	38.6
Idaho	10	44.4
Georgia	60	50.0
Florida	14	55.6
Alabama	8	60.0
Ohio	5	60.0
Pennsylvania	25	61.9
Oregon	22	63.6
Illinois	87	72.0
Michigan	27	73.1
West Virginia	34	73.5
South Carolina	19	73.7
Colorado	21	75.0
North Dakota	30	75.9
Iowa	28	81.5
Washington	23	87.0
South Dakota	9	87.5
Mississippi	36	87.9
Kansas	10	88.9
Nevada	9	88.9
Texas	105	90.4
Tennessee	12	91.7
Missouri	67	92.3
Nebraska	57	92.9
Kentucky	90	96.5
Arkansas	30	100.0
Connecticut	1	100.0
Hawaii	4	100.0
Indiana	79	100.0
Maine	12	100.0
Montana	34	100.0
New Hampshire	7	100.0
New Mexico	8	100.0
Wyoming	6	100.0
DC	1	n/a
Rhode Island	1	n/a
Vermont	0	n/a
Wisconsin	56	n/a

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Jurors Questioned at Sidebar or in Chambers

Percent of respondents who reported that jurors were questioned individually at sidebar or in chambers, outside the range of hearing of other jurors, during voir dire.

State	Sample Size	% of Respondents
Rhode Island	62	66.1
Maryland	347	63.7
Connecticut	170	62.9
Massachusetts	197	60.4
Hawaii	69	58.0
DC	107	57.9
New Hampshire	45	55.6
Maine	65	53.8
New Jersey	168	53.0
Pennsylvania	748	52.9
Alaska	225	51.1
West Virginia	90	50.0
Wyoming	47	44.7
Utah	406	44.3
Delaware	41	43.9
Texas	574	43.7
Kentucky	211	41.7
New York	450	40.2
Arizona	161	38.5
Louisiana	159	35.8
Colorado	176	35.2
Missouri	348	34.2
California	446	33.2
Florida	405	32.3
Vermont	57	31.6
Montana	66	30.3
Alabama	57	28.1
New Mexico	97	26.8
Arkansas	45	26.7
Illinois	781	26.6
Iowa	168	24.4
Wisconsin	179	24.0
Mississippi	126	22.2
Oklahoma	173	22.0
Georgia	382	20.2
South Carolina	83	19.3
Idaho	68	19.1
Virginia	226	19.0
Ohio	255	17.6
Kansas	111	17.1
Nevada	140	17.1
Nebraska	150	16.7
Washington	165	15.8
Minnesota	345	13.9
South Dakota	213	13.1
Indiana	274	12.0
North Dakota	154	11.0
Tennessee	181	8.3
Michigan	799	8.0
Oregon	393	4.8
North Carolina	245	2.4

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Jurors Permitted to Take Notes

Percent of respondents who reported that jurors were permitted to take notes.

State	Sample Size	% of Respondents
Wyoming	47	95.7
Arkansas	45	95.6
Arizona	161	95.0
Indiana	274	94.9
Colorado	176	92.6
Oregon	393	92.1
Minnesota	345	91.9
California	446	91.5
Alabama	57	91.2
Idaho	68	91.2
Maryland	347	90.5
Utah	406	90.4
Hawaii	69	88.4
Iowa	168	88.1
New Mexico	97	87.6
Illinois	781	87.3
Washington	165	87.3
Alaska	225	87.1
DC	107	86.9
Montana	66	86.4
Wisconsin	179	86.0
Nevada	140	83.6
Georgia	382	81.9
South Dakota	213	80.8
Tennessee	181	77.3
North Dakota	154	76.6
Kentucky	211	76.3
Massachusetts	197	67.0
North Carolina	245	64.9
Virginia	226	59.7
Vermont	57	59.6
Mississippi	126	57.1
Florida	405	55.1
Ohio	255	53.7
Texas	574	53.0
Michigan	799	52.1
Oklahoma	173	50.3
Connecticut	170	47.6
Delaware	41	46.3
Pennsylvania	748	46.1
West Virginia	90	44.4
Missouri	348	40.2
New Jersey	168	39.9
South Carolina	83	38.6
Kansas	111	36.0
Louisiana	159	34.6
New York	450	32.7
Nebraska	150	24.7
Maine	65	23.1
New Hampshire	45	20.0
Rhode Island	62	19.4

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Jurors Provided with Notetaking Materials

Percent of respondents who reported that jurors were provided with writing utensils and notepaper for taking notes.

State	Sample Size	% of Respondents
Wyoming	47	95.7
Indiana	274	95.3
Arizona	161	94.4
Minnesota	345	93.9
Oregon	393	93.9
California	446	93.7
Maryland	347	93.7
Arkansas	45	93.3
Nevada	140	92.1
Colorado	176	91.5
Washington	165	90.3
Hawaii	69	89.9
Iowa	168	89.3
Alaska	225	88.9
DC	107	88.8
Illinois	781	88.6
Idaho	68	88.2
Montana	66	84.8
Utah	406	82.3
New Mexico	97	81.4
Georgia	382	80.4
South Dakota	213	77.9
North Dakota	154	72.7
Tennessee	181	72.4
Massachusetts	197	66.5
Kentucky	211	64.9
Vermont	57	56.1
Ohio	255	53.7
Florida	405	52.6
Pennsylvania	748	45.9
Alabama	57	45.6
Connecticut	170	45.3
Michigan	799	43.3
West Virginia	90	42.2
Delaware	41	41.5
North Carolina	245	40.0
Oklahoma	173	39.9
Virginia	226	39.8
Mississippi	126	37.3
New Jersey	168	36.9
Missouri	348	36.5
Kansas	111	36.0
Louisiana	159	34.0
Texas	574	32.8
New York	450	26.4
Wisconsin	179	25.7
Nebraska	150	24.7
South Carolina	83	22.9
Maine	65	21.5
Rhode Island	62	21.0
New Hampshire	45	17.8

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Juror Questions to Witnesses

Percent of respondents who reported that jurors were permitted to submit questions in writing to witnesses.

State	Sample Size	% of Respondents
Arizona	161	91.3
Indiana	274	86.1
Colorado	176	62.5
New Mexico	97	58.8
New Jersey	168	35.1
Wyoming	47	34.0
Washington	165	33.9
Oregon	393	28.0
Wisconsin	179	27.4
Vermont	57	26.3
Kentucky	211	24.6
Utah	406	24.4
Idaho	68	23.5
Hawaii	69	23.2
California	446	22.9
DC	107	22.4
Tennessee	181	21.5
Nevada	140	18.6
Massachusetts	197	18.3
Florida	405	14.6
Alaska	225	14.2
Ohio	255	14.1
Arkansas	45	13.3
South Dakota	213	12.2
Michigan	799	12.1
Virginia	226	11.5
Maryland	347	9.2
New Hampshire	45	8.9
Nebraska	150	6.7
Montana	66	6.1
New York	450	4.9
Rhode Island	62	4.8
Connecticut	170	4.7
Alabama	57	3.5
North Dakota	154	3.2
Oklahoma	173	2.9
Kansas	111	2.7
Minnesota	345	2.6
West Virginia	90	2.2
Georgia	382	2.1
Texas	574	1.7
Maine	65	1.5
Iowa	168	1.2
Missouri	348	1.1
Illinois	781	1.0
Pennsylvania	748	0.8
Louisiana	159	0.6
Delaware	41	0.0
Mississippi	126	0.0
North Carolina	245	0.0
South Carolina	83	0.0

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

Jurors Instructed Before Closing Arguments

Percent of respondents who reported that jurors were instructed on the law before closing arguments.

State	Sample Size	% of Respondents
Arkansas	45	93.3
West Virginia	90	91.1
Kansas	111	90.1
Montana	66	89.4
Oklahoma	173	87.3
Virginia	226	87.2
New Mexico	97	86.6
Washington	165	84.8
Maryland	347	84.4
Colorado	176	81.8
Iowa	168	80.4
Idaho	68	79.4
South Dakota	213	79.3
Utah	406	77.8
Texas	574	77.2
Wyoming	47	76.6
Nevada	140	73.6
Missouri	348	70.7
Kentucky	211	70.6
Wisconsin	179	70.4
California	446	69.7
Arizona	161	67.1
Mississippi	126	64.3
Hawaii	69	63.8
Minnesota	345	50.7
North Dakota	154	48.7
DC	107	42.1
Delaware	41	39.0
Nebraska	150	33.3
Maine	65	32.3
Alaska	225	31.6
Tennessee	181	28.7
Rhode Island	62	25.8
Oregon	393	20.6
Indiana	274	18.6
New Hampshire	45	17.8
Ohio	255	17.6
Pennsylvania	748	9.8
Illinois	781	9.7
Florida	405	9.6
New Jersey	168	8.9
Michigan	799	8.4
South Carolina	83	8.4
Louisiana	159	7.5
Alabama	57	7.0
Georgia	382	6.5
New York	450	5.6
Massachusetts	197	4.6
North Carolina	245	4.5
Connecticut	170	3.5
Vermont	57	3.5

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

At Least One Copy of Jury Instructions

Percent of respondents who reported that at least one written copy of the final jury instructions was provided to jurors.

State	Sample Size	% of Respondents
Montana	66	100.0
Wyoming	47	100.0
Iowa	168	98.8
Kentucky	211	98.6
New Mexico	97	97.9
Idaho	68	97.1
North Dakota	154	96.8
Kansas	111	96.4
Arizona	161	96.3
Illinois	781	95.5
Wisconsin	179	95.5
Delaware	41	95.1
Missouri	348	94.8
Virginia	226	94.7
Texas	574	94.6
California	446	94.2
Hawaii	69	94.2
Indiana	274	94.2
South Dakota	213	93.9
Washington	165	93.9
Colorado	176	93.8
Utah	406	93.6
Arkansas	45	93.3
Nebraska	150	93.3
Alaska	225	91.6
Minnesota	345	91.6
Nevada	140	90.0
New Hampshire	45	88.9
Vermont	57	87.7
DC	107	86.9
Oklahoma	173	86.7
Tennessee	181	86.7
Ohio	255	85.1
Mississippi	126	81.0
Florida	405	72.8
Oregon	393	61.1
West Virginia	90	56.7
Maine	65	44.6
Michigan	799	40.9
Rhode Island	62	38.7
Maryland	347	38.6
North Carolina	245	35.1
Louisiana	159	34.0
Connecticut	170	31.8
Georgia	382	28.0
New Jersey	168	26.2
Massachusetts	197	22.8
South Carolina	83	20.5
Alabama	57	12.3
Pennsylvania	748	11.1
New York	450	10.7

n/a = Not Applicable

National Center for State Courts, 2007

State Rankings of Judge & Attorney Survey Results

Center for Jury Studies

All Jurors Received a Copy of Jury Instructions

Percent of respondents who reported that all jurors received a written copy of the final jury instructions.

State	Sample Size	% of Respondents
Arizona	161	80.7
Indiana	274	77.4
Hawaii	69	72.5
Wyoming	47	70.2
Washington	165	68.5
Colorado	176	67.0
Oklahoma	173	64.2
Iowa	168	61.9
Idaho	68	58.8
Kansas	111	58.6
Vermont	57	57.9
Texas	574	57.0
Alaska	225	55.6
Utah	406	53.7
Kentucky	211	53.6
Nebraska	150	52.0
California	446	49.3
Minnesota	345	46.7
Ohio	255	46.3
Montana	66	45.5
New Mexico	97	45.4
Nevada	140	44.3
Missouri	348	43.4
Tennessee	181	38.7
Florida	405	38.3
New Hampshire	45	35.6
South Dakota	213	34.7
Delaware	41	34.1
North Dakota	154	29.9
Oregon	393	29.5
Virginia	226	28.8
Maine	65	27.7
Mississippi	126	27.0
DC	107	21.5
Rhode Island	62	19.4
Connecticut	170	17.6
North Carolina	245	17.6
Michigan	799	16.8
Illinois	781	15.1
Maryland	347	14.7
Georgia	382	14.1
New Jersey	168	13.7
Massachusetts	197	9.6
West Virginia	90	8.9
Arkansas	45	6.7
South Carolina	83	6.0
Wisconsin	179	5.6
Alabama	57	5.3
New York	450	5.3
Pennsylvania	748	5.1
Louisiana	159	0.6

n/a = Not Applicable

National Center for State Courts, 2007

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Minority and Justice Commission Jury Diversity Task Force

2019 Interim Report

BACKGROUND

On May 24, 2017, the Washington State Minority and Justice Commission ("MJC") and Washington Appleseed co-hosted the annual Supreme Court Symposium ("Symposium") on the topic of jury diversity. Following the Symposium, Chief Justice Mary Fairhurst requested, on behalf of the Court, that MJC further explore the recommendations put forward at the Symposium. MJC created the Jury Diversity Task Force ("Task Force") as a Commission subcommittee and appointed Judge Steve Rosen as chair. The Task Force consisted of the following individuals representing the identified groups:

Ms. Aimee Sutton	Latino/a Bar Association of Washington President; The Marshall Defense Firm
Ms. Angeline Thomas	Washington Appleseed
Ms. Anita Khandelwal	King County Department of Public Defense
Ms. Barbara Serrano	Washington Women Lawyers
Ms. Blanca Rodriguez	Northwest Justice Project
Mr. Chris Gaddis	Pierce County Superior Court Administrator; AWSCA
Mr. Darrell Cochran	Washington State Association for Justice (Civil Plaintiff's Bar)
Mr. David Morales	Northwest Justice Project
Ms. Heidi Percy	Judicial Operations Mngr. Snohomish County Clerk's Office
Ms. Jennifer Creighton	Court Administrator, Thurston County District Court
Judge Linda Coburn	Edmonds Municipal Court; DMCJA; Washington State Minority & Justice Commission
Judge Steve Rosen (Chair)	King County Superior Court
Mr. Justin Bingham	Spokane City Prosecutor
Mr. Michael E. Chait	Washington Defense Trial Lawyers (Civil Defense Bar)
Mr. Morgann Halencak	Jury Manager, Clallam County Superior Court
Ms. Pam Loginsky	Washington Association of Prosecuting Attorneys
Mr. Peter Collins	Seattle University
Representative Javier Valdez	Washington State Legislature
Mr. Sean McAvoy	District Court Executive/Clerk of the Court US. District Court Eastern District of Washington
Senator Manka Dhingra	Washington State Legislature
Mr. Tim Johnson	King County Department of Public Defense
Mr. Todd Bowers	Attorney General's Office
Mr. Tom McBride	Washington Association of Prosecuting Attorneys
Mr. Travis Stearns	Washington Appellate Project
Ms. Vonda Sargent	American Civil Liberties Union

TASK FORCE OBJECTIVE

Examine a range of policy proposals that might have the effect of increasing minority representation on Washington State juries, and make recommendations to MJC about which approaches, if any, to pursue.

TASK FORCE PROCESS

The first full Task Force meeting was held on January 31, 2018. Prior to that meeting, Washington Appleseed circulated a detailed policy memorandum entitled *Tactics to Increase Jury Diversity* ("WA Appleseed memo," attached as Exhibit A). The WA Appleseed memo identified six major factors that resulted in minority underrepresentation on juries:

- **Factor 1—Source Lists:** Whether minorities receive a summons depends on what source lists are used and how frequently those lists are updated.
- **Factor 2—Economic Hardship:** Given the correlation between race and poverty, minorities are disproportionately likely to seek economic hardship excusals and few jurisdictions have programs to alleviate this burden.
- **Factor 3—Eligibility:** Minorities may not meet eligibility requirements to serve.
- **Factor 4—Felon Disenfranchisement:** Felon disenfranchisement disproportionately affects minority jurors.
- **Factor 5—Summons Processes:** Inefficiencies in the summons process could be having a negative effect on minority representation.
- **Factor 6—Data Collection:** Though data collection does not have a direct impact on whether diverse jurors make it through courthouse doors, it is crucial that we are able to monitor the nature and extent of the problem in order to determine which solutions have the most promise.

At the meeting, Task Force members were divided into three working groups to explore the issues identified under each factor:

- **Summons** (Factors 1, 5, and 6)
- **Economic Hardships** (Factor 2)
- **Jury Service Eligibility** (Factors 3 and 4)

During the spring and summer, the three working groups met independently to discuss their assigned factors and prepare recommendations for the Task Force. At meetings on August 22, 2018, and October 24, 2018, the Task Force heard final reports and recommendations from all of the working groups and voted on whether each proposed recommendation should be considered high, medium, or low priority. The list of recommendations receiving at least 50% high-priority votes is presented below. The next step is for the Minority and Justice Commission to decide which recommendations will move forward to the Board for Judicial Administration (BJA) for approval or other further action.

TASK FORCE RECOMMENDATIONS—HIGH PRIORITY

These recommendations were voted **high priority** by Task Force members in attendance at the meetings where votes were casted.

1. Source List Expansion and Frequency (Factor 1)

Expanding source lists beyond the traditional "motor/voter" list is expected to result in more minority and low income populations being summoned for jury duty. According to a research project conducted by Washington Appleseed at the Task Force's request, a few other states have expanded source lists beyond the traditional lists. These other states include property owners, social service recipients, and information from tax rolls. However, none of those states track juror diversity or demographics, so it is impossible to tell how these changes have affected juror diversity, or exactly how they will change Washington's juror diversity if enacted.

Currently, Washington court jurisdictions receive updated source lists annually. Approximately 10-15% of the US population moves annually,[1] change of address databases are not always updated, and approximately 40-50% of summons are returned as undeliverable or never receive a response. Data shows that the most mobile populations are minority groups,[2] and the committee believes that updating source lists more often is likely to be effective in increasing minority juror turnout.

Task Force Recommendations:

a. Increase the number of source lists in Washington beyond lists of registered voters and driver's license & state ID card holders. (High=11, Medium=4, Low=1)[3]

   i. Determine resources needed to expand source lists.

   ii. Analyze and research any obstacles to including additional source list information (e.g. privacy statutes, multiple addresses for utilities).

b. Update source lists more often than annually. (High=8, Medium=5, Low=3)

   i. Research costs (state and local) of creating source list two or four times per year.

2. Ensuring Adequate Juror Compensation and Job Security (Factor 2)

The Task Force recognized that juror compensation in Washington is inadequate. Data shows that financial hardship is the second highest reason to excuse a potential juror, behind undeliverable summonses. The Task Force believes that lower income and minority populations are disproportionally affected by the financial hardships of jury service. There was a robust discussion within the Task Force

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[1] https://www.census.gov/newsroom/blogs/random-samplings/2017/01/mover-rate.html

[2] For example, "The highest mover rates by race were for the black or African-American alone population…" https://www.census.gov/newsroom/press-releases/2016/cb16-189.html

[3] The reader of this paper may note that there were 17 voting members of the committee, but that the total number of votes for many of the recommendations do not equal 17. This is due to absences and abstentions.

about initiating a pilot project, in select jurisdictions, to study the effect of increasing juror compensation, provided that potential jurors are made aware of the increase. However, the idea of instituting a pilot project was almost unanimously rejected by the Task Force. Instead, the Task Force recommended pursuing a statewide juror pay increase, as well as exploring the feasibility of tax credits or deductions for jury service.

Task Force Recommendations:

a. Increase juror compensation statewide. (High=unanimous)

b. Research the feasibility of tax credits or deductions for jury service. (High=unanimous)

3. <u>Providing Childcare for Potential Jurors (Factor 2)</u>

Ensuring adequate childcare for jurors, and making that information known to potential jurors, was identified as a high priority. Providing childcare would alleviate economic burdens and barriers to juror participation, particularly for minority and low income populations. The working group noted that King County currently offers childcare at the Regional Justice Center in Kent, although it was not known whether juror summonses let potential jurors know about the existence of this service.

Task Force Recommendations:

a. The Task Force supported the concept of all courts providing childcare for jurors. However, it recommended first looking into how childcare is set up at the King County Regional Justice Center (i.e. operational costs and where the funding comes from), and determine whether it is a model that other courts across Washington could implement. Also look into whether jurors receive notice that childcare is available at the time they receive their summons. (High=13, Medium=1, Low=0)

4. <u>Felon Disenfranchisement (Factor 4)</u>

The Task Force recognized that minority populations, specifically African American males, were more likely than any other group to have a felony conviction. RCW 2.36.070 states that a person is eligible for jury service unless they are a felon and have not had their "civil rights restored." This phrase is not defined, but the Washington Association of Prosecuting Attorneys and caselaw strongly suggest that it refers to voting rights. In their juror qualification questionnaires, many courts ask whether a potential juror is a felon and has had his/her civil rights restored. This question, while legally accurate, has created a lot of confusion for individuals who have felony convictions, as many do not know if their civil rights were restored, if they are eligible to vote, or if they have a certificate of discharge from their felony case. Adding to the confusion, RCW 2.36.070 is not clear that an individual with a felony conviction who may still have outstanding legal financial obligations (LFOs), but who is not under DOC supervision, is eligible for jury service.[4]

[4] All Task Force members agreed that the statute allows felons who are not actively being supervised to be jurors regardless of outstanding LFO obligations. However, the Task Force strongly believes that this section, and the lack

Task Force Recommendations:

a. Pursue a statutory amendment to define the phrase "civil rights restored" in RCW 2.36.070. (High = unanimous). The statutory change has already been drafted, and Sen. Dhingra has introduced the change as SB 5162. The bill adds a new section 13 to RCW 2.36.010 which states, "(13) "Civil rights restored" means a person's right to vote has been provisionally or permanently restored prior to reporting for jury service."

b. Regardless of whether this statute passes, the AOC or Minority and Justice Commission should pursue an educational campaign to courts asking them to change the wording of their juror qualification questionnaire to make it clear that individuals who have felony convictions can serve as jurors, unless they are still under DOC supervision. For example, the question could be worded as, "Do you have a felony conviction and are currently being supervised by the DOC? (If your only obligation is monetary, you should answer NO.) ___ Yes ___ No" (High=unanimous)

5. Summons Streamlining and Follow-up (Factor 5)

Currently, there are different practices around the state for juror summonsing, how jurors are qualified, and what type of procedure is used when a juror fails to appear. Each court drafts its own summons, and these forms vary dramatically from court to court. Some courts qualify jurors in one step (where a summons and questionnaire are sent together), and other courts summon in two steps (where the court first sends out questionnaires, and then, if the juror is qualified, later sends a summons). When a summoned juror does not appear for service, some courts do nothing, others send a second summons, and others send a notice to appear in front of a judge to explain the absence.

The Task Force ultimately determined that the best practice would be a one step process and using follow up mailings to non-responders to encourage a response. The Task Force believes that these steps are likely to increase responses in general, and particularly among minority populations.

In Washington, all summons must be sent via US mail or personal service. RCW 2.36.095. The Task Force considered whether summonsing could be done via other means. Many business and service providers provide notices via email, through mobile device applications, and text message based notifications, reminders, bills, and even payments. The Task Force discussed using automated messaging (text, email, phone calls)[5] to remind jurors of their service and increase response rates. We know that Asian and African American populations appear for jury service at approximately 50% of what would be expected

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of a definition of "civil rights restored," is creating unnecessary confusion that disproportionally affects communities of color.

[5] Many doctors and dentists use reminder services: https://simpletexting.com/industry-guide/text-appointment-reminders-for-doctors-and-dental-offices/, and courts are starting to adopt these reminders and are finding that they save money: http://www.spokesman.com/stories/2018/sep/14/with-automated-warning-system-public-defenders-off/

based on census data.[6] So, increasing juror response rates through reminders or more effective summonsing is likely to increase the participation rates for minority jurors more than any other group.

Task Force Recommendations:

a. Recommend courts use a one step process, which is now a national best practice. (High=16, Low=1)

b. Create a system for reminder calls, texts and emails for jurors. (High=14, Medium=1, Low=2)

c. Research whether statutes should be changed to allow summons via methods other than paper. (High=11, Medium=5, Low=1)

d. Task appropriate AOC staff with working with local courts and court associations to develop statewide summonsing best practices, provide education to the courts on best practices, assist courts with data collection, and act as a subject matter expert on juror issues. (High=7, Medium=2, Low=3)

6. <u>Data Collection (Factor 6)</u>

The Task Force unanimously agreed on the importance of collecting jury demographic data and recommends the permanent statewide implementation of a system to collect juror demographics.[7] The Minority and Justice Commission conducted the juror demographic survey in 2016-17, and could provide assistance in helping to develop a more streamlined process for data collection. Continuing to track demographics will help the state monitor whether and to what extent each proposed change affects minority juror participation.

The Task Force also believes that tracking the demographics of each juror at each phase of jury selection (sent to courtrooms for voir dire, excusals for hardships, challenges for cause, and peremptory challenges) will provide never before seen transparency in the demographics of how jurors are empaneled. Race based discrepancies in challenges for cause, hardship, and peremptory challenges are well documented and should be tracked.[8] Such transparency may increase minority juror participation due to a renewed belief that the justice system is fair.

Task Force Recommendations:

a. Begin collecting juror demographic data on a permanent, statewide basis. (High=unanimous)

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[6] See, https://q13fox.com/2017/05/24/jury-of-your-peers-not-if-youre-a-minority-in-washington-study-shows/

[7] The Task Force is aware of only one state, New York that currently collects juror demographic information. See New York Judiciary Law Sec. 528: https://codes.findlaw.com/ny/judiciary-law/jud-sect-528.html

[8] See part IV and VI, as well as the full law review article at: https://illinoislawreview.org/print/vol-2018-no-4/the-jury-sunshine-project/

b. Begin collecting all juror demographic information at each stage of the jury selection process, tracking all hardships, challenges for cause, and peremptory challenges by demographic factor. (High=unanimous)

TASK FORCE IDEAS — NOT RANKED AS HIGH PRIORITY

The Task Force considered a number of ideas for which it did not recommend any action. The following ideas were considered but did not receive a majority of high priority votes:

1. Creating a mechanism (legal and actual) for citizens who are not on the source list to volunteer to be on the master jury list. (High=8, Medium=5, Low=3)
2. Target summons to zip codes with low return rates[9]. (High=7, Medium=8, Low=2)
3. Increase public outreach to minority communities (No one moved this to a vote after discussion – the committee believed other organizations were working on outreach).
4. Improve the movement of juror data between different state agencies and private contractors (No one moved this to a vote after discussion).
5. Improve the readability of summons statewide (No one moved this to a vote after discussion).
6. Allow the use of a modified trial schedule, such as trials from 8 am – 1 pm, to ease the burden on working jurors (No one moved this to a vote after discussion).
7. Move to a one day/on trial system statewide (No one moved this to a vote after discussion).
8. Change state law so that once a person reports for jury service anywhere in Washington, they will not be re-summoned for a set period of time, such as five years (No one moved this to a vote after discussion).
9. Clarify the statutory requirement of being able to communicate in English to be more inclusive or use interpreters. The committee considered a proposed statutory change requiring an in-person review of a juror's English proficiency as it related to the requirements of a specific case. The proposal would have requested AOC to run a pilot project in 4 jurisdictions for 1 year. (High=7, Medium=5, Low=3)
10. Production of a best practices bench card explaining how to interpret and apply current law relating to English proficiency (No one moved this to a vote after discussion).
11. Ask MJC or AOC to create educational materials for court administrators on best practices and practical options relating to English proficiency. (High=2, Medium=4, Low=7)
12. Change state law to allow summonses in multiple languages (No one moved this to a vote after discussion).
13. Production of a bench card and educational materials discussing best practices for following up with non-responders. (High=6, Medium=6, Low=1)

[9] The committee had a robust discussion related to the legality of this proposal. Proponents of this option supported their position with fair cross section and affirmative action cases. Opponents of this option supported their position with equal protection/equal opportunity cases and Washington Constitution article I, section 21. The MJC and the reader should be aware of this debate as this interim report is considered.

TASK FORCE IDEAS STILL UNDER CONSIDERATION

The Task Force also considered one issue and one idea that are still under consideration but could not be ready in time for this report.

1. Washington's two largest counties, King and Pierce, have both discovered that the number of people on the source list appears to be significantly higher than the number of adults living in each jurisdiction. The overages are between 10-15%. It is unknown why this overage exists, or how it affects minority or any specific demographics' representation. When more information is available, the committee will supplement this report.
2. The committee considered a proposal to change the way jurors are sent to courtrooms so that they are more geographically representative of the jurisdiction. At the committee's request, a University of Washington School of Law professor, as well as a research assistant, are currently reviewing past summonsing and distribution patterns to see if and how this idea would change things. This research is in its infancy, and when more information is available, the committee will supplement this report.

Proposed New GR 37—Jury Selection Workgroup

FINAL REPORT

> "Twenty-six years after *Batson*, a growing body of evidence shows
>
> that racial discrimination remains rampant in jury selection."
>
> Justice Charles Wiggins *State v. Saintcalle*, 178 Wn.2d 34, 35 (2013).

BACKGROUND

In 2015, the American Civil Liberties Union (ACLU) proposed to the Supreme Court a new GR 36—Jury Selection. The court published the proposed rule for comment with a comment period ending April 30, 2017. During that time, the court received thirty comment letters including two letters proposing alternative rules. Also during that time, a new GR 36—Trial Court Security was adopted, therefore the court re-numbered the ACLU's proposed new GR to 37.

One of the alternative rule proposals was submitted by the Washington Association of Prosecuting Attorneys (WAPA), and the ACLU subsequently submitted an alternate version of their original proposal. Based on these three proposals and the subsequent comments, the court requested a workgroup be formed to see if a consensus could be reached on integrating the proposals and if not, to provide a clearer description of the positions and concerns which would assist the court in taking action on the rule proposals.

WORKGROUP OBJECTIVE

Consider the three rule proposals to see if consensus can be reached on integrating such proposals, if not, to provide a clearer description of positions and concerns which would assist the court in taking action on the rule proposals.

WORKGROUP PROCESS

To begin their process, the workgroup started with the three rule proposals and created a small drafting group to capture areas of consensus and decisions as they were made. Almost all workgroup members attended regularly in person or by phone. Workgroup members discussed various state and federal cases and had access to the 2017 Minority and Justice Commission Symposium on Jury Diversity materials as well as to the comments that had been posted regarding the original published rule.

Specifically, the workgroup discussed juror selection jurisprudence, including such cases as: *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013); *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010); *State v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), and *State v. Evans*, 100 Wn. App 757, 998 P.2d 373 (2000). Workgroup members also discussed statutes and court rules such as RCW 4.44.120 and CrR 6.4 to review current jury selection requirements and identify the need for changes.

In addition to reviewing relevant materials, workgroup members discussed various approaches to addressing the issue of juror discrimination. Through these discussions, areas of agreement and disagreement emerged and four recommendations were made, including a rule proposal. After multiple drafting attempts by individuals and collectives of members, ultimately, Mr. Taki Flevaris and Mr. Jim Whisman produced the final draft rule proposal with alternative options that were discussed and voted on at the last meeting. The recommendations and final rule proposal are discussed in detail below.

Although the proposed rule is the final product of the workgroup's process, it does not incorporate all of the areas of consensus or disagreement. For this reason, a brief overview of areas of general consensus and disagreement is provided below. Workgroup members agreed to submit individual statements in support or opposition to concepts or language included in the final proposed rule. Those statements follow the proposed rule.

AREAS OF CONSENSUS

The history of the exclusion of potential jurors based on race and/or ethnicity is significant, meaningful, and should be referenced in the rule proposal.

Workgroup members have different opinions on where the history of exclusion should be reflected in the rule. Suggestions included: 1) a detailed history in the GR 9 cover sheet as part of the rule's purpose statement, or 2) incorporating the history in the definition of who a "reasonable" observer is within the proposed rule. Ultimately, the majority of the workgroup members voted to include the definition within current subsection (f).

It is appropriate for the proposed rule to be a General Rule, which applies to both criminal and civil jury trials.

Members discussed the differences in impact of a jury selection rule on civil and criminal trial practices. Members reached consensus on maintaining the proposal as a General Rule which is implemented in both criminal and civil jury trials.

Eliminating peremptory challenges is not the preferred way to address juror discrimination.

Workgroup members discussed the idea of eliminating peremptory challenges and concluded that they are still useful as long as they are not based on the race or ethnicity of potential jurors. One member commented that the removal of peremptory challenges would force appellate courts to examine the challenges for cause, which could lead to an inconsistent or possibly unwanted outcome.

The proposed rule should not simply codify *Batson* and its progeny.

Workgroup members discussed the shortcomings and procedural difficulties under the current juror selection framework. Generally, workgroup members agreed that the Supreme Court has signaled the need for substantial reform through its jurisprudence in juror selection and the convening of this workgroup.

It is necessary to address implicit bias.

Workgroup members rejected the "purposeful discrimination standard" established by *Batson* because it fails to consider discrimination caused by implicit bias. Members concluded that the court's recent opinions such as *Saintcalle* and *Erickson* make it clear that the final rule should address implicit bias.

A low threshold for the basis to hear the objection is preferred.

Workgroup members acknowledged that while there should be some threshold to hear an objection under the new rule, most concurred that the threshold should not prevent the striking party from having to present a race neutral reason for a peremptory challenge. Using the *prima facie* standard, if the trial judge erroneously overrules an objection, or if the appellate court changes the standard which had been correctly applied by the trial judge, the appellate court currently has no information about the reason for the peremptory. If the striking party is always required to state a race neutral reason for the peremptory, there will be an appropriate record for the appellate courts to consider.

The argument regarding the objection should be heard outside of the presence of the jury pool.

Upon review of the narratives delivered at the Minority and Justice Symposium, workgroup members agreed the colloquy between both litigants and the judge's determination related to a GR 37 objection should be made outside of the presence of the jury pool.

The GR 37 objection should be made before the potential juror is excused.

Although workgroup members acknowledged that this provision could be perceived to conflict with the ruling in *Erickson*, where the court determined that the objection could be raised after the jury pool has been excused, they agreed that objection before dismissal is preferred. The issue raised in *Erickson*, where the defense claimed the trial court never allowed an opportunity for counsel to make a *Batson* objection, can easily be avoided if, after peremptory challenges have been completed but before any jurors have been released, the court simply asks counsel if there are issues regarding the jury selection process. If any counsel indicate the existence of an issue, the jurors should be escorted from the courtroom before any discussion of the issue.

The burden of proof should rest with the challenging party.

Workgroup members generally agreed that when the evidence could go either way and a judge could see both sides of the argument, the judge ultimately relies on whether the burden of proof has been met. Historically, the burden has rested with the objecting party. Therefore, instead of requiring the defendant or objecting party to prove a *prima facie* case of discrimination against a particular juror, workgroup members generally agreed the burden should be carried by the striking party to give reasons to justify the peremptory challenge for the judge's determination. However, members did not agree regarding the standard of the burden.

The judge is allowed to raise the issue on his or her own motion.

Workgroup members discussed the option of having the judge raise the issue on his or her own motion, ultimately they agreed that current law already provides for the judge to raise the issue. *State v. Evans*, 100 Wn. App 757 (Div. 1, 2000).

Requiring blind voir dire was raised but not explored.

The suggestion of blind voir dire, in which attorneys do not see the jurors they are questioning, was raised as a means to eliminate the possibility of challenge based on perceived or actual race or ethnic identification. However, the group chose not to explore the suggestion further.

AREAS OF DISAGREEMENT

Including gender and sexual orientation in the current rule proposal.

Initially, the workgroup focused on issues of race and ethnicity as they had been discussed in *Batson* and Washington state court cases. Members hoped that if they found an agreed-upon approach regarding challenges to jurors based on race and ethnicity that the approach could simply be extended to issues of gender and sexual orientation. At the final meeting, some members expressed concern about extending the rule proposal to include gender and sexual orientation when those categories or classifications had not specifically been discussed. Additionally, members agreed that while gender and sexual orientation should be included in the proposed rule at a later time after thoughtful consideration, in order to meet the court's requested time frame and objective, it was necessary to postpone further discussion on gender and sexual orientation.

Allowing additional time for voir dire.

Although the overwhelming majority of workgroup members voted not to include a provision allowing additional time for voir dire in the proposed rule, members did agree that the nature of voir dire may change under the new rule and judges should be aware that more time might be necessary. Workgroup members acknowledged that judges already have the ability to manage voir dire as well as the discretion to grant additional time so removal of the reminder provision from the proposed rule should not prove detrimental. Workgroup members generally agreed that the reminder to the court that additional time for voir dire may be necessary or appropriate may be included in a best practices document or education about the new rule.

The group did agree that after a *Batson* objection is raised, the juror in question should not be subject to any additional voir dire. Doing so only makes jurors feel they are on trial, and magnifies their perceived insult if they are ultimately excused.

Standard for determination of objection – “could view” vs. “would view”.

Workgroup members disagreed as to the standard of proof for determining whether a peremptory challenge would be allowed. Although three alternative standards are proposed in subsection (e) of the final proposed rule, much of the workgroup’s discussion focused on whether an objective observer “could view” or “would view” race or ethnicity as a factor in the challenge. Workgroup members had strong opinions about the standard for determination, which was one of the most significant areas of disagreement within the workgroup. Therefore, statements in support or opposition of a standard were requested from members and are included in this report.

Directing vs. advising the court to explain its ruling on the record.

Workgroup members generally agreed that the court should explain its ruling on the record but disagreed on whether the language directing the court to do so should be mandatory (“shall”) or advisory (“should”). These alternatives are reflected in subsection (e) of the final proposed rule.

Including circumstances to be considered and reasons that are presumptively invalid.

The original and alternative rule proposals submitted by the ACLU included both of these areas as comments to the proposed rule. Several workgroup members strongly disfavored including comments in a proposed rule and suggested that any such factor or circumstance should be included either in the GR 9 cover sheet as part of the rationale or in the rule itself if it is determined that the factors contribute substantively to the determination of the challenge. Members were evenly split on including circumstances or presumptively invalid reasons in the proposed rule. Therefore, statements in support or opposition of the three alternative standards were requested from members and are included in this report.

WORKGROUP RECOMMENDATIONS

- Adopt a version of the proposed rule submitted by the workgroup.
- Independently review how the rule can be expanded to include gender and sexual orientation.
- Require education sessions for judges related to the implementation of the rule prior to its effective date, if possible.
- Consider the creation of a list of best practices for jury selection as it relates to the new rule.

Adopt a version of the proposed rule submitted by the workgroup.

The proposed rule is located in Appendix 1 and is presented in a red-lined format in order to demonstrate as many points of agreement and disagreement as possible within the workgroup. The footnotes indicate areas when there was an overwhelming majority, agreement by consensus, or an evenly divided vote.

The following is the workgroup's effort to provide a roadmap for the court for those areas where the workgroup is evenly divided and the resolution is left for the court. Subsections (e), (h), and (i) include decision points that the workgroup was unable to resolve and are highlighted below. Alternative language is noted in brackets throughout the proposed rule.

1. <u>Subsection (e) includes three alternative standards:</u>

   [If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.**] OR**

   [The peremptory challenge shall be denied unless an objective observer would conclude that race and ethnicity was not a factor in the use of the peremptory challenge.**] OR**

   [If the court determines that an objective observer would view race or ethnicity as factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.**]**

2. <u>Subsection (e) includes a choice between "should" and "shall".</u>

   The court [should/shall] explain its ruling on the record.

3. <u>Workgroup members are evenly divided regarding whether subsection (h) [Reasons Presumptively Invalid]/[Suspect Reasons]—should be included or removed.</u>

   First, a determination must be made regarding whether subsection (h) should be included or removed. If (h) is included, the alternative language bracketed in (h) should be reviewed. Based on the evenly divided vote to include or remove subsection (h), workgroup members did not discuss which alternative within the bracketed language was preferred.

4. Workgroup members are evenly divided regarding whether subsection (i) Reliance on Conduct—should be included or removed.

   First, a determination must be made whether subsection (i) should be included or removed. If (i) is included, the alternative language within the brackets should be reviewed. Based on the evenly divided vote to include or remove subsection (i), workgroup members did not discuss which alternative within the bracketed language was preferred.

Please see Appendix 2 for individual or organizational statements in support or opposition to the alternatives cited above.

Independently review how the rule can be expanded to include gender and sexual orientation.

While the majority of workgroup members agreed that the rule as proposed should focus on race and ethnicity in order to accomplish the objective within the time given, several members agreed that gender and sexual orientation should be included in the rule after thoughtful consideration of issues specific to those subjects. The workgroup recommends that the court either continues to work on, or convenes another workgroup to focus on adding gender and sexual orientation to the rule once it is adopted.

Require education sessions for judges regarding the implementation of the rule prior to its effective date, if possible.

Workgroup members acknowledge that implementing the new rule will change the voir dire process as it currently exists as that is one of the purposes. Thus, judges should be educated about the history of this process, the intent behind the language of the rule and guidance on the practical application of the rule if possible.

Consider the creation of a list of best practices for jury selection as it relates to the new rule.

Workgroup members reviewed several suggestions related to best practices but did not vote or agree on what practices should be included. Best practices could include pre-trial questionnaires, discussions with counsel about the peremptory process, and written recording of peremptory challenges.

Conclusion

Collectively, members agree that a general court rule is the best vehicle to address the discriminatory use of peremptory challenges during jury selection. The workgroup's proposed rule is intended to shift the burden to the striking party to prove a race-neutral basis for the challenge, instead of the current standard that requires a judge to make sometimes subjective determinations about the motivations of a peremptory challenge. The

workgroup would also like to offer a few members to be present at any review of the report to answer any questions the Court may have.

APPENDIX 1 – WORKGROUP PROPOSED NEW RULE GR 37—JURY SELECTION

APPENDIX 1

denotes decision points for choosing between alternative language within brackets.
denotes decision points regarding keeping or removing section.

RULE 37. JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on **[**race or ethnicity**]**[1] ~~/ **[**race, ethnicity, gender, or sexual orientation**]**. Eliminating the appearance of improper bias in jury selection is necessary because that appearance undermines public confidence in the justice system.~~[2] ~~**[**This rule is consistent with RCW 2.36.080, which states that a citizen shall not be excluded from jury service on account of race or color.**]**~~[3]

(b) Scope. This rule applies in all jury trials.

(c) Objection. ~~The court shall provide the parties with sufficient time for voir dire to allow the parties to exercise peremptory challenges upon adequate information.~~[4] A party may object to the use of a peremptory challenge to raise the issue of improper bias. ~~If a party believes that race or ethnicity~~[5] ~~might be playing a role in the exercise of a peremptory challenge, the party may object~~. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. ~~The basis for the objection shall then be articulated~~.[6] The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances.

> **[**If the court determines that an objective observer could view race or ethnicity as ~~playing a role~~ a factor[7] in the use of the peremptory challenge, then the peremptory challenge shall be denied.**]**
>
> **[**The peremptory challenge shall be denied unless an objective observer would conclude that race and ethnicity was not a factor ~~played no role~~ in the use of the peremptory challenge.**]**
>
> **[**If the court determines that an objective observer would view race or ethnicity ~~gender, or sexual orientation~~ [8]as ~~playing~~ a ~~role~~ factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.**]**[9]

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[1] Vote of 13-2 to exclude gender and gender orientation and focus on race and ethnicity.
[2] Unanimous to remove the second sentence.
[3] Members agreed by consensus to remove citation to statute and include it in GR 9 cover sheet.
[4] Vote of 14-1 to remove sentence "The court shall provide the parties with sufficient time for voir dire to allow the parties to exercise peremptory challenges upon adequate information."
[5] Vote of 13-2 to exclude gender, focus on race and ethnicity.
[6] Vote of 14-1 against requiring a standard or requirement to make a *prima facie* case.
[7] Workgroup members did not have strong opinions on using "playing a role" vs. "factor" but agreed that the use of "factor" is ok.
[8] This language is removed per the vote on subsection (a).
[9] The vote was equally split between alternatives. Statements in support or against alternatives are included in the final report.

[~~Whether it can be proved that a prospective juror's race or ethnicity played a motivating role in the exercise of a peremptory challenge is immaterial.~~**]** / **[**The court need not find purposeful discrimination to deny the peremptory challenge.**]**[10]

The court [should/shall] ~~state~~ explain its ruling on the record .[11] ~~reasons for allowing or disallowing the peremptory challenge.~~

(f) Nature of Observer. For purposes of this rule, an objective observer 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.[12]

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

> **[**(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.**]**
>
> ~~**[**(i) whether the reason may be disproportionately associated with race, ethnicity, or gender because of its adverse effects upon that identifiable group or groups; (ii) whether the party exercised peremptory challenges against similarly situated venire persons; (iii) whether the party has disproportionately exercised peremptory challenges against a particular race, ethnicity, or gender in the instant case or in past cases.**]~~[13]

(h) [Reasons Presumptively Invalid] / [Suspect Reasons]. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following **[**are presumptively invalid reasons for a peremptory challenge:**]** / **[**reasons should be allowed only where the court finds that the juror's views may prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath:**]** (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.[14]

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[10] Workgroup members generally agreed to strike the first alternative and adopt the second alternative.

[11] Members generally agreed on including the sentence but evenly split between whether using "should" or "shall".

[12] Vote of 14-1 to include subsection (f) in the proposed rule.

[13] Vote of 10 for alternative I, 2 for alternative II, 1 opposed both alternatives.

[14] The vote was equally split between including subsection (h) and removing subsection (h). Workgroup members did not vote on the alternative language within subsection (h) due to the split vote on inclusion of the subsection. Workgroup members will submit comments in favor or against inclusion of subsection (h) and alternative language within subsection (h) if they choose.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, **[**that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.**] / [**the court in making its determination shall consider whether the judge or others can corroborate the alleged conduct.**]**[15]

(j) Disallowed Challenges Preserved. If a peremptory challenge is disallowed under this rule, the party exercising it retains the right to use the peremptory challenge against another potential juror.

~~**(k) Appellate Review.** Disallowing a peremptory challenge under this rule shall not be deemed reversible error absent a showing of prejudice.~~[16]

[15] The vote was equally split between including subsection (i) and removing subsection (i). Workgroup members did not vote on the alternative language within subsection (i) due to the split vote on inclusion of the subsection. Workgroup members will submit comments in favor or against inclusion of subsection (i) and alternative language within subsection (i) if they choose.

[16] Vote of 8 to remove subsection (k) and 4 to include subsection (k).

APPENDIX 2 – INDIVIDUAL AND ORGANIZATIONAL STATEMENTS

APPENDIX 2

To: Chief Justice Mary Fairhurst, Supreme Court of Washington
From: Superior Court Judge Blaine Gibson
Date: February 13, 2018
Re: Thoughts Regarding the Batson Work Group Proposal

Elimination of Peremptory Challenges

After having served as co-chair of the *Batson* work group, I have concluded that the only way discrimination can be eliminated from the jury selection process is to eliminate peremptory challenges.

Such a drastic change from the status quo will, of course, have negative consequences. The focus of voir dire will shift to challenges for cause. Attorneys will demand more time for voir dire in order to develop grounds for such challenges. Defendants who are convicted will appeal every adverse ruling on challenges for cause. More cases will be sent back for retrial because of erroneous rulings on challenges for cause. There may be more hung juries. Finally, there will most certainly be vigorous push back from trial attorneys, even including those who advocate changing the *Batson* rule.

Fairness to All Involved

Although eliminating peremptory challenges would have undesirable effects, at least it would be equally fair, or equally unfair, to all parties. The report you have received from the *Batson* work group proposes the outline of a new rule, but it leaves the task to the Supreme Court of making the required policy decisions. In assessing the report, the court should be aware that the work group fixated solely on the rights of jurors who are currently experiencing discrimination. No consideration was given to how any of the options in the proposed rule might affect the rights of the litigants or of the other jurors. Although I raised these issues, the group chose not to discuss them. What began in the *Batson* case as a concern about the right of the defendant to a jury of his peers has shifted 180 degrees to a focus on the rights of jurors, without regard for the rights of the litigants.

Consider the example of a juror of color who has witnessed or experienced behavior by the police that has caused the juror to be distrustful of them. Assume the juror has survived a challenge for cause. Most members of the

group felt a peremptory challenge against that juror would constitute racial discrimination because it would be a continuation of the discrimination exercised by the police. This is despite the fact that striking a juror who has expressed a distrust of the police has been held to be a valid use of a peremptory challenge. *Cook v. LaMarque*, 593 F.3d 810, 824–25 (9th Cir. 2010). The countering argument is that, if a juror has expressed a bias which has been recognized as a legitimate basis for a peremptory challenge, it should not make any difference how the juror acquired the bias. It is the existence of the bias that is important, not how or why the bias was acquired.

In deciding whether to adopt a rule that partially or completely immunizes a biased juror against a peremptory challenge, the Supreme Court must decide whether, and to what extent, to consider the rights of the party who wants to strike that juror. The court might also want to consider the rights of a juror who does not fall into a protected class, but who also has a distrust of the police. If there are two jurors who have expressed an identical bias, is it fair to allow one to be stricken but not the other?

Other problems with the Proposal

There are many other potential problems with the group's proposal, depending upon which options the court choses. If the court places the burden of proof on the striking party, the opposing parties may well object to every peremptory challenge. The proposed rule eliminates the requirement of a prima facie showing to establish the sufficiency of the objection, so there would be no reason not to object. The objectors would have nothing to lose, and they might get lucky once in a while.

One of the options in the group's proposal is a standard that would disallow a peremptory challenge if an objective observer "could view race or ethnicity as a factor" in the use of the challenge. The problem with this standard is that it is the same as asking if it is "possible" race or ethnicity was a factor in the use of the challenge. As everyone knows, anything is possible. In applying such a standard, at least some judges would hold that, whenever a juror is a member of a protected class, discrimination is a possible factor in the use of the peremptory, so those judges would not allow any peremptory challenges against such jurors, regardless of what

biases they may have shown. This court would need to decide whether that standard would be fair to the litigants and the other jurors.

Other Possible Approaches

Most of the members of the group preferred a drastic change to the existing *Batson* rule, so they did not consider lesser modifications. If the Supreme Court decides to keep peremptory challenges, but cannot agree on the options in the group's proposal, the court could still improve the *Batson* rule by lowering the standard from "purposeful discrimination" to one that recognizes the existence of implicit bias. This would not solve the overall problem, but it would lower the bar for establishing discrimination.

Finally, there is my "out of the box" proposal: blind voir dire. Symphony orchestras used to consist almost entirely of white men. Then, in the 1950s, many orchestras began using blind auditions. The musicians were screened off from the people doing the judging. The number of women and minorities selected has been increasing ever since.

If attorneys discriminate during jury selection, they do so mostly because of the juror's name and what the juror looks like. If the attorneys do not have that information, they cannot use it to discriminate.

My proposal is attached. It is not without cost, both financial and otherwise. It would not eliminate discrimination, but it would substantially reduce it, while preserving peremptory challenges.

If the Supreme Court is interested in experimenting with blind voir dire, Yakima County Superior Court would be willing to be a test site, provided we can obtain a grant to cover the set-up costs.

Best Practices for Peremptory Challenges

Assuming the court retains peremptory challenges, there are steps that can be taken to minimize potential problems caused by their use. My proposed list of best practices is attached.

There are three primary principles in these best practices:

> Peremptories are exercised in secret, so jurors are not told they are being stricken;

Except for those who are excused for hardship or cause, no jurors are excused until peremptory challenges have been completed and all *Batson* or other jury selection issues have been resolved; and

If there is a *Batson* challenge, no additional voir dire is allowed.

Use of these practices will prevent the jurors from feeling that they are on trial, lessen the adverse effects of being stricken, and reduce the likelihood of other complications.

Reducing Discrimination Using Blind Voir Dire

A Proposal from Judge Blaine Gibson

1. The goal of blind voir dire is to prevent trial counsel, as much as reasonably possible, from obtaining information about jurors which might be used to discriminate against them during the jury selection process because of race, ethnicity, or any other protected class status.
2. The judge, counsel, the parties, the clerk, and the court reporter, or electronic recording equipment, will be in a courtroom that is open to the public.
3. The venire, and needed court staff, will be in another room that is not open to or visible to the public.
4. There will be a two-way audio link between the courtroom and the venire room. There may also need to be a one-way video link between the rooms so the jurors can see counsel and the parties.
5. During the entire voir dire process the jurors will be identified only by their numbers. Counsel will not be provided with any information about the jurors [except for age, occupation, other?].
6. Voir dire will be conducted by audio only. Counsel will not be allowed to ask jurors their names, race, country of origin, or ethnicity. If possible, the voices of the jurors should be modified so as to make it more difficult for the people in the courtroom to glean additional identifying information about a juror, such as gender.
7. During breaks, if the jurors are allowed out of the venire room, their juror numbers must be covered so outside observers cannot correlate a face with a number.
8. After voir dire and all peremptory challenges have been completed, the jurors and alternates selected for the trial shall be conducted into a courtroom.

Discussion

Blind voir dire is modeled after the blind audition process used by many symphony orchestras. After orchestras began using blind auditions, the number of women and minorities selected increased substantially, presumably because race and gender discrimination

had been eliminated. Similarly, blind voir dire would eliminate most of the opportunities to discriminate against jurors, while preserving the advantages of the peremptory challenge process.

Blind voir dire would involve some cost. To begin with, courts would have to be equipped with the appropriate electronic equipment. This would be a one-time cost, with some small ongoing expense for maintenance. For courtrooms that are already connected to an intranet, or to the actual internet, it may not be necessary run any additional wiring between rooms. Furthermore, all courtrooms would not have to be wired for blind voir dire. One or more small courtrooms could be used for voir dire, and then after the jury has been selected, the trial could be held in a courtroom that was not wired for voir dire.

Even though two separate rooms would be used for voir dire, the actual amount of valuable floor space required may be less than is currently used. Presently, if the venire consists of 100 jurors, voir dire has to be conducted in a large courtroom, and there must also be a room available that is large enough to accommodate the entire venire for those occasions on which a matter must be heard outside the presence of the jury. With blind voir dire, the actual courtroom only has to be large enough for the judge, counsel, the parties, the clerk, the court reporter, and a few members of the public. It would not even need a jury box. The venire room does not have be near the courtroom, or even in the same building. Furthermore, time would be saved because the venire would never have to be conducted into and out of the courtroom in order to hold hearings outside the presence of the jury.

Prosecutors will be concerned that not knowing the names of the jurors will prevent them from researching them ahead of time to see if they have criminal records. However, it is unlikely most prosecutors actually research jurors before voir dire in ordinary cases. After the jury has been selected, their names would be disclosed to the attorneys. If it turns out a juror has a felony conviction, or is otherwise disqualified, an alternate juror can be substituted.

There is some concern that additional court personnel might be required to wrangle the venire. There is no way to know for certain at this time, but it might not actually require any more staff than are currently used, especially since the venire would not repeatedly be conducted into and out of the courtroom.

Trial attorneys would certainly claim that blind voir dire would deprive them of the opportunity to observe the body language and demeanor of the jurors. First, it is questionable whether attorneys actually gain any accurate or useful information from body language or demeanor. Second, body language and demeanor have long been suspect as merely pretexts for racial discrimination. The loss of the opportunity to observe the jurors during voir dire would be a small price to pay for minimizing discrimination.

It is possible that having the venire in a separate room that is not accessible to the public may raise a constitutional issue regarding open courtrooms. This issue would have to be resolved by the Supreme Court.

Best Practices for Peremptory Challenges

Proposed by Judge Blaine Gibson

Whether or not a new *Batson* rule is adopted, there are steps the trial court can take to reduce the problems associated with *Batson* challenges.

1. The questionnaires some counties give to jurors before trial ask the race of the juror. No information about the race of any juror should be furnished to counsel.
2. At a pre-trial conference, the court should have a discussion with counsel about the peremptory process. The court should confirm how many peremptories each party is allowed, and how they will be exercised.
3. At the pre-trial conference, the court should advise counsel that, after the peremptory process has been completed, the court will ask counsel if there are any issues with regard to the jury selection process. The court should explain that the purpose of this question is to give counsel the opportunity to raise a *Batson* challenge, or any other appropriate issue, before any jurors have been excused. The court should also advise counsel that, if they wish to raise any issue about the selection of the jury, they should simply indicate there is an issue, but they should not articulate the nature of the issue until all jurors been conducted out of the courtroom. This process is designed to avoid the argument raised in *Erickson*, in which defense counsel claimed the court never allowed any opportunity to raise a *Batson* objection before the excess jurors had been excused.
4. At the pre-trial conference, the court should remind counsel that, during the peremptory process, if they pass, waive, or take any action other than exercise a peremptory, they will be deemed to have accepted the top 6, or 12, jurors, depending on the size of the jury, and they will not be allowed to exercise any remaining peremptories against those jurors. The same would be true for selection of alternates.
5. After voir dire has been completed, the court should confer with the clerk and counsel in order to compare juror lists to verify that all lists

identify the same jurors who remain after excusals for hardship and cause.

6. Peremptory challenges should be made in writing, on a form designed for that purpose. As counsel exercise a peremptory, they should write on the form the number and the name of the juror being challenged. The form is then given to the bailiff, who shows it to opposing counsel, the clerk, and the judge, before giving the form to opposing counsel for the next peremptory. The jurors should not be told which jurors have been stricken. After the jury has been selected, the peremptory form must be given to the clerk for filing.
7. If there is a *Batson* challenge, no additional voir dire should be allowed.
8. No jurors who have been the subject of peremptory challenges should be excused until all *Batson* or other jury selection issues have been resolved.
9. The court should not announce the names and numbers of the jurors who have been selected to sit on the case until after all *Batson* or other jury selection issues have been resolved.

INDIVIDUAL STATEMENT BY
JUDGE FRANKLIN L. DACCA
- February 16, 2018 -

I. INTRODUCTION

First of all, I was very honored to serve on this important Committee as one of two representatives from the District Municipal Court Judges Association ("DMCJA"). The comments recited below regarding the Committee's Final Report are, however, my personal and individual comments and should not be construed in any way as the position or positions of the DMCJA.

My comments below are drawn from my judicial experience as a Pierce County District Court Judge since 2003. I also have been a licensed attorney in the State of Washington since 1973. I have tried and presided over hundreds of criminal and civil trials in Federal, Superior and District Court in Washington and California.

I am respectfully submitting comments regarding three specific sections of the proposed GR 37, namely sections (e), (h) and (i). I have strong feelings regarding the language set forth in these sections, and I appreciate your consideration of my perspective.

II. SECTION (e) - DETERMINATION

Under this section, the Committee has submitted three alternative sentences which address the threshold or test which the trial court shall properly consider in evaluating an objection to the use of a peremptory challenge. The order of the three alternatives does NOT reflect in any way the preferences by the Committee as to these options. All three, I might add, have language which is drawn from the doctrine of appearance of fairness which is recognized in this jurisdiction.

As a trial judge, I respectfully submit that the only reasonable and workable alternative is the third test as follows in Section (e): "If the court determines that an objective observer would view race or ethnicity as playing a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." It is true that the

Committee was equally split between alternatives one and three. Option one is identical to choice three, but instead of the word "would", option one has the word "could".

I fully recognize that option one has been submitted in good faith. And I respect the position of my colleagues who support this language and the language in Sections (h) and (i). However, if the very low threshold of the "could" language is adopted, it is stating that if it is "possible" that an objective observer could view race or ethnicity as a factor in the exercise of a peremptory challenge, then the peremptory challenge shall be denied.

I respectfully submit that this "could" alternative in this proposed rule, is unworkable and will virtually result in the denial of every peremptory challenge exercised when objected to by a party. In other words, if option one is adopted, then I would respectfully recommend that the use of peremptory challenges be abolished entirely with only challenges for cause left. Option three (the "would" language) reflects language which is a reasonable and workable standard for the trial court's determination, and further reflects a much needed departure from the current law relating to purposeful discrimination.

III. SECTION (h) – PRESUMPTIVELY INVALID REASONS

As to both proposed sections (h) and (i), I have maintained a consistent position that these two sections should not be included in any way in the body of Rule 37. Arguably, it may be appropriate to include this language in a GR 9 Cover Sheet to highlight the purpose and context of the proposed rule. Moreover, for the reasons discussed below, I am strongly recommending that these two sections also not be included in the "Comments" to Rule 37 due to the language and presumptions created.

The language in section (h) reflects a number of responses from potential jurors which create a presumptively invalid reason for exercising a peremptory challenge. I understand the arguments of the proponents of this section. However, the main reason I find this language unacceptable and inappropriate is that it would unduly invade the province of the trial court's discretion and management of the voir dire process. By setting forth identifiable "trigger points", it would set up an unworkable (and unduly lengthy) voir dire process which would likely compromise the rights of the parties and litigants and the rights and privacy of the jurors themselves. In sections (a) through (g), the proposed Rule

37 specifically identifies how the objection should be made, the nature of the response, the tests and threshold of the court's determination, and also clearly sets forth in section (g), the totality of the circumstances to be considered by the trial court. Every case and trial is unique, and I submit that sections (h) and (i) unduly interfere with the trial judge's responsibilities in exercising good discretion and managing the voir dire process and trial.

IV. SECTION (i) – RELIANCE ON CONDUCT

As noted above, the language in proposed section (i) should not properly be included in the proposed Rule or included in any Comments section. At best, similarly to section (h), this language referring to specific conduct which requires close scrutiny, may properly be included in a GR 9 Cover Sheet to assist the Court and litigants.

It is to be noted that due to the time constraints even after five complete sessions, the Committee had very little time, if any, to address this language in section (i). Similarly to section (h), the requirements of this section unduly invade the trial court's discretion and management of the voir dire process. This section further creates an unworkable scenario where certain alleged conduct creates presumptions and even requires advance notice to the trial court and corroboration throughout the voir dire process well before the actual exercise of the peremptory challenge. If adopted in the Rule or Comments, this section (i) will create an unworkable voir dire process subject to lengthy interruptions, delay, confusion and inappropriate scrutiny of individual jurors.

Therefore, I respectfully recommend that sections (h) and (i) be deleted. The other sections of the Rule set forth well-defined standards which will let the trial judge and litigants do their job consistent with the law in this jurisdiction and the Canon of Ethics.

Judge Franklin L. Dacca
Pierce County District Court

Statement of American Civil Liberties Union of Washington, Washington Association of Criminal Defense Lawyers, Fred T. Korematsu Center for Law & Equality, Legal Voice, Loren Miller Bar Association, and Latina/o Bar Association of Washington

Introduction

The six organizations listed above respectfully request that this Court adopt the version of proposed GR 37(e) that requires a court to deny a peremptory challenge if "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge[.]" This standard provides stronger protection against discrimination than the alternative proposals, and is necessary to address the serious problem of race-based exclusion from jury service.

We also urge the Court to adopt subsections (g), (h), and (i) of the proposed rule. Subsection (g) lists circumstances courts are already obliged to consider under *Batson*, and 12 of 13 workgroup members voted to include it. Subsection (h) designates certain reasons for exclusion as presumptively invalid because they are highly correlated with race and perpetuate systemic discrimination. These reasons include having been stopped by police, having a family member in prison, and believing law enforcement officers engage in racial profiling. Subsection (i) requires heightened scrutiny of demeanor-based justifications for exclusion, because such reasons are often borne of implicit biases and have historically been used to eliminate prospective jurors of color.

Implementing these recommendations is essential given the nature and magnitude of the problem. By adopting the stronger version of proposed GR 37, this Court will fulfill its pledge to address racial and ethnic bias in the use of peremptory challenges in Washington.

This Court should adopt the first option under subsection (e).

This Court should adopt the following language for GR 37(e):

> **(e) Determination.** The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.[1]

The difference between "could" and "would" is critical. The "would view" standard is not meaningfully different from the "purposeful discrimination" standard under *Batson*. It requires a court to conclude that an observer would view the party exercising the challenge

[1] Judge R.W. Buzzard, working group co-chair, joined the undersigned organizations in voting for this version of subsection (e).

as being motivated by the juror's race or ethnicity. It essentially compels a judge to endorse "an accusation of deceit or racism" in order to sustain a challenge to a peremptory strike. *Saintcalle*, 178 Wn.2d at 53 (describing problem with *Batson* standard). It will not solve the problem this Court set out to address.

The "could view" standard, in contrast, softens the accusatory edge of the objection. It allows a judge to deny a peremptory challenge without suggesting that the party *actually* exercised the peremptory challenge based on race. Instead, the strike would be disallowed if an observer *could* view race as a factor, given the prevalence of implicit biases, the historical use of certain justifications to exclude prospective jurors based on race, and any other relevant circumstances. The rule would preclude those strikes that raise meaningful concerns about race or ethnicity, all things considered. This is critical to making any headway against unconscious bias, which operates "far more often" when there are plausible, neutral reasons for action. *Saintcalle*, 178 Wn.2d at 49.

The "could" standard is familiar and workable, and has been applied in comparable circumstances. For instance, it is sometimes used to evaluate the prejudice caused by misconduct. When a jury improperly considers extrinsic evidence, a court reviewing a motion for a new trial will make "an objective inquiry into whether the extraneous evidence … *could have* affected the jury's determination[.]" *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 273 (1990) (emphasis added). As another example, a "conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *In re the Personal Restraint of Benn*, 134 Wn.2d 868, 936 (1998) (emphasis added). In these situations, courts apply the "could" standard because the errors at issue are serious. *See Benn*, 134 Wn.2d at 936 ("could" standard applied to address "fundamentally unfair" practice); *Richards*, 59 Wn. App. at 273 ("Any doubt that the misconduct affected the verdict must be resolved against the verdict"). The same standard is necessary to address the serious problem of race discrimination in jury selection.

As an example from elsewhere, New Jersey courts apply a similar standard to combat corruption from organized crime. *See In re Pontoriero*, 439 N.J. Super. 24 (N.J. Super. Ct. App. Div. 2015). In particular, New Jersey has established a detailed regulatory scheme to "combat corruption and organized crime on the New Jersey ... waterfronts," including business licensing that is subject to revocation for improper relationships. *Id.* at 29. Based on "the history of corruption on the waterfront," the need for such "strict regulation" was "well established." *Id.* at 39. To determine whether a license is properly revoked under the scheme, New Jersey courts consider "whether a reasonably objective observer could believe that [a known] criminal associate could influence the licensee in his or her role as a [licensee]." *Id.* at 41. This stringent standard "is meant to encompass the risk of actual corruption," which is notoriously difficult to prove, "as well as any reasonable perception of corruption by the public." *Id.* at 42. Here, the history of racial discrimination and need for strict regulation are well-established. And a similarly stringent standard is needed, because of the difficulty of proving racial discrimination and to account for the public appearance of racial inequity in jury selection.

As in these other contexts, if the "could view" standard is adopted, it will be interpreted and applied sensibly and in furtherance of the rule's underlying policy purposes. Court rules "are interpreted in the same manner as statutes." *Jafar v. Webb*, 177 Wn.2d 520, 526 (2013). This means the standard adopted would be interpreted in a way that is "sensible." *Kinnan v. Jordan*, 131 Wn. App. 738, 751 (2006). It would also be interpreted in a way that advances the underlying intent and policy behind the rule, and in conjunction with the rest of its provisions. *See, e.g.*, *Dept. of Nat. Res. v. Marr*, 54 Wn. App. 589, 593 (1989); *State v. Base*, 131 Wn. App. 207, 213-14 (2006).

At bottom, the question of which standard to use is a policy question. The "function of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have … for a particular type of adjudication." *In re A.W.*, 182 Wn.2d 689, 702 (2015) (internal marks omitted). When it comes to racial and ethnic bias in jury selection, this Court has already recognized that the problem is widespread, harmful, and demands intervention, but it is difficult to identify in individual cases. The "could view" standard addresses this problem by requiring a high degree of confidence that race was not a factor before permitting a peremptory challenge.

In sum, this Court should adopt a standard requiring courts to disallow a peremptory challenge if an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.

This Court should adopt proposed subsection (g).

This Court should adopt subsection (g), which provides:

> **(g) Circumstances Considered.** In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

Subsection (g) is already the law, and the new court rule cannot provide less protection than already exists under the Fourteenth Amendment. *See Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005). It is helpful for trial judges and practitioners to have these considerations in the court rule, rather than requiring them to consult the relevant cases for some requirements and the court rule for others.

This Court should adopt proposed subsections (h) and (i).

This Court should adopt subsections (h) and (i), which provide:

> **(h) Reasons Presumptively Invalid.** Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge: (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.
>
> **(i) Reliance on Conduct.** The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

Subsections (h) and (i) are essential tools for determining whether an objective observer could view race or ethnicity as playing a role in the exercise of a peremptory challenge. Each subsection identifies certain types of justifications that historically have been used to exclude people of color from juries, whether as a pretext, due to unconscious bias, or otherwise. These justifications standing alone should be deemed insufficient, as a matter of law, to sustain a questionable peremptory strike. Without these subsections, attorneys and judges who are unaware of the mechanisms that have been used to exclude people of color will conclude that no one could view race as a factor where these justifications are offered.

Subsection (h)

The justifications for exclusion listed in subsection (h) are highly correlated with race and have been used historically to exclude people of color from jury service. These justifications, standing alone, provide little reason to question a person's fitness to serve as a juror. And they are systemically harmful in the aggregate. More should be required to sustain a questionable peremptory challenge under review. Identifying and prohibiting these justifications in the governing rule, as a matter of law, would promote equitable results and provide needed clarity for judges and litigants.

The listed justifications related to contacts with the criminal justice system are especially troublesome, because African Americans and other minority groups in Washington are arrested, searched, and charged at significantly higher rates than Caucasians – and this difference cannot be explained by a difference in crime commission rates. *See* Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* at 7 (March 2011). In light of this disparity, permitting parties to

remove jurors on the basis of police contacts is doubly discriminatory and perpetuates the lack of jury diversity in Washington. *See Saintcalle,* 178 Wn.2d at 100 (Gonzalez, J., concurring) (citing study noting that striking all persons with a relative in prison could disproportionately exclude racial minorities).

This Court witnessed this phenomenon in *Seattle v. Erickson*, 188 Wn.2d 721 (2017). There, the prosecutor exercised a peremptory challenge against an African-American potential juror because the juror stated during voir dire that he was "angry, embarrassed, and upset" at having been stopped by police and wrongly accused of a crime. RP 152, 202. Just as this juror was upset about being profiled by police, people who are excluded from jury service because of their race may feel "shame and humiliation" as a result of their exclusion. Equal Justice Initiative, *Illegal Race Discrimination in Jury Selection: A Continuing Legacy* (August 2010) ("EJI Report") at 28. More should be required to exclude a citizen from jury service. At the very least, police contacts standing alone should be deemed insufficient, as a matter of law.

This Court also heard directly from a potential juror who had been the subject of a peremptory challenge based on her negative experiences with police. *Minority & Justice Commission Symposium on Jury Diversity in Washington*, http://bit.ly/2rS4nAc at ~2:08. The potential juror described the poor treatment she and her family had received from law enforcement officers, the embarrassment she felt when the prosecutor exercised a peremptory challenge against her and all of the potential jurors were ushered into the hallway, and the indignation she felt at the suggestion that she could not be fair. Her experience is not unique; it is representative. *See* USA Today: "It's still too easy to push blacks, minorities off of juries" https://usat.ly/2C8s6jY (describing case in which black potential juror was excluded, despite assuring lawyers he could be fair, because he expressed concerns about unfair law enforcement practices).

There is "no question" that racial disparities exist with respect to police contacts and arrests. Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 Yale L. & Pl'y Rev. 387, 394 (2016). "[S]tudies verify the prominent impact of negative police contacts on the citizenry's general perceptions of fairness and bias in our justice system." *State v. E.J.J.*, 183 Wn. 2d 497, 513 (2015) (Madsen, C.J., concurring). Excluding potential jurors on the basis of their negative police contacts only exacerbates the unfairness, both actual and perceived. This Court should adopt proposed subsection (h) to address one of the primary mechanisms historically used to exclude people of color from juries.

Subsection (i)

Subsection (i) is equally important. Litigants "frequently justify [peremptory] strikes by making unverifiable assertions about African-American potential jurors' appearance and demeanor." EJI Report at 18. These demeanor-based justifications for exclusion should be treated with caution because they are often rooted in bias – whether conscious, implicit, or institutional. Requiring such justifications to be corroborated would promote accuracy, prevent improper challenges, and establish a clear framework for courts and litigants to follow.

Justice Marshall anticipated this issue. He noted that a party's "own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is sullen, or distant, a characterization that would not have come to his mind if a white juror had acted identically." *Batson*, 476 U.S. at 106 (Marshall, J., concurring). Others subsequently acknowledged this phenomenon:

> [W]e now know that implicit biases can lead members of different races to perceive members of other races as lazy, or hostile, or threatening. Thus, accepting "body language or demeanor" as a purportedly legitimate reason for a peremptory challenge provides another "Handy Race-Neutral Explanation" because it disregards the effect of implicit bias upon perceptions of body language or demeanor.

Judge 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, 164 (2010).

In *Saintcalle*, the prosecutor described the African-American juror as "very checked out" and not "engaged" – yet the record reflected that she participated in voir dire far more than any other juror. *Saintcalle*, 178 Wn.2d at 59-60. The prosecutor had also described a Mexican-American potential juror as "not very intelligent," even though the juror was a real estate broker, parent, and college student who provided reasoned responses during voir dire. *Compare* EJI Report at 17 ("A startlingly common reason given by prosecutors for striking black prospective jurors is a juror's alleged 'low intelligence'").

Thus, if any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party should be required to provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior should invalidate the given reason for the peremptory challenge. This would be a workable approach to a serious problem.

Race discrimination should be addressed now; other issues should be referred for further study

The Committee was tasked with developing a proposal that would address the long history of race discrimination in jury selection – particularly the implicit bias that the *Batson* standard has failed to uproot. The forms this discrimination takes, and the stereotypes it relies on, are different in the context of gender, sexual orientation, and gender identity. Washington State must also address and act to end discrimination in jury selection based on gender, sexual orientation, and gender identity, yet putting those statuses in this rule without context would, in our view, fail to address that discrimination. It is our recommendation that this rule be adopted as proposed, and that a second task force with additional expertise and background in gender, sexual orientation, and gender identity discrimination be convened to squarely address those issues.

Conclusion

The undersigned organizations urge this Court to adopt the stronger version of proposed GR 37 set forth above. A peremptory challenge should be denied if an objective observer could view race or ethnicity as a factor in the exercise of the challenge. A juror's negative experience with police or the justice system should be a presumptively invalid justification for excluding the juror. Demeanor-based reasons for exercising a peremptory challenge should be invalid absent corroboration. Adopting these provisions will reduce discrimination, honor the dignity of jurors, and promote respect for the justice system.

Respecfully submitted this 16th day of February, 2018 by:

Lila J. Silverstein
Washington Association of Criminal Defense Lawyers

Taki V. Flevaris
Fred T. Korematsu Center for Law & Equality

Jeffery P. Robinson
American Civil Liberties Union

Sara L. Ainsworth
Legal Voice

La Rond Baker
Loren Miller Bar Association of Washington

David A. Perez
Latina/o Bar Association of Washington

STATEMENT ON THE WORKGROUP FINAL REPORT WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

INTRODUCTION

The core concern of the Washington Association of Prosecuting Attorneys (WAPA) is to recommend a rule that recognizes principles of unconscious bias in jury selection, while preserving the right of all parties to remove jurors unlikely to fairly consider the facts of the case.

Both parts of this balance are important. Jurors should not be excluded because of their race, gender, or sexual orientation, but jury trials exist to fairly adjudicate disputes between parties. If there are concrete race and gender-neutral reasons to believe a juror may not be fair, a party has a limited right to ask that such juror be excused. This concern is particularly acute for the plaintiff, who carries the burden of proof at trial, and it is most acute for the State in a criminal case, because a single unfair juror can cause a mistrial.

To this end, WAPA recommends this Court consider the proposed rule that is attached to this comment. This proposal was shaped by the many profitable discussions with the members on the workgroup, but it is ultimately offered as a choice to the overly-complex proposal that has emerged from that group.

The comments below will follow the structure of Jury Selection Workgroup's Final Report.

BACKGROUND

This section supplements the background provided in the official report to more fully describe attempts by the Washington Association of Prosecuting Attorneys (WAPA) to foster agreement among committee members.

WAPA proposed for discussion three different frameworks for a rule. The first was the original WAPA proposal which essentially codified existing law under Batson v. Kentucky. This proposal adhered to the purposeful discrimination test used in the traditional constitutional analysis from Batson. At the second committee meeting, WAPA proposed an alternative that used a "but-for" test for determining whether discrimination was occurring. (This proposal included sexual orientation as a protected class.) At either the third or fourth meeting, following up on a proposal by one workgroup member to use the appearance of fairness standard, WAPA proposed a rule that adapted that standard to this context,

attempting at the same time to accommodate existing proposals from other groups.

Ultimately, WAPA believes that use of the appearance of fairness standard is proper, but that many other provisions in the rule are either unnecessary, compromise the rule's application to gender and sexual orientation, and/or make the rule unduly complex for the trial process.

AREAS OF CONSENSUS

Consensus is a difficult concept to measure in any committee, and it is even more difficult to describe in a group of this size and as to a topic as complex as this rule became. And, because the framework for decision-making was not discussed until the last meeting, there remains some confusion as to how the progress of this group should be measured. It is fair to say, however, that the committee report accurately summarizes many areas of agreement. WAPA includes the following qualifications to that summary.

The history of inappropriate exclusion of jurors is important to appreciate the need for this rule and to understand how it is to be implemented. That history is best addressed in the GR 9 statement supporting the rule.

WAPA agrees with the notion that there should be a low threshold for raising an objection under this rule; in fact, the only limit to raising a GR 37 objection should be a lawyer's obligations under the rules of professional responsibility. In WAPA's view, there should be no other threshold inquiry. The first step of the Batson inquiry, a prima facie test, has historically cut off discussion as to meaningful objections to peremptory challenges. That step ultimately served to mask intentional or unconscious bias. Eliminating the prima facie showing will be a highly significant improvement in the process, insofar as it will force litigants to root their challenges in concrete reasons focused directly on a juror's ability to serve.

WAPA believes, however, that the burden of carrying the objection should remain on the party lodging the objection.

Areas of Disagreement

Gender and Sexual Orientation:

Twenty four years ago the Supreme Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1994). Gender-based discrimination occurs across a spectrum of cases, including paternity,

family law, employment, domestic violence, and sexual assault, to name just a few. Like discrimination based on race, peremptory challenges to women are often masked (intentionally or not) in more benign language: the juror seemed "emotional" or "irrational" in her views. Such practices are unquestionably forbidden under the state constitution. Wa. Const. Article XXXI, sec. 1.

Exempting gender discrimination from this rule is a mistake. The issue will be litigated in numerous cases because discrimination based on gender is unconstitutional. But if dropped from GR 37, the issue will be litigated under the Batson framework rather than under this rule. Trial judges will be forced to juggle multiple, complex legal analyses during voir dire instead of applying a single standard. And, appellate courts will need to constantly refine the contours of two quite distinct legal tests for what are essentially two facets of the same problem. The law is complex enough without creating unnecessary additional burdens in this fashion.

Every proposed version of GR 37 presented to this committee prohibited gender discrimination and most pubic commenters to the proposed rules earlier opened for comment agreed that gender discrimination should be included. The issue was not debated or discussed by the workgroup. At the final meeting, several organizations that earlier supported gender discrimination language announced that they would no longer support that part of the proposed rule. This announcement apparently followed discussion among a block of representatives conferring outside the workgroup process. That decision was ill-advised and should be reconsidered.

WAPA also proposed to the workgroup that sexual orientation be analyzed under GR 37. Discrimination based on sexual orientation is clearly prohibited. RCW 49.60.030(1) (declaring a "right to be free from discrimination because of .... sexual orientation"). This Court and other courts have recognized that "members of the LGBT community are vulnerable to discrimination." In re Marriage of Black, 188 Wn.2d 114, 129–30, 392 P.3d 1041 (2017), citing Obergefell v. Hodges, ___ U.S.___, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015) (holding unconstitutional state laws that prohibit same-sex marriage) and Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) 130 (holding that heightened scrutiny applies to classifications based on sexual orientation and that equal protection forbids striking a juror on the basis of sexual orientation). See also Pavan v. Smith, ___ U.S. ___, 137 S. Ct. 2075, 198 L. Ed. 2d 636 (2017) (The Constitution entitles same-sex couples to civil marriage on the same terms and conditions as opposite-sex couples) and American Bar Association, Criminal Justice Section, National LGBT Bar Association, Report to the House of Delegates, http://www.abajournal.com/files/2018_hod_midyear_108D.pdf

(encouraging states and federal courts to prohibit discrimination based on sexual orientation).

WAPA acknowledges that sexual orientation is less-readily apparent to the observer and that direct inquiry of jurors should be avoided to respect juror privacy. However, these concerns do not justify omitting sexual orientation from the rule. The rule that WAPA now recommends is broader than the current proposal and would permit objections to peremptory challenges based on both gender and sexual orientation.

Additional Time For Voir Dire

Any version of this proposed rule will require lawyers and the trial judge to more carefully weigh peremptory challenges. This might require additional time for voir dire; it will certainly require lawyers to use their time efficiently and to focus on a juror's ability to fairly consider the case. This point need not be addressed in the body of the rule, but might be an appropriate topic for either the GR 9 cover sheet or the commentary.

Standard for determination of objection

The standard used in the committee proposal derives from the appearance of fairness standard—whether an objective observer "would view" the challenge as based on a prohibited basis. The ACLU proposes to replace the usual "would view" language with "could view."

The "would view" standard permits courts to disallow a suspect peremptory challenge while still allowing litigants to challenge jurors who likely cannot fairly consider the evidence. It is a standard that already exists in the law and a body of case law has applied it in various contexts. The "objective observer would view" standard does not require that a trial judge find purposeful discrimination by a lawyer.

There is no legal precedent for using a "could view" standard. The standard would be nearly impossible to meet, especially when considered along with other proposed definitions and presumptions included in the ACLU version of the rule. And, there is no existing body of case law against which that standard could be judged.

Directing versus advising the court to explain its ruling on the record

Trial courts should explain the bases for rulings so that litigants can understand the court's ruling and to facilitate appellate review. Trial courts may be encouraged to do so by comment to the rule.

Including circumstances to be considered and reasons that are presumptively invalid

"Circumstances to be considered." No rule can delineate all possible circumstances that must be considered. Some of the "circumstances" outlined in the existing rule are duplicative, others are unnecessary, and the totality is far too dense and ambiguous to be useful in the fast-moving and fluid process of an actual voir dire. Other "circumstances considered" are internally contradictory: a challenge can be denied because the challenger didn't ask enough questions of the juror ((g)(i)), but also because the challenger asked too many questions ((g)(ii)).

WAPA recommends that the most important circumstances be outlined in a comment. Those would include the following:

> (1) Whether the reason for the peremptory is disproportionately associated with one race, ethnicity, gender or sexual orientation because of its adverse effects upon that identifiable group; (2) If the basis for the challenge is attributed to the juror's demeanor, whether the judge or others can corroborate that demeanor; (3) Whether the party exercised peremptory challenges against similarly situated venire persons.

"Reasons that are presumptively invalid." No reason should be *presumed* invalid. Although some questions posed to jurors have historically masked racism or sexism, those same questions can also have a direct bearing on the juror's ability to assess the evidence objectively, and answers to those questions may uncover unconscious bias in a juror.

For example, a litigant might ask whether a juror has a family member or close friend who was the victim of sexual assault, or who was harassed at work. Women are disproportionately the victims of sexual assault and workplace harassment, and are thus more likely to answer "yes" to this question. Some litigants might use this line of questioning as a proxy for a sexist peremptory challenge. On the other hand, a juror might credibly say in voir dire that she could be fair to a defendant convicted of sexual assault, even though she herself was a victim, because she firmly believes that nobody should be convicted of a crime they did not commit. Alternatively, it might become clear that the juror's personal experiences make her unable to serve, whether she realizes it or not. The decision on such matters should be left to the trial court's discretion.

Similarly, a lawyer might ask jurors whether they or family or friends immigrated to this country. This question might be directed at Hispanic jurors in a case where a White defendant is charged with assaulting a Hispanic person, or in a case where an immigrant plaintiff is suing her employer. The lawyer for the White

defendant or the employer might try to remove jurors the lawyer believes are sympathetic to the victim or plaintiff. A person's experience as an immigrant might, or might not, make that person unable to fairly consider a particular case. The decision should not, however, be made on the basis of presumptions about the juror's experience, either for or against the juror's service. Rather, the decision should be left to the discretion of the trial court asking whether the exercise of the peremptory challenge would appear to the reasonable person to be racially-based.

Taking another example, a juror might answer that he or she has family members convicted of crimes, but credibly say that he or she could still be fair to the State in a criminal case. Or, it might become apparent from the juror's answers that he or she *cannot* be fair.

In sum, a mere "yes" answer to questions like those above provides little information and should not fail the appearance of fairness test. However, upon further questioning, a clearer picture might emerge, making it apparent that this juror either is, or is not, able to consider the case fairly. Discerning a juror's fitness to serve cannot be reduced to mere presumptions, it should be left to the trial court's judgment based on in-court questioning.

WORKGROUP RECOMMENDATIONS

This workgroup labored for many hours in an effort to achieve consensus on this difficult topic. Significant progress was made in reaching near agreement to eliminate a prima facie showing and regarding the use the appearance of fairness standard as a basis for the key decisional standard.

Still, the "final' rule with its multiple alternatives is, in WAPA's judgment, too cumbersome for implementation in real-world trials. Voir dire is a complex and nuanced process. Lawyers and the trial judge must constantly assess a juror's language as well as her facial expressions, body language, and tone of voice. The language of this proposal (in either form) is complex, multi-layered, and multi-factored. It will burden rather than assists trial judges.

For that reason, WAPA respectfully suggests this Court consider the following proposed rule, which, using the appearance of fairness standard as its core, provides trial judges with a tool to curtail inappropriate challenges based on race, gender or sexual orientation, whether the challenge is rooted in intentional or unconscious bias. Because this version eliminates race-specific language in the factors and presumptions, it can be used to discourage peremptory challenges based on all forms of discrimination, and it avoids the need to apply two standards, one rule-based and the other constitutionally-based.

SUGGESTED AMENDMENT
GENERAL RULES (GR)

Rule 37 JURY SELECTION

(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity, gender or sexual orientation.

(b) If a party believes that an adverse party is exercising a peremptory challenge on the basis of race, ethnicity, gender, or sexual orientation the party may object to the exercise of the challenge. An objection is waived unless made before the court excuses the juror. The objection shall be made outside of the presence of the panel.

(c) Upon objection to the exercise of a peremptory challenge pursuant to this rule, the adverse party shall articulate the reasons that the peremptory challenge was exercised.

(d) The court shall disallow the peremptory challenge if in the exercise of discretion it finds that a reasonably prudent and disinterested observer would conclude that the party exercised the peremptory challenge on the basis of race, ethnicity, gender or sexual orientation.

(e) Disallowing a peremptory challenge under this rule shall not be deemed reversible error absent a showing of prejudice.

Comment

In determining whether a reasonably prudent and disinterested observer would conclude that a party exercised a peremptory challenge on the basis of race, ethnicity, gender, or sexual orientation, a court should consider the totality of circumstances, including: (1) Whether the reason for the peremptory is disproportionately associated with one race, ethnicity, gender or sexual orientation because of its adverse effects upon that identifiable group; (2) If the basis for the challenge is attributed to the juror's demeanor, whether the judge or others can corroborate that demeanor; (3) Whether the party exercised peremptory challenges against similarly situated venire persons.

PRESIDENT
Lori O'Tool
Preg, O'Donnell & Gillett
206.287.1775
lotool@poglaw.com

PRESIDENT-ELECT
Peter Ritchie
Meyer Fluegge & Tenney, P.S.
509.575.8500
ritchie@mftlaw.com

TREASURER
Rachel Reynolds
Bullivant Houser Bailey
206.521.6415
Rachel.reynolds@bullivant.com

SECRETARY
Jillian Hinman
Soha & Lang
206.624.1800
Hinman@sohalang.com

TRUSTEES
Levi Bendele, Seattle
Jillian Hinman, Seattle
Paul Kirkpatrick, Spokane
Allison Krashan, Seattle
George Mix, Seattle
Jon Morrone, Seattle
Heather Proudfoot, Seattle
Rachel Tallon Reynolds, Seattle
Michael Rhodes, Seattle
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John G. Bergmann• Harold C. Fosso
Martin T. Crowder • Gene H. Knapp, Jr.
William L. Parker • Michael Mines • Fred R. Butterworth
Frank H. Roberts • Charles E. Peery
Arthur R. Hart • Robert P. Piper • Roy J. Moceri
F. Lee Campbell • Hoyt Wilbanks • Jack P. Scholfield

February 15, 2018

Ms. Shannon Hinchcliffe
Office of Legal Services and Appellate Court Support
Administrative Office of the Courts
P.O. Box 41174
Olympia, WA 98504-1170

Dear Ms. Hinchcliffe,

Enclosed is the Washington Defense Trial Lawyers' Comments on the Workgroup Draft of GR 37, prepared by our representative, Past President Michael Nicefaro.

We thank you for your time and effort in facilitating this group and hope for a rule that embodies the carefully considered comments of the Washington Defense Trial Lawyers.

Kind Regards,

Lori K. O'Tool
WDTL President

Enclosure

Washington Defense Trial Lawyers' Comments on Workgroup Draft of GR 37

February 16, 2018

Contact: Mike Nicefaro, WSBA No. 9537

Regarding Section (a) Policy and Purpose:

The WDTL motto is "Fighting for Justice and Balance in Civil Courts." Consistent with that tenet, WDTL believes that GR 37 should not be limited to protection of potential jurors' race and ethnicity, but should extend to protect potential jurors' sex, sexual orientation, gender expression and gender identity, and that these attributes be expressly listed in the rule. Washington law (See RCW 49.60, WAC 162-32, etc.) protects these attributes. Exclusion of these protected groups from specific mention in GR 37 will incorrectly suggest that the groups are not protected by law, and deprive group members of a process to test whether a peremptory challenge asserted against them is consistent with the spirit of this rule as well as overarching Washington law. WDTL acknowledges that other sections of this draft are more specific to race and ethnicity than to sex and gender, but believes that inclusion of reference to other protected classes will not create any inconsistencies, the modified rule will be workable, and the advantages of inclusion far outweigh the disadvantages of exclusion.

Regarding Section (b) Scope:

The WDTL has no comment on this section.

Regarding Section (c) Objection:

The WDTL has no comment on this section.

Regarding Section (d) Response:

Traditionally, by definition, a party asserting a peremptory challenge had no restriction for doing so (other than by a *Batson* challenge). WDTL agrees that the *Batson* rule is inadequate, and acknowledges that imposing some restrictions on the use of peremptory challenges is appropriate if doing so will allow for accountability in the use of such challenges to increase the confidence of litigants

and their communities in the fairness of our jury trial system. This rule will replace the traditional essentially unlimited right to exercise peremptory challenges with a qualified right through a process whereby the court balances the reasons given for asserting the challenge (Section (d) of this rule) against the perceived impact of the challenge (Section (e) of this rule). It should be recognized that this new process will be subject to abuse by a party using an objection to compel an opponent to disclose attorney work product, such as juror prejudice or bias that the attorney is trying to avoid. For that reason, WDTL suggests that this section include language to the effect "In obtaining such statement, the court shall protect against unreasonable disclosure of the mental impressions, conclusions, opinions, or legal theories of the party exercising the peremptory challenge." This language mirrors that of CR 26.

Regarding Section (e) Determination:

WDTL believes that GR 37 should not be limited to protection of potential jurors' race and ethnicity. Rather, WDTL believes it should extend to protect potential jurors' sex, sexual orientation, gender expression and gender identity. Therefore, WDTL believes that these attributes should be listed here in Section (e) as well as in Section (a).

As between the three bracketed alternatives, WDTL believes that the third alternative should be adopted, for the following reasons. The first alternative, ("…could view…") is disfavored because it is too vague and hypothetical. Under this new rule, parties that previously had an absolute right (subject to *Batson*) to resolve impartiality concerns following a denied challenge for cause or otherwise through the exercise of a peremptory challenge will now be subject to a demand that they provide a reason for the challenge. The reason offered will be balanced against the perceived impact of allowing the challenge. While a rule like GR 37 is appropriate to provide protection to prospective minority jurors and their communities, it should extend no further than necessary to implement that protection while still allowing the use of peremptory challenges to assure litigants that they have a means, when challenges for cause are insufficient, to assure themselves of as fair a jury as possible. The second alternative ("…was not a factor…") is disfavored because it assumes improper motive (conscious or unconscious) is the norm unless proven otherwise. Although, sadly, it is undeniable that bias, conscious and otherwise, has historically affected the use of peremptory challenges, most would say that it is unfair to hold that it is the norm. Consequently, WDTL supports the use of the third bracketed alternative ("…an objective observer would view race or ethnicity as a factor…") with the additional sex and gender protection language added.

WDTL supports the language "…need not find purposeful discrimination…" because it allows the court to, after balancing the reasons given for exercising the challenge against the impact of allowing the challenge, make a finding based on discriminatory impact rather than on discriminatory intent. Discriminatory impact should be less difficult to establish than discriminatory intent, and as such more practical than the former *Batson* process.

Finally, WDTL supports the use of mandatory language requiring the judge to explain its ruling on the record, thereby creating a sufficient and more complete record for appellate review.

Regarding Section (f) Nature of Observer:

The WDTL has no comment on this section.

Regarding Section (g) Circumstances Considered:

WDTL disfavors inclusion of this section that is intended to reflect the holdings of past appellate decisions. Incomplete listings of legal holdings is potentially misleading. Moreover, subsequent opinions can change the law, rendering the language of the rule inaccurate. Perhaps most important, the language of the rule should not suggest whether, in the unique aspects of a particular case, the circumstance listed automatically taints a peremptory challenge. If this section is included, WDTL believes that the first two subjections ((i) and (ii)) should be deleted entirely, or at the very least qualified by appropriate language indicating that the number of questions asked and the duration of time spent with a potential juror is not necessarily indicative of an inappropriate conscious or unconscious bias or motive for exercise of a peremptory challenge, or of a discriminatory impact of such challenge.

Regarding Section (h) [Reasons Presumptively Invalid] / [Suspect Reasons]:

WDTL disfavors inclusion of this section that is intended to reflect the holdings of past appellate decisions. Incomplete listings of legal holdings is potentially misleading. Moreover, subsequent opinions can change the law, rendering the language of the rule inaccurate. Perhaps most important, the language of the rule should not prejudge whether, in the unique circumstances of a particular case, the reason listed supports a peremptory challenge notwithstanding a challenge for cause having been denied. If this section is included, WDTL

prefers the second alternative ("reasons should be allowed…") because it realistically suggests a more fact-based analytic process that the first alternative.

Regarding Section (i) Reliance on Conduct:

WDTL disfavors inclusion of this section that is intended to reflect the holdings of past appellate opinions. There is an entire body of law beyond these statements that addresses proper reasons for dismissing prospective jurors based on their conduct. Incomplete listings of legal holdings is potentially misleading. Moreover, subsequent appellate opinions can change the law, rendering the language of the rule inaccurate.

Regarding Section (j) Disallowed Challenges Preserved:

The WDTL has no comment on this section.

APPENDIX 3 – GR 37 WORKGROUP MEMBERSHIP LIST

GR 37 WORKGROUP MEMBERSHIP LIST

Name	Representing
Judge Blaine G. Gibson, Co-chair	Superior Court Judges' Association
Judge R.W. Buzzard, Co-chair	District and Municipal Court Judges' Association
Judge Beth Andrus	Superior Court Judges' Association
Judge Franklin Dacca	District and Municipal Court Judges' Association
Jeffrey Robinson	American Civil Liberties Union of Washington
Jim Whisman	Washington Association of Prosecuting Attorneys
Lila Silverstein	Washington Association of Criminal Defense Lawyers
Peter Meyers	Washington State Association for Justice
Michael A. Nicefaro, Jr.	Washington Defense Trial Lawyers
Rachael DelVillar	Superior Court Jury Administrator
Tina Marusich	Courts of Limited Jurisdiction Jury Administrator
Taki Flevaris	Korematsu Center for Law and Equality
La Rond Baker Chris M. Sanders Chalia Stallings-Ala'ilima	Loren Miller Bar Association of Washington
David Perez	Latina/o Bar Association of Washington
Sara L. Ainsworth	Legal Voice
Andrea T. Chin	Asian Bar Association of Washington
Shannon Hinchcliffe	AOC Staff

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A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials

Catherine M. Grosso
Michigan State University College of Law, grosso@law.msu.edu

Barbara O'Brien
Michigan State University College of Law, obrienb@law.msu.edu

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A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson* North Carolina Capital Trials*

*Catherine M. Grosso & Barbara O'Brien***

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** Catherine Grosso and Barbara O'Brien are associate professors at the Michigan State University College of Law.

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I. INTRODUCTION

Among those who laud its mission, it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place. Scholars, judges, and practitioners have criticized the decision for its failure to curb the role of racial stereotypes in jury selection.[1] Likewise, previous research in North Carolina has suggested both that race continues to play a role in jury selection and that courts are reluctant to enforce *Batson* rigorously.[2] Recently, however, the North Carolina General Assembly passed legislation aimed at curing this defect by providing trial courts a unique opportunity to consider the role of race in peremptory challenges from a different angle.

The North Carolina Racial Justice Act of 2009 ("RJA") created a state claim for relief for defendants currently on death row who can show that race was a significant factor in the exercise of peremptory challenges in their cases.[3] A defendant who makes such a showing is entitled to have a death sentence reduced to life without parole.[4] The RJA expressly deems a broad range of evidence relevant by allowing claimants to prove their cases using "statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both."[5] This Article presents the results of a study undertaken in order to evaluate the potential for statistical evidence to support claims under this part of the RJA.

In particular, we examined how prosecutors exercised peremptory challenges in capital trials of all defendants on death row in North Carolina as of July 1, 2010, to assess whether potential jurors' race played any role in those decisions.[6] We found substantial disparities in which potential jurors prosecutors struck. Over the twenty-year period we examined, prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black. These disparities remained consistent over time and across the state, and did not diminish when we

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1. *See infra* notes 19–21 and accompanying text.

2. *See* Amanda S. Hitchcock, Recent Development, *"Deference Does Not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina Supreme Court's highly deferential approach to reviewing Batson claims in capital cases); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (studying jury selection in one North Carolina county).

3. *See* N.C. GEN. STAT. §§ 15A-2010–12 (2011) (creating a cause of action if the court finds race was a significant factor in the prosecutor's decision to seek or impose a death sentence).

4. *Id.* § 15A-2012(a)(3).

5. *Id.* § 15A-2011(b).

6. A list of current death row inmates is available at http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm.

controlled for information about venire members that potentially bore on the decision to strike them, such as views on the death penalty or prior experience with crime.[7]

In Part II, we review the prior research on jury selection, particularly on the issue of racial bias. In Part III, we present our study methodology and design. Part IV presents the statewide unadjusted racial disparities in prosecutors' exercise of peremptory strikes, and Part V presents the results of analyses controlling for other factors potentially relevant to jury selection.

II. THE STUBBORN LEGACY OF RACE IN JURY SELECTION: THE RULES AND THE REALITY

The Supreme Court has grappled with barriers to racial diversity in juries for decades.[8] Indeed, even while characterizing the peremptory challenge as a tool vital to the accused, the *Swain v. Alabama* Court held that a prosecutor's systematic exclusion of black jurors was "at war with our basic concepts of a democratic society and a representative government."[9] Jurors, the Court asserted, "should be selected as individuals, on the basis of individual qualifications, and not as members of a race."[10] The Court elaborated this view in *Batson v. Kentucky*, when it noted that purposefully excluding people from jury service based on their race undermines public confidence in our justice system.[11] The Court later clarified that excluding jurors because of their race harmed not only the defendant, but the wrongly excluded jurors as well,[12] and that defense counsel must abide by the same rules as prosecutors.[13] The Court has extended the doctrine to prohibit gender-based strikes,[14] and some lower courts have prohibited strikes based on religious affiliation.[15]

While the Court established an elaborate three-step process for challenging a peremptory challenge as based on race (or gender), parties

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7. Please see Part III.E and Appendix A for more information on this coding.

8. Duren v. Missouri, 439 U.S. 357 (1979); Castaneda v. Partida, 430 U.S. 482 (1977); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (juries exist "to guard against the exercise of arbitrary power"); Glasser v. United States, 315 U.S. 60, 86 (1942) (juries must not be "the organ of any special group or class"), *superseded on other grounds by rule*, FED. R. EVID. 104(a), *as recognized in* Bourjaily v. United States, 483 U.S. 171 (1987).

9. Swain v. Alabama, 380 U.S. 202, 204 (1965) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) (internal quotation marks omitted), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

10. *Id.* (quoting Cassell v. Texas, 339 U.S. 282, 286 (1950)) (internal quotation marks omitted).

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

12. Powers v. Ohio, 499 U.S. 400, 425 (1991).

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

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

15. United States v. Brown, 352 F.3d 654 (2d Cir. 2003); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998).

can readily defeat the challenge by proffering a plausible race-neutral reason for the strike decision.[16] Trial courts rarely reject these explanations (in the third step) as disingenuous, or "pretextual."[17] Moreover, the Court designed the *Batson* regime to counter intentional discrimination. Significant psychological research suggests that racial bias can operate below the level of conscious awareness to affect people's perceptions and behaviors.[18] As a result, a party who is subconsciously influenced by a juror's race might offer in good faith a race-neutral reason for the strike. *Batson*'s focus on the credibility rather than reasonableness of the proffered explanation authorizes trial courts to uphold such strikes even though they may be actually (if unintentionally) driven by race.

The difficulty of uncovering racial bias—whether deliberate or unconscious—has led many to conclude that the *Batson* regime cannot counter discrimination in jury selection.[19] Many scholars and several judges have called for the wholesale abolition of peremptory challenges.[20] Others have suggested less drastic reforms, such as reducing the number of peremptories available to each side, so as to limit the opportunity for race-

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16. In the first stage, the defendant carries the burden of establishing a prima facie case. In the second, the prosecution carries a burden of producing a race-neutral explanation for the strike or strikes. Finally, in the third stage, the defendant carries the burden of proving that the explanations offered by the prosecution with respect to one or more venire members were pretextual, thereby supporting an inference that one or more was racially motivated. *Batson*, 476 U.S. at 96–98.

17. Miller-El v. Dretke, 545 U.S. 231, 278 (2005) (Thomas, J., dissenting); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 483–84 (1996).

18. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357–411 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

19. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 706–07 (1998); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501; Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475 (1998); Deborah Ramirez, *Affirmative Jury Selection: A Proposal To Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 173–74.

20. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); 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, 199–211 (1989); William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49 (1999); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 809 n.2 (1997) (listing and citing judges and academics who have voiced strong concerns about peremptory challenges); Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451 (2000); Arielle Siebert, Batson v. Kentucky*: Application to Whites and the Effect on the Peremptory Challenge System*, 32 COLUM. J.L. & SOC. PROBS. 307 (1999).

based jury selection.[21] The RJA adopts none of these policy recommendations. Rather, it authorizes a new approach to examining the role of race in the exercise of peremptory challenges based on a broad range of evidence.

As noted earlier, the RJA created a state statutory claim for defendants facing a death sentence who can show that race was a significant factor in the exercise of peremptory challenges "in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed."[22] The geographical scope of a potential claim makes it distinct from a typical *Batson* claim as does the range of evidence expressly authorized. Claimants may prove their cases using "statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both."[23]

This Article presents evidence relevant to a claim under the RJA. Anecdotal evidence suggests that race weighs heavily in decisions to exercise peremptory strikes[24]—a conclusion bolstered by systematic research. Previous research on jury selection generally, and the role of race in the exercise of peremptory studies more specifically, typically evaluates different aspects of *Batson*'s legal framework. While this framework does not apply directly to an RJA claim, the central question remains constant: Did race play a significant role in the exercise of peremptory challenges?

A. *EXPERIMENTAL AND MOCK-JURY STUDIES*

Experimental and other laboratory work with mock jurors lends support to those who suspect that race continues to play a role in jury selection.[25] For example, a number of studies conducted before the *Batson* Court prohibited consideration of race in jury selection demonstrated its importance in decision making. George Hayden, Joseph Senna, and Larry Seigel examined the types of information relevant to prosecutorial decision making in voir dire among twenty randomly selected prosecutors from four Boston-area

21. Adams & Lane, *supra* note 19; Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363 (2009).

22. N.C. GEN. STAT. § 15A-2011(a) (2011).

23. *Id.* § 15A-2011(b).

24. In a 1986 training video, Philadelphia District Attorney Jack McMahon emphasized the importance of striking certain black venire members, such as "blacks from low-income areas" and blacks who are "real educated." Videotape: Jury Selection with Jack McMahon (DATV Prods. 1987), *available at* http://video.google.com/videoplay?docid=-5102834972975877286, *cited in* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 41–43 (2001).

25. Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 533 (2008).

counties.[26] The researchers presented the prosecutors with categories of information about potential jurors for two hypothetical cases, one involving a black defendant and the other a white defendant.[27] Prosecutors could seek information about potential jurors from one category at a time, and then decide whether to strike the juror or to seek more information.[28] Prosecutors typically sought information about potential jurors' gender, age, residence, occupation, demeanor, and appearance.[29] In the case involving the black defendant, however, prosecutors sought information on race of the venire member significantly more often than they did in the case involving the white defendant.[30]

More recently, Michael Norton and Samuel Sommers presented three groups of study participants—college students, law students, and trial attorneys—with the facts of a criminal case involving a black defendant.[31] The researchers told participants to assume the role of the prosecutor, and that they had only one peremptory strike left to use in deciding which of two prospective jurors to strike.[32] The prospective jurors each had qualities that pretesting suggested would be troubling to prosecutors: one was a journalist who had investigated police misconduct and the other had indicated skepticism about statistics relevant to forensic evidence that the state would offer.[33] Participants were randomly assigned to one of two conditions: one in which the first prospective juror was black and the second white, and another in which the race of the prospective jurors was reversed.[34]

Participants challenged the black juror more often than the white juror, regardless of whether the juror was presented as the journalist or the statistics skeptic.[35] Yet, when asked to explain why they struck the juror they did, the study participants almost never mentioned race; participants tended to offer the first juror's experience writing about police misconduct when

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26. George Hayden, Joseph Senna & Larry Siegel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768 (1978).

27. *Id.* at 781–82.

28. *Id.* at 782–83.

29. *Id.* at 784–85, 784–85 tbl.II.

30. *Id.*

31. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 266 (2007).

32. *Id.*

33. *Id.* at 265–66.

34. *Id.* at 266–67.

35. *Id.* at 267, 267 tbl.I. The effect was statistically significant for college ($n = 90$) and law students ($n = 81$) ($p < .05$), and marginally significant in the smaller attorney sample ($n = 28$). *Id.* at 266–67.

striking him, and cited the second juror's skepticism about statistics when striking him.[36]

In another study, Norbert Kerr and colleagues had attorneys view videotaped voir dire of mock jurors in a criminal case, and assigned each the role of judge, defense attorney, or prosecutor—usually based on their current position or past experience in the respective role.[37] They asked participants to rate the desirability of the potential jurors and to indicate which ones they would strike.[38] The researchers found that attorneys assigned the role of prosecutor were far more likely to strike black prospective jurors than jurors of another race.[39]

Studies that examine jury selection in hypothetical settings are limited by the artificial nature of the decision making.[40] Their strength, however, is that they allow researchers greater control over the variables in question in order to identify causal factors. These studies offer substantial evidence that race plays a significant role in jury selection, especially when considered in light of the research on jury selection in real trials set forth below.[41]

B. Studies Examining Jury Selection in Actual Trials

Only a handful of published studies have examined how parties exercise peremptory challenges in actual trials. In one study, Billy Turner and colleagues examined strikes by both the prosecution and defense in 121 criminal trials in one Louisiana parish from 1976–1981.[42] The authors compared the percentage of struck jurors who were black (44%) to the percent of the population in the Louisiana parish that was black at the time of the study (18%), and inferred from this twenty-six-point disparity that jury selection was not race neutral.[43]

John Clark and colleagues analyzed jury selection in twenty-eight trials in two adjacent counties in a southeastern state.[44] Across the eleven criminal

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36. *Id.* at 267–68.

37. Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll & James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 676 (1991).

38. *Id.* at 677–78.

39. *Id.* at 692.

40. *See* Sommers & Norton, *supra* note 31, at 270–71 (noting limitations of experimental jury-selection studies).

41. *See id.* at 270 (noting convergence of experimental and archival data analysis of the effect of race in jury selection).

42. Billy M. Turner, Rickie D. Lovell, John C. Young & William F. Denny, *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 63 (1986).

43. *Id.*

44. John Clark, Marcus T. Boccaccini, Beth Caillouet & William F. Chaplin, *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 647 (2007).

trials they examined, race was a statistically significant predictor of both prosecution and defense strikes, but in reverse patterns: the state struck disproportionally more black potential jurors while the defense struck disproportionally fewer.[45]

Mary Rose examined peremptory strike decisions in thirteen non-capital felony trials in North Carolina.[46] Prosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire.[47] In comparison, defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire.[48]

A third study conducted by Richard Bourke and Joe Hingston at the Louisiana Crisis Assistance center examined jury selection in 390 jury trials involving 13,662 prospective jurors in Jefferson Parish, Louisiana.[49] In both six- and twelve-person juries, prosecutors struck "black prospective jurors at more than three times the rate" they struck their white counterparts.[50]

David Baldus and colleagues examined strike decisions over a seventeen-year period in 317 Philadelphia County capital murder trials.[51] They found that prosecutors struck on average 51% of the black jurors they had the opportunity to strike, compared to only 26% of comparable non-black jurors.[52] Defense strikes exhibited a nearly identical pattern in reverse: defense counsel struck only 26% of the black jurors they had the opportunity to strike, compared to 54% of comparable non-black jurors.[53] The disparate effect of race on jury selection held even when the researchers controlled for various non-racial characteristics of the jurors, such as age, occupation, education, and responses to certain questions asked in voir dire.[54]

Journalists at the *Dallas Morning News* replicated the methodology of the Philadelphia study to examine the exercise of peremptory challenges in 108 of 381 non-capital felony trials in Dallas County, Texas, during the first ten months of 2002.[55] Like Baldus and colleagues, the journalists considered in

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45. *Id.* at 651.

46. Rose, *supra* note 2, at 697.

47. *Id.* at 698–99.

48. *Id.*

49. RICHARD BOURKE & JOE HINGSTON, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 5 (2003).

50. *Id.* at 7–8.

51. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001).

52. *Id.* at 53.

53. *Id.*

54. *Id.* at 70–72.

55. Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, but Analysis Shows They Are More Likely To Reject Black Jurors*, DALL. MORNING NEWS, Aug. 21, 2005, at 1A [hereinafter *A Process of Juror Elimination*], *available at* 2005 WLNR

the analyses the impact of non-racial characteristics of potential jurors.[56] The *Dallas Morning News* study found that prosecutors "excluded eligible blacks from juries at more than twice the rate they rejected eligible whites."[57] The disparate effect of race on jury selection held even when they controlled for non-racial characteristics of the jurors. The journalists concluded that "being black was the most important personal trait affecting which jurors prosecutors rejected."[58]

A major strength of the Philadelphia and Dallas County studies was the inclusion of race-neutral factors about jurors that might bear on a party's decision to strike.[59] One possible explanation for racial disparities in strike rates is that race is associated with other race-neutral factors that drive strike decisions. If members of one race are disproportionately less supportive of the death penalty, for example, prosecutors' disproportionately high strike rates against that group may be driven by group members' views rather than their race. Controlling for various race-neutral factors that may bear on the decision to strike allows the researcher to rule out at least some alternative explanations of racial disparities.

C. *STUDIES ANALYZING APPELLATE DECISIONS REVIEWING* BATSON *CLAIMS*

We are aware of no study directly assessing *Batson*'s effectiveness in countering consideration of race in jury selection, such as by comparing strike rates against black jurors in trials before *Batson* was decided to those that came after. However, the consistency of researchers' findings of racial disparities in studies spanning several decades suggests that *Batson* has not

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24658335 (presenting part of the findings of the study). The *Dallas Morning News* published the results of this research in a set of feature stories between Sunday, August 21 and Tuesday, August 23. *See About the Series*, DALL. MORNING NEWS, Aug. 21, 2005, at 19A, *available at* 2005 WLNR 24658085 (describing the series); *How the Analysis Was Done*, DALL. MORNING NEWS, Aug. 21, 2005, at 19A, *available at* 2005 WLNR 2457224 (reporting study design and methodology). The *Dallas Morning News* published a similar study on jury selection in Dallas County in 1986. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, DALL. MORNING NEWS, Mar. 9, 1986, at 1A, *available at* 1986 WLNR 1683009. This study analyzed the impact of peremptory strikes on jury composition in "100 randomly selected felony" jury trials in 1983 and 1984 and found blacks largely excluded from jury service. *Id.* We are aware of one other study on peremptory challenges by journalists. This study reached similar results. Douglas Frantz, *Many Blacks Kept Off Juries Here*, CHI. TRIB., Aug. 5, 1984, at 1 (reporting on jury selection for all 31 criminal jury trials in Cook County Circuit Courts in July 1984).

56. *A Process of Juror Elimination*, *supra* note 55. The journalists consulted with David Baldus and George Woodworth, the principle authors of the Philadelphia study, in conducting this research. *Id.*

57. *Id.*; *see also* Steve McGonigle et al., *Jurors' Race a Focal Point for Defense: Rival Lawyers Reject Whites at Higher Rates*, DALL. MORNING NEWS, Aug. 22, 2005, at 1A, *available at* 2005 WLNR 24659140 (presenting findings with respect to jury selection by defense attorneys).

58. *A Process of Juror Elimination*, *supra* note 55.

59. Baldus et al., *supra* note 51, at 65–72, tbls.6 & 7.

been especially successful in purging consideration of race from jury selection.

One possible reason *Batson* has been so ineffective is the ease with which parties can generate race-neutral explanations for challenged strike decisions. Research on the exercise of *Batson* challenges indicates that courts commonly accept reasons proffered to justify challenged strikes based on little more than stereotyping and guesswork.[60] Kenneth Melilli analyzed all published *Batson* decisions from 1986 to 1993, and concluded that proffered explanations were often grounded in stereotypes and, to a lesser degree, attorneys' intuition about favorability of a potential juror.[61] A second similar study concluded that the reasons courts often find acceptable may merely obfuscate race discrimination. Jeffrey Beilin and Junichi Semitsu surveyed all published and unpublished federal decisions from 2000 to 2009 that reviewed state or federal trial courts' denials of *Batson* challenges.[62] After reviewing decisions in 269 cases, they reported that their "most revealing discovery was the substantial list of acceptable reasons that could conceivably implicate a juror's likelihood of being impartial but were likely to disproportionately impact specific racial or ethnic groups."[63]

Two papers examining the implementation of *Batson* in North Carolina concluded that the significant deference the North Carolina Supreme Court gives to trial courts weakened *Batson*'s impact in that state.[64] The first paper evaluated the first five years of *Batson* appeals in North Carolina and found that "[n]either the North Carolina Supreme Court nor the North Carolina Court of Appeals ever ha[d] held for a defendant on the merits of a *Batson* claim."[65] In particular, the paper documents the court's almost complete

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60. *See* Melilli, *supra* note 17, at 484–502; *see also* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1116–20 (2011). We are aware of one other study of appellate opinions concerning *Batson* challenges. This study noted that most litigants lose *Batson* appeals and that most of the venire members reviewed in *Batson* challenges were black. Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59 (2008).

61. Melilli, *supra* note 17, at 487, 497 tbl.III-R (noting that 52.48% of the explanations involved group stereotypes); *id.* at 498 tbl.III-S (listing the group stereotypes employed and the frequency with which they were employed).

62. Bellin & Semitsu, *supra* note 60, at 1092.

63. *Id.* at 1092, 1096. The authors noted, for example, that overrepresentation of black males in prison and the finding that 32% of black men are likely to be imprisoned at least once during their lifetime (compared to much lower rates for white men, for example) suggest that "striking all persons with a relative who is or has been in prison will disproportionately exclude minority venirepersons." *Id.* at 1097.

64. Hitchcock, *supra* note 2, at 1356; Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1577 (1991).

65. Schwartz, *supra* note 64, at 1535.

deference to prosecutors' proffered explanations.[66] In the second paper, Amanda Hitchcock reached a similar conclusion based on her analysis of North Carolina Supreme Court rulings in all sixty-one capital cases involving a *Batson* claim between 1986 and 2005.[67] The North Carolina court deferred to trial courts in almost every case "because *Batson* determinations often turn on the credibility of the prosecutor's stated reasons for the objectionable challenges."[68] Hitchcock documents the court's reluctance to rely upon statistical evidence to state a claim, its strict requirement of a complete match in side-by-side comparisons of jurors, and its lack of interest in claims based on disparate questioning.[69]

While the Supreme Court has established a framework intended to limit the consideration of race in the exercise of peremptory challenges, the research reviewed here suggests that it continues to play a role. The study we present below provides further evidence that race not only weighs in jury selection, but weighs heavily. Moreover, its influence cannot be explained by ostensibly race-neutral factors that happen to correlate with race.

III. METHODOLOGY

The North Carolina RJA study follows the methodology used in the Philadelphia and Dallas County studies discussed above[70] by including analysis of race-neutral factors about jurors that might bear on a party's decision to strike. It improves on the Philadelphia study with more complete race and strike information.[71] In addition, unlike any of the studies presented above, this study includes cases from multiple counties. In fact, it includes data about jury selection in more than one-half of the counties in North Carolina.

We analyzed the role of race in strike decisions in two phases. First, we compared the rate at which prosecutors struck eligible black venire members to the rate at which they struck eligible venire members of other races. We then analyzed the role that characteristics other than race played in prosecutors' decisions to strike or pass potential jurors, and whether any of those characteristics could account for racial disparities in who gets struck.

A. *STUDY POPULATION*

We examined jury selection in at least one proceeding for each inmate who resided on North Carolina's death row as of July 1, 2010, for a total of

66. *Id.* at 1561–63.
67. Hitchcock, *supra* note 2, at 1328–30.
68. *Id.* at 1344.
69. *Id.* at 1345–47, 1349–50.
70. *See supra* text accompanying notes 51–59.
71. Baldus et al., *supra* note 51.

173 proceedings.[72] For each proceeding, we sought to include every venire member who faced a peremptory challenge as part of jury selection. For the purposes of this study a "venire member" included anyone who was subjected to voir dire questioning and not excused for cause, including potential alternates. Each proceeding involved an average of 42.9 strike-eligible venire members, producing a database of 7,421 strike decisions. Of these, 3,952 (53.3%) were women, and 3,469 (46.7%) were men. The venire members' racial composition was as follows: white (6,057, 81.6%); black (1,211, 16.3%); Native American (79, 1.1%); Latino (21, 0.3%); mixed race (20, 0.3%); Asian (13, 0.2%); other (11, 0.1%); Pacific Islander (2, 0.03%); and unknown (7, 0.1%).

B. *DATA COLLECTION*

We created an electronic and paper case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' or clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision.

C. *OVERVIEW OF DATABASE DEVELOPMENT*

Staff attorneys completed all coding and data entry at Michigan State University College of Law in East Lansing, Michigan, under the direct supervision of the primary investigators.[73] Staff attorneys received detailed training on each step of the coding and data entry process.

We collected information about the proceeding generally, including the number of peremptory challenges used by each side, and the name of the judge and attorneys involved in the proceeding, as well as basic demographic and procedural information specific to each venire member.

Coding also required staff attorneys to determine strike eligibility for each potential juror. "Strike eligibility" refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only. Likewise, if a party had exhausted its peremptory challenges by the time it reached a potential juror, the failure to strike reveals nothing about how that party exercised its discretion. This

72. We included proceedings for all current death-row inmates to ensure the inclusion of every defendant with a potential claim under the Racial Justice Act. We also focused our analysis on defendants with an active death sentence because of the availability of data in such cases. In addition, we were confident that the decision making in 173 proceedings would provide a large enough sample for meaningful statistical analysis. We were able to include all but one proceeding, Jeffrey Duke's 2001 trial, in which the case materials are unavailable.

73. A total of twelve staff attorneys and five law students worked on this project.

determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror, and excludes those when the decision was out of the party's hands.[74]

In the second part of the study, staff attorneys used juror questionnaires (when available) and jury selection transcripts to code information relating to the following: (1) demographic characteristics (e.g., gender, marital status, employment, and educational background); (2) prior experiences with the legal system (e.g., prior jury service and experience as a criminal defendant or victim); and (3) attitudes about potentially relevant matters (e.g., ambivalence about the death penalty[75] and skepticism about, or greater faith in, the credibility of police officers).

D. Race Coding

In order to analyze potential racial disparities in peremptory strikes, it was necessary to identify the race of each venire member. Any potential findings about racial disparities in strike decisions would turn on the accuracy of this coding. Strike information was straightforward in that it could be extracted directly from the transcripts. As explained more fully below, race information was equally straightforward in a good number of cases. But for the cases that required the staff attorneys to look deeper to determine the race of venire members, we implemented a rigorous protocol to produce data in a way that is both reliable and transparent.

We obtained information about potential jurors' race from three sources. First, we collected juror questionnaires for many of the venire members in our study. These questionnaires almost always asked the venire member's race, and the vast majority of respondents provided that information. We considered potential venire members' self-reports of race to be highly reliable and were able to get this information from juror questionnaires for 62.3% (4,623/7,421) of the eligible venire members.

For a second group of venire members, race was noted explicitly in the trial record. More than six percent (6.4%, 478/7,421) stated their race on

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74. In one case (Gary Trull), the defense successfully challenged the prosecution's exercise of a peremptory strike against a black venire member, and the court seated him as an alternate juror. Thus, although this venire member ultimately served on the jury, we nevertheless treated him as struck by the prosecution in the analysis.

75. A court could properly remove for cause a venire member who expressed unwillingness to impose the death penalty under any circumstances under *Lockhart v. McCree*, 476 U.S. 162 (1986), *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Witt v. Wainwright*, 470 U.S. 1039 (1985), and thus such venire members are not included in our analysis. Sometimes, however, a venire member expressed reservations or ambivalence about the death penalty that fell short of outright opposition. Such a venire member would still be eligible to serve on the jury, but a prosecutor could reasonably base a decision to exercise a peremptory strike on this basis. *See* Witherspoon v. Illinois, 391 U.S. 510, 519–20 (1968). Accordingly, this is one of the many venire member characteristics we included in our analysis.

the record in a manner that appears in the voir dire transcript.[76] Similarly, a court clerk's chart noting the race of potential jurors that was officially made part of the trial record or a statement by an attorney on the record provided race information for a smaller percent of the venire members (0.5%, 40/7,421).[77]

Finally, for the remaining 30.6% (2,273/7,421) of venire members, we used electronic databases to find race information and record the race and source of race information. Staff attorneys used the North Carolina State Board of Elections website, LexisNexis "Locate a Person (Nationwide) Search Non-regulated," LexisNexis Accurint, and the North Carolina Department of Motor Vehicles online database. Many of the case files included juror-summons lists with addresses, which allowed staff attorneys to match online records to the information about the potential juror with a high level of certainty.

The primary investigators prepared a strict protocol for use of these websites for race coding and trained staff attorneys on that protocol in a half-day session. One objective of this protocol was to minimize the possibility of researcher bias. In addition, staff attorneys who searched for venire members' information on electronic databases were (whenever possible) blind to strike decisions.[78]

Throughout this process, we instructed staff attorneys to code a venire member's race as "unknown" unless they were able to meet strict criteria ensuring that the person identified in the public record was in fact the venire member and not just someone with the same name.[79] Staff attorneys were not to rely on a record containing information that was not wholly consistent with whatever information we had about a particular venire member. For instance, staff attorneys would not rely on a public record in which the person's middle initial was inconsistent with that of the venire

76. In these instances, the judges asked potential jurors to state their race for the record.

77. Importantly, we did not rely on clerks' or attorneys' observations about potential jurors' race unless incorporated into the record and thus subject to dispute if a party or the court objected to the classification. For instance, we considered reliable an attorney's mention of a potential juror's race during an argument regarding a *Batson* challenge with the assumption that the other party or the court would challenge that assessment if the attorney was mistaken. In contrast, we did not rely on a clerk's notes about the race of potential jurors on a jury chart unless it was clear that the parties had a chance to review that document and challenge any perceived inaccuracies.

78. Staff attorneys seeking race information from public sources knew about strikes only when they had to turn to the transcript for information to help them find that venire member's race. For instance, venire members often indicated during voir dire precisely where they lived and for how long. For cases lacking a summons list with addresses, this information was useful in public records searches where we lacked direct information about race.

79. For instance, staff attorneys were instructed to use information such as the venire member's middle name or year of birth to link the venire member to records of someone with the same name. When at all in doubt, staff attorneys were instructed to code the venire member's race as unknown.

member, unless they were able to document a name change to account for the discrepancy (for instance, a record that indicated that a venire member started using her maiden name as a middle name). If staff attorneys found someone with the same name as the venire member but with a different address, they were to use that record only if they could trace the person's address back to that of the venire member. Staff attorneys saved an electronic copy of all documents used to make race determinations.[80]

Because of the importance of the race coding, we conducted a reliability study on this methodology. Staff attorneys and law students used public records to code race for 1,897 venire members for whom we also had juror questionnaires reporting race or express designations of race in a voir dire transcript.[81]

We then compared the data from public records to the presumably more reliable self-reported data in the jury questionnaires. Staff attorneys using public records were unable to determine a venire member's race to the level of reliability required by the study protocol in 242 of 1,897 cases (12.8%).[82] In the remaining 1,655 cases, the race extracted from the public records matched that taken from the presumably more reliable sources for 97.9% of the venire members. This suggests that the method we used is highly reliable.

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80. For instance, if a staff attorney identified the race of a venire member through the North Carolina Board of Elections website, he or she would save the record with the venire member's race designation (usually as an Adobe Acrobat file but sometimes as a screen shot). If the staff attorney relied upon an address provided in the juror-summons list to identify a venire member had moved since the time of the trial, the staff attorney would also save records of the venire member's change of addresses over the years. This information was often available in the Lexis-Nexis Locate a Person Database, which allowed the staff attorney to trace the venire member's address from the juror-summons list to his or her current address reflected in the North Carolina Board of Elections website. For each step in the process linking current information about each venire member to information recorded at the time of the trial, staff attorneys saved a copy of the electronic record.

81. The staff attorneys did not have access to the questionnaires or voir dire transcripts when they conducted the public-records research.

82. We instructed staff attorneys to code a venire member's race as unknown unless they could rule out the possibility that the record on which they were relying referred to someone besides the venire member. In cases where we had juror summons lists with addresses, a staff attorney usually had no trouble identifying the venire member from two people with the same name. Lacking specific identifying information, however, staff attorneys were sometimes unable to meet the strict criteria for extracting race. We expected that this method of extracting data on race would lead to a moderate amount of missing data.

In the full study, we expended additional efforts to find the missing data. In most instances, our staff attorneys reviewed transcripts more closely to gather identifying information that allowed them to link the venire members to the appropriate public records. For example, venire members often stated in voir dire where they lived and worked. This additional information often allowed staff attorneys to narrow down public records for people with the same name even when we lacked a juror-summons list.

Staff attorneys and law students did not expend this level of effort in tracking down race through public-record databases solely for the reliability check.

The methods described in this section allowed us to document race for all but 7 of the 7,421 eligible venire members in our study. In other words, our database includes race information for 99.9% of the eligible venire members, as well as the source of that information for each venire member.

E. Coding Race-Neutral Control Variables (Descriptive Information)

Strike and race information allows for the calculation of strike rates by race. To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered. Thus, in addition to basic demographic information about each eligible venire member, we coded more detailed information on approximately sixty-five variables for a random sample of venire members. We sought to identify the variables that consistently and reliably predicted whether the state would strike or pass a potential juror. Appendix A provides a partial list of our race-neutral control variables. These variables document information such as views on the death penalty; education, marital, and employment status; religious affiliation; and experience with crime.

Because this process is labor intensive,[83] we drew a random sample of venire members from the database[84] and coded detailed descriptive information for almost a quarter of the venire members in the database (1,753/7,421).[85]

The following sections of this Article present the research in increasing levels of analytical complexity. We start with the unadjusted racial disparities in prosecutorial strikes, and then present disparities controlling, one at a time, for potentially relevant race-neutral variables. Finally, we present the disparities that emerge via fully controlled logistic regression analysis of a randomly selected sample of a quarter of the study population for whom we coded detailed individual-level information.

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83. We instituted procedures for double coding of descriptive information to ensure accuracy and intercoder reliability.

84. We used the SPSS random-select function to draw the sample. The demographic profile of the random sample strongly resembled that of the complete study population. Of these 1,753 jurors, 1,749 were eligible to be struck by the state. We determined the race of all but two jurors (83.6% non-black (1,465), 16.3% black (286), and 0.1% missing (2)). These percentages mirror those in the full sample (83.6% non-black (6,203), 16.3% black (1,211), and 0.1% missing (7)). The random sample also reflects the relative proportions of men and women: The smaller sample included 51.9% women (910) and 48.1% men (843); the full data set included 53.3% women (3,952) and 46.7% men (3,469).

85. A few of the venire members who were randomly selected to be included in the sample could not be coded due to the poor quality or unavailability of the case materials. The transcript for the case of Wayne Laws was too faded to be made searchable, and no venire members were coded for descriptive information. No transcript was available in the more recent case of Michael Ryan.

F. STATEWIDE UNADJUSTED PROSECUTORIAL STRIKE PATTERNS

The statewide database includes information about 7,421 venire members. Of those, 7,400 (99.7%) were eligible to be struck by the state. We analyzed prosecutorial-strike patterns using only those venire members who were eligible to be struck by the state. Among strike-eligible venire members, the overwhelming majority were either white (6,039, 81.6%) or black (1,208, 16.3%); just 2.0% (153) were other races. As noted above, we are missing race information for 7 (0.1%) venire members.

Prosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members. As seen in Table 1, across all strike-eligible venire members in the study, prosecutors struck 52.6% (636/1,208) of eligible black venire members, compared to only 25.7% (1,592/6,185) of all other eligible venire members.[86]

In addition, Table 2 shows that the average rate per case at which prosecutors struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members.[87] Of the 166 cases that included at least one eligible black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members.[88]

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86. *See infra* Table 1. This difference is statistically significant, $p < .001$; put differently, there is less than a one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral. Several different chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values, and the results were consistent regardless of the test used.

87. The analyses presented in Tables 1 and 2 are very similar, but differ in their unit of analysis. Table 1 shows strikes against all venire members in the study pooled across cases (7,400 strike eligible venire members across 173 cases). Table 2 compares the strike rates calculated per case. Thus, only those cases with at least one eligible black venire member (166) were included, and each case represents one data point. We present both ways of calculating these disparities to demonstrate that the effect is robust and does not depend on which method is used.

88. *See infra* Table 2. This difference is statistically significant, $p < .001$. When we exclude those venire members whose race we coded from public records, the pattern is substantially the same: Of 139 cases, prosecutors struck an average of 55.7% of eligible black venire members compared to only 22.1% of all other eligible venire members. This difference is statistically significant, $p < .001$. This suggests that the patterns we observed are not skewed in some way by the source of information about potential jurors' race.

The disparities between mean prosecutorial strike rates against eligible black venire members versus those of other races are consistent across time: 57.4% versus 25.9%, $p < .001$ (1990–1994, forty-two cases); 54.7% versus 24.0%, $p < .001$ (1995–1999, eighty cases); 57.2% versus 25.0%, $p < .001$ (2000–04, twenty-nine cases); and 56.4% versus 25.4%, $p < .01$ (2005–2010, fifteen cases).

TABLE 1
Statewide Prosecutorial Peremptory Strike Patterns
(Strikes against venire members aggregated across cases)

		A	B	C	D
		Black Venire Members	**All Other Venire Members**	**Unknown**	**Total**
1.	**Passed**	572 (47.4%)	4,593 (74.3%)	3 (42.9%)	5,168 (69.9%)
2.	**Struck**	636 (52.6%)	1,592 (25.7%)	4 (57.1%)	2,232 (30.1%)
3.	**Total**	1,208 (100.0%)	6,185 (100.0%)	7 (100.0%)	7,400 (100.0%)

*Chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) indicate that these differences in strike rates are significant at $p < .001$.

TABLE 2
Statewide Average Rates of State Strikes
(Strike rates calculated in individual cases and averaged across cases)

	A	B
	Average Strike Rate	**Number of Cases Averaged**
1. **Strike Rates Against Black Qualified Venire Members**	56.0% (*SD* = 24.6%)	166
2. **Strike Rates Against All Other Qualified Venire Members**	24.8% (*SD* = 7.0%)	166

*A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

As seen in Table 3, disparities were even greater in cases involving black defendants. In cases with non-black defendants, the average strike rate was 51.4% against black venire members and 26.8% against all other venire members.[89] In cases with black defendants, the average strike rate was 60.0% against black venire members and 23.1% against other venire members.[90]

89. *See infra* Table 3. Out of 166 cases with black eligible venire members, ninety involved black defendants and seventy-six involved defendants of other races.

90. *See infra* Table 3.

The difference in the magnitude of the disparity between black and other defendants is statistically significant.[91] In other words, although state strike rates are always higher against black venire members than against other venire members, the disparity is significantly greater in cases with black defendants.

TABLE 3
Disparities in Strike Patterns by Race of Defendant
(Strike rates calculated in individual cases and averaged across cases)

		A	B	C
	Race of Defendant	**Strikes Against**	**Average Strike Rate**	**Number of Cases Averaged**
1.	**Black**	**Black Qualified Venire Members**	60.0% (*SD* = 30.0%)	90
2.		**All Other Qualified Venire Members**	23.1% (*SD* = 6.9%)	
3.	**Non-Black**	**Black Qualified Venire Members**	51.4% (*SD* = 25.8%)	76
4.		**All Other Qualified Venire Members**	26.8% (*SD* = 6.6%)	

*Analysis of variance (*F*-test) indicates that this difference between the disparities in strike rates by race of defendant is significant at $p < .03$.

IV. THE EFFECT OF RACE AFTER CONTROLLING FOR VENIRE MEMBERS' PERSONAL CHARACTERISTICS ON THE EXERCISE OF PEREMPTORY STRIKES

The disparate strike rates in the first stage of the analysis are compelling evidence of racial discrimination in jury selection, but testing alternative explanations for the observed disparities provides a more complete picture. For instance, Baldus and colleagues found that jurors who expressed concern about imposing the death penalty faced markedly higher odds of being struck by the prosecution.[92] Public opinion research indicates that attitudes about the death penalty differ across racial groups.[93] By collecting

91. Note, however, that we were unable to find a statistically significant effect of defendant's race on the likelihood that a black potential juror would be struck in a fully controlled model.

92. Baldus et al., *supra* note 51.

93. For example, a 2003 Gallup poll of 1,017 randomly sampled adults found that 67% of white respondents supported the death penalty compared to only 39% of African American respondents. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL

and controlling for information about a wide variety of juror characteristics, we can examine the possibility that variables that happen to correlate with race (rather than race itself) account for the observed disparities.[94]

We first controlled for race-neutral variables by analyzing strike disparities within subsets of the study population. For example, we excluded all of the venire members who expressed any ambivalence about the death penalty and then analyzed the strike patterns for the remaining venire members. Because none of the remaining venire members expressed ambivalence about the death penalty, any racial disparity in strike patterns we observed could not be attributable to the possibility that relevant attitudes vary along racial lines. We looked at five different subsets in this manner, removing (1) venire members who expressed any reservations about the death penalty, (2) unemployed venire members, (3) venire members who had been accused of a crime or had a close relative accused of a crime, (4) venire members who knew any trial participant, and finally, (5) all venire members with any one of the first four characteristics. The disparities identified through the unadjusted analysis persisted in each and every subset, as seen in Table 4.

JUSTICE STATISTICS 2003, at 146, tbl.2.52, *available at* http://www.albany.edu/sourcebook/pdf/section2.pdf.

94. Our analysis did not include any potential jurors removed for cause. As a result, any characteristic that would make someone ineligible to serve on a death penalty jury (such as categorical opposition to the death penalty) has already been "controlled for" in that people with these characteristics are not included in the analysis.

TABLE 4
Strike Patterns when State-Strike Eligible Venire Members with Potentially Explanatory Variables Are Removed from Equation

		A	B	C	D
	Variable	**Number of Venire Members Removed from Analyses**	**Strike Rates**	**Strike Rate Ratio**	***p*-value***
1.	**Venire Member with Death Penalty Reservations**	185	44.5% (Black VMs) vs. 20.8% (All others)	2.1	<.001
2.	**Unemployed Venire Member**	25	49.0% (Black VMs) vs. 24.7% (All others)	2.0	<.001
3.	**Venire Member or Close Other Accused of Crime**	398	50.3% (Black VMs) vs. 23.7% (All others)	2.1	<.001
4.	**Venire Member Knew a Trial Participant**	47	53.2% (Black VMs) vs. 25.4% (All others)	2.1	<.001
5.	**Venire Member with Any One of Above Characteristics**	580	39.7% (Black VMs) vs. 19.0% (All others)	2.1	<.001

*Chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values.

The disparities in prosecutorial strike rates against eligible black venire members persist even when other characteristics one might expect to bear on the decision to strike are removed from the equation. Table 4 provides a simple way of comparing apples to apples. However, the decision to strike or pass a potential juror can turn on a number of factors in isolation or combination. In the following section, we provide the results of a fully controlled logistic regression model, taking into account a number of

potentially relevant factors to examine whether the racial disparities can be explained by some combination of race-neutral factors.

As noted above, we collected individual-level descriptive information for a significant randomly selected portion (1,753/7,421) of the venire members in the study. Even after controlling for other factors potentially relevant to jury selection, a black venire member had 2.48 times the odds of being struck by the state as did a venire member of another race.[95] In other words, while many factors one might expect to bear on the likelihood of being struck did matter, none—alone or in combination—accounts for the disproportionately high strike rates against qualified black venire members.[96]

The coding process described above produced close to sixty-five variables potentially relevant to whether a venire member was struck or passed. We sought to identify the variables that consistently and reliably predicted whether the state would strike or pass a potential juror. The resulting model combines those factors to distinguish venire members based on how objectionable (or desirable) they were to prosecutors as potential jurors.

Using the Logistic Regression command in SPSS, we started the analysis with a simple model using only venire members' race[97] and tested each candidate control variable both individually and in small groups. This process allowed us to identify the most important control variables for the decision to strike or pass an eligible venire member. This process produced about twenty-five variables that bore a significant relation (either in isolation

95. We used a logistic regression model with the dependent variable that the strike-eligible venire member was struck or passed on by the state. A few words are in order about the choice of this model in lieu of a multilevel model. One assumption of logistic regression is that the data are independent. That assumption comes into question in this context, as a party's decision to use one of its strikes is likely to be affected by who else is in the pool. This can present a problem in that it might increase the risk of Type I error; that is, it could increase the chances that the researcher will improperly find a result statistically significant. One way to gauge whether a particular dataset presents such a risk is to look at interclass correlations. If subjects (i.e., venire members) nested within settings (i.e., trials) are in fact more similar to each other than are subjects between settings, the researcher should use a multilevel model. We examined the interclass correlations for the 173 cases in this study and found a negative interclass correlation. That means that venire members within a case were no more alike as to the outcome of interest (struck or passed) than were venire members between cases. In fact, that the interclass correlation was negative suggests that the results of the logistic regression analysis are likely conservative. For this reason, using a multilevel model was unnecessary and a traditional logistic regression model was appropriate. *See* David A. Kenny, Deborah A. Kashy & Niall Bolger, *Data Analysis in Social Psychology*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 237 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

96. *See infra* Table 5.

97. Including the race variable in this model helps to identify which variables are potentially significant in the complete model independent of race. To get the clearest picture possible, we also tested potential control variables without including race in the model, but this did not produce a different list of potential control variables.

or in combination) to the odds of being struck. We then tested these variables in various combinations, both by forcing them into the model and by allowing the computer program to assess which of the candidate variables provided the best fitting model. Through this process, we were able to build a model estimating the effects of various venire member characteristics on strike decisions.

Table 5 presents the final logistic regression model for prosecutorial strike decisions. A venire member is coded "1" if struck by the state and "0" if strike-eligible but not struck. The "Black" variable in Row 2 shows the regression coefficient, the standard error of that estimated coefficient, the odds ratio, the confidence interval for that odds ratio, and the *p*-value for the effect that being black has on the odds of being struck by the state. This model estimates that after controlling for several other race-neutral factors, black venire members face odds of being struck by the state that were 2.48 times those faced by all other venire members.[98]

The results of the logistic regression model are consistent with the unadjusted disparities we observed looking simply at the relative strike rates against black and other venire members. None of the factors we controlled for in the regression analysis eliminated the effect of race in jury selection. While we found many non-racial factors that were highly relevant to the decision to strike, none was so closely associated with race or so frequent that it could serve as an alternative explanation of the racial disparities. Note that throughout the process of building this model, we found no factor or combination of factors that rendered the effect of race non-significant. In other words, the statistically significant influence of race on the odds of being struck was robust; its predictive power did not depend on the inclusion or exclusion of any particular variable or variables in the model.[99] A black venire member was still more than twice as likely (2.48 to 1) to be struck by the state even when other relevant characteristics were held constant.

98. $p < .001$. *See infra* Table 5.

99. If we were missing data for an individual juror regarding *any* of the variables under analysis, this model excluded that juror from the analysis completely (even though we have data about that juror for some of the other variables). To determine whether exclusion of these cases with missing data skewed the model, we used a method known as multiple imputation. *See* DONALD B. RUBIN, MULTIPLE IMPUTATION FOR NONRESPONSE IN SURVEYS 2 (1987); J.L. SCHAFER, ANALYSIS OF INCOMPLETE MULTIVARIATE DATA 104–05 (1997). This method allows us to use the information we do have about a juror to impute a value for the missing variable using what we know about other jurors for whom we have complete information on the variable in question. We then conducted another logistic regression analysis using these data (original data supplemented by imputed values for the missing). This model produced estimates that were very close to the estimates presented in Table 5, in which we used only jurors for whom we have complete information. This suggests that the information we were missing about venire members was missing randomly, and thus did not skew the analysis.

This finding is notable because it speaks to the concern that we have failed to account for other race-neutral factors that might explain the disparity. For instance, while we have accounted for many race-neutral factors that bear on jury selection, we cannot account for a venire member's physical appearance or body language—factors litigators often cite as relevant to their decision to strike.[100] But factors like these should generally be unrelated to the race of the venire member. Moreover, even if these factors were associated more with some racial groups than others, that association would have to be very strong and the factor quite frequent to explain the observed racial disparities.

100. *See, e.g.*, Ben Rubinowitz & Evan Torgan, *Jury Selection: Time Constraints and Weaknesses in Cases*, N.Y. L.J., Aug. 29, 2007, at 8 (emphasizing the importance of a "juror's demeanor [and] ability to maintain eye contact" in assessing potential bias); Jeff Strange, *Jury Selection in 30 Minutes or Less*, PROSECUTOR (Tex. Dist. & Cnty. Atty's Ass'n, Austin, Tex.). Sept.–Oct. 2009, *available at* http://www.tdcaa.com/node/5267 (emphasizing the importance of noting how a potential juror dresses and interacts with other members of the panel to assess whether they are "conformists who accept societal norms and expect others to do the same").

TABLE 5
Statewide Fully Controlled Logistic Regression Model

	A	B	C	D	E	F	G
	Variable Name	**Variable Description**	**Coefficient**	**S.E.**	**Odds Ratio**	**C.I.**	***p*-value**
1.	**Intercept**		-1.714	0.137	0.16		<.001
2.	**Black**	**Venire member is black**	**0.906**	**0.19**	**2.48**	**1.71, 3.58**	**<.001**
3.	**DP_Reservations**	Venire member expressed reservations about the death penalty	2.437	0.23	11.44	7.23, 18.09	<.001
4.	**SingleDivorced**	Venire member is not married	0.543	0.17	1.72	1.23, 2.41	<.01
5.	**JAccused**	Venire member accused of a crime	0.730	0.23	2.07	1.33, 3.24	<.01
6.	**Hardship**	Venire member worried serving would impose a hardship	1.094	0.31	2.99	1.61, 5.54	<.01
7.	**Homemaker**	Venire member is a homemaker	0.799	0.32	2.22	1.18, 4.17	<.02
8.	**JLawEnf_all**	Venire member or close other works in law enforcement	-0.466	0.19	0.63	0.44, 0.90	<.02
9.	**JKnewD**	Venire member or venire member's immediate family knew the defendant	2.156	0.66	8.63	2.37, 31.41	<.01
10.	**JKnewW**	Venire member knew a witness	-0.615	0.25	0.54	0.33, 0.88	<.02
11.	**JKnewAtt**	Venire member knew one of the attorneys in the case	0.744	0.25	2.11	1.29, 3.44	<.01
12.	**LeansState**	Venire member expresses view that suggests view favorable to state (e.g., problems with presumption of innocence, right not to testify)	-1.966	0.54	0.14	0.05, 0.40	<.001
13.	**PostCollege**	Venire member went to graduate school	0.996	0.27	2.71	1.59, 4.63	<.001
14.	**VeryYoung**	Venire member is 22 or younger	0.920	0.40	2.51	1.14, 5.55	<.03

$R^2 = .32$

V. CONCLUSION

How North Carolina courts interpret and apply the RJA to claims of racial bias in jury selection is an open question pending the outcome of cases currently in litigation.[101] In the past, North Carolina trial courts have not been especially willing to sustain *Batson* objections, and reviewing courts have shown almost complete deference to those rulings.[102] The RJA's express authorization to look at patterns that emerge in strike decisions across cases shifts the focus from a question of a particular prosecutor's credibility in a particular case to what the data tell us about what drives strike decisions generally. Justifications for strike decisions that seem plausible in the limited context of a single case—even with the aid of side-by-side comparisons of struck and unstruck jurors authorized by *Miller-El v. Dretke*—might not hold up when the universe of potential comparators expands to include jury selection in other cases.[103]

---

101. The study presented in this Article was the focus of a two-and-a-half week hearing in Cumberland County, North Carolina in early 2012. Death row inmate Marcus Robinson's RJA claim as to racial disparities in prosecutors' use of peremptory strikes in capital jury selection was the first such claim to go to a hearing. On April 20, 2012, the trial court issued its ruling that race had been a significant factor in the state's decision to exercise peremptory strikes, finding the analyses presented here "to be a valid, highly reliable, statistical study of jury selection practices in North Carolina capital cases between 1990 and 2010." Order Granting Motion for Appropriate Relief at 45, State v. Robinson, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012), *available at* http://www.aclu.org/files/assets/marcus_robinson_order.pdf. The defendant's death sentence was vacated, and he was resentenced to life in prison without the possibility of parole.

102. *See* Amanda S. Hitchcock, *Recent Development, "Deference Does Not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina Supreme Court's highly deferential approach to reviewing *Batson* claims in capital cases).

103. *See* Sommers & Norton, *supra* note 31, at 269 (finding evidence of racial bias in mock jury selection experiment but noting that "[w]e observed bias against Black venire members only when examining decisions made by several participants; indeed, for any given participant, we are unable to determine whether the peremptory was influenced by race or whether the justification provided was valid").

APPENDIX A

PARTIAL LIST OF VARIABLES FROM DATA COLLECTION INSTRUMENT

Part A. General Codes

Variable Name	Label
DName	Defendant's name
VM_Name	Juror's name
VM_Race	Juror's race
SourceRace	Source of race information (e.g., juror questionnaire, public record)
StrikeState	StrikeState = 1 if state used a peremptory strike against the juror (all else = 0)
StrikeDef	StrikeDef = 1 if defense used a peremptory strike against the juror (all else = 0)
Status	Juror's ultimate status (e.g., struck, seated as an alternate juror)
Gender	0 = Female; 1 = Male
Age	Juror's age in years
Marital	Juror's marital status (e.g., married, widowed, single)
Children	0 = No children; 1 = Children
ReligiousOrg	1 = Belongs to a religious organization; 0 = all else
Education	Juror's education level (e.g., high school graduate, attended graduate school)
Military	1 = Served in military; 0 = all else
Employment	See below for a portion of the coding appendix used to code jurors' employment
SpouseEmployment	Employment of married jurors' spouses (same codes used for jurors' employment)
Descriptives	Up to 10 codes used to capture experiences and attitudes expressed in jury selection. See below for a partial list of codes.

Part B. Employment Codes
(excluding subparts capturing different types of jobs within those listed as examples)

Code	Category	Examples
10	*Management & Professional*	Management and business; computers; legal; medical; engineering
20	*Sales and Office Occupations*	Sales; office and administrative support
30	*Farming, Fishing, and Forestry*	
40	*Service*	Healthcare support; fire fighting; law enforcement; food preparation
50	*Military*	Enlisted or officer
60	*Construction, Extraction, Maintenance, & Repair*	
70	*Production & Transportation*	
80	*Outside of Labor Force*	Student; retired; homemaker; unemployed

Part C. Codes for Juror Characteristics
(excluding subparts capturing more detailed juror characteristics)

Code	Category	Examples
100	*Hardship*	Emotional difficulty; caretaking obligation
300	*Juror/Friend/Family Was Victim of Crime*	
400	*Juror/Friend/Family Was Accused of Criminal Activity*	
700	*Admitted Bias or Other Reason S/he Could Not Be Fair*	Premature opinion; admitted bias
800	*Expressed View Contrary to Applicable Law, Not Including Death Qualification*	Difficulty presuming innocence; draws adverse inferences from failure to testify
900	*Prior Familiarity with Parties*	Knows parties or attorneys
1200	*Moral or Religious Reservations about Imposing the Death Penalty*	Ambivalence about death penalty (short of refusal to impose under any circumstances)

REPORT

A Process Evaluation and Demographic Analysis of Jury Pool Formation in North Carolina's Judicial District 15B

September 2016

Maureen Berner, PhD
David Brown, MPP
Julia P. Da Silva, MPA Candidate, MSW Candidate
Caroline Simpson, MPA, MLS
Micah Guindon, MPA

Findings at a Glance

At the request of the Executive Council for North Carolina's Judicial District 15B, we conducted a process evaluation of state and county procedures related to jury pool formation and a demographic survey of individuals who reported for jury duty in Chatham and Orange counties. While some aspects of the state-level process could not be verified, the county-level process followed state law, which gives the counties significant discretion in preparing their jury lists. Our analysis of survey results from forty-eight jury pools over two years indicated a small but persistent trend in which there were fewer African Americans and more whites than expected based on census data. Given that jury pool members at the courthouse are the product of a multi-step selective process, future research should focus on the characteristics of individuals we could not survey: (1) those summoned for jury duty whose summonses are returned as undeliverable and (2) those who are excused, deferred, disqualified, or simply fail to appear.

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Executive Summary

A jury pool is a group of randomly selected citizens, each of whom reports for jury duty after receiving a summons from his or her local court. In the fall of 2013 the Judicial District Executive Council of North Carolina's Judicial District 15B set out to determine how well jury pools in Chatham and Orange counties reflect the demographic composition of each county's jury-eligible population. To assist the Executive Council, a research team from the School of Government at the University of North Carolina at Chapel Hill conducted a process evaluation of state and county procedures related to jury pool formation and a demographic survey of individuals who reported for jury duty. This report presents findings on these and related topics for Judicial District 15B.

We drew two key conclusions from our process evaluation. First, the process by which statewide voter registration and driver's license data are combined and cleaned (e.g., by eliminating duplicate addresses) was unclear and thus could not be verified. Second, while the subsequent county-level process followed state law, because that law is broad and somewhat vague, the counties have significant discretion, resulting in some process variation between them.

Demographically, we determined that the white population was overrepresented in the survey results for those who reported for jury duty in both counties during our spring 2014 to spring 2016 study period, while the African-American population was underrepresented, relative to their respective shares of each county's adult citizen population. The Hispanic population was slightly overrepresented in the Chatham County survey results and slightly underrepresented in the Orange County survey results. Men were underrepresented in the Chatham results, while women were underrepresented in the Orange results. Individuals living alone were dramatically underrepresented in the jury pool survey results for both counties.

It is important to emphasize that our demographic analysis was limited to those individuals we were able to survey—that is, those who appeared for jury duty. Further research could focus on the characteristics of the population we could not survey: (1) those summoned for jury duty whose summonses are returned as undeliverable and (2) those who are excused, deferred, disqualified, or simply fail to appear.

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Both the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System and the School of Government funded research assistants to make this report possible. We gratefully acknowledge their contributions to this effort.

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Part 1. Research and Findings

Background

Jury pools are randomly selected groups of eligible citizens who report for jury duty after receiving summonses from their local courts. Juries for both civil and criminal trials are formed from these pools. The jury pool–formation process takes place in each county according to local procedures and state law.

The right to trial by a jury of one's peers is fundamental to our justice system. The United States Supreme Court has interpreted this right to require that juries be drawn from "a representative cross section of the community."[1] State and local policies that encourage inclusion with respect to the overall jury-eligible population and individual demographic groups in the community help to satisfy this requirement for *representativeness*. Readers may refer to Appendixes A and B for more information on representativeness and the statutory framework of the jury pool–formation process in North Carolina, respectively.

In the fall of 2013 the Judicial District Executive Council (hereinafter JDEC) of North Carolina's Judicial District 15B, which comprises Chatham and Orange counties,[2] asked the research team from the School of Government at the University of North Carolina at Chapel Hill for assistance in determining whether jury pools in the district accurately reflect the demographic composition of each county's jury-eligible population. To better understand the jury pool–formation process and the diversity of jury pools in Judicial District 15B, the research team conducted (1) a process evaluation of current jury pool–formation procedures in statute and in practice at the state and county levels and (2) a survey of individuals who appeared for jury duty to determine whether there were differences between the demographic composition of the jury pools and the demographics of the total jury-eligible population in the counties they represent. This report summarizes our work and covers information gathered from February 2014 to July 2016. We hope the foundational information presented here will assist all stakeholders in advancing the goal of continuous improvement of North Carolina's judicial system.

Methods

Based on the initial request of the JDEC for District 15B, we developed the questions and methods presented in Table 1, below. We present a detailed discussion of our methodology in Appendix C.

1. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

2. Throughout the report, we generally discuss the two counties in alphabetical order (i.e., Chatham first) unless there is a substantive reason not to do so.

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Table 1. Research Questions and Methods

Research Questions	Research Methods
How does the jury pool–formation process work in statute and in practice at the state level and in Chatham and Orange counties?	**Process Evaluation.** We conducted semi-structured interviews, document analysis, and statutory review to understand the process at the state and county levels. This understanding provides important context for the data comparisons in the survey and census comparison portion of the report.
Are there racial or ethnic disparities between the demographics of jury pool populations and the demographics of Chatham and Orange counties?	**Survey and Census Comparison.** We compared demographic data from survey responses collected at jury pool orientations in both Chatham and Orange counties to federal Census Bureau data to identify any racial or ethnic disparities. In addition to race and ethnicity, we analyzed survey responses for sex, household size, and household income.

Process Evaluation Results

In North Carolina, the jury pool–formation process begins at the state level with communications between the State Board of Elections and the North Carolina Division of Motor Vehicles (DMV). The goal at this level is to create a representative source list of residents eligible for jury service by combining a list of registered voters with a list of licensed drivers. The state-level steps conclude when this source list of potential jurors is provided to the three-member jury commissions in each county. The process then moves to the county level, where the jury commission reviews and revises the list of local names to arrive at a county-level master list of all prospective jurors qualified to serve in the upcoming two-year period.[3] The process ends when the assistant and deputy court clerks in each county use computer software to randomly select names of prospective jurors from the county master list, mail out jury summonses to those individuals, grant deferrals and exemptions as appropriate, process those who appear for jury service, and ultimately guide selected jurors through their duties.

Our evaluation of this process revealed the following:

- There was no clear documentation of the state-level process by which a list of eligible jurors for each county is created. In particular, it was not clear (1) how data from the Board of Elections' list of registered voters was combined with customer data from the DMV or (2) how the resulting list was cleaned (e.g., by eliminating duplicate records). The process for creating the state-level list was changing during our study period.
- At the county level, the processes we examined fell within the broad statutory requirements that govern jury pool formation, which allow for significant local discretion and procedural variation.

Appendix E includes more details on the process evaluation results.

3. While this is a biennial process for nearly all of North Carolina's counties, at this time two counties—Cumberland and Mecklenburg—complete the process annually, as permitted by statute.

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Survey Analysis Results

Our analysis of more than 1,500 jury pool surveys documented a small but persistent trend in which there were fewer African Americans and more whites in our survey results than expected based on census data. This was true not only overall (combining all jury pools in a county across the study period), but also across many of the individual jury pools. More specifically, when we examined the survey results from potential jurors who reported for duty from spring 2014 to spring 2016, we found the following with respect to race and ethnicity:

- In Chatham County during our study period,
  - Whites made up 84.2 percent of jury pool survey respondents. Based on the census estimate for voting-age white citizens in the county, we would have expected that number to be 81.0 percent. There were 619 whites among the Chatham jury pool survey respondents; we would have expected about 595.
  - African Americans made up 11.3 percent of jury pool survey respondents. Based on the census estimate for voting-age African-American citizens in the county, we would have expected 14.0 percent.[4] There were 83 African Americans among the Chatham jury pool respondents; we would have expected 103.
- In Orange County during our study period,
  - Whites made up 84.7 percent of jury pool survey respondents. Based on the census estimate for voting-age white citizens in the county, we would have expected that number to be 78.2 percent. There were 626 whites among the Orange jury pool survey respondents; we would have expected about 578.
  - African Americans made up 8.4 percent of jury pool survey respondents. Based on the census estimate for voting-age African-American citizens in the county, we would have expected 12.4 percent.[5] There were 62 African Americans among the Orange jury pool respondents; we would have expected 92.
- Individuals who identified as Hispanic or Latino were slightly overrepresented in Chatham's survey results and slightly underrepresented in Orange's results. However, the percentages were fairly close to the corresponding Census Bureau estimates for voting-age Hispanic or Latino citizens, and those citizens' relatively small share of each county's population meant that the overall effect was slim. For example, the underrepresentation in Orange County amounted to about five fewer potential jurors out of almost 750 surveyed.
- The patterns that appear in the aggregate results were generally repeated across many of the individual jury pools. African Americans tended to be underrepresented in survey results from those pools considerably more often than whites or Hispanics when compared to their respective Census Bureau estimates. The size of such disparities tended to be one to two individuals per batch of surveys collected from each pool; in some cases, it was a fractional value less than 1.
- In statistical terms, the survey estimates tended to be outside of the 90 percent confidence interval for the corresponding census estimates, which means that random variation alone is not likely to fully explain the results and suggests that there may be concerns about representativeness. For the non-statistician, it is easier to see the differences in the

4. In the technical language of jury pool analysis, this represents an "absolute disparity" of 2.7 percentage points and a "comparative disparity" of about 20 percent. See the discussion of survey results in Appendix F for more details on these terms and calculations.

5. This represents an absolute disparity of 4.1 percentage points (after rounding) and a comparative disparity of about 33 percent.

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aggregate results across the whole time period and harder to visualize them in a single pool of individuals showing up for jury duty, because the number of people involved is much smaller. This is why the consistency of the patterns across those pools, over time, may be more meaningful than the composition of any single pool showing up on a specific date.

- The professional demographer we retained to review our analysis characterized these results as follows:

> [A]s soon as we start getting further away from that 90 percent confidence interval, the more we begin to be suspicious that the composition of the jury pool is distinct from the citizen voting-age population. We can't exactly quantify how significant this deviation is, and it might be hard to see in individual jury pools, but the overall pattern reveals a fairly significant concern about potential underrepresentation of African Americans. How this happens is unclear. It may be that the underrepresentation starts with the initial master list and the limits of inclusiveness. It may be that there are also higher rates of non-response to summons and survey non-response that further exacerbate this estimate.

Our jury pool surveys yielded these additional findings:

- Men were underrepresented by about 10 percent in the Chatham County survey results, while women were underrepresented by about 3 percent in the Orange County results.[6]
- Individuals living alone were dramatically underrepresented in the jury pool survey results for both counties.
- The median reported household income among Chatham County respondents was $64,500 per year, while it was $90,000 per year among Orange County respondents. In Chatham, respondents with household incomes of at least $100,000 outnumbered respondents with incomes less than $25,000 by a ratio of two to one; in Orange, that ratio was almost eight to one.

Appendix F contains an extensive discussion of these and related survey results.

Limitations

These findings must be accompanied by several caveats. First, our jury pool survey depended upon voluntary responses, and while the response rate was generally good, we do not have demographic data for every member of every jury pool and there were several pools in Orange County that we had to exclude because no surveys were distributed on the dates the pools were convened. Second, while the Census Bureau datasets we used for community comparison were the best available, the data do not align perfectly with the jury-eligible population that we surveyed. Moreover, the Census Bureau data are older in some cases than the survey data we collected. Finally, we were able to survey only those individuals who *appeared* for jury duty, and thus our analysis could not assess those individuals who were included in the state and county master lists, were summoned

6. These calculations of comparative disparity are based on Census Bureau estimates of men and women in the voting-age population of each county but do not control for citizenship. For example, if a large number of men in Chatham County are not citizens, the number of men observed in our jury pool data would be closer to what would be expected and the degree of underrepresentation would be less.

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for jury duty, but ultimately (1) had undeliverable addresses; (2) were deferred, excused, or disqualified; or (3) simply failed to appear. For more information on the limitations of this study, refer to Appendix D.

Conclusions

Our survey analysis indicated a small but persistent pattern of overrepresentation of whites and underrepresentation of African Americans among jury pool survey respondents in Chatham and Orange counties, but we did not find a similar pattern for Hispanics. There are additional disparities among the survey results with respect to sex and household size when compared to census data. These survey results could indicate similar disparities in District 15B's actual jury pools.

To suggest that this is worth a further look is not to say that state or county officials or policies are intentionally erecting barriers to certain groups' participation in jury pools. Indeed, we found no specific practices inconsistent with law or policy in our review of state-level procedures, and counties have significant discretion in vetting their jury lists and composing their eventual pools. It is possible that policies or practices that are neutral in intent could nonetheless affect distinctive demographic groups or sub-groups in different ways. Further, by surveying those who appear for jury duty, we are capturing the end result of a long and complex jury pool–formation process that has multiple selective steps. By collecting data on those who appear and finding ways to gain insight into the characteristics of those who do not, officials could better understand how the current jury pool–formation process influences the composition of each resulting jury pool.

Recommendations for Future Research and Practice

More research should be conducted to detail the state-level process and the various processes employed in additional counties. This research should consider the following questions that we could not include in the scope of this project:

- Is the population that receives a county's initial jury summonses representative of the community?
- How do the demographic characteristics of those summoned for jury duty who obtain deferrals and excusals or are disqualified compare to those who remain available to serve?
- How do the demographic characteristics of those summoned who fail to appear for jury duty compare to those who do appear?
- In addition to race and ethnicity, how do characteristics such as sex, household size, and household income interact with and impact jury pool formation?

Finally, it may be valuable to adopt data collection practices that make it possible to assess the representativeness of county jury pools on a routine basis.

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Part 2. Appendixes

List of Abbreviations and Acronyms Used in the Appendixes

ACS	American Community Survey
AOC	North Carolina Administrative Office of the Courts
BOE	North Carolina State Board of Elections
CVAP	Citizen Voting Age Population (special tabulation of data from the ACS)
DMV	North Carolina Division of Motor Vehicles
DOT	North Carolina Department of Transportation
G.S.	North Carolina General Statutes
JDEC	Judicial District Executive Council (of Judicial District 15B)
SOG	University of North Carolina School of Government
U.S.C.	United States Code

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Appendix A. Inclusiveness and Representativeness in Jury Pools

In this report we discuss the concepts of *inclusiveness* and *representativeness* as they relate to jury pools. We do not include a legal analysis of inclusiveness or of representativeness specific to Judicial District 15B or to Chatham or Orange county. For an in-depth discussion of the concepts introduced in this section, their legal underpinnings, and how they have been adjudicated in North Carolina and at the federal level, see chapter 6 of the School of Government publication *Raising Issues of Race in North Carolina Criminal Cases*.[7]

Inclusiveness and representativeness are principles used to determine standards for equitable jury pools. Inclusiveness can be defined as the proportion of the jury-eligible population that appears in the master list of potential jurors (source list)—that is, how many jury-eligible members of the population are on the list versus not on the list at key stages of the process. Representativeness, on the other hand, is the extent to which a jurisdiction's master jury list reflects community demographics.

The National Center for State Courts notes that "the three most important criteria for the resulting master jury list are inclusiveness, representativeness, and accuracy with respect to address records" and recommends that the list include at least 85 percent of all jury-eligible adults.[8] Inclusiveness is directly related to representativeness: a higher degree of inclusiveness in the master jury list typically leads to a higher level of representativeness of the community. In an attempt to maximize inclusiveness, some states use data sources beyond driver's license and voter registration information with the intent of capturing more of the jury-eligible population and improving the accuracy of their lists. For example, New York uses five source lists, including voter registrations, income tax filings, driver's license and identification card records, unemployment insurance receipts, and family assistance receipts.[9] Similarly, after combining voter registrations with driver's license and identification card records, Georgia refines its master jury list by consulting statewide lists of death certificates, persons declared mentally incompetent, and convicted felons without their rights restored, as well as county lists of persons who have been permanently excused or inactivated for various reasons (e.g., non-residency).[10]

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7. Alyson A. Grine & Emily Coward, Raising Issues of Race in North Carolina Criminal Cases (UNC School of Government, 2014).

8. Nat'l Ctr. for State Courts, Joint Tech. Comm., Jury Management System Requirements Adopted Standards 2, 22 (2014), www.ncsc-jurystudies.org/~/media/files/pdf/aboutus/committees/jtc/jury_management_system_requirements_final_12_16_14.ashx.

9. N.Y. State Unified Court Sys., Office of Court Research, Jury Representativeness: A Demographic Study of Juror Qualification and Summoning in Monroe County, New York 5 (2011), www.mcba.org/UserFiles/files/Jury Representativeness Study 08-25-2011.pdf.

10. Interview with Mike Cuccaro, Assistant Director at the Judicial Council of Georgia/Administrative Office of the Courts (Sept. 24, 2014). *See also* Supreme Court of Ga., Jury Composition Rule, *available at* www.gasupreme.us/wp-content/uploads/2015/06/JURY-COMPOSITION-RULE---02_21_14.pdf.

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Both the United States Constitution and the North Carolina Constitution provide legal protections that apply to jury pool formation. In particular, the U.S. Supreme Court has held that the constitutional right to a trial by an impartial jury, guaranteed by the Sixth Amendment to the U.S. Constitution, includes the right to a jury selected from a representative cross-section of the community.[11] Further, the Equal Protection Clause of the Fourteenth Amendment protects against discrimination in the formation of a jury.[12] Fair cross-section and equal protection rights are further protected by parallel provisions of the North Carolina Constitution.[13] While the equal protection standard prohibits discriminatory *intent* in excluding specific groups from the jury pool, the fair cross-section standard prohibits discriminatory *outcomes* resulting from the jury pool–formation process, even if unintended.[14]

Fair cross-section claims may arise if jury pools do not reflect the demographic composition of the counties from which they are drawn. Such underrepresentation of racial or ethnic groups in jury pools can have serious ramifications. In *Peters v. Kiff*, the U.S. Supreme Court explained that the exclusion of a distinctive group from jury deliberations deprives the justice system of the benefits of a diverse array of human experiences and perspectives.[15] Further, in a 2012 study researchers from Duke University analyzed how the racial composition of jury pools influences case outcomes.[16] The authors concluded that the presence of African Americans in a jury pool has an impact on case outcomes even if they are not actually seated on the jury. Specifically, they found that "the presence of even one or two blacks in the jury pool results in significantly higher conviction rates for white defendants and lower conviction rates for black defendants."[17]

The controlling case for Sixth Amendment fair cross-section claims is *Duren v. Missouri*.[18] In *Duren*, the U.S. Supreme Court heard a challenge to the underrepresentation of women in jury pools and developed a three-pronged test to determine whether a fair cross-section violation has occurred. The test requires a defendant to show that (1) the allegedly underrepresented group is a distinctive group in the community, (2) the representation of this group in the jury pool is not fair and reasonable in relation to the number of such persons in the community, and (3) this underrepresentation is the result of systematic exclusion of the distinctive group in the jury-selection process.[19] Evidence offered to prove systematic exclusion has included analysis of automated processes that generate jury lists, examination of methods used to summon jurors, and documentation of demographic underrepresentation across a series of jury pools over time.[20] The *Duren* test is generally considered less demanding than the standard for assessing Fourteenth Amendment equal protection claims because it does not require the defendant to demonstrate intentional discrimination.

Appendix B addresses the statutory framework governing North Carolina's jury pool–formation process.

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11. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
12. Castaneda v. Partida, 430 U.S. 482 (1977).
13. N.C. Const. art. I, §§ 24, 26.
14. Grine & Coward, *supra* note 7, at 6-8.
15. 407 U.S. 493 (1972).
16. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127(2) Q. J. Econ. 1 (2012).
17. *Id.* at 3–4.
18. 439 U.S. 357 (1979).
19. *Id.* at 364.
20. Grine & Coward, *supra* note 7, at 6-16, 6-17.

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Appendix B. Overview of Statutory Framework of North Carolina's Jury Pool–Formation Process

Who Is Eligible for Jury Service?

According to G.S. 9-3, persons who meet the following qualifications may serve as jurors:

- Citizens of the state and residents of the county
- Individuals who have not served as jurors during the preceding two years or who have not served a full term of service as grand jurors during the preceding six years
- Adults age 18 years or older
- Individuals who are physically and mentally competent
- Individuals who can understand the English language
- Persons who have not been convicted of a felony or pleaded guilty or *nolo contendere* to an indictment charging a felony (though persons who have so pleaded and who have had their citizenship rights restored pursuant to law are qualified to serve)[21]
- Individuals who have not been adjudged *non compos mentis* (not of sound mind)

How Is the Jury Pool–Formation Process Described in Statute?

The procedures listed below are outlined in state statutes.

The Commissioner of Motor Vehicles Initiates the Jury Pool–Formation Process and Creates County-Specific Lists

According to statute, the jury pool–formation process should begin when the commissioner of motor vehicles provides alphabetized lists of names to each county jury commission. This occurs every odd-numbered year but can be done annually if a county requests it. G.S. 9-2(a) allows the senior resident superior court judge for a given county to decide if an annual or biennial list is created.

G.S. 20-43.4(b) notes that the alphabetized lists of names provided to the county jury commissions should include "persons whose license to drive has been suspended" and "former licensees whose license has been canceled, except that the list shall not include the name of any formerly licensed driver whose license is expired and has not been renewed for eight years or more." The statute does not explicitly include individuals with state identification cards.

21. Restoration of citizenship for those convicted of felonies happens automatically upon completion of sentence, parole, probation, or post-release supervision. (See G.S. 13-1 through -4 for the statutory requirements.)

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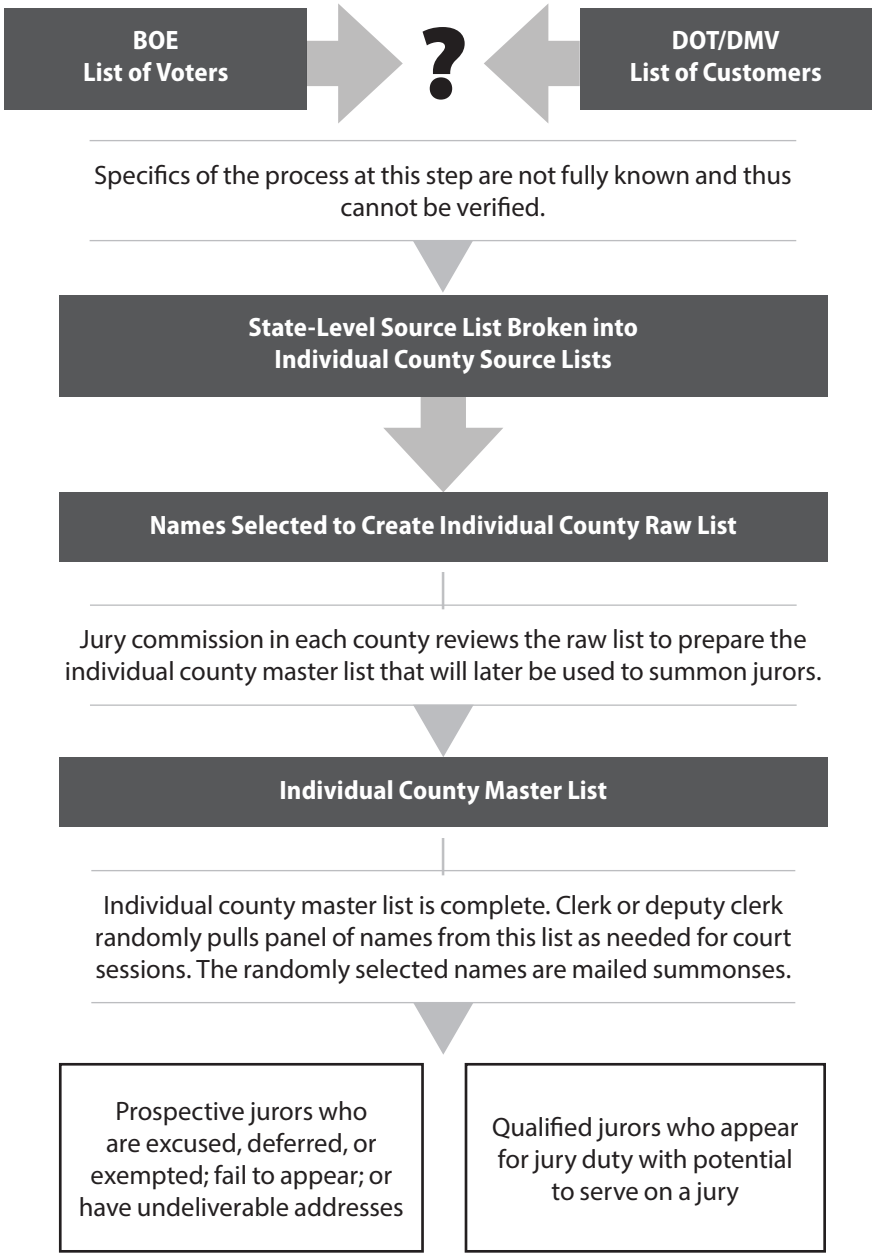
Figure 1. General Overview of Jury Pool–Formation Process as Outlined in N.C. Statute



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Sources for Lists Provided to County Jury Commissions

G.S. 20-43.4(b) explains the roles of the DMV (acting through its commissioner), BOE, and State Registrar in this process:

- **Eliminating Duplicates.** "Before providing the list to the county jury commission, the DMV commissioner shall have computer-matched the list with the voter registration list of the State Board of Elections to eliminate duplicates."
- **Removing Special Cases.** "The Commissioner shall also remove from the list the names of those residents of the county who are (i) issued a drivers license of limited duration under G.S. 20-7(s), (ii) issued a drivers license of regular duration under G.S. 20-7(f) and who hold a valid permanent resident card issued by the United States."
- **Removing Names of the Deceased**. "The Commissioner shall also remove from the list the name of those residents . . . who are recently deceased, which names shall be supplied to the Commissioner by the State Registrar under G.S. 130A-121(b)."
- **Merging and Coding the Lists of Drivers and Voters**. "The Commissioner shall include in the list provided to the county jury commission names of registered voters who do not have drivers licenses, and shall indicate the licensed or formerly licensed drivers who are also registered voters, the licensed or formerly licensed drivers who are not registered voters, and the registered voters who are not licensed or formerly licensed drivers."

Simply put, these statutory provisions provide that the list given to each individual jury commission should include licensed or formerly licensed drivers who are not voters, registered voters who are not drivers, and individuals who are both registered to vote and licensed (or formerly licensed) to drive.

How Is the Individual County Master List Prepared According to Statute?

As described in more detail in this report, the commissioner of motor vehicles provides a source list to the jury commission of each county. The jury commission uses the source list to identify and summon prospective jurors who are qualified to serve in the county. Statutory language guiding these steps is highlighted below.

Jury Commission Prepares Master List

G.S. Chapter 9 describes how this process works:

- **Each county's jury commission receives a list from the commissioner of motor vehicles and may merge the list with other reliable sources of names**. G.S. 9-2(a) explains that the jury commission shall "prepare a master list of prospective jurors" every odd-numbered year or every year if requested in writing by the senior resident superior court judge. To prepare the list the jury commission must use the list of names provided by the commissioner of motor vehicles, though G.S. 9-2(b) authorizes the jury commission to "use fewer than all the names from the list if it uses a random method of selection." The jury commission, in its discretion, may supplement the list provided by the DMV commissioner with names from other sources: "The Commission may use other sources of names deemed by it to be reliable." G.S. 9-2(e) directs the jury commission to merge the list provided by the DMV commissioner with any other reliable source list the commission chooses to

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use. This merged source list is then used to create the county master jury list, as described immediately below.

- **The jury commission prepares a master list**. The jury commission prepares a master list of prospective jurors by randomly selecting a desired number of names from the list described above. G.S. 9-2(f) mandates as follows with respect to selecting names to form the master list:

> The master list shall contain not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium, or, if an annual list is being prepared . . . the master list shall contain not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous year but in no event shall the list include fewer than 500 names, except that in counties in which a different panel of jurors is selected for each day of the week, there is no limit to the number of names that may be placed on the master list.

The AOC's jury commissioners' manual indicates that the majority of counties summon jurors for weekly terms and are therefore subject to the statutory mandate regarding the minimum and maximum numbers of names that may be included on a master list.[22]

- **The jury commission documents policies affecting the list**. The jury commission is tasked with documenting the policies and procedures it used to create the individual county master list. G.S. 9-2(j) provides as follows:

> The procedure for performing the preparation of the master list shall be in writing, adopted by the jury commission, and kept available for public inspection in the office of the clerk of court. The procedure must effectively preserve the authorized grounds for disqualification, the right of public access to the master list of prospective jurors as provided by G.S. 9-4, and the time sequence for drawing and summoning a jury panel.

- **Use of technology in creating the county master list**. G.S. 9-2(k) provides guidance on the appropriate role of technology in reviewing and preparing the individual county master list:

> In counties utilizing electronic data processing equipment, the functions of preparing and maintaining custody of the master list of prospective jurors, the procedure for drawing and summoning panels of jurors, and the procedure for maintaining records of names of jurors who have served, been excused or disqualified, or whose service has been deferred may be performed by this equipment, except that decisions as to mental or physical competence of prospective jurors shall continue to be made by jury commissioners.

22. N.C. Admin. Office of the Courts, Court Servs. Div., A Manual for North Carolina Jury Commissioners and Clerks of Superior Court 6 (5th ed. 2013), *available at* www.nccourts.org/Citizens/GoToCourt/Documents/JuryCommissionerManual.pdf.

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Clerk of Court Draws Panels, Sends Summonses, and Provides Exemptions/Deferrals

After the jury commission finalizes the individual county master list, court staff will use the finalized list to summon jurors for upcoming trials.

- **Drawing panels of jurors**. As outlined in G.S. 9-5, at least thirty days prior to any session of court requiring a jury, the court clerk "shall prepare or have electronically prepared a randomized list of names from the master jury list equal to the number of jurors required for the session." The clerk of court may either prepare and mail the summonses or provide names and addresses or summonses to the county sheriff for mailing.
- **Providing exemptions/deferrals**. In addition to the eligibility criteria listed in G.S. 9-3 and discussed above, G.S. 9-6 and 9-6.1 provide procedures by which prospective jurors may be excused, deferred, or exempted from service.

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Appendix C. Methods

Overview: Process Evaluation Methods

While the jury pool–formation process in North Carolina is outlined at a general level in statute, as discussed above, there has not been a systematic examination of how the process works in practice. Our evaluation includes documenting the individual steps in each of the three main parts of the process for forming jury pools: (1) the development and distribution of lists of jury-eligible individuals by the state to individual counties, (2) the cleaning and preparation of the lists at the county level, and (3) the related county-level jury pool–selection and summons process. After discussion of the statewide process, our evaluation focuses exclusively on the county-level process used in Chatham and Orange counties.

Overall, our process evaluation work consisted of document review, interviews, and observation of the use of the primary software employed by almost all North Carolina counties for list management, cleaning, and distribution. Our focus has been on (1) understanding the statutorily prescribed jury pool–formation process and (2) comparing that to the steps actually used in practice in each of the three main parts of the process listed above. We experienced challenges in obtaining both interviews and documents at various points in our research, particularly in documenting the state-level process. Therefore, this review should not be considered comprehensive.

State-Level Process Evaluation Methods

The state-level process evaluation focused on the identification of eligible jurors and the delivery of lists containing the names of those individuals to the counties. The research team conducted four informational interviews, then followed up with many subsequent communications seeking clarification, with employees from the BOE, DOT, and State Registrar.

County-Level Process Evaluation Methods

The research team conducted twelve interviews at the county level and had numerous clarifying communications thereafter. We held face-to-face and phone interviews with jury commissioners, clerks of court, and deputy clerks of court and corresponded via email with a representative from the AOC. County-level research considered the jury commission process, jury summonses, and exemptions from jury duty. Additionally, the team interviewed the president of Service Commander Software, Inc., whose eponymous software system is used by the vast majority of North Carolina counties—including Chatham and Orange—to electronically manage jury pool lists, including selecting jurors to be summoned and recording whether or not they appeared for duty.

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Table 2. Demographic Variables Analyzed in Jury Pool Survey Results, Corresponding Data Sources for Countywide Comparison, and Year(s) Those Data Were Collected

Variable Analyzed in Jury Pool Survey Results	Data Source for Comparison	Year(s) That Comparison Data Were Collected
Race	ACS CVAP	2010–2014
Ethnicity	ACS CVAP	2010–2014
Sex	ACS 1-Year Estimates	2014
Household size	ACS 1-Year Estimates	2014
Household income	ACS 1-Year Estimates[a]	2014

Notes
a. For methodological reasons explained in Appendix F, we ultimately determined that, while close, this dataset was not appropriate for direct comparison to the household income results in our jury pool surveys.

Survey Analysis Methods

We compared demographic data from survey responses collected at jury pool orientations in both Chatham and Orange counties to U.S. Census Bureau data drawn from a representative sampling of those counties' populations to identify any racial or ethnic disparities. In addition to race and ethnicity, we analyzed survey responses by sex, household size, and household income. Table 2 summarizes the demographic variables we analyzed in our jury pool survey results and the data sources we used for comparison to county estimates.

Background: Jury Pool Survey

To assess the representativeness of jury pools in Chatham and Orange counties, in early 2014 the SOG created a paper survey for distribution to jury pool participants in N.C. Superior Court District 15B. Once developed, we forwarded the survey to clerks of superior court in each county with a request to provide one to each individual who reported for jury duty. The instructions included in the survey informed the potential respondent that participation was voluntary, anonymous, and would not affect his or her jury service in any way. In Chatham County, all sixteen jury pools from March 2014 to March 2016 were surveyed, the vast majority of jury pool participants completed a survey, and, according to the deputy clerk, there was no discernible trend or pattern with respect to those who did not respond. In Orange County all but four of the thirty-six jury pools from May 2014 to April 2016 were surveyed. Due to a difference in how the surveys were distributed,[23] there was a higher non-response rate in Orange than in Chatham, but the assistant clerk in charge of the process for most of that period also reported no discernible trend or pattern with respect to those who did not respond.

23. Surveys were offered directly to every potential juror in Chatham County as they checked in. In Orange County, potential jurors were informed of the availability of the survey and invited to go to the side of the check-in room to obtain the form.

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From spring 2014 to spring 2016, clerks or their staff in the respective county courts collected survey responses from prospective jurors and mailed or hand-delivered them to the SOG in regular batches. By the end of April 2016, we had received a total of 790 survey responses from Chatham and 746 from Orange.[24] We manually entered the information from each survey response into Qualtrics, an online survey database maintained on an SOG server, and then exported the information to Microsoft Excel for analysis. After reviewing the data, we recoded certain responses—for example, converting all household income data to per-year rather than per-week or per-hour values—and performed other data-cleaning tasks where appropriate, as described in more detail in Appendix D (Limitations) and Appendix F (Survey Analysis Results).

Background: American Community Survey (ACS)

To draw conclusions about how closely the jury pools reflected the communities from which they were drawn, we compared the jury pool participants' survey results to the Census Bureau's annual ACS, which has replaced the decennial census "long form" as the federal government's primary tool for collecting comprehensive, detailed socioeconomic information.[25] By sampling a small but representative percentage of the American population each year, the ACS is able to generate up-to-date estimates for various characteristics of the entire population. The editions we used include data gathered continuously from 2010 to 2014 for some variables and data gathered exclusively in 2014 for others. The ACS therefore provided a more recent and expansive portrait of Chatham and Orange counties than the 2010 decennial census. As with the decennial census, federal law requires complete and accurate responses to the ACS, and data can be analyzed at the county level.[26]

We focus on several of the most common demographic variables in our analysis: race and ethnicity, sex, household size, and household income. For the latter three variables, we compared our survey results to the ACS's data release for 2014, which contained demographic estimates for Chatham and Orange counties based on samplings that the Census Bureau conducted throughout that year.[27] For race and ethnicity, however, we employed the CVAP dataset, a "special tabulation" of data within the overall ACS results from its most recent five-year data release (2010–2014).[28]

24. We received 1,536 total survey responses by April 2016. Seven responses could not be used because the respondents indicated residency outside of the county where they had appeared for jury duty, leaving 1,529 surveys for analysis.

25. For more information about the ACS, see U.S. Census Bureau, *American Community Survey: About the Survey*, "What Is the American Community Survey?," Census.gov, www.census.gov/programs-surveys/acs/about.html (last revised June 22, 2015).

26. According to the Census Bureau, the requirement to respond accurately to all questions is found in 13 U.S.C. § 221, as amended by 18 U.S.C. §§ 3559 and 3571.

27. The Census Bureau released the ACS's "2014 ACS 1-Year Estimates" to the public on Sept. 17, 2015. For more information, see U.S. Census Bureau, *American Community Survey: News & Updates*, "2014 Data Release New and Notable," Census.gov, www.census.gov/programs-surveys/acs/news/data-releases/2014/release.html (last revised May 23, 2016).

28. As of September 2016, the 2010–2014 version of the ACS's CVAP dataset was the most recent edition released to the public. For more information about the CVAP dataset, see U.S. Census Bureau, *Restricting Data: Data*, "Voting Age Population by Citizenship and Race (CVAP)," Census.gov, www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Sept. 2, 2016).

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As the name (Citizen Voting Age Population) indicates, the CVAP dataset is a subset of ACS data that is restricted to U.S. citizens who are of voting age—essentially, the jury-eligible population of the two counties being studied.[29] In this way the dataset aligns well with our jury pool survey data, given that individuals who appear in court for possible jury duty are chosen from a pool vetted for age and citizenship, among other factors, as described elsewhere in this report.

29. The Census Bureau's Redistricting Data Office publishes the CVAP dataset primarily for use in redistricting and other elections-related analyses.

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Appendix D. Limitations

Several limitations are important to note. First, most of our findings are limited to the individual counties of Judicial District 15B and are not generalizable to other counties or to the state as a whole. However, this work could suggest avenues of inquiry for other counties or judicial districts, both within North Carolina and in other states, that are interested in examining the representativeness of their jury pools. Second, due to a reliance on volunteer help at most stages of the process, including survey distribution and data entry, we were unable to impose full quality controls in data gathering. However, we made extensive efforts to verify, clean, and validate the data to the extent possible. For example, we audited all electronically entered survey data back to the original paper survey form and made multiple contacts to confirm our understanding of interview information obtained by different team members over the study period. However, certain limitations remain, as detailed below.

Limitations of Process Evaluation Methods

In several cases, individuals at the state and local levels could not be interviewed or were unable to provide detailed information on the jury pool–formation process steps in which they were involved. For example, in one case a jury commissioner was unavailable during our study period; this commissioner used a personal software program to sort and remove individuals with addresses beyond county lines from the county raw list. In interviews with other people, this program was described as very helpful and integral to creating the county master list. However, we were unable to confirm precisely what the program was or how it was used.

In addition, we were limited in some of our analysis by the proprietary nature of the software program Service Commander, used by almost all North Carolina counties to randomly select names from the individual county source lists. Clerks and their staff use this program extensively and they spoke highly of it. The software program is used primarily for pre-programmed management tasks, including tracking who is removed from the jury lists, the reason for such removals, and the duration of removals. While the raw data are the property of the clerks, they are accessed via the Service Commander program and are not readily accessible to the clerks for independent analysis. In the future, if appropriate arrangements can be made, the information stored within Service Commander could be helpful in our understanding of whether certain groups are disproportionately impacted by removal of individuals from the lists at the local level and, if so, which groups and in what manner.[30]

30. Representatives of Service Commander told us this would be possible. In our discussions with them, we were impressed by their deep knowledge of North Carolina's county-by-county jury pool–formation process and their dedication to its continuous improvement.

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Limitations of the Demographic Analysis

With any survey, choices made about question structure and wording, which respondents to target, and what distribution method to use will affect the data the survey ultimately produces. The ACS and its CVAP data subset are no different: despite their value for the purpose of our comparisons, they have several inherent limitations. Similarly, our jury pool survey has limitations that influence the way we interpret and report its results. One key limitation both sets of survey results share is the self-reported nature of the data—without the ability to confirm the veracity of responses, we must rely exclusively on the respondents to interpret each question correctly and to answer with honesty and accuracy.

Our analysis was limited in part by the fact that, in the course of our work, we learned that according to G.S. 20-43.4(c), jury pool lists are not public information across the entirety of the jury pool–formation process. To access the jury lists at each step of the process in order to compare them to census data would, therefore, require formal data-sharing agreements, approval by the University of North Carolina at Chapel Hill's Institutional Review Board, and extensive security measures to protect the data. The time and effort needed to adopt such measures was beyond the scope of this project but may be possible in the future.

Another important limitation is that the federal government does not have a dataset that exactly matches the criteria for the jury-eligible population in North Carolina. Therefore, for each comparison, we chose the most appropriate individual dataset from the Census Bureau's ACS. However, even the closest match may exclude some people who would normally be part of North Carolina's jury-eligible population or include some people who would not be. For example, the ACS one-year data edition for 2014 provides an estimate of all males and females in each county who are 18 years of age and older, and we compare this estimate to the percentage of each sex that appeared in our jury pool results. But the overall ACS sample includes non-citizens, children under 18, individuals who cannot understand English, and felons who have not had their rights restored—people who are not legally eligible for jury duty.

Ultimately, courts considering questions of jury representativeness have commonly accepted census data reflecting the total population, as opposed to the jury-eligible population, as evidence of the number of distinctive group members in a community: "If voting age population data is available courts may consider it, but courts generally do not require such precision."[31] In an effort to provide as much detail as possible, however, we discuss some of the finer points of the comparisons below.

Limitations of the ACS

First, while the ACS is methodologically rigorous, it is important to reiterate that its counts are estimates based on sampling. The ACS does not solicit responses from every person in Chatham and Orange counties; as a result, any estimate derived from the sample of people who respond to the ACS in each county is likely to be close to, but not exactly the same as, the true value for that variable in the overall Chatham or Orange populations. The ACS dataset accounts for this by accompanying each of its estimates with a "plus or minus" margin of error, which represents the "degree of uncertainty for an estimate arising from sampling variability."[32] When that mar-

31. Grine & Coward, supra note 7, at 6-12–6-13.

32. *See* ArcGIS, *SC Counties Veterans ACS Data from 2009–2013*, "Description," http://www.arcgis.com/home/item.html?id=60c2879fa09043d78cc94578418229e7 (last modified Sept. 22, 2015)

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gin of error is added to and subtracted from each estimate, it forms a range of values around the estimate that represents the "90 percent confidence interval"—that is, a range that will contain the true count in the population with 90 percent probability (i.e., 90 percent of the time, or nine times out of ten).[33] For example, one census dataset we use indicates that the estimated number of Asian voting-age citizens in Orange County is 4,130 plus or minus 371, which means that the 90 percent confidence interval for the county's actual number of such citizens would range from 3,759 to 4,501 (or approximately 3.8 to 4.5 percent of all voting-age citizens in Orange County).

The ACS's CVAP dataset, as discussed above, presents race and ethnicity estimates that are limited to **citizens** who are **18 years of age and older**—two important criteria for county jury service. Still, the CVAP dataset, along with broader ACS data, are likely to include both felons who have not yet had their rights restored and people who have limited proficiency with English—two cohorts of people that North Carolina law excludes from jury service. Simply put, if the demographic characteristics of those two cohorts differ significantly from the demographics of each county's population as a whole, then some measure of error will be introduced when we compare our jury pool results to ACS data.[34] However, we feel we are using the best comparison data available.[35]

Students are another group that is difficult to filter for comparison analysis. Because it is home to the University of North Carolina at Chapel Hill, Orange County in particular holds a large student population. The ACS treats students as county residents for the purposes of its data collection.[36] However, deputy court clerks told us that they typically defer students from jury service upon request, so there may be fewer students than expected in our survey results relative to their numbers in the county population.

A further limitation that affects our ability to compare our survey results to the Census Bureau's community demographic estimates is the CVAP dataset's treatment of race and ethnicity.

(using Census Bureau language to explain ACS estimates).

33. *Id*. According to the Census Bureau's description of its sampling methodology, there is "a 90 percent probability that the interval defined by the estimate minus the margin of error and the estimate plus the margin of error . . . contains the true value."

34. For example, recent state-level estimates from Chris Uggen, Sarah Shannon, and Jeff Manza indicate that there were 82,432 disenfranchised felons in North Carolina in 2010, about 1.14 percent of the voting-age population (and a slightly higher percentage of the citizen voting-age population). More than half of these individuals were African American: 43,621. Among the African-American voting-age population, 2.84 percent were disenfranchised due to prior or current felony charges. Christopher Uggen et al., The Sentencing Project, State-Level Estimates of Felon Disenfranchisement in the United States, 2010 16–17 (2012), www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf.

35. Following a similar study that noted, "[u]nfortunately, it is not possible to use U.S. Census Bureau information to simultaneously account for the intersection of: age, race, citizenship status, and language ability at the county level," we chose to focus the analysis, where possible, on citizens and the voting-age population because those groups are larger and easily grouped using census data. Neb. Minority Just. Comm., Representative Juries: Examining the Initial and Eligible Pools of Jurors 7 (Dec. 2008), *available at* http://nlc1.nlc.state.ne.us/epubs/S3000/B017-2008.pdf.

36. For more information about how a "resident" is defined in the ACS, see U.S. Census Bureau, *Frequently Asked Questions*, "How Do I Know Who Counts as a 'Resident' for the American Community Survey (ACS)?," Census.Gov, https://ask.census.gov/faq.php?id=5000&faqId=915 (last visited Apr. 22, 2016).

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In general, courts have recognized the census's unintentional tendency to undercount racial and ethnic minorities.[37] We describe some of the specific issues affecting our analysis below.

The ACS form includes a question that asks whether the respondent is "of Hispanic, Latino, or Spanish origin." The next question on the form asks for the respondent's race and gives specific options from which to choose: "White", "Black, African Am., or Negro", or "American Indian or Alaska Native", as well as "Native Hawaiian", "Asian Indian", "Korean", and others.[38] The results for each question for citizens age 18 and older are presented in the CVAP dataset, including counts for specific combinations tallying those who indicated more than one race (e.g., "Black or African American and White"). Such respondents are counted separately from respondents who report a single race, such that a respondent who marks both "White" and "Black, African Am., or Negro" would be included in the totals for this common dual-race category but, to avoid double-counting, would not also be included in the totals for either the white or African-American race category alone.[39] Further, if the respondent indicates that he or she is Hispanic in response to the ethnicity question, the CVAP dataset *excludes that respondent from its race counts*. For example, if a respondent indicates that she is both "Hispanic" and "White", the CVAP dataset classifies her as "Hispanic" and excludes her from the total for "White."

More generally, the term "ethnicity" in Census Bureau data essentially means either "Hispanic or Latino" or "Not Hispanic or Latino", as these are the only two ethnicities that the U.S. Office of Management and Budget requires federal agencies to use. According to the Census Bureau, "Hispanic origin can be viewed as the heritage, nationality group, lineage, or country of birth of the person or the person's parents or ancestors before their arrival in the United States."[40] It encompasses people who are from or who identify with places in Latin America, including countries in which Spanish is not the primary language (e.g., Brazil), as well as countries outside Latin America in which Spanish is the primary language (e.g., Spain). An email exchange with the Census Bureau's Redistricting and Voting Rights Data Office, which produces the CVAP dataset from the ACS results, indicated that all of the following responses to the questions about ethnicity and race would be coded as "Hispanic or Latino":

- Identifies a Hispanic origin but marks nothing for the subsequent question about race.
- Identifies a Hispanic origin, then marks "White" for the question about race.
- Does not respond to the question about ethnicity, then marks "Some other race" and writes in "Hispanic" for the question about race.

With respect to analyzing race and ethnicity, the research team generally adopted the Census Bureau's classification rules in our jury pool analysis in order to better align our survey results with ACS estimates and the ACS's CVAP dataset, allowing for more meaningful comparisons of jury pool and county demographics and, thus, a better assessment of jury pool representativeness. Moreover, it is important to note that the majority of respondents in our survey results who

37. Grine & Coward, *supra* note 7, at 6-13.

38. According to the Census Bureau, U.S. Office of Management and Budget standards assert that "Hispanic origin" is a separate concept from race and mandate that two different questions (i.e., one asking about ethnicity/Hispanic origin, the other about race) be used when collecting such data through self-identification. U.S. Census Bureau, Overview of Race and Hispanic Origin: 2010 2 (2011), www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

39. With respect to race categories, "[a]s a matter of policy, the Census Bureau does not advocate the use of the *alone* population over the *alone-or-in-combination* population or vice versa." *Id.* at 4 n.11.

40. *Id.* at 2.

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identified as Hispanic, Latino, or Spanish did not also choose a racial category to describe themselves. For those who did (eighteen out of forty), sixteen identified as white, one identified as both white and African American, and one identified as "mixed." Further, out of 1,434 non-Hispanic responses from Chatham and Orange counties, only eleven indicated two or more races. It thus seems clear that adopting the Census Bureau's classification rules has a minimal effect on our counts of race and ethnicity in the jury pool survey results.

Finally, even though it is the most recent available data of its kind, the 2010–2014 CVAP dataset that controls for citizenship and voting age presents estimates based on data between zero and six years older than our 2014–2016 survey results. This means that it would tend to understate trends that have occurred since 2010, and especially since the end of that five-year period (2014). For example, if the number of Hispanics has increased or decreased dramatically in Chatham or Orange since 2014, the Census Bureau's estimate of voting-age Hispanic citizens based on 2010–2014 data is likely to be lower or higher, respectively, than the actual population during our study period. Comparing these understated or overstated county estimates to jury pool survey percentages from 2014–2016 would then portray jury pools as either more or less representative than they actually were.

Taken together, all of these limitations suggest that any analysis of representativeness should be longitudinal and as comprehensive as possible to counter short-term variability and random error. We pursued this goal by attempting to gather data on each and every jury pool formed in Chatham and Orange counties in the study period.

Limitations of Our Jury Pool Survey

The fact that the questions we asked the members of the jury pool were not identical to the questions asked in the ACS represents one limitation of our survey analysis. This means that we must carefully consider how each question was asked when comparing our survey results to ACS estimates. Accordingly, we report the wording of each question in the ACS and its corresponding jury pool survey question in Appendix F's discussion of our survey findings.

A second limitation is that the surveys we distributed in Chatham County differ in the way some of the questions were asked from the surveys we distributed in Orange County. This is because we created a revised version of our survey early in the project but did not distribute it to both counties.[41] As a result, the Orange County survey features closed-ended questions and contains two more questions overall, while the Chatham County survey contains only open-ended questions that solicit narrative responses.[42] For example, Orange County respondents were given specific racial and ethnic categories from which to choose, while Chatham County respondents were asked how they would describe themselves "in terms of race and/or ethnicity." This limitation does not affect results within each county; although cross-county comparisons were not the

41. Given that Chatham County had already begun distributing the original version of the survey while Orange County had not, and because the question wording was not deemed to be dramatically different, project staff decided to use the revised version only in Orange County.

42. Survey methodologists disagree about which mode produces more accurate responses (i.e., those that reflect the true condition). Some believe that allowing the respondent to explain more fully via a narrative (open-ended) response is worth the content analysis required to assess and categorize each response, while others maintain that this need for subjective interpretation introduces an additional source of potential error that outweighs other benefits.

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primary purpose of this study, readers wishing to make those comparisons should carefully consider the differences between the two surveys when doing so.

The problem of non-response is a third limitation that must be considered when analyzing our jury pool survey results (or any voluntary survey of this type). There are two separate non-response considerations that could bias our analysis: one is non-response to the survey as a whole (i.e., survey opt-out), and the other is non-response to individual questions (i.e., omission of information).

1. **Non-response to the survey as a whole**. As noted above, the instructions on each county's jury pool survey informed the potential respondent that survey completion was voluntary. Thus, it is important to ask whether the people who declined to fill out our survey, taken collectively, are different in any meaningful ways from the people who chose to complete it. Given that our survey relied upon consent and promised anonymity for both respondent and non-respondent, we had no way of assessing such differences as the surveys were being distributed in the county courts. However, as noted above, court clerks from both counties told us that they distributed the surveys systematically to all jury pools (with exceptions noted elsewhere). The actual response rate was 90 percent in Chatham and 48 percent in Orange, which are strong response rates according to general survey methodology.[43] In general, as long as the people who did not fill out the survey were substantially similar to the people who did—that is, if these individual decisions were essentially random—there would be little or no bias in our survey results from non-response to the survey as a whole. Clerks reported that there did not seem to be any pattern to those declining participants, but these observations would not necessarily capture small but meaningful differences in response rates.
2. **Non-response for individual questions**. The considerations here are similar to those for the cohort who declined to respond to the survey as a whole: Are people who skipped a particular question different in important ways from people who answered it? To account for this, our general practice when reporting jury pool survey results is to use language like, "Of the people who responded to this question", as seen in Appendix F. Moreover, while we exclude non-responses to individual questions from our calculations of race, household income, and other variables in our analysis, we report the non-response total in a row at the bottom of each summary table for context. It is important to note that these non-response totals also include responses that could not be assigned to one of our existing categories—for example, "Human", "American", "Neutral", or "Diverse" in response to the question about the respondent's racial identity.

Finally, the survey results in this report represent the responses of only those individuals who appeared in court for possible jury service. This report does not include information, demographic or otherwise, about those who were summoned but did not appear—whether because they were excused, deferred, or disqualified in advance; never received the summons; or simply chose to ignore it. Figure 2 shows all possible jury pool participants as well as the subset that we were able to reach with our survey (i.e., the resulting jury pool).

43. In Orange County we received surveys from 48 percent of individuals to whom they were offered. The response rate declines to 43 percent if we include the four jury pools we could not analyze because we received no survey batches.

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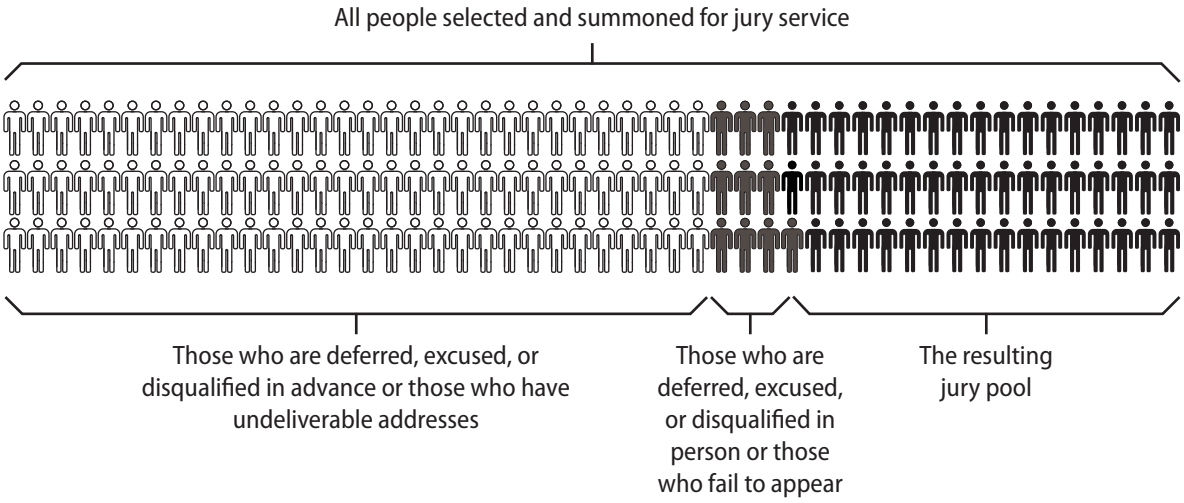
Figure 2. Sample Survey Population Diagram



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Appendix E: Process Evaluation Results

This portion of the report examines the steps involved in forming a jury pool in practice. Overall, we found the following:

- At the state level, we were unable to clearly document the merger of voter registration data from the BOE with DMV data for the study period or verify what groups of individuals were eventually included in the state-level source list. We therefore cannot comment on whether practice followed statutory guidelines at this level.
- We learned in our interviews that DOT was reviewing and changing the process for creating the state-level source list. We do not have details on those changes.
- The county-level process followed state law, which is broad and gives significant discretion to the counties to manage their jury lists. As a result, there was significant process variation between counties.

We describe our understanding of the process at the state and county levels, respectively, below.

Compilation of the State-Level Source List

The legal authority for identifying who is eligible for jury duty is outlined in the North Carolina General Statutes and described in Appendix B, above. We gathered information on the general steps of the overall process in practice. Our understanding of the process is outlined in figures 3–5, which include each step along with corresponding explanations. However, as noted below, we were not able to verify if or how certain steps for creating lists of specific individuals were actually completed. While we were informed that the list-creation process was undergoing changes, we were not given details about the nature of these changes.

Phase 1: BOE List Starts the Process

There is no statutory provision specifying what office initiates the process of creating the state-level source list. In practice, the AOC's *Manual for North Carolina Jury Commissioners and Clerks of Superior Court*[44] and our interviews suggest that it begins informally when a member of the AOC staff contacts the DMV in the spring of odd-numbered years to see if either the contact person for the process or the process itself has changed since the time of last contact. Ordinarily this is done every odd-numbered year, but it can be done annually if requested by the senior resident superior court judge for the county. Two counties, Cumberland and Mecklenburg, typically request annual lists and contact the DMV directly.

In the fall, the DMV contact person sends a data request to the DOT Information Technologies Section's State Automated Driver's License System (SADLS) division. Many of the steps at the

44. *See supra* note 22 for full citation.

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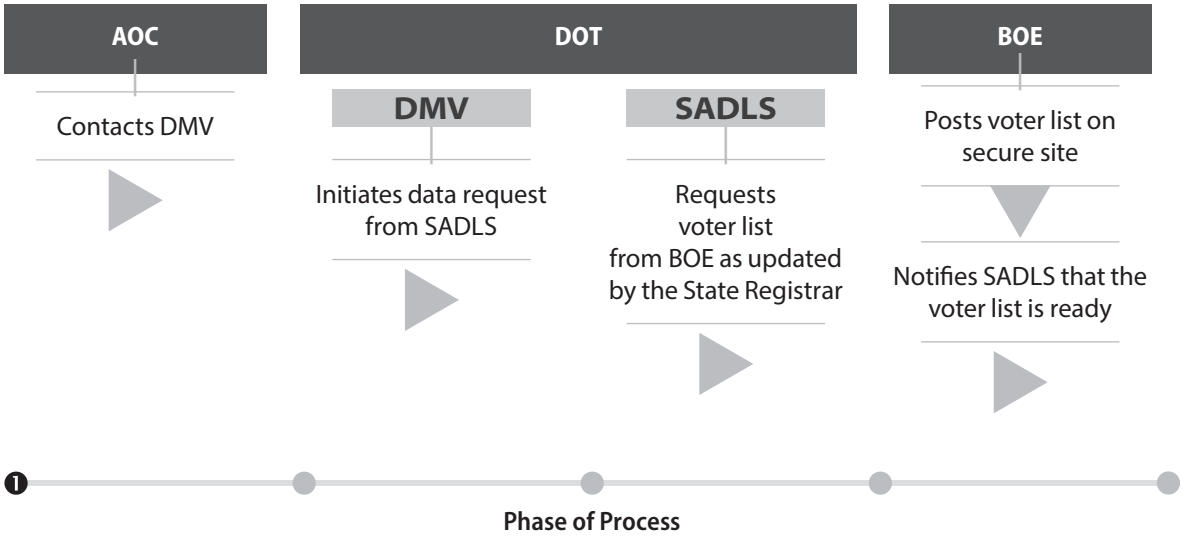
Figure 3. Phase 1: Process Starts with BOE List



DOT take place as a series of exchanges between two internal offices: the SADLS division and the DMV's Processing Services (PS).

After being contacted by PS, the SADLS division reaches out to the BOE's information technology manager to request a file of all registered voters. After receiving this request, the BOE creates a file of registered voters based on its current database. According to interviews, the BOE's file includes active registered voters as well as voters who have been inactive for less than four years.[45]

The statewide list of voters is sorted by county, then alphabetically by name, and the file is stored as a text file. When this process is complete, the BOE notifies the DOT and sends the file to SADLS via secure FTP.

What Is the Role of the State Registrar in the Source List–Creation Process?

The State Registrar plays an indirect role, working through its normal relationship with the BOE and the DOT. North Carolina death certificates are sent to the state vital records office, where they are hand-keyed into a database and then transferred to different customers, such as the BOE and the DOT. Per a data use agreement in place with these customers, the information is uploaded for them on a secure FTP (File Transfer Protocol) site at the beginning of each month. These customers can then download the information to which they have access, which is password protected. The BOE receives a monthly file containing any new records that have been processed. The DOT receives a monthly year-to-date file containing any records they already have or any new records already processed. As the BOE and the DOT modify their files with State Registrar information, those changes should flow into the the jury formation process.

45. A voter is not removed from the voter list unless there has been no contact with the voter for two federal election cycles or four years. At this point the BOE attempts to contact the voter through the mail. If there is no response, the voter is marked as "Inactive." Inactive voters are still registered to vote but will be required to verify or update their address with the BOE when they present to vote. If an inactive voter, after a time spanning two statewide general elections, does not vote or have any contact with the BOE where the voter affirms his current address, the voter will be removed from the voter list. Conversely, a designation of "Active" means that the BOE has been able to verify the voter's address. Emails and interviews with Veronica Degraffenreid, Election Preparation and Support Manager, BOE, and Greg McCurry, Information Technology Manager, BOE (Oct. 2014 through Dec. 2015).

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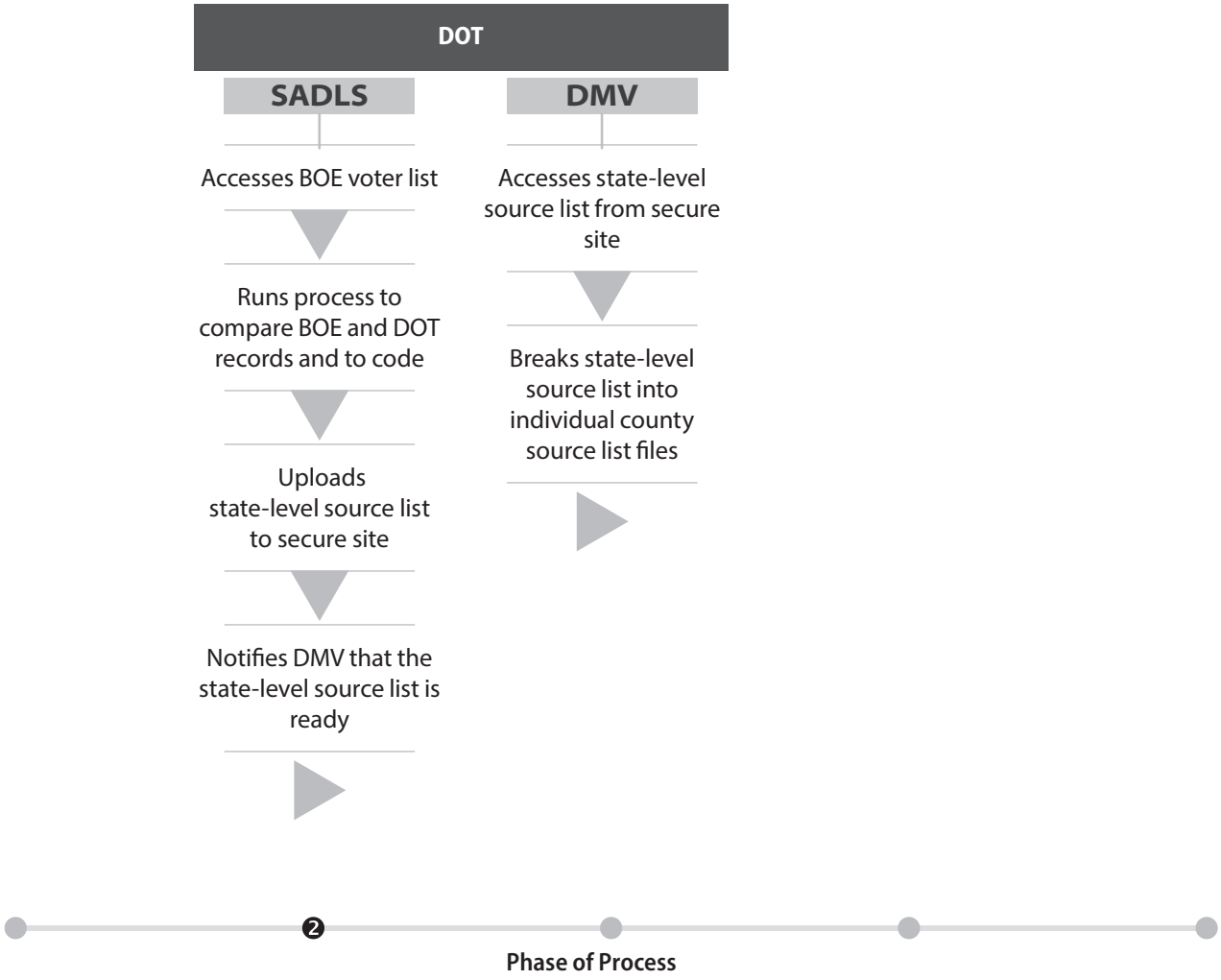
Figure 4. Phase 2: DOT Codes Names and Divides for Individual Counties



Phase 2: DOT Continues Process with Coding of Names and Dividing for Individual Counties

Some of the specific steps surrounding the incorporation of data from the DMV are unclear. Correspondence and interviews with DOT representatives revealed that the DOT runs an automated process to compare the list of registered voters with a list of registered drivers. Status codes are then used to code the list of registered voters. Those with state identification (ID) cards or licenses suspended for eight years or less are included in this comparison. It is not clear what, if anything, is done with DMV data on state ID card holders; it is important to remember that state IDs are not mentioned in any statutes regarding jury eligibility. Individuals holding state IDs may be included by virtue of being registered voters or holding separate driver's licenses.

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Individuals under age 18 and those with licenses suspended for longer than eight years are removed from the BOE-originated list. The remaining names on the list are coded as follows:[46]

- **M**: multiple entries of same name (note that it is not clear if or how duplicates are eliminated)
- **S**: name exists only in the BOE-originated list, not in any DMV records
- **B**: name appears in both the BOE-originated list and DMV records

This coding structure does not include an option for individuals who are licensed drivers but not registered voters. When asked about this, the DMV stated that "Additional customers [who] will be 18 years of age as of the next January 1st, [are] not deceased, and have a valid Social Security Number are added to the [BOE] list."[47] However, the term "customers" was not defined, and it could not be determined how the agencies handle duplicate names appearing in both lists or other details on when, how, and by whom the merger of the BOE and DMV lists takes place.

We cannot comment, therefore, on whether or not the jury pool–formation process at this stage meets statutory guidelines. However, it is important to remember that we are making observations about the process as it existed during our study. DMV officials emphasized in multiple communications that their internal process for creating the source list was going through changes, though they did not describe those changes.

According to our communications, when the BOE list has been coded and customer names added, the DOT (SADLS) emails DMV Processing Services (PS), which accesses the data on a mainframe. At this point DMV PS divides the data and saves individual county files.

How Are Addresses Verified?

While there is no specific address verification step in the state-level process, DOT driver's license information is first collected at individual DMV offices, where it goes through an address verification process. This process checks addresses against postal records (including incomplete addresses). However, it is not clear if or how DMV data are merged with BOE data or how DMV address information is incorporated. We were unable to document (1) how duplicates of BOE and DMV data would be handled if a merging of lists occurs and (2) which address would be used if reported addresses differ.

46. Interview with Jackie Ruffin, Information Technology Manager/Development Supervisor, DOT, in Raleigh, N.C. (2015).

47. Email from Carla Thorpe, Application Development Manager, DOT, to Maureen Berner (Mar. 11, 2015).

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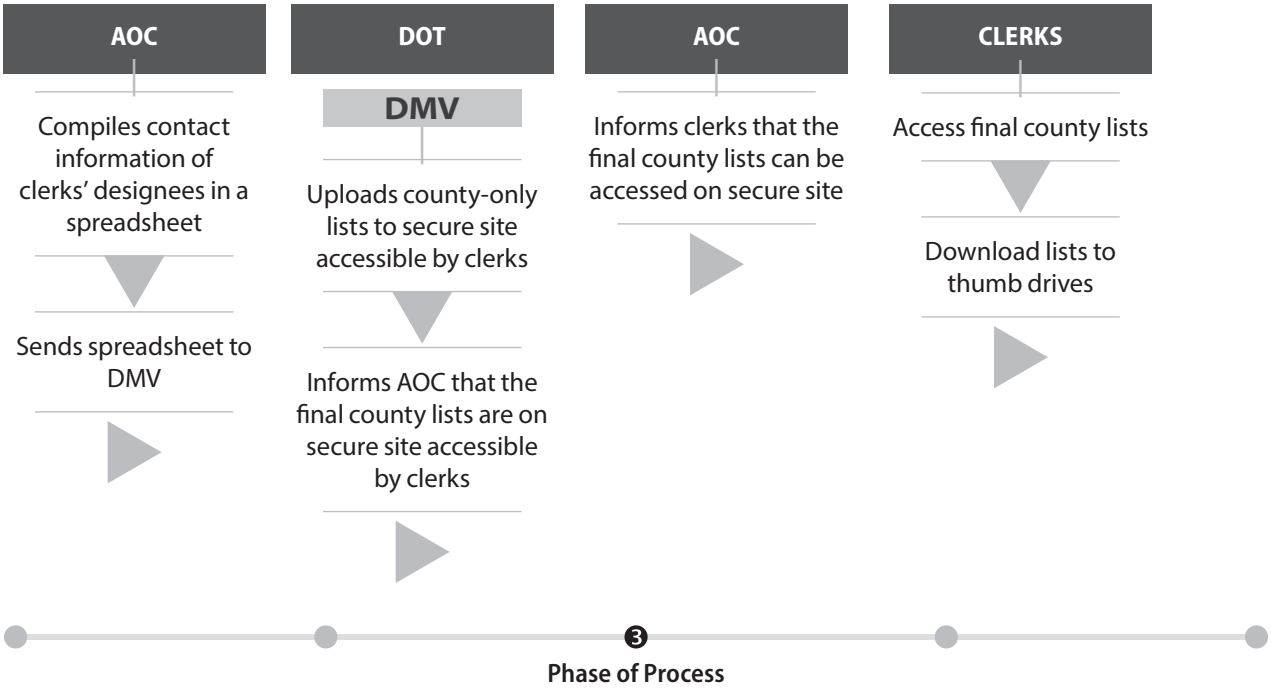
Figure 5. Phase 3: County Source List Distribution to Clerks



Phase 3: Distribution of Individual County Source Lists to Clerks

Before the DMV prepares the lists for each county, a member of the AOC staff contacts each elected clerk of court to determine who should receive the notification that the list has been posted. Once the names and email addresses of the designees are collected by the AOC, this information is sent to the DMV in a spreadsheet. As each county's list is posted on the secure site, an email notification is auto-generated to those designees on the spreadsheet, advising them that the list is available. Only these designees can download the list. (See Figure 5, above.)

At this point, each county begins to follow its own process. In Chatham and Orange counties, clerks download their respective county source lists via a secure file transfer onto a USB flash drive.

Jury Commission Review of the County List

Phase 4: Jury Commission Review of the County Raw List

At the time of this writing ninety counties, including Chatham and Orange, and the Eastern Band of Cherokee Indians use Service Commander software (commonly referred to simply as Service Commander) to help manage the jury process.[48] Service Commander first appears in the process when the clerk of court in each county downloads the individual county source list from

48. This information is provided by the website for the Service Commander software: www.servicecommander.com/ (last visited Sept. 2, 2016).

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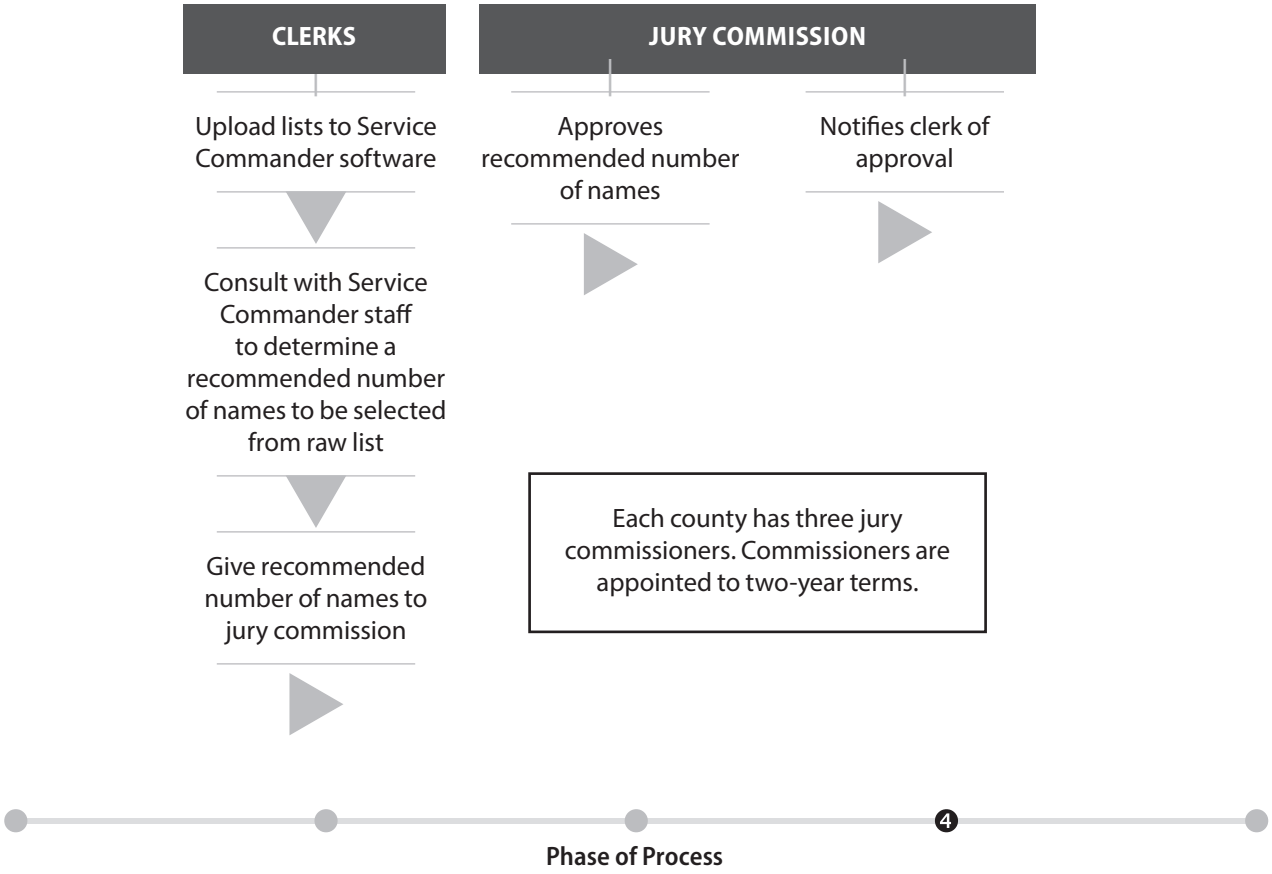
Figure 6. Phase 4: Jury Commission Review of the County Raw List



the state and uploads it into the software program. The process then moves to the county jury commissions.

In North Carolina a county jury commission may supplement the list of names provided by the state with "other sources of names deemed by [the commission] to be reliable."[49] According to the Statement of Sources and Procedures from each of the two jury commissions involved in our study, no other sources were used to supplement the voter registration list and DMV records in Chatham and Orange counties during the 2014–2015 biennium.[50] The jury commission is also

49. G.S. 9-2(b).

50. County of Chatham, Jury Commission's Statement of Sources and Procedures Filed Pursuant to North Carolina General Statutes 9-4 for Biennium 2014–2015 (2013); County of Orange, Jury Commission's Statement of Sources and Procedures for Biennium 2014–2015 Master Jury List (2013).

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permitted to use fewer than all of the names from the list provided by the state if a random method of selection is used, but it does not appear that the jury commission of either county reduced the list in this manner.[51]

Each commission is required by G.S. 9-2 to limit its biennial list to no more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium, while ensuring that the list contains at least 1.25 times as many names as were drawn the previous biennium.[52] Thus, in practice, the jury commissions in both Chatham and Orange counties develop a randomly generated raw list of names for their use that is smaller than the original, larger source list provided by DMV.

Service Commander calculates an optimal smaller list size that follows the formula set forth in G.S. 9-2 and draws on experience from the previous biennium, such as the number of individuals summoned, the number that commissioners removed, and the number exempted from jury service.[53] Service Commander informs the clerk of the recommended number of names. The clerk passes this information to the jury commission, which usually concurs and formally requests such a list.

How Is the Jury Commission Formed?

In accordance with statute, each county maintains a three-person jury commission to prepare and review the raw individual county list received from the state. The clerk of court, the board of county commissioners, and the senior resident superior court judge each appoints a member of the commission. The commissioners serve two-year terms and can serve successive terms.

Phase 5: Removal of Names to Determine Individual County Master List

Service Commander processes the jury commission's request and provides the actual names of prospective jurors to the clerk. (See Figure 7, below.) Table 3 shows the number of names requested by each county in our study in the 2014–2015 biennium compared to the estimated adult population of each county in 2014.[54] Chatham County requested a number of names 1.46 times the number of jurors from the previous biennium, while Orange County requested 1.54 times the

Table 3. Number of Names Requested for the Individual County Raw List in the 2014–2015 Biennium

County	Chatham	Orange
Population Age 18 and Older	54,263	111,775
Requested Number of Names for 2014–2015 Individual County Raw List	8,500	27,000
Percentage (%) of Adult Population	15.7	24.2

51. G.S. 9-2(b).

52. G.S. 9-2(f). Note, however, that there is no limit to the number of names that may be placed on the master list in counties that select a different panel of jurors for each day of the week. According to the AOC's jury commission manual, however, most counties do not employ this method of jury selection.

53. N.C. Admin. Office of the Courts, Court Servs. Div., A Manual for North Carolina Jury Commissioners and Clerks of Superior Court 6 (5th ed. 2013), *available at* www.nccourts.org/Citizens/GoToCourt/Documents/JuryCommissionerManual.pdf.

54. See the Chatham and Orange jury commissions' Statements of Sources and Procedures, cited in full *supra* note 50. See also the Census Bureau's AmericanFactFinder webpage, where particularized population estimates can be generated through user inputs under the "Community Facts" heading, at http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml.

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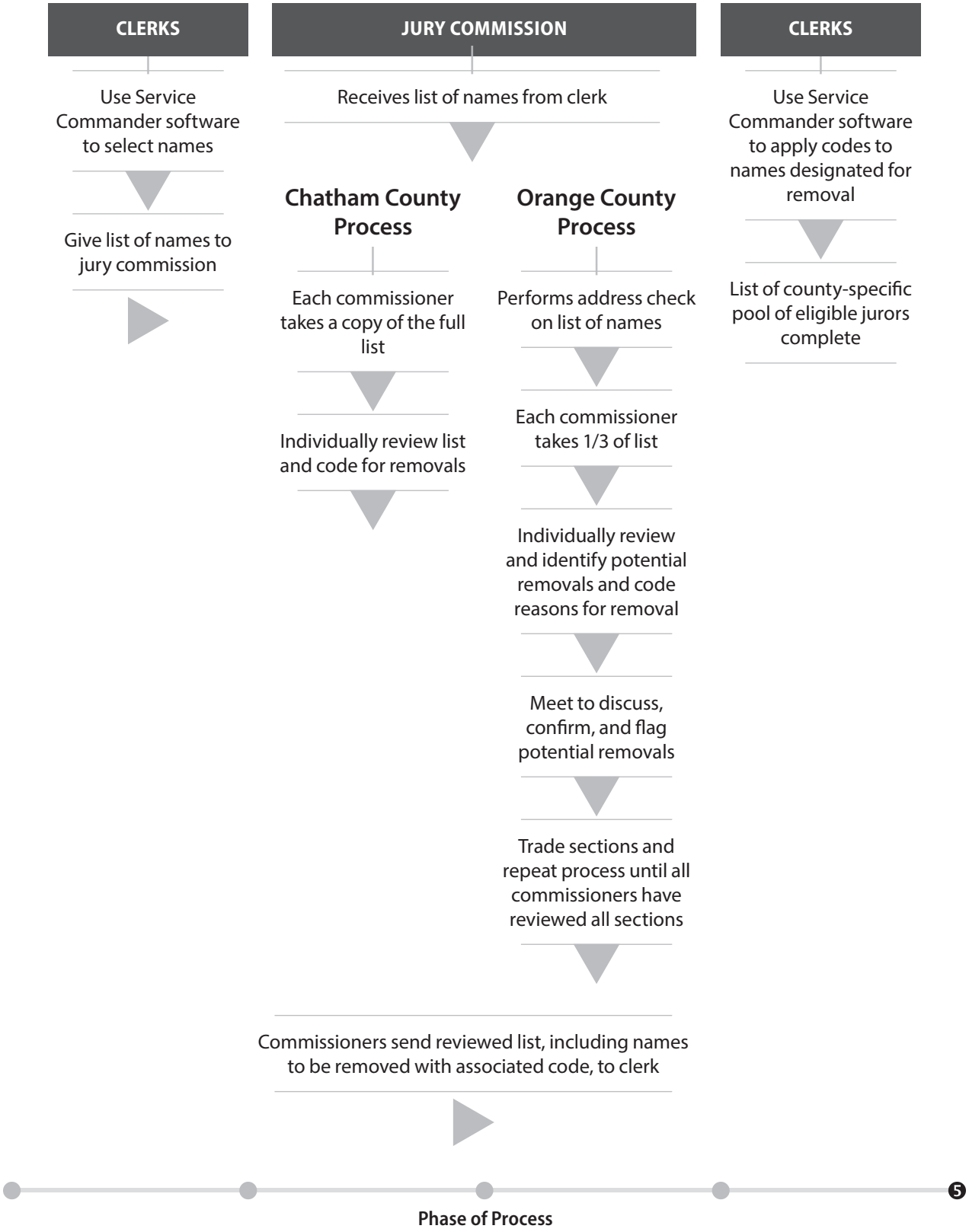
Figure 7. Phase 5: Removal of Names to Determine Individual County Master List



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number of jurors. The county jury commission receives the randomly selected names, at this point unaltered by Service Commander or court staff.

With respect to removing names from the 2014–2015 county raw list, Chatham County jury commissioners employed a process whereby each commissioner independently reviewed the entire list provided by Service Commander and then returned the list with assigned removal codes to the deputy clerk.

Orange County jury commissioners used a collaborative process for removing names, with multiple meetings and group discussions. The Service Commander list was printed out and divided into three sections, each assigned to one commissioner. Each commissioner took a section, assigned codes to that section (see Table 5 on page 38), and then met as a group with the other commissioners to discuss recommendations for removal for reasons such as addresses outside the county or individuals known to be deceased. The commissioners then switched sections and repeated this process until all three of them had seen all three sections of the list.

Are There Steps in the Process Where Names of the Deceased Are Removed from the Jury Pool?

Deceased individuals can also be removed from the jury pool at the county level. For example, jury commissioners may notice someone on the individual county raw list whom they know to be deceased and remove the name. Or, in a scenario where a jury summons is mailed to a deceased individual, relatives may return the summons with an explanation to the deputy clerk.

Removal of Names Due to Bad Addresses

In Orange County the clerk of court provided one of its jury commissioners with a thumb drive containing the county raw list prior to commission review. The commissioner used a privately owned software program on a personal computer to identify which addresses on the raw list were within the county and eligible for jury service. This program also identified which addresses fell outside county lines and thus corresponded to individuals who should be removed. Many of the actors involved in the removal process praised the helpfulness of this program. The software program was not used in Chatham County.

In both counties, the jury commissioners used the codes in Table 5 to record the reason for any removal. The codes were developed for used with the Service Commander software. The names of individuals chosen for removal and the associated codes were provided to the clerks, who manually removed the names. In both counties, decisions to remove names were based on the jury commission members' personal and/or professional knowledge of the individual or address.

Table 4 shows the number and percentage of names removed from each county raw list by county jury commissioners in the 2014–2015 biennium.[55]

Table 4. Number of Names Removed from the Individual County Raw List by Jury Commissioners in the 2014–2015 Biennium

County	Chatham	Orange
Number of Names on List Provided by Service Commander	8,500	27,000
Number of Names Removed by Jury Commission	153	1,273
Percentage (%) of Names Removed	1.8	4.7

55. See the Chatham and Orange jury commissions' Statements of Sources and Procedures, cited in full *supra* note 50.

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Table 5. Service Commander Reasons for Excusal in the Process of Reviewing the Individual County Raw List

Code	Corresponding Default Status in Service Commander Software
Deceased	Permanently Excused
Disability (Physically or Mentally Incompetent)	Permanently Excused
Duplicate	Semi-Permanently Excused
Felon (Rights Not Restored)	Semi-Permanently Excused
Language Barrier	Semi-Permanently Excused
Non-Citizen	Semi-Permanently Excused
Non-Resident	Semi-Permanently Excused
Prior Service	Semi-Permanently Excused
Vacation	Deferred
Other	Deferred

Author's Note: All reasons for removal must fall into the existing Service Commander categories. Each removal code is associated with one of the following default statuses: "Semi-permanent", "Permanent", or "Deferred". For example, if a jury commissioner knows that someone on the county raw list has died, the commissioner would mark that name for removal with the code "D" for "Deceased". Service Commander would then automatically mark the record as "Permanently Excused". A "Semi-Permanently Excused" status means that the name will not be pulled again in the current biennium. A status of "Deferred" means that a person is temporarily excused until whatever date is manually entered into the computer by clerk staff at the time of the coding. The owner of Service Commander explained that court staff has the ability to overrule all codes and associated time settings. However, it is unclear how often that is done.

The individuals left on the county raw list after commissioner review are then considered the "county master list" from which groups of names are randomly drawn as needed to form juries throughout the biennium. Court clerk staff mail jury summonses to these individuals, process those who appear for jury service, and ultimately guide selected jurors through their duties. After summonses are mailed to the randomly selected potential jurors, additional information may come to clerks prompting them to remove names from the master list, such as a death notice or a notice that someone has moved out of the county.

How Do Non-Citizens Fit into this Process?

Because non-citizens cannot be registered voters, they would not be on the BOE-originated list. However, they could be added by the DMV because individuals with lawful resident status, such as green-card holders or asylees, may obtain driver's licenses. (We could not verify with the DMV who was being added to the list other than "customers".) This means that, at least theoretically, non-citizens could be on the state-level source list that is divided and distributed to each county. In fact, the AOC guidelines state that it is the local jury commission's responsibility to remove non-citizens from the list. A code for "non-citizen" exists in Service Commander.

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Appendix F: Survey Analysis Results

Survey Analysis Findings

We analyzed 785 surveys completed by jury pool participants in Chatham County and 744 completed by jury pool participants in Orange County. Our findings are summarized in the bullet points below; more complete details can be found in the remainder of the section.

We found the following results for **Chatham County**:

- Overall, 84.2 percent of jury pool respondents were white. Based on the census estimate for voting-age white citizens in the county, we would have expected this figure to be 81.0 percent. In the raw count, there were 619 whites among Chatham jury pool respondents; we would have expected about 595.
- African Americans made up 11.3 percent of jury pool survey respondents. Based on the census estimate for voting-age African Americans in the county, we would have expected the number to be 14.0 percent. There were eighty-three African Americans among Chatham jury pool respondents; we would have expected 103.
- Of the sixteen individual jury pools we analyzed, whites were underrepresented in two, African Americans were underrepresented in eight, and Hispanics were underrepresented in four.[56]
- Overall, men were underrepresented relative to their share of the county population. Males accounted for 43.1 percent of jury pool survey respondents, while females accounted for the remaining 56.9 percent. Based on census estimates, we would have expected a group that was 48.0 percent male and 52.0 percent female. There were 324 males; we would have expected 360 to 361.[57] There were 427 females; we would have expected 390 to 391.[58]
- Individuals living alone were underrepresented—they made up 13.0 percent of our respondents (or a total of 100 respondents); we would have expected this figure to be 29.4 percent (or a total of 225 to 226 respondents).[59]
- The median reported household income among Chatham County respondents was $64,500 per year. About 16 percent of potential jurors reported household incomes under $25,000 per year, while about 33 percent reported household incomes of $100,000 or more.

We found the following results for **Orange County**:

- Overall, 84.7 percent of jury pool respondents were white. Based on the census estimate for voting-age white citizens in the county, we would have expected this figure to be 78.2

56. Here and below we focus on over or underrepresentation by at least one full person—that is, we are not counting differences that mathematically represent only a fraction of a person.

57. The expected count was 360.5.

58. The expected count was 390.5

59. The expected count was 225.5.

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Table 6. Total Surveys Received and Analyzed, March 2014–April 2016

	Total Surveys Received	Total Excluded from Analysis	Total Surveys Analyzed
Chatham	790	5	785
Orange	746	2	744
Total	**1,536**	**7[a]**	**1,529**

Notes
a. Each of these seven responses indicated a county of residence outside the county in which the respondent reported for jury duty.

percent. In the raw count, there were 626 whites among Orange jury pool respondents; we would have expected about 578.

- African Americans made up 8.4 percent of jury pool survey respondents. Based on the census estimate for voting-age African Americans in the county, we would have expected this number to be 12.4 percent. There were sixty-two African Americans among Orange jury pool respondents; we would have expected ninety-two.
- Of the thirty-one individual jury pools we analyzed, whites were underrepresented in two, African Americans were underrepresented in seventeen, and Hispanics were underrepresented in one.
- Overall, women were underrepresented relative to their share of the county population. Females accounted for 51.8 percent of jury pool survey respondents, while males accounted for the remaining 48.2 percent. Based on census estimates, we would have expected a group that was 53.5 percent female and 46.5 percent male. There were 384 females; we would have expected 397. There were 358 males; we would have expected 345.
- Individuals living alone were underrepresented—they made up 16.1 percent of our respondents (or a total of 109 respondents); we would have expected this figure to be 27.8 percent (or a total of about 188 respondents).
- The median reported household income among Orange County respondents was $90,000 per year. About 6 percent of potential jurors reported household incomes under $25,000 per year, while about 48 percent reported household incomes of $100,000 or more.

Jury Pool Survey Results: Response Breakdown by County

As shown in Table 6, we received and analyzed more than 1,500 surveys from jury pool participants in Chatham and Orange counties over a two-year period.

Tables 7 and 8, below, show the data we collected from jury pools occurring during our study period for Chatham County and Orange County, respectively.

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Table 7. Individual Jury Pools in Chatham County during Our Study Period

Pool Number	Type of Trial	Total Jurors Drawn and Summoned[a]	Total Jurors Deferred or Excused[b]	Total Jurors Available[c]	Total Jurors Who Appeared	Total Surveys Received	Survey Response Rate[f] (%)
Pool 1	Criminal	125	44	81	57	54	95
Pool 2	Civil	100	56	44	44	37	84
Pool 3	Criminal	140	82	58	59[d]	59	100
Pool 4	Criminal	135	50	85	66	54	82
Pool 5	Criminal	130	54	76	54	43	80
Pool 6	Civil	100	61	39	42[d]	34	81
Pool 7	Criminal	131	69	62	61	27	44
Pool 8	Criminal	140	68	72	72	72	100
Pool 9	Civil	100	55	45	45	43	96
Pool 10	Criminal	125	73	52	53[d]	53	100
Pool 11	Criminal	140	88	52	52	49	94
Pool 12	Criminal	130	83	47	47	47	100
Pool 13	Criminal	145	97	48	50[d]	50	100
Pool 14	Civil	130	63	67	67	63	94
Pool 15	Civil	130	67	63	63	57	90
Pool 16	Criminal	130	83	47	48[d]	48	100
Overall		**2,031**	**1,093**	**938**	**880**	**790[e]**	**90%**

Notes

a. Includes potential jurors who had previously been deferred.

b. Includes undeliverable summonses and potential jurors who were disqualified in advance or in person (e.g., for having moved out of the county).

c. "Total Jurors Available" equals "Total Jurors Drawn and Summoned" minus "Total Jurors Deferred or Excused".

d. According to a Chatham County deputy clerk, "Total Jurors Who Appeared" could exceed the "Total Jurors Available" due to how potential jurors are coded in Service Commander if they are deferred, excused, or disqualified in person after appearing; if they are selected for grand jury service; or if they appear for jury duty despite receiving an advance deferral.

e. Includes survey responses from Pools 1 and 13 that identified Wake as the county of residence, a survey response from Pool 1 that did not identify county of residence but reported a Virginia zip code, and survey responses from Pools 6 and 10 that identified Orange as the county of residence. We excluded these five responses from our analysis; the remaining 785 responses correspond to the count of "Total Surveys Analyzed" for Chatham County reported in the last column of Table 6, above.

f. "Survey Response Rate" equals "Total Surveys Received" divided by "Total Jurors Who Appeared".

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Table 8. Individual Jury Pools in Orange County during Our Study Period

Pool Number	Type of Trial	Total Jurors Drawn and Summoned[a]	Total Jurors Deferred or Excused[b]	Total Jurors Available[c]	Total Jurors Who Appeared	Total Surveys Received	Survey Response Rate[h] (%)
Pool 1	Criminal	150	101	49	50[d]	50	100
Pool 2	Civil	151	78	73	57	55	96
Pool 3	Civil	150	81	69	55	40	73
Pool 4	Criminal	100	71	29	25	25	100
Pool 5	Civil	151	95	56	56	52	93
Pool 6	Criminal	155	92	63	61	18	30
Pool 7	Civil	152	99	53	53	28	53
Pool 8	Civil	151	101	50	49	23	47
Pool 9	Criminal	150	91	59	59	10	17
Pool 10	Criminal	100	53	47	47	20	43
Pool 11	Criminal	100	75	25	25	11	44
Pool 12	Civil	152	100	52	52	30	58
Pool 13	Criminal	150	107	43	43	18	42
Pool 14	Civil	150	113	37	37	N/A[e]	N/A
Pool 15	Criminal	152	108	44	44	N/A[e]	N/A
Pool 16	Criminal	150	116	34	34	32	94
Pool 17	Civil	150	105	45	45	14	31
Pool 18	Criminal	150	113	37	37	16	43
Pool 19	Civil	150	97	53	53	6	11
Pool 20	Criminal	151	102	49	49	N/A[e]	N/A
Pool 21	Criminal	150	98	52	50	N/A[e]	N/A
Pool 22	Criminal	100	61	39	36	41[f]	N/A[f]
Pool 23	Criminal	150	111	39	39		N/A[f]
Pool 24	Criminal	151	105	46	43	19	44
Pool 25	Civil	150	72	78	58	27	47
Pool 26	Civil	154	59	95	50	31	62
Pool 27	Civil	152	72	80	30	22	73
Pool 28	Criminal	154	69	85	49	21	43
Pool 29	Criminal	152	54	98	49	13	27
Pool 30	Civil	153	50	103	63	19	30

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Table 8. Individual Jury Pools in Orange County during Our Study Period (*continued*)

Pool Number	Type of Trial	Total Jurors Drawn and Summoned[a]	Total Jurors Deferred or Excused[b]	Total Jurors Available[c]	Total Jurors Who Appeared	Total Surveys Received	Survey Response Rate[h] (%)
Pool 31	Civil	150	94	56	56	6	11
Pool 32	Criminal	150	97	53	53	31	58
Pool 33	Criminal	150	95	55	55	18	33
Pool 34	Criminal	152	51	101	58	22	38
Pool 35	Civil	151	80	71	69	21	30
Pool 36	Criminal	150	65	85	51	7	14
Overall		**5,234**	**3,131**	**2,103**	**1,740**	**746[g]**	**43%[i]**

Notes

a. Includes potential jurors who had previously been deferred.

b. Includes undeliverable summonses and potential jurors who were disqualified in advance or in person (e.g., for having moved out of the county).

c. "Total Jurors Available" equals "Total Jurors Drawn and Summoned" minus "Total Jurors Deferred or Excused".

d. According to an Orange County assistant clerk, "Total Jurors Who Appeared" could exceed the "Total Jurors Available" due to how potential jurors are coded in Service Commander if they are deferred, excused, or disqualified in person after appearing or if they appear for jury duty despite receiving an advance deferral.

e. We did not receive survey batches for these jury pools.

f. Due to an internal miscommunication, we inadvertently combined the survey batches from Pools 22 and 23 during data entry. The two batches totaled 41 surveys in all and were of roughly equal size but cannot now be separated for individual analysis.

g. Includes a survey response from Pool 5 that identified Guilford as the county of residence and a survey response from Pool 18 that identified Wake as the county of residence. We excluded these two responses from our analysis; the remaining 744 responses correspond to the count of "Total Surveys Analyzed" for Orange County reported in the last column of Table 6, above.

h. "Survey Response Rate" equals "Total Surveys Received" divided by "Total Jurors Who Appeared".

i. The response rate rises to 48 percent if we exclude the four jury pools for which we received no survey batches.

The following sections discuss findings for each of our demographic variables of interest: race and ethnicity, sex, household size, and household income. Given the JDEC's heightened interest in the race and ethnicity variables, we report data for those variables by individual jury pool; we report the other variables only in the aggregate. For each variable, we are interested in how much, if at all, the statistic from our jury pool survey data differs from the Census Bureau's ACS estimate for each county.[60]

60. As discussed on pages 23–24, above, this can be interpreted as the interval that contains the true population value with 90 percent probability (or nine times out of ten). The interval's high and low ends are formed by adding the margin of error to and subtracting it from each census estimate.

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5 Is Person 1 of Hispanic, Latino, or Spanish origin?

- ☐ **No,** not of Hispanic, Latino, or Spanish origin
- ☐ Yes, Mexican, Mexican Am., Chicano
- ☐ Yes, Puerto Rican
- ☐ Yes, Cuban
- ☐ Yes, another Hispanic, Latino, or Spanish origin – *Print origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on.*

6 What is Person 1's race? *Mark (X) one or more boxes.*

- ☐ White
- ☐ Black or African Am.
- ☐ American Indian or Alaska Native — *Print name of enrolled or principal tribe.*

☐ Asian Indian	☐ Japanese	☐ Native Hawaiian
☐ Chinese	☐ Korean	☐ Guamanian or Chamorro
☐ Filipino	☐ Vietnamese	☐ Samoan
☐ Other Asian – *Print race, for example, Hmong, Laotian, Thai, Pakistani, Cambodian, and so on.*		☐ Other Pacific Islander – *Print race, for example, Fijian, Tongan, and so on.*

- ☐ Some other race – *Print race.*

Jury Pool Survey Results: Race and Ethnicity

The images above depict questions related to race and ethnicity asked by the ACS during our study period.[61]

Results for Chatham County

Our Chatham County jury pool survey asked for the same information requested by the ACS and reproduced above, though it did so via the following open-ended question:

How would you describe yourself in terms of race and/or ethnicity?

61. In a 2011 publication presenting 2010 census results, the Census Bureau stipulated that "[t]he race categories included in the census questionnaire generally reflect a social definition of race recognized in this country and are not an attempt to define race biologically, anthropologically, or genetically." The agency further acknowledged that its race categories include "race and national origin or sociocultural groups." U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 2 n.7 (2011), www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

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Table 9. Race and Ethnicity: Overall Results for Chatham County

	Census Percentage Estimate for County[d] (%)	Corresponding Jury Pool Survey Percentage (%)	Expected Count in Jury Pool Survey Based on Census Estimate	Observed Jury Pool Survey Count
Not Hispanic or Latino	97.3	96.9	715.1	712
White[a]	81.0	84.2	595.4	619
Black or African American	14.0	11.3	103.0	83
Asian	1.1	0.7	7.9	5
American Indian or Alaska Native	0.4	0.1	2.8	1
Native Hawaiian or Other Pacific Islander	0.0	0.0	0.2	0
Two or More Races	0.8	0.5	5.7	4
Hispanic or Latino[b]	2.7	3.1	19.9	23
Grand Total	100%	100%	735	735
Non-Responses to Jury Pool Survey[c]				50
Total Surveys Analyzed				785

Notes

Due to rounding, individual totals with decimals may not sum exactly to the "Not Hispanic or Latino" subtotal or to the "Grand Total" shown in the table.

a. Race and ethnicity category names mirror those in the Census Bureau's 2010–2014 ACS Citizen Voting Age Population results file.

b. Includes all respondents who identified themselves as Hispanic, Latino, or Spanish, regardless of any accompanying racial identification.

c. Includes all respondents who chose not to respond to the open-ended question or answered the question in a way that we could not interpret.

d. The 90 percent confidence intervals for each census estimate are as follows: Not Hispanic or Latino, 96.9–97.6%; White, 80.7–81.3%; Black or African American, 13.7–14.3%; Asian, 0.9–1.3%; American Indian or Alaska Native, 0.3–0.5%; Native Hawaiian or Other Pacific Islander, 0.0–0.1%; Two or More Races, 0.2–1.4%; and Hispanic or Latino, 2.2–3.3%.

The results of our survey of the Chatham jury pools regarding race and ethnicity as compared to the 2010–2014 ACS's corresponding estimates for the entire county, in each case limited to citizens of voting age, are presented above.

Discussion

The Census Bureau estimates that the true proportion of non-Hispanic whites in the Chatham County adult citizen population was 81.0 percent during the period these data were collected (2010–2014), with a 90 percent confidence interval ranging from 80.7 to 81.3 percent. According to our survey results, of those in the jury pools who responded to our question and did not identify themselves as Hispanic, 84.2 percent described themselves in ways that we categorized as "white"—or 3.2 percentage points **more** than we would expect relative to the census estimate for

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voting-age white citizens in the county as a whole (81.0 percent). In jury analyses, this percentage-point difference between the representation of the group in the jury pool and its representation in the overall population is commonly referred to as the "absolute disparity". In the raw count, there were 619 whites in the jury pool survey results; based on the census estimate for voting-age white citizens in the county, we would have expected about 595. Compared to their share of the population in Chatham, whites were **overrepresented** in our jury pool survey results by 4.0 percent.[62] This calculation of the percentage by which the number of group members in the jury pool differs from what we would expect given their number in the population is referred to as the "comparative disparity".

The Census Bureau estimates that the true percentage of African Americans in the Chatham County adult citizen population was 14.0 percent during the period these data were collected, with a 90 percent confidence interval ranging from 13.7 to 14.3 percent. Of those in the jury pools who responded to our survey question and did not identify themselves as Hispanic, 11.3 percent told us they were they were "Black", "African American", or a related term. This result was 2.7 percentage points **less** than we would expect relative to the census estimate for voting-age African American citizens in the county as a whole (14.0 percent). This is the absolute disparity. In the raw count, there were eighty-three African Americans in the jury pool survey results; based on the CVAP estimate for voting-age African American citizens in the county, we would have expected 103. Compared to their share of the population in Chatham, African Americans were **underrepresented** in our jury pool survey results by 19.5 percent (comparative disparity).[63]

Hispanics were **overrepresented** in our survey results by 15.6 percent (comparative disparity) but, given their lower overall population numbers in the county, this amounted to only about three individuals in absolute terms. While we would have expected about twenty to self-identify as Hispanic in the overall jury pool total, there were in fact twenty-three. Further, this result was inside the 90 percent confidence interval for the census's estimate of Chatham County's true Hispanic voting-age population, suggesting there may be no actual difference between the two. However, given that the Chatham County version of our survey asked about both race and ethnicity simultaneously in a single open-ended question, the true proportion of Hispanics in Chatham's jury pools is harder to determine than in Orange County, where two closed-ended questions were used to solicit the same information.

In general, it is important to remember that, in the case of the Hispanic population, we are comparing data collected in 2014–2016 with a census estimate that averages data gathered from 2010–2014. Although this is the best comparison data currently available, it is nonetheless dated. Anecdotal information suggests that there have been large fluctuations in Chatham's Hispanic population due to employment changes in the county. We would also expect to see steady increases in the size of the Hispanic population eligible for jury duty as younger Hispanics—the vast majority of whom are citizens—enter the voting age cohort.

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62. To calculate this percentage, one would subtract the CVAP estimate (81.0 percent) from the corresponding jury pool survey result (84.2 percent) and then divide by the CVAP estimate (81.0 percent).

63. Using the calculation described *supra* note 62, when one subtracts the CVAP estimate (14.0 percent) from the corresponding jury pool survey result (11.3 percent) and then divides by the CVAP estimate (14.0 percent), one gets a negative value; the negative value indicates underrepresentation relative to what we would expect in the jury pool survey batch given the CVAP estimate. The same calculation method may be used for statements about comparative disparities in the remainder of this report.

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Table 10. Race and Ethnicity: Results for Individual Jury Pools in Chatham County

Pool Number	Total Surveys	Usable Responses	White (Expected)[c]	White (Observed)	Af. Am. (Expected)[c]	Af. Am. (Observed)	Hispanic (Expected)[c]	Hispanic (Observed)
Pool 1	54	48	38.9	41	6.7	3	1.3	3
Pool 2	37	35	28.4	31	4.9	4	0.9	0
Pool 3	59	56	45.4	45	7.9	9	1.5	1
Pool 4	54	51	41.3	38	7.1	7	1.4	4
Pool 5	43	41	33.2	37	5.7	4	1.1	0
Pool 6	34	29	23.5	24	4.1	5	0.8	0
Pool 7	27	23	18.6	21	3.2	1	0.6	1
Pool 8	72	65	52.7	54	9.1	10	1.8	1
Pool 9	43	43	34.8	35	6.0	5	1.2	2
Pool 10	53	49	39.7	38	6.9	6	1.3	5
Pool 11	49	44	35.6	36	6.2	7	1.2	1
Pool 12	47	44	35.6	38	6.2	4	1.2	1
Pool 13	50	46	37.3	42	6.4	2	1.2	0
Pool 14	63	62	50.2	52	8.7	6	1.7	4
Pool 15	57	52	42.1	46	7.3	4	1.4	0
Pool 16	48	47	38.1	41	6.6	6	1.3	0
Overall	**790[a]**	**735[b]**	**595.4**	**619**	**103.0**	**83**	**19.9**	**23**

Notes

a. Includes survey responses from Pools 1 and 13 that identified Wake as the county of residence, a survey response from Pool 1 that did not identify county of residence but reported a Virginia zip code, and survey responses from Pools 6 and 10 that identified Orange as the county of residence. We excluded these five responses from our analysis; the remaining 785 responses correspond to the count of "Total Surveys Analyzed" for Chatham County reported in the last column of Table 6, above.

b. Excludes the five responses described in note a, above, as well as those from all respondents who chose not to respond to the open-ended question or answered the question in a way that we could not interpret.

c. We derived the "expected" number for each racial/ethnic group by multiplying the Census Bureau's percentage estimate for that group in the county by the usable responses for each jury pool.

Pool-by-Pool Results

While analyzing the overall jury pool survey counts gives us a broad perspective, looking at the individual jury pools tells us more about possible patterns over time. In Table 10 we present the survey results from every Chatham County jury pool formed from March 2014 through March 2016. For each pool we present the total number of surveys it contained, the number of usable responses present (which excludes non-responses), the expected count for the three largest racial/ethnic groups based on the proportion of each group in Chatham County (per the census estimates), and the actual count for each group in each pool's survey results. The summary row at the bottom of the table corresponds to information presented in Table 9, above.

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It is important to note that at this level, with such small numbers, differences can turn on a single individual. Rather than focus on survey results from any individual jury pool, we would instead draw readers' attention to the issue of consistency in under or overrepresentation in our results over many pools and in the aggregate totals.

We see the following results in Table 10 for the sixteen jury pool survey batches we analyzed:

- Whites were overrepresented in **ten** jury pool survey batches and underrepresented in **two**.[64]
- African Americans were overrepresented in **one** jury pool survey batch and underrepresented in **eight**.
- Hispanics were overrepresented in **four** jury pool survey batches and underrepresented in **four**.

As noted in the discussion of the limitations of the ACS's CVAP dataset beginning on page 23, the county estimates we are using for comparison to our jury pool survey percentages are based on data collected from 2010 through 2014. Thus, to the extent the relative population of white, African American, and/or Hispanic voting-age citizens in the county has remained essentially the same since the CVAP data were released, our comparisons would not under or overstate the representativeness of the county's jury pools. Significant fluctuations in population up or down during that time, however, would tend to impact our assessment of representativeness.

This kind of analysis is outside the scope of our report, primarily because it depends upon the Census Bureau's release of the next edition of its CVAP five-year data covering 2011–2015, which is not expected until 2017. It may also be possible to see indications of racial and ethnic population trends from year-over-year comparisons of ACS one-year data editions from 2010 forward. However, these datasets do not control for voting age or citizenship.

Results for Orange County

Our Orange County jury pool survey asked for the same race and ethnicity information requested by the ACS and reproduced above, though it did so in the following way:

Are you Spanish, Hispanic, or Latino?

- ❑ Yes
  - ❑ Spanish
  - ❑ Hispanic
  - ❑ Latino
- ❑ No

Please choose one or more races that you consider yourself to be:

- ❑ White
- ❑ Black or African American
- ❑ American Indian or Alaska Native
- ❑ Asian
- ❑ Native Hawaiian or Other Pacific Islander
- ❑ Other: _____

The results of our survey of the Orange County jury pools regarding race and ethnicity as compared to the 2010–2014 ACS's corresponding estimates for the entire county, in each case limited to citizens of voting age, are presented below.

64. As explained *supra* note 56, we focus on over or underrepresentation by at least one full person–that is, we do not count differences between expected and observed values that are less than 1.

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Table 11. Race and Ethnicity: Overall Results for Orange County

	Census Percentage Estimate for County[d] (%)	Corresponding Jury Pool Survey Percentage (%)	Expected Count in Jury Pool Survey Based on Census Estimate	Observed Jury Pool Survey Count
Not Hispanic or Latino	97.1	97.7	717.3	722
White[a]	78.2	84.7	577.9	626
Black or African American	12.4	8.4	92.0	62
Asian	4.2	3.5	30.7	26
American Indian or Alaska Native	0.3	0.1	2.6	1
Native Hawaiian or Other Pacific Islander	0.0	0.0	0.1	0
Two or More Races	1.9	0.9	14.0	7
Hispanic or Latino[b]	2.9	2.3	21.7	17
Grand Total	100%	100%	739	739
Non-Responses to Jury Pool Survey[c]				5
Total Surveys Analyzed				744

Notes

Due to rounding, individual totals with decimals may not sum exactly to the "Not Hispanic or Latino" subtotal or to the "Grand Total" shown in the table.

a. Race and ethnicity category names mirror those in the Census Bureau's 2010–2014 ACS Citizen Voting Age Population results file.

b. Includes all respondents who identified themselves as Hispanic, Latino, or Spanish in response to the question about ethnicity, regardless of any accompanying racial identification in the subsequent question about race.

c. Includes one respondent who chose not to answer either the ethnicity or the race question, two who chose not to answer the race question after checking "No" for Hispanic origin, and two who answered the race question in ways that we could not interpret.

d. The 90 percent confidence intervals for each census estimate are as follows: Not Hispanic or Latino, 96.4–97.7%; White, 77.9–78.5%; Black or African American, 12.2–12.7%; Asian, 3.8–4.5%; American Indian or Alaska Native, 0.2–0.5%; Native Hawaiian or Other Pacific Islander, 0.0–0.0%; Two or More Races, 1.1–2.7%; and Hispanic or Latino, 2.5–3.4%.

Discussion

The Census Bureau estimates that the true proportion of non-Hispanic whites in the Orange County adult citizen population was 78.2 percent during the period these data were collected (2010–2014), with a 90 percent confidence interval ranging from 77.9 to 78.5 percent. Turning to our survey results, of those in the jury pools who responded to our survey question and did not identify themselves as Hispanic, 84.7 percent described themselves in ways that we categorized as "white"—or 6.5 percentage points **more** than we would expect relative to the census estimate for voting-age white citizens in the county as a whole (78.2 percent). This is the absolute disparity. In the raw count, there were 626 whites in the jury pool survey results; based on the census estimate

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for voting-age white citizens in the county, we would have expected about 578. Compared to their share of the population in Orange, whites were **overrepresented** in our jury pool survey results by 8.3 percent (comparative disparity).

The Bureau estimates that the true proportion of African Americans in the Orange County adult citizen population was 12.4 percent during the period these data were collected, with a 90 percent confidence interval ranging from 12.2 to 12.7 percent. Of those in the jury pools who responded to our survey question and did not identify themselves as Hispanic, 8.4 percent told us they were "Black or African American"—or 4.1 percentage points **less** than we would expect relative to the census estimate for voting-age African American citizens in the county as a whole (12.4 percent), after rounding. Thus, the absolute disparity is 4.1 percentage points. In the raw count, there were sixty-two African Americans in the aggregate jury pool survey results; based on the census estimate for voting-age African American citizens in the county, we would have expected ninety-two. Compared to their share of the population in Orange, African Americans were **underrepresented** in our aggregate jury pool survey results by 32.6 percent (comparative disparity).

Hispanics were **underrepresented** in our survey results by 21.8 percent (comparative disparity) but, like in Chatham, this amounted to only about five individuals in absolute terms. While we would have expected about twenty-two to self-identify as Hispanic in our survey results (accounting for 2.9 percent), there were in fact only seventeen (2.3 percent).

Asians were also slightly **underrepresented**. The jury pool survey results showed that "Asian" was the race indicated by potential jurors in twenty-six of 739 usable responses, or 3.5 percent. The 2010–2014 CVAP estimate for adult Asian citizens was 4.2 percent, with a 90 percent confidence interval that ranged from 3.8 percent to 4.5 percent. This means that we would have expected to see about thirty-one Asians in our survey results instead of the twenty-six we observed.

Pool-by-Pool Results

The pool-by-pool survey results from Orange County are displayed in Table 12, below. For each jury pool formed we present the total number of surveys, the number of usable responses present (which excludes non-responses), the expected count for the three largest racial/ethnic groups based on the proportion of each group in Orange County (per the census estimates),[65] and the actual count for each group in each pool's survey results. The summary row at the bottom of the table corresponds to information presented in Table 11, above.

65. While the 2010–2014 ACS estimate for voting-age Asian citizens in Orange County (4,130) outnumbers the estimate for voting-age Hispanic citizens (2,925), the ACS estimate for all Hispanics in the county (11,310) is greater than the corresponding estimate for Asians (9,695).

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Table 12. Race and Ethnicity: Results for Individual Jury Pools in Orange County

Pool Number	Total Surveys	Usable Responses	White (Expected)[e]	White (Observed)	Af. Am. (Expected)[e]	Af. Am. (Observed)	Hispanic (Expected)[e]	Hispanic (Observed)
Pool 1	50	49	38.3	37	6.1	7	1.4	2
Pool 2	55	55	43.0	43	6.8	5	1.6	3
Pool 3	40	40	31.3	31	5.0	5	1.2	1
Pool 4	25	25	19.6	21	3.1	4	0.7	0
Pool 5	52	50	39.1	41	6.2	6	1.5	1
Pool 6	18	18	14.1	16	2.2	2	0.5	0
Pool 7	28	28	21.9	26	3.5	2	0.8	0
Pool 8	23	22	17.2	18	2.7	1	0.6	0
Pool 9	10	10	7.8	10	1.2	0	0.3	0
Pool 10	20	20	15.6	16	2.5	3	0.6	1
Pool 11	11	11	8.6	11	1.4	0	0.3	0
Pool 12	30	30	23.5	27	3.7	2	0.9	1
Pool 13	18	17	13.3	15	2.1	1	0.5	1
Pools 14–15[a]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Pool 16	32	32	25.0	28	4.0	2	0.9	0
Pool 17	14	14	10.9	11	1.7	0	0.4	1
Pool 18	16	15	11.7	10	1.9	3	0.4	1
Pool 19	6	6	4.7	6	0.7	0	0.2	0
Pools 20–21[a]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Pools 22–23[b]	41	40	31.3	35	5.0	2	1.2	0
Pool 24	19	19	14.9	17	2.4	2	0.6	0
Pool 25	27	27	21.1	24	3.4	2	0.8	0
Pool 26	31	31	24.2	25	3.9	3	0.9	0
Pool 27	22	22	17.2	19	2.7	1	0.6	0
Pool 28	21	21	16.4	17	2.6	3	0.6	1
Pool 29	13	13	10.2	13	1.6	0	0.4	0
Pool 30	19	19	14.9	18	2.4	0	0.6	1
Pool 31	6	6	4.7	5	0.7	1	0.2	0
Pool 32	31	31	24.2	26	3.9	2	0.9	1
Pool 33	18	18	14.1	16	2.2	2	0.5	0
Pool 34	22	22	17.2	19	2.7	0	0.6	2

(*continued*)

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Table 12 (*continued*)

Pool Number	Total Surveys	Usable Responses	White (Expected)[e]	White (Observed)	Af. Am. (Expected)[e]	Af. Am. (Observed)	Hispanic (Expected)[e]	Hispanic (Observed)
Pool 35	21	21	16.4	19	2.6	1	0.6	0
Pool 36	7	7	5.5	6	0.9	0	0.2	0
Overall	**746[c]**	**739[d]**	**577.9**	**626**	**92.0**	**62**	**21.7**	**17**

Notes

a. We did not receive survey batches for these jury pools.

b. Due to an internal miscommunication, we inadvertently combined the survey batches from Pools 22 and 23 during data entry. The two batches totaled forty-one surveys in all and were of roughly equal size but cannot now be separated for individual analysis.

c. Includes a survey response from Pool 5 that identified Guilford as the county of residence and a survey response from Pool 18 that identified Wake as the county of residence. We excluded these two responses from our analysis; the remaining 744 responses correspond to the count of "Total Surveys Analyzed" for Orange County reported in the last column of Table 6, above.

d. Excludes the two responses described immediately above in note c, one respondent who chose not to answer either the ethnicity or race question, two who chose not to answer the race question after checking "No" for Hispanic origin, and two who answered the race question in ways that we could not interpret.

e. We derived the "expected" number for each racial/ethnic group by multiplying the Census Bureau's percentage estimate for that group in the county by the usable responses for each jury pool.

We see the following results in Table 12 for the thirty-one jury pool survey batches we analyzed:[66]

- Whites were overrepresented in **twenty** jury pool survey batches and underrepresented in **two**.
- African Americans were overrepresented in **one** jury pool survey batch and underrepresented in **seventeen**.
- Hispanics were overrepresented in **two** jury pool survey batches and underrepresented in **one**.

It is important to reiterate that, with such small numbers, differences in representation can turn on a single individual. For that reason, we should focus on how consistently demographic groups are under or overrepresented in our survey results across all jury pools and in the aggregate results. As the professional demographer we retained to review our analysis put it:

> [A]s soon as we start getting further away from that 90 percent confidence interval, the more we begin to be suspicious that the composition of the jury pool is distinct from the citizen voting-age population. We can't exactly quantify how significant this deviation is, and it might be hard to see in individual jury pools, but the overall pattern reveals a fairly significant concern about potential

66. We are treating the mistakenly combined pools as a single pool for the purpose of these observations.

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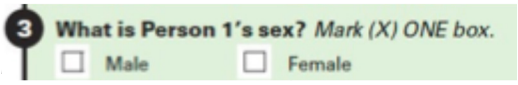
underrepresentation of African Americans. How this happens is unclear. It may be that the underrepresentation starts with the initial master list and the limits of inclusiveness. It may be that there are also higher rates of non-response to summons and survey non-response that further exacerbate this estimate.

Finally, the same census caveat from the corresponding Chatham County results section applies here: The county estimates we are using for comparison to our jury pool survey percentages, while the latest available, are nonetheless based on data collected from 2010 through 2014. Significant fluctuations in the relative proportions of these groups' voting-age citizens in Orange County during recent years, if any, could distort our assessment of representativeness.

Jury Pool Survey Results: Sex

The image below depicts the question related to sex asked by the 2014 ACS.



Results for Chatham County

Our Chatham County jury pool survey asked for the same information regarding sex requested by the ACS and reproduced immediately above, though it did so in the following way:

How would you describe yourself in terms of gender?

The results of our survey of the Chatham County jury pools regarding sex as compared to the ACS's corresponding estimates for the entire county, in each case limited to respondents who are of voting age, are presented below.

Table 13. Sex: Overall Results for Chatham County

	Census Percentage Estimate for County (%)	Corresponding Jury Pool Survey Percentage (%)	Expected Count in Jury Pool Survey Based on Census Estimate	Observed Jury Pool Survey Count
Female	52.0	56.9	390.5	427
Male	48.0	43.1	360.5	324
Total	100%	100%	751	751
Non-Responses to Jury Pool Survey[a]				34
Total Surveys Analyzed				785

Notes
a. Includes responses that we could not interpret.

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Discussion

The Census Bureau estimates that the true proportion of voting-age females in the Chatham County population was 52.0 percent during the year these data were collected (2014), with a 90 percent confidence interval ranging from 51.1 to 52.9 percent. According to our survey results, of those in the jury pools who responded to our survey question, 56.9 percent identified themselves in ways that we interpreted as "Female"—or 4.9 percentage points **more** than we would expect relative to the census estimate for voting-age females in the county as a whole (52.0 percent). This is the absolute disparity. In the raw count, there were 427 females in the jury pool survey results; based on the census estimate for voting-age females in the county, we would have expected 390 to 391.[67] Compared to their share of the population in Chatham, females were **overrepresented** in our jury pool survey results by 9.3 percent (comparative disparity).

The results for males are very nearly opposite, as we would expect. The estimated true proportion of voting-age males in the Chatham County population was 48.0 percent during the year 2014, with a 90 percent confidence interval ranging from 47.1 to 48.9. Of those in the jury pools who responded to our survey question, 43.1 percent identified themselves in ways we interpreted as "Male"—or 4.9 percentage points **less** than we would expect relative to the census estimate for voting-age males in the county as a whole (48.0 percent). This is the absolute disparity. In the raw count, there were 324 males in the jury pool survey results; based on the census estimate for voting-age males in the county, we would have expected 360 to 361.[68] Compared to their share of the population in Chatham, males were **underrepresented** in our jury pool survey results by 10.1 percent (comparative disparity).

Results for Orange County

Our Orange County jury pool survey asked for the same information regarding sex requested by the ACS and reproduced above, though it did so in the following way:

What is your sex?

❑ Male ❑ Female

67. As shown in Table 13, the expected count was 390.5.
68. As shown in Table 13, the expected count was 360.5.

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The results of our survey of the Orange County jury pools regarding sex as compared to the 2014 ACS's corresponding estimates for the entire county, in each case limited to respondents who are of voting age, are presented below.

Table 14. Sex: Overall Results for Orange County

	Census Percentage Estimate for County (%)	Corresponding Jury Pool Survey Percentage (%)	Expected Count in Jury Pool Survey Based on Census Estimate	Observed Jury Pool Survey Count
Female	53.5	51.8	397	384
Male	46.5	48.2	345	358
Total	100%	100%	742	742
Non-Responses to Jury Pool Survey				2
Total Surveys Analyzed				744

Discussion

The Census Bureau estimates that the true proportion of voting-age females in the Orange County population was 53.5 percent during the year 2014, with a 90 percent confidence interval ranging from 53.2 to 53.8 percent. Of those in the jury pools who responded to our survey question, 51.8 percent identified themselves as "Female"—or 1.7 percentage points **less** than we would expect relative to the census estimate for voting-age females in the county as a whole (53.5 percent). This is the absolute disparity. In the raw count, there were 384 females in the jury pool survey results; based on the census estimate for voting-age females in the county, we would have expected 397. Compared to their share of the population in Orange, females were **underrepresented** in our jury pool survey results by 3.3 percent (comparative disparity).

Once again, the results for males are very nearly opposite. The estimated proportion of voting-age males in the Orange County population was 46.5 percent during the year 2014, with a 90 percent confidence interval ranging from 46.2 to 46.8 percent. Of those in the jury pools who responded to our survey question, 48.2 percent identified themselves as "Male"—or 1.7 percentage points **more** than we would expect relative to the census estimate for voting-age males in the county as a whole (46.5 percent). This is the absolute disparity. In the raw count, there were 358 males in the jury pool survey results; based on the census estimate for voting-age males in the county, we would have expected 345. Compared to their share of the population in Orange, males were **overrepresented** in our jury pool survey results by 3.8 percent (comparative disparity).

Jury Pool Survey Results: Household Size

The Census Bureau defines a household as "all the persons who occupy a housing unit as their usual place of residence."[69] A housing unit, in turn, "is a house, an apartment, a mobile home, a group of rooms, or a single room that is occupied . . . as separate living quarters . . . The occupants

69. *See* U.S. Census Bureau, *American Community Survey (ACS), 5-Year Estimates*, "Households and Persons Per Household," Census.Gov, www.census.gov/quickfacts/meta/long_HSD410214.htm (last visited May 9, 2016).

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may be a single family, one person living alone, two or more families living together, or any other group of related or unrelated persons who share living arrangements."[70] The 2014 ACS determined household size via the following question:

How many people are living or staying at this address?
- **INCLUDE** everyone who is living or staying here for more than 2 months.
- **INCLUDE** yourself if you are living here for more than 2 months.
- **INCLUDE** anyone else staying here who does not have another place to stay, even if they are here for 2 months or less.
- **DO NOT INCLUDE** anyone who is living somewhere else for more than 2 months, such as a college student living away or someone in the Armed Forces on deployment.

Number of people

Results for Chatham County

Our Chatham County jury pool survey asked for information about household size in the following way:

How many people live in your household?

The results of our survey of the Chatham County jury pools regarding household size as compared to the ACS's corresponding estimates for the entire county are presented below.

Discussion

As shown in Table 15, persons living alone were dramatically **underrepresented** in our jury pool survey results, while the remaining household sizes were **overrepresented**. However, the 1-Person, 3-Person, and 4-Person household categories represented the only census estimates where our survey results were outside the 90 percent confidence interval for their corresponding estimates in the ACS dataset. In general, household size data can shed some light on whether certain living situations create hardships for jury duty. For example, adults with childcare responsibilities, those with caregiving responsibilities for other adults, and single people who cannot afford to miss work all may be more likely to request excusals and thus be underrepresented in jury pools relative to the population at large.

70. *Id.*

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Table 15. Household Size: Overall Results for Chatham County

	Census Percentage Estimate for County (%)	Corresponding Jury Pool Survey Percentage (%)	Expected Count in Jury Pool Survey Based on Census Estimate	Observed Jury Pool Survey Count
1-Person Household	29.4	13.0	225.5	100
2-Person Household	39.8	44.3	306.0	340
3-Person Household	14.4	18.4	110.7	141
4-Person Household	11.4	16.5	87.7	127
5-Person Household	3.5	5.3	26.8	41
6-Person Household	1.2	1.6	8.9	12
7-or-More-Person Household	0.3	0.9	2.4	7
Total	100%	100%	768.0	768
Non-Responses to Jury Pool Survey[a]				17
Total Surveys Analyzed				785

Notes
a. Includes responses that we could not interpret.

Results for Orange County

Our Orange County jury pool survey asked for information about household size in the following way:

Including yourself, how many people live your household?

The results of our survey of the Orange County jury pools regarding household size as compared to the 2014 ACS's corresponding estimates for the entire county are presented below.

Discussion

As in Chatham, persons living alone were dramatically **underrepresented** in our jury pool survey results for Orange County. Several of the larger household sizes were **overrepresented**, but it should be noted that only in the cases of the 1-Person and 4-Person household categories were our survey results outside the 90 percent confidence interval for their corresponding estimates in the ACS dataset. (See Table 16, below.)

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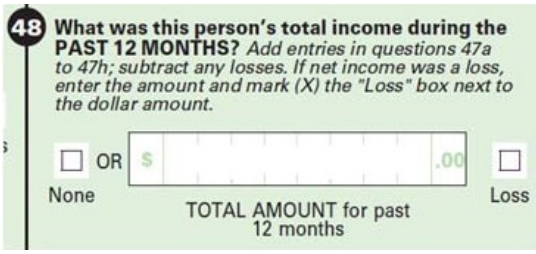
Table 16. Household Size: Overall Results for Orange County

	Census Percentage Estimate for County (%)	Corresponding Jury Pool Survey Percentage (%)	Expected Count in Jury Pool Survey Based on Census Estimate	Observed Jury Pool Survey Count
1-Person Household	27.8	16.1	187.9	109
2-Person Household	37.1	37.5	250.7	253
3-Person Household	14.1	18.7	95.0	126
4-Person Household	13.0	19.6	88.0	132
5-Person Household	5.0	5.6	34.0	38
6-Person Household	1.2	2.2	8.4	15
7-or-More-Person Household	1.6	0.3	11.0	2
Total	100%	100%	675.0	675
Non-Responses to Jury Pool Survey[a]				69
Total Surveys Analyzed				744

Notes
a. Includes responses that we could not interpret.

Jury Pool Survey Results: Household Income

The 2014 ACS determined household income using a series of questions that walked respondents through their wages, salary, commissions, self-employment proceeds, interest, dividends, Social Security benefits, public assistance, pension benefits, alimony, child support, and other income sources, similar to an IRS tax return. Ultimately, the ACS used the question depicted below to solicit the grand total of income for each person in the household, which the Census Bureau then summed for all occupants to determine total household income.


48 **What was this person's total income during the PAST 12 MONTHS?** *Add entries in questions 47a to 47h; subtract any losses. If net income was a loss, enter the amount and mark (X) the "Loss" box next to the dollar amount.*

☐ OR $ .00 ☐

None TOTAL AMOUNT for past 12 months Loss

Results for Chatham County

In contrast with the ACS approach, described immediately above, our Chatham County jury pool survey asked for information about household income with a single question:

What is a broad estimate of the total income for your household?
About $_____ per_____

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After consulting with our demographic expert, we determined that it would not be appropriate to compare the household income results from our jury pool surveys to the Census Bureau's 2014 ACS one-year dataset. This is due to (1) differences in the way we asked the household income question relative to the way this same information was solicited by the census; (2) differences in the underlying distribution of answers; and (3) the fact that hourly, daily, weekly, and monthly income flows as reported by jury pool survey respondents may not accurately indicate total annual income. Given these limitations, the observed results for each county are presented below without corresponding census estimates.

Table 17. Annual Household Income: Overall Results for Chatham County

Reported Household Income	Jury Pool Survey Percentage (%)	Jury Pool Survey Count
$0 to $24,999	16.2	111
$25,000 to $49,999	21.4	147
$50,000 to $74,999	17.2	118
$75,000 to $99,999	12.4	85
$100,000 to $149,999	17.1	117
$150,000 to $199,999	8.3	57
$200,000 or more	7.4	51
Total	100%	686
Non-Responses to Jury Pool Survey[a]		99
Total Surveys Analyzed		785

Notes
a. Includes responses that we could not interpret.

Discussion

The median reported household income among Chatham County respondents was $64,500 per year. About 16 percent of potential jurors reported household incomes under $25,000 per year, while about 33 percent reported household incomes of $100,000 or more. It is worth noting that non-response to this question was relatively high, as we might expect when asking about income. Including answers that we could not interpret, non-response accounted for about 13 percent of the 785 surveys we analyzed. (See Table 17, above.)

Results for Orange County

The question in our Orange County jury pool survey asking for information about household income was identical to the question in our Chatham County survey:

What is a broad estimate of the total income for your household?
About $_____ per_____

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Table 18. Annual Household Income: Overall Results for Orange County

Reported Household Income	Jury Pool Survey Percentage (%)	Jury Pool Survey Count
$0 to $24,999	6.3	39
$25,000 to $49,999	13.1	82
$50,000 to $74,999	17.1	107
$75,000 to $99,999	15.7	98
$100,000 to $149,999	20.8	130
$150,000 to $199,999	12.2	76
$200,000 or more	14.7	92
Total	100%	624
Non-Responses to Jury Pool Survey[a]		120
Total Surveys Analyzed		744

Notes
a. Includes responses that we could not interpret.

The results of our survey of the Orange County jury pools regarding household income are presented above.

Discussion

The median reported household income among Orange County respondents was $90,000 per year. Only about 6 percent of potential jurors reported household incomes under $25,000 per year, while about 48 percent reported household incomes of $100,000 or more. As with the Chatham surveys, non-response to this question was notable, accounting for about 16 percent of the 744 surveys we analyzed. (See Table 18, above.)

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THE JURY SUNSHINE PROJECT: JURY SELECTION DATA AS A POLITICAL ISSUE

*Ronald F. Wright**
*Kami Chavis***
*Gregory S. Parks****

In this Article, the authors look at jury selection from the viewpoint of citizens and voters, standing outside the limited boundaries of constitutional challenges. They argue that the composition of juries in criminal cases deserves political debate outside the courtroom. Voters should use the jury selection habits of judges and prosecutors to assess the overall health of local criminal justice: local conditions are unhealthy when the full-time courtroom professionals build juries that exclude parts of the local community, particularly when they exclude members of traditionally marginalized groups such as racial minorities. Every sector of society should participate in the administration of criminal justice.

This political problem starts as a public records problem. Poor access to records is the single largest reason why jury selection cannot break out of the litigator's framework to become a normal topic for political debate. As described in Part III, the authors worked with dozens of students, librarians, and court personnel to collect jury selection documents from individual case files and assembled them into a single database, which we call "The Jury Sunshine Project." The database encompasses more than 1,300 felony trials and almost 30,000 prospective jurors.

Part IV presents some initial findings from the Jury Sunshine Project to illustrate how public data might generate political debate beyond the courtroom. Part V explores the possible explanations for the racial patterns observed in jury selection. Some accounts of this data point to be-

* Needham Y. Gulley Professor of Criminal Law, Wake Forest University.
** Professor of Law and Associate Provost for Academic Initiatives, Wake Forest University.
*** Professor of Law, Wake Forest University.

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nign nonracial factors as the real explanation for the patterns observed. Other interpretations of the data treat these patterns as a new type of proof of discriminatory intent: evidence that cuts across many cases might shed new light on the likely intent of prosecutors, defense attorneys, or judges in a single case. A third perspective emphasizes the community effects of exclusion from jury service. Finally, Part VI generalizes from the data about the race of jurors to ask more generally how accessible public records could transform criminal justice. Sunshine will open up serious community debates about what is possible and desirable in local criminal justice systems.

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I. INTRODUCTION

Lawyers treat jury selection—no surprise here—as an issue to litigate. They file motions, objecting to mistakes by the clerk of the court when she calls a group of potential jurors to the courthouse for jury duty. After those potential jurors arrive in the courtroom, lawyers file further motions, testing the

reasons that judges give for removing a prospective juror. The lawyers also watch for signs that their opponents might rely on improper reasons, such as race or gender, to remove potential jurors from the case. Again, there is a motion for that. The law of jury selection has plenty of enforcers who stand ready to litigate.

In this Article, we stand outside the litigator's role and look at jury selection from the viewpoint of citizens and voters. As citizens, we believe that the composition of juries deserves political debate outside the courtroom. Voters should consider the jury selection habits of judges and prosecutors when deciding whether to re-elect the incumbents to those offices. More generally, jury selection offers a stress test for the overall health of local criminal justice. Conditions are unhealthy when full-time courtroom professionals build juries that exclude parts of the local community, particularly when they exclude traditionally marginalized groups such as racial minorities. Every sector of society should play a part in the administration of criminal justice.

This political problem starts as a public records problem. As we discuss in Part II of this Article, the legal doctrines related to jury selection focus too much on single cases, and limited public access to court data makes that myopia worse. Poor access to courtroom records is the single largest reason why jury selection cannot break out of the litigator's framework to become a normal topic for political debate.[1]

The paperwork in the typical case file, found in the office of the clerk of the court, does record a few details about which residents the clerk called to the courthouse, which panel members the judge and the attorneys excluded from service, and which people ultimately served on the jury. But many details about jury selection go unrecorded. And even more important, it is practically impossible to see any patterns across the case files in many different cases. The clerk normally does not hold the data in aggregate form or in electronically searchable form. Thus, there is no place to go if a citizen (or a news reporter or candidate for public office) wants to learn about the actual jury selection practices of the local judges or prosecutors. There is no vantage point from which to see the whole of jury selection, rather than the selection of a single jury.[2]

Until now. As we describe in Part III, we worked with dozens of students, librarians, and court personnel to collect jury selection documents from individual case files. Then we assembled them into a single database, which we call "The Jury Sunshine Project." The paper records, housed in 100 different courthouses, depict the work of lawyers and judges in more than 1,300 felony trials, as they decided whether to remove almost 30,000 prospective jurors. The assembled data offer a panorama of jury selection practices in a state court system during an entire year.

1. *See infra* Section II.D.

2. For a review of periodic efforts to assemble jury selection data related to specialized categories of cases (particularly in capital cases), see *infra* Section II.D.

In Part IV, we present some initial findings from the Jury Sunshine Project to illustrate how public data might generate political debate beyond the courtroom. Our analysis shows that prosecutors in North Carolina—a state with demographics and legal institutions similar to those in many other states—excluded nonwhite jurors about twice as often as they excluded white jurors. Defense attorneys leaned in the opposite direction: they excluded white jurors a little more than twice as often as nonwhite jurors. Trial judges, meanwhile, removed nonwhite jurors for "cause" about 30% more often than they removed white jurors. The net effect was for nonwhite jurors (especially black males) to remain on juries less often than their white counterparts.

The data from the Jury Sunshine Project also show differences among regions and major cities in the state. Prosecutors in three major cities—Greensboro, Raleigh, and Fayetteville—accepted a higher percentage of nonwhite jurors than prosecutors in three other cities—Charlotte, Winston-Salem, and Durham. While there may be reasons why prosecutors choose different jurors than judges or defense attorneys do, why would prosecutors in some cities produce such different results from their prosecutor colleagues in other cities?

Part V explores possible explanations for the racial patterns that we observed in jury selection. Some accounts of these data point to benign nonracial factors as the real explanation for the patterns we observed. Other interpretations of the data treat these patterns as a new type of proof of discriminatory intent: evidence that cuts across many cases might shed new light on the likely intent of prosecutors, defense attorneys, or judges in a single case.

A third perspective emphasizes the *effects* of exclusion from jury service. This system-wide perspective does not concentrate on what a single attorney or judge was thinking at the moment of removing a juror. Instead, what matters is how the work of all the attorneys, judges, clerks, and ordinary citizens in the courthouse forms a pattern over time. When courtroom actors exclude a portion of the community from jury duty in a persistent and predictable way, that outcome—regardless of the intent of the actors—undercuts the legitimacy of local criminal justice.

Finally, in Part VI, we generalize from our data about the race of jurors to ask more generally how accessible public records could transform criminal justice. We believe that sunshine will open up serious community debates about what is possible and desirable in the local criminal justice system. By widening the frame of vision from a litigant's arguments about a single case, the quality of justice becomes a comparative question. For instance, voters and residents who learn about jury selection patterns will naturally ask, "How do the jury selection practices of my local court compare to practices elsewhere?" Researchers and reporters can answer those questions with standardized public data, comparing prosecutors and judges with their counterparts in different districts.

Data-based comparisons such as these make it possible to hold prosecutors and judges directly accountable to the public, in a world where voters generally have too little information about how these public servants perform their

work. When challengers raise the issue during the re-election campaign of the chief prosecutor or the judge, and reporters write stories about the latest jury selection report, it could shape the selection of jurors across many cases.

With the help of public records—assembled to make it easy to compare places, offices, times, and crimes—the selection of juries could become something more than an insider's litigation game of dueling motions. The patterns, visible in those public records, could prompt a public debate about what the voters expect from their judges and prosecutors. It takes a democratic movement, not just a constitutional doctrine, to bring the full community into the jury box.

II. CASE-LEVEL DATA AND DOCTRINES

Every defendant has a legally enforceable right to an impartial and representative jury, so lawyers and judges raise constitutional and statutory claims during criminal and collateral proceedings to protect that right. The litigators' concerns about jury selection, however, keep the focus narrow. In this Part, we briefly review some of the legal doctrines that litigators use to enforce the ideals of jury selection, noting the doctrinal emphasis on single cases.

We then show how current public records laws and the practices of jury clerks reinforce the single-case orientation of the constitutional doctrine. As a result, it is nigh impossible to view jury selection at the overall system level. The existing archival empirical studies of jury selection reflect this difficulty: they deal with specialized crimes or targeted locations, making it difficult to draw general lessons about juries and the overall health of criminal justice systems.

A. Judge Removes Jurors for Cause

Before the start of a jury trial, lawyers for the prosecution and the defense may challenge jurors for cause. The judge, responding to these objections from the attorneys, must confirm that each potential juror meets the general requirements for service, such as residency and literacy requirements.[3] At that point, the judge also evaluates possible sources of juror bias against the defendant or against the government.

The "cause" for removal might be a prospective juror's relationship with one of the parties or lawyers.[4] The judge also inquires into the prior experiences of the jurors; for instance, the judge might ask if any of the jurors was ever a

3. *See* 42 PA. CONS. STAT. § 4502 (2016) (declaring that citizens are not qualified to be jurors if they are "unable to read, write, speak and understand . . . English . . . ;" are not able to "render efficient jury service" due to mental infirmity; or have been "convicted of a crime punishable by imprisonment for more than one year . . . ."); TEX. CODE CRIM. PROC. ANN. art. 35.16 (West 2016) (allowing a challenge for cause for jurors with felony or misdemeanor convictions).

4. Judges encounter special problems during for-cause removals in death penalty cases. A juror who declares that he or she would always vote to impose the death penalty, or not to impose the death penalty, will be excluded for cause. *See* Witherspoon v. Illinois, 391 U.S. 510, 520–23 (1968).

victim of a crime. A juror who brings prior knowledge about the events surrounding the alleged crime receives special scrutiny. There is no limit to the number of jurors a judge might exclude on these grounds.[5]

The statutes and judicial opinions dealing with for-cause removals share two important features. First, the standards defer to trial judges. Appellate courts apply an "abuse of discretion" standard to these questions and rarely overturn the trial judge's decision to grant or deny a party's request to remove a juror for cause.[6] Second, the law of for-cause removal of jurors looks to one trial at a time. Any challenge to the judge's decision begins with a review of the court transcript for evidence of the individual juror's alleged bias. A comparison to some other juror in the same case might be relevant, but the judge's habits across many cases—or the actions of the local judiciary more generally during questions of removal—do not matter for litigators. Indeed, there are no aggregate data sources that could show how often trial judges remove jurors for cause. Litigators see this issue case by case, and appellate courts normally conclude that the trial judge acted within her discretion, whatever she chose.

B. Attorneys Remove Jurors with Peremptory Challenges

After the parties argue to the judge about removals for cause, lawyers for the prosecution and defense use peremptory challenges to strike a designated number of jurors.[7] True to the name, peremptory strikes require no explanation. Perhaps one side wants to exclude jurors with certain political attitudes because the attorneys believe those jurors may not sympathize with their client's side of the case. There are only a few ways that lawyers can take their peremptory strikes too far: they may not use peremptory challenges to exclude jurors based on race, gender, or other "suspect" categories for equal protection purposes. To do so would violate the Constitution.[8]

The method for litigants to prove racial discrimination in the use of peremptory challenges has changed over the years. Under the approach laid out in *Swain v. Alabama*,[9] a party claiming discrimination had to present evidence reaching beyond the opponent's behavior in the case at hand. The defendant would need to show that "in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself."[10]

5. *See* MO. REV. STAT. § 494.470 (2016) ("A prospective juror may be challenged for cause for any reason mentioned in this section and also for any causes authorized by the law."); N.C. GEN. STAT. § 15A-1214(d)–(e) (2016).

6. *See* Oswalt v. State, 19 N.E.3d 241, 245 (Ind. 2014); State v. Lindell, 629 N.W.2d 223, 239–40.

7. *See* OHIO R. CRIM. P. 24(D) (2009) ("[E]ach party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases . . . ."); TENN. CODE ANN. § 40-18-118 (2016) (providing eight strikes for each side in cases punishable by imprisonment for more than one year but not death, and three for each side if crime is punishable by less than one year).

8. *See* Miller-El v. Dretke, 545 U.S. 231, 237–39 (2005); Batson v. Kentucky, 476 U.S. 79, 89 (1986).

9. 380 U.S. 202, 222–23 (1965); Norris v. Alabama, 294 U.S. 587, 589 (1935).

10. *Swain*, 380 U.S. at 223.

Two decades later, the Court in *Batson v. Kentucky*[11] expanded the options for a party trying to prove intentional racial discrimination during jury selection. A litigant now may rely solely on the facts concerning jury selection in the individual case. Under this analysis, the attorneys try to reconstruct the state of mind of a single prosecutor (or a single defense attorney) who removed a prospective juror in a single trial. The relevant factual question is a familiar one in criminal court: what was the state of mind of a single actor at one moment in the past?

The *Batson* Court developed an oddly detailed constitutional test: a three-step analysis (plus one prerequisite) for examining invidious racial discrimination in the use of peremptory strikes during jury selection. As a prerequisite, the litigant must identify jurors belonging to a constitutionally relevant group, such as a group based on race, ethnicity, or gender.[12] At that point, the moving party takes the first step by showing facts (such as disproportionate use of peremptory challenges against jurors of one race, or the nature of the questions posed on *voir dire*) to create a prima facie inference that the other attorney excluded jurors based on race.[13]

Second, the burden shifts to the nonmoving party to give neutral explanations for its challenges. The explaining party cannot simply deny a discriminatory intent or assert good faith. The attorney must point to some reason other than the assumption that jurors of a particular race would be less sympathetic to the party's claims at trial.[14] Finally, in the third step, the moving party offers reasons to believe that the other party's supposedly neutral reasons for the removal of jurors were actually pretextual. On the basis of these arguments, the court decides if the nonmoving party's explanation was authentic or pretextual.

Critics immediately spotted the potential weakness of the *Batson* framework and argued that it is too easy for attorneys to fabricate race-neutral reasons, after the fact, to exclude minority jurors.[15] Appellate courts affirm convic-

11. 476 U.S. at 96–97.

12. *See* United States v. Mensah, 737 F.3d 789, 803 (1st Cir. 2013) (Asian Americans); United States v. Heron, 721 F.3d 896, 902 (7th Cir. 2013) (recognizing circuit split and state court split on religion-based challenges); United States v. Roan Eagle, 867 F.2d 436, 440–41 (8th Cir. 1989) (Native Americans); Commonwealth v. Carleton, 641 N.E.2d 1057, 1058–59 (Mass. 1994) (Irish Americans).

13. *See* People v. Bridgeforth, 769 N.E.2d 611, 616–17 (N.Y. 2016) (holding that removal of dark-skinned juror can satisfy step one); Hassan v. State, 369 S.W.2d 872 (Tex. Crim. App. 2012) (applying step one); City of Seattle v. Erickson, 398 P.3d 1124, 1131 (Wash. 2017) (holding that removal of only minority juror in pool can establish prima facie case).

14. *See* People v. Gutierrez, 395 P.3d 186, 198 (Cal. 2017) (rejecting adequacy of proffered race-neutral reasons); State v. Bender, 152 So. 3d 126, 130–31 (ruling that prosecutor not required to present arrest records in order to support race-neutral explanation for peremptory strike); People v. Knight, 701 N.W.2d 715, 730 (Mich. 2005) (finding prosecutor presented adequate race-neutral reasons for excusing prospective jurors).

15. *See* Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting) ("To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd. . . . If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination."); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J.L. REFORM 229, 236 (1993) ("[I]n almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race.").

tions even when prosecutors invoke "nonracial" reasons that correlate with race-specific behaviors or stereotypes,[16] and they sometimes affirm when prosecutors rely on the race-neutral reason only for nonwhite jurors.[17] Some courts also uphold the use of peremptories where the attorney had mixed motives for the removal and at least one of the motives was nonracial.[18] Several studies of published opinions confirm that appellate courts rarely reverse convictions based on *Batson* claims.[19]

Judges stress the fact-specific nature of their rulings on *Batson* claims.[20] The Court's latest case involving race and juror selection, *Foster v. Chatman*,[21] reinforced this aspect of the doctrine: to use a bit of an understatement, the case did not involve subtle discrimination. Documents related to the jury selection in that case showed that the prosecutors made notations about the race of several

16. *See* United States v. Herrera-Rivera, 832 F.3d 1166, 1173 (9th Cir. 2016) (finding that government's proffered reasons for striking potential juror were not pretextual and that strike was based on juror's having criminal history and family members who used drugs); United States v. White, 552 F.3d 240, 251 (2d Cir. 2009) (accepting the explanation that a juror had "an angry look that she wasn't happy to be here"); Lingo v. State, 437 S.E.2d 463, 471 (Ga. 1993) (prosecutor excluded black male juror who appeared "angry"); Clayton v. State, 797 S.E.2d 639, 643–45 (Ga. Ct. App. 2017) (State's reliance on fact that prospective black juror had gold teeth was not race-neutral); State v. Clifton, 892 N.W.2d 112, 126–27 (Neb. 2017) (holding that trial court did not err in finding race-neutral the prosecutor's rationale that juror had years of alcohol and crack addiction).

17. *See* Lewis v. Bennett, 435 F. Supp. 2d 184, 191–92 (W.D.N.Y. 2006) (striking unmarried juror); State v. Collins, No. M2015-01030-CCA-R3-CD, 2017 WL 2126704, at *14 (Tenn. Crim. App. May 16, 2017) (jurors had family members affected by drug abuse, prosecutor removed the only black juror).

18. *See* Cook v. LaMarque, 593 F.3d 810, 817 (9th Cir. 2010) (using comparative analysis of stricken versus nonstricken jurors rather than a mixed-motive test); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1116–17 (2018).

19. *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092 (2011) (examining 269 *Batson* challenges in federal court from 2000–2009); James E. Coleman Jr. & David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, N.C. ST. B. J., Fall 2017, at 13–14 (comparing reversals in North Carolina to other southern states); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1961 (2016).

20. *See* Gray v. Brady, 592 F.3d 296, 301 (1st Cir. 2010) ("[W]hether to draw an inference of discriminatory use of peremptories is an intensely case and fact-specific question . . . .") (quoting Gray v. Brady, 588 F. Supp. 2d 140, 146 (D. Mass. 2008)). Despite the doctrinal emphasis on fact-specific judicial review of jury selection, the parties often present formulaic, prepackaged arguments to explain their removal of jurors. Litigation in this area has unearthed training materials from local prosecutor's offices, listing ready-made "neutral" justifications that prosecutors might use to overcome a *Batson* challenge. *See, e.g.*, Commonwealth v. Cook, 952 A.2d 594, 601 (Pa. 2008) (describing a training video for new prosecutors calling for prosecutors to strike black people and women from juries and explaining how to conceal discriminatory strikes). Lawyers litigating claims of racial bias in the North Carolina criminal justice system collected materials demonstrating such prosecutor training practices. *See generally* Catherine M. Grosso et al., *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1535 (2012). In some instances, trainers specifically instructed prosecutors to exclude members of racial minority groups from juries. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 265–66 (2005) (Dallas County); Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 104 (2012); Brian Rodgers, *Local DA Encourages Blocking Blacks from Juries, Wharton County Prosecutor Says*, HOUS. CHRON. (Mar. 22, 2016, 9:51 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/Local-DA-encourages-blocking-blacks-from-juries-6975314.php.

21. 136 S. Ct. 1737, 1743–45 (2016).

potential jurors, writing the letter "b" alongside their names, highlighting their names in green, and placing these jurors in a category labeled, "definite NO's." It is hard to imagine many *Batson* claims with evidence this strong, certainly not for cases litigated after attorneys became more sophisticated in preparing for possible *Batson* claims.[22]

Since the Court decided *Batson*, critics have proposed improvements to the test.[23] Chief among them, scholars persistently call for the abolition of peremptory strikes.[24] At the end of the day, however, the *Batson* test has endured, more or less in its original form. *Batson* marks the boundaries of constitutional enforcement and these boundaries do not seem likely to move any time soon.[25]

C. Venire *Selection*

Litigants also sometimes object to the composition of the jury *venire*—the local residents whom the clerk of the court summons to the courthouse on any given day for potential jury service. Constitutional doctrine plays only a limited backstop role here, as it does with peremptory challenges.

The Supreme Court does read the Equal Protection Clause to prevent states from excluding racial groups from the jury *venire* by statute.[26] The Court

22. *See, e.g.*, *Ex parte* Floyd, 227 So. 3d 1, 13 (Ala. 2016) (affirming conviction after remand to reconsider in light of *Foster*, despite prosecutor use of list designating jurors by race).

23. *See* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. REV. 357, 372 (2017); Scott Howe, *Deselecting Biased Juries*, 2015 UTAH L. REV. 289, 337 (2015); Nancy S. Marder, Foster v. Chatman*: A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1176 (2017) (proposing allowing defendants to obtain more information, such as prosecutor notes, or inferring discriminatory intent from discriminatory effect or practice); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 22 (2014); Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1541 (2015); *cf.* Andrew G. Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 969 (2016).

24. *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."); Bellin & Semitsu, *supra* note 19, at 1107; Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1149 (1994); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 179 (2005); Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363, 371 (2009); David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of* Batson*'s Three Harms and the Peremptory Challenge*, 1994 ANN. SURV. AM. L. 203, 241.

25. *See* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 528 (decrying the doctrine's "useless symbolism"); Camille A. Nelson, Batson, *O.J., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008) ("*Batson*'s promise of protection against racially discriminatory jury selection has not been realized."); Bryan Stevenson, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, HUM. RTS. MAG. (Fall 2010), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/illegal_racial_discrimination_in_jury_selection.html. Change might occur instead at the subconstitutional level. In April 2018, the Washington Supreme Court approved a new procedural rule that removed a showing of discriminatory intent as a basis for disallowing an improper peremptory challenge. *See* WASH. STATE CT. GEN. R. 37.

26. In the first case to deal with the question, *Strauder v. West Virginia*, the Court sustained an equal protection challenge to a statute excluding black people from the jury *venire*. 100 U.S. 303, 309 (1880). In later cases, the Court did not require the defendant to show complete exclusion of a racial group from jury service: a substantial disparity between the racial mix of the county's population and the racial mix of the *venire*, together

has also established that defendants may challenge the process of creating the *venire*, a right that stems from the Sixth Amendment's promise of an impartial jury.[27] A defendant who challenges the *venire* must show that a distinctive group (such as a racial group) is underrepresented in the pool, meaning that its jury *venire* numbers are "not reasonable in relation to" the number of such persons in the community.[28] After showing a gap between the general population and the composition of the *venire*, the defendant must identify some aspect of the jury selection process that causes a "systematic" exclusion of the group.[29]

Statistics matter in proving the defendant's claim. State courts and lower federal courts use several different techniques to measure the gap between the presence of a distinctive group in the population and on the jury *venire*.[30] In that sense, the litigation related to jury *venires* places more weight on the pattern of outcomes and less on the intent of particular actors in a single trial.[31] Nevertheless, litigators in this arena still look to a small set of trials—a single *venire*, typically a single day's worth of trials—for the relevant evidence.[32] Moreover, a judicial finding for defendants who challenge the composition of the *venire* is rare.[33] Like the legal doctrines related to judicial removals for cause and litigant removals through peremptory challenges, the litigation surrounding the jury *venire* leaves most jury selection choices undisturbed—including some troubling outcomes.[34]

D. Public Records and Past Jury Selection Studies

As we have seen, when entire segments of the community remain underrepresented in jury service, constitutional doctrines provide a remedy only in

with an explanation of how the jury selection process had created this outcome, would be enough to establish a prima facie case of discrimination. The government would then have to rebut the presumption of discrimination. *See* Castaneda v. Partida, 430 U.S. 482, 499 (1977) (underrepresentation of Mexican Americans); Turner v. Fouche, 396 U.S. 346, 359 (1970) (underrepresentation of black people).

27. In *Taylor v. Louisiana*, the Court held that a Louisiana law placing on the *venire* only those women who affirmatively requested jury duty violated the Sixth Amendment's requirement that the jury represent a "fair cross section" of the community. 419 U.S. 522, 530 (1975).

28. Missouri v. Stewart, 714 S.W.2d 724, 727 (Mo. Ct. App. 1986).

29. *See* Duren v. Missouri, 439 U.S. 357 (1979). At that point, the burden of proof shifts to the government to show a "significant state interest" that justifies use of the method that systematically excludes a group.

30. The Court, in *Berghuis v. Smith*, described three different measures of the participation gap: the absolute disparity test, the comparative disparity test, and the standard deviation test. 559 U.S. 314, 316 (2010); *see also* State v. Plain, 898 N.W.2d 801, 826–27 (Iowa 2017) (challenges to jury pools can be based on multiple analytical models).

31. *See* Jessica Heyman, *Introducing the Jury Exception: How Equal Protection Treats Juries Differently*, 69 N.Y.U. ANN. SURV. AM. L. 185, 203 (2013).

32. *Id.*

33. *See* United States v. Fadiga, 858 F.3d 1061, 1063–64 (7th Cir. 2017) (holding that evidence that 20% of the population in the two counties that provided jurors for the district court were black and that no juror on defendant's forty-eight person *venire* was black was insufficient to establish prima facie case of discrimination); United States v. Best, 214 F. Supp. 2d 897, 902–03 (N.D. Ind. 2002) (holding that jury *venire* did not violate Sixth Amendment fair cross-section requirement, even if percentage of black people in counties from which *venire* was drawn was 19.6% and percentage of black people on this *venire* was only 4.8%).

34. *See* David M. Coriell, Note, *An (Un)Fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 465 (2015).

the most extreme individual cases. They do so without checking the broader context of courtroom practices. Unfortunately, record-keeping about jury selection compounds the doctrinal problem of single-case myopia.

State courts maintain records (typically in a nonelectronic format) about the construction of individual juries: which prospective jurors sat in the box, which jurors the judge removed for cause, and which jurors the two attorneys removed through peremptories.[35] But aggregate data is another thing entirely: clerks do not traditionally compile data on the rate at which parties or judges exclude minority jurors over long periods of time.[36] Even if state courts were to compile and publish their records to show jury selection practices across many cases, the case files are not fully comparable from place to place. The lack of data not only makes it difficult for litigants to ferret out racial discrimination in particular cases, but it also makes it difficult to identify patterns of behavior that supervisors might address through better training and accountability.[37]

Because of the fragmented nature of public records dealing with jury selection, researchers have not created many databases on this topic, and the limited data they have managed to collect focus on specialized crimes or on trials in a handful of locations. Comparisons across many locations, time periods, or types of crimes have not been possible.

For instance, most of the efforts of scholars and litigants to collect records about jury selection at the trial court level have related to capital murder trials.

35. Clerks in some states also maintain a record of the order of removal. Jurisdictions vary in how much information they collect and retain about individual jurors. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 8-314(a) (West 2016) ("A jury commissioner shall document each . . . decision with regard to disqualification, exemption, or excusal from, or rescheduling of, jury service."); MINN. GEN. R. PRACTICE R. 814 (2017) ("[N]ames of the qualified prospective jurors drawn and the contents of juror qualification questionnaires . . . must be made available to the public . . . ."); 42 PA. CONS. STAT. § 4523(a) (2016) ("The jury selection commission shall create and maintain a list of names of all prospective jurors who have been disqualified and the reasons for their disqualification. The list shall be open for public inspection.").

36. For an exception, see N.Y. JUD. LAW § 528 (McKinney 2016).

> The commissioner of jurors shall collect demographic data for jurors who present for jury service, including each juror's race and/or ethnicity, age and sex, and the chief administrator of the courts shall submit the data in an annual report to the governor, the speaker of the assembly, the temporary president of the senate and the chief judge of the court of appeals.

Id. We are unaware of any state that requires the clerk of the court to collect information about the removal of jurors from the *venire* at the case level, in all jury trials, and to report that data routinely, both at the case level and in aggregate form. *See* S.B. 576, 2017 Leg. (Cal. 2017) (requiring jury commissioner to develop a form to collect specified demographic information about prospective jurors, prohibiting disclosure of the form, but also requiring jury commissioner to release biannual reports with aggregate data).

37. The best overview of these shortcomings in the public records appears in Catherine M. Grosso & Barbara O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 KY. L.J. 651, 654 (2017); *see also* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) ("[T]here is extremely little evidence available even in a full-blown *Batson* hearing to shed much light on the question of whether an explanation is credible."); Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 CRIM. JUST., Summer 2016, at 43, 45 ("[E]very jurisdiction needs to do a better job of collecting data both on the composition of the jury venires and on the use of peremptory challenges."); Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954–56 (noting poor quality of juror data that courts maintain and report).

Researchers have tallied jury statistics in capital cases in Pennsylvania,[38] North Carolina,[39] South Carolina,[40] and elsewhere.[41]

Other studies have ventured beyond capital murder trials but remained limited to a small number of county courthouses.[42] The most comprehensive of these efforts includes a study of criminal trial juries based on records from two counties in Florida.[43] Several studies focused on the creation of the jury *venire*, prior to any removals by judges and attorneys.[44] Litigators—perhaps frustrated

38. *See* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1662 (1998); David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425, 1449 (2012).

39. *See* Grosso et al., *supra* note 20, at 1533; Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1627 (2013).

40. *See* Ann M. Eisenberg et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2014*, 68 S.C. L. REV. 373, 373 (2017); Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U. L. REV. 299, 302 (2017).

41. *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 22–28 (2001); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 116 (2016) (qualitative study of *Witherspoon* strikes in eleven Louisiana trials resulting in death verdicts from 2009 to 2013); Brandon L. Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L. J.F. 417, 419 (2017) (survey of persons reporting for jury duty in Orange County, California, asking questions about eligibility to serve on hypothetical death penalty case); Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 520 (2014) (analyzing nonarchival study of 445 jury-eligible citizens in six death penalty states).

42. Two noncapital studies analyzed single parishes in Louisiana. *See* LA. CRISIS ASSISTANCE CTR., BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 2 (2003), http://www.blackstrikes.com; Billy M. Turner et al., *Race and Peremptory Challenges During* Voir Dire*: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 63 (1986) (examining data from 121 criminal trials in one Louisiana parish). Another working paper analyzed 351 jury trials from Los Angeles County, Maricopa County (Arizona), Bronx County, and Washington, D.C. *See* Jee-Yeon K. Lehmann & Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences* 9 (2013), http://www.uh.edu/~jlehman2/papers/lehmann_smith_jurycomposition.pdf.

43. *See* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1026 (2012). Some of the single-jurisdiction studies collected data about juries for a remarkably small number of cases. *See* Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 697 (1999) (compiling data from thirteen noncapital felony criminal jury trials in North Carolina; black people were much more likely to be excluded by the prosecution and white people by the defense).

44. *See* MAUREEN M. BERNER ET AL., A PROCESS EVALUATION AND DEMOGRAPHIC ANALYSIS OF JURY POOL FORMATION IN NORTH CAROLINA'S JUDICIAL DISTRICT 15B, at 2 (2016), https://www.sog.unc.edu/publications/reports/process-evaluation-and-demographic-analysis-jury-pool-formation-north-carolina's-judicial-district; BOB COHEN & JANET ROSALES, RACIAL AND ETHNIC DISPARITY IN MANHATTAN JURY POOLS: RESULTS OF A SURVEY AND SUGGESTIONS FOR REFORM 1 (2007), http://www.law.cuny.edu/academics/social-justice/clore/reports/Citizen-Action-Jury-Pool-Study.pdf; James Michael Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 3 (2014); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado* Veniremen, 42 U. COLO. L. REV. 1, 4 (1970); Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813, 1814 (2001).

by silence from the academy—have also assembled some statistics regarding prosecutor exclusions from juries in single counties.[45] Journalists have also assembled a few localized studies.[46]

Finally, a few studies have analyzed jury selection in the trial court through the lens of published opinions. Some studies used these opinions as a way to understand typical practices in trial courts, despite the selection bias problems involved.[47] Other studies based on published appellate opinions restricted their analyses to the role of appellate judges in this litigation.[48]

What is missing from the archival research on jury selection is the power to look across all criminal trials, comparing different jurisdictions and different types of trials. Without that systemic view, judges and lawyers in one county can only speculate about whether the findings of specialized studies are generalizable to their home jurisdiction.

III. THE JURY SUNSHINE PROJECT

Public data, collected routinely in the criminal courts, could expand the frame of reference. If jury selection records were published in comparable form across jurisdictions, available without physical travel between courthouses, it would become feasible to compare one prosecutor's or public defender's office to another, and to compare one jurisdiction to another. Such comparisons might be valuable to supervising prosecutors, judges with administrative duties, researchers, voters, or even litigants.

To demonstrate how this data collection might operate, we set a goal to learn about jury selection for all felony trials in a single year, for an entire state. We chose felony trials in 2011 in North Carolina.[49] Our main contribution to

45. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf (summarizing statistics indicating racial disparities among prosecutors during jury selection for eight southern states: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee); Grosso & O'Brien, *supra* note 37, at 657 (summarizing collection of jury selection data in capital litigation context).

46. *See* Steve McGonigle et al., *Striking Differences*, DALL. MORNING NEWS, Aug. 21–23, 2005 (finding that in felony trials in Dallas County, Texas, prosecutors tended to reject black jurors, while defense attorneys tended to retain them).

47. *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 463 (1996) (inferring that criminal defendants make approximately 90% of *Batson* claims; only 17% of challenges with black people as the targeted group were successful, 13% for Hispanic people, and 53% for white people).

48. *See* Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59, 62 (2008) (analyzing 184 race-based peremptory challenge cases, concluding that appellants rarely win such challenges); Pollitt & Warren, *supra* note 19, at 1962. In light of the challenges of assembling archival data, some researchers opt instead for experimental studies. *See* Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 533–34 (2008).

49. We began this effort in the fall of 2012, so we chose the most recent complete year of records. The state constitution at the time guaranteed that all felony trials in the state would be tried to a jury. N.C. CONST. art. I, § 24. Only a few misdemeanor charges were decided by juries: those "appealed" from the district court to

the existing public records was to connect the dots, pulling into one location the insights about public servants and public actions that are currently dispersed among paper files, voter records, and office websites. Although each data point comes from a public record, linking them is no easy job. In our case, it became a run through an elaborate obstacle course.

A. Traveling to the Courthouses

The first obstacle on the course was to identify trial files, separating them from the much more common cases that did not produce a trial. The North Carolina Administrative Office of the Courts ("NCAOC") reports the number of charges tried each year, but they do not specify which cases are resolved through trial and which end with guilty pleas, dismissals, or other outcomes.[50] NCAOC declined our request to generate a list of file numbers for all cases that were resolved through jury trials in 2011, citing resource limitations.[51] We needed, therefore, a path around this obstacle.

Putting aside a few customized situations,[52] our most useful strategy relied on public data from NCAOC to specify the trial cases. NCAOC posts raw data of court dispositions in a format not easily accessible by the public. After persistent and creative efforts by the information technology staff at our law school, we were able to download this data and format it for our purposes.[53] On the basis of this NCAOC data, we generated a list of cases that led to a jury trial in each county.

In all likelihood, our lists from these various sources were incomplete. Some felony jury trials probably occurred in 2011 that never came to our attention. But based on comparisons between the number of trials we located and the number of trials that NCAOC listed in their annual reports,[54] we are confident that we obtained a strong majority of the trials for that year. There is no reason

the superior court for a trial *de novo*. *See* N.C. GEN. STAT. § 7A-271(b) (2016) (providing for appeals from district court to superior court).

50. Annual case activity reports for felonies, misdemeanors, and infractions appear at *Case Activity Reports—Fiscal Year 2016–2017*, N.C. CT. SYS., http://www.nccourts.org/Citizens/SRPlanning/Statistics/CAReports_fy16-17.asp (last visited May 18, 2018).

51. Our contact in NCAOC had cooperated with past data requests, with minimal burden on the office, but asserted that NCAOC leadership appointed by the governor who was elected in 2012 had instructed employees not to cooperate with this type of request. Recent litigation established that court records are housed in the clerks' offices, not in a centralized file housed with the NCAOC. *See* LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts, 775 S.E.2d 651, 656 (N.C. 2015).

52. A few counties (such as Guilford and Mecklenburg) maintained their own records about the cases that proceeded to trial. In those cases, we relied on the county clerk's records to identify cases that proceeded to trial. In one case (New Hanover County), our researcher focused on "thick files" in the collection as a rough proxy for the cases that went to trial. In other cases, we asked the county clerk to request from the NCAOC a list of trials for that county. NCAOC treated requests from the county clerk of the superior court as a legal obligation, unlike statewide requests from scholars.

53. We are grateful to Trevor Hughes and Matt Nelkin for their work on this project.

54. NCAOC data track the number of criminal charges resolved through trials, while our database records the number of criminal trials, treating multi-charge or multi-defendant cases as a single trial. We collected jury selection data on 1,307 trials, while NCAOC listed 2,112 charges resolved by jury trial for fiscal year 2011–2012.

to believe that our collected trials differ from the remaining trials for any relevant characteristic.[55]

The typical file for a felony trial, stored in the county clerk's office, contains a jury selection form. The one-page form includes space for twelve separate jury boxes. In each box, an assistant clerk records the names of the jurors seated in that box.[56] Other documents in the file indicate the judge, defense attorney, and prosecutor assigned to the case; the charges filed; the jury's verdict for each charge in the case; and the sentence that the judge imposed.

In the fall of 2012, we conducted a pilot project in one county to test the viability of our collection plans, gathering the available file information for a few dozen trials. From that point forward, we relied on law students, law librarians, and undergraduate students to travel to most of the clerks' offices for the 100 counties in North Carolina, between early 2013 and the summer of 2015.[57] Remarkably, the clerks in 10 of the 100 counties reported that *no jury trials at all* occurred in their counties between 2011 and 2013.[58]

B. Completing the Picture for Jurors, Judges, and Attorneys

The clerk in each county summons prospective jurors who reside in that county,[59] so we knew the name and county of residence of each prospective juror. Based on the research of Grosso and O'Brien in the capital trial context,[60] we also knew that North Carolina maintains open public records about jurors who are also registered voters, so we assigned a cohort of student researchers to pursue the biographical background for each juror.[61] Some prospective jurors were not present in the voter database because they were summoned for jury

55. We also plan to keep this research project open for some years and will add further trials to the 2011 data as they come to our attention.

56. We were disappointed to find that some clerks recorded only the fact that a prospective juror was removed from the box without indicating which courtroom actor was responsible for the removal. We coded these jurors as "Removed." The jury form also usually indicated the order of removals for any particular actor (that is, the form showed that a prospective juror was the third peremptory challenge by the defense or the fourth removal for cause by the judge) but not the overall order of removal of jurors in the *voir dire* process. One county (Guilford) adopted a notation that did capture this information about the overall order of removals.

57. Based on what we learned from the pilot study, we refined a data collection protocol for students, as recorded in a codebook and standard spreadsheet. The field researchers focused on trials in 2011, but in smaller counties with very few trials per year, they also collected information for trials in 2010 and 2012. We are grateful to Elizabeth Johnson, a reference librarian at the school of law, for coordinating this complex field operation. *See* Liz McCurry Johnson, *Accessing Jury Selection Data in a Pre-Digital Environment*, 41 AM. J. TRIAL ADVOC., Summer 2017, at 45, 49.

58. The counties with no jury trials were Bertie, Camden, Chowan, Clay, Franklin, Madison, Mitchell, Montgomery, Pamlico, and Warren.

59. *See* N.C. GEN. STAT. § 9-4 (2016).

60. *See* Grosso et al., *supra* note 20, at 1533.

61. The board of elections provides online data including the name, home address, gender, race, age, and party affiliation of each voter. *See Voter Search*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT, https://vt.ncsbe.gov/RegLkup/ (last visited May 18, 2018). A few counties (including Mecklenburg) adopted notation techniques that included a record of each juror's race and gender within the clerk's file. Students worked on matching juror profiles with voter records between spring 2013 and summer 2016.

duty based on their driver's license,[62] but we did obtain the background information for a strong majority of the prospective jurors based on the voter database.[63]

The file for each trial indicated the judge, prosecutor(s), and defense attorney(s) assigned to the case. For most of these full-time courtroom actors, research assistants were able to identify race, gender, date of admission to the state bar (a proxy for the actor's level of experience), and the judge's date of appointment to the bench.[64]

In addition to the case-specific information about each trial and its participants, we also obtained information about each county, judicial district, and prosecutorial district.[65] These data points included census information about the population and racial breakdown of each county and case-processing statistics about each prosecutorial district.

After all of the data road trips and Internet searches were done, we held records for 1,306 trials.[66] This phase of the Jury Sunshine Project contains information about 29,624 removed or sitting jurors, 1,327 defendants, 694 defense attorneys, 466 prosecutors, and 129 superior court judges. We connected all of those bits of information into a single relational database.[67]

62. *See* N.C. GEN. STAT. § 9-2(b) ("In preparing the master list [of prospective jurors], the jury commission shall use the list of registered voters and persons with driver's license records supplied to the county by the Commissioner of Motor Vehicles . . . .").

63. We gave researchers a protocol to follow when deciding whether a prospective juror from the clerk's records matched a voter from the online board of elections records. The clerks in some offices provided us with the jury *venire* lists, which they maintained separately from the files for each trial; the *venire* lists provided home addresses for the jurors, increasing our confidence that the jurors listed in the clerk's records matched the voters listed in the voter records for the county. After clerks learned that we were asking for access to file information about jurors, some superior court judges issued orders prohibiting the clerks from releasing the juror *venire* lists to anyone other than the parties to the case. The North Carolina General Assembly also amended the statute to restrict access to the addresses and birthdates recorded on the jury *venire* lists. *See* N.C. GEN. STAT. § 9-4(b); 2013 N.C. Sess. Laws 166; 2012 N.C. Sess. Laws 180.

64. In some cases, this information was available from the public data stored on the site of the North Carolina State Bar regarding licensed attorneys. *See Search for a North Carolina Lawyer*, N.C. ST. B., https://www.ncbar.gov/for-lawyers/directories/lawyers/ (last visited May 18, 2018). We also learned which office defense attorneys worked in (private firm or public defender's office). In North Carolina, the public defender service covers sixteen of the judicial districts in the state. The remaining districts operate with appointed counsel. *See* N.C. GEN. STAT. § 7A-498.7. Students followed a written protocol to search in standard locations and a prescribed order for the professional biographies of the courtroom actors.

65. North Carolina divides the state into forty-four different prosecutorial districts and thirty different superior court districts. *See* N.C. GEN. STAT. § 7A-41. The judicial districts break into eight different divisions; judges spend six months each year in their home district and six months traveling to other districts within the division.

66. The NCAOC data list a total of 2,112 charges that were resolved through trial for fiscal year 2011–2012. The breakdown of charges for individual counties suggests that we obtained the records for almost every felony trial that occurred in the state during calendar year 2011. The total number of defendants who faced trial in North Carolina in 2011 remains speculative because each prosecutor retains the discretion to file separate counts either as separate file numbers in the office of the clerk or as separate counts covered under a single file number.

67. We checked the quality of the field data during the process of loading county-specific spreadsheets into the central database. Another statewide version of the data exists in spreadsheet form, as assembled by Dr. Francis Flanagan of the Wake Forest University Department of Economics. *See generally* Francis X. Flanagan, *Peremptory Challenges and Jury Selection*, 58 J.L. & ECON. 385 (2015); Francis X. Flanagan, Race, Gender,

IV. ILLUSTRATIVE COMPARISONS OF JURY SELECTION PRACTICES

These data open up a new universe of questions about jury selection and performance. They shed light on simple descriptive issues about the relative contributions of judges, prosecutors, and defense attorneys in building a jury. They also allow us to compare jury practices in more serious felonies to those in the trials of lesser crimes. Because the data include the jury's verdict on each charge,[68] we can compare outcomes for a defendant with a single charge to outcomes in trials with multiple defendants and charges. It is possible to track case outcomes from juries of different compositions, based on juror age, gender, or race. Any of these questions might prove interesting to taxpayers and voters who want to understand their criminal courts.

But you have to start somewhere. In this Part, we present evidence related to racial disparities in jury service. We treat this as a demonstration project, to imagine in concrete terms the sort of public debate that might spring up when jury data become available in accessible form, allowing comparisons among jurisdictions.

Our first observations relate to the flow of prospective jurors through the courtroom. Table 1 indicates the contributions of each of the three courtroom actors.

TABLE 1: TOTAL JURORS REMOVED AND RETAINED

DISPOSITION	JURORS	%
Juror Retained for Service	16,744	57
Judge Removed	3,277	11
Prosecutor Removed	3,002	10
Defense Attorney Removed	4,187	14
Removed, Source Unknown	2,414	8
TOTAL	29,624	100

As Table 1 indicates, 57% of the jurors who sat in the jury box ultimately served on that jury. Defense attorneys were the most active courtroom figures, removing 14% of the total with peremptory challenges; judges removed 11% of the jurors for cause; and prosecutors exercised their peremptory challenges against 10% of the prospective jurors called into the box. Records did not indicate the source of the removal for 8% of the jurors.[69]

We know something about the order of removal because state statute creates a uniform framework for some aspects of the selection process.[70] At the

and Juries: Evidence from North Carolina (2017) (unpublished article) (on file with the author) [hereinafter Flanagan, North Carolina Jury Evidence].

68. Our field researchers entered separate codes for guilty as charged, guilty of lesser charge, mistrial, and acquittal.

69. These unexplained removals were based on incomplete records in a few counties. If we assume that the courtroom actors accounted for the "unknown" removals at the same rate that they did for the recorded cases, then defense attorneys removed a total of 15% of the pool, judges excluded 12% for cause, and prosecutors removed 11%.

70. *See* N.C. GEN. STAT. § 15A-1214.

outset, the clerk of the court randomly selects prospective jurors from the *venire* to seat in the jury box. The judge instructs the jury about the general nature of the upcoming trial[71] and then may ask jurors about their "general fitness and competency."[72] The parties "may personally question prospective jurors individually."[73]

The judge removes jurors for cause before the parties make their peremptory challenges, basing this decision in part on motions from the attorneys. The judge rules first on the prosecutor's motions, and the clerk replaces any jurors removed. After that, the prosecutor exercises challenges to the twelve jurors in the box. Again, the clerk refills any empty seats before the judge and prosecutor repeat the process. The defense attorney takes the next shift, asking the judge to remove jurors for cause and striking any jurors from the group of twelve that the prosecutor and judge left in the box.[74] The judge and prosecutor again take the first turn on any replacement jurors who arrive in the box after the defense attorney is done with the first set of challenges.[75]

71. *See id.* § 15A-1213.

72. *See id.* § 15A-1214(b).

73. The judge sometimes removes jurors for cause before the parties ask their questions, but the judge always remains free to remove additional jurors in light of their answers to attorney questions. Defense attorneys examine jurors only after prosecutors tender a complete set of twelve jurors. *See id.* § 15A-1214(c).

74. When jurors are replaced at any step along the way, the initiative passes again to the judge and the prosecutor, who may remove any new juror before the prosecutor "tenders" the newest set of retained jurors to the defense attorney. *See id.* § 15A-1214(d), (f). In capital cases, the process may advance one juror at a time. *See id.* § 15A-1214(j).

75. Local variations in this removal process and gaps in the file records leave us uncertain about the precise order of removals of jurors from any given trial. For instance, it is possible for the judge and the prosecutor to retain all twelve jurors initially placed in the box, for the defense attorney to exercise all six of the available peremptories, and then for the judge and prosecutor to remove some of the replacement jurors for those six boxes. In most counties, the clerk records the order of jurors removed by each particular actor (for instance, "D3" would indicate the third juror removed by defense counsel), but not the order of removals as between parties. Only one county (Guilford) tracked the order of removal overall.

A. Demographic Differences Among Removed Jurors

Table 2 indicates the racial breakdown of jurors who were retained and removed. We identified 60% of our jurors as white, 16% as black, and 2% as some other race (including Hispanic ethnicity).[76] The race was not indicated in our data for 22% of the jurors.[77]

The data indicate that black jurors and other nonwhite jurors serve on juries at a slightly lower rate than white jurors. The retention rate for white jurors was 58%, while the rate for black jurors was 56% and for jurors of other races was 50%.

TABLE 2: JUROR DISPOSITION, BY RACE OF JUROR

DISPOSITION	WHITE	%	BLACK	%	OTHER	%	UNKNOWN	%
Juror Retained	10,402	58	2,628	56	324	50	3,389	53
Judge Removed	1,729	10	574	12	133	21	841	13
Prosecutor Removed	1,437	8	755	16	94	15	716	11
Defense Removed	2,960	17	288	6	63	10	876	14
Removed, Source Unknown	1,351	8	427	9	36	6	600	9
TOTAL	17,879		4,672		650		6,422	

76. The voter registration and juror records use the racial categories white, black, Asian, Hispanic, Native American, and other. Voters self-identify and do not have the option of choosing more than one race. Because of the small numbers recorded in four of those categories, we combine them into a single "other" category. Based on current census figures, we believe that these figures underestimate the number of Hispanic or Latino citizens called for jury service in felony trials today. White residents (excluding Hispanic or Latino ethnicity) comprised 65.3% of the 2010 population, while "Black or African American alone" residents made up 21.5%, and "Hispanic or Latino" residents made up 8.4% of the state population at that time. *See Quick Facts: North Carolina*, U.S. CENSUS BUREAU (July 1, 2017), https://www.census.gov/quickfacts/NC.

77. These jurors did not appear in the voter database or appeared in the voter database with race not indicated. Jurors not appearing in the voter database were placed into the juror pool in the county based on their appearance on the list of licensed drivers. The race of licensed drivers is not publicly available data in North Carolina. If the jurors whose race was unknown were assigned a racial identity in proportion to the rest of the pool, black jurors would constitute 20% of the pool. Under this scenario, white jurors would constitute 77% of the total pool, and other races would make up 3%.

When it comes to the race of the jurors, a remarkable pattern appears in Table 2. The data show that judges removed nonwhite jurors at a higher rate than they did for white jurors.[78] Then prosecutors removed nonwhite jurors at about twice the rate that they did white jurors. But in the end, defense attorneys *nearly* rebalanced the levels of jury service among races by removing more jurors than the judges or the prosecutors did and by using their peremptory challenges more often against white jurors than they did against black and other nonwhite jurors.

To bring these racial effects into focus, we express the differences in the form of a "race removal ratio." In Table 3, we express the ratio of removal rates for black jurors to removal rates for white jurors: a ratio of exactly 1.0 would mean that the judges or attorneys removed black jurors and white jurors in exactly the same percentages.[79] A ratio above 1.0 means that the actors removed black jurors at a higher rate than they removed white jurors. Conversely, a ratio below 1.0 means that actors removed white jurors more often. We adjusted the calculations for each courtroom actor to reflect the pool of jurors available at the time of that actor's removal decision.[80]

TABLE 3: REMOVAL RATIOS, BY RACE, FOR COURTROOM ACTORS

ACTOR	BLACK-TO-WHITE RATIO	OTHER-TO-WHITE RATIO
Judge	1.3	2.1
Prosecutor	2.1	2.0
Defense Attorney	0.4	0.7

Table 3 indicates that prosecutors excluded black jurors at more than twice the rate that they excluded white jurors (for a 2.1 ratio, or 20.6% to 9.7%); similarly, they used peremptory challenges against other nonwhite jurors at twice their rate of exclusion for white jurors (producing a 2.0 ratio, or 19.5% to 9.7%). Defense attorneys, by contrast, excluded black jurors less than half as often as they excluded white jurors (with a 0.4 ratio, or 9.9% to 22.2%). Interestingly, the judges excluded black jurors for cause a bit more often (a 1.3 ratio, or 13.5% to 10.5%) but they excluded other nonwhite prospective jurors at a much higher rate (with a 2.1 ratio, or 21.7% to 10.5%).

78. The different removal rates for jurors of different races by each of the three courtroom actors are all statistically significant, using the chi-square test for significance.

79. We calculated this ratio after excluding the removals by unknown parties and the removal of jurors of unknown race. In every case, the rate of removal of jurors of unknown race sat in between the rate of removal for white jurors and for nonwhite jurors.

80. Judges have access to the entire pool. Prosecutors choose from the jurors remaining after the judge has chosen, while defense attorneys make their decisions regarding the jurors left after the prosecutors and judges have acted. There is some imprecision in this method because after one of the parties has exercised its full complement of peremptories, the clerk might place additional jurors into the box. While the attorneys may still challenge these additional jurors for cause, the removal depends on establishing the relevant legal basis for removal. The number of jurors that a party "retains" therefore includes some jurors that the party did not actively choose.

The gender of prospective jurors complicates the selection patterns. On the whole, women and men served on juries at much the same rate. Judges, prosecutors, and defense attorneys did not differ much in their choices based on gender, at least when we look at all felony trials together.[81] When race and gender intersected, however, the courtroom actors each pursued a different strategy.

TABLE 4: TOTAL REMOVALS, BY RACE AND GENDER

DISPOSITION	BLACK MALE	%	BLACK FEMALE	%	WHITE MALE	%	WHITE FEMALE	%
Juror Retained	1,011	53	1,609	58	5,028	57	5,346	59
Judge Removed	255	13	318	12	813	9	910	10
Prosecutor Removed	345	18	407	15	805	9	625	7
Defense Removed	105	6	183	7	1,438	16	1,518	17
Removed, Source Unknown	186	10	238	9	677	8	671	7
TOTAL	1,902		2,755		8,761		9,070	

Black male jurors were scarce from the outset. They made up only 6.4% of the total pool of summoned jurors (compared to 9.3% for black females). Once the selection process began, judges and prosecutors removed black males at a higher rate than other jurors. Table 5 summarizes the removal rates for each of the courtroom actors.[82]

TABLE 5: RATES OF REMOVAL OF AVAILABLE JURORS

	BLACK MALE	BLACK FEMALE	WHITE MALE	WHITE FEMALE
Judge	14.9%	12.6%	10.1%	10.8%
Prosecutor	23.6%	18.5%	11.1%	8.3%
Defense	9.4%	10.2%	22.2%	22.1%

81. The retention rate for female jurors overall was 55%; for male jurors it was 55.4%. Judges removed 13% of females and 11.7% of males; prosecutors removed 12.1% of female and 13.8% of male jurors available to them; defense attorneys removed 21.5% of female and 20.6% of male jurors available to them. It is possible, on the basis of Jury Sunshine Project data, to compare the treatment of male and female prospective jurors in particular categories of cases, such as sexual assault or domestic violence charges. We reserve those questions for another time, concentrating here on the insights one can gain from exploring all felony trials as a group.

82. The percentages in Table 5 are based on the pool of jurors after excluding those with an unknown removal source. The percentages for prosecutors and defense attorneys also reflect the reduced pool of jurors available to those actors at the relevant point in the process. The differences in treatment between white and nonwhite jurors are statistically significant, using the chi-square test. For each group of actors, the p-value is < 0.00001.

Defense attorneys did not remove male and female jurors of the same race at meaningfully different rates. Prosecutors, however, used their challenges proportionally more often against black male jurors (striking 23.6% of those available in the pool at that point in the process) than they did against black female jurors (18.5% of those available). A similar, but less pronounced, gap appeared in judicial removals for cause: judges removed 14.9% of the black male jurors and 12.6% of the black female jurors. All told, black males started the process underrepresented in the pool and ended up comprising only 6% of the jurors who served.[83]

B. Geographical Differences in Juror Removal Practices

Judges, prosecutors, and defense attorneys have different objectives at a trial and value different characteristics in jurors. It does not surprise us, therefore, to find that these courtroom actors produce different demographic patterns when they choose jurors.

Comparisons *within* these groups, however, are another matter. What might explain two different prosecutor's offices that behave quite differently in their selection of juries? We explored this question through a comparison of the six largest cities in the state, all with populations larger than 200,000. Table 6 lists the removal ratios for the courtroom actors in the counties where those cities are located.

TABLE 6: REMOVAL RATIOS IN URBAN COUNTIES

CITY (COUNTY)	Judges Black-to-White	Judges Other-to-White	Prosecutors Black-to-White	Prosecutors Other-to-White	Defense Black-to-White	Defense Other-to-White
Winston-Salem (Forsyth)	1.6	2.7	3.0	4.0	0.6	0.8
Durham (Durham)	1.1	1.0	2.6	1.5	0.5	0.3
Charlotte (Mecklenburg)	1.0	1.9	2.5	2.3	0.3	0.5
Raleigh (Wake)	1.2	1.4	1.7	1.9	0.4	1.0
Greensboro (Guilford)	0.9	0.4	1.7	1.6	0.4	1.0
Fayetteville (Cumberland)	0.9	1.2	1.7	1.2	0.5	0.4

The prosecutor's offices appear to fall into two groups. Greensboro, Raleigh, and Fayetteville all produced a removal ratio of 1.7 for black jurors; Greensboro and Durham also showed relatively low removal ratios for other nonwhite jurors. On the other hand, the prosecutor's offices in Durham, Char-

83. Black males make up approximately 11% of the state population overall. We note for future research the potential relevance of the race and gender of the judges, prosecutors, and defense attorneys who select the jurors.

lotte, and Winston-Salem excluded black jurors at a higher rate than elsewhere in the state. In the most extreme case, the prosecutors in Forsyth County removed black jurors from the box three times more often than they removed white jurors: that is, among the 151 black jurors reporting for duty in felony trials, the prosecutors exercised their peremptory challenges to remove 27.5% of the jurors available to them after the judges removed some jurors for cause. Out of 541 total white jurors, the prosecutors in Forsyth County removed 9.3% of the available candidates.

One more geographical comparison deserves our attention: the differences between urban and rural counties.[84] Despite the differences in jury selection among the six largest cities in the state, urban counties as a group shared some features that distinguished them from rural counties. Table 7 summarizes the results.

TABLE 7: REMOVAL RATIOS, URBAN AND RURAL COUNTIES

	Judges, Black-to-White	**Prosecutors, Black-to-White**	**Defense, Black-to-White**
Urban	1.2	2.3	0.5
Rural	1.1	1.7	0.3

For the judges and the prosecutors, it appears that the racial disparities in removal rates are most pronounced in urban counties. Defense attorneys, on the other hand, produced more racially imbalanced results in rural areas; their ratio of black-to-white removal rates became even smaller in rural counties.[85]

V. PREVIEW OF A POLITICAL DEBATE

The data from the Jury Sunshine Project speak only to outcomes in the jury selection process. The numbers show what judges and attorneys did when they picked jurors, but they do not show why. The competing—and complementary—explanations for these racial disparities in the jury selection process are a fitting topic for political debate.

In this Part, we preview the sorts of arguments that prosecutors, judges, defense attorneys, and interested community members are likely to advance during this debate. Some of these explanations for racial disparity emphasize

84. We designate the most rural counties as the thirty-three counties with the lowest population densities in the state. *See North Carolina Population Density County Rank*, USA.COM, http://www.usa.com/rank/north-carolina-state--population-density--county-rank.htm (last visited May 18, 2018). Among those thirty-three counties, eight conducted no jury trials at all and eleven recorded generic removals without attributing them to the judge or a party. Those counties made choices regarding 2,706 jurors (or 2,199 when excluding the jurors with an unknown removal source). For purposes of Table 7, we designated the most urban counties as the eleven counties with the highest population densities, covering all cities with populations more than 80,000. Those counties made choices about 13,037 jurors. The racial differences in rates of juror removal for each of the actors, as well as the urban-rural differences reflected in the removal ratios in Table 7, are statistically significant.

85. All three courtroom actors—judges, prosecutors, and defense attorneys—removed fewer available jurors in rural counties than they did in urban counties. Judges removed 15.7% of available jurors in urban counties, and only 8.1% in rural counties. The comparable figures for prosecutors were 14.3% and 8.4%; for defense attorneys, they were 22.3% and 12.3%.

the intent of the judges and attorneys when they exclude jurors. Others put intent to the side and ask instead about the effects of systematic exclusion on defendants and the community.

A. Intent-Based Interpretations

What might explain the patterns in jury selection that we observed in Part IV? Starting with the defense attorneys, who used their removal powers at the highest rate, perhaps the simplest explanation is best: they used all the available *voir dire* clues (including the race of the prospective jurors) to seat jurors who were more sympathetic to human frailty, or those who were more skeptical of local police. Perhaps the use of the jurors' race was the explicit basis for the defense attorney's choice, or maybe the race correlated with other clues, such as expressions of general respect for authority. Put simply, defense attorneys may have used race as one factor to pick a jury to win a trial.

As a matter of trial strategy, such choices are rational. Flanagan used our jury data to calculate the performance differences among juries of different racial compositions. He found that juries composed of more black men were more likely to acquit any defendant.[86] Conversely, juries with more white men were more likely to convict, particularly when the defendant was a black man.[87] Thus, it is easy to see why defense attorneys might want to save more of their peremptory challenges for white male jurors.[88]

As for the judges, it is more difficult to reconstruct the reasons why they removed a higher percentage of black jurors from the *venire*. The 30% increase in the rate of removal among black jurors, when compared to white jurors, might reflect greater economic stresses among black jurors, such as transportation difficulties or pronounced hardship from missing days away from a job.[89] The higher rate of judicial removals for cause for nonwhite jurors might also reveal how judges align themselves with prosecutors, and respond more favorably to their requested removals for cause.

And then there are the prosecutors. One potential explanation for the race removal ratios higher than 1.0 would be intentional strategic decisions that incorporate race.[90] Perhaps line prosecutors relied on race as a clue about the general receptiveness of jurors to a law enforcement perspective. Like the defense attorneys, the prosecutors may have relied in part on race to pick a winning jury.

86. *See* Flanagan, North Carolina Jury Evidence, *supra* note 67, at 14.

87. *Id.* at 13–15. Flanagan used instrumental variable regressions, using the demographic composition of the randomly selected jury pool as an instrument for the composition of the jury.

88. There is also another possible explanation for the exclusion pattern on the defense side: perhaps defense attorneys were aware that nonwhite jurors were underrepresented on the *venire* that the clerk called to the courthouse. Their removal of white jurors, then, might have revealed an effort to restore the jury to a racial balance that better reflected the community. *See* BERNER ET AL., *supra* note 44, at 7.

89. The judges' different treatment of white jurors and nonwhite jurors other than black jurors is equally puzzling. It might reflect a greater incidence of language barriers within this group, but that is speculation.

90. *Cf.* Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 LAW & CONTEMP. PROBS. 199, 206 (2016).

It is also possible that prosecutors removed jurors based on a factor correlated with race—most prominently, jurors with a felony conviction, a prior arrest, or close family members who had negative experiences in the criminal justice system.[91] Prosecutors might have been fully aware of the disparate racial impact of these choices and regretted that unintentional side effect of their removal strategy.

Again, our data suggest that such choices by prosecutors are strategically rational. Flanagan found that for every peremptory challenge that the prosecutor used, the conviction rate for black male defendants increased by 2–4%.[92]

None of these intent-based accounts, for any of the courtroom actors, can explain jury selection choices in individual cases. Racial disparities in aggregate jury selection outcomes speak only about averages. They reveal incentives that shape the larger patterns of removal. These arguments, therefore, might not win the day in the courtroom under current constitutional doctrine. But the reasons why prosecutors and judges exclude black jurors (especially males) at a high rate could be relevant to voters and community groups outside the courtroom as they discuss local criminal justice conditions.

B. The Effects of Juror Exclusion

A political debate about the exclusion of jurors might extend beyond the possible intent of courtroom actors. The discussion, based on data-driven comparisons of different places and actors, might also include the *effects* of juror exclusion.

Having a diverse jury can have life-changing implications for criminal defendants. White jurors are more likely to convict and are more likely to inflict harsh punishments on black defendants accused of killing white victims.[93]

The exclusion of minority jurors from service also affects the jurors themselves and the community where the trial occurs. Jury service creates a forum for popular participation in criminal justice.[94] When major segments of the community remain outside the courtroom, with other more "favored" people issuing the verdicts, the legitimacy of the system suffers. Statewide statistics reveal in more systematic and detailed ways how different parts of the community find it easier or harder to serve on juries.

91. *See* Binnall, *supra* note 44, at 3; Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 389 (2016); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 593 n.12 (2013).

92. *See* Flanagan, North Carolina Jury Evidence, *supra* note 67, at 14. Among the 1,327 defendants in our database, 666 (50%) are black males and 385 (29%) are white males. The race is unknown for 71 male defendants (5%). There are 74 (6%) black female defendants and 63 (5%) white female defendants.

93. *See* Bellin & Semitsu, *supra* note 19, at 1082–83.

94. *See* AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 15, 205 (2005); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 70 (2012).

1. Impact on Excluded Jurors

In addition to the harm to criminal defendants, courts have long recognized that individuals who are excluded because of racial discrimination also experience a cognizable harm. For example, in *Carter v. Jury Commission of Greene County*, the Court noted, "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[95]

Even when courts have declined to hold that serving on a jury is an enforceable right, they have still agreed that jury service is a "'badge of citizenship' worn proudly by all those who have the opportunity to do so and that it would, indeed, be desirable for all citizens to have that opportunity."[96] Many courts have noted that exclusion of qualified groups not only violates the Constitution but also undermines "our basic concepts of a democratic society and representative government."[97] When state actors participate in this exclusion, it deepens the harm. As one court noted long ago, "When Negroes are excluded from jury service because of their color, the action of the state 'is practically a brand upon them, affixed by the law, an assertion of their inferiority.'"[98]

2. Impact of Juror Exclusion on the Community

The exclusion of minority jurors also has a detrimental impact on the community. It is a basic notion of democracy that a jury should reflect the community. A jury that is "made up of representatives of all segments and groups of the community" is "more likely to fit contemporary notions of neutrality" and a combined "commonsense judgment of a group of laymen."[99]

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95. 396 U.S. 320, 329 (1970).

96. *See* United States v. Conant, 116 F. Supp. 2d 1015, 1020–22 (E.D. Wis. 2000) ("While no court has yet recognized a constitutional right to serve on a jury, the possibility that such a right might exist is to be given the most careful scrutiny.").

97. *See* Ciudadanos Unidos de San Juan v. Hidalgo Cty. Grand Jury Comm'rs, 622 F.2d 807, 825 (5th Cir. 1980) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

Id.; *see also* Cassell v. Texas, 339 U.S. 282, 303–04 (1950) (Jackson, J., dissenting).

> Qualified Negroes excluded by discrimination have available, in addition, remedies in courts of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible.

Cassell, 339 U.S. at 303–04.

98. White v. Crook, 251 F. Supp. 401, 406 (M.D. Ala. 1966) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)); *see also* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561, 1564 (2012) (proposing suits by prospective jurors to overcome informational obstacles to *Batson* challenges).

99. *See* Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection*, 24 J. CRIM. JUST., no. 1, 1996, at 71, 72 (quoting Apodaca v. Oregon, 406 U.S. 404, 410 (1972)).

The Supreme Court has long recognized the importance of the role of jury participation in our society and has explicitly examined the impact that such exclusion has on the broader community. For example, in *Taylor v. Louisiana*, the Supreme Court recognized the importance in selecting a fair representation of jury members because of the potential impact on a community.[100] The Court explained that the fair representation requirement was essential in (1) guarding against "the exercise of arbitrary power" and invoking the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor," (2) upholding "public confidence in the fairness of the criminal justice system," and (3) sharing the administration of justice as "a phase of civic responsibility."[101]

Systemic exclusion harms the community because jury service creates a forum for popular participation in criminal justice.[102] When major segments of the community remain outside the courtroom, with other people issuing the verdicts, the legitimacy of the system suffers. In *Georgia v. McCollum*, the Court explained that improper exclusion of jurors on the basis of race not only affects the juror, but that the harm also extends beyond the rejected juror "to touch the entire community"[103] because discriminatory proceedings "undermine public confidence in the fairness of our system of justice."[104]

The problems related to the systemic exclusion of racial minorities on juries are particularly acute when the subject matter of the case involves racial violence. The Court has long recognized the danger that such cases might create distrust within minority communities. For example, in *McCollum*, Justice Blackmun discussed cases involving racial violence in which peremptory challenges had resulted in the striking of all black jurors:

> In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal jus-

100. *See* Taylor v. Louisiana, 419 U.S. 522, 526–27 (1975).

101. *Id.* at 530–31 (internal quotation marks omitted) (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). Similarly, after the Court's decision in *Batson*, the Court decided in *Powers v. Ohio*, 499 U.S. 400 (1991), to expand the right to complain against discriminatory use of peremptory challenges to defendants who were not members of the same race as the excluded jurors. The harm done to the community's interest in jury service served as a key justification: "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." *Powers*, 499 U.S. at 402.

102. *See* AMAR, *supra* note 94, at 15, 205; Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 981–94 (1998) (exploring historical basis for treating jury selection as a political right affecting the community).

103. 505 U.S. 42, 49 (1992) (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986)). The *McCollum* Court noted that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* (internal quotation marks omitted) (quoting *Batson*, 476 U.S. at 87).

104. *Batson*, 476 U.S. at 87. This is a key insight from the "procedural justice" literature. *See* Richard R. Johnson, *Citizen Expectations of Police Traffic Stop Behavior*, 27 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 487, 488 (2004) (noting that studies have shown that people are more likely to "defer to the law and refrain from illegal behavior" when police treat them fairly); Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008).

> tice system is essential for preserving community peace in trials involving race-related crimes. Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.[105]

A homogenous jury, on the surface, does not look like a fair jury. The appearance of prejudice in the jury selection process leads to continuing pessimism and distrust concerning the operation of the criminal justice system among the omitted groups.[106] The excluded community perceives that it is "shut out." The court's participation in discrimination and racism undermines its moral authority as the enforcer of antidiscrimination policies.[107]

The public at large also shares an interest in "demonstrably fair trials that produce accurate verdicts."[108] Diversity itself enhances the deliberations of juries. In *Peters v. Kiff*,[109] Justice Marshall identified this contribution of a representative jury:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . . . [E]xclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[110]

In sum, excluding minorities from jury selection has negative implications beyond the harms that a criminal defendant might raise in the courtroom. Like other systemic issues in the criminal justice system, visible and systematic barriers to jury service can erode community trust and decrease legitimacy.[111]

The accountability of judges and prosecutors to the community is also compromised when particular races, neighborhoods, ages, or other social

105. *See* Tyler & Fagan, *supra* note 104, at 235–36. The 1980 Miami urban rebellion resulted in the death of eighteen people and $200 million in property damage and other losses. This rebellion followed an all-white jury acquitting four white police officers for the beating death of a black insurance executive after a change of venue from Miami to Tampa and after the defendants had used their peremptory challenges to exclude all black people on the jury *venire*. *See* Ihosvani Rodriguez, *McDuffie Riots Shook Miami*, SUN SENTINEL (May 16, 2005), http://articles.sun-sentinel.com/2005-05-16/news/0505150370_1_liberty-city-blacks-and-police-black-man. The Florida governor's report of the disturbance specifically identified the practice of excluding black people from juries in racially sensitive cases as a cause of the riots and a reason for black people in Dade County to distrust the criminal justice system. GOVERNOR BOB GRAHAM'S DADE CTY. COMM., REPORT OF GOVERNOR'S DADE COUNTY CITIZENS COMMITTEE 60–61 (Oct. 30, 1980), https://www.floridamemory.com/items/show/329091?id=1.

106. Adam Benforado, *Flawed Humans, Flawed Justice*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/opinion/flawed-humans-flawed-justice.html.

107. *See* M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1928 (1993).

108. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 749 (1992).

109. 407 U.S. 493 (1972).

110. *Id.* at 503–04.

111. There is an ironic aspect to the Jury Sunshine Project: publication of data about uneven community access to jury service might exacerbate the problem by making it more visible. If the public debate never results in greater equality of jury service, that outcome is a sobering possibility.

groups cannot contribute their fair share to the jury system. In particular, prosecutors who can exclude parts of the community from jury service effectively shield themselves from full accountability to the public.[112] They can choose for themselves which segments of the population will set their priorities in the charging and resolution of cases.

Whether such disparities are the result of purposeful discrimination is difficult to prove, but even the perception that discrimination is occurring has important implications for the criminal justice system.[113] These practices deserve scrutiny outside the courtroom, beyond the confines of constitutional doctrine.

VI. ACCESS TO DATA AND CRIMINAL JUSTICE REFORM

In Part IV we highlighted data, for illustrative purposes, to address the question of exclusion from juries on the basis of race. But racial equity is only one possible objective for those who might use open jury data. In this Part, we explain how file data, made available in a searchable form that is comparable across district boundaries, could create an informed and engaged role for the public in positive criminal justice reform.

A. The Analogy to Traffic Stop Data

Constitutional doctrines such as *Batson* have not opened the door to jury service for minority groups.[114] But is there any better (or quicker) alternative than advocating for changes in the constitutional doctrine? The American experience with traffic stops and pedestrian stops by police over the last two decades suggest that there is, in fact, a better way. In that setting, a frustrating and limited constitutional doctrine does not tell the whole story. The increased availability of data about the patterns of police stops created a political debate that continues to shape police conduct. Through the political process, members of these communities are able to insist on changes in police department policies with the aim of reducing racial profiling.

Just as in the jury selection context under *Batson*, the Supreme Court's approach to racial profiling under the Fourth Amendment allows law enforcement officials to cloak constitutionally impermissible conduct in race-neutral terms. Equal Protection jurisprudence insulates these practices from systemic reform.

112. This compounds the other weaknesses of the electoral check on the prosecutor's performance in office. *See* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 88–89 (2011); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582–83 (2009).

113. *See* Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2 (2009); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J.C.R. & SOC. JUST. 25, 30 (2011).

114. *See supra* Section II.B.

The centerpiece of this evasion is *Whren v. United States*.[115] The case involved two vice squad officers' decision to stop a car. One possible ground for the stop was illegal driving (making a right turn without a signal); another plausible reason for the stop was the officers' unsupported hunch that the driver and passenger were involved in drug distribution. Which was the true reason? The Court said that it didn't matter. As long as the circumstances give officers reasonable suspicion to believe a driver violated a *traffic* law, courts treat the stop as reasonable under the Fourth Amendment.[116] An officer can use race as a basis for suspicions about criminal behavior, stop suspects of only one race, and shroud those discriminatory stops in race-neutral language.[117] David Harris summed up the impact of constitutional law on pretextual stops this way: a judicial finding of racial profiling is "the legal equivalent of lightning bolts hurled by Zeus."[118]

As a result, constitutional litigation standing alone has not changed field practices very much. Numerous studies conducted over several decades have demonstrated that law enforcement officers disproportionately select racial minorities for traffic stops, disproportionately search them during these stops, and disproportionately subject minority drivers to "stop and frisk" practices.[119]

The greater impact of constitutional litigation was delayed and indirect. Some of the earliest statistical clues about racial profiling practices came to light during litigation over constitutional claims, which routinely ended in losses for plaintiffs who wanted to change these police practices.[120] Eventually, advocates changed the venue for their arguments. They broadened their strategy

115. 517 U.S. 806 (1996); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Carlos Torres et al., *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J.L. & SOC. CHANGE 283, 285 (2015).

116. *Whren*, 517 U.S. at 819.

117. *See* MICHAEL L. BIRZER, RACIAL PROFILING 72 (2013). A few examples confirm the limited power of equal protection doctrine to respond to racial profiling. In *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997), the court turned aside the defendant's equal protection claim and rejected statistics showing that police disproportionately targeted black people because the officers had a plausible, nonracial reason for detaining the defendant. Similarly, in *Bingham v. City of Manhattan Beach*, 329 F.3d 723, 736 (9th Cir. 2003), the Ninth Circuit affirmed summary judgment because the appellant failed to provide evidence to refute the officer's race-neutral explanation for the traffic stop. *See also* Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003) (denying relief because plaintiff failed to provide evidence of discrimination to counter the officer's race-neutral justification of the traffic stop).

118. David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 75 (2003).

119. *See, e.g.*, David Barstow & David Kocieniewski, *Records Show New Jersey Police Withheld Data on Race Profiling*, N.Y. TIMES (Oct. 12, 2000), http://www.nytimes.com/2000/10/12/nyregion/records-show-new-jersey-police-withheld-data-on-race-profiling.html; DAVID A. HARRIS, AM. CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS ACLU (June 1999), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways (describing statistics from Maryland and Illinois). More recent data related to New York City's "stop and frisk" policy tell a consistent story. Nearly nine out of every ten people that the New York Police Department stopped and frisked were completely innocent. Although black people and Hispanic people account for a little over half of the city's population, 83% of the people stopped were black or Hispanic. *See Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html.

120. *See* Harris, *supra* note 118, at 78.

and took their claims to legislatures. As a result, many states enacted legislation to address racial profiling, including some laws that require law enforcement to collect and report data about their stop practices.

As part of a strategy to prevent racial profiling, about eighteen states now require, by law, mandatory data collection for all stops and searches.[121] Public agencies now make these data available to the public, sometimes through a centralized entity and at other times through individual law enforcement agencies.[122]

Private individuals and groups have stepped forward as intermediaries to monitor and interpret these data, making the information accessible and useful for the public and for policy entrepreneurs. Researchers employed in universities produced some studies,[123] while policy advocacy organizations performed some of their own analyses.[124]

Journalists also found stories within these numbers. Some news outlets reported the results of academic and advocacy studies.[125] In addition, teams of reporters created their own analyses, sorting and summarizing the overwhelming databases for their readers. For instance, the *New York Times* examined police traffic stop records between 2010 and 2015. In consent searches in Greensboro, North Carolina, "officers searched blacks more than twice as often but

121. See NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA app.1 (Sept. 2014), http://www.naacp.org/criminal-justice-issues/racialprofiling/; Patrick McGreevy, *Brown Signs Legislation to Protect Minorities from Racial Profiling and Excessive Force*, L.A. TIMES (Oct. 4, 2015, 3:00 AM), http://www.latimes.com/local/politics/la-me-pol-sac-brown-racial-profiling-20151004-story.html. In 1999, North Carolina became the first state to mandate data collection regarding race for police who stop drivers. N.C. GEN. STAT. § 143B-902 (2016); R.I. GEN. LAWS § 31-21.2-5(e) (2016).

122. Since 2002, all state highway patrol and police departments in North Carolina have collected the data and sent them to the North Carolina Department of Justice, which publishes the data through its website. *See North Carolina Traffic Stop Statistics*, N.C. DEP'T PUB. SAFETY, http://trafficstops.ncsbi.gov (last visited May 18, 2018).

123. One such academic study, by Frank Baumgartner, reported that black drivers were on average 73% more likely to be searched than white drivers in North Carolina. *See* Frank R. Baumgartner, *NC Traffic Stops*, U.N.C. CHAPEL HILL, https://www.unc.edu/~fbaum/traffic.htm (last updated Dec. 13, 2017) (concluding that Hispanic drivers were 96% more likely to be searched than white drivers and black male drivers were 97% more likely to be searched, yet black men were 10% less likely to have illegal substances than white men in probable cause searches; during consent searches, black men were 18% less likely to have illegal substances than their white counterparts).

In a separate study based on 4.5 million traffic stop records, Sharad Goel and other researchers at Stanford University found that 5.4% of black drivers were searched, compared to 3.1% of white drivers. *See* Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED STAT. 1193, 1206 (2017), https://5harad.com/papers/threshold-test.pdf (revealing that, in nearly every department, black and Hispanic drivers were subject to a lower threshold of suspicion than their white and Asian counterparts; statewide, the thresholds for searching white people were 15%, for Asian people 13%, for black people 7%, and for Hispanic people 6%).

124. *See* Richard A. Oppel, Jr., *Activists Wield Search Data to Challenge and Change Police Policy*, N.Y. TIMES (Nov. 20, 2014), https://www.nytimes.com/2014/11/21/us/activists-wield-search-data-to-challenge-and-change-police-policy.html. In 2015, the Southern Coalition for Social Justice published an interactive map on their website that allows a viewer to search the North Carolina stop data by police department. *See Open Data Policing*, S. COALITION SOC. JUST., https://opendatapolicingnc.com (last visited May 18, 2018).

125. *See* Tonya Maxwell, *In Traffic Stops, Disparity in Black and White*, ASHEVILLE CITIZEN-TIMES (Aug. 27, 2016, 2:34 PM), http://www.citizen-times.com/story/news/local/2016/08/27/traffic-stops-disparity-black-and-white/89096656/ (describing Simoiu et al., *supra* note 123).

found contraband only 21 percent of the time, compared with 27 percent of the time with whites."[126]

The collection, publication, and interpretation of traffic stop data fundamentally changed the conversation. Advocates claim that collecting data about race is the best way to gather tangible evidence of widespread unconscious bias toward minorities during police traffic stops.[127] Compared to case studies or anecdotal evidence of an individual who was harmed due to police brutality or over-policing, statistical evidence might persuade a wider range of people.[128]

The public discussion of data also changes internal management for police departments. When the police know that data analysts and reporters are watching them work, they work more carefully.[129] Where this transparency exists, reform advocates can target more precisely the local police practices that they suspect are most troubling. In some cases, the data will reveal no problems; in others, they might confirm for police leadership the factual basis for a complaint that once seemed amorphous or speculative.[130]

When the government collects and publishes data in a format that allows for comparisons between places, reports give the public and local police leaders a benchmark for police performance. One department that stands out from other law enforcement agencies across the state—either in a positive or negative way—can reflect on the reasons for those local differences. Similarly, data collected over time may identify trends, allowing police leaders to see in a concrete way whether a new policy is working.

In sum, the move from constitutional argument in the courtroom to political argument in the public arena loosened a stalemate on the question of police

126. *See* Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 25, 2015), http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html (city's driving population is 39% black; 54% of those pulled over were black); *see also* Matthew Kauffman, *Data: Minority Motorists Still Pulled Over, Ticketed at Higher Rates than Whites*, HARTFORD COURANT (Sept. 22, 2015, 7:02 PM), http://www.courant.com/news/connecticut/hc-racial-profiling-0923-20150922-story.html.

127. LORIE FRIDELL ET AL., RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE 116–17 (2001), http://fairandimpartialpolicing.com/docs/rbp-principled.pdf; *cf.* Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 129–31 (2016).

128. FRIDELL ET AL., *supra* note 127, at 128. For a discussion of methodology issues in these studies, see JOYCE MCMAHON ET AL., U.S. DEP'T JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVICES, HOW TO CORRECTLY COLLECT AND ANALYZE RACIAL PROFILING DATA: YOUR REPUTATION DEPENDS ON IT! 35 (2002), https://ric-zai-inc.com/Publications/cops-p044-pub.pdf (last visited May 18, 2018). Critics argue that unless the record of the stop includes very specific data points, down to the cross streets where the stop occurred (which in many cases is not a required data point), there is no record of which areas of the jurisdiction are facing the most police presence. The specific location of the stop, according to this argument, is necessary to put the stop into context.

129. Martin Kaste, *Police Are Learning to Accept Civilian Oversight, but Distrust Lingers*, NPR (Feb. 21, 2015, 10:18 AM), https://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers.

130. Sometimes, of course, police leaders offer benign interpretations of the data and deny any need for policy changes. *See* Joey Garrison, *Nashville Police Chief Slams Racial Profiling Report as 'Morally Disingenuous,'* TENNESSEAN (Mar. 7, 2017, 12:58 PM), https://www.tennessean.com/story/news/2017/03/07/nashville-police-chief-slams-racial-profiling-report-morally-disingenuous/98856754/.

traffic stops.[131] We believe that something similar can happen if government agencies collect and report jury selection data and if academics, advocates, and journalists step forward to interpret and publicize those data.[132]

B. The Effects of Sunshine Across Different Criminal Justice Areas

The transformative power of data, in our view, is not limited to traffic stops or jury selection. We place our proposal in the larger context of using transparency to change criminal justice practices for the better.

1. Use of Data to Regulate a Range of Actors

As Andrew Crespo has pointed out, the criminal courts already collect useful facts that remain hidden because they are scattered in single files or inaccessible formats.[133] An effort to assemble these facts in aggregate form could improve the courts' efforts to regulate the work of other criminal justice players, such as police and prosecutors.

Careful record-keeping and transparency regarding the collected data already contributes to accountability in diverse parts of the criminal justice system. In the context of correctional institutions, transparency of data has been instrumental in ensuring fair treatment of prisoners, as Alabama and other states' courts have held that their state open-record acts apply to prisoners.[134] While correctional institutions have been hesitant to comply, this requirement has shed light on prison deaths, suicides, beatings, and other prison conduct, hopefully holding these correctional institutions accountable and giving the legislature a chance to address misconduct.[135]

Similarly, experts have pushed for increased transparency in the context of officer-involved shootings, arguing that a lack of transparency surrounding

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131. As a result of the *New York Times* investigation in 2015, the Greensboro police chief ordered officers to refrain from stopping drivers for minor infractions involving vehicle flaws, which are stops that are subject to individual officer discretion and stops for which black people and Hispanic people were more likely to be pulled over. *See* Sharon LaFraniere, *Greensboro Puts Focus on Reducing Racial Bias*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/12/us/greensboro-puts-focus-on-reducing-racial-bias.html; Oppel, *supra* note 124.

> After having initially rejected protesters' demands, the city [of Durham, North Carolina] . . . agreed to require the police . . . to obtain written consent to search vehicles in cases where they do not have probable cause. . . . "Without the data, nothing would have happened," said Steve Schewel, a Durham City Council member . . . .

Oppel, *supra* note 124.

132. For an example of news coverage drawing on relevant, but limited, demographic information related to jury selection, see Pam Kelley & Gavin Off, *Wes Kerrick Jury Won't Mirror Mecklenburg's Diversity*, CHARLOTTE OBSERVER (July 27, 2015, 8:51 PM), http://www.charlotteobserver.com/news/local/crime/article29073877.html (comparing jury pool in the criminal trial of a police officer who shot a suspect with overall county population demographics).

133. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2109–10 (2016).

134. *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 460 (2011).

135. *Id.* at 458–63.

these incidents has impeded reform.[136] In a test of the reform power of data, President Obama signed the Death in Custody Reporting Act.[137] This law requires states and local law enforcement agencies that receive federal money to make quarterly reports about the deaths of any persons who are detained, arrested, or incarcerated.[138] The theory is that national data will help policymakers "identify not only dangerous trends and determine whether police use force disproportionately against minorities, but best practices, and thus ultimately develop policies that prevent more deaths."[139] The next few years might reveal whether this government-mandated reporting regime can produce more comprehensive results than the more decentralized efforts of newspapers and others in the private sector to build databases of police-involved shootings.[140]

2. *Internal Management Uses of Data*

The practical impact of jury selection data depends, in part, on how prosecutors, judges, court clerks, and others use the data once the information becomes available. These criminal justice professionals have the capacity to collect for themselves the jury selection statistics and to generate reports on the topic.[141] Managers in the prosecutor's office, the chief judge's chambers, or the clerk's office might be more open to the use of jury selection data if they were to collect the data themselves.

On the other hand, data collection mandated by statute, statewide regulation, or rule of procedure could produce more uniform results in different localities and allow for the sort of place-to-place comparisons that make it easier to diagnose local problems. For example, the Florida legislature recently passed a pathbreaking law that requires key criminal justice actors to collect and post criminal justice data in a format that will allow comparisons across localities.[142]

136. Mark Berman & Mark Guarino, *Chicago Releases 'Unprecedented' Evidence from Nearly 100 Investigations into Police Shootings, Use of Force*, WASH. POST (June 3, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/06/03/chicago-set-to-release-massive-trove-of-evidence-from-100-investigations-into-police-shootings-alleged-misconduct/?utm_term=.dc838ad9f343.

137. Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014).

138. *Id.* § 2(a).

139. *See* Kami Chavis Simmons, *No Way to Tell Without a National Database*, N.Y. TIMES: ROOM FOR DEBATE (July 13, 2016, 10:53 AM), https://www.nytimes.com/roomfordebate/2015/04/09/are-police-too-quick-to-use-force/no-way-to-tell-without-a-national-database.

140. *See* Geoffrey P. Alpert, *Toward a National Database of Officer-Involved Shootings: A Long and Winding Road*, 15 CRIMINOLOGY & PUB. POL'Y 237, 238–39 (2015); *2015 Washington Post Database of Police Shootings*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings/ (last visited May 18, 2018) (displaying police shooting data drawn from "news reports, public records, Internet databases and original reporting").

141. *See* Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1485, 1485 n.97 (2012) (collecting proposals that would require prosecutors to maintain jury selection statistics); Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. (forthcoming 2019) (proposing the use of standardized letters to disclose prosecutor discovery violations to affected parties).

142. *See* FLA. STAT. ANN. § 900.05(3), (4) (2018); John Kennedy, *Governor Signs Sweeping Court Data Collection*, SARASOTA HERALD-TRIBUNE (Mar. 30, 2018), www.heraldtribune.com/news/20180330/governor-signs-sweeping-court-data-collection.

A sense of professionalism among judges or prosecutors might motivate them to take data seriously when it shows a departure from the standard practices of their colleagues elsewhere in the state.[143] After learning about patterns in jury selection across many cases, they might change practices on their own initiative. For instance, accessible data might convince supervisors to train prosecutors to avoid racial bias during jury selection.

3. External Public Uses of Data

Internal management use of routine criminal justice data is only half the story. In the end, we look to public accountability—through the ballot box or other forms of democratic input into criminal justice practices[144]—to convert jury selection data and other comparable datasets into drivers of change.

The information visible to the public about how prosecutors and judges perform, compared to their peers, is historically thin.[145] That is starting to change. Private nonprofit organizations, such as Measures for Justice, are funding, collecting, and disseminating data that allow citizens to compare their local courts to others in the same state and elsewhere.[146] Data such as this could make it possible to evaluate practices across time and across places. When news reporters, advocates, academics, and analysts interpret that data for the general public, the data could shift public priorities. It could create more informed accountability in a world where criminal court professionals get very little feedback from the communities they serve.

We do not claim to know how voters will ultimately react when these data about the criminal courts become accessible to them. It is possible that in some places, the most politically engaged members of the community will not care about jury selection; they might even resist the idea of expanding jury participation to include every population group. But local variety is built into the

143. *See* Sidney Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 587–90 (2011) (analyzing the restraining power of professional norms in bureaucracies such as prosecutor's offices).

144. *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1621 (2017); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014).

145. *See* Russell M. Gold, *"Clientless" Prosecutors*, 51 GA. L. REV. 693, 701 (2017); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 776–77 (2017); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 594 (2014). For a remarkable recent example of a prosecutor committing to regular release to the public of its own statistics about charging decisions, see Tanveer Ali, *Cook County Felony Weapon Cases Up 43 Percent in 2017, Data Shows*, CHI. SUN-TIMES (Feb. 21, 2018, 3:24 PM), https://chicago.suntimes.com/
news/felony-weapon-cases-up-43-percent-in-2017-county-data-shows (reporting change in office practices based on data set that Cook County prosecutor released voluntarily).

146. *See Overview*, MEASURES FOR JUSTICE, https://measuresforjustice.org/about/overview/ (last visited May 18, 2018); Amy Ellis, *MacArthur Foundation Awards FIU $1.7 Million to Study Prosecutor Behavior*, FIU NEWS (Mar. 9, 2018, 10:26 AM), https://news.fiu.edu/2018/03/macarthur-foundation-awards-fiu-1-7-million-to-study-prosecutor-behavior/120350.

criminal justice systems in the United States.[147] Voters and engaged community groups in most places, we hope, will value inclusive practices in their criminal courts and will expect their agents, operating in the sunshine, to deliver the results.

VII. CONCLUSION

The fulcrum that could move jury practices sits in the office of the clerk of the court. Public employees in those offices already collect some basic background facts about prospective jurors and record the decisions by judges, prosecutors, and defense attorneys to remove jurors or to keep them. And if the clerk's office is the fulcrum, the lever to shift the entire jury selection process in the direction of greater inclusion will be public records laws, embodied in state statutes, local court rules, and office policies.

It is startling that public courts, in an age when electronic information surrounds us on all sides, make it so difficult to track jury selection practices across different cases. It should not require hundreds of miles of driving between courthouses; access to the data should not depend on special requests for judicial approval.[148] Information about the performance of public servants in the criminal courts, in aggregate form, would be easy to collect and to publish. Jury selection goes to the heart of public participation in criminal justice: this is precisely where the sun needs to shine first.

147. *See* Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199, 1200 (2013). *But cf.* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973 (2008) (describing decline of local influence in last half of twentieth century).

148. Careful disclosure policies can protect the legitimate privacy interests of jurors without requiring case-by-case judicial approval of jury selection information. *See* Grosso & O'Brien, *supra* note 37, at 667–68; Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 152 (1996).

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Daniel R. Pollitt

Brittany P. Warren

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THIRTY YEARS OF DISAPPOINTMENT: NORTH CAROLINA'S REMARKABLE APPELLATE *BATSON* RECORD*

DANIEL R. POLLITT** & BRITTANY P. WARREN***

On April 30, 1986, the United States Supreme Court handed down its decision in Batson v. Kentucky. *The opinion reiterated that the Equal Protection Clause of the Fourteenth Amendment prohibits the exercise of peremptory strikes on the basis of race during jury selection. The Court provided what is now a familiar three-step framework for determining whether purposeful discrimination against minority jurors has occurred. Since its decision in* Batson*, the Supreme Court has continued to explore issues arising within this framework and has offered further guidance in adjudicating* Batson *claims.*

Our research examines North Carolina's disappointing Batson *record in the thirty years since the decision was handed down. In the 114 cases decided on the merits by North Carolina appellate courts, the courts have never found a substantive* Batson *violation where a prosecutor has articulated a reason for the peremptory challenge of a minority juror. In all of the seventy-four cases decided by the Supreme Court of North Carolina during that time, that court has never once found a substantive* Batson *violation. In contrast, over the past thirty years every state appellate court located in the Fourth Circuit has found at least one substantive* Batson *violation where the State struck a minority juror. North Carolina's remarkable record is even more disappointing in the light of recent studies finding the existence of*

* © 2016 Daniel R. Pollitt & Brittany P. Warren.

** J.D., University of North Carolina School of Law, 1980. Daniel R. Pollitt worked at North Carolina's Office of the Appellate Defender for over twenty-five years, representing indigent criminal defendants in their state court appeals. His cases often involved *Batson* and other civil and human rights issues, such as racial discrimination in grand jury foreperson selection and the minimum age of death penalty eligibility.

*** J.D., Valparaiso Law School, 2014; B.A., University of Illinois Urbana-Champaign, 2009. Brittany P. Warren is licensed to practice law in North Carolina and Missouri. She served as a Magistrate in Guilford County, North Carolina from 2015 to 2016. Thank you to the staff at The Center for Death Penalty Litigation who provided me with the initial opportunity to collaborate with Dan on this very important topic.

pervasive prosecutorial racial discrimination in North Carolina jury selection.

In an attempt to explain this record, this Article maintains that North Carolina courts misapply Batson *jurisprudence in several important ways, namely at the first and third step of the framework. This article concludes that North Carolina courts should implement a correct application of* Batson*'s principles in order to provide minority defendants a fair shot at eliminating racial discrimination in jury selection at trial.*

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INTRODUCTION

In light of the recent thirtieth anniversary of the United States Supreme Court's decision in *Batson v. Kentucky*,[1] decided April 30, 1986, it seems appropriate to pause and consider the record compiled by the North Carolina appellate courts over the last thirty years in adjudicating *Batson* claims.[2] Briefly, that record is remarkable and disappointing: North Carolina's highest court has never once in those thirty years found a substantive *Batson* violation.[3] As other courts have observed, "[s]tatistics are not, of course, the whole answer, but nothing is as emphatic as zero."[4]

In *Batson*, the Supreme Court reaffirmed that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from exercising peremptory challenges against potential jurors on the basis of race.[5] In its earlier

1. 476 U.S. 79 (1986).

2. This analysis seems especially timely in light of the United States Supreme Court's recent decision in Foster v. Chatman, where the Court reaffirmed and applied *Batson* to reverse the Georgia Supreme Court and find a *Batson* violation. Foster v. Chatman, 136 S. Ct. 1737, 1747–55 (2016).

3. A "substantive *Batson* violation" refers here to an appellate court's holding that the State has engaged in purposeful racial discrimination in the exercise of peremptory challenges against minority jurors.

4. *E.g.*, United States v. Hinds Cty. Sch. Bd., 417 F.2d 852, 858 (5th Cir. 1969).

5. *Batson*, 476 U.S. at 84–86 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)); *see also* Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 370 (1881).

decision in *Swain v. Alabama*,[6] however, the Court had held that a criminal defendant could not prove such discrimination absent a showing of systematic and repeated discrimination "in case after case, whatever the circumstances."[7] The *Batson* Court overruled *Swain* on this point, reasoning that *Swain* had "placed on defendants a crippling burden of proof" and made "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny."[8] To replace *Swain*, the *Batson* Court established a three-step framework for determining whether the State engaged in purposeful racial discrimination against minority jurors in the exercise of peremptory challenges at one particular criminal trial.[9] That thirty-year-old framework is now familiar: first, the defendant must establish a prima facie case by showing that the circumstances at trial raise an inference of discrimination; second, if the defendant succeeds, the burden shifts to the State to offer a race-neutral reason for the peremptory challenge; and third, if the State succeeds, the court must then determine if the defendant has met his or her ultimate burden of proving purposeful discrimination.[10] In several post-*Batson* decisions, discussed in some detail below, the Supreme Court has addressed legal issues raised within the basic *Batson* framework, such as the degree of proof necessary to establish a prima facie case and the importance of comparative juror analysis.[11]

Part I sets forth the record compiled by the North Carolina appellate courts in *Batson* cases over the last thirty years. Part II then contrasts that record to the findings in a recent academic study of state prosecutors' peremptory challenges. Part III demonstrates how that record is the result of state court misapplications of United States Supreme Court *Batson* jurisprudence, and Part IV compares that record to the *Batson* records in North Carolina's neighboring states. To conclude, this Article suggests that North Carolina appellate courts begin correctly applying the *Batson* framework and jurisprudence so as to provide a fair chance to eliminate a species of racial discrimination in our state.

6. 380 U.S. 202 (1965).
7. *Id.* at 223; *see Batson*, 476 U.S. at 91–92.
8. *Batson*, 476 U.S. at 92–93.
9. *Id.* at 96–98.
10. *Id.*
11. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 240–66 (2005) (observing that "[t]he numbers" describing the State's use of peremptory challenges in that case were "remarkable").

I. THE APPELLATE *BATSON* RECORD IN NORTH CAROLINA

Since 1986, and as of September 6, 2016,[12] the Supreme Court of North Carolina has decided seventy-four cases on the merits in which it adjudicated eighty-one *Batson* claims raised by criminal defendants over alleged racial discrimination against minority jurors in the State's exercise of peremptory challenges at criminal trials.[13] To date, that court has not found a substantive *Batson* violation in any of those cases.[14] In seventy-one of those seventy-four cases, that court found no *Batson* error whatsoever.[15] In the three remaining cases, that court held the trial court erred at *Batson*'s first step in finding no prima facie case existed and conducted or ordered further review.[16] However, none of these three cases has ultimately resulted in the holding of a substantive *Batson* violation.[17]

Since 1986, the North Carolina Court of Appeals has decided forty-two cases in which it has adjudicated forty-three *Batson* claims on the merits, also involving many more jurors than claims.[18] In thirty-seven of those forty-two cases, that court found no *Batson* error whatsoever.[19] In two cases, the court found the defendant had established a prima facie case at *Batson*'s first step and remanded for consideration at *Batson*'s third step, but neither case ultimately

12. The North Carolina appellate courts' last decision day before this Article's print date.

13. *See infra* Addendum, Table 1. The claims involved far more than eighty jurors. In a few cases, the court has adjudicated two different claims in one case; for example, the court may find no *Batson* error at step one as to some jurors and no *Batson* violation at step three as to other jurors. *See, e.g.*, State v. Locklear, 349 N.C. 118, 138–40, 505 S.E.2d 277, 288–90 (1998). Please note that this analysis includes only published decisions. Unpublished decisions do not reveal any additional grants of *Batson* relief. The North Carolina Court of Appeals' decision finding a prima facie case in *State v. Quick*, 116 N.C. App. 362, 448 S.E.2d 149 (1994), was both unpublished and reversed on further review by the Supreme Court of North Carolina. State v. Quick, 341 N.C. 141, 146, 462 S.E.2d 186, 190 (1995); *see infra* notes 45, 82–85 and accompanying text.

14. *See infra* Addendum, Table 1.

15. *See infra* Addendum, Table 1.

16. State v. Barden, 356 N.C. 316, 342–45, 572 S.E.2d 108, 126–28 (2002); State v. Hoffman, 348 N.C. 548, 553–55, 500 S.E.2d 718, 722–23 (1998); State v. Smith, 328 N.C. 99, 123–27, 400 S.E.2d 712, 725–28 (1991). *Barden* was remanded for consideration at *Batson*'s third step and litigation is currently ongoing. *See* State v. Barden, 362 N.C. 277, 280, 658 S.E.2d 654, 655 (2008). On remand in *Hoffman*, the trial judge held there was no purposeful discrimination at *Batson*'s third step, and the Supreme Court of North Carolina affirmed on further appeal. State v. Hoffman, 349 N.C. 167, 173, 505 S.E.2d 80, 84 (1998). Finally, in *Smith*, the Supreme Court of North Carolina itself found no purposeful discrimination at *Batson*'s third step. *Smith*, 328 N.C. at 123–27, 400 S.E.2d at 725–28.

17. *Barden*, 356 N.C. at 342–45, 572 S.E.2d at 126–28; *Hoffman*, 349 N.C. at 167, 505 S.E.2d at 84; *Smith*, 328 N.C. at 126–127, 400 S.E.2d at 725–28.

18. *See infra* Addendum, Table 2.

19. *See infra* Addendum, Table 2.

resulted in the finding of a substantive *Batson* violation.[20] To date, that court has found a substantive *Batson* violation involving minority jurors in only one case, which involved very unusual facts.[21] In *State v. Wright*,[22] the defendant objected to the challenge of seven black jurors; the prosecutor stated reasons for striking five of the jurors, but did not state any specific reason for striking the other two.[23] On appeal, the court observed that unlike all other previous North Carolina *Batson* cases, where prosecutors had provided reasons for "each and every" strike, the *Wright* prosecutor "had not even offered any explanation as to two jurors" or "specifically mentioned" the two jurors "at all."[24] The court held that in the absence of any stated reason for the strikes, "it follows that the peremptory challenges [were] not allowed."[25]

Two of the North Carolina Court of Appeals' forty-two cases involve successful "reverse *Batson*" claims where the court found purposeful discrimination against white jurors challenged by black defendants.[26] In *State v. Cofield*,[27] the defendant challenged four of six white jurors.[28] The trial judge allowed one strike but found a prima facie case as to the other three.[29] Although the defendant gave many demeanor- and non-demeanor-based reasons for his strikes, the trial judge held that all of those reasons were pretext and required the three jurors to serve.[30] On appeal, the court held the 66% "strike rate" established a prima facie case and relied on comparative juror analysis to uphold the finding of a reverse *Batson* violation.[31] In *State v. Hurd*,[32] the black defendant challenged a white juror who, when

20. State v. McCord, 140 N.C. App. 634, 653–54, 538 S.E.2d 630, 645–46 (2000); State v. Hall, 104 N.C. App. 375, 381–84, 410 S.E.2d 76, 79–81 (1991). On remand in these two cases the trial courts found no purposeful discrimination and those holdings were affirmed on appeal. State v. McCord, 158 N.C. App. 693, 696–99, 582 S.E.2d 33, 35–37 (2003); State v. Sessoms, 119 N.C. App. 1, 4–7, 458 S.E.2d 200, 202–04 (1995).

21. *See* State v. Wright, 189 N.C. App. 346, 352–54, 658 S.E.2d 60, 64–65 (2008).

22. 189 N.C. App. 346, 658 S.E.2d 60 (2008).

23. *Id.* at 352–53, 658 S.E.2d at 64–65.

24. *Id.* at 352–54, 658 S.E.2d at 64–65.

25. *See id.* at 351–54, 658 S.E.2d at 63–65 (quoting State v. Cofield, 129 N.C. App. 268, 275, 498 S.E.2d 823, 828 (1998)).

26. *See* State v. Hurd, __ N.C. App. __, __, 784 S.E.2d 528, 536 (2016); State v. Cofield, 129 N.C. App. 268, 280, 498 S.E.2d 823, 831 (1998). When reviewing these and all other *Batson* claims discussed in this Article, the North Carolina appellate courts review the trial court's ruling for clear error rather than conducting a de novo review of the claim.

27. 129 N.C. App. 268, 498 S.E.2d 823 (1998).

28. *Cofield*, 129 N.C. App. at 277, 498 S.E.2d at 830.

29. *Id.* at 272, 498 S.E.2d at 827.

30. *Id.* at 270–73, 498 S.E.2d at 826–28.

31. *See id.* at 277–80, 498 S.E.2d at 830–32.

32. __ N.C. App. __, __, 784 S.E.2d 528 (2016).

asked on voir dire about the death penalty, stated "I would say before I came here I ha[d] no problem"; "I think that's what we need to be done";"I don't like the fact that someone's life [is] being taken"; and "there's a punishment for a crime."[33] Upon the State's *Batson* objection, the defendant stated two race-neutral reasons for the strike: the juror's pro-death penalty statements and his own subjective feeling the juror was "in favor of capital punishment as a matter of disposition."[34] The trial court engaged in extensive comparative juror analysis, concluded the defendant's stated reasons were "pretextual," and disallowed the challenge.[35] On appeal, the court engaged in comparative juror analysis, comparing the voir dire answers regarding the death penalty of the challenged white juror and another unchallenged "Asian/Black" juror, and upheld the finding of a reverse *Batson* violation.[36]

In light of North Carolina's history of racial discrimination in criminal justice,[37] it is indeed disturbing that two "reverse *Batson*" cases involving black defendants' challenges of white jurors are the only cases in North Carolina appellate history finding substantive *Batson* violations where attorneys have provided reasons for strikes. In sum, in all the 114 North Carolina appellate *Batson* cases involving minority jurors decided on the merits since 1986, the courts have never found a substantive *Batson* violation where a prosecutor has managed to articulate even one reason, however fantastic, for the peremptory challenge.

II. THE MICHIGAN STATE UNIVERSITY STUDY

North Carolina's remarkable appellate *Batson* record, including its Supreme Court's record of not finding a single substantive *Batson* violation in thirty years, might lead one to conclude that racial discrimination in North Carolina jury selection is a thing of the past. However, recent academic studies show that this conclusion is simply not true. In 2011, researchers at Michigan State University College of Law conducted a comprehensive study of over 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried

33. *Id.* at __, 784 S.E.2d at 531–32.
34. *See id.* at __, 784 S.E.2d at 532.
35. *Id.* at __, 784 S.E.2d at 532–33.
36. *Id.* at __, 784 S.E.2d at 531–32, 536–37.
37. *See generally* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and The Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, (2010) (examining the impact of racial bias on the imposition of the death penalty in North Carolina and the implications of the Racial Justice Act).

between 1990 and 2010.[38] The study showed prosecutors struck 52.6% of eligible black jurors and only 25.7% of all other eligible jurors in those capital trials.[39] The probability of this disparity occurring in race-neutral jury selection is less than one in ten trillion.[40] This disparity was significantly greater in cases involving black defendants, where the average strike rate of eligible black jurors was 60%.[41] After adjusting for race-neutral characteristics, researchers found prosecutors struck black jurors at 2.48 times the rate they struck all other jurors.[42] As one commentator has noted with regard to the state's use of peremptory strikes in North Carolina criminal trials, "[t]he impact of race is neither theoretical nor minor, but real and substantial,"[43] and discriminatory peremptory strikes continue to be a powerful mechanism for exclusion of black jurors from participation in the criminal justice system.[44]

III. NORTH CAROLINA'S MISAPPLICATIONS OF UNITED STATES SUPREME COURT *BATSON* JURISPRUDENCE

An analysis of North Carolina's appellate *Batson* record begs the question: why is this record so remarkable and disappointing? The most likely answer is that North Carolina courts routinely misapply United States Supreme Court *Batson* jurisprudence, most notably at steps one and three of the *Batson* framework.

38. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1542–43 (2012) (reporting on the study).

39. *Id.* at 1548.

40. NORTH CAROLINA RACIAL JUSTICE ACT JURY SELECTION STUDY 22 (2010); Order Granting Motion for Appropriate Relief at 58, State v. Robinson, 91-CRS-23143 (N.C. Super. Ct. Apr. 20, 2012), http://www.deathpenaltyinfo.org/documents/RobinsonRJAOrder.pdf [https://perma.cc/A3P4-J7A2].

41. Grosso & O'Brien, *supra* note 38, at 1549–50.

42. *Id.* at 1553.

43. Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 132–34 (2012).

44. Preliminary findings from a study of jury selection in all non-capital North Carolina felony trials from 2011–2012, involving 22,000 potential jurors, conducted by Wake Forest University School of Law professors "indicate that prosecutors strike non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck 16 percent of non-white potential jurors, while they struck only 8 percent of white potential jurors." Kami Chavis, *The Supreme Court Didn't Fix Racist Jury Selection: Timothy Foster Got Justice, But Prosecutors Still Have Wide Leeway to Exclude Black Jurors*, THE NATION (May 31, 2016), https://www.thenation.com/article/the-supreme-court-didnt-fix-racist-jury-selection/ [https://perma.cc/2MUH-QYNS].

A. *Misapplications at* Batson*'s Step One*

Of the Supreme Court of North Carolina's seventy-four *Batson* cases, thirty-four contain adjudications at *Batson*'s first step.[45] In thirty-two of those thirty-four cases, that court wholly or in part denied the claim on the ground that the defendant failed to establish a prima facie case.[46] Indeed, in one of those thirty-two cases, that court reversed a decision of the North Carolina Court of Appeals finding a prima facie case.[47] Overall, the Supreme Court of North Carolina has found a prima facie case in whole or in part in only three of the thirty-four cases it reviewed.[48] The record in the North Carolina Court of Appeals is equally remarkable. In fourteen of the sixteen cases raising issues at *Batson*'s first step that court denied relief on the ground that the defendant failed to establish a prima facie case.[49]

North Carolina appellate courts misapply the law in many ways as they review *Batson* claims at the step one prima facie case stage, including: (1) failing to give meaningful weight to the relevant prima facie case circumstance of a pattern of strikes against prospective minority jurors; (2) giving considerable weight to imagined and unarticulated possible reasons for strikes gleaned from juror voir dire responses; and (3) imposing a far too onerous burden of proof on defendants at *Batson*'s first step.

1. Failure to Give Weight to a Pattern of Strikes

In *Batson*, the Court held that "a 'pattern' of strikes against black jurors included in the particular venire" is an important relevant circumstance that itself could "give rise to an inference of

45. *See infra* Addendum, Table 1 & 3; *see also* State v. Barden, 356 N.C. 316, 342–45, 572 S.E.2d 108, 126–28 (2002); State v. Smith, 328 N.C. 99, 123–27, 400 S.E.2d 712, 725–28 (1991).

46. *See infra* Addendum, Table 3. The Supreme Court of North Carolina reviews race-based and gender-based discrimination claims under the same general framework, and in two cases that court has denied gender-based discrimination claims on the ground the defendant did not establish a prima facie case. State v. Call, 349 N.C. 382, 403–04, 508 S.E.2d 496, 510 (1998); State v. Bates, 343 N.C. 564, 595–97, 473 S.E.2d 269, 286–87 (1996).

47. State v. Quick, 341 N.C. 141, 145–46, 462 S.E.2d 186, 189–90 (1995). Justices Frye and Webb dissented in *Quick*, arguing the court was unwilling to draw the line on *Batson*. *Id.* at 147, 462 S.E.2d at 190 (Frye, J., dissenting).

48. *See* cases cited *supra* note 16. In *Hoffman*, the court denied the claim at step one as to some jurors and allowed the claim at step one as to others. State v. Hoffman, 348 N.C. 548, 551–55, 500 S.E.2d 718, 720–23 (1998).

49. *See infra* Addendum, Table 4; *see also* State v. McCord, 140 N.C. App. 634, 653–54, 538 S.E.2d 630, 645–46 (2000); State v. Hall, 104 N.C. App. 375, 381–84, 410 S.E.2d 76, 79–81 (1991).

discrimination."[50] Misapplying *Batson*, in at least eighteen cases involving more than one peremptory challenge,[51] the Supreme Court of North Carolina has failed to find error in trial court determinations finding no prima facie case even though the prosecutor struck 50% or more of minority jurors in the tendered qualified pool.[52] In two cases, that court refused to find a prima facie case when the prosecutor struck 100% of the minority jurors tendered.[53] In four cases, the court refused to find a prima facie case when the prosecutor struck or attempted to strike 69% or more of qualified minority jurors.[54] In an additional six cases, the court refused to find a prima facie case when the prosecutor's strike rate of minority jurors was 60% or higher.[55] In two other cases, the court refused to find a prima facie case when the prosecutor's strike rate was higher than 50%.[56]

Finally, in four cases, the court refused to find a prima facie case when the strike rate was 50%.[57] The North Carolina Court of Appeals has similarly refused to find prima facie cases when prosecutors have

50. Batson v. Kentucky, 476 U.S. 79, 96–97 (1986).

51. Approximately ten of the thirty-four cases involve only one strike. *See infra* Addendum, Table 3.

52. *See* cases cited *infra* notes 51–55.

53. State v. Chapman, 359 N.C. 328, 342–43, 611 S.E.2d 794, 807–08 (2005) (three of three, 100%); State v. Williams, 343 N.C. 345, 357–60, 471 S.E.2d 379, 385–87 (1996) (two of two, 100%).

54. State v. Fletcher, 348 N.C. 292, 318–20, 500 S.E.2d 668, 683–84 (1998) (three of four challenged when juror Hudson struck, 75%; four of five challenged when juror Watkins struck, 80%); State v. Beach, 333 N.C. 733, 740–41, 430 S.E.2d 248, 252 (1993) (nine of thirteen, 69%); State v. Davis, 325 N.C. 607, 618–19, 386 S.E.2d 418, 423 (1989) (eight of eleven, 73%); State v. Robbins, 319 N.C. 465, 491–92, 356 S.E.2d 279, 295 (1987) (seven of nine, 78%).

55. State v. Maness, 363 N.C. 261, 275–76, 677 S.E.2d 796, 805–06 (2009) (five of eight challenged when juror Simmons struck, 63%); State v. Taylor, 362 N.C. 514, 528–29, 669 S.E.2d 239, 254–55 (2008) (three of five, 60%); State v. Locklear, 349 N.C. 118, 137–41, 505 S.E.2d 277, 288–90 (1998) (two of three challenged when juror Cummings struck, 67%); State v. Hoffman, 348 N.C. 548, 550–53, 500 S.E.2d 718, 720–22 (1998) (two of three challenged when juror Cox struck, 67%); State v. Gregory, 340 N.C. 365, 398–99, 459 S.E.2d 638, 657 (1995) (five of eight, 63%); State v. Abbott, 320 N.C. 475, 480–82, 358 S.E.2d 365, 369–70 (1987) (three of five, 60%).

56. State v. Smith, 351 N.C. 251, 262–63, 524 S.E.2d 28, 37–38 (2000) (six of eleven, 55%); State v. Allen, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988), *vacated on other grounds*, 494 U.S. 1021 (1990) (ten of seventeen, 59%).

57. State v. Nicholson, 355 N.C. 1, 24–25, 558 S.E.2d 109, 127 (2002) (four of eight, 50%); State v. Norwood, 344 N.C. 511, 527, 476 S.E.2d 349, 355 (1996) (one of two, 50%); State v. Quick, 341 N.C. 141, 145–46, 462 S.E.2d 186, 189–90 (1995) (two of four, 50%); State v. Belton, 318 N.C. 141, 153–60, 347 S.E.2d 755, 762–64 (1986) (six of twelve, 50%, although this case was decided under the Sixth Amendment's impartial jury guarantee rather than *Batson* because the jury selection took place before *Batson* was rendered).

struck 80%,[58] 75%,[59] 71%,[60] and 50%[61] of qualified minority jurors. The repeated failure to find a prima facie case of discrimination where the record shows a pattern of striking 50% or more of qualified minority jurors shows the North Carolina appellate courts give little to no weight to the "pattern of strikes" circumstance in adjudicating claims under *Batson*'s first step, except perhaps when the challenged jurors are white.[62] Indeed, in a perversion of *Batson*, the Supreme Court of North Carolina frequently asserts that a strike rate of 57.2% is "some evidence that there was no discriminatory intent"[63] and routinely cites cases with strike rates of over 50% as "tend[ing] to refute an allegation of discrimination."[64]

2. Imagining Reasons for Strikes

In determining whether a defendant has established a prima facie case under *Batson*, the North Carolina appellate courts consistently conjure race-neutral reasons for strikes gleaned from juror voir dire responses and then impute those imagined reasons to the prosecutor or judge who never articulated them. In *Miller-El v. Dretke*,[65] commonly referred to as *Miller-El II*, the United States Supreme Court condemned this practice, stating that "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis" for

58. *See* State v. Cherry, 141 N.C. App. 642, 647–48, 541 S.E.2d 205, 208 (2000) (twelve of fifteen, 80%).

59. *See* State v. Mills, 225 N.C. App. 773, 780, 741 S.E.2d 427, 431–32 (2013) (three of four, 75%).

60. *See* State v. Carmon, 169 N.C. App. 750, 756, 611 S.E.2d 211, 215 (2005) (five of seven, 71%).

61. *See, e.g.*, State v. Moore, 167 N.C. App. 495, 500, 606 S.E.2d 127, 130 (2004) (two of four, 50%); State v. Robinson, 97 N.C. App. 597, 600, 389 S.E.2d 417, 420 (1990) (three of six, 50%); State v. McNeill, 99 N.C. App. 235, 241, 393 S.E.2d 123, 126 (1990) (four of eight, 50%); State v. Batts, 93 N.C. App. 404, 409, 378 S.E.2d 211, 213 (1989) (two of four, 50%).

62. In the "reverse *Batson*" case of *State v. Cofield*, where the challenged jurors were white, the Court of Appeals held striking four of six jurors, or 67%, "reveal[ed] a 'pattern of strikes' against Caucasian jurors" supporting a prima facie case of discrimination under *Batson*. State v. Cofield, 129 N.C. App. 268, 277, 498 S.E.2d 823, 830 (1998); *see supra* text accompanying notes 26–31. As displayed above, it is disturbing that in at least eleven cases a 67% or higher strike rate against minority jurors did *not* reveal a legally significant "pattern of strikes" or raise a prima facie case of discrimination. *See supra* text accompanying notes 53–55, 58–60.

63. *See* State v. Smith, 328 N.C. 99, 121, 400 S.E.2d 712, 725 (1991) (twelve of twenty-one, citing an acceptance rate of 42.8%); *see also* State v. Spruill, 338 N.C. 612, 632, 452 S.E.2d 279, 289 (1994).

64. *See, e.g.*, State v. Taylor, 362 N.C. 514, 529, 669 S.E.2d 239, 255 (2008); State v. Ross, 338 N.C. 280, 285, 449 S.E.2d 556, 561 (1994).

65. 545 U.S. 231 (2005).

a strike, and criticizing lower courts for "imagin[ing] . . . reason[s] that might not have been shown up as false."[66]

Misapplying this principle, North Carolina appellate courts routinely conjure possible legitimate reasons for strikes from juror responses during voir dire and then rely on those reasons to uphold the finding of no prima facie case. For example, in *State v. Nicholson*,[67] the prosecutor struck two jurors without stating a reason.[68] On appeal, the Supreme Court of North Carolina relied on reasons not stated by the prosecutor—the two jurors expressed reservations about imposing the death penalty on voir dire—to find a prima facie showing had not been made, stating that "[t]he responses of these prospective jurors . . . are relevant to a determination of whether defendant has made a prima facie showing."[69] In *State v. Chapman*,[70] the appellate court expressed similar sentiments when considering a juror's expressed death penalty reservations and another juror's family criminal history to find that a prima facie case had not been made because these responses "provided obvious non-racial reasons for peremptory challenge."[71] In at least seventeen of its thirty-two cases finding no prima facie case, the Supreme Court of North Carolina has relied on a reason it itself had conjured from the voir dire to end the *Batson* inquiry at step one.[72] In eight of its fourteen cases finding no prima facie case, the North Carolina Court of Appeals has done the same.[73] This practice is error according to the framework provided by the United States Supreme Court.[74]

66. *Id.* at 250–52.

67. 355 N.C. 1, 558 S.E.2d 109 (2002).

68. *See id.* at 22–23, 558 S.E.2d at 125–26.

69. *Id.* at 23, 558 S.E.2d at 126.

70. 359 N.C. 328, 611 S.E.2d 794 (2005).

71. *Id.* at 343, 611 S.E.2d at 808; *see also* State v. Hoffman, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998) (finding no prima facie case because a struck juror's response indicated a connection to defense counsel and for that reason "the State may have feared a bias in favor of defendant").

72. *See infra* Addendum, Table 5. In the cases listed in Addendum, Tables 5 and 6, the reasons cited by the appellate court were not proffered by the respective prosecutors. Rather, the courts themselves drew inferences from juror voir dire testimony in the record.

73. *See infra* Addendum, Table 6.

74. *See* Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1551–56 (1991).

3. Imposing an Excessive Burden of Proof

In *Johnson v. California*,[75] the United States Supreme Court held that it is not necessary to fully prove the existence of purposeful discrimination or even show discrimination "more likely than not" occurred in order to establish a prima facie case under *Batson*.[76] Instead, the *Johnson* Court indicated that the burden of proof was far less onerous and held that "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."[77]

In misapplication of *Johnson*, the North Carolina appellate courts apply a crippling, virtually undefined,[78] and far too onerous burden of proof on defendants at *Batson*'s step one. North Carolina appellate decisions refusing to find a prima facie case where defendants have clearly produced evidence "sufficient to permit the . . . draw[ing] [of] an inference that discrimination has occurred" demonstrate the burden of proof applied at *Batson*'s first step is far too strict.[79] For example, in *State v. Chapman*,[80] the Supreme Court did not find a prima facie case where the prosecutor struck all three qualified minority jurors for a 100% minority strike rate, and the ultimate all-white jury sentenced the black defendant to death.[81] Similarly, in *State v. Robbins*,[82] the court did not find a prima facie case where the prosecutor struck 78% of qualified minority jurors and used more peremptory challenges on minority than white jurors to produce an all-white jury that sentenced the black defendant to death.[83]

In *State v. Quick*,[84] the prosecutor struck 50% of qualified minority jurors and no white jurors in a case involving a black

75. 545 U.S. 162 (2005).
76. *Id.* at 170.
77. *Id.*
78. Usually, the Supreme Court of North Carolina does not define the burden of proof it imposes in order to establish a prima facie case under *Batson*. Often, the court simply states a defendant "must make a prima facie showing." *See, e.g.*, State v. Taylor, 362 N.C. 514, 527, 669 S.E.2d 239, 254 (2008), *cert. denied*, 558 U.S. 581 (2009). Sometimes, the court overstates the necessary showing. *See, e.g.*, State v. Locklear, 349 N.C. 118, 136, 505 S.E.2d 277, 287 (1998) (requiring the defendant show that "racial discrimination appears to have been the motivation for the challenges" (quoting State v. Porter, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990))).
79. *Johnson*, 545 U.S. at 170.
80. 359 N.C. 328, 611 S.E.2d 794 (2005).
81. *Id.* at 342, 611 S.E.2d at 807.
82. 319 N.C. 465, 356 S.E.2d 279 (1987).
83. *Id.* at 490–92, 356 S.E.2d at 294–95 (seven of nine, 78%).
84. 341 N.C. 141, 462 S.E.2d 186 (1995).

defendant.[85] On initial appeal, the North Carolina Court of Appeals found a prima facie case and remanded.[86] However, on further appeal, the Supreme Court of North Carolina reversed, holding that there was not sufficient evidence of a prima facie case and no *Batson* error.[87] In *State v. Gregory*,[88] the court did not find a prima facie case where the prosecutor struck 62.5% of qualified minority jurors and used half of the State's peremptory challenges against minority jurors, and the black defendant was sentenced to death.[89] Similarly, in *State v. Davis*,[90] the court did not find a prima facie case where the prosecutor struck 73% of qualified minority jurors and used more than half of the State's peremptory challenges against minority jurors, and the black defendant was sentenced to death.[91]

To be sure, the Supreme Court of North Carolina occasionally states that "a prima facie showing . . . is not intended to be a high hurdle for defendants to cross."[92] However, that court's actions, discussed above, speak much louder than those words. Since 1986, the North Carolina appellate courts have made a total of fifty-one adjudications at *Batson*'s step one in cases involving minority jurors and found only five prima facie cases.[93] This 10% prima facie case finding rate belies the "not intended to be a high hurdle" language and reveals that, in fact, the North Carolina appellate courts have

85. *Id.* at 143, 146, 462 S.E.2d at 188–89.

86. *Id.* at 143, 462 S.E.2d at 187–88 (two of four, 50%).

87. *Id.* at 142–47, 462 S.E.2d at 187–90.

88. 340 N.C. 365, 459 S.E.2d 638 (1995).

89. *See id.* at 398–99, 459 S.E.2d at 657 (five of eight, 62.5%).

90. 325 N.C. 607, 386 S.E.2d 418 (1989).

91. *Id.* at 618–19, 386 S.E.2d at 423 (eight of eleven, 73%); *see also* State v. Taylor, 362 N.C. 514, 529, 669 S.E.2d 239, 255 (2008) (refusing to find a prima facie case where the prosecutor struck three of five, or 60%, of qualified minority jurors and only two minority jurors sat on the ultimate jury); State v. Carmon, 169 N.C. App. 750, 756, 611 S.E.2d 211, 215 (2003) (holding the same where the prosecutor struck five of seven, or 71%, of minority jurors and used all of the State's peremptory challenges against minority jurors); State v. Fletcher, 348 N.C. 292, 319–20, 500 S.E.2d 668, 684 (1998) (holding the same where the prosecutor had challenged three of four, or 75%, of minority jurors at one point, and 80% at a later point, even though an earlier challenge had been denied); State v. Beach, 333 N.C. 733, 736–41, 430 S.E.2d 248, 250–52 (1993) (holding the same where the prosecutor struck nine of thirteen, or 69%, of qualified minority jurors and used 75% of the State's peremptory challenges to exclude minority jurors, and where only two minority jurors sat on the ultimate jury); State v. Belton, 318 N.C. 141, 153, 347 S.E.2d 755, 762–63 (1986) (holding the same in a case involving a black defendant and white victims where the prosecutor struck six of twelve, or 50%, of minority jurors and used 57% of the State's peremptory challenges against minority jurors).

92. *See, e.g.*, State v. Waring, 364 N.C. 443, 478, 701 S.E.2d 615, 638 (2010) (quoting State v. Hoffman, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998)).

93. *See infra* Addendum, Tables 3 & 4; *see also supra* notes 45–49 and accompanying text.

made *Batson*'s step one an almost insurmountable barrier for defendants to cross.

B. Misapplications at Batson*'s Step Three*

Of the Supreme Court of North Carolina's seventy-four *Batson* cases, forty-six contain adjudications at *Batson*'s third step.[94] In every one of those forty-six cases—100%—that court denied the claim on the ground that the defendant failed to establish a case of purposeful discrimination.[95] The record in the North Carolina Court of Appeals is almost equally remarkable. Of the forty *Batson* cases involving minority jurors, twenty-five contain adjudications at *Batson*'s third step.[96] In twenty-four of those cases, that court denied the defendant's claim at step three.[97] In the sole outlier decision, discussed in Part I, the court found a *Batson* violation only because the prosecutor inexplicably never gave a reason for two of the strikes.[98] No North Carolina appellate court has ever found purposeful discrimination against minority jurors under *Batson* when the prosecutor has articulated any reason for the strike.

North Carolina appellate courts misapply the law in many ways as they adjudicate *Batson* claims at the purposeful discrimination stage, including: (1) refusing to recognize and give weight to disparate treatment of similarly situated jurors and (2) giving excessive deference to findings by the trial judge of no purposeful discrimination.

1. Ignoring Disparate Treatment of Similarly Situated Jurors

The United States Supreme Court has explicitly approved the practice of comparing a prosecutor's disparate treatment of similarly situated minority and white jurors *even when the jurors are not identical in all respects*, and held that such disparate treatment is powerful evidence of discriminatory intent at *Batson*'s third step.[99] In *Miller-El II*, the Court stated:

> [m]ore powerful than . . . bare statistics . . . are side-by-side comparisons of some black venire panelists who were struck

94. *See infra* Addendum, Table 7. In virtually all of these cases, the court reached the step three phase only because it or the trial court skipped the step one phase entirely.

95. *See infra* Addendum, Table 7.

96. *See infra* Addendum, Table 8.

97. *See infra* Addendum, Table 8.

98. State v. Wright, 189 N.C. App. 346, 352–54, 658 S.E.2d 60, 63–65 (2008); *see also supra* text accompanying notes 21–25.

99. Miller-El v. Dretke, 545 U.S. 231, 241, 247 n.6 (2005).

> and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.[100]

The Court called such side-by-side comparisons "comparative juror analysis,"[101] an approach it had explicitly endorsed as early as 2003 in *Miller-El v. Cockrell*,[102] commonly referred to as *Miller-El I*. In dissent, Justice Thomas rejected the legitimacy of comparative juror analysis unless the potential jurors were "comparable in all respects that the prosecutor proffer[ed] as important."[103] The *Miller-El II* majority flatly rejected Justice Thomas' reasoning, stating that:

> [n]one of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one . . . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.[104]

In *Foster v. Chatman*,[105] the United States Supreme Court recently compared treatment of black and white jurors, even though they seemingly shared only one common trait, and found "compelling" evidence of disparate treatment and purposeful discrimination.[106] The Court stated: "[s]till other explanations given by the prosecution, while not explicitly contradicted by the record, are difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered [the struck black juror] an unattractive juror."[107] The Court then individually examined the given "explanations" trait by trait, such as age and marital status, and

100. *Id.* at 241; *see* Foster v. Chatman, 136 S. Ct. 1737, 1754 (2016).

101. *Miller-El v. Dretke*, 545 U.S. at 241.

102. 537 U.S. 322 (2003).

103. *Miller-El v. Dretke*, 545 U.S. at 291 (Thomas, J., dissenting). In his dissent, Justice Thomas also stated that " '[s]imilarly situated' does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them." *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. at 362–63 (Thomas, J., dissenting)).

104. *Id.* at 247 n.6. The Court then actually performed painstaking comparative juror analysis of jurors who had "strong similarities as well as some differences," found disparate treatment, and held that this disparate treatment was a strong factor proving purposeful discrimination. *Id.* at 241–52; *see also* Snyder v. Louisiana, 552 U.S. 472, 483–85 (2008).

105. 136 S. Ct. 1737 (2016).

106. *Foster*, 136 S. Ct. at 1750–54.

107. *Id.* at 1750.

found meaningful discrimination between black and white jurors even though the disparate treatment related solely to one common trait.[108] Further, the compared jurors in *Foster* were far from identical: a black juror whose son had a criminal conviction was compared to white jurors whose sons did not have convictions; and a black juror whose wife worked at a mental hospital was compared to a white juror who no longer worked at the hospital.[109]

Remarkably, both before and after *Miller-El I* and *II*, no North Carolina appellate court has ever relied on comparative juror analysis to find a *Batson* violation in a case involving minority jurors. Indeed, the courts have improperly and consistently refused to engage in comparative juror analysis unless jurors were identical in all respects, and routinely disregarded disparate treatment of similarly situated jurors, as defined in *Miller-El II*, in adjudicating purposeful discrimination at *Batson*'s third step.[110] In decisions before *Miller-El I* and *II*, such as *State v. Williams*,[111] the Supreme Court of North Carolina refused to give any weight to disparate treatment of jurors unless the jurors were exactly identical, holding that "[d]isparate treatment of prospective jurors is not necessarily dispositive on the issue of discriminatory intent . . . . Because the ultimate decision to accept or reject a given juror depends on consideration of many relevant characteristics, one or two characteristics between jurors will rarely be directly comparable."[112] In *State v. Porter*,[113] the court held that "alleged disparate treatment of prospective jurors would not be dispositive necessarily . . . . Rarely will a single factor control the

108. *Id.* at 1750–54.

109. *Id.* at 1751–54.

110. The only exceptions are the "reverse *Batson*" cases of *State v. Hurd*, __ N.C. App. __, __, 784 S.E.2d 528, 534 (2016), and *State v. Cofield*, 129 N.C. App. 268, 270, 277, 498 S.E.2d 823, 826, 830 (1998), where the challenged jurors were white. In *Cofield*, the North Carolina Court of Appeals applied comparative juror analysis even though the black and white jurors merely "parall[ed]" each other and had "almost . . . identical credentials." *Cofield*, 129 N.C. App. at 270, 498 S.E.2d at 826; *see supra* text accompanying notes 21–32. In *Hurd*, the court employed comparative juror analysis even though the minority and white jurors' answers were not identical; the face of the decision shows the jurors gave only one similar answer regarding the death penalty, those two answers were not identical ("probably about a four" versus "four" on a hypothetical death penalty scale), and there is no indication the unchallenged juror ever similarly stated "there's a punishment for a crime." *Hurd*, __ N.C. App. at __, 784 S.E.2d at 532–36. These cases are the only cases in North Carolina appellate history utilizing comparative juror analysis to find a *Batson* violation. These two cases also happen to be reverse *Batson* cases disallowing black defendants' challenges of white jurors.

111. 339 N.C. 1, 452 S.E.2d 245 (1994).

112. *Id.* at 18, 452 S.E.2d at 256.

113. 326 N.C. 489, 391 S.E.2d 144 (1990).

decision-making process."[114] The court rejected comparison of jurors who were not identical in all respects, stating:

> This approach fails to address the factors as a totality which when considered together provide an image of a juror . . . . "[M]erely because some of the observations regarding each stricken venireperson may have been equally valid as to other members of the venire who were not challenged [does not] require[ ] . . . finding the reasons were pretextual."[115]

In decisions after *Miller-El I* and *II*, the North Carolina appellate courts have obstinately continued to refuse to engage in comparative juror analysis unless jurors were identical in all respects. For example, in the 2004 decision in *State v. Bell*,[116] the State struck a black juror allegedly because her foster child was seeking psychiatric treatment, but passed a white juror who "worked with and around psychologists on a daily basis" and other white jurors who had "connections to the psychiatric field."[117] The State struck another black juror allegedly because she had been charged with a crime, although the charges were "dropped," and because she had a child with special needs; however, the State passed white jurors whose relatives were convicted and charged with crimes and other white jurors "with previous experiences in the criminal justice system."[118] On appeal, the *Bell* court insisted the jurors were "not . . . similarly situated individuals" and rejected the defendant's disparate treatment claims "because the same combination of factors was not present in the other two prospective jurors" and "no juror had experienced all . . . the circumstances that caused the State to dismiss" a minority juror.[119] In

114. *Id.* at 501, 391 S.E.2d at 152.

115. *Id.* at 501, 391 S.E.2d at 152–53 (quoting State v. Thomas, 780 S.W.2d 128, 131 (Mo. Ct. App. 1989)); *see also* State v. Rouse, 339 N.C. 59, 80, 451 S.E.2d 543, 554 (1994) (stating that disparate treatment not demonstrated "[e]ven if the responses of these eleven [unchallenged] jurors were similar to those of" struck black juror), *overruled on other grounds by* State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006); State v. Thomas, 329 N.C. 423, 432, 407 S.E.2d 141, 147 (1991).

116. 359 N.C. 1, 603 S.E.2d 93 (2004).

117. *Id.* at 13–14, 603 S.E.2d at 103.

118. *Id.* at 14–16, 603 S.E.2d at 103–04.

119. *Id.* at 13–16, 603 S.E.2d at 103–04; *see also* State v. McClain, 169 N.C. App. 657, 669, 610 S.E.2d 783, 791 (2005) (rejecting comparative juror analysis unless jurors were identical); State v. Littlejohn, 158 N.C. App. 628, 633, 582 S.E.2d 301, 305 (2003) (same). In contrast to *Bell*, the United States Supreme Court saw sufficient similarities to conduct meaningful comparative juror analysis between a black juror who was struck allegedly in part because his wife currently worked at a mental hospital and a white juror who was passed even though she had once, but did not currently, work at that same hospital. Foster v. Chatman, 136 S. Ct. 1737, 1754 (2016).

other post-*Miller-El I* decisions, North Carolina courts have simply not addressed the disparate treatment claims made by defendants and failed to perform any comparative juror analysis.[120]

In *State v. Waring*,[121] the Supreme Court of North Carolina's most recent *Batson* case, the court cited *Miller-El II* and indicated it might be more open to comparative juror analysis and disparate treatment claims.[122] However, on closer inspection, *Waring*'s holdings and results clearly show that the court continues to misapply the law and require that jurors be identical in all respects before it will find probative disparate treatment. In *Waring*, the prosecutor struck a black juror primarily because she had been charged—but not prosecuted—for driving a car with an altered vehicle identification number ("VIN"), and because her jury questionnaire and voir dire were inconsistent with court records.[123] The prosecutor then passed a white juror who had twice been convicted of drunk driving and whose jury questionnaire and voir dire were also inconsistent with court records.[124] Although there were only very minor differences between the jurors,[125] the appellate court held that the jurors "were not similarly situated" and consequently found no significance in the prosecutor's disparate treatment.[126] At the same trial, the prosecutor also challenged a black juror who stated personal opposition to the death penalty when first asked but later qualified her answer by pledging three times that she could impose death and was not predisposed to life; however, the prosecutor passed two white jurors who "expressed various opinions about the death penalty" when

120. *See* State v. Chapman, 359 N.C. 328, 340–43, 611 S.E.2d 794, 806–08 (2005); State v. James, 230 N.C. App. 346, 354, 750 S.E.2d 851, 857 (2013).

121. 364 N.C. 443, 701 S.E.2d 615 (2010).

122. *Id.* at 487, 701 S.E.2d at 643 ("While a prosecutor's reason for exercising a peremptory challenge can appear race-neutral when standing alone, a comparative analysis [of jurors] may provide a more reliable gauge of its plausibility.").

123. *Id.* at 489–90, 701 S.E.2d at 644.

124. *Id.* at 490–91, 701 S.E.2d at 644–45.

125. The record does not support the prosecutor's claim the black juror did not have a position on the death penalty; the juror said three times she had thought about the death penalty, she could vote for death, she would not be reluctant to perform her duties, and her position was: "I still didn't come up with a position where I would be swayed in either way." *Id.* at 481–91, 701 S.E.2d at 640–45. *Compare* Miller-El v. Dretke, 545 U.S. 231, 242–46 (2005) (stating that prosecutor's reason for strike "mischaracterized [the juror's] testimony" and was discredited), *with* Foster v. Chatman, 136 S. Ct. 1737, 1753–54 (2016) (discrediting prosecutor's assertion that he struck a black juror because the juror "appeared to be confused" about his position on the death penalty where the record of jury voir dire showed the juror "unequivocally voiced his willingness to impose the death penalty"). The record suggests the *Waring* prosecutor ran record checks on black, but not white, jurors. *Waring*, 364 N.C. at 489, 701 S.E.2d at 644.

126. *Waring*, 364 N.C. at 490–91, 701 S.E.2d at 645.

asked and also later qualified their answers.[127] The defendant indicated that one white juror initially expressed "personal issues" with the death penalty but "ultimately stated he could follow the law," and the other said she was "predisposed to life without parole" and that death "would not be 'plan A.' "[128] Although there were no other significant differences between the jurors, the appellate court found that there was a "definable difference" between the jurors with regard to death penalty views, and consequently, no probative disparate treatment.[129]

These decisions, including the most recent ones in *Waring*, *Bell*, and *Carter*, demonstrate that the North Carolina appellate courts improperly continue post-*Miller-El I* and *II* to refuse to find significance in disparate treatment of jurors unless the jurors are identical in all respects, even if those courts do not expressly acknowledge that continued practice. Under any reasonable view, the black and white jurors in *Waring* and other cited cases shared very strong similarities and were similarly situated as defined in *Miller-El II*. The differences between the *Waring* jurors were so minor and insignificant as to be practically nonexistent; in fact, there were more differences between the *Miller-El II* jurors, who received meaningful comparative juror analysis, than there were between the *Waring* jurors who did not. While the *Waring* prosecutor's disparate treatment of the jurors should have been powerful evidence of purposeful discrimination, the disparate treatment was of no probative value at all because the North Carolina court incorrectly held that the jurors were allegedly "definably different." *Waring* shows that a determined North Carolina trial or appellate court can

127. *Id.* at 479, 701 S.E.2d at 638.

128. *Id.*

129. *Id.* at 475–80, 701 S.E.2d at 636–39; *see also* State v. Carter, 212 N.C. App. 516, 522–25, 711 S.E.2d 515, 522–24 (2011) (finding that two black jurors whose relatives were incarcerated and one "without . . . much experience in the community," were not similarly situated to a white juror whose relative was incarcerated, white jurors who had criminal records, and two white jurors who were new to the community); State v. Matthews, 162 N.C. App. 339, 342–43, 595 S.E.2d 446, 449–50 (2004) (holding that the prosecutor's strike of a black juror who had been excused from a jury in a prior case, but failure to strike white jurors with similar experience, "does not rise to the level of demonstrating discriminatory intent"). *Compare* State v. McCord, 158 N.C. App. 693, 697–99, 582 S.E.2d 33, 36 (2003) (holding no disparate treatment when the prosecutor struck a black juror who was young, single, and employed "by an unfamiliar business," but did not strike white jurors who were single and employed by unfamiliar businesses because no white juror "possessed all three qualities"), *with Foster*, 136 S. Ct. at 1752–53 (comparing disparate treatment of a black juror with a young son who had a criminal conviction and white jurors with young sons who did not have criminal convictions despite the State's argument the jurors were "not similar").

always find minute differences between what are, in reality, similarly situated jurors and then justify ignoring true disparate treatment because of those insignificant differences. The North Carolina appellate courts have rejected comparative juror analysis and disparate treatment claims in more than twenty-five cases as they have erroneously refused to acknowledge that disparate treatment can be probative even where jurors are not identical in all respects.[130] This continued practice violates the letter and spirit of *Miller-El II* and *Foster v. Chatman*, and is why the North Carolina appellate courts have never found a *Batson* violation against minority jurors employing comparative juror analysis. Indeed, as the Supreme Court foresaw in *Miller-El II*, the practice of requiring an "exactly identical white juror" has made *Batson* and comparative juror analysis "inoperable" in North Carolina.[131]

2. Affording Excessive Deference

The United States Supreme Court has recognized the principle that, in *Batson* cases, "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal and will not be overturned unless clearly erroneous."[132] However, the same Court has also cautioned that "deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief[,]" and chided reviewing courts for blindly following a trial court's determinations rather than giving "full consideration to the substantial evidence" put forth by a defendant in support of a *Batson* claim.[133] Later, the Court observed that "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and . . . some false reasons are shown up within the four corners of a given case[.]"[134] Further, in *Snyder v. Louisiana*,[135] the Court recognized that such high deference is inappropriate where the prosecutor alleges a demeanor-based reason for a strike but the trial court fails to "[make] a finding that an attorney credibly relied on demeanor in exercising [the] strike."[136]

130. *See infra* Addendum, Table 9.
131. Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005).
132. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (quoting Hernandez v. New York, 500 U.S. 352, 364 (1991)).
133. *Id.* at 340–41.
134. *Miller-El v. Dretke*, 545 U.S. at 240.
135. 552 U.S. 472 (2008).
136. *See id.* at 479.

Misapplying these holdings, North Carolina appellate courts afford far too much deference to trial courts and conduct cursory review of *Batson* claims at best. Indeed, in review of almost every *Batson* claim within the jurisdiction, the appellate courts rely on the proposition that "[a] trial court's rulings regarding race-neutrality and purposeful discrimination are largely based on evaluations of credibility and should be given great deference" and hold no violation without considered analysis of the claim.[137]

This toothless review in *Batson* cases is especially improper in light of the dubious reasons North Carolina prosecutors routinely give for their peremptory challenges of minority jurors at the second step of the *Batson* framework. Review of the *Batson* cases shows a surprisingly large number of prosecutors' reasons are based on alleged juror demeanor, such as jurors' body language or failure to make appropriate eye contact.[138] An even larger number of

137. *See, e.g.*, State v. King, 353 N.C. 457, 469–70, 546 S.E.2d 575, 586–87 (2001). In contrast, the North Carolina Court of Appeals conducted an exhaustive review of the State's *Batson* claim in the reverse *Batson* case of *State v. Hurd*, __ N.C. App. __, 784 S.E.2d 528 (2016). There, although the court accorded great deference to the trial court's determination, it also extensively compared the voir dire answers of the challenged white juror to those of an unchallenged "Asian/Black" juror, examined the entire context of the strike, including a pre-trial motion that was not in the appellate record, and even faulted the defendant's reasons for the strike as somehow "fail[ing] to resolve" other statements made by the challenged juror on voir dire. *Id.* at __, 784 S.E.2d at 532–33, 535–36. Then, the court rejected the defendant's proffered reasons even though they were the very same type of reasons the court has routinely accepted in previous cases involving strikes of minority jurors. *See id.* at __, 784 S.E.2d at 537. This reverse *Batson* decision, notwithstanding its deference to the trial court, is one of the few North Carolina appellate cases to exhaustively review a *Batson* claim and truly scrutinize the reasons proffered for the strike. Again, it is troublesome that one of the few North Carolina cases to fully consider a *Batson* claim on appeal involves a reverse *Batson* claim rather than one involving minority jurors.

138. *See, e.g.*, State v. Bonnett, 348 N.C. 417, 434, 502 S.E.2d 563, 575 (1998). For example, prosecutors claimed to have struck minority jurors in part because they "sat with [their] arms crossed," State v. White, 349 N.C. 535, 549, 508 S.E.2d 253, 263 (1998); answered questions "with [their] arms folded," State v. Robinson, 336 N.C. 78, 95, 443 S.E.2d 306, 313 (1994); and were "leaning away" from the prosecutor, State v. Lyons, 343 N.C. 1, 12, 468 S.E.2d 204, 208 (1996). Other prosecutors have claimed they struck minority jurors because the jurors were allegedly "nervous," State v. Smith, 328 N.C. 99, 125, 400 S.E.2d 712, 727 (1991); "head-strong," State v. Floyd, 115 N.C. App. 412, 415, 445 S.E.2d 54, 57 (1994); "soft-spoken," State v. Gaines, 345 N.C. 647, 668, 483 S.E.2d 396, 409 (1997); "belligerent," *Bonnett*, 348 N.C. at 434, 502 S.E.2d at 575; "hostile," State v. Jackson, 322 N.C. 251, 255, 368 S.E.2d 838, 840 (1988); or because the jurors were "smiling," State v. Locklear, 349 N.C. 118, 139, 505 S.E.2d 277, 289 (1998). When contradictory reasons, such as both "hostile" and "smiling," are legitimate, it would seem very hard for the State to lose. *Compare* State v. Barnes, 345 N.C. 184, 211–13, 481 S.E.2d 44, 58–59 (1997) (reviewing a prosecutor's striking of a black juror because she was "not a local person" and another black juror who had too many community ties), *with* Foster v. Chatman, 136 S. Ct. 1737, 1748, 1751 (2016) (discrediting proffered reasons for

prosecutors' reasons are based on even more subjective juror characteristics and allegedly based on their opinion that the juror was evasive, immature, confrontational, authoritarian, equivocal, misleading, hesitant, or uncertain.[139] Further, many prosecutorial reasons are not based on facts found in the record or proved to be true. Thus, prosecutors frequently claim their strikes of minority jurors are based on record checks they performed before trial, information from a police officer or prosecutor's office staff member, or information the prosecutor says he or she knows to be true that conflicts with the juror's questionnaire or voir dire answers.[140] Prosecutors often cite reasons that are totally unrelated to the case being tried and seemingly fantastic. For example, a prosecutor claimed to have struck a minority juror because the juror was "physically attractive."[141] These reasons, all of which have been accepted by North Carolina trial and appellate courts, "reek[ ] of afterthought."[142]

Orders issued in 2012 by Gregory Weeks, a North Carolina trial judge in Cumberland County, in connection with Racial Justice Act

peremptory strikes where the prosecutor struck one black juror in part because he asked to be excused from jury service and another black juror in part because she did not ask to be excused from jury service).

139. *See, e.g.*, *Bonnett*, 348 N.C. at 434–35, 502 S.E.2d at 575 (reviewing a prosecutor's striking of a juror based on the juror's "air of defiance"). Other alleged reasons have included the juror's "rather militant animus," State v. Golphin, 352 N.C. 364, 430, 533 S.E.2d 168, 213 (2000); the juror's "non-verbal communication suggested hostility and indifference," *Jackson*, 322 N.C. at 257, 368 S.E.2d at 841; and that the juror was "potentially less responsible," *Barnes*, 345 N.C. at 211, 481 S.E.2d at 58. Still other reasons include that the prosecutor "just did not feel comfortable with [the juror's] answers and her demeanor," State v. Williams, 343 N.C. 345, 358, 471 S.E.2d 379, 386 (1996); "didn't get a good sense that [the juror] ha[s] a good sense of herself," State v. Waring, 364 N.C. 443, 478, 710 S.E.2d 615, 638 (2010); or "perceived 'some reluctance' " in the juror's answers, State v. Larrimore, 340 N.C. 119, 134, 456 S.E.2d 789, 796 (1995).

140. *See, e.g.*, *Bonnett*, 348 N.C. at 434, 502 S.E.2d at 575; State v. Kandies, 342 N.C. 419, 436–38, 467 S.E.2d 67, 76–77 (1996).

141. *Barnes*, 345 N.C. at 210–11, 481 S.E.2d at 58. Other asserted reasons include that the juror "had never held a professional position," State v. Martin, 105 N.C. App. 182, 187, 412 S.E.2d 134, 136 (1992); the juror had an "alleged acquaintance with [the] defendant's former girlfriend," State v. Pender, 218 N.C. App. 233, 239, 720 S.E.2d 836, 840 (2012); the juror was "not promoted in the military as [soon as the prosecutor thought] he should have been," State v. Floyd, 343 N.C. 101, 105, 468 S.E.2d 46, 49 (1996); and the juror had "personal problems" with her own daughter, State v. Bell, 359 N.C. 1, 14, 603 S.E.2d 93, 104 (2004). In *State v. Best*, the court explicitly expressed that it would approve "implausible or even fantastic" reasons. 342 N.C. 502, 511, 467 S.E.2d 45, 51 (1996). *But see Foster*, 136 S. Ct. at 1752 (finding that the prosecutor's implausible' and 'fantastic' assertion" supported the Court's conclusion that the prosecutor's reason for striking the juror was "pretextual").

142. *Foster*, 136 S. Ct. at 1755 (quoting Miller-El v. Dretke, 545 U.S. 231, 246 (2005)).

litigation show the regularity with which North Carolina prosecutors offer pretextual reasons for peremptory strikes at *Batson*'s step two.[143] Judge Weeks' orders surveyed a large number of criminal cases not discussed here, and reveal that the reasons prosecutors gave for strikes in those cases were often subjective, irrelevant, and thinly-disguised pretext for racial discrimination.[144] Judge Weeks also found that in the 1990s North Carolina prosecutors circulated and used a "cheat sheet" of approved reasons for minority strikes that included such reasons as "lack of eye contact," "air of defiance," "arms folded," "leaning away from questioner," and "evasive."[145] The similarity between the reasons listed in the "cheat sheet" and the reasons given in the cases discussed here further demonstrates the given reasons were pure pretext.[146]

In light of the highly suspect nature of the reasons North Carolina prosecutors give for minority juror strikes at *Batson*'s step two, the failure of the appellate courts to weigh the validity of those reasons and find purposeful discrimination at *Batson*'s step three is especially improper. Under correct review at *Batson*'s third step, "the persuasiveness of the justification becomes relevant . . . [and] implausible or fantastic justifications may (*and probably will*) be found to be pretexts for purposeful discrimination."[147] North Carolina appellate courts, however, accept fanciful reasons as race-neutral and do not consider their unpersuasive nature when determining whether purposeful discrimination has occurred. North Carolina appellate courts routinely grant too much deference even where the State's reasons are weak, the trial court has not made a demeanor-based factual finding, and there is strong evidence of purposeful discrimination.

143. *See* Order Granting Motions for Appropriate Relief at 1–6, State v. Golphin, 97-CRS-47314-15 (N.C. Super. Ct. Dec. 13, 2012), https://www.aclu.org/files/assets/rja_order_12-13-12.pdf [https://perma.cc/XV6V-VDQ5]; Order Granting Motion for Appropriate Relief, *supra* note 40, at 1–3.

144. Order Granting Motions for Appropriate Relief, *supra* note 143, at 112–36.

145. *Id.* at 73–77.

146. Without expressing any opinion on the findings, conclusions, or substantive merits of Judge Weeks' orders, on December 18, 2015, the Supreme Court of North Carolina vacated them for procedural error and remanded for further proceedings in the trial court. State v. Augustine, 368 N.C. 594, 780 S.E.2d 552 (2015); State v. Robinson, 368 N.C. 596, 780 S.E.2d 151 (2015).

147. Purkett v. Elem, 514 U.S. 765, 768 (1995) (emphasis added). Indeed, in *Foster*, the United States Supreme Court itself conducted an "independent examination of the record," which revealed that much of the prosecutor's reasoning had "no grounding in fact" and many of the prosecutor's reasons "[could not] be credited." *Foster*, 136 S. Ct. at 1749, 1751.

For example, in *State v. Thomas*[148] the prosecutor struck seven of eight eligible black prospective jurors in a case involving a black defendant and a white victim.[149] While the prosecutor said he struck jurors because "one was young and unmarried, and not as stable and mature as the State preferred; one had never before thought about the death penalty and appeared evasive; [and] one was young and stated that serving on the jury would work hardship on his job because he traveled a lot"; the defendant argued on appeal that these reasons were pretext since the State failed to strike white jurors with the same characteristics.[150] Despite the high minority strike rate, the State's weak and subjective reasons, no apparent factual finding by the trial court regarding one juror's alleged evasiveness, and evidence showing pretext, the Supreme Court of North Carolina nonetheless accorded the trial court "great deference" and did not find a *Batson* violation.[151] In *State v. Bell*, the court did not find a *Batson* violation even though the prosecutor struck nine of eleven minority jurors, gave demeanor-based reasons for strikes, passed similarly situated white jurors, and the trial court apparently made no factual findings.[152]

In *State v. Fletcher*,[153] a case involving a black defendant and a white female victim, the prosecutor challenged two of the first three black jurors, disparately questioned black juror Greene, and did not challenge white jurors who gave answers similar to Greene.[154] Further, the trial court found the prosecutor's challenge to another black juror was racially discriminatory.[155] Nevertheless, the Supreme Court of North Carolina accorded "great deference" and did not find a *Batson* violation as to Greene.[156] In *State v. Lyons*,[157] the State struck three minority prospective jurors allegedly because one "was

148. 329 N.C. 423, 407 S.E.2d 141 (1991).

149. *Id.* at 432, 407 S.E.2d at 147 (seven of eight, 87.5%).

150. *Id.* at 430, 407 S.E.2d at 146.

151. *Id.* at 431–33, 407 S.E.2d at 146–48. Similarly, in *State v. Bond*, that court incorrectly afforded "much deference" and did not recognize a *Batson* violation where the State used eight of nine peremptory strikes against black prospective jurors (approximately 89%); the juror at issue was allegedly struck because he "expressed some hesitation and . . . appeared to be concerned and worried when asked about the death penalty," although there was no indication the trial court made a factual finding as to demeanor. 345 N.C. 1, 21, 478 S.E.2d 163, 173 (1996).

152. State v. Bell, 359 N.C. 1, 11–16, 603 S.E.2d 93, 103–05 (2004).

153. 348 N.C. 292, 500 S.E.2d 668 (1998).

154. *Id.* at 314–17, 500 S.E.2d at 681–84.

155. *Id.*

156. *Id.* at 313–14, 500 S.E.2d at 680–81.

157. 343 N.C. 1, 468 S.E.2d 204 (1996).

leaning away from the entire jury selection process," one was a nurse and looked "shocked" and "puzzled" in response to voir dire questions, and one did not have a "sufficient stake in the community."[158] Although the trial court did not make factual findings as to the demeanor of those jurors and the State accepted three white jurors who were also nurses, the Supreme Court of North Carolina nonetheless accorded excessive deference and did not find a *Batson* violation.[159]

Similarly, in *State v. Tirado*[160] the State used eight of its first ten peremptory strikes against minority prospective jurors in a case involving minority defendants and two white victims.[161] The prosecutor said he struck one juror because he would not maintain eye contact and provided short answers on voir dire and another because "she didn't understand sometimes—I don't—can't say that she wasn't paying attention. I don't know. We just don't know what the cause of it was, but we could see the result of that concern was her sitting over a long trial[.]"[162] Despite the prosecutor's inability to articulate the reason for striking the female juror and absent specific factual findings by the trial court as to demeanor, the appellate court nonetheless found no error, reasoning that "the trial court was in the best position to assess the prosecutor's credibility."[163]

These cases illustrate the overwhelming tendency of North Carolina appellate courts to provide cursory review of *Batson* claims and to afford excessive deference to lower court *Batson* findings—an approach that contrasts sharply with that of the United States

158. *Id.* at 11–13, 468 S.E.2d at 208–09.

159. *Id.* at 13–14, 468 S.E.2d at 209–10. Similarly, that court afforded "great deference" and did not find a *Batson* violation in *Kandies* even where the State struck nine black prospective jurors, allegedly basing two of the strikes on the opinions of "a source within the High Point Police Department" not before the court, and where the defendant argued that the State failed to strike similarly situated white prospective jurors. *See* State v. Kandies, 342 N.C. 419, 434–37, 467 S.E.2d 67, 75–76 (1996); Amanda S. Hitchcock, Recent Development, *"Deference Does Not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Cases*, 84 N.C. L. REV. 1328, 1353–55 (2006). Furthermore, in *King*, the defendant challenged one of the State's six strikes against black prospective jurors. State v. King, 353 N.C. 457, 468, 546 S.E.2d 575, 585–86 (2001). The prosecutor said he struck the juror based on information "from another source" not named or in the record and because the juror's uncle had been murdered. Even though the prosecutor admitted the information was totally unconfirmed and passed a white juror whose wife had been raped, the Supreme Court of North Carolina nonetheless afforded the trial court "great deference" and did not recognize a *Batson* violation. *Id.* at 470–72, 546 S.E.2d at 587–88.

160. 358 N.C. 551, 599 S.E.2d 515 (2004).

161. *Id.* at 568–70, 599 S.E.2d at 528–29 (eight of ten, 80%).

162. *Id.*

163. *Id.*

Supreme Court over the last ten years. In *Foster*, *Snyder*, and *Miller-El II*, the state courts did not find *Batson* violations; however, the Supreme Court conducted searching "independent examination of the record" and, despite the highly deferential standard of review, found clear error in the state courts' decisions and substantive violations.[164] These recent decisions clearly indicate that state courts are affording excessive deference to lower court *Batson* findings, a message the North Carolina appellate courts seemingly have yet to hear.[165]

IV. THE *BATSON* RECORDS IN NEIGHBORING STATES

North Carolina's remarkable appellate *Batson* record stands in sharp contrast to the records of her neighboring states in the Fourth Circuit, which have all been much more willing than North Carolina to engage in meaningful *Batson* analysis and hold *Batson* violations when warranted. The records in these states are further evidence North Carolina misapplies *Batson* jurisprudence. Since 1986, the appellate records in these neighboring states with respect to adjudication of claims of purposeful racial discrimination against minority jurors at *Batson*'s step three are as follows[166]:

164. *See* Foster v. Chatman, 136 S. Ct. 1737, 1749, 1755 (2016); Snyder v. Louisiana, 552 U.S. 472, 485–86 (2008); Miller-El v. Dretke, 545 U.S. 231, 266 (2005).

165. In *Foster*, the Court noted Georgia prosecutors had at times been "downright indignant" at accusations they engaged in purposeful racial discrimination under *Batson*. *Foster*, 136 S. Ct. at 1755. So too, perhaps, are the North Carolina defense lawyers in the reverse *Batson* cases of *Hurd* and *Cofield*, who were similarly found to have violated *Batson*. The authors suggest that any such indignation should instead be focused toward state jury selection practices which produce overwhelming statistical disparities that simply could not occur in race-neutral jury selection. *See* Batson v. Kentucky, 476 U.S. 79, 98–99 (1986) (if affirmations of good faith "were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement' . . . . The reality of practice . . . shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors") (quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)).

166. Although appellate courts in neighboring states have found substantive *Batson* violations in civil cases, North Carolina appellate courts have made no such findings. *See infra* Addendum, Table 10 (providing published cases in which courts in neighboring states found substantive *Batson* violations).

Appellate *Batson* Records in Fourth Circuit States Since 1986

State Court	*Batson* Adjudications at Step Three	Number of Batson Violations Found
W. Va.	9	2
Md.	6	3
Va.	18	3
Va. Ct. App.	13	3
S.C.	33	11
S.C. Ct. App.	14	2

Accordingly, every other court of last resort in virtually every state neighboring North Carolina has found at least one substantive *Batson* violation in the last thirty years.[167] South Carolina's has found eleven such violations.[168] Compare these neighboring states' records to the Supreme Court of North Carolina's record of zero violations in seventy-four *Batson* cases and the overall North Carolina appellate record of zero violations in 113 *Batson* cases when the prosecutor has stated a reason for striking minority jurors. With regard to *Batson* jurisprudence within the region, North Carolina appears to stand alone.

CONCLUSION

In *Batson*, the United States Supreme Court overruled its previous decision in *Swain v. Alabama*, reasoning that *Swain* "placed on defendants a crippling burden of proof" and made "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny."[169] Unfortunately, over the last thirty years, North Carolina has created a remarkable and disappointing appellate *Batson* record by misapplying binding precedent found in *Batson* and subsequent decisions, paying lip service to *Batson* jurisprudence, and continuing to adhere to rejected pre-*Batson* principles. Thirty years after *Batson*, North Carolina defendants challenging racially discriminatory

167. *See infra* Addendum, Table 10. A 2010 study by the Equal Justice Initiative showed the appellate courts in six other southern states—Florida, Georgia, Mississippi, Alabama, Arkansas, and Louisiana—have all ordered multiple reversals for substantive *Batson* violations and racially-tainted jury selection. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 19–27 (2010), http://www.eji.org/raceandpoverty/juryselection [https://perma.cc/9YCU-7RLN]. Alabama's appellate courts have ordered over eighty such reversals. *Id.*

168. *See infra* Addendum, Table 10.

169. Batson v. Kentucky, 476 U.S. 79, 92–93 (1986).

peremptory strikes still face a crippling burden of proof and prosecutors' peremptory challenges are still effectively immune from constitutional scrutiny.

Although *Batson* has received criticism for not providing the most effective tool for eradicating racial discrimination in jury selection, the *Batson* records in North Carolina's neighboring states and the United States Supreme Court's decisions in *Foster*, *Snyder*, and *Miller-El II* belie the notion that *Batson* is completely toothless in combating discriminatory peremptory challenges. Further, as recently affirmed in *Foster*, the *Batson* framework is the law of the land which must be given meaningful and correct application in North Carolina rather than the cursory nod and misapplication it has received to date. Hopefully, *Batson*'s thirtieth anniversary and the *Foster* decision will be the turning point for North Carolina's thus far remarkable and disappointing appellate *Batson* record.

ADDENDUM

A. *Table 1: Supreme Court of North Carolina Published Cases Adjudicating* Batson *Claims on the Merits, 1986–2016*

1. *State v. Waring*, 364 N.C. 443, 701 S.E.2d 615 (2010).
2. *State v. Maness*, 363 N.C. 261, 677 S.E.2d 796 (2009).
3. *State v. Taylor*, 362 N.C. 514, 669 S.E.2d 239 (2008).
4. *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515 (2005).
5. *State v. Chapman*, 359 N.C. 328, 611 S.E.2d 794 (2005).
6. *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004).
7. *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004).
8. *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002).
9. *State v. Williams*, 355 N.C. 501, 565 S.E.2d 609 (2002).
10. *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002).
11. *State v. Nicholson*, 355 N.C. 1, 558 S.E.2d 109 (2002).
12. *State v. Fair*, 354 N.C. 131, 557 S.E.2d 508 (2001).
13. *State v. King*, 353 N.C. 457, 546 S.E.2d 575 (2001).
14. *State v. Hardy*, 353 N.C. 122, 540 S.E.2d 334 (2000).
15. *State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000).
16. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000).
17. *State v. Blakeney*, 352 N.C. 287, 531 S.E.2d 799 (2000).
18. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000).
19. *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000).
20. *State v. Smith*, 351 N.C. 251, 524 S.E.2d 28 (2000).
21. *State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486 (1999).
22. *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998).
23. *State v. Hoffman*, 349 N.C. 167, 505 S.E.2d 80 (1998).
24. *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998).
25. *State v. Hoffman*, 348 N.C. 548, 500 S.E.2d 718 (1998).
26. *State v. Bonnett*, 348 N.C. 417, 502 S.E.2d 563 (1998).
27. *State v. Lemons*, 348 N.C. 335, 501 S.E.2d 309 (1998), *vacated on other grounds*, 527 U.S. 1018 (1999).
28. *State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998).
29. *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357 (1998).
30. *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997).
31. *State v. Robinson*, 346 N.C. 586, 488 S.E.2d 174 (1997).
32. *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997).
33. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997).

34. *State v. Bond*, 345 N.C. 1, 478 S.E. 2d 163 (1996).
35. *State v. Harden*, 344 N.C. 542, 476 S.E.2d 658 (1996).
36. *State v. Norwood*, 344 N.C. 511, 476 S.E.2d 349 (1996).
37. *State v. Peterson*, 344 N.C. 172, 472 S.E.2d 730 (1996).
38. *State v. Womble*, 343 N.C. 667, 473 S.E.2d 291 (1996).
39. *State v. Lynch*, 343 N.C. 483, 471 S.E.2d 376 (1996).
40. *State v. Williams*, 343 N.C. 345, 471 S.E.2d 379 (1996).
41. *State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204 (1996).
42. *State v. Floyd*, 343 N.C. 101, 468 S.E.2d 46 (1996).
43. *State v. Richardson*, 342 N.C. 772, 467 S.E.2d 685 (1996).
44. *State v. Best*, 342 N.C. 502, 467 S.E.2d 45 (1996).
45. *State v. Kandies*, 342 N.C. 419, 467 S.E.2d 67 (1996).
46. *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995).
47. *State v. Quick*, 341 N.C. 141, 462 S.E.2d 186 (1995).
48. *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995).
49. *State v. Larrimore*, 340 N.C. 119, 456 S.E.2d 789 (1995).
50. *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994).
51. *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994).
52. *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 (1994).
53. *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994).
54. *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994).
55. *State v. Ross*, 338 N.C. 280, 449 S.E.2d 556 (1994).
56. *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879 (1994).
57. *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994).
58. *State v. Wiggins*, 334 N.C. 18, 431 S.E.2d 755 (1993).
59. *State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993).
60. *State v. Glenn*, 333 N.C. 296, 425 S.E.2d 688 (1993).
61. *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991).
62. *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991).
63. *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991).
64. *State v. McNeill*, 326 N.C. 712, 392 S.E. 2d 78 (1990).
65. *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990).
66. *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989).
67. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *vacated on other grounds*, 494 U.S. 1021 (1990).
68. *State v. Crandell*, 322 N.C. 487, 369 S.E.2d 579 (1988).
69. *State v. Gray*, 322 N.C. 457, 368 S.E.2d 627 (1988).
70. *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988).
71. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987).

72. *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987).
73. *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987).
74. *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

B. *Table 2: North Carolina Court of Appeals Published Cases Adjudicating* Batson *Claims on the Merits, 1986–2016*

1. *State v. Hurd*, __ N.C. App. __, 784 S.E.2d 528 (2016).
2. *State v. James*, 230 N.C. App. 346, 750 S.E.2d 851 (2013).
3. *State v. Mills*, 225 N.C. App. 773, 741 S.E.2d 427 (2013).
4. *State v. Pender*, 218 N.C. App. 233, 720 S.E.2d 836 (2012).
5. *State v. Carter*, 212 N.C. App. 516, 711 S.E.2d 515 (2011).
6. *State v. Headen*, 206 N.C. App. 109, 697 S.E.2d 407 (2010).
7. *State v. Wright*, 189 N.C. App. 346, 658 S.E.2d 60 (2008).
8. *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211 (2005).
9. *State v. McClain*, 169 N.C. App. 657, 610 S.E.2d 783 (2005).
10. *State v. Alvarez*, 168 N.C. App. 487, 608 S.E.2d 371 (2005).
11. *State v. Moore*, 167 N.C. App. 495, 606 S.E.2d 127 (2004).
12. *State v. Gattis*, 166 N.C. App. 1, 601 S.E.2d 205 (2004).
13. *State v. Matthews*, 162 N.C. App. 339, 595 S.E.2d 446 (2004).
14. *State v. Wiggins*, 159 N.C. App. 252, 584 S.E.2d 303 (2003).
15. *State v. Littlejohn*, 158 N.C. App. 628, 582 S.E.2d 301 (2003).
16. *State v. McCord*, 158 N.C. App. 693, 582 S.E.2d 33 (2003).
17. *State v. Mays*, 154 N.C. App. 572, 573 S.E.2d 202 (2002).
18. *State v. Cherry*, 141 N.C. App. 642, 541 S.E.2d 205 (2000).
19. *State v. McCord*, 140 N.C. App. 634, 538 S.E.2d 633 (2000).
20. *State v. McKeithen*, 140 N.C. App. 422, 537 S.E.2d 526 (2000).
21. *State v. Crockett*, 138 N.C. App. 109, 530 S.E.2d 359 (2000).
22. *State v. White*, 131 N.C. App. 734, 509 S.E.2d 462 (1998).
23. *State v. Cofield*, 129 N.C. App. 268, 498 S.E.2d 823 (1998).
24. *State v. Corpening*, 129 N.C. App. 60, 497 S.E.2d 303 (1998).
25. *State v. Caporasso*, 128 N.C. App. 236, 495 S.E.2d 157 (1998).
26. *State v. Sessoms*, 119 N.C. App. 1, 458 S.E.2d 200 (1995).
27. *State v. Floyd*, 115 N.C. App. 412, 445 S.E.2d 54 (1994).
28. *State v. Degree*, 114 N.C. App. 385, 442 S.E.2d 323 (1994).
29. *State v. Austin*, 111 N.C. App. 590, 432 S.E.2d 881 (1993).
30. *State v. Crummy*, 107 N.C. App. 305, 420 S.E.2d 448 (1992).
31. *State v. Mebane*, 106 N.C. App. 516, 418 S.E.2d 245 (1992).
32. *State v. Martin*, 105 N.C. App. 182, 412 S.E.2d 134 (1992).

33. *State v. Hall*, 104 N.C. App. 375, 410 S.E.2d 76 (1991).
34. *State v. Burge*, 100 N.C. App. 671, 397 S.E.2d 760 (1990).
35. *State v. McNeill*, 99 N.C. App. 235, 393 S.E.2d 123 (1990).
36. *State v. Melvin*, 99 N.C. App. 16, 392 S.E.2d 740 (1990).
37. *State v. Aytche*, 98 N.C. App. 358, 391 S.E.2d 43 (1990).
38. *State v. Robinson*, 97 N.C. App. 597, 389 S.E.2d 417 (1990).
39. *State v. Sanders*, 95 N.C. App. 494, 383 S.E.2d 409 (1989).
40. *State v. Batts*, 93 N.C. App. 404, 378 S.E. 2d 211 (1989).
41. *State v. Attmore*, 92 N.C. App. 385, 374 S.E.2d 649 (1988).
42. *State v. Cannon*, 92 N.C. App. 246, 374 S.E.2d 604 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

C. *Table 3: Supreme Court of North Carolina Published Cases Adjudicating* Batson *Step One Claims, 1986–2016*

1. *State v. Waring*, 364 N.C. 443, 701 S.E.2d 615 (2010).
2. *State v. Maness*, 363 N.C. 261, 677 S.E.2d 796 (2009).
3. *State v. Taylor*, 362 N.C. 514, 669 S.E.2d 239 (2008).
4. *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515 (2005).
5. *State v. Chapman*, 359 N.C. 328, 611 S.E.2d 794 (2005).
6. *State v. Nicholson*, 355 N.C. 1, 558 S.E.2d 109 (2002).
7. *State v. Blakeney*, 352 N.C. 287, 531 S.E.2d 799 (2000).
8. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000).
9. *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000).
10. *State v. Smith*, 351 N.C. 251, 524 S.E.2d 28 (2000).
11. *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998).
12. *State v. Hoffman*, 348 N.C. 548, 500 S.E.2d 718 (1998).
13. *State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998).
14. *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357 (1998).
15. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997).
16. *State v. Norwood*, 344 N.C. 511, 476 S.E.2d 349 (1996).
17. *State v. Williams*, 343 N.C. 345, 471 S.E.2d 379 (1996).
18. *State v. Richardson*, 342 N.C. 772, 467 S.E.2d 685 (1996).
19. *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995).
20. *State v. Quick*, 341 N.C. 141, 462 S.E.2d 186 (1995).
21. *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995).
22. *State v. Ross*, 338 N.C. 280, 449 S.E.2d 556 (1994).
23. *State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993).
24. *State v. Glenn*, 333 N.C. 296, 425 S.E.2d 688 (1993).

25. *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989).
26. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *vacated on other grounds*, 494 U.S. 1021 (1990).
27. *State v. Crandell*, 322 N.C. 487, 369 S.E.2d 579 (1988).
28. *State v. Gray*, 322 N.C. 457, 368 S.E.2d 627 (1988).
29. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987).
30. *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987).
31. *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987).
32. *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

D. *Table 4: North Carolina Court of Appeals Published Cases Adjudicating* Batson *Step One Claims, 1986–2016*

1. *State v. Mills*, 225 N.C. App. 773, 741 S.E.2d 427 (2013).
2. *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211 (2005).
3. *State v. Moore*, 167 N.C. App. 495, 606 S.E.2d 127 (2004).
4. *State v. Gattis*, 166 N.C. App. 1, 601 S.E.2d 205 (2004).
5. *State v. Mays*, 154 N.C. App. 572, 573 S.E.2d 202 (2002).
6. *State v. Cherry*, 141 N.C. App. 642, 541 S.E.2d 205 (2000).
7. *State v. McKeithen*, 140 N.C. App. 422, 537 S.E. 2d 526 (2000).
8. *State v. Crockett*, 138 N.C. App. 109, 530 S.E.2d 359 (2000).
9. *State v. Burge*, 100 N.C. App. 671, 397 S.E.2d 760 (1990).
10. *State v. McNeill*, 99 N.C. App. 235, 393 S.E.2d 123 (1990).
11. *State v. Aytche*, 98 N.C. App. 358, 391 S.E.2d 43 (1990).
12. *State v. Robinson*, 97 N.C. App. 597, 389 S.E.2d 417 (1990).
13. *State v. Batts*, 93 N.C. App. 404, 378 S.E.2d 211 (1989).
14. *State v. Attmore*, 92 N.C. App. 385, 374 S.E.2d 649 (1988).

E. *Table 5: Supreme Court of North Carolina Published Cases Relying on Conjured Reasons in Adjudicating* Batson *Step One Claims, 1986–2016*

1. *State v. Waring*, 364 N.C. 443, 701 S.E.2d 615 (2010).
2. *State v. Taylor*, 362 N.C. 514, 669 S.E.2d 239 (2008).
3. *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515 (2005).
4. *State v. Chapman*, 359 N.C. 328, 611 S.E.2d 794 (2005).
5. *State v. Nicholson*, 355 N.C. 1, 558 S.E.2d 109 (2002).
6. *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000).
7. *State v. Hoffman*, 348 N.C. 548, 500 S.E.2d 718 (1998).

8. *State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998).
9. *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357 (1998).
10. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997).
11. *State v. Williams*, 343 N.C. 345, 471 S.E.2d 379 (1996).
12. *State v. Richardson*, 342 N.C. 772, 467 S.E.2d 685 (1996).
13. *State v. Quick*, 341 N.C. 141, 462 S.E.2d 186 (1995).
14. *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995).
15. *State v. Glenn*, 333 N.C. 296, 425 S.E.2d 688 (1993).
16. *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989).
17. *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987).

F. Table 6: North Carolina Court of Appeals Published Cases Relying on Conjured Reasons in Adjudicating Batson *Step One Claims, 1986–2016*

1. *State v. Mills*, 225 N.C. App. 773, 741 S.E.2d 427 (2013).
2. *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211 (2005).
3. *State v. Moore*, 167 N.C. App. 495, 606 S.E.2d 127 (2004).
4. *State v. Cherry*, 141 N.C. App. 642, 541 S.E.2d 205 (2000).
5. *State v. McNeill*, 99 N.C. App. 235, 393 S.E.2d 123 (1990).
6. *State v. Aytche*, 98 N.C. App. 358, 391 S.E.2d 43 (1990).
7. *State v. Batts*, 93 N.C. App. 404, 378 S.E.2d 211 (1989).
8. *State v. Attmore*, 92 N.C. App. 385, 374 S.E.2d 649 (1988).

G. Table 7: Supreme Court of North Carolina Published Cases Adjudicating Batson *Step Three Claims, 1986–2016*

1. *State v. Waring*, 364 N.C. 443, 701 S.E.2d 615 (2010).
2. *State v. Maness*, 363 N.C. 261, 677 S.E.2d 796 (2009).
3. *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004).
4. *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004).
5. *State v. Williams*, 355 N.C. 501, 565 S.E.2d 609 (2002).
6. *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002).
7. *State v. Nicholson*, 355 N.C. 1, 558 S.E.2d 109 (2002).
8. *State v. Fair*, 354 N.C. 131, 557 S.E.2d 508 (2001).
9. *State v. King*, 353 N.C. 457, 546 S.E.2d 575 (2001).
10. *State v. Hardy*, 353 N.C. 122, 540 S.E.2d 334 (2000).
11. *State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000).
12. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000).

13. *State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486 (1999).
14. *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998).
15. *State v. Hoffman*, 349 N.C. 167, 505 S.E.2d 80 (1998).
16. *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998).
17. *State v. Bonnett*, 348 N.C. 417, 502 S.E.2d 563 (1998).
18. *State v. Lemons*, 348 N.C. 335, 501 S.E.2d 309 (1998), *rev'd on other grounds*, 527 U.S. 1018 (1999).
19. *State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998).
20. *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997).
21. *State v. Robinson*, 346 N.C. 586, 488 S.E.2d 174 (1997).
22. *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997).
23. *State v. Bond*, 345 N.C. 1, 478 S.E. 2d 163 (1996).
24. *State v. Harden*, 344 N.C. 542, 476 S.E.2d 658 (1996).
25. *State v. Peterson*, 344 N.C. 172, 472 S.E.2d 730 (1996).
26. *State v. Womble*, 343 N.C. 667, 473 S.E.2d 291 (1996).
27. *State v. Lynch*, 343 N.C. 483, 471 S.E.2d 376 (1996).
28. *State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204 (1996).
29. *State v. Floyd*, 343 N.C. 101, 468 S.E.2d 46 (1996).
30. *State v. Best*, 342 N.C. 502, 467 S.E.2d 45 (1996).
31. *State v. Kandies*, 342 N.C. 419, 467 S.E.2d 67 (1996).
32. *State v. Larrimore*, 340 N.C. 119, 456 S.E.2d 789 (1995).
33. *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994).
34. *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994).
35. *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 (1994).
36. *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994).
37. *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994).
38. *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879 (1994).
39. *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994).
40. *State v. Wiggins*, 334 N.C. 18, 431 S.E.2d 755 (1993).
41. *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991).
42. *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991).
43. *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991).
44. *State v. McNeill*, 326 N.C. 712, 392 S.E. 2d 78 (1990).
45. *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990).
46. *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988).

H. *Table 8: North Carolina Court of Appeals Published Cases Adjudicating* Batson *Step Three Claims, 1986–2016*

1. *State v. James*, 230 N.C. App. 346, 750 S.E.2d 851 (2013).
2. *State v. Pender*, 218 N.C. App. 233, 720 S.E.2d 836 (2012).
3. *State v. Carter*, 212 N.C. App. 516, 711 S.E.2d 515 (2011).
4. *State v. Headen*, 206 N.C. App. 109, 697 S.E.2d 407 (2010).
5. *State v. Wright*, 189 N.C. App. 346, 658 S.E.2d 60 (2008).
6. *State v. McClain*, 169 N.C. App. 657, 610 S.E.2d 783 (2005).
7. *State v. Alvarez*, 168 N.C. App. 487, 608 S.E.2d 371 (2005).
8. *State v. Matthews*, 162 N.C. App. 339, 595 S.E.2d 446 (2004).
9. *State v. Wiggins*, 159 N.C. App. 252, 584 S.E.2d 303 (2003).
10. *State v. Littlejohn*, 158 N.C. App. 628, 582 S.E.2d 301 (2003).
11. *State v. McCord*, 158 N.C. App. 693, 582 S.E.2d 33 (2003).
12. *State v. McCord*, 140 N.C. App. 634, 538 S.E.2d 633 (2000).
13. *State v. White*, 131 N.C. App. 734, 509 S.E.2d 462 (1998).
14. *State v. Corpening*, 129 N.C. App. 60, 497 S.E.2d 303 (1998).
15. *State v. Caporasso*, 128 N.C. App. 236, 495 S.E.2d 157 (1998).
16. *State v. Sessoms*, 119 N.C. App. 1, 458 S.E.2d 200 (1995).
17. *State v. Floyd*, 115 N.C. App. 412, 445 S.E.2d 54 (1994).
18. *State v. Degree*, 114 N.C. App. 385, 442 S.E.2d 323 (1994).
19. *State v. Austin*, 111 N.C. App. 590, 432 S.E.2d 881 (1993).
20. *State v. Crummy*, 107 N.C. App. 305, 420 S.E.2d 448 (1992).
21. *State v. Mebane*, 106 N.C. App. 516, 418 S.E.2d 245 (1992).
22. *State v. Martin*, 105 N.C. App. 182, 412 S.E.2d 134 (1992).
23. *State v. Melvin*, 99 N.C. App. 16, 392 S.E.2d 740 (1990).
24. *State v. Sanders*, 95 N.C. App. 494, 383 S.E.2d 409 (1989).
25. *State v. Cannon*, 92 N.C. App. 246, 374 S.E.2d 604 (1988).

I. *Table 9: Published Cases in the North Carolina Appellate Courts Rejecting Comparative Juror Analysis in* Batson *Claims, 1986–2016*

1. *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004).
2. *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002).
3. *State v. King*, 353 N.C. 457, 546 S.E.2d 575 (2001).
4. *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000).
5. *State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486 (1999).
6. *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998).
7. *State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998).

8. *State v. Peterson*, 344 N.C. 172, 472 S.E.2d 730 (1996).
9. *State v. Floyd*, 343 N.C. 101, 468 S.E.2d 46 (1996).
10. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997).
11. *State v. Lyons*, 343 N.C. 1, 468 S.E.2d 204 (1996).
12. *State v. Kandies*, 342 N.C. 419, 467 S.E.2d 67 (1996).
13. *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994).
14. *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994).
15. *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 (1994).
16. *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991).
17. *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991).
18. *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991).
19. *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990).
20. *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988).
21. *State v. James*, 230 N.C. App. 346, 750 S.E.2d 851 (2013).
22. *State v. Carter*, 212 N.C. App. 516, 711 S.E.2d 515 (2011).
23. *State v. McClain*, 169 N.C. App. 657, 601 S.E.2d 783 (2005).
24. *State v. Matthews*, 162 N.C. App. 339, 595 S.E.2d 446 (2004).
25. *State v. Wiggins*, 159 N.C. App. 252, 584 S.E.2d 303 (2003).
26. *State v. Littlejohn*, 158 N.C. App. 628, 582 S.E.2d 301 (2003).
27. *State v. McCord*, 158 N.C. App. 693, 582 S.E.2d 33 (2003).

J. Table 10: Published Appellate Cases in Neighboring States Finding Substantive Batson *Violations, 1986–2016*

West Virginia

1. *State ex rel. Ballard v. Painter*, 582 S.E.2d 737 (W. Va. 2003).
2. *State v. Marrs*, 379 S.E.2d 497 (W. Va. 1989).

Maryland

1. *Ray-Simmons v. State*, 132 A.3d 275 (Md. 2016).
2. *Chew v. State*, 562 A.2d 1270 (Md. 1989).
3. *Tolbert v. State*, 553 A.2d 228 (Md. 1989).

Virginia

1. *Commonwealth v. Thompson*, 455 S.E.2d 206 (Va. 1995).
2. *Hill v. Berry*, 441 S.E.2d 6 (Va. 1994).
3. *Faison v. Hudson*, 417 S.E.2d 305 (Va. 1992).
4. *Hopkins v. Commonwealth*, 672 S.E.2d 890 (Va. Ct. App. 2009).

5. *Broady v. Commonwealth*, 429 S.E.2d 468 (Va. Ct. App. 1993).
6. *Jackson v. Commonwealth*, 380 S.E.2d 1 (Va. Ct. App. 1989).

South Carolina

1. *Robinson v. Bon Secours Saint Francis Health Sys., Inc.*, 675 S.E.2d 744 (S.C. 2009).
2. *McCrea v. Gheraibeh*, 669 S.E.2d 333 (S.C. 2008).
3. *State v. Marble*, 426 S.E.2d 744 (S.C. 1992).
4. *State v. Grate*, 423 S.E.2d 119 (S.C. 1992).
5. *State v. Adams*, 415 S.E.2d 402 (S.C. 1992).
6. *State v. Patterson*, 414 S.E.2d 155 (S.C. 1992).
7. *State v. Davis*, 411 S.E.2d 220 (S.C. 1991).
8. *State v. Grandy*, 411 S.E.2d 207 (S.C. 1991).
9. *Chavous v. Brown*, 409 S.E.2d 356 (S.C. 1991).
10. *State v. Tomlin*, 384 S.E.2d 707 (S.C. 1989).
11. *State v. Oglesby*, 379 S.E.2d 891 (S.C. 1989).
12. *State v. Stewart*, 775 S.E.2d 416 (S.C. Ct. App. 2015).
13. *Foster v. Spartanburg Hosp. Sys.*, 442 S.E.2d 624 (S.C. Ct. App. 1994).