

NJSBA

New Jersey State Bar Association

Working Group on Jury Selection

**INTERIM REPORT
TO THE JUDICIAL CONFERENCE
ON JURY SELECTION**

November 2021

ACKNOWLEDGEMENTS

This Report reflects the collected wisdom, analysis and extensive experience in the courtroom and in thought leadership in the New Jersey legal community. Its members are:

Working Group on Jury Selection Co-Chairs

Raymond A. Brown and Michael G. Donahue III

Members

Thomas R. Ashley
Wanda Akin
Christine A. Amalfe
Robert Bianchi
Domenick Carmagnola
Ehsan F. Chowdry
Jenny Chung
Timothy Donohue
Thomas P. Fischer
Jason E. Foy
Norberto Garcia
CJ Griffin
Hon. Jamie Happas
Anthony J. Iacullo
Christopher J. Keating
John E. Keefe, Jr.

Lawrence Lustberg
Hon. Lawrence Lawson
Thomas J. Manzo
Jennifer Mara
Kevin H. Marino
William H. Mergner Jr.
Brian Neary
Michael Noriega
Adalgiza Nunez
Ryan A. Richman
Joseph J. Russo
Robert C. Scrivo
Nancy Erika Smith
G. Glennon Troublefield
Karol Corbin Walker
Kimberly A. Yonta

TABLE OF CONTENTS

INTRODUCTION	2
EXECUTIVE SUMMARY	4
ASSEMBLING A REPRESENTATIVE AND “UNBIASED” VENIRE	4
THE ROLE OF FOR-CAUSE AND PEREMPTORY CHALLENGES	5
<i>Reducing Peremptory Challenges</i>	6
<i>Batson/Gilmore Reform</i>	7
CONCLUSION AND RECOMMENDATIONS	7
JURY REPRESENTATIVENESS	9
THE ROLE OF FOR-CAUSE AND PEREMPTORY CHALLENGES	13
1. Challenges For Cause	13
2. Peremptory Challenges	21
3. Reduction or Elimination of Peremptory Challenges Does Not Further the Goals of <i>Batson/Gilmore/Andujar</i>	26
4. The <i>Rose Report</i> and Peremptory Challenges	28
BATSON/GILMORE REFORM	32
1. The <i>Batson/Gilmore</i> Framework’s Failure	32
2. Washington State’s GR 37	35
3. <i>California AB 3070</i>	37
4. Connecticut’s Jury Selection Task Force Recommendations regarding <i>Batson</i> Reform	39
5. Modifying <i>Batson/Gilmore</i> in New Jersey	39
6. <i>Batson/Gilmore/Andujar</i> Reform: For-Cause Challenges	40
CONCLUSION AND RECOMMENDATIONS	42
APPENDIX	45
Washington General Rule	A
California AB 3070	B
Lamberth/Quinlan Report on Implicit Bias in the Jury System	C
Curriculum Vitae of Dr. John Lamberth	D
Curriculum Vitae of Dr. Tara Lai Quinlan	E
Letter Submission of Elisabeth Semel	F

INTRODUCTION

Implicit bias science has changed our understanding of racial and ethnic disparities in our legal system. New Jersey's jury selection process, as well as its entire judicial system, must undergo rigorous analysis to address the discriminatory impact of implicit bias, as well as explicit bias. Reducing implicit bias requires awareness, education, implementation, and motivation to change.

The broad challenge of race and fairness in the criminal justice system in New Jersey is profound. Data available from the Criminal Sentencing and Disposition Commission reveals that the incarceration rate for Black people in New Jersey is 12 times the white incarceration rate (*i.e.*, a 12:1 ratio), which is the highest disparity of any state in the nation. New Jersey Criminal Sentencing and Disposition Commission, *Annual Report*, p. 4 (Nov. 2019).¹ That statistic, and other information from experts and interested stakeholders, compels us to address race and jury selection with care and dedication precisely in order to protect minority defendants.

In pursuit of a system that best serves the residents of this state who turn to the courts to resolve their disputes, the time has come to reframe how New Jersey effectively addresses both intentional and implicit discrimination in all of its expressions. This endeavor can and will have historic implications for our system of justice moving forward, and it must be given the time, attention and analysis it requires and deserves.

The Judiciary's recent proposals provide for expanded juror orientation content regarding implicit and explicit bias; new and revised mandatory model jury selection questions designed to reveal, recognize and counteract bias in the jury selection process; and model jury charges on impartiality and implicit bias. But these will not be enough to assure an impartial jury selection process: isolated, passive training and directions to ignore bias are themselves not effective.

The Judicial Conference agenda appears to take critical aim at peremptory challenges; however, presenting the idea of reducing these challenges at the outset is shortsighted.

¹ The full report can be accessed [here](#).

Without at least considering and then effecting comprehensive and meaningful reform to the jury selection process, a proposal to reduce peremptory challenges must be seen for what it is: an erosion of the criminal defendant's substantive rights. As the Supreme Court recognized, "[t]he denial of the right of peremptory challenge is the denial of a substantial right." *State v. Singletary*, 80 N.J. 55, 62 (1979) (quoting *Wright v. Bernstein*, 23 N.J. 284, 295 (1957)).

The New Jersey State Bar Association (NJSBA) and its members wholly embrace the elimination of bias, including implicit bias, in the justice system and the NJSBA welcomes and advocates for a holistic look at the systemic issues aimed at determining the best and most effective ways to address and eliminate bias in the jury selection process. That should start at the beginning and include examining how people are summoned; considering legislation to address implicit bias in venirepersons, judges, and attorneys; and educating jurors, lawyers, and judges. A critical area of study should fall to the *voir dire* process and specifically judicial challenges for cause. There is no dispute that explicit and implicit bias can infect challenges to jurors. Reducing or eliminating peremptory challenges, which have long been viewed as the only tool available to Black and other criminal defendants of color to ensure unbiased juries, is not the best way to achieve this goal.

As jury selection involves fact-finders making significant decisions about individuals' lives and liberty, everything possible should be done to analyze, address and root out implicit bias from the venire. The NJSBA is committed to exploring changes that may be helpful in solving the problems identified in *State v. Andujar*, 247 N.J. 275 (2021), to ensure we are not applying a Band-Aid solution to a wound that has festered in our society, and in our system of justice, for centuries.

EXECUTIVE SUMMARY

“In many ways, New Jersey courts are doing an admirable job ensuring that minority groups participate on criminal and civil juries, based on their venire composition... (Yet) whites are more likely to appear on juries than other groups.” Mary Rose, *Final Report on New Jersey’s Empirical Study of Jury Selection Practices and Jury Representativeness* (2021) (hereinafter *Rose Report*).

The pursuit of a representative justice system requires a complex, deep dialogue and effort to rid ourselves of the ancient and pernicious presence of race prejudice in jury selection. In short, we believe this project should begin with understanding how to assemble a representative venire, through steps that will address and ameliorate both implicit and explicit bias, including by exploring more deeply questions regarding the appropriate role of judges in our selection process. Speed of jury selection should not be a factor that drives decisions relating to the process. Indeed, most cases take years to get to a jury trial and making changes to the process simply to expedite the selection of jurors is inconsistent with the constitutional imperatives of providing a fair trial for every litigant. The search for the truth, objectivity, and fairness should certainly not be controlled or dominated by statistical analyses of efficiency or by artificial time deadlines.

Assembling a Representative and “Unbiased” Venire

In order to reduce bias and implicit bias in jury selection, it is fundamental that the system first produce a pool of jurors from which a fair jury of peers can be selected. That begins with sincere efforts to summon a representative group of citizens from whom selection of jurors can be made. We must then do all that we can to assure that their biases, explicit and implicit, are examined and minimized. Representativeness is not just good policy, it is mandated by the United States and New Jersey Constitutions.

The NJSBA urges consideration of broadening the pool of those who are summoned. New Jersey Courts currently use the driver’s license, voter registration, and income tax lists, yet proposed legislation, A4275 (Sumter)/S2587 (Singleton) (2020-21 Legislative Session), would include a broader range of sources from which to draw potential jurors. There is also an

important policy debate with demographic implications that must be considered as to whether convicted persons who have served their sentences should be added to the rolls.

We also urge re-examination of whether the tradition of county-wide selection in New Jersey should be revisited to provide more representative arrays. We pose the question of whether we need to revisit the frequent demographic mismatch between the typical array and resulting juries and the cohort of defendants, which in many counties is heavily weighted towards African Americans.

It is also worth considering changes to juror compensation, such as increased daily compensation, legislation to compel employers to provide paid time off for jurors in exchange for a tax credit for those that do so, and providing compensated trips to the courthouse for jurors to learn about implicit bias. Strong consideration should be given to a more thorough *voir dire* during the trial process and efforts made to change the dialogue away from viewing an “unused juror” as “waste[d]” or the process as one that “burdens the public” to one that encourages those involved in the process to engage in it and remain committed to it as a civic responsibility.

To overcome such deeply rooted challenges, any discussion of solutions must be bold and imaginative and backed by data. Data is essential to the task of analyzing our current problems. This is clear from the mandate of *State v. Dangcil*, ____ N.J. ____ (2021), and the observation of Dr. Rose who stated, “my first recommendation to New Jersey is that it develop a system to routinely measure, at minimum, the race, ethnicity, and gender of all persons appearing for service.” *Rose Report* at 6.

The Role of For-Cause and Peremptory Challenges

The New Jersey system of jury selection has been judge-dominated for half a century. It is now essential that we examine the current roles of judges and explore alternatives that look carefully at the impact of implicit bias on judges, as well as others, and at additional regular, specialized training for our judges.

It is also time to examine other possible modalities for jury selection, such as increasing attorney participation in *voir dire*. It should be noted, as research makes clear, that even when judges are trained and vetted for implicit bias the venire can be adversely affected by a judge-driven process. For example, retired Federal District Court Judge Mark Bennett has observed: “judge-dominated *voir dire* at the beginning of the jury selection process may exacerbate implicit bias in the selected jury’s determinations because it prevents detection and removal of implicitly biased jurors.” Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149, 158 (2010).

One critical issue discussed in the legal community following *Andujar* was the strong view that race-based challenges for cause are not given adequate scrutiny by trial or appellate judges. This anecdotal perspective is reinforced by the NJSBA analysis of judicial decision making in *The Role of “For-Cause” and Peremptory Challenges* section of this report. Unlike in other states, New Jersey’s jurisprudence gives judges the discretion to accord great weight to a juror’s assertion of impartiality, which is problematic. Fortified with the weight of considerable scientific support, implicit bias, especially one’s own bias, is impossible even for a sincere but untrained venireperson to ferret out or disclose. It is for this reason that, in addition to urging greater judicial training on implicit bias, we recommend that the Court carefully explore and consider what Washington and California have done, by way of employing a plenary standard of review to the exercise of for-cause challenges especially when, as occurred in *Andujar*, they may be based upon racial bias.

Reducing Peremptory Challenges

The NJSBA continues to oppose the elimination or reduction of peremptory challenges. We believe strongly that the elimination or reduction of criminal defense challenges constitutes an erosion of the criminal defendant’s substantive rights. This is reinforced by Dr. Rose’s view that peremptory challenges are not a significant driver of deficiencies in the racial composition of criminal juries. Indeed, peremptory challenges by their nature act as a safeguard in a system that relies heavily, with regard to for-cause challenges, upon a juror’s self-diagnosis of bias.

Thus, reducing peremptory challenges is not a panacea, and indeed, not even an appropriate incremental step at this stage, to address the important problem that we are all attempting to solve.

Furthermore, New Jersey's jurisprudence places great weight on a juror's own assertion of impartiality at both the trial and appellate level. This is a powerful argument for preserving the number of peremptory challenges available to counsel and their clients. Under current conditions and even with enhanced universal implicit bias training, there is every reason to believe that lawyers are better suited than jurors to identify juror implicit bias. Additionally, since attorneys are necessarily familiar with the facts of the case, they may be just as useful as the trial judge in the *voir dire* stage. Given the complex matrix of scientific, administrative, and judicial approaches to the challenge we face, altering the only tool for direct participation in jury selection available to all defendants, particularly those of color, is the wrong point at which to begin a journey that has many other trailheads to explore.

Batson/Gilmore Reform

Finally, in the search for positive solutions to the legal system's bias issues, the NJSBA offers a number of proposals for consideration. As one example, the NJSBA proposes that New Jersey should modify the *Batson/Gilmore* framework. This report thus includes an assessment of the weaknesses of the current approach and analyzes the steps that other states (notably California and Washington) have undertaken which we in New Jersey should review and monitor before imposing wide-spread change. California's AB 3070 and Washington's General Rule 37 are meaningful changes that incorporate an objective test to measure whether race or ethnicity is a factor in the use of a challenge. The objective test modifies the analysis so that the inquiry is not focused on overt, purposeful racial animus by the party striking the juror. Using an objective test has the added benefit of reducing legal discord by eliminating the accusatory flavor of the current structure.

Conclusion and Recommendations

This is an historic moment for the Judiciary in New Jersey, where success will balance the scales of justice for generations ahead. But for there to be meaningful reform, it is the

NJSBA's view that we understand that there is no quick fix to this systemic scourge of bias and prejudice. We must consider a more holistic and comprehensive approach than that which appears to be under consideration here, which is largely limited to the reduction of peremptory challenges and largely focused on considerations of efficiency.

The NJSBA exhorts all decisionmakers involved in developing solutions to think expansively and creatively. Eradicating bias in the courts requires an extensive gathering of data on juries, their composition and the challenges used, followed by a deep analysis of what that data means. The pursuit of a more perfect system should include many approaches, including exploring the possibility of a pilot program that involves critical stakeholders to test and measure the best path ahead, and enhancing substantive and sustained training for all.

At the conclusion of this report, recommendations are detailed on the following categories: peremptory challenges; expanded *voir dire*; *Batson* reform; summoning of jurors; training; and data collection and analysis.

JURY REPRESENTATIVENESS

Diverse juries are integral to the constitutional right to an impartial jury and it is critical to collect and analyze data about those who are summoned, appear and serve on juries.

The right to a fair and impartial jury is promised by the Sixth Amendment of the United States Constitution and Article 1, Paragraph 9 of the New Jersey Constitution. The “right to trial by an impartial jury, in our heterogeneous society where a defendant's ‘peers’ include members of many diverse groups, entails the right to trial by a jury drawn from a representative cross-section of the community.” *State v. Gilmore*, 103 N.J. 508, 524 (1986). While “every criminal defendant has the right to a jury selected from a ‘fair cross-section’ of the community—a pool of people reflecting the community’s racial and ethnic makeup[,] substantial evidence suggests that jury pools across the country often do *not* represent a fair cross-section of communities.” Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719, 1722 (2016). Simply put, “Black people and nonwhite people are often underrepresented in jury pools[.]” Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021) (hereinafter *EJI Jury Selection Report*).²

Diverse juries are integral to the constitutional right to an impartial jury and provide for more effective and fairer juries. The jury selection process begins with a pool of summoned jurors and any examination of bias in the jury selection process should begin with that pool. Although directed to do so prospectively in *Dangcil*, only a few months ago, New Jersey’s Judiciary does not now regularly collect juror racial identity or ethnicity data. The absence of statewide data frustrates a criminal defendant’s attempt to examine whether jury pools fairly represent the communities from which they are drawn, as the law requires. *Rose Report* at 35-36.

While New Jersey does not regularly collect race and ethnicity data, a limited dataset that included race and ethnicity data was analyzed in the *Rose Report*. In this report requested by the Judiciary, Mary R. Rose, Ph.D. evaluated data from 95 trials in 14 counties over seven

² The full report can be found [here](#).

weeks where juror questionnaires were used to obtain race and ethnicity information. *Rose Report* at i.

Dr. Rose’s findings are cause for alarm. They “indicate that the processes that determine who appears at the courthouse constitute a systemic source of minority-group attrition because concerning levels of underrepresentation appeared in nearly all areas studied, a finding consistent with many studies of other areas and courts.” *Id.* at iii (citations omitted). She found that “[a] comparison of the jury pools in this study to the communities from which they were drawn reveals that substantial underrepresentation of African Americans is commonplace.” *Id.* at 10. These findings highlight the importance of starting the evaluation of bias at the beginning of the jury selection process.

Consistent with the Court’s directive in *Dangcil*, data collection is recommended. She states “my first recommendation to New Jersey is that it develop a system to routinely measure, at minimum, the race, ethnicity, and gender of all persons appearing for service. Courts should collect information on cognizable groups in a fashion that permits regular in-house analyses to more quickly and inexpensively check for problems in patterns of representativeness.” *Id.* at 6. In *Dangcil*, the Court directed that “to better assist our courts in preventing underrepresentation . . . we direct the AOC to begin collecting jurors’ demographic information.” *Dangcil*, ___ N.J. ___ (slip op. at 36-37). Dr. Rose notes that “[c]onsistent with Supreme Court rulings, parties should have access to deidentified data to pursue or defend claims about the representativeness of ‘cognizable groups’ in jury pools.” *Rose Report* at 7. The collection of racial, ethnic and gender information is what *Dangcil* requires, and it is where we must start; that information, should, in turn, inform any other recommendations for reform.

Thus, Dr. Rose recommends that the Judiciary should intensely study “the source(s) of why jury pools – the groups of people who appear at the courthouse for service – consistently and substantially underrepresent African Americans.” *Id.* at 11. She states that “if New Jersey’s goal is to create juries that better represent their communities, then it must better understand and address sources of attrition in who makes it to the courthouse.” *Id.*

The dataset reviewed by Dr. Rose does not suggest that reducing or eliminating peremptory challenges will ensure jury representativeness. Indeed, Dr. Rose’s review

demonstrates that peremptory challenges are not the main reason that Black and Latinx citizens are excluded from juries. In fact, “[p]atterns of peremptory challenges did not explain many of the examples of concerning levels of underrepresentation” discussed in her report. *Id.* at 14. Further, without a statewide data collection system in place and an opportunity to analyze it, the dramatic step of reduction or elimination of peremptory challenges cannot be fairly evaluated for its consequences – both intended and unintended.

As juror demographic information is obtained and analyzed, it will suggest concrete and immediate opportunities to create a more representative pool of summoned jurors. The lists from which juries are selected are critical to achieving a representative cross section of the jurisdiction. “People of color Black Americans are often underrepresented in jury pools because they are often underrepresented in the source lists—typically voter registration databases—used to create the pool.” *EJI Jury Selection Report*. While New Jersey courts currently use the driver’s license, voter registration, and income tax lists, these are lists that may underrepresent certain racial and ethnic groups. Proposed legislation would engage a broader range of sources to draw potential jurors including public benefit recipients, public utility customers, and other program eligibility lists. *See* A4275(Sumter)/S2587 (Singleton) (2020-21 Leg. Session) (“Expands category of lists from which single juror source list is compiled. . .”).

Another opportunity to expand the pool of jurors is to revisit who is excluded from juror service. Presently, all citizens who have been convicted of an indictable offense are barred from jury service. Serious consideration should be given to removing this lifetime bar from jury service, which systematically excludes disproportionate numbers of persons of color from jury service, according to the findings of the New Jersey Commission to Review Criminal Sentencing.

We also urge reexamination of whether the tradition of county-wide selection in New Jersey should be revisited to provide more representative arrays. We also pose the question of whether we need to revisit the frequent demographic mismatch between the typical array and resulting juries and the cohort of defendants which in many counties is heavily weighted towards African Americans.

The starting point to advance jury representativeness is the initial stages of the jury selection process. Data collection consistent with *Dangcil* and with Dr. Rose’s recommendations

are important components of this effort. Reducing or eliminating peremptory challenges should not be the place to start.

THE ROLE OF FOR-CAUSE AND PEREMPTORY CHALLENGES

New Jersey's approach to for-cause challenges, while similar to the law of some other states, also lags some of its sister jurisdictions. New Jersey should employ a plenary standard of review to the exercise, at the very least, for-cause challenges that, as occurred in Andujar, are based upon racial bias. Until those meaningful changes are made, peremptory challenges remain critical to ensuring a fair jury selection process and a fair trial.

Parties are entitled to "an unbiased jury" and "a fair jury selection process." *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22, 40 (2009). A fair jury selection process requires the empaneling of impartial jurors by searching out potential and latent juror biases. To carry out that task, a thorough *voir dire* "should probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially." *State v. Erazo*, 126 N.J. 112, 129 (1991).

Potential jurors, otherwise qualified to serve, are generally excused in two ways. The court can excuse jurors "for cause" when it appears that they would not be fair and impartial, that their beliefs would substantially interfere with their duties, or that they would not follow the court's instruction or their oath. *State v. Simon*, 161 N.J. 416, 465 (1999); *State v. DiFrisco*, 137 N.J. 434, 460 (1994). The court or either party can challenge a juror for cause. Each party is also entitled to exercise peremptory challenges and remove a juror without stating a reason pursuant to *N.J.S.A. 2B:23-13*.

1. Challenges For Cause

Challenges for cause under *R. 1:8-3(b)* "permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality." *State v. W.A.*, 184 N.J. 45, 54 (2005) (citing *Swain v. Alabama*, 380 U.S. 202, 220, *rev'd on other grounds*, *Batson v. Kentucky*, 476 U.S. 79, 106 (1986)). Thus, a trial court should grant a challenge for cause to ensure that each juror is "impartial, unprejudiced and free from improper influences." *State v. Reynolds*, 124 N.J. 559, 567 (1991) (citing *State v. Jackson*, 43 N.J. 148, 158 (1964)). The test in New Jersey is "whether, in the trial court's discretion, the juror's beliefs or attitudes would substantially

interfere with his or her duties.” *Simon*, 161 N.J. at 466 (citations omitted). The party challenging a prospective juror for cause bears the burden of demonstrating that “the juror’s view would prevent or substantially impair the performance of that juror’s duties in accordance with the court’s instructions and the juror’s oath.” *Id.* (citing *DiFrisco*, 137 N.J. at 460).

As noted, New Jersey trial courts possess considerable discretion in determining the qualifications of prospective jurors. *Simon*, 161 N.J. at 465-66. In particular, since juror qualification is predicated upon the trial judge’s observation of a juror’s credibility and demeanor in professing their ability to be fair, the trial court’s decision to include or exclude a juror from the jury pool will not be reversed absent an abuse of discretion. *See, e.g., State v. Colclough*, A-0841-15T1, 2017 WL 6032503, at *7 (N.J. Super. Ct. App. Div. Dec. 6, 2017) (citing *State v. Pennington*, 119 N.J. 547, 588–89 (1990)). Significantly, “although a juror’s professions of impartiality will not always insulate him from excusal for cause,” in New Jersey, unlike in other states (as is discussed below), a juror’s statement of impartiality is afforded “a great deal of weight,” and a reviewing court defers to the trial court’s ability to assess the juror’s sincerity and credibility about his or her impartiality. *Singletary*, 80 N.J. at 64; *see also Jackson*, 43 N.J. at 158 (“It is said that when a juror testifies that he believes he can, and the court finds as a matter of fact that he will, if selected, render an impartial verdict on the evidence, he is an impartial juror as required by the law. . . . A juror’s answer to questions touching his state of mind is primary evidence of his competency”); *Colclough*, 2017 WL 6032503, at *7 (A juror’s statement of impartiality is afforded “a great deal of weight”); *State v. Jefferson*, 131 N.J.L. 70, 72 (1943) (“A juror may have formed an opinion as to the guilt of the accused, but as long as he has a firm intention to be guided by the evidence adduced and the law, as charged by the court, and has displayed no malice or ill will to the accused, there is no reason whatever why he should not serve as a juror.”); *Amaru v. Stratton*, 209 N.J. Super. 1, 18 (App. Div. 1985) (“[w]here a trial court questions a venireman and concludes from his or her responses that he or she will be impartial, such professions of impartiality should be accorded a great deal of weight.” (citation omitted)).

The consequence of this case law has been a series of decisions in which New Jersey courts, invoking these deferential standards for determining whether removal of a juror for

cause is warranted, have affirmed alarming decisions by trial courts with regard to for-cause challenges. For example, in *Singletary*, the New Jersey Supreme Court found no abuse of discretion in a trial court's decision not to excuse a juror for cause despite the juror having recently been a victim of the identical crime (armed robbery) as that with which the defendant was charged. *Singletary*, 80 N.J. at 55. In affirming, the Court stated that "[a]lthough it might well have been the wiser course to have excused venireman Sheeran for cause, the failure to do so was not so clearly an abuse of discretion as to necessitate reversal on this ground alone," because the trial court "questioned Sheeran extensively and concluded from his responses that he could, in fact, be impartial." *Id.* at 64; *see also Reynolds*, 124 N.J. at 567 (affirming a conviction where the trial court failed to excuse a juror who "was employed as an investigator by the Division of Criminal Justice," because the trial court "observed that [the juror] [was] obviously intelligent" and could be "totally impartial."); *see generally DiFrisco*, 137 at 466 (discussing the deference paid to trial courts with regard to the disposition of for-cause challenges).

Appellate Division authority is consistent with this Supreme Court jurisprudence: for example, in *State v. Hill*, the Appellate Division found no abuse of discretion in a trial court's refusal to excuse a juror for cause even though the juror expressed to the Court a specific fear of the defendant based upon the defendant's involvement with the Pagan motorcycle club. *Hill*, A-1044-04T1, 2006 WL 1914647, at *4 (N.J. Super. Ct. App. Div. July 13, 2006). The case highlights the deference that trial courts are afforded in deciding for-cause challenges. That is, despite the juror in question having raised concerns about his safety as a result of the defendant's involvement with the Pagans and his allegedly threatening his co-defendant, the Appellate Division affirmed the trial court's refusal to excuse the juror for cause because the trial court "was satisfied," based upon the juror's statement, "that [he] could be fair and impartial." *Id.* "Giving deference to the ability of the trial judge to assess the credibility of the juror," the Appellate Division, "perceived no abuse of discretion." *Id.* Similarly, in *State v. Brooks*, the Appellate Division affirmed a trial court decision refusing to dismiss, for cause, a juror who overheard an incriminating conversation between members of the defendant's family in the hallway. *Brooks*, A-0412-16T1, 2019 WL 6713165, at *2-4 (N.J. Super. Ct. App. Div.

Dec. 10, 2019), *cert. denied*, 244 N.J. 179 (2020). The Court wrote, in an example of what we consistently see in New Jersey decisions on the subject, that despite finding it “troubling” that the trial court refused to reopen jury selection and allow defense counsel to use of one of the remaining peremptory challenges, the trial court’s “decision not to excuse for cause” was “unassailable” because “only the trial judge was in a position to assess [the juror’s] demeanor, and whether his assertion that he had not formed an opinion regarding defendant’s guilt was credible.” *Id.* at *4.

Beyond this case law, which makes it clear that, as noted above, trial courts rely largely upon a juror’s profession of impartiality, “[t]he empirical evidence reveals that judges place considerable, often overwhelming, weight on [a juror’s] self-diagnosis” of impartiality. David Yokum, Christopher T. Robertson, and Matt Palmer, *The Inability To Self-Diagnose Bias*, 96 *Den. L. Rev.* 869, 880 (2019). But social science demonstrates that this reliance on a juror’s self-diagnosis with respect to his or her fairness is misplaced. Thus, for example, a study published in 2019 found, after conducting four separate experiments, that prospective “jurors [are] unable to diagnose their own biases.” *Id.* at 869. That is in part because, perhaps not surprisingly given that we all think we are fair, people are unable to “consciously access[.]” the facts necessary to determine whether they are biased are not. *Id.* at 902. On the other hand, this same study stated that “in general, people are better at diagnosing bias in others than in themselves.” *Id.* at 901.

Accordingly, peremptory challenges by their nature act as a safeguard in a system that relies heavily upon a juror’s self-diagnosis of bias. That is, lawyers – as third parties – are better suited than are the jurors themselves to diagnose partiality. And courts, at least in New Jersey, are hamstrung in this inquiry because they rely so heavily on jurors’ own assessments of whether they can be fair. *Id.*; *see also* Brooks Holland, *Confronting The Bias Dichotomy In Jury Selection*, 81 *La. L. Rev.* 165, 196 (Fall 2020) (“Because lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcomes.” (citations omitted)).

Moreover, New Jersey’s approach to for-cause challenges, while similar to the law of some other states, also lags some of its sister jurisdictions. In some, for example, the law

specifically imposes a standard far friendlier to for-cause challenges than is that of New Jersey. In Florida, for example, “the trial court must excuse a prospective juror for cause if any reasonable doubt exists regarding his or her ability to render an impartial verdict.” *Thomas v. State*, 958 So.2d 1047, 1050 (Fla. 2d DCA 2007) (citing *Busby v. State*, 894 So.2d 88, 95 (Fla.2004)). Thus, unlike in New Jersey, “[i]n close cases, any doubt as to a juror's competency should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality.” *Id.*; see also *Williams v. State*, 638 So.2d 976, 978 (Fla. 4th DCA 1994) (“Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality.”). Of course, this “close case” standard is as the cases discussed above show, not the law in New Jersey. See, e.g., *Simon*, 161 N.J. at 468 (affirming a trial court’s decision to retain two jurors who were “close calls” because nothing in the record suggest[ed] that the trial court abused its discretion”); *DiFrisco*, 137 N.J. at 466 (noting that the Court was not “convinced that the trial court erred in not excusing” a juror whose “responses did suggest the possibility that her ability to deliberate impartially was ‘substantially impaired’ . . .” because of the “deference to trial courts in *voir dire*.”) As a result, peremptories are far more critical here than in they are in places like Florida. In *Singletary*, for example, one of only two remaining peremptory challenges were used in order to strike the obviously biased juror at issue – if peremptories were eliminated or reduced, that could not have happened, and the entire proceeding would have been infected with the resulting unfairness. See also *DiFrisco*, 137 N.J. at 466 (defendant forced to use peremptory challenge to correct “the court’s erroneous failure to excuse juror [] for cause”); *State v. Williams*, 113 N.J. 393, 433 (1988) (error arising from judge's refusal to excuse two potential jurors for cause based on juror's strong opinion about the death penalty was cured by counsel’s use of peremptory challenge to remove juror from panel); *State v. Biegenwald*, 126 N.J. 1, 27 (1991) (while defendants “argument that the juror

should have been excused for cause [was] persuasive, we find the failure to have excused [the juror] unproblematic” in part because “defense counsel excused [the juror] peremptorily”).³

Like Florida, in Wisconsin, appellate courts ordinarily “give weight to a [trial] court’s conclusion that a prospective juror is or is not objectively biased” and will reverse the lower court’s determination “only if as a matter of law a reasonable judge could not have reached such a conclusion.” *State v. Tody*, 764 N.W.2d 737, 743 (Wis. 2009). While this “objective standard” is sometimes invoked in the New Jersey case law, see *State v. Scherzer*, 301 N.J. Super. 363, 487–88 (App. Div. 1997) (holding that trial courts in New Jersey should rely on their own “objective evaluation” of a juror’s bias or prejudice), it is completely undermined by the deference that trial courts pay to juror self-assessments and that appellate courts, in turn, pay to trial courts, discussed above. The Wisconsin Supreme Court, like that of Florida, has “been very clear about the . . . court’s role in jury selection.” *State v. Lindell*, 629 N.W.2d 223, 250

³ Indeed, New Jersey law recognizes that one purpose of the peremptory challenge is to cure the improper denial of for-cause challenges. Thus, “the erroneous failure to excuse a juror for cause” will be considered harmless error unless the challenging party has exhausted “its allotment of peremptory challenges.” *State v. Bey*, 112 N.J. 123, 154 (1988). See also *DiFrisco*, 137 N.J. at 470 (“when a trial court erroneously fails to excuse a prospective juror for cause and the defense then peremptorily challenges that juror. . . the subsequent exhaustion of peremptory challenges” will only constitute reversible error if the defense “demonstrate[s] that a juror who was partial sat as a result of the defendant’s exhaustion of peremptories.”). That is, the peremptory challenge has “the effect of curing what might otherwise have been reversible error.” *State v. Williams*, 113 N.J. 393, 433 (1988). The impact of reducing or eliminating peremptories will thus leave such errors entirely unaddressed, as it would have been in the cases cited above. That result would be particularly unfortunate, given the stated purpose, in these very cases, of peremptories: “the goal of peremptory challenges is to secure an impartial jury.” *DiFrisco*, 137 N.J. at 468.

We recognize that Dr. Rose has concluded that “the liberal use of for-cause challenges likely explains why attorneys do not often use their full complement of [peremptory] challenges.” *Rose Report* at 16. But this conclusion does not account for the law set forth above; nor even does it focus on for-cause challenges based upon considerations of bias, whether based upon demographics or otherwise. Rather the for-cause “challenges” Dr. Rose examined included jurors who appear to have been excused for personal reasons, having to do with availability and the like, and her study thus has little to say about the law discussed here governing for-cause challenges based upon bias. For example, Table VI.1 itemizes types of outcomes for all venirepersons yet makes no notation for typically expressed and granted hardship excuses.

(Wis. 2001). That is, “[t]he appearance of bias should be avoided” at all times. *Id.*; see also *State v. Louis*, 457 N.W.2d 484, 488 (Wis. 1990) (citations omitted). Trial courts thus “are advised to err on the side of striking jurors who appear to be biased when it is reasonable to suspect that bias is present,” *State v. Lepsch*, 892 N.W.2d 682, 709–10 (Wis. 2017) (concurring opinion). “Such action, the court has written, will avoid the appearance of bias, and may save judicial time and resources in the long run.” *State v. Sellhausen*, 809 N.W.2d 14 (Wis. 2012).

Though the New Jersey courts sometimes intone similar principles, see, e.g., *State v. Jones*, A-0968-06T4, 2008 WL 4681992, at *5 (N.J. Super. Ct. App. Div. Oct. 23, 2008) (“where there is doubt as to the prospective juror’s competency or impartiality[,] he should be permitted to stand aside so that a clearly qualified juror may take his place”) (citing *Jackson*, 43 N.J. at 160), the matter is ultimately left to trial court discretion, in a way that undermines those very principles. See, e.g., *Arenas v. Gari*, 309 N.J. Super. 1, 19 (App. Div. 1998) (“If a party’s reasonable apprehension of unfairness can be avoided without injuring the rights of others, a sound exercise of judgment favors excusing a juror.”) (citation omitted). Likewise, while in *Singletary* the Court stated that “all doubts concerning a juror’s ‘sense of fairness or . . . mental integrity’” should be resolved by dismissing the challenged venireman,” its ultimate holding – that there was no error in permitting a juror who had just been the victim of the same crime as that for which the defendant was standing trial – completely undermines this language. *Singletary*, 80 N.J. at 65. In Florida, by contrast, the standard is not nearly so toothless, and so cases in which that state’s “reasonable doubt” standard is not satisfied, are actually reversed. See, e.g., *Bell v. Greissman*, 902 So. 2d 846, 848 (Fla. Dist. Ct. App. 2005) (finding reversible error where trial court failed to excuse juror who during a personal injury trial expressed “skepticism about tort claims in general”); *Bell v. State*, 870 So.2d 893 (Fla. 4th DCA 2004) (finding reversible error where trial court denied challenge for cause after juror responded with an uncertain “I’d try not to” and “I would give it my best shot,” in reference to his previously stated bias); *Williams v. State*, 638 So. 2d 976, 979 (Fla. Dist. Ct. App. 1994) (finding reversible error where court failed to strike a juror who “expressed initial unprompted doubts about” his ability to be unbiased despite “the courts subsequent questioning” which prompted the juror to state he could be fair and impartial); *Imbimbo v. State*, 555 So.2d 954

(Fla. 4th DCA 1990) (reasonable doubt found where a juror admitted he “probably” would be prejudiced, even though he then asserted he “probably” could follow the judge's instructions).

Finally, but perhaps most significantly, the development of the law in New York provides far better guidance to trial courts than is the case here in New Jersey. Thus, just across the Hudson River, “when potential jurors reveal knowledge or opinions reflecting a state of mind likely to preclude impartial service, they must in some form give unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence.” *People v. Johnson*, 730 N.E.2d 932, 939 (N.Y. 2000). “Obviously, when potential jurors themselves openly state that they doubt their own ability to be impartial in the case at hand, there is far more than a *likelihood* of bias, and an unequivocal assurance of impartiality must be elicited if they are to serve.” *Id.* In New York, a prospective juror’s indication that they would “try” to be “impartial” does not constitute the unequivocal declaration necessary to purge [his/her] expressed bias” in a case. *People v. Butler*, 686 N.Y.S.2d 372, 373 (App. Div. 1999) (citing *People v. Torpey*, 472 N.E.2d 298, 301 (N.Y. 1984)). In these ways – requiring “an unequivocal assurance of impartiality” and making clear that “trying” to be fair is insufficient – New York law, which is mirrored in other jurisdictions, such as Minnesota,⁴ reveals the deficiencies of the law in New

⁴ In Minnesota if there is reason to believe that a juror harbors bias, that juror is considered “rehabilitated” only if “she states unequivocally that she will ‘follow the district court's instructions’ and ‘set aside any preconceived notions and fairly evaluate the evidence.’” *Ries v. State*, 889 N.W.2d 308, 314 (Minn. Ct. App. 2016), *aff'd*, 920 N.W.2d 620 (Minn. 2018). And the Minnesota Supreme Court has found rehabilitation inadequate when jurors state that they would “try,” “do their best,” “think they could,” “think it would be hard,” or “guess” they could set aside their bias. *See, e.g., State v. Fraga*, 864 N.W.2d 615, 625 (Minn. 2015) (finding a juror's ambiguous acknowledgement that “I think it would be hard” to be probative of bias); *State v. Nissalke*, 801 N.W.2d 82, 107 (Minn. 2011) (finding a juror's statement that he would “try to” treat other testimony similar to the testimony of a police officer probative of bias); *State v. Prtine*, 784 N.W.2d 303, 311 (Minn. 2010) (finding juror biased who said she would be more inclined to believe a police officer's testimony and only said “I think” or will “try” to be fair).

Likewise, in Connecticut, trial courts through *voir dire* must determine that prospective “juror[s] can indeed serve fairly and impartially.” *State v. Camera*, 81 Conn.App. 175, 179–81, *cert. denied*, 268 Conn. 910, (2004). And, as in New York, “the nature and quality of the juror's assurances is of paramount importance; the juror must be unequivocal about his or her ability to be fair and impartial.” *State v. Berrios*, 129 A.3d 696, 715 (Conn. 2016) (citing *State v. Osimanti*, 229 Conn. 1, 36 (Conn. 2010); *see also State v. Dixon*, 122 A.3d 542, 551 (Conn. 2015) (same)).

Jersey. Indeed, in New Jersey, the law appears to be precisely the opposite.⁵ Thus, in *State v. Papasavvas*, 163 N.J. 565 (2000), the Supreme Court concluded that a trial judge properly sat a juror who expressed concerns about his impartiality. Notwithstanding that, as the dissent pointed out, the record showed that this juror’s “most forceful assertion of his impartiality” was that he “would think” he could fairly judge the evidence in the case. *Id.* at 643 (Long, J., dissenting).

We can do better, including that we can, as Washington and California have done, employ a plenary standard of review to the exercise of even for-cause challenges that, as occurred in *Andujar*, are based upon racial bias. Until those meaningful changes are made, peremptory challenges remain critical to ensuring a fair jury selection process and a fair trial.

2. Peremptory Challenges

The second mechanism to excuse potential jurors is the peremptory challenge. Peremptory challenges preserve a party’s right to reject a limited number of jurors for no stated reason. *See State v. Brunson*, 101 N.J. 132, 138 (1985). *N.J.S.A. 2B:23-13(b)* establishes the right to peremptory challenges and sets forth the number each party shall be entitled. It provides that in criminal trials, where a defendant is charged with kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, third-degree forgery or perjury, a sole defendant is entitled to 20 peremptory challenges and the state 12. If there are co-defendants, each defendant shall be entitled to 10 challenges and the state shall be entitled to six 6 per defendant. In other criminal matters, each defendant is entitled to 10 challenges and the state is entitled to 10 per defendant. *See N.J.S.A. 2B:23-13(b)*.

⁵ Only in one discrete, specifically defined circumstance does New Jersey require a potential juror to be unequivocal in his or her responses - when he or she has been exposed to pretrial publicity. *See Williams*, 113 N.J. at 433. “Once it is established that a juror has been exposed to pretrial publicity, then, in order to vindicate a defendant’s right to an impartial jury, the *voir dire* must unequivocally establish that the potential juror can put that information or opinion aside.” *Id.*; *see also State v. Timmendequas*, 161 N.J. 515, 673 (1999) (same). But this rule has not been extended beyond the question of pretrial publicity.

"The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). "The right of a peremptory challenge is as substantial as the right to a challenge for cause." *State v. Thompson*, 142 N.J. Super. 274, 280 (1976). Expressly in order to secure a fair trial, "the Legislature and this Court have sought to insure that the triers of fact will be 'as nearly impartial as the lot of humanity will admit' by providing defense counsel with twenty peremptory challenges." *Singletary*, 80 N.J. at 62 (citing *Jackson*, 43 N.J. 148, 158 (1964)). Peremptory challenges play a crucial role in assuring the right to trial by an impartial jury. *Brunson*, 101 N.J. at 138. "The importance of the peremptory challenge in the process of selecting a fair and impartial jury cannot be ignored." *Singletary*, 80 N.J. at 79 (Clifford, J., dissenting). "[New Jersey's Supreme] Court has repeatedly stressed the significance of the right of peremptory challenge." *Williams*, 113 N.J. at 442 (1988).

Explicit and implicit bias are serious concerns with respect to all aspects of our judicial system including its jury selection process. While implicit bias can potentially impact every step of jury selection, commencing with the summoning of potential jurors, "[t]here is little empirical evidence about the degree to which peremptory challenges alone introduce implicit bias into the jury selection process." *Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson* p. 29-30, (2020) (hereinafter *CT Report*)⁶ ("The [Peremptory Challenge Working Group] found no empirical studies on the relationship between the number of peremptory challenges allowed and racial disparity on juries.") Meanwhile, peremptory challenges are an important tool to protect against juror biases. *Holland*, 81 La. L. Rev. at 169. ("Zealous lawyers are an important safeguard against *juror* bias in criminal trials, yet our concern over *lawyer* bias may lead us to eliminate one of the legal safeguards against *juror* bias—the peremptory challenge.")

Criminal defendants, disproportionately Black as well as from other disenfranchised racial or ethnic groups, benefit most from their right to exercise peremptory challenges. And they have the most to lose if peremptory challenges are reduced. Without first comprehensive and meaningful reform to the jury selection process, a proposal to reduce peremptory

⁶ A full copy of this report can be found [here](#).

challenges must be seen for what it is: an erosion of the criminal defendant's substantive rights. ("[T]he denial of the right of peremptory challenge is the denial of a substantial right." *Singletary*, 80 N.J. at 62 (quoting *Wright v. Bernstein*, 23 N.J. 284, 295 (1957))).

Peremptory challenges have existed for nearly as long as juries have existed and are firmly rooted in the American jury trial tradition. *Batson*, 476 U.S. at 119. It is "a right with deep historic roots" *Brunson*, 101 N.J. at 136 (1985). "The fact that peremptory challenges have been a part of the common law, statutes, and court rules, for over 700 years indicates that they still have a place in ensuring a fair trial for all parties." Daniel Edwards, *The Evolving Debate Over Batson's Procedures for Peremptory Challenges*, National Association of Attorneys General (Apr. 14, 2020).⁷ Peremptory challenges have "always been held essential to the fairness of trial by jury." *Lewis v. United States*, 146 U.S. 370, 376 (1892).

Moreover, "peremptory challenges provide a perception of fairness in criminal trials. . . . By allowing litigants to participate in the selection of jury members through peremptory challenges, a perception of fairness is created because 'the impartiality of the adjudicator goes to the very integrity of the legal system.'" Laurel Johnson, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide*, 5 U. Denv. Crim. L. Rev. 199, 208 (Summer, 2015) (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)). They allow the parties an active role in choosing their fact finder. Perhaps just as significantly by imparting a sense of fairness and control, peremptory challenges have an ameliorating effect on the dominance of the state in criminal prosecutions. Primary reliance on for-cause challenges would require the defendant to win permission from the court which, like the prosecutor, is a state actor. See *Holland*, 81 La. L.R. 165, 196-197 ("Judges in criminal cases are agents of the same State that is also prosecuting the defendant.").

That is, while the criminal justice system can reduce defendants to near-powerlessness, the right to challenge provides participants a sense of control—they may reject jurors for nondiscriminatory reasons known only to them. Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. Crim. L. & Criminology 1, 15 (Winter, 2014). "Absent violations of equal protection, '[t]he peremptory challenge, unlike challenges for cause, requires neither

⁷ A full copy of this report can be found [here](#).

explanation nor approval by the court.'" *DiFrisco*, 137 N.J. at 469 (1994) (quoting *Brunson*, 101 N.J. at 138). "[I]t is the defendant himself who plays the critical role in exercising the peremptory challenge. . . Indeed, it is that undefinable frisson either of comfort or unease that passes from one person to another that is the essence of the peremptory challenge. . ." *W.A.*, 184 N.J. at 54-55.

Of course there is great value in a party's active ability to participate in the creation of the jury. A principal function and important attribute of the peremptory challenge is "to provide the parties with an opportunity to participate in the construction of the decision-making body, thereby enlisting their confidence in its decision." Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum. L. Rev. 725, 771 (1992). And this matters: verdicts are instilled with authority and enhanced acceptability when a party's autonomy and opportunity for participation are protected.

The peremptory challenge also provides a measure of independence from the court. The mechanism, by its design, allows the court only limited control over the party's right to exercise its discretion and lends voice to its concerns over the potential bias or partiality of a venireperson. They provide "a mechanism for the exercise of *private* choice in the pursuit of fairness. . . an enclave of private action in a government-managed proceeding." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 633-34 (1991) (O'Connor, J., dissenting).

Peremptory challenges also allow a party to protect against bias in the face a juror's claimed ability to set aside or disregard bias. Courts commonly will "seat a juror who, despite a disclosed and acknowledged bias, commits himself or herself to being impartial and following the judge's instructions." *State v. Pendleton*, A-1137-17T3, 2020 WL 5240602, at *15 (N.J. Super. Ct. App. Div. Sept. 3, 2020). Further, as Dr. Rose acknowledges, *see Rose Report* at ix-x) there is a prevailing practice among some judges to attempt to rehabilitate jurors regarding acknowledged bias expressed by a juror. Peremptory challenges are then a necessary tool to dismiss jurors who have acknowledged bias, but, under judicial questioning, assert that they believe they can be fair. By exercising such a challenge, a party need not be bound by such assurances of impartiality that are inconsistent with research and science regarding bias, as previously noted.

Challenges for cause will only eliminate the most blatant biases. Further, the parties and their attorneys will always understand, in an intimate and unique manner unavailable to other observers and participants, how the biases of jurors, explicit or implicit, may intersect with the trial testimony and evidence. *See Holland*, 81 La. L.Rev. 165, 195 (“[W]hile the judge is evaluating whether jurors can be generally impartial in a sexual assault case, the defense lawyer is evaluating whether the jurors will respond fairly and critically to the anticipated cross-examination of the victim and will listen fairly to the client’s testimony, including cross-examination.”) They can best appreciate the role biases may play during trial and how biases may undermine impartiality.

New Jersey’s current *voir dire* process does not permit the robust examination of juror attitudes, beliefs, and experiences necessary to rely solely, or even primarily, on cause challenges alone to eliminate jury bias. When *voir dire* is limited, there is simply not enough information generated to create the necessary record to adequately evaluate for-cause challenges emanating from juror bias related to case-specific issues. The combination of restrictive *voir dire* procedures and narrow grounds for challenges for cause make it difficult to effectively “prove” that a prospective juror has explicit or implicit biases that will affect his or her ability to be impartial.

In such a setting, peremptory challenges are vitally necessary to protect a party from the seating of a juror who has demonstrated through their answers matters of concern to a party which do not rise to the level of cause, as judicially constructed. A potential juror’s responses during *voir dire* may not establish evidence that surmount a court’s high burden that the juror’s views would prevent or substantially impair performance of the juror’s duties or oath, “but a party may nonetheless detect some unfavorable leaning. That is precisely the situation in which a party is likely to exercise a peremptory challenge.” *DiFrisco*, 137 N.J. at 469. Our current for-cause standard does not adequately address these issues and most often defers these determinations to the party’s decision as to whether to exercise a peremptory challenge. In fact, this is the real-life experience of many of the NJSBA’s members as it is common for courts to deny a for-cause challenge and immediately state “you may use a peremptory on that.”

Another important function of the peremptory challenge is "to eliminate extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise." *Brunson*, 101 N.J. at 137-138 (quoting *Swain v. Alabama*, 380 U.S. 202, 219). It is intended that each party will use peremptory challenges to remove those prospective jurors who appear most likely to be biased against them or in favor of the opponent, leaving a jury as impartial as can be obtained from the available pool. *Brunson*, 101 N.J. at 148 (citing *People v. Wheeler*, 583 P.2d 748, 760 (1978)).

3. Reduction or Elimination of Peremptory Challenges Does Not Further the Goals of *Batson/Gilmore/Andujar*

It has been suggested in scholarship, which plays a prominent role in the *Guide to the New Jersey Judicial Conference on Jury Selection*, that reducing or eliminating peremptory challenges could be an important part of the solution in confronting racial bias in our courts. See *Guide to the New Jersey Judicial Conference on Jury Selection*, Attachment D (hereinafter *Judicial Conference Guide*).⁸ This viewpoint, however, is shortsighted, narrowing in on the possibility of bias in one aspect of jury selection and ignoring the far greater problem of racial disparities in the criminal justice system, and the plights of those individuals affected by it. But when it comes to concerns of racial justice and the courts, that population of people cannot be forgotten.

For that population of people, whose lives and fates have been taken almost entirely out of their hands and placed into the system's, the ability of their attorneys to use peremptory challenges on their behalf to help ensure fair and impartial juries is one of the few means they have left to affirmatively sculpt their fates. The elimination of peremptory challenges reduces the self-determination of vulnerable people whose autonomy has already been substantially reduced, and places it instead in the hands of the court. Indeed, this issue was noted when the question of reducing peremptory challenges was proposed previously in 2005. There, a letter signed by the New Jersey Office of the Public Defender and the Association of Criminal Defense Lawyers of New Jersey noted that:

⁸ A full copy of the guide can be found [here](#).

[i]t would certainly be ironic if this abuse [prosecutorial discrimination in peremptory challenges] became the rationale for reducing or eliminating peremptory challenges -- changes that would work against the very group victimized by the abuse. It is the extent to which prosecutors have unlawfully used their peremptory challenges particularly when African Americans are on trial that argues in favor of maintaining the current system in New Jersey.

Report of the Special Supreme Court Committee on Preemptory Challenges and Voir Dire (Exhibit N – Minority Report on Behalf of the Association of Criminal Defense Lawyers of New Jersey and the Office of the Public Defender) (May 16, 2005). Reducing the protections and minimal control afforded criminal defendants over their trials cannot further racial justice goals when those individuals are disproportionately poor people of color and subjected to a system whose agents are disproportionately white.

Nor would reducing or eliminating peremptory challenges eliminate the problem of racial bias in jury selection because for-cause challenges would remain. For-cause challenges pose the same risks of cloaking racial bias in neutral language that peremptory challenges have under a *Batson* framework. So long as there are humans choosing who sits on a jury, there will be a risk of racial discrimination in that selection, and certainly of implicit bias playing a determinative role. Of course, the goal cannot be to eliminate all bias because that aim is not reasonably possible. Rather it should be to craft strategies to address it as best as the judicial system and parties are able through the modifications described herein. Removing peremptory challenges will not eliminate racial bias in jury selection; rather, the primary fallout will be harm to defendants, who are disproportionately people of color.

In short, reducing peremptory challenges would substantially undermine the ability of many indigent people of color to face a representative jury after becoming involved with the criminal justice system. Such actions neither promote the goals of racial justice nor serve to advance the appearance of fairness in the general population. The consolidation of power in the court to the detriment of those involved in the system is not the answer. Washington State appears to have recognized as much in its workgroup on this issue prior to enacting their modified standard. See *Proposed New GR 37—Jury Selection Workgroup, Final Report*, p. 3

(2018)⁹. As set forth below, the answer is to modify the test by which we evaluate racial discrimination in jury selection to deal with it more effectively. A single biased juror often makes the difference between life in prison and a mistrial, between a chance at liberty and the deprivation of liberty. A defendant's peremptory challenges are one of the few means available to ensure that one such biased juror cannot participate in the trial.

Connecticut recently embarked upon the same path as New Jersey and there is much to learn from that experience. In *State v. Holmes*, 221 A. 3d 407 (Ct. 2019), the Connecticut Supreme Court upheld the rejection of a defendant's *Batson* challenge, but recognized systemic concerns regarding *Batson's* failure to address the effects of implicit bias. Connecticut's Chief Justice formed a Jury Selection Task Force to examine and to propose necessary solutions toward eradicating racial bias from the jury selection process.

The *CT Report* was issued Dec. 31, 2020, and it did not recommend either the elimination or reduction of peremptory challenges. In particular, the Task Force's Peremptory Challenges Working Group considered whether the use of peremptory challenges contributed to imbedding implicit bias in the jury selection process and whether peremptory challenges should be eliminated or severely limited. It was concluded that "peremptory challenges fulfill important goals: They give parties and their lawyers a sense of control over the proceedings; they enhance the public's perception of procedural fairness; they are a hedge against unrestrained judicial power; they prevent some biased individuals from serving on juries; and they save time that otherwise would be spent on cause challenges." *CT Report* at p. 30-31. Of significance, "it is unclear how much the elimination of peremptory challenges would reduce implicit bias in jury selection." *Id.* at 31. The Working Group unanimously recommended that Connecticut's current system of peremptory challenges remain undisturbed as "it seems ill-advised to take a monumental step for a possibly marginal gain." *Id.*

4. The *Rose Report* and Peremptory Challenges

As previously noted, Dr. Rose "use[d] data from 95 trials in 14 counties to examine the representativeness of juries in New Jersey and to explore potential sources of attrition from

⁹ A full copy of the report can be found [here](#).

jury service that are systemic (system-wide) and/or systematic (attributable to processes).” See *Rose Report* at i. The data did not demonstrate that the use of peremptory challenges by attorneys was a determinative factor in the under-representation of minorities on juries. Rose observed that “[a]ccording to a variety of measures, peremptory challenges are rarely the primary way that minority groups experience attrition from jury participation.” *Id.* at 69. “[P]atterns of peremptory challenges did not explain many of the examples of concerning levels of underrepresentation” discussed in her report. *Id.* at 14. In fact, “in neither criminal nor civil cases did peremptory challenges have any statistically significant relationship with jury diversity.” *Id.* at 84, fn 58.

Dr. Rose goes on to suggest that New Jersey’s “large number” of peremptory challenges results in jury service employees assembling particularly “large” venires which results in many “unused” jurors who may have a perception of the court system as being illegitimate if they are excused from jury service without sitting on a jury. *Id.* at 92. She claims that being “unused” may make “citizens feel their time is wasted which undermines the legitimacy of the courts.” *Id.* at 19. Importantly, these assertions are not based upon the empirical data that was reviewed.

The Judiciary’s *Judicial Conference Guide* appears to adopt this suggestion that the number of peremptory challenges afforded in criminal matters results in “unneeded” jurors brought to New Jersey courthouses. These are deemed “waste” and their service is labeled “burdens on the public.” See *Judicial Conference Guide* at 15-18. But, of course, it is questionable that the fixed number of potential peremptory challenges drives the overall number of jurors ultimately asked to report to create a trial jury rather than the unknown number of cause challenges that will arise from a given panel, especially given Dr. Rose’s findings with regard to the liberality with which for-cause challenges, which appear to include those based on scheduling conflicts or other excuses, are granted. For example, Table VI.1 itemizes types of outcomes for all venirepersons and makes no notation for typically expressed and granted hardship excuses. Jurors come to the courthouses an unknown lot. Some demonstrate explicit bias or an acknowledged inability to perform impartially as a trial juror. Many others provide various reasons for excusal ranging from economic hardships and

childcare issues to medical appointments, nonrefundable airplane tickets, or vacation plans. Trial judges often grant such “hardship” requests *See New Jersey Judiciary Bench Manual for Jury Selection*, p. 22¹⁰ (“Jurors who express hardship problems (child care issues, absence from work without pay, etc.) should be liberally excused especially when the trial is anticipated to take an extended period of time.”). The number of jurors who may ultimately demonstrate “cause” that justifies excusal, unlike the potential number of peremptories, is unknown until jurors are actually questioned.

Other factors also drive uncertainty. For example, trials expected to start sometimes do not as matters resolve or adjourn. While the data demonstrates how many trials were completed and how many jurors were not questioned, it does not demonstrate how many trials were expected to commence but did not move forward to jury selection. That reality, which will never cease, is as much or more a cause of jurors being unused as are peremptory challenges, or at least there is no data to the contrary in Dr. Rose’s report or elsewhere.

Available data does not support a conclusion that peremptory challenges are the primary factor driving the number of jurors asked to report to New Jersey courthouses. From 2004 to 2019, the average size of criminal jury panels increased from 72 to 165 jurors, while the average size of civil jury pools increased from 42 to 57 jurors. *See Judicial Conference Guide* at 17-18. Notably, peremptory challenges remained constant. This data demonstrates that other factors, separate from the number of statutorily provided peremptory challenges, can dramatically affect “utilization” and the relative “need” of a juror.

In any event, for the reasons set forth above this is not the time to consider reduction or elimination of peremptory challenges. As noted above, New Jersey’s Judiciary has committed, for the first time in its history, to capturing juror’s demographic data on a regular and ongoing basis. This will allow the comprehensive analysis of our jury selection system as a whole in light of the data amassed, which should occur before considering disturbing peremptories, as should the other reforms suggested here.

Peremptory challenges are a substantial right and vital to securing impartial juries. Our system’s fairness rests in part upon a peremptory challenge regime that has existed for over a

¹⁰ A full copy of this manual can be found [here](#).

century. Reducing challenges would hollow this core foundational element. New Jersey should not follow a path that erodes a criminal defendant's right to an impartial jury. It would be unwise and even dangerous to shock the system in this manner as it could easily come crashing down on the person with the most to lose -- the criminal defendant. We must not allow this to happen.

BATSON/GILMORE REFORM

New Jersey should modify the Batson/Gilmore framework to fortify the fair jury selection process, while retaining the inherent value of the peremptory challenge, consistent with reforms in states including Washington and California and what has been proposed in Connecticut.

New Jersey should modify the *Batson/Gilmore* framework, including implementing appropriate rule changes, to strengthen the guarantee of a fair jury selection process. The NJSBA suggests reform of the framework to address the problem of discriminatory challenges while retaining the inherent value of the peremptory challenge. Such reform has been enacted in Washington and California and proposed in Connecticut. New Jersey should follow their path.

1. The *Batson/Gilmore* Framework's Failure

Although *Batson*, decided 35 years ago, represented a substantial step forward in addressing racial discrimination and disparities in our courts, it ultimately has not proven to be effective at achieving that goal. In the wake of *Batson*, substantial scholarship has both described and condemned its shortcomings. *See, e.g.,* Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 Rev. Litig. 209, 250-51 (Spring, 2003) (“ . . . *Batson*, despite its undeniable importance, may currently be little more than a procedural hurdle that can readily be overcome, particularly by prosecutors.”); *see generally* *EJI Jury Selection Report* (studying the continuing problems of racial discrimination in jury selection after *Batson*). As Judge Mark W. Bennett bluntly observed, “it ought to be obvious that the *Batson* standards for ferreting out lawyers’ potential explicit and implicit bias during jury selection are a shameful sham.” Bennett, 4 Harv. L. & Pol’y Rev. at 165.

Indeed, these shortcomings in the framework can be seen in our recent cases playing out these exact faults. *See State v. Amaker*, No. A-5068-17T1, 2020 WL 7329827 (App. Div. Dec. 14, 2020) (failing to reverse a trial court’s decision that there was no discrimination where significant and disproportionate number of Black jurors were excused for reasons including juror’s “potential to not believe the police officer’s testimony” based on previous negative experience he had with law enforcement and another juror’s supposed failure to make

adequate eye contact with prosecutor); *see also Racial Discrimination Persists in California Jury Selection* (noting that Black jurors are disproportionately excluded for perceived distrust of the criminal legal system and having had previous negative experiences with law enforcement); *EJI Jury Selection Report* at 24-25 (calling proffered reason for removal of Black jurors for failing to make eye contact with prosecutor in Mississippi case “highly dubious”).

There are many reasons for *Batson’s* failures, but two of the most significant factors are the ease with which “race neutral” reasons are accepted by judges and the failure to account for the nuances of racial discrimination and implicit bias. Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1626-27 (2018) (describing how under the current framework it is “painfully easy to cloak even the most overt forms of racism through pretextual race-neutral justifications,” and *Batson* only ferrets out one “narrow type of racially discriminatory action”). This is particularly true with regard to implicit bias, or discrimination that is not conscious and intentional, which is a concrete facet of human interaction but often either poorly addressed or not addressed at all by our legal system. *See generally* Bennett, 4 Harv. L. & Pol’y Rev. 149. Efforts to eradicate discrimination thus far have focused instead almost exclusively on overt discrimination. *Id.* at 152. However, where efforts to address discrimination focus entirely on overt, purposeful discrimination, it may in fact exacerbate implicit bias issues. *Id.* at 158 (describing how *Batson* challenges “may create further implicit bias in jury selection by ‘sanitizing’ or providing ‘cover’ for the biased selections that it is purportedly designed to detect and eliminate.”) Certainly, it will leave them unaddressed. Not only does *Batson* fail to adequately address purposeful discrimination, but it may also be exacerbating a more pernicious form of discrimination.

Indeed, Justice Marshall, in his powerful concurring opinion in *Batson*, noted these shortcomings of the *Batson* framework at the time. Specifically, Justice Marshall raised concerns about the difficulty of assessing a prosecutor’s true motives in striking a juror, stating:

[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed ‘uncommunicative,’ or ‘never cracked a smile’ and, therefore ‘did not possess the sensitivities necessary to realistically look at the

issues and decide the facts in this case'? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Batson, 476 U.S. at 106 (1986) (Marshall, J., concurring) (citations omitted). Justice Marshall then went on to describe the more insidious dangers of implicit biases, stating,

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

Id. at 107.

The progress of time and development of social science has only confirmed these problems of implicit bias, which the Court has sought to address here. See Bennett, 4 Harv. L. & Pol'y Rev. at 165 ("The rapid growth of social science knowledge about implicit biases has only affirmed Justice Marshall's prediction that Batson would become 'irrelevant' and that 'racial discrimination in jury selection . . . would go undeterred.'" (citation omitted)).

In *Andujar*, the Court stated that *Gilmore* reaches farther than purposeful discrimination. The Court recognized that "implicit bias is no less real and no less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination" *Andujar*, 247 N.J. at 303. "*Gilmore's* reasoning, therefore, logically extends to efforts to remove jurors on account of race either when a party acts purposely or as a result of implicit bias. In both instances, a peremptory challenge can violate the State Constitution, depending on the circumstances." *Id.* But this holding has not yet had the opportunity to seep into the judicial consciousness or to play out in our caselaw. Before peremptory challenges, so valuable to the perception and reality of the process, are reduced, that process should take place.

Justice Marshall's and Judge Bennett's proposed remedy for addressing the issue of implicit racial bias in jury selection was extreme: removing peremptory challenges altogether.

Batson, 476 U.S. at 107-08 (Marshall, J., concurring); Bennett, 4 Harv. L. & Pol'y Rev. at 166. But New Jersey need not - and as explained in more detail below should not - go so far.

New Jersey is not unique in encountering these issues. Other states have embraced this challenge and concluded that reform of the *Batson* framework is a critical component to combatting discrimination in jury selection. Washington and California have enacted meaningful *Batson* reform.¹¹ A discussion of these reforms is required for “a probing conversation about additional steps needed to root out discrimination in the selection of juries.” *Andujar*, 247 N.J. at 318. This Conference presents an opportunity for New Jersey to align its analysis with a contemporary understanding of racial bias by adopting the “objective observer” standard as well as other reform measures utilized in Washington State, California, and proposed elsewhere for addressing racial bias in jury selection.

2. Washington State’s GR 37¹²

In *State v. Jefferson*, the Washington Supreme Court recognized the need to modify the *Batson* standard to better address racial discrimination in jury selection which, despite *Batson*’s ruling being nearly 35 years old, continues to proliferate. *Jefferson*, 429 P.3d at 480 (2018). The *Jefferson* Court’s step forward in addressing this was to modify the third prong of the *Batson* analysis so that the inquiry is not focused on overt, purposeful racial animus by the party striking the juror, but instead on “whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. If so, then the peremptory strike shall be denied.” *Id.* (internal quotations omitted). The so-called “objective observer” standard is “based on the average, reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision-making in nonexplicit, or implicit, unstated, ways.” *Id.*¹³

¹¹ Only one state, Arizona, has concluded that eliminating peremptory challenges is the appropriate path. See *Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure* (filed August 30, 2021).

¹² *Wash. Gen. R. 37* is attached in its entirety in Appendix A.

¹³ The Court in *Jefferson* also modified the standard of review for this prong to *de novo*, explaining that the third prong under the “objective observer” standard would now be objective, rather than a question of fact. *Jefferson*, 429 P.3d at 480.

Washington State codified the objective observer test shortly before *Jefferson* was decided in *Washington General Rule 37*. The rule provides a non-exclusive list of various factors to consider when applying the objective observer test.¹⁴ It also provides a list of purported reasons for striking a juror which, because they are disproportionately associated with non-white jurors, are presumptively invalid, including: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker. *Wash. Gen. R. 37(h)*.

Since Washington's modifications to the *Batson* standard, judges and justices from a variety of jurisdictions have praised the decision and recommended its implementation to rectify *Batson's* shortcomings. See *State v. Porter*, 460 P.3d 1276, 1290-91 (Ariz. Ct. App. 2020) (McMurdie, J., dissenting) (recommending that Arizona adopt a rule mirroring *Wash. Gen. R. 37*); *People v. Bryant*, 253 Cal. Rptr. 3d 289, 310 (Ct. App. 2019) (Humes, P.J., concurring) (citing the "objective observer test" with approval in advocating for reform to California's *Batson* framework); *Holmes*, 221 A.3d at 434-37 (Conn. 2019) (engaging in an in-depth analysis of the need to reform the *Batson* framework and describing with approval Washington's enactment of *Wash. Gen. R. 37*); *State v. Veal*, 930 N.W.2d 319, 361-62 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) (advocating an incorporation of the *Jefferson* test in modifying Iowa's approach to *Batson* challenges); *Tennyson v. State*, No. PD-0304-18, 2018 Tex. Crim. App. WL6332331 at 7* n.6 (Crim. App. Dec. 5, 2018) (Alcala, J., dissenting from refusal for

¹⁴ The *Wash. Gen. R. 37(g)* factors are the following: (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases. *Wash. Gen. R. 37(g)*.

discretionary review) (citing with approval the *Jefferson* decision and noting that the *Batson* framework “must be reformed to provide more than illusory protections against racial discrimination”). By taking a leap forward, Washington’s test has become the gold standard by which other jurisdictions are now addressing their own approach to explicit and implicit bias in jury selection.

The benefits of Washington’s approach are clear, as it works to actively remedy the various deficiencies of the *Batson* framework. By moving the inquiry into how an objective observer would perceive the juror’s removal, rather than probing a prosecutor’s mind for overt racial animus, the test more effectively deals with the issue of implicit bias, an issue largely ignored by the existing framework despite being a much more commonplace form of discrimination. See Bennett, 4 Harv. L. & Pol’y Rev. at 153 (noting the statistical prevalence of implicit bias). Additionally, *Wash. Gen. R.* 37(g) and 37(h) delegitimize so-called “race neutral” explanations for jurors’ removal which are often used to disparately exclude various minority groups from juries, yet frequently offered and accepted to the detriment of jury diversity.

3. California AB 3070¹⁵

On Jan. 29, 2020, the California Supreme Court announced that a jury selection work group would “study whether modifications or additional measures are needed to guard against impermissible discrimination in jury selection.” News Release, Supreme Court of Cal., *Supreme Court Announces Jury Selection Work Group* (Jan. 29, 2020).¹⁶ In *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, Elisabeth Semel and her fellow authors concluded that “[o]nly a drastic course correction that encompasses significant changes to the *Batson* procedure can eliminate the exercise of discriminatory peremptory challenges.” Elisabeth Semel, Dagen Downard, Anne Weis, Danielle Craig, & Chelsea Hanlock, Berkeley L. Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (2020), p. ix.

¹⁵ *California AB 3070* is attached in its entirety in Appendix B.

¹⁶ A copy of the news release may be accessed [here](#).

California enacted *Batson* reform by statute in *California AB 3070* which takes effect on Jan. 1, 2022, in all criminal matters. The statute sets forth that “[i]t is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.” *Cal. Civ. Proc. Code* § 231.7(a). Like Washington, this reform measure did not reduce or eliminate the number of peremptory challenges afforded each party, but rather revised the analysis of discriminatory challenges.

The California statutory procedure provide a specific framework for the how a *Batson* challenge is raised. An objective test is applied to whether the challenge was “related” to the juror’s race, ethnicity, or other impermissible basis. There is a presumption that certain enumerated reasons for a peremptory challenge are invalid which include, among others, receiving state benefits, dress and appearance, the ability to speak another language, and even having a child outside of marriage. *See Cal. Civ. Proc. Code* § 231.7(e)(1)-(13). Further, a challenge based on a prospective juror’s behavior or perceived attitude is presumptively invalid unless confirmed by the court’s own observations. *See Cal. Civ. Proc. Code* § 231.7(g). If an objection is denied, *de novo* review is provided by an appellate court.

The new California procedure bears great similarity to *Wash. Gen. R. 37*. There is focus on implicit bias, not previously present under the *Batson* framework. Further, it provides an objective test to measure discrimination, rather than relying on a party’s actual motivations. They both provide presumptively invalid reasons for challenges. There are also differences between California’s and Washington’s approach. *Wash. Gen. R. 37(a)* only applies the rule to the “unfair exclusion of potential jurors based on race or ethnicity.” California’s protections apply to prospective jurors based on “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.” *Cal. Civ. Proc. Code* § 231.7(a). California also identifies a more detailed list of circumstances the trial court “should consider” in determining whether the peremptory challenge is justified. *Compare Wash. Gen. R. 37(g)(i)-(v)*, with *Cal. Civ. Proc. Code* § 231.7(d)(3)(A)-(G) (listing additional circumstances that the trial court “should consider” in determining whether the peremptory challenge is justified).

4. Connecticut's Jury Selection Task Force Recommendations regarding *Batson* Reform

As noted previously, the Connecticut Jury Selection Task Force has also recommended *Batson* reform. The Task Force's *Batson* Working Group "recommend[ed] unanimously the adoption of a rule modeled in part on Washington's Rule 37[.]" *CT Report* at 20. Their proposed rule "retains the essential thrust of *Rule 37* with some improvements informed by work done in California, taking into account the particulars of Connecticut's jury selection regime." Like Washington, it addresses objections based upon race and ethnicity. And like California and Washington, the Connecticut proposed rule provides presumptively invalid reasons for a challenged strike that were identified as historically associated with improper discrimination. They include: having prior contact with law enforcement officers; expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; having a close relationship with people who have been stopped, arrested, or convicted of a crime; living in a high-crime neighborhood; having a child outside of marriage; receiving state benefits; not being a native English speaker; and having been a victim of a crime. See *CT Report* at 17. The proposal also provides for *de novo* appellate review. *Id.* at 16.

5. Modifying *Batson/Gilmore* in New Jersey

By modifying our *Batson/Gilmore* framework, New Jersey would also help to avoid the challenges in raising these issues illustrated by what happened in *Andujar*. With a standard that does not involve probing the prosecutor's mind for racial animus, prosecutors are less likely to respond emotionally to such challenges, and defense attorneys and judges will be less averse to addressing them. As Judge Bennett noted, because a successful *Batson* challenge under the current framework essentially requires the court to make a finding that the prosecutor is both lying and an overt racist, the courts are often reluctant to grant such challenges. Bennett, 4 *Harv. L. & Pol'y Rev.* at 162-63. The modified standard, then, will make it easier to address racial bias and lack of diversity issues at the trial level.

Revising the *Batson/Gilmore* framework to move away from probing a prosecutor's mind for purposeful discrimination and instead focus on a more objective standard facilitates the goals for equal justice expressed by our courts. The object of this change is to ensure that legal standards comport with the realities of social science, human psychology, and racial

disenfranchisement and discrimination in the United States, and not to make it easier for the defense to finger-point at the state to allege discrimination. A system that recognizes the very real limitations of *Batson* embraces fairer and stronger juries and thus benefits defendants, the state, our Judiciary, and the public.

6. *Batson/Gilmore/Andujar* Reform: For-Cause Challenges

One of the notable aspects of the *Andujar* case is that the state removed F.G., a Black juror, not through a peremptory challenge, but through two motions to strike him for cause. In holding that the state's removal of F.G. through for-cause challenge established unconstitutional racial discrimination, the Supreme Court appears to have, at least implicitly, expanded the application of *Batson/Gilmore* to for-cause challenges. This is significant because, despite for cause challenges posing much of the same bias problem as peremptory challenges, they have by and large evaded similar safeguards.

Because *Batson* only explicitly applies to peremptory challenges, courts have often declined to extend the doctrine to situations involving allegations of discrimination with respect to challenges for cause. See *United States v. Elliott*, 89 F.3d 1360, 1364-65 (8th Cir. 1996) ("*Batson* applies only to peremptory strikes. We know of no case that has extrapolated the *Batson* framework to for-cause strikes. There is simply no legal basis for this argument, which fails to recognize that peremptory strikes, for which no reasons need be given (absent a *Batson* challenge), are different from challenges for cause, which by definition require a showing of cause."); *Underwood v. State*, 708 So. 2d 18, 28 (Miss. 1998) ("*Batson* only applies to peremptory challenges, not challenges for cause. Because challenges for cause by nature must be made based upon a race-neutral reason, they are not subject to the *Batson* inquiry."); but see *State v. Riddley*, 776 N.W.2d 419, 431 (Minn. 2009) (acknowledging "a rare case" could arise where an extension of *Batson* might be appropriate if "the facts undoubtedly suggest that the prosecutor has challenged for cause a juror for racially discriminatory reasons, and the trial court has erred in granting the motion...").

The rationale of the above cases is that since the bar for granting a for-cause challenge is higher than the threshold needed for establishing a race neutral reason to rebut a *Batson* challenge, there is no need to apply *Batson* to challenges for cause. *Riddley*, 776 N.W.2d at 431.

However, as noted previously, one of the main failures of *Batson* is the ease with which race neutral justifications are thrown about and accepted. Frampton, 71 Vand. L. Rev. at 1626-27. As *Andujar* and common sense make clear, that problem still exists where there is a challenge for cause. As when a prosecutor is rebutting a *Batson* challenge, so too during a for-cause challenge can bias be readily cloaked in race neutral terms. For these reasons, New Jersey would benefit from having the presumptively invalid reasons for making a peremptory challenge also apply to for-cause challenges. *See Wash. Gen. R. 37(h)*. To permit otherwise would leave parties, and particularly prosecutors, with the ability to duck the scrutiny of *Batson/Gilmore/Andujar* even as it grants overbroad discretion to courts in dealing with bias in for cause situations.

Accordingly, extending the protections against racial bias to for-cause challenges is a necessary component of furthering the aims of the Conference. In fact, the implicit bias at issue in *Andujar* arose during a for cause challenge. Implicit bias and discrimination in for-cause challenges must be addressed if New Jersey intends to reduce the discrimination during jury selection.

The existing framework for dealing with racial discrimination in jury selection does not work. Although it may not be possible to eliminate racial bias altogether, restructuring our approach in dealing with this issue in the way Washington and California have done will be a substantial step in the right direction. These changes would be in accord with New Jersey's tradition of being on the forefront of providing significant constitutional protections to our vulnerable populations. Part of that restructuring, however, must include extending racial bias analysis to for-cause challenges; doing otherwise would leave a path for discriminatory challenges to go undetected. Conversely, radically reducing or eliminating peremptory challenges altogether cannot be the solution because its primary result would be harming the many people of color caught up in the criminal justice system, and it would fail to advance the cause of this Conference. Instead, New Jersey should follow the approach of other states that have modified the *Batson* analysis to account for implicit bias, and to provide teeth to *Batson's* initial promise so that it can fulfill its intended purpose.

CONCLUSION AND RECOMMENDATIONS

This is a historic moment for the Judiciary in New Jersey, where success will balance the scales of justice for generations ahead. Simply put - for meaningful reform, we urge there is no quick fix to systemic bias.

The NJSBA exhorts all decision makers involved in developing solutions to think expansively and creatively. Eradicating bias in the courts requires an extensive gathering of data on juries, their composition and the challenges used, followed by a deep analysis of what it means and why. The pursuit of a more perfect system should include many approaches, such as but not limited to, exploring the possibility of a pilot program that involves critical stakeholders to test and measure the best path ahead, and enhancing substantive and sustained training for all.

The NJSBA recommends the following:

1. **Peremptory challenges.** New Jersey should maintain the current number of statutorily afforded peremptory challenges in all matters.
2. **Expanded *voir dire*.** New Jersey's current *voir dire* process be expanded to include appropriate attorney conducted questioning that decreases the influence and dominance of the judge in juror questioning.
3. **For-cause reform.** New Jersey's law on for-cause challenges should be revisited, to provide for less trial court deference to prospective jurors' assessments of their own ability to be fair, and to err on the side of excluding jurors as to whom there is concern in this regard, including because they can say no more than that they will "try" to be fair. As well, the standard for reviewing the denial or grant of for-cause challenges should be raised to a *de novo*, rather than abuse of discretion, standard.
4. ***Batson* Reform.** New Jersey study and enact meaningful reform of the *Batson/Gilmore* analysis consistent with Washington State's GR 37 and California's AB 3070. This reform should embrace both peremptory and for-cause challenges in an effort to eliminate the use of group stereotypes and discrimination, whether based on conscious or unconscious bias. All rulings on for-cause and peremptory challenges should be subject to *de novo* review.

5. **Summoning of jurors.** Several steps should be undertaken, including:
- a. Expand the scope and source of summoned jurors.
 - i. A4275/S2587 expands the category of lists from which the single juror source list is compiled to include NJ Family Care Program eligibility identification card holders, welfare plan identification card holders, non-driver identification cards issued pursuant to the Motor Vehicle Commission, public utility customers, and persons applying for or receiving unemployment insurance, cash assistance, housing assistance, home energy assistance, medical assistance, or food stamps pursuant to a State program in the juror source list.
 - ii. Include convicted felons after set number of years.
 - iii. Include non-citizens who are permanent residents.
 - b. Improve the process for summoning jurors and reduce the attrition of the summoned jurors.
 - i. Address the loss of jurors to undeliverable summonses through data from available sources.
 - ii. Use text, email and paper mail reminders to summoned jurors.
 - c. Increase juror compensation and reimbursement of expenses to reduce economic hardships prospective jurors might suffer when completing jury service.
6. **Training.** Expansive training should include:
- a. Judicial training:
 - i. Specific *voir dire* education and training on topics including:
 - 1. How to question jurors.
 - 2. Appropriate mechanisms to allow attorney participation.
 - 3. The social science regarding the inability to self-diagnose bias.
 - b. Attorney training – continue to encourage/require training

c. Juror training – The implicit bias proposed juror video, *voir dire* questions and proposed charges are a good starting point. They should be augmented by the following:

- i. Extensive implicit bias training of jurors on a day other than the first day of jury service.
- ii. Repeated reminders and reinforcement regarding implicit bias related matters during *voir dire* as well as all aspects of trial.

6. **Data Collection and Analysis.** A data-driven process should include the following:

- a. Data collection on prospective jurors, including, at minimum, race, ethnicity, and gender.
- b. Retain and make available non-personally identifiable data on jurors to be publicly available for research, analysis, and educational purposes.
- c. Train court clerks to accurately collect information on for cause and preemptory challenges.

The NJSBA appreciates the opportunity to play a role in this critical discussion on addressing the impact of implicit bias in the jury selection process, examining the role preemptory challenges play in the process and determining ways to reduce or eliminate bias in the process. We look forward to participating in the conference, reviewing all information presented and submitting further comments, as necessary. We stand ready to serve the legal system of New Jersey and the people who rely on it for meaningful and substantive justice.

APPENDIX

Appendix A

GR 37
JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

[Adopted effective April 24, 2018.]

Appendix B

Assembly Bill No. 3070

CHAPTER 318

An act to add, repeal, and add Section 231.7 of the Code of Civil Procedure, relating to juries.

[Approved by Governor September 30, 2020. Filed with
Secretary of State September 30, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3070, Weber. Juries: peremptory challenges.

Existing law provides for the exclusion of a prospective juror from a trial jury by peremptory challenge. Existing law prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of the sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation of the prospective juror, or on similar grounds.

This bill would, for all jury trials in which jury selection begins on or after January 1, 2022, prohibit a party from using a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups. The bill would allow a party, or the trial court on its own motion, to object to the use of a peremptory challenge based on these criteria. Upon objection, the bill would require the party exercising the challenge to state the reasons the peremptory challenge has been exercised. The bill would require the court to evaluate the reasons given, as specified, and, if the court grants the objection, would authorize the court to take certain actions, including, but not limited to, starting a new jury selection, declaring a mistrial at the request of the objecting party, seating the challenged juror, or providing another remedy as the court deems appropriate. The bill would subject the denial of an objection to de novo review by an appellate court, as specified. The bill would, until January 1, 2026, specify that its provisions do not apply to civil cases.

The people of the State of California do enact as follows:

SECTION 1. (a) It is the intent of the Legislature to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national

origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.

(b) The Legislature finds that peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination. In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.

(c) It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.

SEC. 2. Section 231.7 is added to the Code of Civil Procedure, to read:

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d) (1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court

need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2) (A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a “substantial likelihood” means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, “unconscious bias” includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

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

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

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

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

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

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

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

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

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated

to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g) (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) This section shall not apply to civil cases.

(l) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(m) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(n) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.

SEC. 3. Section 231.7 is added to the Code of Civil Procedure, to read:

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d) (1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2) (A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, "unconscious bias" includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

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

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

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

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

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

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

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious

affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

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

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term "clear and convincing" refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g) (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(l) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(m) This section shall become operative January 1, 2026.

Appendix C

Lamberth/Quinlan Report on Implicit Bias in the Jury System

The New Jersey Supreme Court announced in its decision in *State v. Andujar* that it was convening a Judicial Conference to “enhance public trust for our criminal justice system and the rule of law by ensuring that no citizen is disqualified from jury service because of ...race or other impermissible considerations.”

Prevalence of Implicit Bias in the Criminal Justice System

As the Court in *Andujar* was quite concerned about implicit bias and both of us have worked extensively in that area, we should discuss the phenomenon in somewhat greater depth.

While we might all hope we were free from both explicit and implicit biases, the evidence is clear that we all hold some implicit biases. Even if we do not know we hold them. And no matter how much we wish we did not. Everyone in the population holds implicit biases. Actors in the criminal justice system are no exception.

Like the general public, actors at every stage of the criminal justice system hold implicit biases.¹ Police officers, for example, have been found to associate Black and dark-skinned faces with criminality.² Moreover, police officer decisions to shoot or not shoot have been shown to be biased against African American faces in implicit bias test studies.³

Like police, studies of jurors also reflect the impacts of implicit biases. Jurors have been shown to evaluate ambiguous trial evidence in racially biased ways, with darker skinned defendants being found guilty more often than light skinned defendants.⁴ Jurors have also been shown to more readily find guilt in Black defendants who had alleged gang affiliations compared to white defendants with gang affiliations.⁵

¹ Kang, J., Bennett, M., Carbado, D., Casey, P., Dasgupta, N., Faigman, D., Godsil, R., Greenwald, A., Levinson, J., Mnookin, J. (2012) ‘Implicit Bias in the Courtroom’, *UCLA Law Review* 59(1): 1124-1186.

² Eberhardt, J., Goff, P., Purdie, V. and Davies, P. (2004) ‘Seeing black: Race, crime, and visual processing’, *Journal of Personality and Social Psychology*, 87(6): 876-93.

³ Correll, J., Park, B., Judd, C., Wittenbrink, B., Sadler, M. and Keesee, T. (2007) ‘Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot’, *Journal of Personality and Social Psychology*, 92(1),1006.

⁴ Levinson, J. and Young, D. (2010) Different Shades Of Bias: Skin Tone, Implicit Racial Bias, And Judgments Of Ambiguous Evidence, *West Virginia Law Review* 112: 308-350.

⁵ Evelyn M. Maeder & Joel Burdett (2013) The Combined Effect of Defendant Race and Alleged Gang Affiliation on Mock Juror Decision-Making, *Psychiatry, Psychology and Law*, 20:2, 188-201

For judges, research suggests the same implicit biases reflected at other stages of the criminal justice process similarly hold true. For example, while white judges who took the Implicit Association Test (IAT), designed by psychologists at Harvard University in the 1990s and widely used to measure implicit biases, showed preferences for white defendants and were harsher on Black defendants, Black judges treated African Americans more fairly than their white colleagues.⁶ Other studies have shown that judges are less likely to release African American defendants on their own recognizance and were more likely to impose prison sentences compared to white defendants, who were more likely to be released on their own recognizance and more likely to receive jail or community sentences compared to prison sentences.⁷

Ameliorating Implicit Biases

In the wake of the *Andujar* decision, the New Jersey Judiciary has confronted the need to address anew a perpetual impediment on the path toward justice - the influence of implicit racial bias, and practices driven by such bias, such as the process of jury selection. The question is whether the Judiciary will seek a remedy that truly attacks the core problem. Like some before it, the question is whether the Judiciary will offer a stopgap, Bandaid solution such as eliminating peremptory challenges; or whether it will pursue a sea change. We propose that the Judiciary is presented not with a dilemma per se, but a ripe opportunity to meaningfully address the problem of implicit racial bias in the legal system holistically, by addressing head-on the processes that instantiate and foster bias in practitioners of the law and jurisprudence. We further propose that what may appear at first glance to be an activist approach is, in fact, deeply grounded in constitutional principles, albeit informed by both science and unfolding social experience.

The “sea change” solution we propose begins with widespread education and training, throughout the Judiciary and among practitioners of law, in the roots of implicit bias and in corresponding methods to effect meaningful change in the way these guardians of justice perceive, think, and practice.⁸

⁶ Rachlinski, J., Johnson, S., Wistrich, A. and Guthriet, C. (2009) ‘Does Unconscious Racial Bias Affect Trial Judges?’ *Notre Dame Law Review* 84(3): 1195-1246.

⁷ John Wooldredge (2012) Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions, *Justice Quarterly*, 29:1, 41-75.

⁸ See Appendix B for information on a self-paced, fully online bias mitigation training program developed by Dr. John Lamberth in conjunction with professional colleagues.

Procedural Changes

In a 2016 article in Judges Journal⁹, the authors discuss jury issues and how to successfully select members of the community and best practices for achieving a fair and representative jury pool, particularly in relation to racial diversity. We encourage specific consideration of:

1. The lists from which juries are selected are critical to achieving a racial and socio-economically representative cross section of the jurisdiction. As we understand it, New Jersey Courts use the driver's license, voter registration, and income tax lists. Caprethe et al. suggest that two other crucial lists be utilized to include poor people - the welfare and unemployment lists. This would also increase the racial and ethnic representativeness of the jury pool, as minority groups are more heavily represented on these lists.
2. Excusal rates are important in the racial under-representativeness on jury panels. The fact that New Jersey Courts pay only \$5 per day for jury service for the first three days means that many poor people cannot serve. While \$40 per day is better, it still means that many minority group members cannot continue to support their families if they serve, even for a short period of time.
3. The master jury list should reflect the geographic distribution of the population. The geographic distribution can be a rough proxy for socioeconomic status and thus race and ethnicity.

We therefore strongly agree with two of Rose's recommendations:

Recommendation #1: New Jersey courts should develop a means of asking all people who appear at the courthouse to identify how they categorize themselves in terms of their race, Latino/a ethnicity, and gender. This should be incorporated into any existing questionnaires prospective jurors may fill out, or New Jersey should explore a new means of getting this information from all individuals. Such data should be used for in-house analyses of the effect of court practices on jury representativeness, and de-identified data (or detailed reports based on the data) should be available to parties pursuing claims about levels of jury representativeness. New Jersey Courts should also consider making data available to scholars or members of the public seeking to understand the effect of court practices on representation.

Recommendation #3: New Jersey's next intensive study of jury representativeness should be aimed at understanding the source(s) of why jury pools – the groups of people who appear at the courthouse for service – consistently and substantially underrepresent African Americans. New

⁹ Caprethe, W., et al. (2016) Assessing and Achieving Jury Pool Representativeness. Judges Journal, 55,

Jersey should consider how to improve summons response in ways that are appropriate for a given community and that actually generate yields in participation, but which minimize costs to the court and to the underrepresented communities. New Jersey may need to enhance its system for reminding people about their assigned service date and explore reasonable methods of summons enforcement.

Thank you for the opportunity to contribute to the New Jersey Judicial Conference on Jury Selection.

John Lamberth

Dr. John Lamberth

11/3/2021

Tara Lai Quinlan

Dr. Tara Lai Quinlan

11/3/2021

Appendix D

Vitae

John Lamberth, Ph.D.

CEO Beyond-Bias

2021

Name: John C. Lamberth, Ph.D.

Address: Beyond-Bias
91 Lythwaite Farn Ln
Wilmington, DE 19803

Education: Austin College, B. A.

Harvard University, MST

Purdue University
M.S. & Ph. D.

Fellowships and Scholarships Received

N.S.F. Summer Teaching
Assistant Traineeship
N.I.M.H. Traineeship
N.I.M.H. Pre-doctoral
Research Fellowship

Postdoctoral Positions

Founder, Beyond-Bias	2018-Present
Lamberth Consulting	2003-2018
Associate Professor Temple University	1973-2002
Assistant Professor University of Oklahoma	1970-1973

Editorial Responsibilities

Ad Hoc Consultant For:
Journal of Personality
Journal of Research in Personality
Personality and Social Psychology Bulletin
Journal of Personality and Social Psychology
NSF (Social and Developmental Psychology Panel)

Research Interests

Racial Profiling; Implicit Bias, Capital Punishment; Surveying and Survey Research; Jury Decision Making; Jury Composition; Publicity & Prejudice; Small Group Decision Processes; Interpersonal Attraction

Teaching Interests

Social and Personality Psychology
Undergraduate Courses:
Social Psychology, Theories of Personality,
Psychology and the Law, Research Methods
Graduate Courses
Social Psychology, Psychology and the Law

University Service

Undergraduate Advisor (Psych. Dept.)	1973-1976
Coordinator of Intro Psych.	1973-1980
Director, Division of Social Psychology	1982-1985
Chair, Department of Psychology	1989-1995

Committee Memberships

(a) Undergraduate Affairs (Dept)	1973-1980
(b) Research (Dept)	1978-1980
(c) College of Liberal Arts Computer Committee (College)	1977-1982
(d) Weiss Hall Media Services Committee (University)	1976-1982
(e) Graduate School Review Committee (Dept. Of Crim. Justice M.A.)	1981-1984
(f) Committee on Evaluation of Teaching (College)	1983-1986
(g) Committee on Social Responsibility (College)	1987-1989
(h) Budget Priorities (College)	1990-1991
(i) Merit Committee (College)	1991-1993
(j) Increased Compensation (College)	1993-1995
(k) Resource Allocation Committee (Dept.)	1996-1997
(l) Computer Committee (Dept.)	1996-1997
(m) Committee of Inquiry of History Department (College)	1996-1997
(n) Academic Technology Committee(College)	1998-2002
(o) Dean's Fellow for Technology (College)	2000-2002

Committee Chairmanships

- (a) Undergraduate Affairs (Dept) 1974-1977
- (b) College of Liberal Arts Computer Committee (College) 1979-1982
- (c) Weiss Hall Media Services Committee (University) 1977-1982
- (d) Graduate School Review Committee (Crim. Jus. M.A.) 1980-1984
- (e) College Merit Committee 1991-1992
- (f) Computer Committee (Dept.) 1996-1997
- (g) Committee of Inquiry in History Department 1996-1997
- (h) CLA Academic Technology Committee 1998- 2002

Grants and Consultantships

Consultant to U.s. Army for Modern Volunteer Army, 1971-1972

Consultant to Police Assaults Study, Funded by Law Enforcement Assistance Administration, 1972-1975

Grant from Brown & Furst to Support Graduate Education in Psychology and Law, 1984

Consultant to N.J. Public Defender's Office in Composition Challenges in Death Penalty Cases,

- State V. Ramseur 1982-1984
- State V. Long 1984-1986
- State V. Russo 1986-1988
- State V. Lewis 1985-1986
- State V. Dixon 1985-1986
- State V. Erazo 1989-1990
- State V. Bey 1990-1992
- State V. Wilson 1990-1991
- State V. Pompey 1991-1993
- State V. Thomas 1994-1995
- State V. Cruz 1997-1998
- State V. Premone 1998-1999

"Decision Making in Capital Jurors" Grant from NSF 1990-1993.

Consultant to Private attorneys and New Jersey Public Defender's Office in cases in which there were allegations of illegal profiling by State or Local Police or other state agencies

State V. Sprainis	1993
State V. Kennedy	1994
State V. Soto, et al.	1996
Wilkins V. Maryland State Police	1994
Morka V. New Jersey State Police	1999
State V. Maiolino	1999
Cutler V. City of Glenpool	1999
Rodriguez V. California Highway Patrol	1999
United States V. Garcia	1999
State V. Joel Devers	2000
U. S. V. Barlow	2000
Arizona V. Foulkes, et al.	2000
Gerald V. Oklahoma Dept. of Public Safety	2001
State V. Lewis	2003
Jackson V. NJSP	2004
Maryland NAACP v. Maryland State Police	2007
Commonwealth vs. Rosansky	2008
Major Tours, et al. v. New Jersey Department of Transportation	2010
Martin v. Conner and Guissoni	2012
United States v. Johnson	2013
United States v. Maricopa County	2014
Weber v. City of Grand Rapids	2014

Professional Affiliations and Honors

American Psychological Association
Member of Divisions 2, 8, & 41, Teaching of Psychology,
Personality and Social, and Psychology-law Society
American Psychological Society, Founding Member
Eastern Psychological Association
Society of Experimental Social Psychology
Listed in American Men and Women of Science

Articles Reprinted as Chapters

Byrne, D. Ervin, C.R., & Lamberth, J. The Continuity Between the Experimental Study of Attraction and "Real Life" Computer Dating.

Reprinted In:

1. A. Snadowsky & S. Rosenberg (Eds.) Social Psychology: Research in Laboratory and Natural Settings. New York: Free Press, 1972

2. H. Kaufman & L.Z. Solomon (Eds.) Readings In Introductory Social Psychology. New York: Holt, Rinehart & Winston, 1973.

3. S.W. Duck (Ed.) Theory and Practice in Interpersonal Attraction. New York: Academic Press, 1976

4. C. Mayo and M. La France (Eds.) Evaluating

Research in Social Psychology. Belmont, Ca: Brooks/cole, 1977.
5. D. Byrne & L.A. Byrne (Eds.) Exploring Human Sexuality. New York: Harper & Row, 1977.

Lamberth, J. & Knight, M. An Embarrassment of Riches: Effectively Motivating and Teaching Large Introductory Psychology Courses.
Reprinted In:
Daniel, R.S., Benjamin, L., Jr., & Brewer, C. (Eds.), Teaching Introductory Psychology. Earlbaum, 1986.

Books

Lamberth, J., Mccullers, J.C., & Mellgren, R. Foundations of Psychology. New York, Harper & Row, 1976.

Lamberth, J., Rappaport, H., & Rappaport, M. Personality: an Introduction. New York: Alfred A. Knopf, 1978.

Lamberth, J. Social Psychology. New York, Macmillan, 1980.

Lamberth, J. Psicologia Social. Madrid, Spain: Ediciones Piramide, S.a., 1982.

Lamberth, J. Psicologia Social. (2nd Ed.) Madrid, Spain, Ediciones Piramide, S.a., 1986.

Lamberth, J. Psicologia Social. (3rd Ed.) Madrid, Spain, Ediciones Piramide, S.a., 1989.

Book Chapters

Byrne, D. & Lamberth, J. The Effect of Erotic Stimuli on Sex Arousal, Evaluative Responses, and Subsequent Behavior. Technical Reports on the Commission on Obscenity and Pornography, Vol 8, Washington, D.C., U.S. Gov. Printing Office, 1970.

Byrne, D. & Lamberth, J. Reinforcement Theories And Cognitive Theories as Complementary Approaches To the Study of Attraction. In B.I. Murstein (Ed) Theories of Attraction and Love. New York: Springer, 1971.

Lamberth, J., & Kimmel, A.J. the Application of Scientific Knowledge: Ethical Issues and Responsibilities in the Behavioral Sciences. In A.J. Kimmel (Ed.) New Directions for Methodology Of Social and Behavioral Science: Ethics for Human-subjects Research. San Francisco: Josey-Bass, 1981.

Articles and Reports

Byrne, D., Lamberth, J., Palmer, J., & London, O. Sequential Effects as a Function of Explicit and Implicit Interpolated Attraction Responses. Journal of Personality and Social Psychology, 1969, 13, 70-78.

Byrne, D., Ervin, C.R., & Lamberth, J. The Continuity Between the Study of Attraction and "Real Life" Computer Dating. Journal of Personality and Social Psychology, 1970, 15, 157-165.

Lamberth, J., & Craig, L. Differential Magnitude Of Reward and Magnitude Shifts Using Attitudinal Stimuli. Journal of Experimental Research in Personality, 1970, 4, 281-285.

Gouaux, V.C., & Lamberth, J. The Effect on Interpersonal Attraction of Successive and Simultaneous Presentation of Strangers. Psychonomic Science, 1970, 21, 337-338.

Byrne, D., Gouaux, C., Griffitt, W., Lamberth, J., Murakawa, N., Prasad, M.B., Prasad, A., & Ramiriz, M., Iii. The Ubiquitous Relationship: Attitude Similarity and Attraction. Human Relations, 1971, 24, 201-207.

Lamberth, J. Sequential Variables as Determinants Of Human Performance with Attitudinal Reinforcements. Psychonomic Science, 1971, 22, 350-352.

Lamberth, J., & Byrne, D. Similarity-attraction or Demand Characteristics? Personality: an International Journal, 1971, 2, 77-91.

Gouaux, V.C., & Lamberth, J. Interpersonal Attraction as a Function of Izard's First Evaluation and Affective States. Personality: an International Journal, 1971, 2, 289-297.

Gouaux, C., Lamberth, J., & Frederich, G. Affect And Interpersonal Attraction: a Comparison of Trait and State Measures. Journal of Personality And Social Psychology, 1972, 24, 53-58.

Lamberth, J. Gay, R.A., & Dyck, D.G. Differential Reward Magnitude and Human Conditioning. Psychonomic Science, 1972, 28, 231-233.

Lamberth, J., Gouaux, C., & Davis, J. Agreeing Attitudinal Statements as Positive Reinforcers in Instrumental Conditioning. Psychonomic Science, 1972, 29, 247-249.

Lamberth, J., & Padd, W. Student's Attitudes and Absenteeism: a Possible Link. Psychological Reports, 1972, 31, 35-40.

Lamberth, J., & Dyck, D.G. Reward Magnitude and Sequence of Magnitudes as Determinants of Resistance to Extinction in Humans. Journal of Experimental Psychology, 1972, 96, 280-286.

Byrne, D., Cherry, F., Lamberth, J., & Mitchell, H. Husband-wife Similarity in Response to Erotic Stimuli. Journal of Personality, 1973, 41, 385-394.

Byrne, D., Clore, G.L., Griffitt, W., Lamberth, J., & Mitchell, H. When Research Paradigms Converge: Confrontation or Integration. Journal of Personality and Social Psychology, 1973, 28, 313-320.

Byrne, D., Clore, G.L., Griffitt, W., Lamberth, J., Mitchell, H. One More Time. Journal of Personality And Social Psychology, 1973, 28,

323-324.

Lamberth, J., Gouaux, C., & Padd, W. The Affective Eliciting and Reducing Properties of Attraction Stimuli. Social Behavior and Personality, 1973, 1, 95-107.

Byrne, D., Fisher, J.D., Lamberth, J., & Mitchell, H.E. Evaluations of Erotica: Facts or Feelings. Journal of Personality and Social Psychology, 1974, 29, 111-116.

Nation, J.R., Knight, J.M., Lamberth, J., & Dyck, D.G. Programmed Student Achievement: a Test of the Avoidance Hypothesis. The Journal of Experimental Education, 1974, 42, 57-61.

Davis, J., & Lamberth, J. Energization Properties Of Positive and Negative Stimuli. Journal of Experimental Psychology, 1974, 103, 196-200.

Lamberth, J., Rataj, G.W., & Padd, W. An Evaluation of Differential Topic Importance, Population Homogeneity, and Relatedness of Attitudinal Stimuli in Attraction Research. Journal of Representative Research in Social Psychology, 1974, 5, 84-92.

Lamberth, J., & Knight, J.M. an Embarrassment of Riches: Effectively Teaching and Motivating Large Introductory Psychology Sections. Teaching of Psychology, 1974, 1, 16-20.

Lamberth, J., & Knight, J.M. to Curve or Not to Curve: the Defense. Teaching of Psychology, 1975, 2, 82-83.

Byrne, D., Lamberth, J., Mitchell, H.E., & Winslow, L. Sex Differences in Attraction: Response to the Needs of the Opposite Sex. Journal Of Social and Economic Studies, 1976, 2,

Lamberth, J., & Kostaske, D. Mastery Teaching with And Without Incentives for Repeating Quizzes. Teaching of Psychology, 1979, 6, 71-74.

Lamberth, J., & Kostaske, D. Student Evaluations: An Assessment of Validity. Teaching of Psychology, 1981. 8, 8-11.

Lamberth, J., & Kostaske, D. Using TA Ratings to Validate Evaluations: the Important Issues. Teaching of Psychology, 1982, 9, 102.

Lamberth, J., Kreiger, E., & Shay, S. Juror Decision-making: a Case of Attitude Change Mediated by Authoritarianism. Journal of Research In Personality, 1982, 16, 419-434.

Lamberth, J. Driving While Black. Washington Post, August 16, 1998, C1.

Buckman, W.H., & Lamberth, J. Challenging Racial Profiles: Attacking Jim Crow on the Interstate. The Champion, Sept./October, 1999.

Cole, D., & Lamberth, J. The Fallacy of Racial Profiling. New York Times, May 13, 2001.

Lamberth, J. A Multi-jurisdictional Assessment of Traffic Enforcement and Data Collection in Kansas. Printed for the Office of the Governor in the State of Kansas. Fall, 2003.

Lamberth, J. Racial Profiling Data Analysis Study. Final Report for the San Antonio Police Department. Printed for the San Antonio Police Department, December, 2003.

Lamberth, J. Ann Arbor Police Department Traffic Stop Data Collection Methods and Analysis Study. Printed for the City of Ann Arbor. February, 2004.

Lamberth, J Grand Rapids Police Department Traffic Stop Data Collection Program: Report for the City of Grand Rapids. Printed for the City of Grand Rapids. May, 2004.

Lamberth, J. Interim Report for the Montgomery County Police Department's Traffic Stop and Data Collection Project. A report for the Montgomery County Police Department. May, 2006.

Lamberth, J Methodological Consultant. Ethnic Profiling in the Moscow Metro by the Open Society Justice Initiative. Summer, 2006.

Kadane, J.B. & Lamberth, J. In the Matter of the Study of State Police Stop Activity at the Southern end of the New Jersey Turnpike. Report prepared for the New Jersey ACLU and submitted to the Governor's Advisory Committee on Police Standards. 2007

Lamberth, J. Methodological Consultant. Ethnic Profiling in Paris. Open Society Justice Initiative. 2008.

Lamberth, J. Traffic Stop Data Analysis Project of the Sacramento Police Department. 2008

Kadane, J.B. & Lamberth, J. Are blacks egregious speeding violators at extraordinary rates in New Jersey? Law, Probability & Risk, 2009.

Lamberth, J. Traffic Stop Data Analysis Project, The City of Kalamazoo Department of Public Safety. 2013.

Jobard, F., Levy, R., Lamberth, J. and Nevaneb, S. Measuring appearance based discrimination: An analysis of identity checks in Paris. Population, 2013.

Lamberth, J. Traffic Stop Data Analysis Project of the Kalamazoo Department of Public Safety. 2013

Lamberth, J., and Clayton, J. Grand Rapids Police Department Traffic Stop Data Analysis. 2017.

Lamberth, J., Barber, C., Flagg, E. & Caldwell, S. Beyond Bias: Dialogues on Race. Online Implicit Bias Training Course, 2019.

Papers Read

"Sequential Effects in Responding to Attitudinal Stimuli," at the Psychonomic Society, St. Louis, October, 1968.

"Differential Magnitude of Reward and Magnitude Shifts Using Attitudinal Stimuli," at the South-Western Psychological Association, Austin, April,

1969.

"Differential Reward Magnitude Using a Performance Measure and Attitudinal Stimuli," at the Western Psychological Association, Vancouver, June 1969.

"The Effects of Continual Responding on the Contrast in Attraction Research," at the Psychonomic Society, St. Louis, November, 1969.

" Reinforcement Theories and Cognitive Theories as Complementary Approaches to the Study of Attraction," at a Symposium on Attraction Theory, Connecticut College, October, 1970.

"The Effect of Sequential Variables on Performance Using Attitudinal Stimuli," at the Psychonomic Society, San Antonio, November, 1970.

"Competence as a Variable in Interpersonal Attraction," at the Southwestern Psychological Association, Oklahoma City, April, 1972.

"Conditioning and Attraction: a Relationship," at The Psychonomic Society, St. Louis, Nov., 1972.

"Stimulus Generalization: Affect and Attraction," At the Psychonomic Society, St. Louis, Nov., 1973.

"The Lawyer's Dilemma: Authoritarianism and Jury Selection," at the Midwestern Psychological Association, Chicago, May, 1974.

"Jury Verdicts of Authoritarians and Equalitarians In Simulated Criminal Trials," at the Psychonomic Society, Denver, November, 1975.

"Deliberation: A Crucial Aspect of Jury Research," At the Psychonomic Society, St. Louis, Nov., 1976.

"Introductory Psychology-a Student's Perspective," At a Symposium "Teaching Introductory Psychology: Issues, Innovation and Perspectives," at the American Psychological Association, Washington, D.C., August, 1976.

"Mastery Instructional Systems: Innovations, Problems, and Possibly Some Solutions," as Part of A Symposium at the American Psychological Association, San Francisco, August, 1977.

"Scientifically Selecting Juries." Invited Address at the Camden County Bar Association, Cherry Hill, N.J., March 1980.

"Jury Selection: a Psychological Approach." Invited Address at the American Trial Lawyers Association-New Jersey, Moorestown, N.J., Jan., 1981.

"The Ubiquitous and Mysterious Jury." Invited Address at the American Criminal Defense Lawyers-New Jersey Seminar on Experts, New Brunswick, New Jersey, April, 1989.

"Juror Acceptance of Diminished Capacity in Capital Cases." Invited Address at the

International Conference of Law and Society, Amsterdam, June, 1991.
"Selecting the Right Jury." Invited Address at The New Jersey Institute for Continuing Legal Education, New Brunswick, N. J., October, 1991.

"Systematic Jury Selection." Invited Address at the Inn of Court, Montclair, N.J., November, 1991.

"The Psychological Cost of Serving on a Capital Jury." Paper Presented at the Law and Society Convention, Philadelphia, May, 1992.

"How Juries Perceive Women Lawyers." Invited Address at the Trial Lawyers of New Jersey Seminar On Women in Litigation, New Brunswick, N.j., October, 1992.

"In Their Own Words: Capital Jurors Thoughts about Serving on a Capital Jury." Discussant at the American Criminologists Society, New Orleans, November, 1992.

"The Disappearing and Reappearing Penalty Trial." Paper Presented at the Law and Society Convention, Chicago, May, 1992.

"Driving While Black." Invited Address at the Convention of the Congressional Black Caucus, Washington, D.C., September, 1998.

"Racial Profiling." Town Meeting in Norfolk, VA. Sponsored by "Citizens Opposed to Police Profiling Stops. December, 1998.

"Racial Profiling." Guest on "It's Your Call", CN8, Comcast Network. March 3, 1999.
"Driving While Black." Guest on "It's Your Call", CN8, Comcast Network. March 9, 1999.

"New Jersey and Maryland Racial Profiling." Testimony before the Black and Latino Legislative Caucus of the New Jersey Legislature. April 20, 1999.

"Racial Profiling." Guest on "Radio Times", WHYY 91 FM, Philadelphia. April, 1999.

"Profiling." Guest on "Due Process", New Jersey Network, April 30, 1999.

"Statistics on Racial Profiling." Testimony before the Pennsylvania House Democratic Policy Committee, May 27, 1999.

"Making Sense of the Numbers". Invited Address at the Martin Luther King Day Celebratory Seminar, Chicago, January 17, 2000.

"Urban Benchmarks in Racial Profiling". Invited presentation at The Annual Conference on Criminal Justice Research and Evaluation. Washington, D.C., July 2000

"Benchmarks for Urban Areas". Invited Presentation on Racial Profiling at The 11th Annual Regional Law Enforcement Executives Training Conference, St. Louis, August, 2000.

"Hit Rates for Searched Motorists and Pedestrians". Invited Panelist on Racial Profiling at Conference on Race, Community and Police. Harvard Law School, December, 2000.

"Proof Differences between Litigation and Peer Reviewed Research". Invited Panelist on Litigation Solutions at Conference on Race, Community and Police. Harvard Law School, December, 2000.

“Best Practices: Collecting, Analyzing and Reporting Traffic Stop Data for Cities and Suburban Areas”. Invited Address at the 2001 National Traffic Stop and Racial Profiling Summit for Law Enforcement. Washington, D.C. July, 2001.

“Racial Profiling Data Collection and Analysis in Urban/Suburban Areas.” Testimony before the Pennsylvania House Judiciary Committee’s Subcommittee on Crime and Corrections. October, 2001.

“Fallacious Reasoning: Minority Motorists are Not More Likely to be Carrying Contraband.” Invited Panelist at “Shaking the Foundations” Conference. Stanford Law School, November, 2001.

“Data Collection and Analysis in Racial Profiling.” Invited Presentation at the Legal and Defenders Annual Meeting. Miami, November, 2001.

“Racial Profiling, Assessment and Evaluation”. Invited Lecture at the Conference on Racial Statistics and Public Policy. University of Pennsylvania, March, 2002.

“Developing Appropriate Benchmarks for use in Analyzing Stop Data”. Invited Presentation at the National Summit on Racial Profiling, Washington, D.C., March 2002.

“Data Collection and Analysis.” Invited Presentation at 2002 Training Series on Racial Profiling and Use of Force. Alexandria, VA, August, 2002.

“Technical Presentation of 4 Case Studies of Racial Profiling Analysis.” Invited Presentation at Confronting Racial Profiling in the 21st Century: Implications for Racial Justice conference. Boston, MA, March, 2003.

“Risk Management,” and “Observation Benchmarks.” Invited Presentation at National Symposium on Racial Profiling. Rosemont, IL, November, 2003.

“Observation Benchmarking.” Invited Presentation at By the Numbers conference. Las Vegas, NV, July, 2004.

“Observation Benchmarking.” Invited Presentation at Addressing Ethnic Profiling and Discrimination in Policing in Europe conference. Budapest, Hungary, January, 2005.

“Issues/Problems in the Statistical Proof of a Pattern or Practice of Racial Profiling”. Invited Presentation at Open Society Institute Summit on Systemic Racial Discrimination in The Criminal Justice System. New York, September, 2008.

"The Effectiveness of Stop and Frisk in the United States. Invited Address at the Roundtable on Current Debates, Research Agendas and Strategies to Address Racial Disparities in Police Initiated Stops in the UK and USA. John Jay College of Criminal Justice, New York, Aug. 2011.

“Collection of Disaggregated Data, Analysis and Research.” Invited Address at the Meeting of Experts on Racial Profiling convened by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance for the United Nations Office of the High Commissioner for Human Rights. Los Angeles, November, 2014.

“The Importance of Data in Building Community Police Relations.” Invited Address at the Eighth Session of the Human Rights Council of the United Nations Forum on Minority Issues. Geneva, Switzerland, November 23-25, 2015.

“Investigating Racial Profiling in the United States.” Invited Address at the Meeting on Building Leadership for Fair and Effective Policing sponsored by the Open Society Justice Initiative. Barcelona, Spain, Dec 3-4, 2015.

Expert Testimony

Qualified as an Expert in Statistics, Surveying and Social Psychology for Change of Venue Motions, Jury Composition Challenges, Racial Profiling Cases or Other Motions Requiring Statistical Expertise in the Following Courts:

Federal Court: Newark Vicinage of the District of New Jersey, 1982. Norfolk Division of the Eastern District of Virginia, 1983, Eastern District of Maryland, 1996, 2007, 2012. Trenton Vicinage of the District of New Jersey, 2005, Camden Vicinage of the District of New Jersey, 2011, Middle District of North Carolina, 2014.

State Courts: Atlantic County, N. J. 1986, 1988, Camden County, N.J., 1986, Coconino County, AZ., 2000, Essex County, N.J., 1984 and 1990. Franklin County, Pa., 1986. Gloucester County, N.J., 1985, 1987, 1991, 1995, 1998. Hanover County, Va., 1986, 1990, Henrico Co., Va. 1986, Morris County, N. J., 1989, 1993. Richmond City, 1986, Suffolk Co., MA. 2008, Warren County, N.J., 1992 & 1994.

Appendix E

DR. TARA LAI QUINLAN

U. of Birmingham School of Law ♦ Birmingham, UK B15 2RE ♦ 44 7834736740 ♦ t.quinlan@bham.ac.uk

EDUCATION

Doctor of Philosophy (Ph.D.), Sociology 2012 – 2015

London School of Economics, London, England

- Thesis: *Blurred Boundaries: How Neoliberalisation Has Shaped Policy Development of Post-9/11 Counterterrorism Policing in London & New York City*

Master of Laws (LL.M) (Honors), Criminal Law, Criminology & Criminal Justice 2011 – 2012

King's College London School of Law, London, England

- Best Student Prize (Highest Grade on LLM)
- Dissertation: *Contextualizing the Implementation & Implications of Post-9/11 Terrorism Policing in the United States and the United Kingdom*

Juris Doctor (J.D.), Law 2001 – 2004

Northeastern University School of Law, Boston, MA

- Research Assistant to Professor Deborah Ramirez
- Teaching Fellow, *Law, Culture and Difference* class

Bachelor of Arts (B.A.), American Studies & Rhetoric 1994 – 1998

University of California, Berkeley, Berkeley, CA

ACADEMIC APPOINTMENTS

Lecturer (US Assistant Professor) in Law 2021 – present

University of Birmingham School of Law, Birmingham, England

Research and teach racial disproportionality in policing, police culture, criminal procedure and criminal law.

Senior Lecturer (US Associate Professor) in Law 2021

Birmingham City University School of Law, Birmingham, England

Researched and taught racial disproportionality in policing, police culture, criminal procedure and criminal law.

Senior Lecturer (US Associate Professor) in Law 2019 – 2021

Sheffield Hallam University School of Law and Criminology, Sheffield, England

Researched and taught racial disproportionality in policing, police culture, criminal procedure and criminal law.

Lecturer (US Assistant Professor) in Law 2015 – 2018

University of Sheffield School of Law, Sheffield, England

Researched and taught racial disproportionality in policing, police culture, criminal procedure and criminal law.

<i>Associate Lecturer (US Graduate Teaching Assistant)</i> Birkbeck, University of London Department of Law, London, England	2015
<i>Guest Teacher (US Graduate Teaching Assistant)</i> Department of Social Policy, London School of Economics, London England	2012 – 2014
<i>Teaching Fellow</i> Northeastern University School of Law, Boston, MA	2002 – 2003

PUBLICATIONS – BOOKS

Tara Lai Quinlan, *Police Diversity: Beyond The Blue* (Policy Press/U. Chicago: 2022)

PUBLICATIONS – JOURNAL ARTICLES AND BOOK CHAPTERS

Tara Lai Quinlan, *How Police Culture Shapes Use of Lethal Force: A Response to Flores et al.*, 49 Georgia J. Int'l & Comp. L. 295 (2021) (invited).

Tara Lai Quinlan, *Field, Capital and the Policing Habitus: Understanding Bourdieu Through The NYPD's Post-9/11 Counterterrorism Practices*, 21 Criminology & Crim. Just. 187 (2019).

Tara Lai Quinlan, *Can Increasing Diversity Contribute to Reducing Disproportionate Policing Outcomes?* London School of Economics Crim. L. & Crim. Just. Theory F. (Working Paper Series, 2018).

Tara Lai Quinlan, *The War on Drugs*, The SAGE Encyclopedia of Surveillance, Security, and Privacy, 1109 (2018).

Tara Lai Quinlan, *Foreign Intelligence Surveillance Act*, The SAGE Encyclopedia of Surveillance, Security, and Privacy, 399 (2018).

Tara Lai Quinlan et al., *Counter-Terrorism Policing*, Stop and Search: The Anatomy of a Police Power 123 (Rebekah Delsol & Michael Shiner eds., 2015).

Tara Lai Quinlan, *Targeted Policing of Muslim Communities and Its Unintended Consequences: A Case Study of the NYPD's Post-9/11 Counter-Terrorism Programme*, Int'l Perspectives on Terrorist Victimization: An Interdisc. Approach, 225 (Javier Argomaniz and Orla Lynch, eds., 2015).

Tara Lai Quinlan et al., *The Socio-Political Contexts Affecting Police-Community Engagement in Northern Ireland, Britain and the United States*, Preventing Ideological Violence: Communities, Police and Case Studies of "Success" 33 (P. Daniel Silk et al. eds., 2013).

Deborah Ramirez et al., *Community Partnerships Thwart Terrorism*, Preventing Ideological Violence: Communities, Police and Case Studies of "Success" 151 (P. Daniel Silk et al. eds., 2013).

Deborah Ramirez et al., *Defining Racial Profiling in a Post-September 11th World*, 40 Am. Crim. L. R. 1195 (2003).

PUBLICATIONS – WORKS IN PROGRESS

Tara Lai Quinlan *Terrorism and The Political Economy* (book proposal under peer review for Oxford: Oxford U. Press).

Tara Lai Quinlan, *Positive Action Has Failed Policing: Why Affirmative Action Must Be Used to Diversify England and Wales Policing*, (under review, Oxford J. Legal Stud.).

Tara Lai Quinlan et al., *Measuring Implicit Race and Social Class Bias in the UK: Results from Three New Implicit Association Tests*, (finalizing draft for submission to *Frontiers in Psychol.*).

PUBLICATIONS – FUNDED REPORTS

Matthew Bacon et al., *Evaluation of South Yorkshire Police's Partnership Data Sharing Hub: Final Project Report* (2017) (funded by South Yorkshire Police Dep't).

Deborah Ramirez et al., *The Greater London Experience: Essential Lessons Learned in Law Enforcement-Community Partnerships and Terrorism Prevention* (2008) (funded by Nat'l Inst Just., U.S. Dep't of Just.).

PUBLICATIONS – PUBLIC ENGAGEMENT

Tara Lai Quinlan, *Written Submission to Home Affairs Select Committee Inquiry: The Macpherson Report: Twenty-One Years On* (2020), <https://committees.parliament.uk/work/347/the-macpherson-report-twentyone-years-on/publications/written-evidence/>.

Tara Lai Quinlan et al. *Why Aggressive Stops and Frisks Won't Make Chicago Safer*, *Access to Just. Law360* (November 5, 2018), <https://www.law360.com/articles/1093850/aggressive-stops-and-frisks-won-t-make-chicago-safer>.

Deborah Ramirez et al., *Out With The Warrior, In With The Guardian: Transforming Police Culture*, *The Huffington Post* (October 6, 2016), https://www.huffpost.com/entry/out-with-the-warrior-in-w_b_12351914.

Tara Lai Quinlan, *The NYPD's Post-9/11 Counterterrorism Programme*, *Oxford University Sustainable Security Blog* (2016).

Tara Lai Quinlan, *Racial and Religious Profiling in Post-9/11 Counterterrorism Policing in Race and Policing* (Nadine El-Enemy and Eddie Bruce-Jones, eds. 2015), <https://www.runnymedetrust.org/uploads/images/Race%20and%20Policing%20v4.pdf>.

Tara Lai Quinlan et al., *To Fight Terrorism, Treat Muslim-Americans With Respect*, *The Huffington Post* (December 1, 2015), https://www.huffpost.com/entry/to-fight-terrorism-treat-muslim-americans-with-respect_b_8682070.

Tara Lai Quinlan et al., *Shifting American Police From Warriors to Guardians*, *The Huffington Post* (May 27, 2015), https://www.huffpost.com/entry/shifting-american-police_b_7437618.

Tara Lai Quinlan, *Discrimination and Security in Passenger Screening*, *Aviation Security Int'l Mag.* (February 2015).

Tara Lai Quinlan et al., *A Blueprint for Local Police Reform to Improve Legitimacy*, The Huffington Post (December 24, 2014), https://www.huffpost.com/entry/a-blueprint-for-local-pol_b_6369706.

Tara Lai Quinlan et al., *This is What The End of Racial Profiling Looks Like*, The Guardian (December 12, 2014), <https://www.theguardian.com/commentisfree/2014/dec/12/end-racial-profiling-federal-guidelines>.

Deborah Ramirez & Tara Lai Quinlan, *The Boston Tragedy Reveals the Need For Community-Based Counterterrorism Strategies*, The Huffington Post (April 24, 2013), https://www.huffpost.com/entry/counterterrorism-strategy-boston-bombing_b_3148235.

Deborah Ramirez & Tara Lai Quinlan, *Trayvon Martin Killing Highlights Need for Oversight and Accountability of Private Security Officers*, Am. Const. Soc'y Blog (April 5, 2012).

Deborah Ramirez & Tara Lai Quinlan, *Posthumous Profiling? Puzzling Pieces Abound in the Trayvon Martin Case*, The Huffington Post (March 29, 2012), https://www.huffpost.com/entry/posthumous-profiling-puzz_b_1387887.

CONFERENCE PRESENTATIONS AND INVITED LECTURES

Tara Lai Quinlan et al., Presentation to the American Association of Law Schools Annual Clinical Legal Education Conference: Clinical Legal Education For All, Not For The Few: One UK Law School's Approach To Legal Pedagogy (April 30, 2021).

Tara Lai Quinlan, Invited presentation to The Un-special Relationship: Communication and Criminal Justice in the USA and UK Symposium, sponsored by the City University of New York and Birmingham City University: Policing, Communities and Race, A Comparative View: A Response to Professor Health Brown (April 27, 2021).

Tara Lai Quinlan, Invited presentation to Supporting and Challenging an Independent Review of the Prevent Duty Symposium: Countering Violent Extremism: Examining Policy Formation of CVE Programs In London, New York and Los Angeles (June 18, 2019).

Jules Holroyd et al., Invited presentation to Association of Local Authority Medical Advisors Spring Conference: Implicit Bias in Healthcare Contexts: Research and Remedial Strategies (March 13, 2019).

Tara Lai Quinlan, Presentation to London School of Economics School of Law Criminal Law and Criminal Justice Theory Forum: Can Increasing Diversity Contribute to Reducing Disproportionate Policing Outcomes? (November 14, 2018).

Tara Lai Quinlan, Presentation to Howard League for Penal Reform Conference: Redesigning Justice - Promoting Civil Rights, Trust and Fairness Conference: Police Diversity: Contemplating a Diversity Tipping Point for Shifting Police Culture (March 22, 2018).

Tara Lai Quinlan, Presentation to American Society of Criminology Annual Conference: Police-Led Countering Violent Extremism Programs: Examining Policy Formation In Three Counterterrorism Case Studies, in Philadelphia, Pennsylvania (November 17, 2017).

Tara Lai Quinlan, Invited presentation to University of Sheffield School of Law Alumni Reception: Civil Liberties and Police Powers in the Era of Trump and Brexit, in Toronto, Canada (March 3, 2017).

Tara Lai Quinlan et al., Hosted roundtable discussion at American Society of Criminology Annual Conference: Police Diversity: What Does Real Diversity Look Like and How Does It Impact Policing Outcomes? in New Orleans, Louisiana (November 16, 2016).

Tara Lai Quinlan, invited presentation to The Bonnart Trust Autumn Reception, UK and US Approaches to Community Partnerships and Engagement in the Post-9/11 World, in London, England (November 10, 2016).

Tara Lai Quinlan, Presentation to London School of Economics' Changing Elites in Europe Conference: Researching the Counterterrorism Policymaking Elite Post-9/11, in London, England (November 27, 2015).

Tara Lai Quinlan, Presentation to University of Bath's Understanding Conflict: Research, Ideas and Responses to Security Threats Conference: Comparative Post-9/11 Counterterrorism Policing and the State of Exception, in Bath, England (June 10, 2015).

Tara Lai Quinlan, Presentation to London School of Economics Department of Sociology Annual Conference: Using Social Theory to Understand the Sociology of Counterterrorism, in Windsor, England (January 24, 2015).

Tara Lai Quinlan, Presentation to Law and Society Association Annual Conference: Can the law sufficiently change disproportionate policing practices like stop and frisk, or is something more required?, in Minneapolis, Minnesota (May 30, 2014).

Tara Lai Quinlan, Presentation to American Society of Geographers Annual Conference: New York City's Criminalization of the Appropriation of Urban Public Space Through Graffiti, in Tampa, Florida (April 11, 2014).

Tara Lai Quinlan, Presentation to British Society of Criminology Conference: Crime Reduction Alternatives to Stop and Search, in Wolverhampton, United Kingdom (July 4, 2013).

Tara Lai Quinlan, Presentation to Reprieve UK: Terrorism Policing of Muslim Suspect Communities, in London, England (November 23, 2012).

Tara Lai Quinlan, Presentation to Crimmigration Control International Net of Studies, 1st Annual Crimmigration Control Conference: Policing of Immigrant Suspect Communities by Local Police in Post-9/11 Terrorism Prevention, in Coimbra, Portugal (October 12, 2012).

Tara Lai Quinlan, Presentation to 40th Conference of the European Group for the Study of Deviance & Social Control: The Post-9/11 Construction of Muslim Criminality By Street Police In London and New York City, in Nicosia, Cyprus (September 8, 2012).

Tara Lai Quinlan, Presentation to StopWatch Policy Conference: Alternative Approaches to Stop and Search, in London, England (September 3, 2012).

PROFESSIONAL LEGAL EXPERIENCE

<i>General Counsel & Legislative Director</i>	2009 – 2011
New York State Trial Lawyers Association, New York, New York Provided legal counsel on all external and internal matters; drafted policy analysis and legislation; coordinated all aspects of legislative campaigns.	
<i>Litigation Associate</i>	2006 – 2009
Outten & Golden LLP, New York, NY For plaintiffs' employment law firm, handled all aspects of employment litigation. Delivered Continuing Legal Education (CLE) trainings on employment law & employee privacy.	
<i>Judicial Law Clerk</i>	2004 – 2006
United States Court of Appeals for the Second Circuit, New York, NY In the Staff Attorney's Office, served as judicial law clerk for all Second Circuit judges. Reviewed federal appeals; conducted legal research; drafted legal memoranda and orders.	
<u>BAR ADMISSIONS</u>	
State Bar of New York (No. 4302493)	2005
United States District Court, Southern District of New York	2005
United States District Court, Eastern District of New York	2006
<u>PUBLIC SERVICE/PRO BONO ACTIVITY</u>	
Board of Directors, Liberty, London, England	2019 – present
Stop and Search Review Panel, South Yorkshire Police, Sheffield, England	2017 – 2019
Death Penalty Casework Team, Reprieve, London, England	2012 – 2014
Member, StopWatch UK, London, England	2011 – 2014
Board of Directors, New York Civil Liberties Union, New York, New York	2009 – 2012
Continuing Legal Education Presenter, NY Chapter, Nat'l Employment Lawyers Ass'n	2006 – 2009
Issues Co-Chair, Asian American Bar Association of New York	2008 – 2010
Events Co-Chair, NY Chapter, National Asian Pacific American Women's Forum	2004 – 2006
<u>Consultation, Grants and Awards</u>	
Unbiasing Security Project, Google	2019
Impact Grants, U. Sheffield Faculty of Arts & Humanities Fund	2018
Research Grant, U. Sheffield School of Law Research Fund	2018
On CampUS Placement Grant, University of Sheffield	2016
Merit PhD Scholarship, London School of Economics	2012
Research Grant, Runnymede Trust / StopWatch	2012
40 Under 40 Rising Stars in New York State Politics, <i>The Capitol Newspaper</i>	2010
National Institute of Justice, United States Department of Justice	2006

Appendix F

October 28, 2021

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Comments on the Jury Selection Process (Pre-Judicial Conference)

Dear Judge Grant,

I am writing to offer comments in anticipation of the upcoming Judicial Conference on the Jury Selection Process.

I have been a member of the Berkeley Law faculty since 2001. I am the founding director of our Death Penalty Clinic, which I currently co-direct.

I have been engaged in the litigation and analysis of jury selection issues for close to three decades. A copy of my CV is available on my Berkeley Law [faculty page](#). It does not, however, reflect my contributions to litigation in criminal and capital jury selection matters, including amicus curiae briefs in support of the appellant or petitioner in cases such as *Williams v. California*, 571 U.S. 1197 (2014); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); and *People v. Lenix*, 44 Cal. 4th 602, 187 P.3d 946 (Cal. 2008).

I am a co-author of the 2020 report *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (“*Whitewashing the Jury Box*”).¹ The report was the first empirical investigation into peremptory challenges in our state and included the first analysis of how prosecutors are trained to exercise their strikes. *Whitewashing the Jury Box* reaffirmed what the overwhelming number of studies on peremptory challenges have shown. First, prosecutors historically and currently use their strikes to disproportionately exclude Black prospective jurors.² Second, no such evidence exists regarding

¹ Elisabeth Semel, Dagen Downard, Anne Weis, Danielle Craig & Chelsea Hanlock, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, Berkeley L. Death Penalty Clinic (2020).

² *Id.* at 82-84 nn.1-2 (collecting and discussing studies); *id.* at 13-23 (reporting empirical findings); [Report of the Connecticut Supreme Court's Jury Selection Task Force to Chief Justice Richard A. Robinson](#) (“*Connecticut Task Force Report*”) 28-30 & n.21 (2020) (collecting and discussing studies); see also Anna Offit, *Race Conscious Jury Selection*, 82 Ohio St. L.J. 201,

criminal defense attorneys' exercise of strikes.³ Third, *Batson* is an ineffectual mechanism for eliminating racially discriminatory peremptory challenges.⁴ I also participated in drafting Assembly Bill 3070 (AB 3070),⁵ which works a wholesale revision of the *Batson*⁶ inquiry, and was involved in the legislative process that culminated in the bill's passage.⁷ I note that Attachment D to the *Guide to the New Jersey Judicial Conference on Jury Selection* ("New Jersey Conference Guide") references AB 3070 and quotes from the California Legislature's findings.⁸ The attachment, however, does not include the text of AB 3070 and makes no mention of our report.⁹

Recently, the New Jersey Supreme Court incorporated "implicit or unconscious bias" into the third step of its *Gilmore* analysis, though prospectively only. *State v. Andujar*, 247 N.J. 245, 284, 314-15, 254 A.3d 606 (N.J. 2021); see *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (N.J. 1986). The Court's call for a "thoughtful, comprehensive discussion" of "the nature of discrimination in the jury selection process" is commendable. *Andujar*, 247 N.J. at 317-18.

I am mindful that the New Jersey Judiciary invited "proposals to improve all aspects of jury selection, including [several] key areas," one of which is a reconsideration of the number of statutorily-allowed peremptory challenges.¹⁰ I write specifically to oppose any proposal that New Jersey eliminate or significantly reduce peremptory challenges at this juncture. Although, it is

238 (2021) ("Judges and prosecutors disproportionately excuse Black jurors, while defense attorneys disproportionately excuse White jurors."); *id.* at 239-42 (collecting and discussing studies); *id.* at 223-37 (presenting the results of a qualitative field study based on interviews with Assistant U.S. Attorneys); Shaun L. Gabbidon, Leslie K. Kowal, Kareem L. Jordan, Jennifer L. Roberts & Nancy Vincenzi, *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002-2006*, 33 Am J. Crim. Just. 59, 62-64 (2008) (analyzing 184 federal criminal trials and finding that prosecutors exercised peremptory challenges against Black prospective jurors in close to 90% of the cases, and that reviewing courts found *Batson* violations in only 12.3% of cases).

³ See *supra* note 2.

⁴ See *supra* note 2.

⁵ A.B. 3070, also known as the "Ending Discrimination in Jury Selection Act," was authored by Dr. Shirley Weber, then a member of the California Assembly and currently California's Secretary of State.

⁶ *Batson v. Kentucky*, 476 U.S. 79 (1986). Eight years before *Batson*, the California Supreme Court held that the exercise of a peremptory challenge based on "group bias" violates the state Constitution's fair cross-section guarantee. *People v. Wheeler*, 22 Cal. 3d. 258, 583 P.2d 748, 761 (Cal. 1978).

⁷ [A.B. 3070](#), 2019-2020 Leg., Reg. Sess. (approved by Governor, Sept. 30, 2020, ch. 318) (codified at Cal. Civ. Proc. Code § 231.7).

⁸ See [Guide to the New Jersey Judicial Conference on Jury Selection](#), Attachment D, at D 6-7.

⁹ See *id.* Attachment J, at J 1-16.

¹⁰ *Id.* at 22.

not one of Professor Rose’s recommendations,¹¹ the Arizona Supreme Court recently took this step,¹² and Attachment D to the *New Jersey Conference Guide* prominently features the views of judges who endorse the elimination of peremptory challenges.¹³

After considerable study, reports in Connecticut and Washington and *Whitewashing the Jury Box* recommended a dramatic revision of the *Batson* framework; they did not recommend the reduction or elimination of peremptories.¹⁴ As you know, in 2018, the Washington Supreme Court adopted General Rule 37 (GR 37), becoming the first state to dismantle the *Batson* jury selection regime.¹⁵ AB 3070 is modeled on GR 37.¹⁶

Initial information indicates that GR 37 “has served a critical role in judicial education in eliminating racial bias,”¹⁷ and suggests that attorneys and judges are adhering to GR 37, which has led to a decline in prosecutors’ use of peremptory challenges to disproportionately strike Black jurors as well as a decrease in their reliance on reasons that are “presumptively invalid” under the rule.¹⁸ Although still few, appellate opinions reflect the application of the new standard.¹⁹

¹¹ Mary R. Rose, [Final Report on New Jersey’s Empirical Study of Jury Selection Practices and Jury Representativeness](#), 17, 20, 79-81 (June 2021) (recommending that (1) New Jersey explore ways to reduce the number of jurors who appear for duty but are “not used”; (2) positing that reducing the number of peremptory challenges may be a “mechanism” to achieve this goal; (3) acknowledging that judges’ “willingness to be generous” in granting for-cause challenges likely “facilitates” attorneys’ use of fewer peremptory challenges; and (4) recommending that should New Jersey reduce the number of peremptory challenges, “judges should not likewise pull back on granting challenges for cause”) (emphasis omitted).

¹² [Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47\(e\) of the Rules of Civil Procedure](#) (filed August 30, 2021).

¹³ See, e.g., *New Jersey Conference Guide*, *supra* note 8, at D 2-11, but see *id.* at 10-19 (placing the reduction of peremptory challenges front and center).

¹⁴ *Connecticut Task Force Report*, *supra* note 2, at PDF pages 2-5 (unpaginated documents preceding the formal report) (describing the year-long inquiry and detailing the composition and charge of each of the four subcommittees); *id.* at 16-18 (setting forth a new General Rule on Jury Selection); *id.* at 30-33 (explaining the recommendation not to limit or eliminate peremptory challenges); [Proposed New GR 37—Jury Selection Workgroup Final Report](#) (“Washington Work Group Final Report”)10-13 (2018) (presenting the Proposed New Rule—GR 37); *Whitewashing the Jury Box*, *supra* note 1, at ix-xii (providing recommendations).

¹⁵ Wash. Ct. R. General Applicability, [General R. 37](#).

¹⁶ *Whitewashing the Jury Box*, *supra* note 1, at 71.

¹⁷ Letter from Chief Justice Steven González and Justice Mary Yu, Washington Supreme Court, to Lila Silverstein, Washington Appellate Project (May 20, 2020) (on file with the office of former Assembly member Dr. Shirley Weber and with the author).

¹⁸ See GR 37(h).

¹⁹ See e.g., *State v. Listoe*, 15 Wash. App. 2d 308, 475 P.3d 534, 541 (Wash. Ct. App. 2020) (finding error under GR 37 and holding that an “objective observer aware of implicit bias could view race or ethnicity as a factor” in the prosecution’s strike of “the only Black member of the

I reviewed the *Final Report on New Jersey's Empirical Study of Jury Selection Practices and Jury Representativeness* (“*New Jersey Final Report*”) (2021) by Professor Mary Rose. The report answers three questions posed by the New Jersey Supreme Court about jury representativeness with regard to race, ethnicity and gender, examining the composition of jury pools and the successive stages of the jury selection process to identify those most likely to produce unrepresentativeness, i.e., “patterns of attrition” that “correlate with a person’s race, ethnicity or gender.”²⁰ I note, in particular, Professor Rose’s finding that “the processes that determine who appears at the courthouse constitute a systemic source of minority-group attrition because concerning levels [of] underrepresentation appeared in nearly all areas studied.”²¹ She recommends that “New Jersey’s next intensive study of jury representativeness should be aimed at understanding why the source(s) of jury pools consistently and substantially underrepresent African Americans.”²²

In its directive to Professor Rose, “the Court also expressed a particular interest in whether the existing system of peremptory challenges, and their use in trials, substantially altered the likelihood that members of various racial or ethnic groups were seated on juries.”²³ She found that seated juries are largely representative *when compared to the venirees from which they were selected*.²⁴ Professor Rose documented patterns of attrition, but did not examine individual peremptory and for-cause challenges. Her findings do not tell us whether racial or ethnic bias influenced the exercise of individual challenges or trial court rulings. Nor do they tell us whether discrimination is at play in appellate review of peremptory and/or for-cause challenges. It appears from the referral questions that Professor Rose was not asked to tackle these issues, and it is not clear whether her data set is adequate to address them.²⁵ Professor Rose acknowledged,

venire”); *State v. Omar*, 12 Wash. App. 2d 747, 460 P.3d. 225, 229 (Wash. Ct. App. 2020) (applying GR 37 to affirm the prosecution’s objection to the defense strike of an Asian juror where defense counsel’s reasons “were vague and unsubstantiated” and “might mask conscious or unconscious bias” such that “an objective observer could view race as a factor in the challenge”).

²⁰ *New Jersey Final Report*, *supra* note 11, at 22-23; *id.* at 65 (“For the majority of African Americans, and in the majority of trials examined, attrition came through . . . mechanisms [other than peremptories].”); *id.* at 85 ([A]ctively dismissing people who raise concerns about bias does not negatively affect diversity in criminal or civil cases.”).

²¹ *Id.* at iii; *id.* at 40, 43 (observing that “African Americans are underrepresented in the jury pools to some degree in each one of the 14 counties studied” and that underrepresentation is “at concerning levels in fully 10 of the 14 areas studied”) (emphasis omitted); *id.* at 91 (“[T]he best correlate of a diverse jury is a diverse venire.”).

²² *Id.* at 46.

²³ *Id.* at 23.

²⁴ *E.g.*, *id.* at 69 (concluding that “peremptory challenges are rarely the primary way that minority groups experience attrition from juries”) (emphasis omitted); *id.* at 86 (concluding that “active use of for-cause challenges does not harm jury diversity in criminal cases, and particularly in civil cases”).

²⁵ For example, criminal trials comprised only 27% of the total number of trials studied (26 criminal trials in contrast to 69 civil trials). *Id.* at 33. Professor Rose’s unit of measure was the

“The data do NOT support the conclusion that attorneys ignore race when using peremptory challenges . . . [E]ven though attorney behavior did not stand out as the key systematic explanation for levels of representation on juries, evidence for some amount of racial patterning of strikes did emerge.”²⁶

In the face of overwhelming evidence across time and geography that prosecutors exercise their peremptory challenges to disproportionately remove Black prospective jurors,²⁷ it would be a mistake for the New Jersey Supreme Court to conclude that the state does not have a “*Batson* problem.”²⁸ There is a through line from the historical and present-day discriminatory treatment of Black and Brown people to prosecutors’ discriminatory peremptory challenges and the judiciary’s endorsement of the reasons for these strikes. We describe this trajectory in *Whitewashing the Jury Box*.²⁹ The starting point of our present-day analysis was Justice

particular trial as opposed to the individual juror. *See, e.g., Id.* at 49 (Tbl. VI.1), 51 (Tbl. VI.2), 53 (Tbl. VI.3). The adequacy of the sample size also may be different when the referral question is different as, for example, when the referral question asks whether race discrimination influenced the exercise of individual peremptory or for-cause challenges or judicial decisions on those challenges.

²⁶ *Id.* at viii-ix.

²⁷ *See supra* note 2.

²⁸ There appears to be a contradiction between Dr. Rose’s finding that, in New Jersey, “peremptory challenges are rarely the primary way that minority groups experience attrition from juries” and the guide’s assertion that the exercise of peremptory challenges “intensifi[es]” the underrepresentation in jury venires. *Compare New Jersey Final Report, supra* note 11, at 69 with *New Jersey Conference Guide, supra* note 8, at 19. Also, the guide quotes from Black jurors’ descriptions of the profound harms that they suffered because of their exclusion by peremptory strikes. *See New Jersey Conference Guide, supra* note 8, at 19 (highlighting the testimony of young Black woman before the Washington Supreme Court); *id.* Attachment L, at L 4-6 (providing examples from the Equal Justice Initiative’s 2010 report, [Illegal Racial Discrimination in Jury Selection: A Continuing Legacy](#) (“Illegal Racial Discrimination”), which examined peremptory challenges in eight southern states). The guide fails to mention that these were almost exclusively the accounts of jurors who were removed by prosecution strikes and that neither EJI nor the Washington Jury Selection Work Group recommended the elimination of peremptory challenges. *See Illegal Racial Discrimination, supra*, at 44-50 (presenting recommendations); *Washington Work Group Final Report, supra* note 14, at 3 (concluding that “[e]liminating peremptory challenges is not the preferred way to address juror discrimination”). This year, the Equal Justice Initiative released [Race and the Jury: Illegal Discrimination in Jury Selection](#). Again, EJI did not recommend the elimination of peremptories. Rather, it proposed reforms along the lines of GR 37 and AB 3070. *See* <https://eji.org/report/race-and-the-jury/what-needs-to-happen/#examples-from-across-the-country>.

²⁹ *See Whitewashing the Jury Box, supra* note 1, at 29-65 (describing how implicit bias taints peremptory challenges, prosecutors’ continued resistance to *Batson*—including an analysis of California prosecution training materials—and the California Supreme Court’s resistance to *Batson*).

Marshall's prediction that the *Batson* framework would fail to eradicate race-based peremptory challenges and his explanation of why its protections would prove to be "illusory."³⁰

Among his concerns, Justice Marshall "described the ease with which prosecutors would be able to 'assert facially [race] neutral reasons,' especially when they rely on a prospective juror's demeanor, thus 'creating a difficult burden' for the judge who must assess the credibility of those reasons."³¹ *Whitewashing the Jury Box* found that "[p]rosecutors' reasons for striking jurors correlate with racial stereotypes."³² Our study of 683 California appellate court *Batson* opinions over a 12-year period showed that prosecutors relied on demeanor as a basis for their strikes in over 40% of the cases, jurors' views that the criminal legal system or law enforcement is racially- or class-biased in over 34% of the cases, and jurors' prior contact with law enforcement or the criminal legal system in more than 21% of the cases.³³

Judicial norming of racial proxies and stereotypes as "race-neutral" is among the most insidious and effective ways in which *Batson* has been crippled; this is particularly so when implicit bias is at work.³⁴ In the *Batson* context (though not only there), tolerance of racial bias is something of a feedback loop: prosecutors' explanations for peremptory challenges of Black jurors that are racial proxies, judicial approval of those explanations, and the training of prosecutors to employ these judicially-sanctioned "race-neutral" reasons, with the result that the list of acceptable reasons appears almost infinite.³⁵ Recently, California Supreme Court Justice Goodwin Liu, a critic of the majority's *Batson* jurisprudence and advocate for a "course correction,"³⁶ wrote:

³⁰ See *id.* at 8 (discussing and quoting Justice Marshall's concurring opinion in *Batson*, 476 U.S. at 105-06) (Marshall, J., concurring).

³¹ *Id.* at 8 (quoting *Batson*, 476 U.S. at 105-06) (Marshall, J., concurring).

³² *Id.* at 15.

³³ *Id.* at 15 and Fig. 3.

³⁴ See, e.g., *Illegal Racial Discrimination*, *supra* note 28, at 16-18 (discussing prosecutors' reliance on and courts' tolerance of reasons that "do[] not explicitly mention race" but are "stereotype-based" reasons); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 156-58 (2010) (discussing studies on implicit bias and judicial decision-making); *Whitewashing the Jury Box*, *supra* note 1, at 52-65 (describing five ways in which the California Supreme Court's *Batson* decisions over the past three decades have turned a blind eye to discrimination against Black prospective jurors).

³⁵ *Whitewashing the Jury Box*, *supra* note 1, at 49-51 (examining California prosecutors' jury selection training materials, which include dozens of judicially approved race-neutral justifications. E.g., *id.* at 50 ("The Inquisitive Prosecutor's Guide list 77 race-neutral reasons for striking a juror.") The district attorney training materials referenced in *Whitewashing the Jury Box* are available on the Berkeley Law Death Penalty Clinic's [website](#)).

³⁶ See, e.g., *People v. Rhoades*, 8 Cal. 5th 393, 453 P.3d 89, 139 (2019) (Liu, J., dissenting); see *Whitewashing the Jury Box*, *supra* note 1, at 53-65 (highlighting some of Justice Liu's concurring and dissenting opinions in *Batson* cases).

To many people, excluding qualified Black jurors based on their negative experiences with law enforcement or the justice system must seem like adding insult to injury. It has been more than 30 years since this court has found racial discrimination in the peremptory strike of a Black juror. Over the decades, California courts have repeatedly upheld the exclusion of Black jurors for these reasons. It is time to reassess whether the law should permit the real-life experiences of our Black citizens to be devalued in this way. At stake is nothing less than “public confidence in the fairness of our system of justice.”³⁷

Absent changes that bring unconscious, judicially-sanctioned but discriminatory practices into consciousness and prohibit them, behavior will not change.³⁸ This acknowledgement is key to the structural reformulation of *Batson* that GR 37, AB 3070, and the *Connecticut Task Force Report’s* recommendations aim to accomplish.³⁹ The historical, precedential, and empirical record suggest that eliminating peremptory challenges without—as GR 37 and AB 3070 do—explicitly identifying reasons historically associated with race discrimination and erecting legal barriers against their use will lead to greater tolerance of explicit, implicit, and institutional bias in the exercise of cause challenges. These structural guardrails are imperative to seating juries that are representative *and cross-sectional*.⁴⁰

³⁷ *People v. Triplett*, 48 Cal. App. 5th 655, 267 Cal. Rptr. 675, 692-93 (Cal. Ct. App. 2020) (Liu, J., dissenting from the denial of review) (quoting *Batson*, 476 U.S. at 87) (citations omitted). “Decades of social science research confirms that African Americans and Whites differ in their views of the criminal legal system, with more Blacks consistently expressing the view that the system is racially discriminatory. The reasons for the divide in perception are embedded in the historic and present-day differences . . . between how the two groups experience the criminal legal system.” *Whitewashing the Jury Box*, *supra* note 1, at 40; *id.* at 38-40 (discussing the empirical evidence that the criminal legal system, from police stops to executions, disproportionately targets and punishes Black people); *id.* at 37-43 (summarizing the data on how Black and white people view criminal justice issues); *see also* Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 *Yale L. & Pol’y Rev.* 387, 394 (2016) (observing the racial disparities in the treatment of Black and white people throughout the criminal legal system “harm the individuals that they directly affect and come at a great price for the nation--a diminished view of the justice system and a racial divide between the way that Whites and people of color view our criminal justice system”).

³⁸ *See Whitewashing the Jury Box*, *supra* note 1, at 34 (discussing studies finding that instructions against bias were ineffective in decreasing biased decision-making).

³⁹ *See, e.g.*, A.B. 3070, Sec. 1(a) (In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.”).

⁴⁰ “Bringing together a diverse group of jurors with different life experiences and insights not only preserves ‘the right to trial by a jury drawn from a representative cross-section of the community’ but also helps to achieve impartiality.” *Andujar*, 247 N.J. at 296-97 (quoting

Professor Rose concludes, “Judges in New Jersey use cause challenges with remarkable frequency.”⁴¹ They account for the removal of “over half of all venire persons” in criminal cases and “for just under 40% of the exists from [civil] jury service.”⁴² As noted above, Professor Rose “effectively found no relationship between a juror’s racial or ethnic background and the likelihood that that person would be dismissed through a challenge for cause.”⁴³ She also posits that “in all likelihood, judges’ willingness to be generous in excusing people for cause facilitates” attorneys’ infrequent use of all their peremptory challenges.⁴⁴ Her data do not tell us, however, whether cause challenges are an unexamined source of discrimination, in effect, a shadow peremptory challenge system. This is especially so because Professor Rose’s analysis did not investigate individual for-cause challenges, that is, the grounds on which the challenges were made and granted and on which they were affirmed on appeal. There is compelling evidence that for-cause challenges are as intertwined with race discrimination as peremptory strikes.⁴⁵

Leaving the decision of who serves on juries solely in the hands of judges will not significantly reduce discriminatory jury selection, much less eliminate it. The bench remains overwhelmingly white.⁴⁶ *Batson*’s failure illustrates what the social science evidence establishes: judges are no more impervious than attorneys to conscious and unconscious racial bias.⁴⁷ While the status quo reflects the accuracy of Justice Marshall’s foresight, it also demonstrates a failure of judicial will.⁴⁸ The New Jersey Judiciary should act to ensure that criminal defendants, who

Gilmore, 103 N.J. at 524-25); *see also Wheeler*, 538 P.2d, at 755, 761 (acknowledging the diversity of groups to which jurors “in our heterogenous society” belong; agreeing that it is “unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups”; and concluding that “overall impartiality” is achieved by “the representation of a variety of such groups on the jury”).

⁴¹ *New Jersey Final Report*, *supra* note 11, at 85 (emphasis omitted).

⁴² *Id.* at 85-86.

⁴³ *Id.* at 82 (emphasis omitted).

⁴⁴ *Id.* at 80.

⁴⁵ *See generally*, Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785 (2020);

⁴⁶ Janna Adelstein & Alice Bannon, [State Supreme Court Diversity -- 2021 Update](#), Brennan Ctr. for Justice (April 2021) (finding that “across all state high courts, just 17 percent of justices are Black, Latino, Asian American or Native American,” although “people of color make up almost 40 percent of the U.S. population”); New Jersey Supreme Court Committee on Minority Concerns, [2017-2019 Report](#), 33 (Tbl.1) (reporting that, as of 2019, there were no Black or Asian American justices and there was one Latinx justice on the New Jersey Supreme Court; Black members comprised 8.8% of the Appellate Division and Latinx members comprised 5.9%, with no Asian-American members; 8.9% of the Superior Court, Trial Division judges were Black, 6.8% were Latinx, and 1.3% were Asian American).

⁴⁷ *See Bennett*, *supra* note 34.

⁴⁸ *See, e.g., People v. Chism*, 58 Cal. 4th 1266, 324 P.3d 183, 245 (Cal. 2014) (Liu, J., concurring and dissenting) (observing that the California Supreme Court’s *Batson* jurisprudence . . . leaves

are predominantly men and women of color, can participate meaningfully in the selection of their juries and that the explicit and implicit barriers to jury service for men and women of color are removed.

Thank you for the opportunity to provide these comments. I would be pleased to answer any questions.

Sincerely,



Elisabeth Semel

one to wonder whether any circumstance, short of an outright admission by the prosecutor will ever suffice to prove a violation”) (citation omitted); *State v. Saintcalle*, 178 Wash. 2d 34, 309 P.3d 326, 335 (Wash. 2013) (en banc), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (Wash. 2017) (“In over 40 cases since *Batson*, Washington appellate courts have *never* reversed a conviction based on a trial court’s erroneous denial of a *Batson* challenge.”); *Whitewashing the Jury Box*, *supra* note 1, at 23-24 (showing that over a 30-year period, the California Supreme Court found *Batson* error in 2.1% of the cases and that the state courts of appeal found error in 2.6% of the cases); *id.* at 52-65 (analyzing the California Supreme Court’s resistance to vigorous enforcement of *Batson*); *see also*, Daniel R. Pollitt & Brittany P Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1962-63 (2016) (examining published opinions and revealing that it had been 30 years since the North Carolina Supreme Court found a *Batson* violation); Jeffrey Bellin & Junichi P. Semitus, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011) (reviewing 269 federal civil and criminal *Batson* decisions over a nine-year period, and finding that relief in the form of a new trial was granted in fewer than seven percent of the cases); *Illegal Racial Discrimination*, *supra* note 28, at 22 (observing that though it had decided the *Batson* claims of more than 100 defendants, Tennessee appellate courts “have never reversed a criminal conviction because of racial discrimination during jury selection”).