*Report of the Willamette University College of Law Racial Justice Task Force on the use of Peremptory Challenges during Criminal Jury Selection in Oregon*
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Given recent events, the country has begun to recognize the impact of implicit bias on the criminal justice system. Washington and California, for instance, have made progress in creating broader opportunities and diversification within the jury selection system. Oregon, however, has yet to revise its rules for jury selection. This Report examines the connection between implicit bias and the nature and use of peremptory challenges in Oregon's jury selection process. Accordingly, this Report argues that Oregon must implement a rule that strengthens—or even eliminates the need for—*Batson*'s rule and limits the impact of bias in our judicial system. In doing so, the Report proposes two solutions to reduce the impact of implicit bias on Oregon's jury selection process.

This Report's first recommendation is to abolish peremptory challenges in criminal proceedings. This would require repealing and replacing Or. Rev. Stat. § 136.230, which authorizes peremptory challenges in criminal prosecutions. The Task Force finds that persistent and ongoing racially motivated constitutional violations will continue unless the peremptory challenge is eliminated. This proposal tracks with the recommendation of U.S. Supreme Court Chief Justice Thurgood Marshall, U.S. Supreme Court Justice Stephen Breyer, and a growing body of scholars. It also follows the lead of England, which abolished the peremptory challenge, through the Criminal Justice Act of 1988, due to its propensity for discriminatory use. For similar reasons, Canada eliminated peremptory challenges in 2019 due to their propensity to exclude minority jury panelists.

*Batson* challenges allow attorneys to articulate supposed reasons for "gut-reactions" and are widely acknowledged to serve as a poor mechanism for dealing with the documented implicit bias that exists within the criminal justice system. As Chief Justice Marshall once said, "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." Faced with a better understanding of implicit bias, Oregon has the opportunity to reduce the impact of implicit bias in its courts by abolishing the use of peremptory strikes.

Alternatively, this Report recommends that Oregon implement a rule that combines aspects of both Washington's GR-37 and California's Assembly Bill No. 3070 ("AB 3070"). Such a rule would strengthen *Batson* challenges, as well as expand the classes of persons protected against discrimination. The hybrid Oregon rule would adopt GR 37(h), which lists presumptively invalid reasons for peremptory challenges that have historically been associated with improper discrimination in jury selection. It would also adopt AB 3070(d)(3), which provides a non-exhaustive list of circumstances a court may consider when ruling

on an objection to a peremptory challenge. Such a rule would address some of the problems associated with implicit bias in Oregon's juror selection process and, in doing so, better ensure that Oregon's defendants receive a fair trial. At its core, this Report demonstrates that the deficiencies of *Batson* must be remedied in an effective manner, whether by the elimination of the peremptory challenge or the formulation of a new Oregon rule.

*Introduction*

The Willamette University College of Law Racial Justice Task Force[1] (the "Task Force") was formed to address racial justice and equity issues within the Oregon criminal justice system. The Committee on Bias in the Oregon Justice System (the "Committee") charged the Task Force with investigating options to reduce racial discrimination in Oregon's criminal jury selection process. This Report responds to the Committee's charge to the Task Force in five parts.

First, the Report provides an introduction to explicit and implicit bias. Second, it addresses how federal courts have dealt with bias, including the U.S. Supreme Court in *Batson v. Kentucky*[2] and its progeny.[3] Third, it critiques the *Batson* system and remedies adopted by other states. Fourth, it outlines Oregon's approach to bias in the jury selection process. Lastly, it offers two independent recommendations, in order of effectiveness, to address *Batson*'s deficiencies in Oregon.

## I. Understanding Bias: Explicit & Implicit

In order to address racial injustice in the criminal justice system, one must understand the nature of bias. Bias is a personal inclination or outlook that can either favor or prejudice an idea or individual, usually in a way that is unfair to the idea or individual.[4] Both explicit and implicit bias exist within our criminal justice system. Section A defines explicit bias. Section B defines implicit bias, while also providing a general overview of research demonstrating that implicit bias permeates criminal justice systems nationwide.

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[1] The Willamette University College of Law Racial Justice Task Force is formed primarily of diploma privilege recipients from the class of 2020. Forgoing the bar examination and bar preparation program allowed recent graduates to devote time to the completion of this report during a time of reflection on social justice issues. The Task Force is chaired by Willamette Dean Brian R. Gallini. The Vice-Chairs are Willamette University College of Law 2020 graduates Samantha A. Klausen and Eden E. Vasquez. Task Force Members are Willamette University College of Law 2020 graduates Kyleigh M. Gray, Michael J. Wallace, Alana Axley-Irinaga, Megan Axley-Irinaga, Taylor Hurwitz, Alexandra Hutchinson, Mikayla Frei, Laura Johnson, Caroline McCarthy, Julie Preciado, Dale Wilhelm, Nathaniel Woodward, Dillon Duxbury, Darrin Divers, Kristi Skalman, and Anderson Beals. The Task Force thanks Hon. Jack Landau, Hon. Paul De Muniz, and Professor Caroline Davidson for their appreciable guidance, and Alex Carroll (JD'20, University of Arkansas-Fayetteville School of Law) for his thoughtful suggestions and careful edits.

[2] 476 U.S. 79 (1986).

[3] *See infra* Part II.

[4] *See Bias*, MERRIAM-WEBSTER DICTIONARY (3d ed. 2002).

### A. *Explicit Bias*

Bias results from the brain creating shortcuts by categorizing information in order to increase processing speed.[5] Explicit bias is bias that is related to an individual's conscious beliefs.[6] A person who is explicitly biased is aware that they have a particular feeling or attitude "and related behaviors are conducted" with that bias.[7] He or she also has an accurate understanding of the source of that bias.[8] Explicit bias often indicates conscious endorsement of the thought or feeling.[9] Overt racism and racist comments are one form of explicit bias.[10] To address this, the U.S. Supreme Court has declared that race-based explicit bias is unconstitutional.[11] But there is a second type of bias that likewise affects an individual's judgments and choices.

### B. *Implicit Bias*

Explicit and implicit bias, while related, are distinct.[12] Unlike explicit bias, implicit bias

> refers to the attitudes or stereotypes that affect our understanding, decisions and actions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are

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[5] *See generally* Michael Billig, *Prejudice, Categorization, and Particularization: From a Perceptual to a Rhetorical Approach*, EUROPEAN J. OF SOCIAL PSYCHOLOGY, 79 (1985); Lorie Fridell, *This is Not Your Grandparents' Prejudice: The Implications of the Modern Science of Bias for Police Training*, TRANSLATIONAL CRIMINOLOGY (2013).

[6] Kimberly Papillon, *Two Types of Bias*, NAT'L CTR. FOR CULTURAL COMPETENCE, https://nccc.georgetown.edu/bias/module-3/1.php (last visited Dec. 12, 2020).

[7] *Id.*

[8] *See* Fridell *supra* note 5.

[9] Jerry Kang, *Implicit Bias: A Primer for Courts*, NAT'L CTR. FOR STATE CTS., 5 (2009), https://www.ncsc.org/__data/assets/pdf_file/0025/14875/kangibprimer.pdf (last visisted Dec. 12, 2020).

[10] *Understanding Bias: A Resource Guide*, U.S. DEP'T. OF JUST., https://www.justice.gov/crs/file/836431/download (last visited Dec. 12, 2020).

[11] *See* Buck v. Davis, 137 S. Ct. 759, 775 (2017).

[12] *See generally* Nilanjana Dasgupta, I*mplicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit Prejudice, Stereotypes, and the Self-Concept*, 47 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, 233, 236 (2013); Cheryl Statts et al., *State of the Science: Implicit Bias Review*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, 63 (2015), http://kirwaninstitute.osu.edu/implicit-bias-training/resources/2015-implicit-bias-review.pdf [hereinafter *Implicit Bias Review*].

> activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.[13]

Because implicit bias is an *unconscious* bias, it can occur in all people.[14] It is often unrelated to one's conscious beliefs or known biases, and can affect one's decisions without the person realizing this has occurred.[15] This is a primary danger of implicit bias: individuals do not know when it influences their thoughts and actions.

Concerningly, ongoing research reflects that implicit biases are pervasive.[16] Harvard University, for instance, has created an Implicit Association Test that "measures the strength of associations between concepts (e.g., Black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key."[17] Generally, people hold implicit biases that favor their own "ingroup," defined as a category or group of which the individual believes they are a member.[18] An ingroup can relate to the cultural community to which an individual belongs.

However, research has also shown that people can hold implicit biases against their own ingroup.[19] Implicit bias therefore exists in both ingroup members and out-of-group members.[20] Researchers have

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[13] *Implicit Bias Review*, *supra* note 12.

[14] *See* Kang *supra* note 9, at 2.

[15] Karen Steinhauser*, Everyone Is a Little Biased*, AMERICAN BAR ASS'N. (Mar. 16, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased/.

[16] BRAIN A. NOSEK ET AL., PERVASIVENESS AND CORRELATES OF IMPLICIT ATTITUDES AND STEREOTYPES 36–88 (2007) https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.617.8414&rep=rep1&type=pdf.

[17] *Education*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/education.html (last visited Dec. 12, 2020).

[18] *Id.*

[19] *Id.*

[20] For example, one study provided:

> Fourth to eighth grade students were given explicit and implicit measures for awareness and personal endorsement for the

discovered that Americans, regardless of their race, display pro-White and anti-Black bias on the Harvard Implicit Association Test.[21] Other research has shown the prevalence of pro-male and anti-female implicit biases in both men and women.[22] Researchers attribute these biases to direct and indirect messages throughout the course of one's lifetime that have implications for one's thoughts and judgements of others.[23] Although these implicit biases are created over time and through these learned associations, education and recognition by the individual that they hold biased associations can remedy implicit bias.[24]

Bias has affected the legal system in a variety of ways and continues to do so today. Within the criminal justice system, everyone possesses implicit bias, "even people with avowed commitments to impartiality such as judges."[25] Implicit bias is widespread and can affect those directly involved in the criminal justice system, including attorneys, judges, and potential jurors. For example, implicit bias can influence court decisions on criminal sentencing. In one study, it was noted that,

> research explored the connection between criminal sentencing and Afrocentric features bias, which refers to the generically negative judgements and beliefs that many people hold regarding individuals who possess Afrocentric features such as dark skin, a wide nose, and full lips. Researchers found that when controlling for numerous factors (e.g., seriousness of the primary

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> stereotype that Asians are better at math than Whites are. Both elementary and middle school students reported explicit awareness of the stereotype, and middle school students reported personal endorsement of the bias at a significant level (Cvencek, Nasir, O'Connor, Wischnia, & Meltzoff, 2014). Additionally, the students participated in an Implicit Association Test (IAT) to test the strength of the association between "Asian" and "Math." These (sic) implicit measures of the "Asian=Math" association correlated positively with explicit measures of stereotype awareness in both age groups. Moreover, students in higher grades exhibited a larger degree of the "Asian=Math" association on the IAT than those in elementary school. Results implicated that students' stereotype awareness and likelihood of internalization may increase with age.

Cvencek et. al, *The Development of Math–Race Stereotypes: "They Say Chinese People Are the Best at Math"*, 1 J. RESEARCH ON ADOLESCENCE 4 (2014).

[21] *Implicit Bias Review*, *supra* note 12.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

> offense, number of prior offenses, etc.), individuals with the most prominent Afrocentric features received longer sentences than their less Afrocentrically featured counterparts.[26]

As this research shows, the presence of implicit bias constitutes a grave flaw in the foundation of our criminal justice system by allowing for an individual's skin color or physical features to be a determinative factor in the length of their prison sentence.

Although countless studies, law review articles,[27] and independent research agencies[28] have confirmed the presence and impact of implicit bias, the U.S. Constitution does not protect against implicit bias in the criminal justice system.[29]

For its part, Oregon has studied the impact of bias on its own judicial system. The 1994 Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System found that racial minorities were disadvantaged in most areas of Oregon's judicial system.[30] The 1994 report highlights the struggle between the dominant culture's ability to understand minority communities' cultures and minority groups' ability to participate in Oregon courts.[31] More than twenty-five years later, empirical evidence now confirms that implicit bias exists and pervades Oregon's criminal justice system.[32] The Portland Police Bureau ("PPB"), for example, published a 2014 report illustrating racial

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[26] *Id.*

[27] L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 863, 875–77 (2017), https://www.yalelawjournal.org/pdf/h.862.Richardson.893_jqvsvjxq.pdf.

[28] *See generally* JENNIFER L. EBERHARDT, BIASED, UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019).

[29] *See, e.g.*, State v. Saintcalle, 309 P.3d 326, 344 (Wash. 2013) (stating "the constitutional inquiry [] is aimed at purposeful discrimination." Despite "growing concerns about unconscious and implicit racial biases that could also affect jury selection," the "constitutional test from *Batson* is intended to reach purposeful discriminatory exercise of the peremptory challenge," not non-purposeful discrimination), *abrogated in part by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017); *see also* Georgia v. McCollum, 505 U.S. 42 (1992) (providing that the peremptory challenge is an important "state-created means to the constitutional end of an impartial jury and a fair trial").

[30] *See* Hon. Edwin J. Peterson et. al., *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823 (1994).

[31] *Id.*

[32] *Implicit Bias Review*, *supra* note 12.

discrepancies in traffic stops and the PPB's response.[33] Moving forward, it is necessary to address and remedy the influence of implicit bias in the jury selection process and the use and nature of peremptory challenges—under both federal and Oregon law.

## II. *Batson* & Its Progeny: The Federal Approach to Bias in Jury Selection

In 1963, the Alabama Supreme Court summed up with chilling simplicity the Jim Crow effectiveness of the peremptory challenge: "Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury."[34] The Supreme Court has long held that systematic exclusion of jurors on the basis of race violates the Equal Protection Clause.[35] In the context of peremptory challenges, the Supreme Court attempted to address impermissible bias in the jury selection process in its 1986 decision of *Batson v. Kentucky*.[36]

*Batson* confronted a scenario where the prosecutor used his peremptory challenges to strike all four Black persons in venire, and selected an all-White jury which ultimately convicted the defendants.[37] Before the Supreme Court, the defendant argued in part that the prosecutor's dismissal of all eligible Black jurors violated his right to equal protection under the Fourteenth Amendment.[38] The state countered that the unrestricted ability to exercise peremptory challenges plays a vital role in the criminal justice system.[39]

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[33] The PPB and the Community Police Relations Committee recommended a multifaceted training process directed toward decreasing officers' implicit biases as the primary method for decreasing acts of racial profiling. *See Implicit Bias Review*, *supra* note 12, at 13. Recognition of the harmful effect of implicit bias and training to reduce both implicit and explicit racial bias have facilitated change within Oregon's criminal justice system. *Id.*

[34] Hoffman, Morris B, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, U. CHICAGO L. REV. 809, 829 (1997) (citing Swain v State, 156 S.2d 368, 375 (1963), *aff'd*, 380 U.S. 202 (1965)).

[35] *See* Swain v. Alabama, 380 U.S. 202, 227 (1965) (holding that the Equal Protection Clause prohibits prosecutors from using peremptory challenges in a racial discriminatory manner but requires that the defendant demonstrate the prosecutor had systematically excluded Black jurors to overcome the presumption that the challenge was legitimately exercised).

[36] 476 U.S. 79 (1986).

[37] *Id.* at 83.

[38] *Id.*

[39] *Id.* at 89.

The Court held that, although the use of peremptory challenges is generally available for any reason at all, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that Black jurors as a group will be unable impartially to consider the state's case against a Black defendant."[40] Writing for the majority, Justice Powell stated, "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try" and that "[a] person's race simply 'is unrelated to his fitness as a juror."[41] Although Justice Marshall concurred in the Court's holding, noting his view that the decision was a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries," he pointed out that the decision "will not end the racial discrimination that peremptories inject into the jury selection process . . . [because t]hat goal can be accomplished only by eliminating peremptory challenges entirely."[42]

In the wake of *Batson*, the Court has developed and refined the rules prohibiting the use of peremptory challenges in a discriminatory manner. For example, the Court has extended *Batson* to civil cases[43] and cases where jurors are excluded on the basis of sex.[44] In *Miller-El*, the trial court convicted and sentenced a Black man to death for robbing and killing one hotel clerk and severely injuring another employee.[45] At the beginning of jury selection, 20 of the 108-person venire were Black.[46] Of the twenty Black members, nine were excused for cause by mutual agreement.[47] The prosecutor then excused another ten Black potential jurors using peremptory strikes, leaving only one Black juror to serve at trial.[48] The U.S. District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals held that the prosecutor's challenges did not involve purposeful discrimination.[49]

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[40] *Id.* at 89.

[41] *Id.* at 87 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 223-24 (1946)).

[42] *Id.* at 102-03.

[43] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

[44] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

[45] 545 U.S. 233, 235–36 (2005).

[46] *Id.* at 240-41.

[47] *Id.*

[48] *Id.* at 248.

[49] *Id.* at 236-37.

The U.S. Supreme Court, however, reversed, finding in favor of the defendant.[50] The Supreme Court's decision depended primarily on the basis that at least two of the ten panelists would have been ideal for the prosecution and that the prosecution's race-neutral explanations were inadequate.[51] In its analysis, the Supreme Court interpreted "all relevant circumstances"—the scope of evidence a defendant may rely on according to *Batson*—to include evidence beyond the "four corners of a given case."[52] All relevant circumstances, according to the Supreme Court, includes statistical analysis, historical practice, disparate questioning of jurors, and parallel review of empaneled and struck jurors.[53]

The Supreme Court has also provided a framework for lower courts to determine the veracity of the proffered basis for a peremptory strike against a prospective juror belonging to a protected class. In *Snyder v. Louisiana*, the Court held that an inference of discriminatory intent can follow when a prosecution provides pre-textual justifications.[54] Justifications flowing from two similarly situated jurors and unfounded facts from the state were specifically at issue in *Snyder*.[55] There, the defendant was charged and convicted of first-degree murder and sentenced to death.[56] Thirty-six members of a jury panel survived for-cause challenges, five of whom were Black.[57] The prosecution used peremptory challenges to eliminate all five Black members.[58] On appeal, the Louisiana Supreme Court rejected defendant's *Batson* claim.[59] On further appeal, the U.S. Supreme Court determined that the prosecution's stated reasons for eliminating Black members were pretextual explanations giving rise to an inference of discriminatory intent.[60] The Court reasoned that "it [was] enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser

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[50] The trial occurred before *Batson* was decided, but subsequent appeals applied the doctrine. *Id.* at 231.

[51] *Id.* at 266.

[52] Miller-El v. Dretke, 545 U.S. 233, 239-40 (2005).

[53] *Id.* at 242-43, 253.

[54] Snyder v. Louisiana, 552 U.S. 480, 484 (2008).

[55] *Id.*

[56] *Id.* at 474.

[57] *Id.* at 475-76.

[58] *Id.*

[59] *Id.* at 476.

[60] *Id.* at 485.

showing by the prosecution."[61] As such, the Court concluded that the trial court committed clear error in its ruling on a *Batson* objection.[62]

The Court has also made clear that the standard "all relevant circumstances" includes a prosecutor's conduct in a defendant's separate, unrelated criminal trials. In *Flowers v. Mississippi*, the Court held that a prosecution striking forty-one of forty-two prospective jurors across the lifetime of a case lead to an inference of discriminatory intent.[63] The Court itself stated that such a "one of a kind" case, containing six different trials, only required the application of *Batson* and its progeny. There, the defendant, a Black man, was charged six separate times for the murder of four furniture store employees.[64] The third conviction was set aside on the basis of a *Batson* claim as the Mississippi Supreme Court found that the prosecution impermissibly exercised peremptory strikes on the basis of race.[65] In the sixth trial against him, the prosecution exercised five of its six peremptory challenges to remove Black panelists, and the defendant was thereafter sentenced to death.[66] On appeal, following that sixth trial, the defendant argued that the prosecution—again—violated his constitutional rights because of its racially discriminatory use of peremptory challenges.[67] The Mississippi Supreme Court affirmed the trial court's conviction, finding the strikes were made on race-neutral grounds.[68]

The U.S. Supreme Court reversed. In doing so, the Court relied in part on the history and circumstances surrounding the case, particularly because: (1) during the first four trials, the prosecution had attempted to strike all thirty-six Black panelists; and (2) during the sixth, the prosecution asked 145 questions of the five Black members and only twelve of the eleven White jurors.[69] Additionally, the Court discovered that the prosecution relied on several inaccurate statements—including the assertion that several prospective jurors worked and/or were "close friends" with the defendant's sister—to justify striking jurors.[70]

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[61] *Id.*

[62] *Id.* at 478.

[63] 139 S. Ct. 2228, 2235 (2019).

[64] *Id.* at 2235.

[65] *Id.* at 2245.

[66] *Id.* at 2235.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 2249.

Accordingly, the Court reiterated *Batson*'s pronouncement that "a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial."[71]

The ability to use peremptory challenges during the jury selection process is codified by federal statute.[72] The U.S. Supreme Court has nonetheless clearly announced that the federal constitution does not confer a right to the use of peremptory challenges:

> The right to exercise peremptory challenges in state court is determined by state law. This Court 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." Just as state law controls the existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge.[73]

As a result, there is no guaranteed right for litigants to use peremptory challenges.

## III. Critique of *Batson* & Alternative Proposals

The importance for courts to expand and define the true meaning and operation of laws cannot be overstated.[74] This Part offers contemporary judicial critique of *Batson* and how states have broadened its scope. Section A provides a critique of *Batson* through the reactions of trial court judges as well as academia's studies of *Batson* challenges. Section B considers the alternate proposals to *Batson* that Washington and California have adopted, GR 37 and AB-3070 respectively. Lastly, Section C outlines the similarities and differences between the solutions adopted through Washington's GR 37 and California's AB-3070.

### A. *Critique of* Batson

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[71] *Id.* at 2234.

[72] FED. R. CRIM. P. 24(b).

[73] Rivera v. Illinois, 556 U.S. 148, 152 (2009) (internal citations omitted).

[74] The Federalist No. 22 (Alexander Hamilton).

Since its issuance, *Batson* has faced criticism for its approach to dealing with discrimination and bias in the jury selection process.[75] Concurring in *Batson*, Justice Marshall feared that *Batson* would provide an easy cover for lawyers who were inclined to discriminate,[76] as well as for those who might be unaware of their true motives.[77] Justice Marshall similarly worried that the Court's rule left attorneys free to discriminate, "provided that they hold that discrimination to an 'acceptable' level."[78] Then, in 2005, concurring in *Miller-El*, Justice Breyer wrote that "[g]iven the inevitably clumsy fit between any

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[75] *See* Batson v. Kentucky, 476 U.S. 79, 105 (1986) (Marshall, J., concurring); *see also* Jigar Chotalia & Richard Martinez, *Limitations of the* Batson *Analysis in Addressing Racial Bias in Jury Selection*, J. AM. ACAD. OF PSYCHIATRY AND THE LAW ONLINE 533–35 (Dec. 2018), https://doi.org/10.29158/JAAPL.3797-18 (discussing whether the use of a peremptory strike of the only juror of a particular race constitutes a prima facie showing of racial discrimination); Annie Sloan, *"What to do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 1 (2020) (discussing Washington state's historic court rule to eliminate peremptory challenges in order to promote jury diversity and judicial integrity); *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. 1075-1130 (2011).

[76] *Batson*, 476 U.S. at 102-03.

[77] *Id.* at 106 ("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.").

[78] *Id.* at 105-06 (expressing this sentiment as a reason to entirely eliminate the peremptory challenge). Justice Thurgood Marshall explained why the rule adopted by the *Batson* majority does not sufficiently address the role of bias in the jury selection process:

> I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge. . . . First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a *prima facie* case. . . . Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level. Second, when a defendant can establish a *prima facie* case, trial courts face the difficult burden of assessing prosecutors' motives. Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second guess those reasons. . . . If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

*Id.* (internal citations omitted).

objectively measurable standard and the subjective decision making at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson,* the discriminatory use of peremptory challenges remains a problem."[79]

Trial court judges have expressed similar concerns about *Batson*. District Court Judge Morris Hoffman, a "reluctant convert," wrote in 1997 that despite a "deep respect for the traditions surrounding the right to a jury trial, and a personal conviction, confirmed by my experience on the bench, that jury trials really do work," he had come to believe peremptory challenges must be abolished.[80] Judge Hoffman came to believe that "the peremptory challenge is fundamentally flawed, both because it is rooted in the now meaningless and quite undemocratic concept of royal infallibility, and because it was invented two hundred years before the notion of jury impartiality."[81] He argued that although peremptory challenges were thought to have a legitimate historical purpose, they in fact never did. Instead, when they were first used in England sometime in the 13th or 14th century, peremptory challenges "were actually challenges for cause, which, because of the doctrine of royal infallibility, were irrefutably presumed to be well-taken."[82] And although the peremptory challenge fell into disuse in England, "the American version was vigorously and comprehensively being applied in attempts to stem the inevitable tide of civil rights."[83] In light of the history of peremptory challenges, he stated:

> [E]ven assuming [peremptory challenges are] working today in its post-*Batson* configuration to eliminate hidden juror biases . . . I submit that its institutional costs outweigh any of its most highly-touted benefits. Those costs-in juror *distrust, cynicism, and prejudice-simply obliterate any benefits* achieved by permitting trial lawyers to test their homegrown theories of human behavior on the most precious commodity we have-impartial citizens.[84]

Based on his experience as a trial judge, he expressed his concern that "[a]t worst," these theories of human behavior are based on "racism, sexism, and class hatred all dressed up in twentieth century

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[79] *Miller-El*, 545 U.S. at 270 (2005) (Breyer, J., concurring).

[80] *See* Hoffman, *supra* note 34, at 810, 850.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* (emphasis added).

psychobabble," and "[a]t best, they are animus-free nonsense, but nonsense nonetheless."[85]

Judge Hoffman's concerns are not anomalous. Washington Supreme Court Justice Mary Yu recently expressed a similar belief in her concurring opinion in *State v. Jefferson*.[86] Justice Yu, who originally supported the adoption of General Rule 37—Washington's modification of *Batson* aimed to better uncover impermissible discrimination against prospective jurors—stated she had come to believe "no court rule can overcome the intellectual gymnastics and assumptions required to isolate implicit bias in jury selection" and that "GR 37 is thus an unsatisfying, partial solution to a severe, intractable problem."[87]

Outside the judiciary,[88] academia has likewise studied *Batson* and its progeny. There is a common sentiment among academics that *Batson* is ineffective at combating implicit and explicit racially discriminatory juror exclusion.[89] Academic comment across the thirty-four years since

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[85] *Id.*

[86] State v. Jefferson, 429 P.3d 467, 477 (Wash. 2018) (Yu, J., concurring).

[87] *Id.*

[88] 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, at 16 (2001) (providing empirical studies documenting the disproportionate exclusion of Black jurors); 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.J. 299 (2017); Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1627 (2018).

[89] *See, e.g.*, Rice v. Collins, 546 U.S. 333, 342–43 (Breyer, J., concurring); Batson v. Kentucky, 476 U.S. 79, 108 (Marshall, J., concurring); *See, e.g.*, Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 827 (1997); Nancy S. Marder, Symposium, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 4, 1683 (2006); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 104 (2009); 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, 153 (1989); 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, 1076 (2011); Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1468 (2012); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, WIS. L. REV. 501, 501 (1999); Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. (2007); Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 414 (2016); Sheri Lynn Johnson, Batson *from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71, 71 (2014); Theodore McMillian &

*Batson*'s issuance concludes that "*Batson* is either a disingenuous charade or an ill-conceived sinkhole."[90] In application, academic study similarly reveals that prosecutors across the country continue to use peremptory strikes to eliminate Black prospective jurors at a rate far exceeding their elimination of other groups.[91] For example, Cornell University Law School analyzed the bases and rate that women and African American prospective jurors were removed from South Carolina capital cases.[92] Its study found that prosecutors in such cases "struck 35% of strike-eligible Black potential jurors," effectively erasing 15% of the Black venire members.[93] Additionally, an approximate 32% of Black venire members were removed for their opposition to the death penalty.[94] The study concluded that 47% of

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Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361 (1990); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, (1996); Camille A. Nelson, Batson*, O.J., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687 (2008); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); William T. Pizzi, Batson v. Kentucky*: Curing the Disease but Killing the Patient,* 1987 SUP. CT. REV. 97, 97; Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, at 1504 (2015); Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of* Batson, 45 U.C. DAVIS L. REV. 1359, 1361 (2012); Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1431; Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535, 2535 (2016); Harvard Law Review Association, Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2121 (2006). *But cf.* Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713 (2018) (acknowledging "*Batson*'s failings as a trial doctrine—its inability to prevent and remedy strikes in real time—but . . . focus[ing on] *Batson*'s virtues in appellate and postconviction proceedings").

[90] Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges,* 35 WM. & MARY L. REV. 21, 67 (1993); *see also Batson*, 476 U.S. at 106 (Marshall, J., concurring) (expressing that "the protection erected by the Court today may be illusory," and that, moreover, "[e]ven if all parties approached 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").

[91] *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 (2012); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW AND HUMAN BEHAVIOR 695, 695–702 (1999).

[92] Eisenberg, *supra* note 88.

[93] *Id.*

[94] *Id.*

Black venire members were excluded from serving on a jury compared to 16% of White venire members.[95]

Against that backdrop, the Task Force concurs with the opinions of Justice Marshall, Justice Yu, and others that *Batson* cannot be modified to tackle the problems inherent in peremptory challenges and that peremptory challenges must instead themselves be abolished.[96]

### B. *Alternative Proposals: Washington & California*

Although the current *Batson* rule prohibits juror discrimination in juror selection based on race, its framework requires that *purposeful* discrimination be shown to successfully challenge the use of a peremptory strike. As recognized explicitly by the Washington Supreme Court in *State v. Saintcalle*,[97] the *Batson* framework is simply not "robust enough to effectively combat race discrimination in the selection of juries."[98] That is because, as the court recognized, intentional discrimination is exceedingly difficult to prove.[99]

The facts of *Saintcalle* illustrate this problem. In *Saintcalle*, during jury selection in a murder trial of a Black defendant, the prosecution used a peremptory challenge to strike the only Black juror in *voir dire* after she expressed her thoughts about the criminal justice system and her perspective as a person of color.[100] The defendant raised a *Batson* challenge, alleging that the prosecution excluded the juror based on her race.[101] The trial judge first found that the defendant made a prima facie showing of purposeful discrimination, as required by the first step in the *Batson* framework, but ultimately accepted the prosecution's race-neutral reasons for striking the juror.[102]

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[95] *Id.*

[96] Justice John Paul Stevens also believed that peremptory challenges should be eliminated, but for a different reason. John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907, 907-08 (2003) ("A citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A challenge for cause provides such a reason; a peremptory challenge does not.").

[97] State v. Saintcalle, 309 P.3d 326 (Wash. 2013), *overruled in part on other grounds by* Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

[98] *Id.* at 329.

[99] *Id.* at 335.

[100] *Id.* at 331-32.

[101] *Id.*

[102] *Id.*

On appeal, the defendant argued that the peremptory strike of the only Black juror was a violation of the U.S. Constitution's Fourteenth Amendment guarantee of equal protection.[103] The Washington Supreme Court ultimately affirmed the trial court's ruling because the facts of the case did not support a holding that the trial court's actions were "clearly erroneous," but not before first offering several scathing analyses of the *Batson* framework in three concurring opinions (and a dissent). Among them, Justice Wiggins, for the plurality of three justices, wrote:

> Unconscious stereotyping upends the *Batson* framework. *Batson* is equipped to root out only '*purposeful*' discrimination, which many trial courts probably understand to mean conscious discrimination. But discrimination in this day and age is frequently unconscious and less often consciously purposeful. That does not make it any less pernicious. Problematically, people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it. Since *Batson*'s third step hinges on credibility, this makes it very difficult to sustain a *Batson* challenge even in situations where race has in fact affected decision-making.[104]

To be sure, *Saintcalle* served as a catalyst for changing the *Batson* framework in Washington.[105]

In 2018, the Washington Supreme Court, in consultation with a task force that included members of the community and representatives from the American Civil Liberties Union (ACLU), issued a new state court rule designed to combat implicit bias in juror selection.[106] The resulting rule, General Rule 37 ("GR 37"), expressly sought to "eliminate the unfair exclusion of potential jurors based on race or

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[103] *Id.* at 332.

[104] *Id.* at 336 (citations omitted).

[105] *Id.* ("None of this means we should turn a blind eye to the overwhelming evidence that peremptory challenges often facilitate racially discriminatory jury selection. Nor does it suggest we should 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.").

[106] *See* WASH. CTS., PROPOSED NEW GR 37—JURY SELECTION WORKGROUP 5 (2018), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf.

ethnicity."[107] GR 37, applicable to both criminal and civil trials, seeks to limit the ability of lawyers to use peremptory challenges in a consciously race-based manner, but also "at an implicit, unconscious, and systematic bias level."[108] The new rule no longer restricts the *Batson*'s framework to instances of purposeful discrimination; rather, attorneys can contest the use of peremptory challenge if an "objective observer" could find a discriminatory factor as the purpose for the strike.[109]

Pursuant to GR 37, the concerned party begins by contesting the use of a peremptory challenge on the basis of improper bias and the responding party must then provide a neutral reason for the challenge.[110] GR 37's framework to that point mirrors *Batson*, but step three presents a departure:

> 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.[111]

Additionally, the Washington Supreme Court created an extensive list of situations where an unsuccessful challenge under the *Batson* framework would prevail under GR 37.[112] Examples include: (1) prior contact with law enforcement; (2) expressing a belief that law enforcement officers engage in racial profiling; (3) having a close relationship with individuals who have been stopped, arrested, or convicted of a crime; (4) living in a high crime neighborhood; (5) having a child outside of a marital relationship; (6) receiving state benefits; and (7) being a non-native English speaker.[113]

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[107] WASH. CT. GEN. R. 37(a).

[108] Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HAST. WOMEN'S L. J. 79, 91 (2020).

[109] *Washington Supreme Court is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, AMERICAN CIVIL LIBERTIES UNION (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury [hereinafter ACLU, *Washington Supreme Court*].

[110] WASH. CT. GEN. R. 37(c)–(d); *see also* Anna L. Tayman, *Looking Beyond* Batson*: A Different Method of Combatting Bias Against Queer Jurors*, 61 WM. & MARY L. REV. 1759, 1778-79 (2020) (describing the framework of GR 37).

[111] WASH. CT. GEN. R. 37(e) (emphasis added).

[112] WASH. CT. GEN. R. 37(h)(i)-(vii).

[113] *Id.*

Washington is not the only state to implement such a groundbreaking rule.[114] Indeed, California recently adopted a similar rule, known as AB 3070,[115] which specifies presumptively invalid reasons for excluding a juror.[116] The California rule, set to take effect in 2022, prohibits the removal of a juror based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliations.[117] It also increases the consequences of impermissible uses of peremptory challenges.[118]

AB 3070 allows a party to object to the use of a peremptory challenge and requires the party seeking removal to state the reasons the peremptory challenge was exercised.[119] The court would then be required to evaluate the reasons given and, if impermissible, could impose sanctions, including starting the jury selection process all over, declaring a mistrial at the request of the objecting party, or providing another appropriate remedy.[120] Additionally, included in the bill is a clause that authorizes *de novo* review of an objection by the appellate courts.[121]

Similar to Washington's GR 37, the California bill includes a list of presumptively invalid reasons for juror removal.[122] In California, the presumption of invalidity can only be overcome if the party exercising the peremptory challenge can show by clear and convincing evidence that the rationale for using the challenge was unrelated to a prospective juror's membership in a protected class, and that the reasons

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[114] *See* ACLU, *Washington Supreme Court*, *supra* note 109 ("For decades in Washington state, many people of color have been blocked from participating fully in our democracy as jurors for reasons unrelated to their ability to serve. . . . This groundbreaking rule for jury selection will reduce the damage done by racial and ethnic bias to the integrity of our judicial system and to communities of color.").

[115] Kyle C. Barry, *California Adopts New Laws to Fight Racism in Jury Selection*, THE APPEAL (Sept. 30, 2020), https://theappeal.org/politicalreport/california-jury-selection-racial-discrimination/.

[116] A.B. 3070(e)(1)-(13); 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[117] *See* 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] For a full comparison of the terms in Washington's GR 37 and California's AB 3070, see *infra* Part IV.

articulated bear on the prospective juror's ability to be fair and impartial in the case.[123]

### C. *The Similarities & Differences Between Washington's GR 37 & California's AB 3070*

In 2018, the Washington Supreme Court adopted Washington's General Rule 37 with the specific goal of addressing deficiencies in the *Batson* framework.[124] Since GR 37's adoption, the Washington Supreme Court has addressed its implementation on several occasions. In *State v. Jefferson*, the defendant challenged the state's use of a peremptory strike against the only Black juror on the jury venire, asserting that the strike was racially motivated in violation of *Batson*.[125] Defendant also challenged the *Batson* test on its face, arguing that it failed to protect against racial discrimination in the jury selection process.[126] The court declined to reach the merits by concluding that GR 37 did not apply retroactively to the facts in the defendant's case.[127] The court did, however, recognize that the defendant's challenge would have likely been successful had GR 37 applied.[128]

Recently, California's AB-3070 was formally signed into law on September 30, 2020.[129] Based on the ACLU model approach, California's rule was adopted specifically in response to calls for jury reform.[130] The purpose of AB-3070 is "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

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[123] A.B. 3070(e), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[124] State v. Jefferson, 429 P.3d 467, 476 (Wash. 2018) ("As a prophylactic measure to ensure a robust equal protection guaranty, we must now adopt a new framework [GR 37] for the third part of the *Batson* challenge.").

[125] *Id.* at 470.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 476–77 (noting *Batson*'s two deficiencies: (1) *Batson* makes it "very difficult for defendants to prove [purposeful] discrimination even where it almost certainly exists'" and (2) *Batson* fails to address peremptory strikes due to implicit or unconscious bias, as opposed to purposeful race discrimination. The court stated that applying *Baton* "in this case confirms these deficiencies," and that "if the Rule had been in effect at the time of voir dire, GR 37 does address these two problems.").

[129] A.B. 3070(e), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[130] WASH. CT. GEN. R. 37(a).

groups, through the exercise of peremptory challenges."[131] As discussed further below, AB-307 and GR 37 share certain similarities, including the main purpose of the legislation. AB-3070, however, provides greater protection through some of the key distinctions, specifically through the inclusion of gender.

Although both GR 37 and AB-3070 take similar approaches to preventing bias in the jury selection process, they have several important differences. One important difference is that GR 37 applies only when a juror is impermissibly removed based on his or her race,[132] whereas AB-3070 prohibits discrimination based on race, ethnicity, gender, gender identity, sexual orientation, national origin, and religious affiliation.[133] Although the Washington workgroup did consider including gender in their proposed rule to the Washington Supreme Court, it was not included in their recommendation because workgroup did not feel they had sufficient time to adequately discuss the proposal's merits.[134] The workgroup did, however, recommend that the Washington Supreme Court continue to explore the issue.[135] The broader scope of California's rule reflects Supreme Court and Ninth Circuit cases that have extended the reach of *Batson* beyond race-based challenges, as well as California's broader protected class characteristics.[136]

The two rules also take differing approaches to evaluating *Batson* challenges. Although both rules allow a court to consider the "totality of the circumstances," the "objective observer" standard articulated in

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131 A.B. 3070(e), at § 1(a), 2019 Cal. Assemb., Cal. 2019–2020 Reg. Sess. (Cal. 2020).

132 WASH. CTS., PROPOSED NEW GR 37—JURY SELECTION WORKGROUP 5 (2018), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf.

133 A.B. 3070(e), at § 2(a), 2019 Cal. Assemb., Cal. 2019–2020 Reg. Sess. (Cal. 2020).

134 WASH. CTS., *supra* note 133, at 5.

135 *Id.*

136 *See, e.g.*, Smithkline Beecham v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014) (expanding *Batson* to cover discrimination in jury selection based on sexual orientation); *see also e.g.* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (expanding *Batson* to cover discrimination in jury selection based on gender); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending the reach of *Batson* over civil cases per the equal protection clause of the Fourteenth Amendment); Foster v. Chatman, 136 S. Ct. 1737 (2016) (finding that a state's habeas court's application for res judicata for defendant's *Batson* claim is not independent of the merits of the defendant's federal constitutional challenge, thus falling under the jurisdiction of the Supreme Court).

each is slightly different.[137] California's rule instructs a court to "consider only the reasons actually given" and "not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge."[138] Washington's objective standard, however, requires a court to determine whether an objective observer could have viewed race as a factor in the use of the peremptory challenge, which provides more space for judicial discretion and possibly inconsistent application.[139] Unlike Washington's rule, California's rule also requires a court to explain the reasons behind its decision on the record.[140]

Additionally, the two rules also have differing standards of proof. Washington's rule requires a court to find that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.[141] By contrast, California's rule requires a court to find that there was a substantial likelihood that an objective observer would have viewed protected class status as a factor.[142] Washington's standard is lower and, thus, easier to satisfy because it does not require the challenger to meet the burden of showing a "substantial likelihood" of race as a factor.

Finally, although both rules contain a comprehensive list of presumptively invalid reasons for removing a juror,[143] California's rule allows litigators to overcome a presumptively invalid reason for removal.[144] Historically, the listed presumptively invalid reasons for removal have been associated with improper discrimination and are unrelated to the impartiality of the potential juror. For example, on the list of presumptively invalid reasons for AB-3070, is the removal of a potential juror for "having a close relationship with people who have been stopped, arrested, or convicted of a crime," which provides a

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[137] *See* A.B. 3070 § 2(d)(1), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020); Wash. Ct. Gen. R. 37(g).

[138] A.B. 3070 § 2(d)(1), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[139] Wash. Ct. Gen. R. 37(g).

[140] A.B. 3070 § 2(d)(1), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[141] Wash. Ct. Gen. R. 37(e).

[142] A.B. 3070 § 2(d)(1), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[143] Wash. Ct. Gen. R. 37(g); A.B. 3070 § 2(d)(2), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[144] A.B. 3070 § 1 (b), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

basis for potential discrimination given the higher level of interaction between people of color and law enforcement.[145]

California's rule, however, allows litigators to overcome the presumption of invalidity if they 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.[146]

Washington's rule creates no such mechanism to contest a presumptively invalid removal of a juror.[147] Stated differently, an attorney must avoid providing a presumptively invalid reason for removing a juror.[148]

## IV. Oregon's Approach to Bias in the Jury Selection Process

Washington and California provide compelling and creative illustrative examples that provide greater protection to criminal defendants under the *Batson* framework while simultaneously maintaining peremptory challenges.[149] But whether those approaches are right for Oregon requires deeper consideration of race in Oregon alongside Oregon's pre-*Batson* and post-*Batson* jurisprudence. Accordingly, Section A broadly considers the role of racism in Oregon's history. Section B then examines Oregon's pre-*Batson* jurisprudence, including its initial response to *Batson*. Finally, Section C provides an overview of Oregon's modern application of *Batson*.

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[145] A.B. 3070 § 1 (e), 2019 Cal. Assemb., Cal. 2019-2020 Reg. Sess. (Cal. 2020).

[146] CAL. CODE OF CIV. P. § 231.7(e).

[147] Wash. Ct. Gen. R. 37(e).

[148] WASH. CT. GEN. R. 37(h).

[149] In preparing this Recommendation, the Task Force searched for data indicating the results of the rule changes in Washington and California. The Task Force, however, could not find such data. Neither could the Task Force find a way to track the rules' effects. In the coming years, data may emerge showing that Washington and California juries are more diverse due to the rule changes. But the Task Force is currently unable to confirm the effectiveness of the Washington and California rules. This inability is one of the reasons the Task Force prioritizes eliminating the peremptory challenge over a modified rule.

### A. *Oregon's History of Racism*

Oregon's history is deeply rooted in White supremacy.[150] Many of the laws enacted by both the territorial and federal government at the time of Oregon's inception were explicitly designed to exclude non-white males.[151] In 1850, Congress granted any White male over the age of twenty-one up to 640 acres of land in an effort to encourage more White settlers to migrate to the Oregon territory.[152] This naturally disenfranchised the native populations.[153] Early federal and Oregon statutes established a precedent of White supremacy in the newly-formed Oregon territory, leading to more demonstrations of government-sanctioned racism that have continued to the present day.[154]

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[150] *See generally* ELIZABETH MCLAGAN, A PECULIAR PARADISE: A HISTORY OF BLACKS IN OREGON 1788–1940, PREFACE (1980).

[151] One of the earliest official documents in the territory was an Act titled "An Act to Prevent Negroes and Mulattoes from Coming to, or Residing in Oregon" and passed on September 26, 1849, which read:

> WHEREAS, situated as the people of Oregon are, in the midst of an Indian population, it would be highly dangerous to allow free negroes and mulattoes to reside in the Territory, or to intermix with the Indians, instilling into their minds feelings of hostility against the white race: Therefore,
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> Be it enacted by the Legislative Assembly of the Territory of Oregon, That it shall not be lawful for any negro or mulatto to come into, or reside within the limits of this Territory.

OREGON TERRITORY J.C. AVERY, STATUTES OF A GENERAL NATURE PASSED BY THE LEGISLATIVE ASSEMBLY OF OREGON: AT THE SECOND SESSION, BEGUN AND HELD AT OREGON CITY, DECEMBER 2, 1850, 181-82 (1851).

[152] *Historical Context and Essays*, CTR. FOR STUDY OF THE PAC. NW., https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Homesteading/II.html (last visited December 19, 2020).

[153] MATTHEW P. DEADY & LAFAYETTE LANE, ORGANIC AND OTHER GENERAL LAWS OF OREGON: 1843-1872 (1974).

[154] For a detailed history of treatment of the Black community, and examples of other instances of government-sanctioned racism in Oregon's history, see Walidah Imarisha, *A Hidden History*, OR. HUMANS (Aug. 13, 2013), https://oregonhumanities.org/rll/magazine/skin-summer-2013/a-hidden-history/?gclid=CjwKCAiAn7L-BRBbEiwAl9UtkND7uRJ1jUoeIGB5aizn5TtxM7gvh3GRyXHwZj5YZnzxVuPeJDUhchoCQr8QAvD_BwE; Elaine Rector, *Looking Back in Order to Move Forward*, CITY OF PORTLAND, https://www.portlandoregon.gov/civic/article/516558 (last revised May 16, 2010).

The racial composition of Oregon's prison population demonstrates the lasting effects of Oregon's racist past, particularly when compared to the demographics of the State. In 1980, the U.S. prison population included 315,974 total inmates.[155] That number doubled to 739,980 inmates by 1990.[156] It grew to over 1,000,000 inmates by 2000.[157] Over the same period, Oregon's own prison population grew from 3,172 inmates to 10,553 inmates.[158] In 2014, Oregon's inmate population was 15,060.[159]

In Oregon, White individuals are imprisoned at a rate of 366 per 100,000 people while Black individuals are imprisoned at a staggering rate of 2,061 per 100,000 people.[160] Thus, Oregon's incarceration rate among Black individuals is over five times higher than the rate of incarceration among White individuals. Additionally, Multnomah County, the most populous county in the State, has one of the largest racial disparities in the criminal justice system (including arrests, convictions, and incarceration) per capita within the U.S.[161]

Reframing these disconcerting numbers as percentages reveals a similarly concerning trend. In 2014, one in twenty-one black Oregonian males were incarcerated.[162] Despite being only 1.8% of the population, in 2016 Black Oregonians made up 9.4% of Oregon's

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[155] *Criminal Justice Facts*, THE SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ (last visited Dec. 19, 2020).

[156] *Id.*

[157] *Estimated Number of Persons Under Correctional Supervision in the United States 1980-2016*, BUREAU OF JUST. STAT., www.bjs.gov/index.cfm?ty=kfdetail&iid=487 (last visited Dec. 17, 2020).

[158] *State-by-State Data*, THE SENT'G PROJECT, https://www.sentencingproject.org/the-facts/#detail?state1Option=Oregon&state2Option=0 (last visited Dec. 19, 2020).

[159] *Id.*; *see also* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT'G PROJECT (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

[160] *Id.*

[161] *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System,* THE SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (outlining the disparity between the majority White population and smaller Black, Indigenous, and people of color populations as it relates to arrests, convictions, and incarcerations).

[162] Ashley Nellis & Bobbin Singh, *Fix the Racial Disparities in Oregon's Prison,* THE SENT'G PROJECT (July 10, 2016), https://www.sentencingproject.org/news/fix-racial-disparities-oregons-prisons/.

inmates.[163] Studies have cited implicit bias and stereotypes in decision making as one of the causes of these disparities.[164] The Oregon Criminal Justice Commission's report, published in 2019, found that after a traffic stop, the Portland Police Bureau searched 11% of black drivers, over twice the predicted rate of 4.8%.[165] Because explicit bias in the form of overt racism is unconstitutional,[166] implicit bias is the likeliest explanation for these disparities in the court and criminal justice system.[167] Inferentially, the systemic discriminatory use of peremptory challenges in Oregon courtrooms statewide is a corollary concern of implicit bias.

### B. *Oregon's Early Cases and Response to* Batson

Oregon courts began considering the constitutionality of removing a juror based on his or her race long before *Batson*.[168] In 1963, in *Anderson v. Gladden*, the Oregon Supreme Court specifically noted that "[s]ystemic exclusion from the jury of members of a defendant's race, if proven, would be a denial of equal protection of the laws."[169] In that case, the defendant was a member of the Klamath tribe who was charged with committing second degree murder within the Klamath Indian Reservation.[170] At trial, the prosecutor systematically excluded jurors who were the same race as the defendant. The jury ultimately convicted the defendant. The defendant appealed his conviction on the grounds that the jury selection process violated his equal protection rights.[171]

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[163] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons,* THE SENT'G PROJECT (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/#II.%20Overall%20Findings.

[164] *Id.* at 8.

[165] Conrad Wilson, *Oregon Traffic Stop Data Shows Largest Disparity at Portland, Hillsboro Police,* OR. PUB. BROAD. (Dec. 1, 2019), https://www.opb.org/news/article/oregon-portland-traffic-stop-data-disparity-portland-hillsboro/; *see also* Noelle Crombie, *Portland Police More Likely to Arrest, Search Black People than White, Analysis Shows*, OREGONIAN (Dec. 1, 2019), https://www.portlandoregon.gov/omf/article/748292.

[166] U.S. CONST. art. 14.

[167] *See* Hon. Edwin J. Peterson et. al., *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823, 906 (1994).

[168] *See* Anderson v. Gladden, 383 P.2d 986 (Or. 1963).

[169] *Id.* at 989 (citing *Cassell v. Texas*, 339 U.S. 282 (1950) (grand jury) and *Patton v. Mississippi*, 332 U.S. 463 (1947) (grand and petit juries)).

[170] *Id* at 987.

[171] *Id.* The defendant also alleged that new evidence relating to the merits of the case also justified overturning his conviction. *Id.* at 988.

Despite the Oregon Supreme Court's acknowledgment of the discriminatory effect of systemic exclusion of jurors based upon race, it declined to find that the facts of the particular case were sufficient to establish a constitutional violation. In doing so, the Oregon Supreme Court reasoned that the demographics of the area could have been the reason for the lack of Indian participation in grand and local juries. Additionally, the Oregon Supreme Court noted that even if racial bias influenced jury selection, the defendant waived his right to object because he pleaded to the indictment.[172] Interestingly, the court acknowledged that, "[m]athematically, the odds would seem to be against a juror of a given nonwhite race being drawn in a given term of court," mirroring the complaints of the defendant but ultimately declining consider it at that time.[173]

The Oregon Supreme Court applied *Batson* in its 1992 decision in *State v. Henderson*.[174] The Court ultimately adopted much of the federal approach under *Batson*. In *Henderson*, the Oregon Supreme Court articulated its understanding of the three step analysis embodied in *Batson*, including first requiring that a party "establish a prima facie case of purposeful discrimination" by showing that he or she is a member of the particular racial or ethnic group in question and that the juror removed was also a member of that same group.[175] If the party establishes the prima facie case, then the burden shifts to the prosecution to show a neutral explanation for the challenge to that juror.[176] Ultimately, the burden of proving purposeful discrimination continues to lie with the party bringing the charge, although bringing such a challenge prompts the prosecution to explain their reasoning

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[172] *Id.* at 989–90. ("[T]he trial court may have been of the opinion that the petition did not allege facts, which, if proved (or admitted), would show a calculated system of racial prejudice resulting in a denial of equal protection. In the alternative, the trial court may have deemed the objections as waived. . . . [T]he petition incorporated by reference such public records as to make the petition manifestly contradictory. . . . The 1960 census for Harney County reveals the following racial distribution: white, 6558; negro, 6; all others (not further classified), 180. Of the 180 persons not otherwise classified, the court can only speculate how many were members of any particular race.").

[173] *Id.*

[174] State v. Henderson, 843 P.2d 859, 860-61 (Or. 1992).

[175] *Id.* (providing the three-step test for determining whether the exclusion of a prospective juror was based on race); *see also* Honorable Edwin J. Peterson et. al., *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823, 906 (1994).

[176] *Id.*

for removing jurors of the similar racial or ethnic backgrounds to the defendant.[177]

Similarly, under both the federal and Oregon approach to *Batson*, a trial court is not resigned to blindly accept a prosecutor's proffered "race neutral" reason for the peremptory strike of a juror. In fact, numerous decisions by the Supreme Court, Oregon Supreme Court, and Oregon Court of Appeals have held that trial judgments must make findings regarding the reliability of the prosecution's race neutral justifications for the removal of jurors when charges of discrimination in the jury selection process are brought by the defendant.[178] This means that a trial court should engage in comparative juror analysis to determine the veracity of a party's race-neutral explanation.[179] For example, if a prosecutor does not excuse White prospective jurors who gave substantially similar answers as non-White prospective jurors, that evidences purposeful discrimination under *Batson*'s third step.[180] As a result of the similarities between the Oregon and federal approach to *Batson*, the Oregon framework confronts much of the same deficiencies that have affected the federal approach.[181]

### C. *Oregon's Modern Application of* Batson

Oregon's legal system currently has two primary mechanisms for securing an impartial jury: the for-cause challenge and the peremptory challenge.[182] A challenge "for cause" commonly stems from an objectively determinable disqualification, such as a juror's statutory ineligibility[183] or a personal conflict of interest.[184] Therefore, a for-cause challenge may stem from "actual bias."[185] To successfully remove a

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[177] *Id.*

[178] State v. Clay, 27 P.3d 1110, 1113 (Or. App. 2001).

[179] *See id.*

[180] *See* Snyder v. Louisiana, 552 U.S. 472, 485 (2008) (J. Thomas dissenting) ("For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution.").

[181] *See supra* Section III.A.

[182] *See* OR. REV. STAT. §10.030 (2020); *see also* OR. REV. STAT. § 136.220 (2020).

[183] *See* OR. REV. STAT. §10.030 (2020) (listing Oregon's basic requirements for jury service eligibility, including age and residency requirements).

[184] *See* OR. REV. STAT. § 136.220 (2020) (requiring, in criminal cases, the removal of a juror who has one or more of an enumerated relationship with the alleged victim, complainant, defendant, or to the cause itself).

[185] OR. R. CIV. P. 57D(1)(g).

juror for actual bias, an attorney must show "the existence of a state of mind on the part of a juror that satisfies the court . . . that the juror cannot try the issue impartially and without prejudice."[186] By contrast, a peremptory challenge allows the attorney to dismiss a juror without having to articulate a reason for doing so[187]—except where it appears that reason is based on race or gender.[188]

Dating to 1864, the Oregon Code of Criminal Procedure originally allowed a criminal defendant to use twice the number of peremptory challenges as the State.[189] The Oregon Supreme Court recognized that the guarantee of a fair trial includes the use of peremptory challenges in *State v. Steeves*.[190] *Steeves* reflects one of the first instances where the Oregon Supreme Court issued an opinion acknowledging the relationship between peremptory challenges and a fair trial. In *Steeves*, the Oregon Supreme Court explained that, because of the then-current statutory structure, "[t]he right to peremptory challenge is the last precious safeguard of a fair trial left to one capitally charged, before he puts life and liberty in the keeping of his sworn triers."[191]

Following *Batson*, ORS § 136.230 was amended to grant both the state and defendant the same number of peremptory.[192] Oregon, however, did not adopt statutory prohibitions against impermissible bases for peremptory challenges until 1995, when the Legislative Assembly added section four to Rule 57 of the Oregon Rules of Civil Procedure 57(D) and made peremptory challenges in criminal cases subject to ORCP 57(D).[193] The provision states that a "party may not exercise a

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[186] *Id.*

[187] OR. R. CIV. P. 57(D)(4).

[188] *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[189] State v. Caseday, 115 P. 287, 293 (Or. 1911); *see also* State v. Durham, 164 P.2d 448 (Or. 1945) ("Since 1864, a defendant in a criminal action has always had the right of peremptory challenge."). Accompanying the right to use peremptory challenges is the right for counsel of each party to question the venire (i.e., potential jurors) to determine whether to use a general or preemptory challenge, if either. State v. Steeves, 43 P. 947, 950 (Or. 1896).

[190] *Steeves*, 43 P. at 950.

[191] *Id.* (quoting *Hale v. State*, 16 So. 387, 389 (1894)).

[192] OR. REV. STAT. § 136.230 (1987) (amended 1995). The increase in peremptory challenges allotted to the prosecution—who were previously only granted six compared to the defendant's twelve—may have had more to do with a national movement to provide more rights to victims than to address racially charged peremptory challenges. *See* Roberts, *supra* note 90, at 1548.

[193] OR. REV. STAT. § 136.320 was amended during the 1995 legislative session to adopt the newly codified prohibition on use of peremptory challenges on the basis of race, ethnicity or sex through the addition of Section 4: "Peremptory challenges are subject to ORCP 57 D(4)." S.B. 869, 74th Leg. Assem. (1995); OR.

peremptory challenge on the basis of race, ethnicity, or sex."[194] The statute outlines a three-step process for objections to peremptory challenges based on race, ethnicity, or sex—mimicking the three-step process prescribed in *Batson* and in Oregon cases interpreting its application. These additions essentially codified *Batson* challenges into Oregon law. Oregon subsequently expanded its statutory scheme to protect additional classes of people against discrimination. Otherwise, the framework has largely gone unamended since 1995.[195]

Since *Batson*, Oregon courts periodically addressed impermissible peremptory challenges based upon the mandates of the federal Constitution, but failed to analyze the issue as it relates to Oregon's statutory schemes regarding the jury selection process.[196] In *State v. Clay*,[197] for instance, a prosecutor asked the jury pool during *voir dire* if any of them had been charged with drug-related offenses.[198] Two jurors, both White, responded in the affirmative.[199] The prosecutor struck neither.[200] The prosecutor next asked the prospective jurors about their experiences with and attitudes towards police.[201] In response, two of three black jurors testified that they had experienced unpleasant encounters with police during traffic-stops. The third testified that she had witnessed police beating a man outside of her home, although she added that she generally believed officers to be good and that they try to do their job well.[202] The prosecutor challenged all three of the potential black jurors.[203]

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REV. STAT. § 136.230 (1995). ORS § 136.230(4) made ORCP 57 guidelines applicable to criminal peremptory challenges.

[194] S.B. 869, 74th Leg. Assem. (1995); OR. R. CIV. P. 57 D(4)(a).

[195] OR. REV. STAT. § 11.030. Additionally, a review of the proposed legislation in Oregon on this issue reveals that no bill recommending an amendment to the statute has progressed beyond initial committee consideration in the last ten years.

[196] MIKE MARTINIS & HEIDI O. STRAUCH, JURY DISCRIMINATION AND STEREOTYPING, AKA VOIR DIRE (2015), https://inns.innsofcourt.org/media/123991/2015_10-08__martinis-strauch_final_edit.pdf.

[197] State v. Clay, 27 P.3d 1110 (Or. App. 2001). This case was the first instance since *State v. Henderson*, 843 P.2d 859 (Or. 1992) in which Oregon appellate courts grappled with *Batson*.

[198] *Clay*, 27 P.3d at 1111.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

The defendant objected to the state's challenge of all three black jurors.[204] In response, the trial judge concluded that the prosecution's proffered justification for removing the juror based upon negative interactions with law enforcement was essentially the same as making a race-based challenge.[205] However, the trial judge further iterated that precedence seemed to limit the judge's authority to reject the justifications offered by the prosecutor, regardless of their plausibility.[206] The trial judge allowed all three peremptory challenges, noting that "in the current state of the law, frankly [. . .] I think the State can state just about any reason and the trial judges are stuck until we have further decisions from appellate courts."[207]

On appeal, the Oregon Court of Appeals held that the defendant had, in fact, made a prima facie case of discrimination by showing that all of the Black jurors were challenged, but a White juror with "a more serious encounter with police—the essential reason proffered for the challenge to African Americans—was not."[208] Ultimately, the Oregon Court of Appeals vacated the judgment and remanded the case for the trial court to determine whether the prosecution's proffered explanation was race-neutral.[209]

In 2019, the Oregon Court of Appeals further grappled with how to best evaluate race-based peremptory challenges in *State v. Curry*.[210] In *State v. Curry*, a 2019 decision, three college-age students were summoned as potential jurors.[211] Two of the students were White and selected as jurors. The other student, and the sole Black individual on the jury panel, was dismissed via a peremptory strike.[212] The Oregon Court of Appeals held that rejecting the defendant's *Batson* objection constituted clear error requiring reversal.[213] In its opinion, the Court of Appeals explained that Oregon's statutory framework "concerning

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[204] *Id.*

[205] *Id.* at 1111–12.

[206] *Id.* (The trial judge indicated that if they had the authority, they would not have allowed "at least two of those challenges" because it created a "race-based jury").

[207] *Id.* (internal quotation marks omitted).

[208] *Id.* at 1112.

[209] *Id.*

[210] State v. Curry, 447 P.3d 7 (Or. App. 2019).

[211] 447 P.3d 7 (Or. App. 2019).

[212] *Id.*

[213] *Id.*

peremptory challenges based on race, ethnicity, or sex provide little guidance as to when a prima facie case of prohibited discrimination has been rebutted."[214] Accordingly, the court called for the legislature to consider "whether a similarly concrete set of rules would improve [Oregon's] handling of peremptory challenges."[215] This Report aims to address the call of the Oregon Court of Appeals, and the task set forth by the Committee in proposing remedies to the current deficiencies present in the current framework under *Batson*.

This Report highlights that implicit bias can influence the jury selection process, while those who hold these beliefs often do not realize the impact of their own unconscious bias. This Report also discusses the critiques that *Batson* and its progeny have encountered since it was decided, which lead two states to respond. Both California and Washington adopted rules formulated to eliminate and reduce discrimination during jury selection. Oregon, however, has yet to formulate an adequate remedy. Given Oregon's history of systemic racism coupled with Oregon courts calling for guidance in allowing these peremptory challenges—this Task Force has proposed the following remedies.

## V. Recommendations

Unlike Washington and California,[216] Oregon has yet to reform its approach to peremptory challenges. As a result, implicit bias continues to permeate Oregon's jury selection process.[217] This Part offers both primary and alternative recommendations to fill that gap in Oregon law. Section A recommends repealing ORS § 136.230 and eliminating preemptory challenges in Oregon. Second, and in the alternative, Section B recommends enacting a hybrid of the Washington and California rules that reframes the *Batson* challenge.

### A. *Eliminate the Peremptory Challenge*

This Section recommends that Oregon repeal ORS § 136.230 and eliminate preemptory challenges from its criminal justice system. Without elimination of the peremptory challenge, unconstitutional

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[214] *Id.* at 14.

[215] *Id.*

[216] *See supra* Part III.

[217] Shane Burley & Alexander R. Ross, *From Nativism to White Power: Mid-Twentieth-Century White Supremacist Movements in Oregon,* 120 OREGON HISTORICAL QUARTERLY 4 (2019), https://link.gale.com/apps/doc/A642197997/AONE?u=s8887317&sid=AONE&xid=5429e8ae.

racial discrimination in juror selection will continue, even if the *Batson* standard is modified to reduce the presence of implicit bias in jury selection. The threat of discrimination enabled by the peremptory challenge is particularly problematic in Oregon, a state with deep roots in White supremacy. The elimination of peremptory challenges also aligns with a growing body of work by jurists and academics who have concluded that a defendant's constitutional rights cannot be secured without complete elimination.[218] Moreover, it follows the lead of England, which abolished the challenge in 1988,[219] and Canada, which abolished peremptory challenges in 2019.[220]

Elimination of the peremptory challenge also heeds the advice of Chief Justice Thurgood Marshall and Justice Stephen Breyer. Justice Marshall said it best in his *Batson* concurrence: "[O]nly by banning peremptories entirely can such discrimination be ended."[221] Justice Marshall's recommendation to abolish the peremptory strike recognizes that, *Batson* has failed to protect against implicit bias in the jury selection process.[222] *Batson* is not an obstacle to discrimination, but rather a roadmap to avoiding detection of discrimination. The rule merely shows attorneys what cannot be said out loud when striking a juror, and it does very little to control or address the actual internal motivations at issue.[223] The reason that the peremptory challenge must be abolished is that *Batson* itself cannot be expanded to sufficiently prevent implicit bias in the jury selection process. Stated differently, expanding *Batson*'s protections would only further refine the roadmap for its discriminatory use. Finally, the *Batson* challenge "merely [allows] defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases."[224] For these reasons, Oregon should abolish the peremptory challenge.

To be sure, the peremptory challenge serves to fulfill several important functions. For example, the peremptory challenge is useful as a hedge against judicial discretion; it saves time in the jury selection process;

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[218] *See* sources cited *supra* notes 88, 91.

[219] Criminal Justice Act 1988, c. 33, Part VIII, § 118 (UK).

[220] *See* Her Majesty the Queen v. Pardeep Singh Chouhan, [2020] S.R.C. __ (Can.) (upholding the constitutionality of Bill C-75 which banned the use of peremptory challenges and was enacted in 2019).

[221] *See Batson*, 476 U.S. at 107 (Marshall, J., concurring).

[222] *See id.* at 106 ("[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons").

[223] *See* People v. Bolling, 591 N.E.2d 1136, 1145 (N.Y. 1992) (Bellacosa, J., concurring).

[224] *See Batson*, 476 U.S. at 94 (Marshall, J., concurring).

and it allows attorneys to remove jurors who may have permissible, but potentially detrimental, bias against them or their client.[225] Although these goals are valuable to the legal profession, this Task Force finds that, for the reasons provided in this report, they can be accomplished by less precarious means—such as creating a rule allowing dismissal in such circumstances or a rule limiting judicial power. And even if these goals cannot be accomplished through other means, the challenge's propensity for abuse outweighs its benefits.

Additionally, it is important to consider that underlying this recommendation is Oregon's history of racism.[226] Oregon has long been and continues to be particularly rife with institutionalized and systemic racially discriminatory practices.[227] For example, at the time it entered the union, Oregon was the only state that explicitly prohibited Black people from living within its borders.[228] More recently, the 1994

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[225] *See, e.g.,* Barbara Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1176 (1993).

[226] Alana Semuels, *The Racist History of Portland, the Whitest City in America*, THE ATLANTIC (July 22, 2016), https://www.theatlantic.com/business/archive/2016/07/racist-history-portland/492035/ ("[R]acism has been entrenched in Oregon, maybe more than any state in the north, for nearly two centuries.").

[227] *See, e.g.*, *White Supremacy & Resistance*, 120 OREGON HISTORICAL QUARTERLY 4, 588–605 (2019); *see also* Tiffany Camhi, *A Racist History Shows Why Oregon is Still so White,* OREGON PUBLIC BROADCASTING (June 9, 2020), https://www.opb.org/news/article/oregon-white-history-racist-foundations-black-exclusion-laws/; Douglas Perry, *Oregon's Founders Sought a 'White Utopia,' a Stain of Racism That Lives on Even as State Celebrates its Progressivism*, OREGONLIVE (June 15, 2020), https://www.oregonlive.com/history/2020/06/oregons-founders-sought-a-white-utopia-a-stain-of-racism-that-lives-on-even-as-state-celebrates-its-progressivism.html; Jason Wilon, *Portland's Dark History of White Supremacy*, THE GUARDIAN (May 31, 2017), https://www.theguardian.com/us-news/2017/may/31/portland-white-supremacy-racism-train-stabbing-murder; Christine Capatides, *Portland's Racist Past Smolders Beneath the Surface,* CBS NEWS (Oct. 29, 2017), https://www.cbsnews.com/news/portland-race-against-the-past-white-supremacy/; *When Portland Banned Blacks: Oregon's Shameful History as an 'All-White' State,* WASHINGTON POST (June 7, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/.

[228] *Id. See, e.g., Greg Nokes, Black Exclusion Laws in Oregon*, THE OREGON ENCYCLOPEDIA (last visited Dec. 22, 2020). Peter Burnett, the namesake of the lash law and later U.S. governor of California, explained his support, stating, "The object is to keep clear of that most troublesome class of population [Blacks]. We are in a new world, under the most favorable circumstances and we wish to avoid most of those evils that have so much afflicted the United States and other countries." *Id.* For more examples of how Oregon perpetuates its origins as an exclusionary and racially inequitable state, see Jena Hughes, *Historical Context of Racist Planning*, BUREAU OF PLANNING AND SUSTAINABILITY (Sept. 2019), https://www.portland.gov/sites/default/files/2019-

Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System report produced empirical evidence that demonstrates the need to address the role that implicit bias plays in Oregon's criminal justice system.[229]

For Oregon to move forward from its racist origins and continuing perpetration of racial injustice,[230] it needs a strong approach to the persistent racial discrimination enabled by the peremptory challenge. In *Batson*, the Court recognized that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[231] It reasoned that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[232] Eliminating the peremptory challenge does more than eliminate a tool that has been wielded against historically disadvantaged groups—it sends a powerful message of inclusion and progress in the justice system.[233]

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12/portlandracistplanninghistoryreport.pdf; *Mapping Inequality: A Historical Legacy of Redlining and its Impact on Economic Opportunity*, UP FOR GROWTH, https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/203941 (last visited Dec. 23, 2020); Shane Burley & Alexander R. Ross, *From Nativism to White Power: Mid-Twentieth-Century White Supremacist Movements in Oregon,* 120 OREGON HISTORICAL QUARTERLY 4 (2019), https://link.gale.com/apps/doc/A642197997/AONE?u=s8887317&sid=AONE&xid=5429e8ae; Paul Vercammen & Holly Yan*, Portland's Liberal Image Tempered by History as 'Skinhead City'*, CNN (June 1, 2017), https://www.cnn.com/2017/05/31/us/portland-white-supremacy-history/index.html; Alana Semuels, *The Racist History of Portland, the Whitest City in America*, THE ATLANTIC (July 22, 2016), https://www.theatlantic.com/business/archive/2016/07/racist-history-.

[229] *See supra* text accompanying note 30.

[230] *See, e.g.*, Conrad Wilson, *Oregon Traffic Stop Data Shows Largest Disparity at Portland, Hillsboro Police*, OR. PUB. BROAD. (Dec. 1, 2019), https://www.opb.org/news/article/oregon-portland-traffic-stop-data-disparity-portland-hillsboro/; *and* Noelle Crombie, *Portland Police More Likely to Arrest, Search Black People than White, Analysis Shows*, OREGONIAN (Dec. 1, 2019), https://www.portlandoregon.gov/omf/article/748292.

[231] *See Batson*, 476 U.S. at 87 (Marshall, J., concurring).

[232] *Id.*

[233] The efficacy and potential consequences of an altered for-cause challenge are beyond the scope of this report. Cursory research at the national level demonstrates that the for-cause challenge may be similarly used as a mechanism to impermissibly exclude minority jurors. *See, e.g.*, Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020) ("The racial disparities documented in the prosecutors' exercise of challenges for cause actually exceed the sizeable disparities in their use of peremptory strikes in both datasets.").

### B. *The Washington-California Hybrid Model*

This Section recommends adopting a rule modeled after Washington's GR 37 and California's AB 3070. It first recognizes that, although such a rule may help to reduce instances of the discriminatory use of peremptory strikes, it does not go far enough to solve the discrimination problems in Oregon's legal system. Against this backdrop, this Section recommends that Oregon adopt a hybrid rule based on those recently adopted in California and Washington.

The creation of a hybrid rule that blends together the strengths in both Washington and California's approach, while considering the history of discrimination and pervasive effects of implicit bias impacting Oregon's criminal justice system today, would make significant strides towards addressing the deficiencies identified with the *Batson* approach. Such a rule would have an immediate impact on the process of jury selection in Oregon and, accordingly, bring the criminal justice system one step closer to ensuring the constitutional rights to a fair trial for all defendants.

Inclusive language, like that found in California's new rule, prohibiting peremptory challenges on the basis of "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" is necessary to prevent discrimination in jury selection.[234] Furthermore, adopting a rule that broadens the categories of what constitutes an impermissible peremptory challenge better serves the purpose of adopting such a rule: eliminating unconstitutional discrimination against jurors.[235] A juror's gender, sexual orientation, national origin, and religious affiliation are irrelevant and impermissible bases on which to strike a juror.[236] Moreover, a rule with broader language that includes *all* of Oregon's protected classes—similar to the inclusive language of California's rule—would more equitably promote diversity, equity, inclusion, and access for

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[234] CAL. CODE OF CIV. P. § 231.7(a).

[235] *See* app. B.

[236] *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (holding discrimination in jury selection based on gender is unconstitutional); SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) (holding that striking a juror on the basis of sexual orientation violates the Constitution); Robert W. Gurry, *The Jury Is Out: The Urgent Need For A New Approach In Deciding When Religion-Based Peremptory Strikes Violate The First and Fourteenth Amendments*, 18 REGENT U. L. REV. 91 (2005) (stating that religion-based peremptory strikes should be reviewed under Equal Protection framework and the Free Exercise and Free Speech Clauses of the First Amendment).

historically disenfranchised Oregonians.[237] In sum, this recommendation seeks to protect each of the protected classes identified under Oregon law.[238]

By narrowing the permissible use of peremptory challenges, the proposed rule also limits the trial judge's discretion by offering workable standards designed to enhance the consistency with which peremptory strikes are evaluated. When a litigant relies on a peremptory challenge premised on category outside the hybrid rule, a trial court shall be required to make a specific ruling and explain its reasons on the record. This will better ensure judicial accountability, while also developing a stronger record for appeal.[239]

Oregon, like Washington, should not allow litigants to overcome presumptions of invalidity.[240] The rule proposed includes a list of circumstances that have historically been used to cloak challenges with a neutral, or permissible, reason but were, in fact, based on impermissible discriminatory purposes.[241] Under the proposed hybrid rule, an attorney can still object to inclusion of a juror if they have cause—i.e., apart from the list of presumptively invalid reasons—if the juror is unable to act impartially and without bias.[242] The list of presumptively invalid reasons for juror removal proposed combines reasons provided in both California and Washington's rule.[243]

Adoption of a rule that combines the strengths of the approaches utilized by Washington and California would make significant progress towards limiting the impact of implicit bias in the jury selection process

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[237] OR. REV. STAT. § 659A.006 (providing that unlawful discrimination based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familiar status threatens rights and privileges of Oregon's inhabitants).

[238] *Id.*

[239] *See* WASH. CTS., PROPOSED NEW GR 37—JURY SELECTION WORKGROUP 5 (2018), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf.

[240] WASH. CT. GEN. R. 37(a).

[241] Although this Task Force has attempted to create a comprehensive list, we also recommend that public comment and input from litigators who have directly witnessed this practice could offer good insight and create a more comprehensive field of circumstances that identify when implicit bias may be impacting the jury selection process.

[242] OR. REV. STAT. § 136.220 (providing instances where implied bias arises); OR RULES OF CIV. P. § 57 D(1)(G) (stating that actual bias is shown when "juror cannot try the issue impartially and without prejudice").

[243] For a full draft of the hybrid rule proposed by this Task Force, see app. B.

and ensure a defendant's constitutional right to a fair trial. Additionally, although this hybrid approach will not fully eliminate the role of implicit bias in the jury selection process, it does effectively balance the concerns that litigators, counsel for both the prosecution and the defense, have expressed with the outright elimination of the use of peremptory strikes.

At its core, the proposed rule abandons the purposeful discrimination requirement of the *Batson* framework and addresses the permeating impact of implicit bias on Oregon's jury selection process. Adopting this rule would increase the diversity of juries and decrease the impact of implicit bias on the jury selection process in Oregon. Although such a rule would raise the bar required to dismiss minority jurors, attorneys, even those with the best intentions, will continue to dismiss minority jurors because, as discussed in detail above, *Batson* requires attorneys to fully understand and acknowledge their own implicit bias, which may not manifest consciously. Combined with a desire not to label well-intentioned colleagues as being racially discriminatory, *Batson* challenges cannot be modified to address implicit bias, and so they fail as a tool to eliminate discrimination.

## VI. Conclusion

In light of the pervasive impact that implicit bias has on the jury selection process, and the deeply rooted racism in Oregon's history, a change in trial procedure is necessary. Adopting a framework that reduces the role of implicit bias in the jury selection process will protect the reputation and function of Oregon's legal profession. The current system erodes public confidence because it allows bias to influence jury verdicts in a variety of contexts. To that end, this Report recommends eliminating peremptory challenges in Oregon or, alternatively, adopting a rule modeled after Oregon's neighboring states that modifies *Batson* challenges.

**Appendix A**

Repeal O.R.S. § 136.230 (reproduced below).

**~~ORS 136.230 Peremptory challenges~~**.

~~**(1)** If the trial is upon an accusatory instrument in which one or more of the crimes charged is punishable with imprisonment in a Department of Corrections institution for life or is a capital offense, both the defendant and the state are entitled to 12 peremptory challenges, and no more. In any trial before more than six jurors, both are entitled to six. In any trial before six jurors, both are entitled to three.~~

~~**(2)** Peremptory challenges shall be taken in writing by secret ballot as follows:~~

> ~~**(a)** The defendant may challenge two jurors and the state may challenge two, and so alternating, the defendant exercising two challenges and the state two until the peremptory challenges are exhausted.~~
>
> ~~**(b)** After each challenge the panel shall be filled and the additional juror passed for cause before another peremptory challenge is exercised. Neither party shall be required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time.~~
>
> ~~**(c)** The refusal to challenge by either party in order of alternation does not prevent the adverse party from exercising that adverse party's full number of challenges, and such refusal on the part of a party to exercise a challenge in proper turn concludes that party as to the jurors once accepted by that party. If that party's right of peremptory challenge is not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called.~~

~~**(3)** Notwithstanding subsection (2) of this section, the defendant and the state may stipulate to taking peremptory challenges orally.~~

~~**(4)** Peremptory challenges are subject to ORCP 57 D(4). [Amended by 1973 c.836 §233; 1977 c.63 §1; 1987 c.2 §7; 1987 c.320 §26; 1995 c.530 §2; 1997 c.801 §70]~~

**Appendix B**

PROPOSED OREGON RULE

1) Policy and Purpose. The purpose of this rule is to eliminate 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.

2) Scope. This rule applies in all jury trials.

3) 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 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 information becomes known that could not have reasonably been known before the jury was impaneled.

4) 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.

5) Determination. The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that an objective observer could 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, 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 Oregon Constitutions.

6) 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 Oregon.

7) 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.

iv) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

v) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(1) 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).

(2) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(3) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge 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.

vi) 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 by that party.

vii) 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.

viii) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

8) Reasons Presumptively Invalid. A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge 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:

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) A prospective juror's neighborhood;

e) having a child outside of marriage; receiving state benefits;

f) not being a native English speaker.

g) The ability to speak another language

h) Dress, attire, or personal appearance.

i) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

9) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: 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.