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# RACE, PEREMPTORY CHALLENGES, AND STATE COURTS: A BLUEPRINT FOR CHANGE

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## INTRODUCTION

Peremptory challenges based on race continue to keep some prospective jurors from serving on juries, but several states, including Washington, California, and Arizona, have taken action and are now trying to address this problem. They grew frustrated with the U.S. Supreme Court's test in *Batson v. Kentucky*,[1] which was an attempt to preserve the peremptory challenge while eliminating peremptory challenges based on race. Washington and California tried to make the *Batson* test more objective and comprehensive. Washington acted through a rule change, and California acted through legislation. In contrast, Arizona made the *Batson* test for peremptory challenges irrelevant by eliminating peremptory challenges altogether. It is the first state in the United States to do so. Each route provides a blueprint for other states to follow.

The *Batson* test, as it has come to be known, was a compromise reached by the U.S. Supreme Court. It was an effort to maintain peremptory challenges, which allow lawyers to remove a certain number of prospective jurors from the jury without having to give a reason, but it was also an attempt to stop the practice of discriminatory peremptory challenges. Discriminatory peremptory challenges are those that lawyers exercise on the basis of a prospective juror's group membership, though the Supreme Court has only recognized race, ethnicity, and gender as protected groups for purposes of the peremptory challenge.[2] A lawyer can challenge the other

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1. 476 U.S. 79, 96–98 (1986).

2. *See id.* at 89 (holding that a prosecutor's exercise of a peremptory challenge against a Black prospective juror because of his race when the defendant is Black violated the Equal Protection Clause);

side's use of a peremptory challenge if he or she can establish a prima facie case of discrimination, in which case the lawyer exercising the peremptory challenge will have to give a race-neutral reason and the judge will decide whether it is pretextual or not. However, it remains the burden of the objecting lawyer to establish that the lawyer exercising the peremptory challenge has engaged in purposeful discrimination.

After thirty-five years of *Batson*, and myriad academic articles[3] and judicial opinions (usually concurring opinions)[4] describing its ineffectiveness, some states have decided that *Batson* needs to address more than purposeful discrimination; it needs to address implicit bias and institutional racism. Washington and California have attempted to strengthen the *Batson* test so that it prohibits peremptory challenges based on implicit bias and institutional racism, in addition to explicit bias. Washington has done so through a rule change, and California has done so through legislation. Meanwhile, Arizona has gone in a different direction. It has decided that jury selection will not be unbiased until peremptory challenges are eliminated. Arizona has followed Justice Thurgood Marshall's prescient advice in *Batson*. In his concurring opinion, Justice Marshall wrote, "I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptory challenges entirely can such discrimination be ended."[5]

Although Washington, California, and Arizona have taken different approaches in their efforts to eliminate discriminatory peremptory challenges, their approaches have some elements in common. In all three states, the state supreme court created a task force, consisting of members of the legal community. The state supreme court charged the task force with

Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding that a prosecutor's exercise of a peremptory challenge against a Black prospective juror violated a white criminal defendant's right to Equal Protection under the Fourteenth Amendment); Hernandez v. New York, 500 U.S. 352, 355, 372 (1991) (recognizing that peremptory challenges based on ethnicity would violate the Equal Protection Clause but holding that the peremptory challenges exercised in this fact-bound case did not do so); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (extending *Batson* to gender).

3. *See, e.g.*, Nancy S. Marder, Foster v. Chatman: *A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1140 n.9 (2017) (providing a sampling of recent academic articles critical of *Batson*); People v. Bolling, 591 N.E.2d 1136, 1144–45 (N.Y. 1992) (Bellacosa, J., concurring) (providing an extensive collection of early articles critical of *Batson*).

4. *See, e.g.*, *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring); Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 183, 185 (S.D.N.Y. 1996) (observing that "[t]ime has proven Mr. Justice Marshall correct" and holding peremptory challenges to be a per se violation of equal protection); Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) (suggesting a reconsideration of "*Batson*'s test and the peremptory challenge system as a whole"); State v. Saintcalle, 309 P.3d 326, 348 (Wash. 2013) (González, J., concurring) ("I believe, however, it is time to abolish peremptory challenges. Peremptory challenges are used in trial courts throughout this state, often based largely or entirely on racial stereotypes or generalizations.").

5. *Batson*, 476 U.S. at 108.

examining the jury system in the state and considering whether jury selection was being conducted fairly. One facet that the task forces were asked to explore was the use of peremptory challenges and whether they were being exercised in a discriminatory manner. In all three states, the task forces were instructed to issue a report with their recommendations.[6]

The task forces in Washington, California, and Arizona, and the well-documented reports they issued, provide a blueprint for other states that also want to take steps to end discriminatory peremptory challenges in their courts. For example, Connecticut has already started down this path. The Connecticut Supreme Court created a task force, and the task force issued a thorough report.[7] It recommended that Connecticut follow the approach that Washington took.[8] Connecticut has recently done this through a rule change,[9] as has New Jersey.[10]

Although the creation of task forces and reports provides a systematic and careful way for state courts to proceed, events sometimes lead to action before the completion of such meticulous study. The California legislature acted before the task force in California produced its report. Although the California legislature followed many of the substantive changes developed in Washington, it did so by legislation rather than by rule change. Similarly, the Arizona Supreme Court acted before its task force produced its report. The Arizona Supreme Court eliminated peremptory challenges through a rule change.

The theme of this Symposium, "Juries in a Time of Crisis and Change," suggests that outside events can exert pressure even on well-regarded judicial institutions such as the jury. Two states' responses to discriminatory peremptory challenges took place after racial protests against systemic racism and an ongoing pandemic that exacerbated the racial divide. The California Supreme Court and the Arizona Supreme Court followed Washington's lead by convening a task force and requesting that it issue a report, but those courts did not act based on those reports. Rather, the California legislature and the Arizona Supreme Court felt the need to act

6. *See infra* Part II.

7. JURY SELECTION TASK FORCE, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (2020), https://www.jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf [https://perma.cc/FKK2-62Y5].

8. *Id.* at 19–20.

9. Conn. Sup. Ct. R. § 5-12(b), https://www.jud.ct.gov/lawjournal/Docs/Misc/2022/29/pblj_8402.pdf. The judges of the Connecticut Superior Court adopted this amendment to the state practice on June 10, 2022, and it became effective on January 1, 2023, *id.* at 3, which means it is too soon to be included in this Article.

10. N.J. Ct. R. 1:8-3A, https://www.njcourts.gov/sites/default/files/courts/supreme/part3of4-orderamendingrules1-8-31-8-51-38-5andadoptingnewrule1-8-3a-07-12-22.pdf. The New Jersey rule, like the Connecticut rule, also went into effect on January 1, 2023. *Id.* at 1.

before the issuance of those reports; they felt the need to reassure their citizens, particularly Black and Latino citizens, that jury selection in their states would be conducted fairly and without bias, including implicit and institutional bias. Other states are likely to feel similar pressure, and they can look to the work that has been done in Washington, California, and Arizona.

States that seek to eliminate discriminatory peremptory challenges can follow the approaches taken by Washington, California, or Arizona. They can convene a task force that will issue a report with recommendations tailored for the needs of their state. Perhaps these other states can act more quickly because of the earlier work done by Washington, California, and Arizona. At the very least, these three states provide examples that other states might wish to use as models for their own reform efforts.

Although recent crises, such as racial protests and the pandemic, have made the need for action appear more pressing, the problem of discriminatory peremptory challenges has been longstanding and in need of reform for quite some time. In *Strauder v. West Virginia*,[11] the U.S. Supreme Court held that a state statute prohibiting Black men from serving as jurors violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which laid the foundation for subsequent cases pertaining to peremptory challenges based on race. Eighty-five years later, in *Swain v. Alabama*,[12] the Supreme Court held that prosecutors could not use peremptory challenges to remove Black prospective jurors because of their race, but the burden that defendants had to meet proved insurmountable. In *Swain*, an opinion that seemed to give more weight to preserving peremptory challenges than to eliminating discriminatory peremptory challenges,[13] the Supreme Court created a "crippling burden of proof"[14] that required a criminal defendant to establish that the prosecutor's office, in case after case, had exercised peremptory challenges based on race.

When the Supreme Court revisited race-based peremptory challenges in *Batson v. Kentucky*, it developed a seemingly more manageable test that allowed a criminal defendant to challenge the prosecutor's exercise of peremptory challenges based on the prosecutor's actions in only that

11. 100 U.S. 303, 310 (1880).

12. 380 U.S. 202, 205 (1965).

13. Indeed, in *Swain*, the U.S. Supreme Court wrote a paean to the peremptory challenge, describing its "very old credentials," *id.* at 212, and identifying it as "one of the most important of the rights secured to the accused," *id.* at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)), and "a necessary part of trial by jury." *Id.*

14. Batson v. Kentucky, 476 U.S. 79, 92 (1986) (recognizing the difficult evidentiary burden it had created in *Swain*).

defendant's case.[15] No longer would a criminal defendant have to try to retrace the steps of a prosecutor in past cases and to obtain evidence that was either no longer available or had never been available, such as the race of prospective jurors who were removed by the prosecutor with peremptory challenges in earlier cases. However, the three-step test in *Batson* did require a defendant to establish a prima facie case of discrimination; only then would the prosecutor have to provide a race-neutral reason for the peremptory challenge, which the judge would have to assess. It still remained the burden of the defendant to establish purposeful discrimination.[16]

In the 1990s, the Supreme Court expanded the reach of *Batson*, which suggested that *Batson* might have far-reaching results. In the *Batson* progeny, the Court made *Batson* applicable to all lawyers, whether in civil or criminal cases and whether prosecutors or defense lawyers, and it protected prospective jurors from peremptory challenges based on their race, ethnicity, or gender.[17] During this period, there was hope that *Batson* might eliminate discriminatory peremptory challenges while still allowing the tradition of peremptory challenges to endure. However, this hope was misplaced.

Even with the expansion of *Batson*, lawyers continued to find ways to exercise peremptory challenges based on prospective jurors' race, ethnicity, or gender. Lawyers who were challenged when they exercised a peremptory challenge to remove a Black prospective juror learned to give reasons—any reasons at all—as long as the reasons did not refer to a prospective juror's race, and after the *Batson* progeny, the reasons could not refer to a prospective juror's ethnicity or gender. Trial judges did not press them on their reasons, even when the reasons might be used disproportionately against Black prospective jurors, or when the reasons might be based on demeanor or behavior that nobody else had observed. Appellate judges were deferential to the rulings of trial judges because trial judges were in the courtroom and appellate judges were not. The literature and case law became

15. *Id.* at 92-93 ("A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. . . . For reasons that follow, we reject this evidentiary formulation . . . .").

16. *Id.* at 96–98 (describing the three-step test).

17. *See* Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding that a *Batson* challenge can be made by a defendant of any race whenever the prosecutor exercises a peremptory challenged based on race); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (extending *Batson* to parties in civil cases); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (extending *Batson* to defense attorneys); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment); *cf.* Hernandez v. New York, 500 U.S. 352, 355, 372 (1991) (recognizing that ethnicity is a protected category under the Fourteenth Amendment and that peremptory challenges could not be exercised on the basis of ethnicity, but holding that peremptory challenges exercised in this case did not violate the Equal Protection Clause).

rife with criticisms of *Batson* and its ineffectiveness at eliminating discriminatory peremptory challenges.[18]

The Supreme Court had several opportunities to address the weaknesses of *Batson* in a series of death penalty cases involving *Batson* challenges;[19] however, the Court did not revise the *Batson* test or eliminate peremptory challenges altogether, as several Justices had raised as possibilities.[20] Many of the critics of *Batson* waited for the Supreme Court to act, hoping that it would fix the problem. If the Supreme Court acted, then it would be able to address the problem of discriminatory peremptory challenges in a uniform way.

The Supreme Court's failure to act meant that state courts could act. No longer did a state's citizens have to wait for the Supreme Court to fix the weaknesses of the *Batson* test or to abandon *Batson* altogether by eliminating peremptory challenges. Some of the early states to act included Washington, California, and Arizona, and, accordingly, their actions are the subject of this Article. They provided a blueprint for action by other states, such as Connecticut and New Jersey. The starting point is to understand the *Batson* test and its shortcomings. From there, state supreme courts can create task forces whose mandate is to write a report with recommendations. State task forces can follow the reports that have been done by Washington, California, and Arizona, and tailor them to meet the needs of their own state courts and legal communities. Although state courts' various approaches will not lead to uniformity in practice, as a decision by the Supreme Court would, at least state courts can respond to the needs of their own citizens so that they can serve on juries and not be removed because of their race, ethnicity, or gender. State courts have done this before. Some states held that race-based peremptory challenges were impermissible before the Supreme Court decided *Batson v. Kentucky*,[21] and some states held that gender-based peremptory challenges were impermissible before the Court decided *J.E.B. v. Alabama ex rel. T.B.*[22]

This Article proceeds in three parts. Part I provides the basics of *Batson*, including the test that the Supreme Court devised that was intended to permit peremptory challenges to continue while halting the use of discriminatory

18. *See supra* notes 3–4.

19. *See infra* Part I.C.

20. *See* Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring); 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.").

21. *See Batson*, 476 U.S. at 82 n.1 (providing different bases that some state courts relied on to conclude that race-based peremptory challenges were impermissible).

22. *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1049–50 & n.24 (1995).

peremptory challenges. That test is directed only against purposeful discrimination and is easy for lawyers to evade. Part II examines three states' responses to *Batson* and discriminatory peremptory challenges. Two of those states, Washington and California, tried to make the *Batson* test more effective by making it more objective and by making some reasons "presumptively invalid," even though those reasons had been accepted in the past. The third state, Arizona, simply eliminated all peremptory challenges. Part III examines what the three states' approaches have in common. In all three, the state's highest court convened a task force and asked it to examine jury selection and to make recommendations about peremptory challenges. All three task forces followed their charge and issued reports with recommendations. The use of task forces and reports can serve as a blueprint for other states, though crises may lead to more immediate action.

## I. SOME BASICS ABOUT *BATSON*

Jury selection in the courtroom begins with a venire, or panel, of prospective jurors who are brought to a courtroom for voir dire, or questioning, to determine whether they can be impartial in the particular case.[23] Prospective jurors can be excused for hardship, for cause, or with peremptory challenges. Typically, the judge will ask prospective jurors if they have a hardship that precludes them from serving, such as the need to take care of a child or an ailing family member. The judge will also ask if there is a reason why they cannot serve in the particular case, such as having a familial connection to a trial participant, a financial stake in the outcome of the case, or the belief that they cannot be impartial in the case. If so, the judge will dismiss them for cause.[24] Whereas the judge decides hardship excuses and for cause challenges, the lawyers decide how they want to exercise their peremptory challenges against the remaining prospective jurors. Lawyers in state and federal courts can remove a certain number of prospective jurors from the jury through the exercise of peremptory challenges. In state courts, peremptory challenges are provided by rule[25] or

23. There is much work that needs to be done preliminarily so that the venire that enters the courtroom represents a fair cross section of the community. Ideally, courts will summon prospective jurors from multiple source lists, send out summonses with up-to-date addresses, and keep exemptions and qualifications to a minimum so that a broad swath of the citizenry can serve. *See, e.g.*, Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, 2023 U. ILL. L. REV. (forthcoming).

24. *See* Hopt v. Utah, 120 U.S. 430, 433 (1887) (providing guidance as to when a for cause challenge should be granted).

25. For example, Arizona had provided peremptory challenges by rule, *see* ARIZ. R. CIV. P. 47(e); ARIZ. CRIM. P. 18.4(c), until the Arizona Supreme Court eliminated peremptory challenges in civil and criminal cases by a recent rule change. *See infra* Part II.C.

by statute.[26] In federal courts, they are provided by rule[27] and by statute.[28] If a judge declines to grant a for cause challenge to remove a prospective juror because the judge thinks there is not cause, a lawyer can use a peremptory challenge to remove that prospective juror without having to give any reason.

Traditionally, lawyers did not have to give any reason at all for the exercise of their peremptory challenges. They simply used their allotment of peremptory challenges to remove those prospective jurors about whom they had misgivings. They might have had doubts about whether those prospective jurors could be impartial or whether those prospective jurors would be sympathetic to their client—the former a more appropriate consideration than the latter.[29] In the past, they might also have decided based upon immutable characteristics of those prospective jurors, such as their race, gender, or ethnicity. However, after the U.S. Supreme Court decided *Batson v. Kentucky*, it was impermissible for prosecutors to exercise peremptory challenges against Black prospective jurors based on their race when the criminal defendant was also Black.[30] In *Batson*, the Supreme Court held that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[31] In subsequent cases, the Supreme Court extended the reach of *Batson* so that all lawyers, whether in civil or criminal cases, could no longer exercise peremptory challenges based upon the race, gender, or ethnicity of the prospective juror.[32]

### *A. The* Batson *Test*

In *Batson*, the challenge the U.S. Supreme Court faced was to develop a test that would allow peremptory challenges to continue but to eliminate peremptory challenges based on race. *Batson* involved a Black criminal defendant, James Batson, who watched as the white prosecutor exercised his peremptory challenges to remove all prospective jurors who were Black.

26. California, for example, provides peremptory challenges by statute. *See* CAL. CIV. PROC. CODE § 231(a), (c) (West 2021) (providing ten peremptory challenges in non-capital cases and six peremptory challenges in civil cases).

27. FED. R. CIV. P. 47(b) (providing the number of peremptory challenges in civil cases as specified in 28 U.S.C. § 1870); FED. R. CRIM. P. 24(b)(1)–(3) (providing varying numbers of peremptory challenges in criminal cases depending upon the seriousness of the crime).

28. 28 U.S.C. § 1870 (providing three peremptory challenges in civil jury trials).

29. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 50 (1988).

30. 476 U.S. 79, 89 (1986).

31. *Id.*

32. *See supra* note 17.

James Batson told his lawyer to object, and the lawyer said he had no basis to do so. James Batson told him to "object anyway," and the lawyer did so.[33]

The Supreme Court tried to create a test that would allow James Batson, and others in his position, to object when prosecutors exercised peremptory challenges against prospective jurors based on their race while still permitting prosecutors to exercise peremptory challenges without having to give reasons, for the most part. To achieve this balance, the Court created a three-step test.[34] At step one, a lawyer can object to the other side's exercise of a peremptory challenge if he or she thinks it is based on the race, gender, or ethnicity of the prospective juror, but the lawyer has to establish a prima facie case of discrimination. At step two, the other side must give a race-neutral reason for the exercise of its peremptory challenge. At step three, the judge must decide whether that reason is pretextual or not. The opponent of the peremptory challenge has the burden of proving "purposeful discrimination."[35] If the reason is pretextual, then the peremptory challenge is not permitted; if the reason is race neutral then the peremptory challenge is permitted.

Chief Justice Warren Burger, writing in dissent in *Batson*, criticized the test as a "curious hybrid."[36] He suggested that over time, the expansion of protected groups would leave the peremptory challenge looking more like a for cause challenge (for which a reason must always be given in open court).[37] He pointed out that the essence of a peremptory challenge is that it can be exercised without giving any reason at all.[38] In his view, the majority had started down the slippery slope of turning a peremptory challenge into a for cause challenge.[39] He lamented this transformation and argued that the peremptory challenge was part of the jury trial tradition in the United States;[40] it was a protection afforded to the criminal defendant to reassure him that he would be tried by an impartial jury;[41] and it was preferable to have peremptory challenges for which no reason had to be given than to require lawyers to say aloud that they had doubts about prospective jurors

33. Sean Rameswaram, *Object Anyway*, *Radiolab Presents: More Perfect*, WNYC STUDIOS, at 13:53 (July 16, 2016), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/object-anyway [https://perma.cc/592U-V6AG].

34. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986) (describing the three-step test).

35. *Id.* at 98.

36. *Id.* at 126 (Burger, C.J., dissenting).

37. *Id.* at 127 ("It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force 'the peremptory challenge [to] collapse into the challenge for cause.'" (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir 1984))).

38. *Id.* ("Analytically, there is no middle ground: A challenge either has to be explained or it does not.").

39. *Id.*

40. *Id.* at 133–34.

41. *See id.* at 129.

because of their stereotypical views about race. Chief Justice Burger agreed with Professor Barbara Babcock, who had written that "'we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.'"[42]

As far as the type of reason that a lawyer had to give to justify his or her peremptory challenge, it had to be more than a mere "den[ial] that he had a discriminatory motive,"[43] but it did not have to rise to the level of a reason required for a for cause challenge.[44] In addition, the reason had to be "related to the particular case to be tried."[45] The Supreme Court backed away from that requirement in *Purkett v. Elem*.[46] As Justice John Paul Stevens noted in his dissent in *Elem*, the Court had replaced *Batson*'s more rigorous standard with a more relaxed one in which any neutral explanation "no matter how 'implausible or fantastic'" or "'silly or superstitious'"[47] would be adequate to rebut a prima facie case of discrimination.

### *B. Several of the U.S. Supreme Court's Assumptions in* Batson

In *Batson*, the Supreme Court made several assumptions. It assumed that lawyers would be aware of their own biases, that they would be honest about their reasons for exercising a peremptory challenge if challenged, that judges would readily be able to discern the veracity of lawyers' reasons, and that judges did not have any biases of their own, even if some lawyers did.

Justice Thurgood Marshall, in his concurrence in *Batson*, pointed out that prosecutors and judges might not be aware of their own biases.[48] Justice Marshall explained that prosecutors could be motivated by "conscious racism," which meant that they were aware of their racial bias, but they also could be motivated by "unconscious racism," which meant that they were unaware of their racial bias.[49] Judges, too, could have conscious or unconscious racism.[50] Today, conscious racism is described as "explicit bias," and unconscious racism is described as "implicit bias."[51]

42. *Id.* at 121 (quoting Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 554 (1975)).

43. *Id.* at 98 (majority opinion).

44. *Id.* at 97.

45. *Id.* at 98.

46. 514 U.S. 765, 767–68 (1995) (per curiam).

47. *Id.* at 775 (Stevens, J., dissenting) (quoting per curiam opinion).

48. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

49. *Id.*

50. *Id.*; *see* Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 CT. REV. 78, 81 (2021) (offering recommendations that judges can follow to address their own implicit biases).

51. *See, e.g.*, Kang, *supra* note 50, at 78–79 (describing explicit and implicit biases).

*Batson* was only directed toward eliminating discriminatory peremptory challenges based on explicit biases but not those based on implicit biases. Justice Marshall pointed out that peremptory challenges based on either form of bias were discriminatory. He concluded that the only way to eliminate both types of discriminatory peremptory challenges was to eliminate *all* peremptory challenges,[52] but he did not persuade any other Justices to take his point of view.

The Supreme Court in *Batson* also assumed that lawyers would be forthcoming about their reasons for exercising a peremptory challenge. The Justices seemed to expect that if lawyers were challenged, they would give the real reason for having exercised a peremptory challenge, even if it meant saying that they had exercised a peremptory challenge based on the race of the prospective juror. However, lawyers did not do this. They simply shifted the reasons they offered. For example, before *Batson* applied to gender, lawyers were willing to say that they exercised a peremptory challenge because of a prospective juror's gender.[53] However, once the Court extended *Batson* to gender in *J.E.B. v. Alabama ex rel. T.B.*, lawyers realized that they could no longer give a prospective juror's gender as a basis for exercising a peremptory challenge. Instead, they learned to give any reason other than one based on race, gender, or ethnicity. Even if the reasons were silly, such as the lawyer who said he did not like the way the prospective juror dressed[54] or the way he wore his hair,[55] they were acceptable because they did not explicitly mention race, gender, or ethnicity.

Trial judges had a difficult time discerning a lawyer's actual reasons and often felt that they had to accept a lawyer's stated reasons. If a trial judge tried to push a lawyer to delve more deeply into his or her reasons, the trial judge ran the risk of impugning the integrity of the lawyer. The trial judge who persevered with questioning a lawyer's reasons would seem to be

52. *Batson*, 476 U.S. at 108.

53. *See* United States v. Omoruyi, 7 F.3d 880, 881 (9th Cir. 1993). In *Omoruyi*, the prosecutor explained that he struck an unmarried Black woman but not an unmarried white woman "[b]ecause she was a single female and my concern, frankly, is that she, like the other juror I struck, is single and given defendant's good looks would be attracted to the defendant." *Id.* at 881. At that time, as long as the prosecutor did not rely on race, he was free to discriminate on any other ground, according to Supreme Court precedent, though not according to Ninth Circuit precedent, which had just been decided. *See* United States v. DeGross, 960 F.2d 1433, 1439 (9th Cir. 1992) (en banc) (extending *Batson* to gender-based peremptory challenges).

54. *See, e.g.*, United States v. Clemons, 941 F.2d 321, 322–23 (5th Cir. 1991) (holding that a prosecutor's reason for exercising a peremptory challenge against a Black prospective juror who dressed "like a rock star" was race neutral).

55. *See, e.g.*, Purkett v. Elem, 514 U.S. 765, 766 (1995) ("I struck [juror] number twenty-two because of his long hair. He had long curly hair. . . . And juror number twenty-four also has a mustache and goatee type beard. . . . And I don't like the way they looked, with the way the hair is cut, both of them.") (quoting prosecutor).

questioning the truthfulness of the lawyer and his or her motives.[56] Was the trial judge suggesting that the lawyer was a liar or a racist? Trial judges were reluctant to engage in rigorous questioning, particularly of prosecutors, who were repeat players and officers of the court.

Trial judges accepted reasons by prosecutors, even when those reasons affected a disproportionate number of Black prospective jurors. For example, prosecutors have exercised peremptory challenges against Black prospective jurors, but, when challenged by the defense attorney, they explained that they struck that prospective juror because he or she came from a "high-crime area," had family members who had experiences with the criminal justice system, or had some characteristic in common with the defendant.[57] Judges accepted these reasons as legitimate concerns of a prosecutor and did not see them as the effects of systemic racism. One judge, tongue-in-cheek, compiled a list that prosecutors could distribute under the heading "'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"[58]

Appellate judges had even more difficulty than trial judges in assessing the reasons that lawyers gave for why they exercised a peremptory challenge. Accordingly, appellate judges tended to defer to the trial judge's determination because at least the trial judge was in the courtroom and could assess the demeanor of a prospective juror or the credibility of a lawyer.[59] Appellate judges explained that they had only the cold, hard record before them and would accept a trial judge's ruling unless it was "completely outlandish" or there was other evidence that its "falsity" is readily apparent.[60]

56. *See, e.g.*, Henry R. Chalmers, *A Long Way to Go: Report Finds Lingering, Hard-to-Eradicate Discrimination in Jury Selection*, LITIG. NEWS, Fall 2010, at 6, 7 (identifying "judges' hesitancy to call prosecutors liars" as one reason discriminatory peremptory challenges continue unabated).

57. *See, e.g.*, United States v. Uwaezhoke, 995 F.2d 388, 393 (3d Cir. 1993) (accepting as "race-neutral on its face" the government's explanation that it exercised a peremptory challenge against a Black female juror "because of [her] likely place of residence, she was more likely to have had direct exposure to a drug trafficking situation than other potential jurors as a class"); Murray v. Groose, 106 F.3d 812, 815 (8th Cir. 1997) ("In the instant case, the prosecutor tendered specific, plausible, race-neutral explanations for his peremptory strikes of seven African-American members of the venire [including] two [prospective jurors] because they had relatives who had been charged with or convicted of crimes . . . ."); United States v. McMillon, 14 F.3d 948, 951–53 (4th Cir. 1994) (holding that a prosecutor's reasons for exercising a peremptory challenge against the only African-American woman on the jury because of her age, number of children, and profession (computer analyst) were race neutral and not a pretext for racial bias).

58. People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) (suggesting that the list could include "too old, too young, divorced, 'long, unkempt hair,' free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, 'lived in an area consisting predominantly of apartment complexes,' single, over-educated") (citations omitted).

59. *See, e.g.*, Tinner v. United Ins. Co. of Am., 308 F.3d 697, 703 (7th Cir. 2002).

60. *Id.* (quoting United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir.), *modified*, 136 F.3d 1115 (7th Cir. 1998)).

Given this combination of lawyers' seemingly neutral reasons, trial judges' reluctance to press lawyers on their reasons, and appellate judges' acceptance of trial judges' rulings, *Batson* was, not surprisingly, ineffective, particularly in certain states in the United States. In North Carolina, for example, appellate courts as of 2021 had not reversed a single conviction due to intentional discrimination against a prospective juror of color since *Batson* became the law in 1986.[61] As a result, lawyers in North Carolina are reluctant to raise a *Batson* challenge when they know that appellate courts are unwilling to enforce *Batson*. One lawyer in North Carolina described this situation as a "'trickle-down effect,'" which influences trial judges, prosecutors, and defense attorneys and "creates an environment in which pursuing a *Batson* challenge is deemed not worth doing."[62]

The Equal Justice Initiative (EJI) observed a similar pattern in several Southern states.[63] When the EJI published its report in 2010, appellate courts in Tennessee had never granted *Batson* relief in a criminal case.[64] The EJI report also discovered that no criminal defendant had won a *Batson* challenge in South Carolina since 1992.[65]

### *C. Limited Tweaks to* Batson *by the U.S. Supreme Court*

The *Batson* cases that the Supreme Court has decided in the past two decades, such as *Flowers v. Mississippi*,[66] *Foster v. Chatman*,[67] *Snyder v. Louisiana*,[68] *Miller-El v. Dretke*,[69] and *Miller-El v. Cockrell*,[70] involved criminal defendants who had been convicted and sentenced to death. Their situations were dire, and the *Batson* violations were egregious. The Court found *Batson* violations in these cases, which was appropriate. However, the close reading that the Court undertook in its review of these cases did not offer a workable approach for busy trial judges, who typically have limited information when they decide a *Batson* challenge.

61. *See* Avi Bajpai, *After 35 Years, Will NC Courts Act on Claims of Racial Bias in Jury Selection?*, CHARLOTTE OBSERVER (N.C.), Oct. 7, 2021, at https://www.charlotteobserver.com/news/politics-government/article254799577.html.

62. *Id.* (quoting Gretchen Engel, Executive Director of the Center for Death Penalty Litigation in Durham, N.C.).

63. EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 28–34 (2010), http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/3K84-6NH8].

64. *Id.* at 22 (finding that appellate courts in Tennessee had "*never* reversed a criminal conviction because of racial discrimination during jury selection").

65. *Id.* at 27.

66. 139 S. Ct. 2228 (2019).

67. 578 U.S. 488 (2016).

68. 552 U.S. 472 (2008).

69. 545 U.S. 231 (2005).

70. 537 U.S. 322 (2003).

For example, in *Foster*, the Supreme Court carefully examined the multiple reasons the two prosecutors gave for exercising peremptory challenges against four Black prospective jurors, resulting in an all-white jury. In particular, the Court focused on the reasons given for Eddie Hood and Marilyn Garrett, two of the four Black prospective jurors removed by the prosecutors with peremptory challenges. The Court is more likely to be able to make these kinds of comparisons in death penalty cases because these cases have more peremptory challenges and more detailed questioning than other criminal cases.[71] The Court found that some of the reasons given by the prosecutors also applied to white prospective jurors though the white prospective jurors were permitted to serve; some of the reasons were not supported by the record; and other reasons "shifted over time, suggesting that those reasons may be pretextual."[72] The opinion also builds on the Court's approach in *Miller-El v. Cockrell*[73] and *Snyder v. Louisiana*.[74] In both of these cases, the Court evaluated the prosecutors' reasons with great attention to detail because the jury selection practices in *Miller-El* and the prosecutor's reasons in *Snyder* raised concerns that race was the actual motivation for the exercise of peremptory challenges, in spite of the prosecutors' ostensibly race-neutral reasons. In *Foster*, the prosecutors' notes,[75] like the jury selection practices in *Miller-El*,[76] raised serious concerns, which led the Court to review the prosecutors' reasons with the utmost care.

However, the petitioner in *Foster* had only asked the Supreme Court to decide whether the courts below had failed to recognize a *Batson* violation.[77] The Court's answer, after a careful reading of the record, was "yes." The Court could have used *Foster* to make the *Batson* test more effective or to

71. I thank Shari Seidman Diamond for making this observation. For example, in a capital case in federal court, each side has twenty peremptory challenges, which is the greatest number of peremptory challenges provided by the *Federal Rules of Criminal Procedure*. *See* FED. R. CRIM. P. 24(b)(1).

72. *Foster*, 578 U.S. at 507.

73. 537 U.S. at 343–46.

74. 552 U.S. 472, 476–78 (2008) (instructing lower courts to consider whether the prosecution's race-neutral reasons were a pretext for purposeful discrimination considering "all of the circumstances that bear upon the issue of racial animosity").

75. The prosecutors' notes, which Foster was able to obtain years later through the Georgia Open Records Act, *see Foster*, 578 U.S at 493–95, revealed that the prosecutors were working from a venire list that was color-coded by race, juror cards that indicated race, and a list of "definite NO's" that included all the Black prospective jurors. The notes revealed that the prosecutors were taking race into account at every step of jury selection, contrary to the commands of *Batson*. *See* Marder, *supra* note 3, at 1137 (discussing *Foster* in detail).

76. For example, in *Miller-El*, 537 U.S. at 333, one jury practice the prosecutors made use of was "jury shuffling," which enables parties in Texas to ask the clerk to reshuffle the jury cards and reorder the prospective jurors. The prosecutors in this case made use of jury shuffling whenever a significant number of Black prospective jurors had moved to the front of the queue for consideration as jurors. *Id.* at 333–34.

77. Petition for Writ of Certiorari at i, *Foster*, 578 U.S. 488 (No. 14-8349).

acknowledge that *Batson* was ineffective and beyond repair, but the Court did neither. Instead, *Foster* is an opinion about how to do a close reading of the prosecutors' reasons, particularly when there are prosecutors' notes that call into question the prosecutors' reasons and come as close to a "smoking-gun" as one can hope to find in a *Batson* challenge case.[78] Although this approach of carefully parsing reasons could be useful for appellate courts because they have the luxury of time and a record, this approach is less useful for trial judges who have to make *Batson* rulings quickly with limited information and are reluctant to press the lawyers appearing before them about the reasons they have given.

Although the Supreme Court could have used *Foster* or any of the other recent *Batson* cases as an opportunity to revise the *Batson* test, it did not do so. Of course, it could still do so in a future case. Meanwhile, some state courts have grown impatient. After more than thirty-five years of *Batson*, they have had ample opportunity to observe the ineffectiveness of the *Batson* test, and they have decided to take action.

## II. THREE STATES' RESPONSES TO *BATSON* AND DISCRIMINATORY PEREMPTORY CHALLENGES

Washington, California, and Arizona have responded with three different approaches to the *Batson* test and the enduring problem of discriminatory peremptory challenges. The State of Washington has taken the lead in trying to strengthen the *Batson* test. The Washington Supreme Court tried to make the *Batson* test more effective by making it more objective through a rule change. California also tried to strengthen the *Batson* test in ways similar to those of Washington, but it did so through legislation rather than a rule change. Finally, Arizona responded to the ineffectiveness of *Batson* and the prevalence of discriminatory peremptory challenges by eliminating peremptory challenges; it is the first state in the United States to do so.

These three states' approaches can serve as models for other states. At the very least, their different approaches show that there is no "one-size-fits-all" approach for states, and other states might create yet other variations. Admittedly, these three states' responses to *Batson* and discriminatory peremptory challenges took effect recently. Washington's rule change affecting peremptory challenges in criminal and civil jury trials was implemented on April 24, 2018;[79] California's legislation took effect on January 1, 2022 for criminal cases and will take effect for civil cases on

78. *See* Marder, *supra* note 3, app. A, at 1206–09 (providing copies of the prosecutors' notes).
79. WASH. SUP. CT. GEN. R. 37.

January 1, 2026;[80] and Arizona's elimination of peremptory challenges in civil and criminal jury trials took effect on January 1, 2022.[81] Although these three states' approaches have only a limited track record so far, other states that are also trying to address the weaknesses of *Batson* and the persistence of discriminatory peremptory challenges could benefit from these states' experiences in getting their respective changes on the books. Thus, this Part describes these three states' approaches, including how the approach was decided upon, what each approach entails, how each approach is working so far (to the extent there is any evidence), and potential strengths and weaknesses.

### *A. Strengthening the* Batson *Test Through a Rule Change: Washington*

#### 1. How the Rule Change Came About

As one participant in the drafting of General Rule 37 (known as "GR37") explained, the Washington Supreme Court opinion in *State v. Saintcalle*[82] served as the catalyst for that court to make a rule change that it hoped would make the *Batson* test more effective in Washington state courts.[83] During jury selection in *Saintcalle*, the prosecutor used peremptory challenges to strike the sole Mexican-American prospective juror and the remaining Black prospective juror on the venire.[84] The prosecutor, in giving reasons for removing the Mexican-American prospective juror with a peremptory challenge, said that the prospective juror was "too young" and "not intelligent."[85] Although the trial judge disallowed the prosecutor's peremptory challenge against the Mexican-American prospective juror,[86] the

80. California's legislation governs peremptory challenges in criminal cases in jury trials beginning on or after January 1, 2022 until January 1, 2026. From January 1, 2026 on, the provisions are effective in civil and criminal jury trials. Assemb. B. 3070, 2019–20 Reg. Sess. (Cal. 2020).

81. *See* ARIZ. SUP. CT. ORD. NO. R-21-0020 (Aug. 30, 2021) (removing peremptory challenges from the Rules of Civil and Criminal Procedure, effective Jan. 1, 2022); ARIZ. SUP. CT. ORD NO. R-21-0020 (Sept. 28, 2021) (removing peremptory challenges from the Justice Court Rules of Civil Procedure and the Rules of Procedure for Eviction Actions).

82. 309 P.3d 326 (Wash. 2013).

83. Webinar: Jury Selection Beyond Intentional Racial Bias, NAT'L CTR. FOR STATE CTS. (June 30, 2022), https://vimeo.com/729213707 [hereinafter Jury Selection] (quoting Lila Silverstein, appellate public defender and counsel for Kirk Ricardo Saintcalle in *Saintcalle*, 309 P.3d at 326, 328) (notes on file with author).

84. *Saintcalle*, 309 P.3d at 329, 332.

85. Jury Selection, *supra* note 83 (quoting attorney Lila Silverstein, appellate public defender and counsel for Kirk Ricardo Saintcalle in *Saintcalle*).

86. Saintcalle's counsel said the trial court judge never explained why he disallowed the prosecutor's peremptory challenge against the sole Mexican-American prospective juror, but the Washington Supreme Court concluded that the trial judge "reject[ed] each of the prosecutor's proffered reasons as pretextual." *Saintcalle*, 309 P.3d at 332.

trial judge permitted the prosecutor's peremptory challenge against the Black prospective juror. The prosecutor said that he had removed the Black prospective juror because she had "checked out" during voir dire and was upset about a friend who had been murdered recently.[87] The defense argued that the prosecutor's peremptory challenge against the Black prospective juror violated *Batson v. Kentucky*,[88] *Snyder v. Louisiana*,[89] and *Miller-El v. Dretke*,[90] but to no avail.[91]

When *State v. Saintcalle* reached the Washington Supreme Court, the court, in an opinion by Justice Charles K. Wiggins, agreed with the defense that there had been race discrimination in the prosecutor's exercise of his peremptory challenges, but the court disagreed that *Batson* had been applied incorrectly. Instead, the court concluded that *Batson* was the problem: "A growing body of evidence shows that *Batson* has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges."[92] The court attributed some of *Batson*'s shortcomings to its failure to address unconscious bias.[93] Therefore, the Washington Supreme Court concluded that a new rule was needed in the State of Washington—one that would address explicit *and* implicit bias—but that the court should "enlist the best ideas from trial judges, trial lawyers, academics, and others" and adopt a rule that would provide "the most effective way to reduce discrimination and combat minority underrepresentation in [the Washington state court] jury system."[94] Although the court supported such a rule, it believed that it could not create one in the case before it.[95] The court noted that the parties had not asked for a new rule; nor had they "raised, briefed, or argued" the issue.[96] Justice Stephen C. González, who wrote a concurring opinion in *Saintcalle*,[97] urged the elimination of peremptory challenges,[98] just as Justice Thurgood Marshall had done in *Batson*.[99] However, Justice

87. *Id.*

88. 476 U.S. 79 (1986).

89. 552 U.S. 472, 485 (2008) (providing that a proffer of pretextual reasons for exercising a peremptory challenge against one prospective juror gives rise to an inference of a discriminatory peremptory challenge against another prospective juror).

90. 545 U.S. 231, 232 (2005) (providing that a trial judge can compare whether the prosecutor offered a reason to strike a minority prospective juror but permitted a white prospective juror with that same characteristic to serve on the jury as part of the "purposeful discrimination" analysis).

91. Jury Selection, *supra* note 83 (quoting attorney Lila Silverstein).

92. *Saintcalle*, 309 P.3d at 334.

93. *Id.* at 336 ("[W]e should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it.").

94. *Id.* at 338–39.

95. *Id.* at 339.

96. *Id.* at 329.

97. *Id.* at 347 (González, J., concurring).

98. *Id.* at 348 ("I believe, however, it is time to abolish peremptory challenges.").

99. Batson v. Kentucky, 476 U.S. 79, 103, 108 (1986) (Marshall, J., concurring).

González, like Justice Marshall, did not persuade his fellow justices that elimination of the peremptory challenge was the only way to eliminate discriminatory peremptory challenges.

After *Saintcalle*, the Washington Supreme Court convened a workgroup of six to redress the shortcomings of *Batson* by drafting a new rule. The workgroup, in response to its charge, ultimately provided the basis for GR37. As recounted in its final report,[100] the workgroup began with a proposal that had been submitted by the American Civil Liberties Union (ACLU) in 2015, as well as an alternative submitted by the Washington Association of Prosecuting Attorneys (WAPA), which was then followed by a response from the ACLU.[101] The Washington Supreme Court asked the workgroup to start with these three proposals and other comments it had received, and to see if the workgroup could reach a consensus, or at least provide points of agreement and disagreement that could assist the court in taking further action on the proposals. Ultimately, the workgroup submitted its final report, which included points on which it had reached agreement and points on which it still had disagreements. The final report also included group recommendations, individual statements, and a final proposed version of GR37 along with some remaining policy choices for the court.[102] Working from this report, the Washington Supreme Court ultimately issued its new GR37.[103]

### 2. What the Rule Change Entails

GR37 altered how the *Batson* test is implemented in Washington state courts by trying to make the test more objective, to include implicit bias and systemic bias, and to make it difficult for lawyers to use several reasons that had been accepted as race neutral in the past even though they had been used disproportionately against Blacks and members of other minority groups.

One goal of the rule change was to try to make the *Batson* test more objective, and it does this in several ways. GR37(e) instructs the trial judge to evaluate the reasons given to justify a peremptory challenge "in light of the totality of the circumstances."[104] The rule also provides that if "an objective observer could view race or ethnicity as a factor in the use of the

100. PROPOSED NEW GR37—JURY SELECTION WORKGROUP: FINAL REPORT (2018), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf [https://perma.cc/43A8-4UGH] [hereinafter PROPOSED NEW GR37].

101. *Id.* at 1.

102. *Id.* at 3–5 (agreements); *id.* at 5–6 (disagreements); *id.* at 7–9 (recommendations); *id.* app. 2 at 14 (statements of individuals and organizations); *id.* at 11–13 (proposed rule with remaining policy choices).

103. WASH. SUP. CT. GEN. R. 37.

104. *Id.* at 37(e).

peremptory challenge," then it "shall be denied."[105] It uses the mandatory word "shall." It also uses the word "could," which suggests that race or ethnicity only have to be a possibility, and it uses the word "factor," which suggests that there could be other considerations. The rule describes this objective observer as one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[106] Thus, this objective observer is one who is knowledgeable about the different forms that discrimination has taken in the past and that discrimination continues to take in the present. The judge's focus on the objective observer means that he or she no longer has to focus on the lawyer appearing before the judge and what the intent of this particular lawyer might be.

GR37 also takes into account some of the interpretive guidance that the U.S. Supreme Court has provided in its review of *Batson* challenges in recent capital cases.[107] For example, GR37(g) reminds trial judges to pay attention to the number and types of questions posed to prospective jurors; to observe whether other prospective jurors who gave similar answers to the struck prospective juror remained on the jury; to note whether a reason might be disproportionately associated with race or ethnicity; and to see whether the party has used peremptory challenges disproportionately against a given race or ethnicity in this case or in past cases.[108]

Another goal of GR37 is to alter the reasons that once were accepted by trial judges but will no longer be accepted in Washington. In fact, these reasons are to be viewed as "presumptively invalid."[109] These reasons, which "historically . . . have been associated with improper discrimination in jury selection in Washington State," include the following:

> (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.[110]

These are all reasons that have been accepted in the past and were seen as race neutral, even though they were disproportionately applied to Black prospective jurors. GR37 ensures that these reasons will be viewed as "presumptively invalid," meaning they are unacceptable and will be viewed

105. *Id.*
106. *Id.* at 37(f).
107. *See supra* Part I.C.
108. WASH. SUP. CT. GEN. R. 37(g).
109. *Id.* at 37(h).
110. *Id.*

as based on race. Although the rule does not indicate if these reasons could ever be used, the rule does use the phrase "presumptively invalid" rather than "prohibited." Thus, it might be that a lawyer who offers a "presumptively invalid" reason could still provide a justification to overcome the presumption.

GR37 also addresses reasons that lawyers typically give to justify peremptory challenges based upon demeanor. These reasons are also given disproportionately for Black prospective jurors, according to GR37(i), and include: "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."[111] GR37(i) provides that if a lawyer is going to offer one of these reasons or a similar reason, he or she must provide notice to the court and the other party so that the behavior can be "verified and addressed in a timely manner."[112] If the judge or opposing counsel cannot verify the behavior, then the reason will be invalidated.[113] The goal is to ensure that demeanor cannot be used as a post hoc justification for a peremptory challenge. The rule requires that a lawyer who sees such behavior must let the court and the opposing counsel know when it occurs.

### 3. How the Rule Change is Working So Far

GR37 has only been in effect for about four years, but it has made a difference in at least nine cases in Washington. A Westlaw and LexisNexis search for cases in Washington that mentioned GR37 from the date the rule became effective (April 24, 2018) until the date of this search (August 5, 2022), yielded a total of forty-four cases.[114] The forty-four cases included any mention of GR37, even if it just appeared in a single footnote.

Among the forty-four cases, not all of them pertained to peremptory challenges or GR37. There were nine cases that were about some other subject matter altogether.[115] Also, among those forty-four cases, six were

111. *Id.* at 37(i).

112. *Id.*

113. *Id.*

114. I thank Mandy Lee, Head of Research and Instruction at the Chicago-Kent College of Law Library, for undertaking the Westlaw and LEXIS searches and finding the forty-four cases.

115. The nine cases that were not about peremptory challenges included the following: Chong Yim v. City of Seattle, 451 P.3d 675 (Wash. 2019); Serv. Emps. Int'l v. Dep't of Early Learning, 450 P.3d 1181 (Wash. 2019); Karstetter v. King Cnty. Corr. Guild, 444 P.3d 1185 (Wash. 2019); State v. Townsend, 15 P.3d 145 (Wash. 2001) (en banc), *overruled by* State v. Pierce, 455 P.3d 647 (Wash. 2020); Carstensen v. Ruiz, 17 Wash. App. 2d 1061 (2021); State v. Severns, 20 Wash. App. 2d 1022 (2021); State v. Williams, 15 Wash. App. 2d 1030 (2020); State v. Perry, 12 Wash. App. 2d 1010 (2020); Johnson v. Seattle Pub. Util., 3 Wash. App. 2d 1055 (2018).

about extending GR37 to some other subject area. Thus, these six cases were not about how GR37 affected peremptory challenges, but rather they were about whether GR37 could be used in a new context.[116] Not surprisingly, these six cases, which involved the possible extension of a rule, were largely decided by the Washington Supreme Court (four out of six cases).[117] When the fifteen cases unrelated to peremptory challenges (nine about other subjects and six about whether to apply GR37 to other areas unrelated to peremptory challenges) were omitted, there remained twenty-nine cases that included discussion about peremptory challenges and GR37.

Among these twenty-nine cases, GR37 made a difference in nine of them,[118] or in roughly one-third of these cases. The "difference" it made in these nine cases was that the trial judge or the appellate judges found that a peremptory challenge violated *Batson*, as now understood according to the requirements of GR37. GR37 allowed trial and appellate judges to consider the "totality of the circumstances" and whether race or ethnicity "*could* be a factor" in the exercise of a peremptory from "an objective observer's" vantage point. In addition, GR37 instructed appellate courts to review the trial judge's decision de novo. The standard for a violation of *Batson* under GR37 was easier to meet than under the traditional *Batson* test. As several of these cases made clear, as long as race or ethnicity *could* be a factor, then there was a *Batson* violation.[119] In addition, the appellate judges, who now

116. The six cases that considered whether to apply GR37 to some area of the law other than peremptory challenges included the following: State v. Sum, 511 P.3d 92 (Wash. 2022); State v. Zamora, 512 P.3d 512 (Wash. 2022); *In re* K.W., 504 P.3d 207 (Wash. 2022); State v. Berhe, 444 P.3d 1172 (Wash. 2019); Carroll v. Renton Sch. Dist., 18 Wash. App.2d 1007 (2021); State v. Abbott, No. 79734-4-I, 2020 LEXIS 2889 (Wash. Ct. App. Nov. 9, 2020).

117. The four cases that were decided by the Washington Supreme Court included the following: *Sum*, 511 P.3d at 92; *Zamora*, 512 P.3d at 512; *In re* K.W., 504 P.3d at 207; *Berhe*, 444 P.3d at 1172.

118. State v. Pierce, 455 P.3d at 648; State v. Omar, 460 P.3d 225 (Wash. Ct. App. 2020); State v. Listoe, 475 P.3d 534 (Wash. Ct. App. 2020); State v. Saylor, 16 Wash. App.2d 1073 (2021) (per curiam); State v. McCrea, 17 Wash. App.2d 1023 (2021); State v. Lahman, 488 P.3d 881 (Wash. Ct. App. 2021); State v. Orozco, 496 P.3d 1215 (Wash. Ct. App. 2021); Wright v. 3M Co., 20 Wash. App.2d 1028 (2021); State v. Eaton, No. 83024-4-I, 2022 LEXIS 784 (Wash. Ct. App. Apr. 11, 2022).

119. *See Pierce*, 455 P.3d at 654 ("Because an objective observer could conclude that race was a factor in the State's peremptory challenge to juror 6, we affirm the Court of Appeals in result . . . ."); *Omar*, 460 P.3d at 227–28 ("Because an objective observer could conclude that race was a factor in the use of the challenge, we determine the trial court properly denied it."); *Listoe*, 475 P.3d at 539 ("An objective observer aware of implicit bias could view race as a factor in the State's exercise of the peremptory challenge because Juror 17 expressed only discomfort rather than an unwillingness to convict based on a hypothetical law."); *Saylor*, 16 Wash. App.2d at 1073 ("The State concedes that, based on the totality of the circumstances in the record, an objective observer could have viewed race or ethnicity as a factor in the challenge to the potential juror. . . . We accept the State's concession."); *McCrea*, 17 Wash. App.2d at 1023 ("We determine that an objective observer 'could view race or ethnicity as a factor' in the State's use of its first two peremptory challenges. The State excluded two Native Americans on the venire panel with its first two challenges and the reasons for doing so make no sense."); *Lahman*, 488 P.3d at 886 ("On balance, the State's explanation for why it struck Juror 2 is insufficient to dispel the concern that 'an objective observer *could* view race or ethnicity as *a* factor' in Juror 2's exclusion from the jury pool."); *Orozco*, 496 P.3d at 1221 ("[A] de novo review of the record persuades us that an

exercised de novo review, were less deferential to the trial judge's decision than they had been under *Batson*, and so they were willing to reverse what the trial judge had done.[120]

With GR37 in place, courts in Washington began to find *Batson* violations. *State v. Omar* is one such case.[121] Omar was charged with first-degree robbery.[122] He exercised a peremptory challenge against a prospective juror who appeared to be of Asian descent. Omar said that he did not like some of her responses. The trial judge denied Omar's peremptory challenge. Omar was convicted, and the appellate court affirmed because the reasons Omar gave for his exercise of the peremptory challenge were "nebulous" and "an objective observer could view race as a factor in the use of the challenge."[123]

In another case in Washington, *State v. Pierce*, two defendants, who were tried by a jury and found guilty of first-degree felony murder, raised the issue on appeal whether the prosecutor impermissibly used a peremptory challenge to remove Juror 6, a Black prospective juror.[124] The Washington Supreme Court held that the prosecutor's use of a peremptory challenge did violate GR37. The court explained that the prosecutor gave reasons that were presumptively invalid under GR37, and thus the prosecutor violated the test that "an objective observer could conclude that race was a factor in the State's peremptory challenge" to Juror 6.[125] The Washington Supreme Court affirmed the court of appeals as to the result but remanded the case to the trial court for further proceedings.

objective observer could view race as a factor in the use of the prosecutor's peremptory strike."); *Wright*, 20 Wash. App. 2d at 1028 ("Of key importance is the low threshold established by GR37 that an objective observer could view race or ethnicity as a factor."); *Eaton*, 2022 LEXIS at *784 ("The State concedes error . . . . [The State] acknowledges that the trial court allowed the peremptory challenge despite stating on the record that an objective observer 'could' have viewed race as a factor in the State's use of the peremptory.").

120. *See Listoe*, 475 P.3d at 539 ("Because we sit in the same position as the trial court and review the record de novo, we may look beyond the State's proffered justification for the peremptory challenge."); *Saylor*, 16 Wash. App.2d at 1073 ("We accept the State's concession. We reverse Saylor's conviction for possession of methamphetamine and remand for further proceedings."); *McCrea*, 17 Wash. App.2d at 1023 ("The State violated GR37 twice. . . . We reverse McCrea's two convictions and remand for a new trial."); *Lahman*, 488 P.3d at 887 ("[O]ur de novo standard of review does not allow deference to the trial court's decision. We disagree with the trial court's assessment of Mr. Lahman's GR37 objection . . . . The applicable remedy is to reverse Mr. Lahman's convictions without prejudice and to remand for a new trial."); *Orozco*, 496 P.3d at 1221 ("We conclude that the State violated *Batson* and GR 37 by striking the only Black person during voir dire and providing a presumptively invalid justification for doing [s]o. The remedy is a new trial."); *Eaton*, 2022 LEXIS at *784 ("We accept the State's concession of error, reverse Eaton's conviction, and remand for a new trial.").

121. 460 P.3d at 225.

122. *Id.* at 226.

123. *Id.* at 229.

124. 455 P.3d 647, 654 (Wash. 2020).

125. *Id.*

Although there is no way to know with certainty what the trial court or appellate courts would have decided in these cases just using the traditional *Batson* test, past practice in Washington suggests that the trial court or appellate courts would not have found a *Batson* violation. Although *Batson* was decided in 1986, and there had been "over forty" *Batson* challenges between 1986 and 2013 (when *Saintcalle* was decided),[126] the Washington Supreme Court noted that "Washington appellate courts ha[d] *never* reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge."[127]

In this relatively short period (2018-2022), which included two years of the pandemic (2020-2022), GR37 had some effect, though not an earth-shattering effect. There are still many ways that GR37 challenges do not make a difference because courts can point to problems with the claim, such as that it was not raised in time[128] or that it was raised in the wrong way (such as against the venire or for a for cause challenge but not a peremptory challenge).[129] There is also a learning curve as judges, lawyers, and pro se litigants figure out how to use GR37.[130]

One interesting development is that judges repeat so much of the language of GR37 in their opinions that the sheer repetition might serve an educational function. The repetition, even though it is in written form in the opinions and not announced at the start of jury selection at every jury trial, which could be an interesting experiment, might function similar to a catechism or prayer, and inspire lawyers and judges to think about bias during the exercise of peremptory challenges. Judges repeat the language of

126. State v. Saintcalle, 309 P.3d 326, 335 (Wash. 2013).

127. *Id.* (citing defense counsel's brief that provides "42 Washington *Batson* cases, all of which affirm a trial court's denial of a *Batson* challenge"); *see* Jury Selection, *supra* note 83.

128. *See, e.g.*, State v. Blockman, No. 54242-1-II, 2022 Wash. App. LEXIS 844, at *9–12 (Wash. Ct. App. Apr. 19, 2022) (holding that Blockman waived his challenge to his GR37 objection because he offered an argument to the trial court and a different argument to the court of appeals); State v. Whicker, 17 Wash. App. 2d 1067, at *6 n.8 (2021) (explaining that the defendant might have had grounds to object to a peremptory challenge under GR37 but he did not object at trial and did not raise it on appeal, so there was no record on the issue).

129. *See, e.g.*, State v. Davis, No. 54660-4-11, 2022 Wash. App. LEXIS 909, at *21 (Wash. Ct. App. Apr. 26, 2022) (explaining that the defendant's claim of ineffective assistance because his counsel failed to utilize GR37 was misplaced because GR37 applies to peremptory challenges and not to impaneled jury members); State v. Teninty, 489 P.3d 679, 682 (Wash. Ct. App. 2021) (rejecting defendant's GR37 argument because it was directed toward a for cause challenge rather than a peremptory challenge); State v. Clark, 487 P.3d 549, 551-54 (Wash. Ct. App. 2021) (noting that defendant, in raising an ineffective assistance of counsel claim, argued that his venire lacked any Black prospective jurors and that his counsel should have ensured such a venire, but the court found this to be a novel theory and one that does not implicate GR37).

130. *See, e.g.*, State v. Lahman, 488 P.3d 881, 887 (Wash. Ct. App. 2021) ("We recognize that GR37 is a new rule and appellate decisions interpreting the rule postdate Mr. Lahman's trial. The trial court understandably struggled with application of the rule to Mr. Lahman's case."); State v. Eaton, No. 83024-4-I, 2022 LEXIS 784, *1 (Wash. Ct. App. Apr. 11, 2022) ("The State concedes error, acknowledging that the trial court 'misconstrued GR 37 in several key respects.'").

GR37 in their opinions, including the three steps of GR37 (tracking *Batson*) that now use the objective observer standard, the totality of the circumstances, several factors, and the presumptively invalid reasons, so that the standard they must apply is clear.[131] In doing so, judges remind the reader about the omnipresence of bias, the importance of asking whether race or ethnicity "could be a factor," and the need to question the reasons that lawyers give for a peremptory challenge more deeply than judges had done under the traditional *Batson* standard. Such repetition about the two types of bias (implicit and explicit) could lead lawyers and judges, as well as other readers, to think more carefully about bias and to look below the surface whenever lawyers exercise peremptory challenges.

One unexpected development is that GR37 analysis has not been limited to peremptory challenges. For example, in 2022, the Washington Supreme Court extended GR37 analysis to include prosecutorial misconduct and Fourth Amendment seizures. In *State v. Zamora*, the Washington Supreme Court held that the "objective observer" analysis in GR37 could be used to assess prosecutorial misconduct when the prosecutor asked prospective jurors about their views on unlawful immigration and other issues that could appeal to racial or ethnic bias.[132] Similarly, in *State v. Sum*, the Washington Supreme Court decided that GR37 was appropriate to use in assessing whether a person seized without a warrant felt free to leave.[133] The court, relying on GR37, explained that the test for a seizure was to be based on the totality of circumstances and viewed from the perspective of an objective observer, who could consider police officers' past use of force directed against people of color in Washington, among other considerations.[134] In *State v. Berhe*, the Washington Supreme Court held that similar standards as those found in GR37 apply to determining whether implicit racial bias was a factor in a jury's verdict.[135] In another instance, the Washington Supreme Court turned to GR37, though it did not find it "directly applicable," to remind lawyers and judges of the need to avoid racial bias in placement decisions for children.[136] Thus, the GR37 analysis, with its emphasis on the knowledgeable objective observer, can extend to

131. For an example of the extensive discussion of GR37 that courts typically include when deciding a GR37 claim, see State v. Listoe, 475 P.3d 534, 539–42 (Wash. Ct. App. 2020); *Lahman*, 488 P.3d at 884-85 (describing the process GR37 requires and characterizing it as "a guided process for how to assess the issue of bias and peremptory challenges").

132. 512 P.3d 512, 522–24 (Wash. 2022) (en banc).

133. 511 P.3d 92, 106 (Wash. 2022) (en banc).

134. *Id.* at 108–10.

135. 444 P.3d 1172, 1181 (Wash. 2019) ("The ultimate question for the court is whether an objective observer . . . could view race as a factor in the verdict.").

136. *In re* K.W., 504 P.3d 207, 220 (Wash. 2022).

new areas of the law and does not appear to be limited to peremptory challenges.[137]

### 4. Strengths of the Rule Change

GR37 strengthens the *Batson* test in several ways. For example, it recognizes the role of implicit bias and institutional bias, whereas the *Batson* test is limited to addressing explicit bias or purposeful discrimination. GR37 also tries to shift the focus away from whether the lawyer is acting based on bad purpose (purposeful discrimination), which judges are reluctant to say about any lawyer, and instead, focuses on how an "objective observer" who is viewing the exercise of the particular peremptory challenge, knowing the history of peremptory challenges and how they have been used as a mask for discrimination, could view that peremptory challenge. In addition, GR37 treats reasons that have been traditionally accepted as race neutral, even though they have been disproportionately used against Black prospective jurors, as "presumptively invalid." GR37 also makes it harder for a lawyer to exercise a peremptory challenge based on discriminatory views about demeanor because now a lawyer who seeks to use demeanor as a reason for striking a prospective juror must alert the court and opposing counsel to the demeanor in question at the time that the prospective juror's demeanor can still be observed.

One of the members of the workgroup suggested that jury selection is proceeding more fairly in Washington since the rule change. Lila Silverstein, who represented the Washington Association of Criminal Defense Lawyers and served as defense counsel to Kirk Saintcalle in *State v. Saintcalle*,[138] suggested that juries in Washington are more diverse now, and lawyers and judges in Washington are more aware of their biases.[139] In addition, lawyers are raising objections to discriminatory peremptory challenges, trial judges are sustaining their objections, and appellate courts are affirming the trial courts' rulings. In Lila Silverstein's words, GR37 is "working very well,"[140] but admittedly this is only anecdotal evidence, and there is a need for empirical evidence to provide support for this claim.

137. However, in two of the six cases seeking to extend GR37 to other contexts, Washington Courts of Appeals declined to do so. *See* Carroll v. Renton Sch. Dist., 18 Wash. App. 2d 1007, *11 (2021) (declining to extend GR37's "objective observer" standard to trial courts making determinations in employment discriminations cases); State v. Abbott, 15 Wash. App.2d 1011, *3 (2020) (finding no law to support defendant's fair-cross-section claim as connected to GR37 or to its extension to jury verdicts involving implicit bias).

138. 309 P.3d 326, 335 (Wash. 2013).

139. *See* Jury Selection, *supra* note 83 (quoting Lila Silverstein).

140. *Id.*

### 5. Weaknesses of the Rule Change

Although GR37 seeks to strengthen the *Batson* test, it does have some limitations, which can easily be exploited. One limitation is that GR37 only applies to race and ethnicity; it does not apply to gender. The workgroup had discussed this omission, but there was disagreement, with some members wanting to include gender and sexual orientation and others preferring to return to the issue later.[141] Thus, GR37 provides less protection than *Batson* currently does in terms of who is covered.[142]

However, the most serious limitation of GR37 is that lawyers will soon learn to avoid giving reasons that are "presumptively invalid" under GR37, just as they learned to avoid giving reasons based on race, gender, or ethnicity under *Batson*. Since there are myriad reasons that a lawyer can give for exercising a peremptory challenge, lawyers can simply shift from the reasons identified by GR37 as "presumptively invalid" to an endless number of reasons that will still be available to them. According to the Supreme Court in *Purkett v. Elem*,[143] reasons just need to avoid being based on race, gender, or ethnicity. This means that lawyers can give any other reasons, including those that are silly, unrelated to the case at hand, irrelevant, or based on some characteristic, such as religion that has not yet been protected by *Batson*.

Another potential problem is that trial judges, who also preside over the trial and have to make quick decisions with limited information, might not be able to keep track of all the differences in voir dire questioning that GR37 anticipates and tries to guard against, though it might be that appellate judges can provide that analysis. Although GR37(e) urges trial judges to consider "the totality of the circumstances," including the ones identified in GR37(g), it is more difficult for a trial judge to keep track of the number of questions, the type of questions, the time spent on the questions, and to make comparisons among those who were struck and those who remained on the jury than for appellate judges who have the transcript in front of them and the time to review it. Similarly, it might also be difficult for trial lawyers to keep track of this kind of information. Trial lawyers, like trial judges, are in the trenches. Appellate judges might be the only ones who have the time to make comparisons between questions asked of prospective jurors who were struck versus questions asked of jurors who were permitted to serve, and who can study the lawyers' peremptory challenge practices in the particular case and in past cases in a way that a trial judge cannot do. However, appellate

141. PROPOSED NEW GR37, *supra* note 100, at 5.

142. *See supra* note 2 (describing the extension of *Batson* so that it prohibits peremptory challenges based on race, ethnicity, and gender).

143. 514 U.S. 765, 767–68 (1995).

judges, even with de novo review under GR37, might still be reluctant to find violations that will require a new trial.

Of course, even if GR37 is more effective than the traditional *Batson* test, it is not a panacea. The workgroup envisioned the need for further education of judges to learn how to implement GR37 and to become familiar with best practices.[144] Some members of the workgroup also envisioned that voir dire would take longer with GR37, and judges should be made aware of that possibility.[145] Finally, GR37 is merely one step and will not address all the factors that interfere with the seating of diverse juries. According to Lila Silverstein, there are several other jury improvements that need to be made in Washington, including greater diversity of the jury pool, more generous juror compensation, sending a new summons to the same zip code from which a summons has been returned as undeliverable, and examining whether challenges for cause are affected by racial bias.[146]

In addition, GR37 still relies on the cumbersome framework established by the Supreme Court in *Batson*. GR37 is an attempt to make *Batson* work more effectively, but it may be that the test is still too easy to evade. Even with the rejection of some reasons that had been accepted in the past, new suspect reasons are likely to be proffered, and those will have to be added by a rule change to the list of "presumptively invalid" reasons.

In some ways, the *Batson* test recalls the children's story of the boy at the dike.[147] When the dike sprouts a leak, the boy tries to stop it by putting his finger in the hole. It is a temporary measure, but it keeps the water from escaping from the dike. He stays in that position for a long time until the adults realize he is missing and find him by the dike. The boy has performed a valuable service to the community by containing the water. Now that the adults have arrived, they can mend the dike. However, *Batson*, unlike the dike, might not be easily mended. *Batson*'s structure might be faulty, and GR37 might only be a stopgap measure, like the boy's finger in the dike. It might be preferable to take a new approach, such as eliminating all peremptory challenges, rather than trying——hopelessly, in my view——to salvage the old approach.[148] However, having states take some action is

144. PROPOSED NEW GR37, *supra* note 100, at 8.

145. *Id.* at 5.

146. *See* Jury Selection, *supra* note 83 (quoting Lila Silverstein).

147. MARGUERITE K. SCOTT, THE BOY AT THE DIKE (1961).

148. The Court in *Batson* recognized that the "evidentiary formulation" in *Swain v. Alabama* was unworkable and rejected it. Batson v. Kentucky, 476 U.S. 79, 93 (1986). When a test becomes "unworkable," that is one of the grounds for rejecting it as precedent. *See, e.g.*, Elena Kagan, Associate Justice, U.S. Supreme Court, In Conversation with Dean Hari Osofsky, Northwestern Pritzker School of Law (Sept. 14, 2022).

preferable to having them take no action and simply hoping that the problem will go away on its own.

### *B. Strengthening the* Batson *Test Through Legislation: California*

California's approach to strengthening the *Batson* test has much in common with Washington's GR37, but California's approach ended up taking place as a result of legislation rather than a rule change. Even though the California Supreme Court had already appointed a workgroup to recommend "changes in trial operations that would attempt to eliminate discrimination in jury selection,"[149] the legislature acted first.

#### 1. How the Legislation Came About

In July 2020, the California Supreme Court appointed an eleven-member workgroup charged with making recommendations that would attempt to eliminate discrimination during jury selection in California state courts.[150] The workgroup issued its report, *Jury Selection Work Group: Final Report to the Supreme Court of California*, in July 2022.[151]

However, long before the workgroup issued its report, Democratic legislators took action. Assemblymember Shirley Weber (D-San Diego) drafted a bill, AB 3070, that she and other Democrats hoped would stop lawyers from using peremptory challenges to remove prospective jurors based on their race, gender, ethnicity, or other group characteristics. After AB 3070 was passed in the Assembly, it went to the Senate floor on Sunday, August 30, 2020, where it fell three votes short of passage.[152] Senator Scott Wiener (D-San Francisco) returned the bill to the full Senate on Monday, August 31, 2021.[153] After two failed attempts, the bill finally secured a majority.[154] The bill went back to the Assembly floor "with just minutes to spare before the midnight close of the session,"[155] and the lower house approved the Senate's amendments to the bill. In the closing minutes of the

149. Cheryl Miller, *California Justice Shared Views with Lawmakers Weighing Bill Aimed at Discrimination in Jury Selection*, LAW.COM: LITIG. DAILY (Sept. 1, 2020, 9:30 PM), https://www.law.com/litigationdaily/2020/09/01/justice-goodwin-liu-shared-views-on-jury-selection-with-lawmakers-weighing-bill-407-15893/ [https://perma.cc/4NET-RPA9].

150. *Id.*

151. JURY SELECTION WORK GROUP, JUD. BRANCH OF CAL., FINAL REPORT TO THE SUPREME COURT OF CALIFORNIA (2022), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-09/Jury%20Selection%20Work%20Group%20Final%20Report.pdf [https://perma.cc/4R6T-HEBA].

152. Miller, *supra* note 149.

153. *Id.*

154. *Id.*

155. *Id.*

2020 legislative session, the bill was sent to Governor Gavin Newsom to sign, and he signed it.[156]

### 2. What the Legislation Includes

In several ways, AB 3070, which added Section 231.7 to the *California Code of Civil Procedure*,[157] resembles Washington's GR37. Section 231.7, like GR37, goes beyond *Batson v. Kentucky*[158] to address unconscious bias in addition to conscious bias. In addition, Section 231.7 provides that the trial judge "shall" assess the reasons given to justify the exercise of a peremptory challenge "in light of the totality of the circumstances,"[159] just as GR37 does. Under Section 231.7, the trial judge has to determine whether there is "a substantial likelihood" that "an objectively reasonable person" would conclude that race, gender, ethnicity, or a similar group characteristic is "a factor in the use of the peremptory challenge," and if so, the "objection shall be sustained."[160] The court "*shall* explain the reasons for its ruling on the record."[161] Section 231.7, like GR37, sought to move away from the judge trying to discern the intent of the individual lawyer and instead it requires the judge to evaluate the peremptory challenge based upon how an objectively reasonable person would view it. Section 231.7 explains that "an objectively reasonable person" is one who is aware of unconscious bias and the role that it has played in "the unfair exclusion of potential jurors in the State of California."[162] Thus, the "objectively reasonable person" in California, like the "objective observer" in Washington, is one who is educated about the roles that unconscious bias and institutional bias have played in excluding Black and Latino prospective jurors from the jury.

Section 231.7, like GR37, provides that certain reasons that had been accepted as nondiscriminatory by trial judges in the past are now "presumed to be invalid," unless the party exercising the peremptory challenge could show by "clear and convincing evidence" that "an objectively reasonable person" would view the rationale as unrelated to the prospective juror's group identity.[163] Section 231.7 includes a list of thirteen reasons that are

156. Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs Landmark Legislation to Advance Racial Justice and California's Fight Against Systemic Racism and Bias in Our Legal System (Sept. 30, 2020), https://www.gov.ca.gov/2020/09/30/governor-newsom-signs-landmark-legislation-to-advance-racial-justice-and-californias-fight-against-systemic-racism-bias-in-our-legal-system/ [https://perma.cc/46JB-TYE6].

157. CAL. CIV. PROC. CODE § 231.7 (West 2021).

158. 476 U.S. 79 (1986).

159. CIV. PROC. § 231.7(d)(1).

160. *Id.*

161. *Id.* (emphasis added).

162. *Id.* § 231.7(d)(2)(A).

163. *Id.* § 231.7(e).

"presumed to be invalid,"[164] including: having distrust of law enforcement or the criminal justice system; expressing a belief that law enforcement engage in racial profiling or that criminal laws have been enforced in a discriminatory manner; having a close relationship with someone who has been stopped, arrested, or convicted of a crime; living in a particular neighborhood; and having a child outside of marriage.[165]

Section 231.7, like GR37, also provides that the demeanor of a prospective juror will be regarded as "presumptively invalid" as a reason for exercising a peremptory challenge unless the trial judge or opposing counsel also sees that behavior and that the lawyer exercising the peremptory challenge can explain why that behavior is relevant to the case at hand.[166] Section 231.7, like GR37, also provides some guidance for trial judges to help them recognize unconscious bias or institutional bias, including whether the lawyer exercising the peremptory challenge has asked more questions or certain types of questions of some prospective jurors but not of others, whether some reasons for the exercise of a peremptory challenge might be disproportionately associated with some groups, or whether the lawyer engaged in cursory questioning of the prospective juror who was removed with a peremptory challenge.[167]

Section 231.7 does differ from GR37 in a few significant ways. One difference is that while GR37 only protects against discriminatory peremptory challenges based on race or ethnicity, Section 231.7 protects against peremptory challenges based on a prospective juror's "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups."[168] Thus, the protection afforded by Section 231.7 is far more expansive than the protection afforded by GR37.

In addition, Section 231.7 provides an array of remedies in the case of a discriminatory peremptory challenge, including quashing the venire and beginning jury selection anew, declaring a mistrial and selecting a new jury (if the jury has already been impaneled), seating the challenged juror, providing the objecting party with additional challenges, or providing another remedy that the court deems appropriate.[169] If the trial judge denies the objection to a peremptory challenge, Section 231.7 provides that the appellate court "shall" review this decision "de novo," with the trial court's

164. *Id.*
165. *Id.* § 231.7(e)(1)–(5).
166. *Id.* § 231.7(g).
167. *Id.* § 231.7(d)(3)(A)–(G).
168. *Id.* § 231.7(a).
169. *Id.* § 231.7(h).

"express factual findings reviewed for substantial evidence."[170] Finally, the legislation provides that it will govern peremptory challenges in criminal cases in jury trials beginning on or after January 1, 2022 and until January 1, 2026; after January 1, 2026, the provisions will be in effect in both civil and criminal jury trials.[171]

### 3. The Strengths of a Legislative Approach

One advantage of a legislative approach is that legislators respond to political pressure and deadlines. With AB 3070, there was political support to address discrimination during jury selection and there was a fast-approaching deadline——the end of the 2019-2020 legislative session. In California at that time, there was a Democratic majority in both houses of the state legislature and there was a Democratic governor. After a summer of racial protest, the Democrats, who controlled the legislature and the executive, might have felt the need to address this pressing social justice issue and to be responsive to their constituents, which included Black and Latino voters.

Although the judiciary might also have felt a need to address this issue, it has different deadlines than the legislature, and in any event, the judiciary is accustomed to proceeding slowly and incrementally when making any changes.[172] Thus, the California Supreme Court appointed a workgroup that had sufficient time to meet (twelve times over the course of twenty-two months), to divide into two task groups, to solicit public feedback, and to review comments from "a wide range of stakeholders" before producing a report with recommendations in 2022.[173] Just as judges work on a case and take the time they need to write their opinion, they also study a problem in judicial administration by taking the time they need to examine all the issues. Judges need to examine the issue from different perspectives, including those of the parties, lawyers, and prospective jurors. A judicial response might have more nuance and detail than a statute can have, but there is also the possibility that in the end a judicial workgroup will be reluctant to act or will take an unreasonable amount of time to act.

Another advantage of a legislative approach is that the statute is then on the books. Although statutes can be amended or repealed by subsequent legislatures, the process is not easy, and intentionally so. Whereas a rule can

170. *Id.* § 231.7(j).

171. *Id.* § 231.7(i), (n).

172. Justice Sandra Day O'Connor, in an interview after she had left the Court, pointed out that Cass Gilbert, the architect of the Supreme Court building, had included tortoises at the base of the lamps in the courtyards of the Supreme Court as a reminder that "justice moves slowly." DVD: Supreme Court and Selecting Judges, Aspen Ideas Festival (C-SPAN July 1, 2009) (on file with author).

173. JURY SELECTION WORKGROUP, *supra* note 151, at 3–4.

be changed by the California Supreme Court, which consists of seven Justices, a statute is harder to change because it requires the cooperation of many more individuals. It also requires political will and needs to be a high priority because a legislature can only take up so many bills in a legislative session.

### 4. The Weaknesses of a Legislative Approach

Although GR37 and Section 231.7 cover much of the same ground, the legislative approach that California opted for means that it will be harder to make changes in the future. This could become a problem particularly with the reasons that the legislature "presumed to be invalid."[174] Once lawyers in California understand that the reasons identified in Section 231.7 are presumed to be invalid, and therefore, no longer acceptable as they had been in the past, lawyers are likely to shift their reasons. They will avoid reasons presumed to be invalid and simply give other reasons. For example, before *J.E.B. v. Alabama ex rel. T.B.*, lawyers could say that they exercised a peremptory challenge based on the prospective juror's gender;[175] however, after *J.E.B.*, they could no longer give gender as a reason.[176] They learned not to give gender and, instead, to give other reasons. Since lawyers can readily learn which reasons will be seen as acceptable and which will not, they will adjust their reasons accordingly. Therefore, a list of reasons that is codified as presumed to be invalid will need to be changed over time. A legislative change is oftentimes more difficult to accomplish than a rule change.

Another problem with the legislature acting rather than the judiciary is that judges are the experts in this area whereas legislators are not. Legislators are not in the courtroom day after day. Some adjustments might need to be made over time, but judges, not legislators, are the actors most likely to realize this. For example, Section 231.7(l) indicates that the legislative intent is not to "lower the standard for judging challenges for cause or expand use of challenges for cause."[177] But a change in one practice, such as the exercise of peremptory challenges, might require a change in another practice, such as for cause challenges. There might need to be some give-and-take. Admittedly, the legislature does not want for cause challenges to become new masks for discrimination, but there might be less reason to worry about for cause challenges—even if they have to be used a little more often—

174. CIV. PROC. § 231.7(e).

175. *See supra* note 53 and accompanying text.

176. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment).

177. CIV. PROC. § 231.7(l).

because judges rather than lawyers decide for cause challenges. In addition, judges have to give a reason in open court when deciding a for cause challenge, and their decision about a for cause challenge is subject to appellate review.[178]

### *C. Eliminating Peremptory Challenges: Arizona*

Arizona chose to eliminate peremptory challenges in civil and criminal jury trials rather than try to strengthen the *Batson* test. The Arizona Supreme Court did so by a rule change.[179] Arizona is the first state in the United States to eliminate peremptory challenges, though other countries, such as England and Wales and Canada, have eliminated peremptory challenges.[180] Arizona has had jury selection without peremptory challenges since January 1, 2022, so there is little data so far, though a study in Arizona is under way.[181] However, the anecdotal evidence suggests that the experiment is working well, particularly if prospective jurors complete a questionnaire before they enter the courtroom for voir dire.[182]

#### 1. How the Rule Change Came About

There were several steps that preceded the Arizona Supreme Court's elimination of peremptory challenges by a rule change. Initially, the Civil Practice and Procedure Committee received a petition that sought a rule change in Arizona similar to GR37 in Washington that was intended to strengthen the *Batson* test.[183] Then, two Arizona Court of Appeals judges, Peter Swann and Paul McMurdie, requested the elimination of peremptory challenges,[184] and they sent their petition to the Arizona Supreme Court,

178. The denial of a for cause challenge can be raised on appeal if the lawyer objects in a timely fashion and does not use a peremptory challenge to remove that prospective juror and so that prospective juror serves as a juror on that jury. *See, e.g.*, United States v. Martinez-Salazar, 528 U.S. 304, 315–16 (2000) ("After objecting to the District Court's denial of his for-cause challenge, Martinez-Salazar had the option of letting Gilbert [a biased juror] sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal.").

179. *See supra* note 82.

180. *See, e.g.*, Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021, 1:52 PM), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/ [https://perma.cc/D68W-NXWK].

181. In August 2022, Arizona State University and others received $2.7 million from the Office of Justice Programs' National Institute of Justice to assess how Arizona's recent elimination of peremptory challenges is affecting jury selection and racial diversity on the jury. Nat'l Ctr. for State Cts., *DOJ to Fund Research on Effects of Peremptory Strikes Abolition in Arizona*, JUR-E BULL. (Sept. 9, 2022), https://www.ncsc.org/newsroom/jure/2022/sept-9 [https://perma.cc/4SH7-4RFB].

182. *See, e.g.*, Jury Selection, *supra* note 83 (citing comments made by Judge Paula S. Gates, Chair, Ariz. Task Force).

183. *Id.* (citing comments made by Judge Paula S. Gates).

184. Kanu, *supra* note 180.

which received many comments in response.[185] During this period, the Arizona Supreme Court reduced the number of peremptory challenges that each side had, and when the pandemic hit in 2020, the Court further reduced the number of peremptory challenges to two per side.[186]

On March 10, 2021, Arizona Supreme Court Chief Justice Robert Brutinel issued Administrative Order No. 2020-35 ("AO 2020-35"), which established the Task Force on Jury Data Collection, Practices, and Procedures.[187] The Arizona Supreme Court named Judge Pamela S. Gates, Civil Presiding Judge of the Superior Court in Maricopa County, as its Chair. The order emphasized the need to ensure that juries in Arizona represent a cross section of the community. The Task Force was to focus not only on jury service, the summoning of jurors, and the jury selection process, but also on how these areas overlap. The Task Force was also asked to make recommendations in several areas, including the number of peremptory challenges that should be available to each side, whether peremptory challenges interfered with the representation of minorities on juries, and whether any other rule changes were needed.[188] The order directed the Task Force to submit a report with recommendations to the Arizona Judicial Council by October 1, 2021.[189]

The Task Force discussed peremptory challenges at numerous meetings, reviewed rule petitions, as well as the comments in response to those rule petitions, and reviewed data released by the Superior Court in Maricopa County about the use of peremptory challenges in 2019 at the downtown courthouse in Phoenix.[190] The Task Force voted 12-4 to recommend to the Arizona Supreme Court that it consider eliminating peremptory challenges.[191] However, before the Task Force could make its recommendation, the Arizona Supreme Court decided to eliminate peremptory challenges. The Arizona Supreme Court issued an order on August 30, 2021, in which it eliminated peremptory challenges through a

185. *See* Jury Selection, *supra* note 83.

186. *Id.*

187. ARIZ. TASK FORCE ON JURY DATA COLLECTION, POL'YS, & PROCS., REPORT AND RECOMMENDATIONS 1 (2021), https://www.azcourts.gov/cscommittees/Task-Force-on-Jury-Data-Collection-Practices-and-Procedures/ [https://perma.cc/7KLN-DASF] [hereinafter ARIZ. TASK FORCE].

188. *Id.* at 2.

189. *Id.*

190. *Id.* at 36–37.

191. *Id.* at 38.

rule change.[192] The Task Force issued its *Report and Recommendations* on October 4, 2021.[193]

After the Arizona Supreme Court's order, that court asked the Task Force to collect some of the best practices for proceeding without peremptory challenges and to identify training that might be needed so that judges could conduct voir dire and seat impartial juries without peremptory challenges.[194] To perform these tasks, the Task Force created a subgroup, the Statewide Jury Selection Workgroup ("SJSW"), to "ensure representation from various stakeholders, including lawyers with diverse practice areas in urban and rural counties, lawyers with civil and criminal experience, as well as individuals with practice area specialization."[195] The SJSW issued its *Report and Recommendations* on November 1, 2021.[196] Among its recommendations were the following: encourage case-specific written juror questionnaires; permit extended oral voir dire with participation by the lawyers; and discourage judges from trying to rehabilitate prospective jurors.[197] The SJSW volunteered to monitor the implementation of the new rule eliminating peremptory challenges because the Task Force's mandate, under which the SJSW operated, did not expire until June 30, 2022.[198]

### 2. Aids for Proceeding Without Peremptory Challenges

The SJSW reported that one effective aid for proceeding without peremptory challenges is for trial judges to give prospective jurors a written questionnaire with fewer than sixty questions to complete before voir dire.[199] The written questionnaire is "to supplement, not [to] replace, oral voir dire" and will not be feasible in all cases.[200] Prospective jurors can complete the questionnaire online or on paper. As Judge Gates has described the process, the judge receives the responses, the responses are entered into an Excel spreadsheet, and the spreadsheet is sent to the lawyers.[201] The written

192. STATEWIDE JURY SELECTION WORKGROUP: A WORKGROUP OF THE TASK FORCE ON JURY DATA COLLECTION, PRACTICES, & PROCS., REPORT AND RECOMMENDATIONS 1 & n.2 (2021), https://www.azcourts.gov/Portals/74/Jury%20TF/SJS%20Workgroup/SJSW_Final%20Report%20and%20Recommendations_11_01_21.pdf?ver=QosXeyxN0xkk1IdwRQF-cw%3d%3d [https://perma.cc/46ES-VDXT] [hereinafter STATEWIDE JURY SELECTION WORKGROUP].

193. *Id.* at 1.

194. *Id.*

195. *Id.*

196. *Id.* at cover page.

197. *Id.* at 3.

198. *Id.*

199. *Id.* at 19.

200. *Id.* at 21.

201. *See* Jury Selection, *supra* note 83 (citing comments made by Judge Pamela Gates).

questionnaire makes it easy for the judge to remove some prospective jurors for hardship or for cause.

The written questionnaire also provides much more information about prospective jurors than lawyers had in the past. In particular, the written questionnaire reveals more about the prospective jurors' attitudes and beliefs than the judge typically elicited in the courtroom through voir dire questions. The written questionnaire is also useful when the questions are open-ended and tailored to the case. According to several empirical studies, prospective jurors are more willing to be candid about sensitive subjects on a written questionnaire than they are when they are being questioned orally in open court.[202]

Judge Gates, the Chair of the Task Force, reported that during the first three months without peremptory challenges (January-March 2022), judges used a questionnaire about thirty percent of the time.[203] During the next three months (April-June 2022), judges used a questionnaire about seventy percent of the time.[204] Judges realized that they were getting useful information about prospective jurors by using a written questionnaire.[205] Sometimes, they were getting enough information to grant a for cause challenge.[206]

The SJSW learned that having lawyers conduct more of the voir dire questioning than the judge when there are no peremptory challenges is also helpful to the process. According to some studies, when the lawyers do the questioning, the prospective jurors are more likely to be candid.[207] When the judge does the questioning, the prospective jurors are more likely to give "socially desirable" answers.[208] People give these answers because they are expected, even if these answers do not necessarily reflect their actual views.

The SJSW also reported that another aid for jury selection without peremptory challenges is to discourage judges from rehabilitating prospective jurors through leading questions. The SJSW report

202. STATEWIDE JURY SELECTION WORKGROUP, *supra* note 192, at 3.

203. Jury Selection, *supra* note 83 (citing comments made by Judge Paula S. Gates).

204. *Id.* (citing comments made by Judge Paula S. Gates).

205. *Id.* (citing comments made by Judge Paula S. Gates).

206. *Id.* (citing comments made by Judge Paula S. Gates).

207. *See, e.g.*, Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1196 (2003) ("Some studies suggest that judges are not as effective as attorneys in uncovering potential biases.").

208. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 HARV. L. & POL'Y REV. 149, 160 (2010) ("[E]mpirical research suggests that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges."); *see also* Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 CHI.-KENT L. REV. 1143, 1150 (2003) ("Some prospective jurors who hold biases are likely to state that they can be impartial solely because that answer is consistent with socially learned values that people should be impartial, a phenomenon that psychologists call 'socially desirable' responses. The tendency to provide such answers can be enhanced by the authoritative presence of the judge.").

recommended providing training for both lawyers and judges. Lawyers need to view voir dire in a more neutral way rather than as an opportunity to gain a strategic advantage, and judges need to cede more time to lawyers so that prospective jurors will be more forthcoming in their responses to voir dire questions. In addition, both lawyers and judges need to learn how to ask open-ended questions and follow-up questions.[209] The SJSW report also recommends training judges and lawyers about implicit bias[210] and making prospective jurors aware of implicit bias through an orientation video.[211]

Although it is too soon to tell how Arizona's elimination of peremptory challenges is working, its approach has the virtue of simplicity and the potential for effectiveness. As Justice Marshall had suggested in his *Batson* concurrence, "only by banning peremptories entirely can such discrimination be ended."[212] The Arizona experience will reveal any additional steps that are needed to make this approach work well in practice.

## III. A BLUEPRINT FOR CHANGE BASED ON THREE STATES' EXPERIENCES

Washington, California, and Arizona are three states that have taken three different approaches to address the problem of discriminatory peremptory challenges. Washington opted for a rule change to strengthen the *Batson* test, whereas California opted for legislation to do the same. In contrast, Arizona eliminated peremptory challenges by a rule change. Washington, California, and Arizona have taken action with respect to peremptory challenges; two other states have followed Washington's lead.[213] Although Washington, California, and Arizona are only three states, their experiences have some commonalities that can provide a blueprint for other states that are uncertain how to proceed.

### *A. The State's Highest Court Can Create a Task Force*

In Washington, California, and Arizona, the state's highest court created a task force to study the jury and to ensure that as many citizens as possible could serve as jurors. A key problem that the task force focused on in all three states was discriminatory peremptory challenges. *Batson* had proven to be an inadequate response to discriminatory peremptory challenges. At the very least, *Batson* failed to address implicit bias and

209. STATEWIDE JURY SELECTION WORKGROUP, *supra* note 192, at 5.
210. *Id.* at 24.
211. *Id.* at 5, 25.
212. Batson v. Kentucky, 476 U.S. 79, 108 (1986).
213. *See supra* notes 9–10 and accompanying text.

institutional bias; it focused only on explicit bias or purposeful discrimination. Although there are other barriers that interfere with the creation of diverse juries, such as undue reliance on voter registration lists, undeliverable summonses, low juror pay, and hardship excuses,[214] discriminatory peremptory challenges pose a unique problem. Discriminatory peremptory challenges take place in the courtroom in front of the judge, the parties, the public, the press, and the prospective jurors; they are directed largely against members of minority groups; and they call into question the integrity of the trial that immediately follows.[215]

The supreme courts in Washington, California, and Arizona created task forces to study the jury in their respective states. The task forces consisted of lawyers, judges, and law professors (in Washington and Arizona) or judges (in California). The task forces collected data, considered possible changes to the peremptory challenge, tried to find common ground, and made recommendations. They went about their work diligently and systematically. Their aim was, in the words of the Washington Supreme Court, "to begin the task of formulating a new, functional method to prevent racial bias in jury selection. To do so, we seek to enlist the best ideas from trial judges, trial lawyers, academics, and others to find the best alternative to the *Batson* analysis."[216] The task forces held meetings, studied the issues, and tried to find common ground. The task forces are a useful first step for states interested in addressing the problem of discriminatory peremptory challenges.

### *B. The Task Force Can Issue a Report with Recommendations*

The state supreme court can instruct the task force to issue a report with recommendations; the report can provide a useful road map for that state. The task force reports are usually thorough and well-documented. The reports identify the problems that are the focus of the task force's study and detail the thought processes that the task forces went through and the different perspectives they learned about from members of the legal community in that state. Some reports provide data collected from state courts, and some note the academic studies that the task force members found particularly useful. The reports also provide recommendations to that state's supreme court. If the members of the task force cannot agree on a

214. *See, e.g.*, Diamond & Hans, *supra* note 23; Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613 (2021) (describing the dilemma that prospective jurors with limited means are excused from jury service based on hardship even though they are otherwise qualified to serve).

215. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 402 (1991) (describing discrimination during jury selection as an affront to the "dignity of persons and the integrity of the courts").

216. State v. Saintcalle, 309 P.3d 326, 338 (Wash. 2013) (en banc).

particular recommendation, then they use the report to provide the state supreme court with policy choices that it needs to make.

A task force report is not only helpful to the state supreme court that requested it, but also it can be useful to other states considering how best to proceed. The supreme court justices of one state can look at the reports that task forces in other states have written. One state's supreme court justices can use the reports of other states as a blueprint for how to begin if they, too, want to address the problems of bias in jury selection in civil and criminal trials in their own state.

One caveat, however, is that in California and Arizona other institutional actors took decisive action before the task forces in those states could complete and issue their reports. In California, the legislature passed AB 3070 on August 21, 2020, and the Governor signed it into law on September 30, 2020, before the task force issued its report in July 2022. In Arizona, the Arizona Supreme Court made a rule change on August 30, 2021 that eliminated peremptory challenges in civil and criminal jury trials in the state as of January 1, 2022, but the task force, which was created on March 10, 2021, did not issue its first report until October 4, 2021, after the Arizona Supreme Court had already taken decisive action.

Even though the Arizona Supreme Court eliminated peremptory challenges before its task force issued its reports, the task force still provided useful information in its two reports. The task force's recommendation had been to eliminate peremptory challenges, so its view coincided with the action taken by the Arizona Supreme Court. In addition, the task force was able to identify additional rules that would need to be changed once peremptory challenges were eliminated. It was also able to point to additional practices, such as written questionnaires for prospective jurors, more voir dire questioning by lawyers rather than judges, and training about implicit bias for lawyers, judges, and prospective jurors, that would help courts to seat impartial juries without peremptory challenges.

Of course, task forces are not the only route available to state courts. Some state courts might choose pilot programs. State courts have used pilot programs in the past to see how jury trial innovations, such as permitting jurors to submit written questions for witnesses, worked in practice.[217] Even federal courts have tried pilot programs.[218] One advantage of a pilot program is that it gives lawyers and judges experience with a particular change in

217. *See, e.g.*, Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 746-49 (2010) (describing states that tried pilot programs, such as allowing jurors to submit written questions for witnesses via the judge, to see how a proposed practice worked).

218. *See, e.g.*, James F. Holderman, *Foreword*, 90 CHI.-KENT L. REV. 785, 786 (2015) (describing his and other federal district court judges' experiences with "several jury trial procedures recommended by the ABA in civil jury trials as part of the Seventh Circuit's Project").

practice. Once they have experience with the new practice, they usually like it, even if they had resisted it initially.[219] Thus, a pilot program is another way to dispel lawyers' and judges' misgivings about a new practice.

### *C. Three Lessons from Three States*

Washington, California, and Arizona have now revised or eliminated peremptory challenges in their states. Other states seeking to make changes in their peremptory challenges can learn from the experiences of these three states. There are at least three lessons that these three states provide.

One lesson is that a change in peremptory challenges might lead to changes in other parts of a state's jury selection process; thus, there is a need for flexibility. For example, Arizona, which chose to eliminate peremptory challenges, has decided that written questionnaires might be very helpful. They provide more information about prospective jurors' attitudes and beliefs than was available just through oral questioning of prospective jurors in open court. Similarly, Arizona has recognized that voir dire might take longer and that it might be useful for lawyers to do more of the questioning of prospective jurors in open court because there is some empirical evidence that prospective jurors might be more candid about their biases in response to lawyers' questions rather than judges' questions.[220] There is also some evidence that a more extensive voir dire might be useful.[221] Washington, which opted for strengthening the *Batson* test rather than eliminating peremptory challenges, also observed that voir dire might take longer as judges try to probe the reasons for a peremptory challenge more deeply than they would have done under the original *Batson* test. What these two states' different experiences suggest is that a change in one part of the jury selection process might lead to changes in other parts. Thus, there is a need for flexibility to make related adjustments.

A second lesson is that states can borrow from each other; they do not need to reinvent the wheel. Washington revised the *Batson* test in an effort to make it more objective. It asked trial judges to consider "the totality of the circumstances" and how an "objective observer" would view the peremptory challenge in question.[222] California borrowed from Washington and also

219. *See, e.g.*, Marder, *supra* note 217, at 746 (describing the majority of lawyers and judges who participated in a pilot program in New Jersey as having a positive experience with jurors' questions to witnesses).

220. *See, e.g.*, Hans & Jehle, *supra* note 207, at 1196.

221. *See* Jessica M. Salerno et al., *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 LAW & HUM. BEHAV. 336, 351–52 (2021) ("[O]ur findings suggest that extended voir dire questioning could enable attorneys to identify jurors with strong predispositions that might bias them and make better use of their challenges in civil cases.").

222. WASH. SUP. CT. GEN. R. 37(e).

asked its trial judges to consider "the totality of the circumstances" and how "an objectively reasonable person" would view the peremptory challenge in question.[223] California also identified a number of reasons that would be "presumed to be invalid,"[224] just as Washington had listed a number of reasons that courts should regard as "presumptively invalid,"[225] even though they had accepted them as race neutral in the past. Although Washington made its changes through a rule change and California made its changes through legislation, California borrowed freely from Washington. Such borrowing should be welcome, as there is no need for each state to start from a blank slate; rather, they can learn from each other and use what other states have already done.

A third lesson is that states need to find consensus within their own legal communities. What is embraced in one state might not be embraced in another. Although California borrowed freely from Washington, as described above, it departed from Washington in other ways. The task force in Washington protected only against peremptory challenges based on race or ethnicity; it did not include gender, even though the U.S. Supreme Court had. Whereas Washington had cut back on the groups that were to be protected against discriminatory peremptory challenges, California moved in the opposite direction. It expanded the number of groups to be protected. Lawyers cannot exercise peremptory challenges based on race, gender, and ethnicity, as the Supreme Court had provided, or on "gender identity, sexual orientation, national origin, or religious affiliation."[226] Although the elimination of peremptory challenges garnered sufficient support in Arizona for the Arizona Supreme Court to make that change, the same approach did not generate sufficient support in Washington. Thus, different states will accept different reforms, and states need to figure out what the people of their state, and the members of their legal community, are willing to accept.

## CONCLUSION

Washington, California, and Arizona turned to task forces and reports to decide how best to reform peremptory challenges. Washington followed its task force recommendations whereas the California Legislature and the Arizona Supreme Court reached decisions before their task forces could issue their reports. My own view is that Washington's and California's decision to strengthen the *Batson* test is likely to prove too complicated to

223. CAL. CIV. PROC. CODE § 231.7(d)(1) (West 2021).
224. *Id.* § 231.7(e).
225. WASH. SUP. CT. GEN. R. 37(h).
226. CIV. PROC. § 231.7(a).

implement effectively, whereas Arizona's decision to eliminate peremptory challenges will be more feasible in the end, but only time will tell. Meanwhile, these three states, and others that follow, will have the opportunity to serve, in Justice Louis D. Brandeis's words, as "laborator[ies] and try novel social . . . experiments without risk to the rest of the country."[227]

Although the U.S. Supreme Court could provide a uniform approach to discriminatory peremptory challenges by eliminating peremptory challenges, it has not done so yet; thus, our best hope now is with state courts' experimentation. State courts will arrive at solutions by working from the ground up through task forces that study the problem, collect data, and issue reports with recommendations. Other states can make use of these reports; the reports can provide a starting point and some background as to what other states have done and why. Although this state-by-state effort will necessarily result in a piecemeal approach to peremptory challenges, at the very least, it will allow for change. It will allow state courts to begin to grapple with the problems of discriminatory peremptory challenges, which have long kept many willing and able citizens from serving as jurors.

227. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).