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**Interpretation and Implementation of *Duren v. Missouri* (1978)
and *Batson v. Kentucky* (1986) in Five States**

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Introduction

Discrimination in the judiciary reached a new level of public salience as white police officers shot unarmed black youths throughout the 2010s, yet faced no consequences in the courts. No less alarming, African Americans form 40% of the total correctional population despite comprising 13% of the U.S. population.¹ Movements like Black Lives Matter attest to mounting frustration with the judiciary's role in these trends. Against this backdrop, a better camouflaged form of discrimination impedes justice just as much, but without the same publicity. Jury discrimination prevents minorities, women, and members of the LBGTQ community from enjoying their constitutional right to jury service. Defendants suffer equally, for discrimination excludes jurors who share their backgrounds from their juries. Diverse juries reach verdicts more objectively than their homogenous counterparts, for a given juror must temper her group-derived predilections to work harmoniously with co-jurors from backgrounds different than her own. The judiciary must eradicate jury discrimination if it is to treat jurors and defendants with true impartiality.

Jury discrimination's chief mechanism is the peremptory strike. During *voir dire*, attorneys pose questions to prospective jurors, or venirepersons, to determine whether any venirepersons are too biased to render an impartial verdict. Attorneys ask venirepersons whether they know the defendant, whether they have had any negative experiences with the judiciary, and whether they believe they can be impartial. Certain answers typically prompt more specific lines of questioning. Venirepersons deemed too partial to sit on a jury may be removed from the venire panel - that is, the assemblage of venirepersons - either by a challenge for cause or a peremptory strike. Unlike challenges for cause, peremptory strikes allow attorneys to

¹ Sawyer, Wendy and Peter Wagner March. "Mass Incarceration: The Whole Pie 2019." Prison Policy Initiative. March 19, 2019.

<https://law.loyno.edu/sites/law.loyno.edu/files/images/Class%2020%20US%20Mass%20Incarceration%20PPI%202019.pdf>

strike venirepersons at will without explaining their reasoning to presiding trial judges. Federal jurisprudence prohibits peremptory strikes only on the basis of intentional discrimination on the basis of race, ethnicity, or gender. But even these prohibitions are hopelessly weak in their current form, for opposing counsel and trial judges rarely have sufficient evidence to argue or determine that a peremptory strike's proponent intended to discriminate. Further complication arises when unconscious bias leads counsel to use peremptory strikes discriminatorily without even realizing. Many upstanding attorneys believe in civil rights and abhor discrimination of any kind, yet unconsciously harbor prejudices that can inform their well-intentioned decisionmaking. We must bear in mind that discriminatory outcomes do not require the involvement of willful discriminators.

A Brief History of Jury Discrimination Reform at the Federal Level

The U.S. Supreme Court's *Duren v. Missouri* (1978) and *Batson v. Kentucky* (1986), with their respective jurisprudential progenies, comprise the federal judiciary's modern contribution to fighting jury discrimination. Until *Duren*, excluding venirepersons based on gender and race had been commonplace and without serious challenge. The Court's *Hoyt v. Florida* (1961) unanimously condoned jury discrimination against women. The *Hoyt* Court felt discrimination was justified to shield women from the "filth, obscenity, and obnoxious atmosphere... of the courtroom."² By contrast, the *Taylor v. Louisiana* (1975) Court concluded that "if [women] are systematically eliminated from jury panels, the Sixth Amendment's fair cross-section requirement cannot be satisfied."³

Duren built on this foundation by ruling that the Sixth Amendment's requirement of "an impartial jury of the State and district wherein the crime shall have been committed," and the Fourteenth Amendment's Equal Protection Clause, together mandate that juries be drawn from

² *Hoyt v. Florida*, 368 U.S. 57 (1961).

³ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

a “fair-cross section” of a jurisdiction’s community. Defense counsel can “[establish] a *prima facie* violation of the fair-cross-section requirement” to counteract the discriminatory denial of such a jury by opposing counsel or by a statute. In order to establish a *prima facie* violation, the defendant must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”⁴ *Duren* targeted discriminatory venireperson selection statutes. Before *voir dire*, a court selects residents of its jurisdiction to appear on a venire panel. State-level statutes govern this stage of jury selection. Many such statutes have explicitly or surreptitiously excluded minorities and women from venire panels. *Duren* abolished this form of discrimination on paper; whether a venire selection statute excludes protected classes is harder to determine than the *Duren* Court foresaw.

Peremptory strikes, which decide a jury’s makeup after venire selection, are *Batson’s* territory. *Batson*, while far more influential than its predecessors, was not the first decision to prohibit discriminatory peremptory strikes. *Hernandez v. Texas* (1954) concerned a Mexican-American petitioner who was systematically denied a jury containing jurors of his race, albeit not by the use of peremptory strikes. The *Hernandez* Court ruled, “When the existence of a distinct class is demonstrated, and it is shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.” Moreover, “Petitioner had the constitutional right to be indicted and tried by juries from which all members of his class were not systematically excluded.”⁵ Though the *Hernandez* Court considered only venire selection statutes, this language presumably applied to peremptory strikes, which can “systematically exclude” “members of [a]

⁴ *Duren v. Missouri*, 439 U.S. 357 (1978).

⁵ *Hernandez v. Texas*, 347 U.S. 475 (1954).

class.” Peremptory strikes definitively entered the picture in *Swain v. Alabama* (1965), after defendant Swain’s prosecutor’s peremptorily struck every African American on the venire. Swain argued that this instance, as well as the same prosecutor’s history of similar misconduct in previous cases, amounted to a *prima facie* case of racial discrimination under *Hernandez*. Ruling for the prosecutor, the Court nonetheless admonished:

[W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance... These ends the peremptory challenge is not designed to facilitate or justify.⁶

Discriminatory use of peremptory strikes, then, were held to violate the Fourteenth Amendment if and only if they were found to be part of a multi-case history of prosecutorial discrimination. This placed on peremptory strike opponents - that is, counsel opposing a given peremptory strike - a crippling burden of proof. It was nearly impossible to prove that a prosecutor had used peremptory strikes discriminatorily over the course of multiple cases, especially in jurisdictions that kept incomplete records. Strike opponents needed a framework to prove discriminatory use of peremptory strikes in the course of a single *voir dire*.

State courts parted ways with *Swain* well before the U.S. Supreme Court. The California Supreme Court’s *People v. Wheeler* (1978), ruling on the permissibility of a prosecutor’s strike of every black venireperson during *voir dire*, drew up a three step procedure by which: (1) strike opponents advance a *prima facie* case that certain venirepersons were struck “because of their group association rather than because of any specific bias;” (2) strike proponents “show if [they] can that the peremptory challenges in question were not predicated on group bias alone,” including a requirement that strikes be related to the “to the particular case on trial or its parties or witnesses;” and (3) “if the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted.”⁷ Unlike

⁶ *Id.*

⁷ *People v. Wheeler*, 22 Cal.3d 258 (1978).

Swain, *Wheeler* allowed strike opponents to challenge a peremptory strike in the context of a single *voir dire* without investigating a given strike proponent's conduct in previous cases. *Wheeler* thus lowered the strike opponent's burden of proof relative to *Swain*. Challenging discriminatory peremptory strikes became feasible, albeit still extremely difficult, for California litigants. Even so, strike proponents could easily invent a justification for their strike related "to the particular case on trial" if they had in fact meant to discriminate. Unconscious bias also fell completely beyond *Wheeler's* reach. The Supreme Judicial Court of Massachusetts, unaware of or unconcerned by these shortcomings, adopted a framework much like *Wheeler* in *Commonwealth v. Soares* (1979).⁸ Jury discrimination reform had begun a slow but sure upward trajectory that continues today.

The U.S. Supreme Court decided *Batson* with California and Massachusetts as its models. At the trial level, defendant *Batson's* counsel moved to discharge the jury on the grounds that the State had peremptorily struck all four black venirepersons to secure an all-white jury. Counsel advanced an argument based on the Sixth and Fourteenth Amendments' right to a jury drawn from a "fair cross-section of the community."⁹ The trial judge dismissed the motion and defendant *Batson* was convicted. *Batson* ultimately found relief in the U.S. Supreme Court. Thirty-two years after the *Hernandez* Court ruled the discriminatory use of peremptory strikes unconstitutional, the *Batson* Court finally issued a three-step framework to enforce that ruling:

[1] [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, supra, at 430 U. S. 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S. at 345 U. S. 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race... [2] Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for

⁸ *Commonwealth v. Soares* 377 Mass. 461 (1979).

⁹ *Duren* had, of course, affirmed this right nine years earlier.

challenging black jurors... related to the particular case to be tried. [3] The trial court then will have the duty to determine if the defendant has established purposeful discrimination.^{10 11}

Batson's three steps, which overruled at the federal level *Swain's* requirement that a strike's discriminatory character be proven through a multi-case inquiry, resembled their *Wheeler* and *Soares* predecessors without copying them precisely. Step one's *prima facie* case of "an inference" of discrimination improves on, but nonetheless draws from, *Wheeler's prima facie* case of a "'strong likelihood' of discrimination." The "neutral explanation" required at *Batson's* step two, however, was novel, and has long been an especially difficult area of *Batson* interpretation. Too many step two explanations are of indeterminate neutrality. Worse, as under *Wheeler*, strike proponents can invent satisfactory step two explanations to mask discrimination. The Court's main, vague guidance on weighing the proponent's step two explanation against the opponent's *prima facie* case was for "the trial court [to] consider all relevant circumstances." This falls woefully short of a bright line rule to inform the trial judge's ruling at step three. Hence only the appeals process constrains a judge's step three determination. Depending on one's perspective, the trial judge's step three leeway may seem sensible or inordinate. As for apportionment of the burdens of proof, *Batson* replaced *Swain's* crippling burden with a still-onerous requirement that opponents prove purposeful discrimination. Yet discrimination is not always purposeful. The Sixth and Fourteenth Amendments obligate us to reform accordingly.

Justice Marshall's concurrence famously called for the peremptory strike's complete abolition, contending, "Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." A judge's own unconscious racism, Marshall continued, could so bias him in the strike proponent's favor that a *Batson* challenge would have no hope of success. Marshall took particular issue with step two. A strike proponent's "easily generated [step two]

¹⁰ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹¹ The bracketed numbers, my own addition, demarcate each of the three steps for clarity.

explanations” could mask discriminatory motives, conscious or unconscious, such that “the protection erected by the Court today may be illusory.” Marshall’s final argument for the peremptory strike’s abolition was the precedence that a venireperson’s Fourteenth Amendment rights take over counsel’s merely statutory right to the peremptory strike.¹²

Though unswayed by Marshall’s dissent, the Court revised the *Batson* framework fairly regularly throughout the 1990s and 2000s. *Edmonson v. Leesville Construction Company* (1991) extended *Batson*’s purview to civil trials. *J.E.B. v. Alabama ex rel. T.B.* (1994) further extended the *Batson* framework to peremptory strikes made solely on the basis of sex. *Hernandez v. New York* (1991) and *Purkett v. Elem* (1995) jointly comprise the most significant alteration to *Batson*. The *Hernandez* Court held that at step two, “the issue is the facial validity of the prosecutor’s explanation. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”¹³ This language contradicts the original *Batson* requirement that a strike proponent’s step two explanation be “related to the particular case to be tried.” The “issue” at step two, then, went beyond “facial validity” under *Batson*’s original terms.

The *Purkett* Court doubled down on this reinterpretation of step two. *Purkett*’s defense counsel raised a *Batson* challenge during *voir dire* after the prosecutor struck two African American men. The prosecutor explained, “[venireperson] number twenty-two... appeared to me to not be a good juror for... the fact that he had long hair hanging down shoulder length, curly, unkempt hair... And juror number twenty-four also has a mustache and goatee type beard... And the mustaches and the beards look suspicious to me.” Needless to say, a venireman’s physical appearance has no bearing on his ability to render an impartial verdict. But an uninspired discriminator might think of no better pretext to advance at step two. Therefore, such a tangentially related explanation merits stricter scrutiny than does an explanation concerning a

¹² *Batson v. Kentucky*, Marshall, J., concurring.

¹³ *Hernandez v. New York*, 500 US 352 (1991).

venireperson's *voir dire* responses. Moreover, as flimsy an explanation as the aforementioned prosecutor's could hardly rebut a true *prima facie* case of discrimination.

The *Purkett* Court ruled otherwise: "It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." This language distorts the original *Batson* requirement of a *related* race-neutral reason at step two. Refer to the block quote above of *Batson*'s original three steps, and note that the relevance requirement is not part of step three but of step two.¹⁴ The *Purkett* majority justified its ruling by claiming that its "warning [that a step two explanation must be related to the case at hand] was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." But this is nonsense. "Related to the particular case to be tried" was one of the few unambiguous dicta in the original *Batson* opinion. It begged no interpretation, much less reinterpretation. A reason *related* to a given case is one that involves the case facts, one or more of the parties to the case, or a venireperson's ability to be impartial. A venireperson's hair, curly, unkempt, or otherwise, involves none of these things; is thus *unrelated*; and, accordingly, cannot pass muster under *Batson*'s original step two. *Purkett*'s majority was literate enough to know the meaning of the word "related." That it fallaciously reinterpreted the *Batson* Court's use of this word suggests either carelessness or intentional diminishment of *Batson*'s protections. Either way, the result is the same: strike proponents can disguise discriminatory peremptory strikes with whatever absurd, pretextual step two explanations suit their fancies. *Batson*'s "related" requirement had put up a pitiful wall against pretextual explanations; *Purkett* removed even this meager threat to the peremptory strike's uninhibited use.

¹⁴ I encourage curious readers to inspect the full *Batson* decision, so they can see for themselves that the "related" requirement indeed falls under step two.

Miller-El v. Dretke (2005) seems on its surface to counterbalance *Purkett* by expanding the number of “relevant circumstances” a trial court can properly consider. The *Miller-El* Court ruled that the trial court, Texas Court of Criminal Appeals, and Fifth Circuit Court of Appeals had “blink[ed] reality” by finding no “clear and convincing evidence” of discrimination by Miller-El’s prosecutors. Comparison of questions posed to black and white venirepersons, statistical analysis demonstrating the removal of 91% of black venirepersons, and the prosecutors’ own “notes of the race of each potential juror” compelled a ruling in Miller-El’s favor.¹⁵ The Court’s citation of these forms of evidence does laudably help trial courts determine what counts as a relevant circumstance. The *Miller-El* Court did not, however, *require* trial courts to consider these forms of evidence; nor did it draw up a list of “relevant circumstances,” or even define this term. Commentators who consider *Miller-El* an antidote to *Purkett*, then, fail to see the former’s narrow scope. *Purkett*’s far-reaching pronouncements about how to conduct a *Batson* inquiry remain more potent than the fact-specific *Miller-El* decision. Conscious and unconscious discrimination can hide as easily as ever behind *Purkett*’s curtain.

Johnson v. California (2005) is the U.S. Supreme Court’s most recent *Batson* case to have broken new ground. The California Supreme Court had approved the trial court’s ruling against Johnson’s *Batson* challenge on the ground that defense counsel had not proven at step one that prosecution had “more likely than not” struck black venirepersons discriminatorily. But the U.S. Supreme Court held that California’s “more likely than not” standard impermissibly placed a higher burden of proof on the strike opponent than *Batson*’s original step one requirement of a *prima facie* inference of discrimination.¹⁶ Though *Johnson* is laudable for theoretically prohibiting state courts from increasing the strike opponent’s burden of proof at step one, that burden remains nearly insurmountable in all but the most blatant cases of

¹⁵ *Miller-El v. Dretke*, 545 U. S. 231 (2005).

¹⁶ *Johnson v. California*, 545 U.S. 162 (2005).

discrimination.¹⁷ *Snyder v. Louisiana* (2008), *Foster v. Chatman* (2016), and *Flowers v. Mississippi* (2019) made only shallow changes in the *Batson* jurisprudence, reaffirming existing tenets instead of filling gaps.

Literature Review

Commentators tend to deal with the two constitutional approaches to jury discrimination reform - Fourteenth Amendment equal protection, governed by *Batson*, and Sixth Amendment fair cross-section, governed by *Duren* - separately. Slusser et al. (1996), a guide to *Batson* inquiries in federal court, note that strike opponents cannot rely solely on the number of minority venirepersons struck; attorneys must supplement their numerical observations with a thorough record of voir dire proceedings, such as the questions asked of minority venirepersons versus those asked of whites.¹⁸ El-Mallawany (2006) examines the effect *Johnson v. California* (2006), arguing that this decision allowed less persuasive *prima facie* cases to pass muster at step one. A higher *prima facie* threshold could result in more persuasive *prima facie* cases and, consequently, more successful *Batson* challenges.¹⁹

Many authors have cited *Purkett v. Elem* (1995) as a deathblow to *Batson*'s already ineffective three step process. Critics predicted as much even before *Purkett*'s effects were clear, and later writers have found those initial predictions prescient. Laeser (1998) noted that clever attorneys could fabricate race neutral reasons under *Purkett*, and that judges were having too hard a time determining what constitutes race neutrality for the *Purkett* system to remain tenable. While Laeser did note the potential validity of abolishing peremptories, he also

¹⁷ That the strike opponent's modern burden of proof is lower than *Swain*'s does not make it readily surmountable.

¹⁸ William C. Slusser; David Hricik; Matthew P. Eastus, "Batson, J.E.B., and Purkett: A Step-by-Step-by-Step Guide to Making and Challenging Peremptory Challenges in Federal Court," *South Texas Law Review* 37, no. 1 (January 1996): 127-160.

¹⁹ Deana Kim El-Mallawany, "Johnson v. California and the Initial Assessment of Batson Claims," *Fordham Law Review* 74, no. 6 (May 2006): 3333-3364.

examined ways of modifying the peremptory system.²⁰ Burnett (2006) went further, arguing that the potential for attorneys to put forth pretextual race neutral reasons at the step two process, and the associated difficulty of determining what constitutes a pretext, support the elimination of peremptory strike altogether.²¹ Antony (2005), drawing from psychology, notes that even if an attorney believes her race neutral reasons to be genuine, they may be based off of subconscious racial stereotypes; neither step two of *Batson*, nor any federal jurisprudence, addresses this potential.²² There are exceptions to the chorus of anti-*Purkett* critics, mainly those who see the peremptory strike as too sacrosanct to reform significantly. Neese (1996) praises *Purkett* for “resuscitating the non-discriminatory hunch” - a strike proponent’s subjective discomfort with a venireperson that need not relate to the case facts. According to Neese, *Batson* unacceptably limited non-discriminatory hunches by requiring race-neutral reasons to be case-related, thereby mortally wounding the peremptory strike.²³ Neese spends little time addressing the new potential for discrimination under *Purkett* as it is secondary to his defense of peremptories. Most of those who write about step two, by contrast, are motivated by concerns about equal protection, suggesting that Neese’s ideological cohorts are satisfied enough with the status quo that they feel little need to argue their views publicly.

Commentators have pointed out that although step two fosters jury discrimination, step three does allow a trial judge to call out a pretextual race neutral reason and disallow a peremptory strike. The problem is that many if not most trial judges refuse to make such a call even when the evidence of discrimination is overwhelming. Bennett (2010) observes that “most

20 Jason Laeser, "Jurors and Litigants Beware - Savvy Attorneys Are Prepared to Strike: Has *Purkett v. Elem* Signaled the Demise of the Peremptory Challenge at the Federal and State Levels," *University of Miami Law Review* 52, no. 2 (January 1998): 635-660.

21 Arthur L. Sr. Burnett, "Abolish Peremptory Challenges - Reform Juries to Promote Impartiality," *Criminal Justice* 20, no. 3 (Fall 2005): 26-35.

22 Antony Page, "*Batson's* Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge." *Boston University Law Review* 85, no. 155 (2005): 156-261.

23 D. John Jr. Neese, "*Purkett v. Elem*: Resuscitating the Nondiscriminatory Hunch," *Houston Law Review* 33, no. 4 (Winter 1996): 1267-1282.

trial court judges will only find deceit [by strike proponents] in extreme situations.” Bennett also expresses concerns that judges, like strike proponents, may harbor unconscious biases that could influence step three.²⁴ Choy (1997) identifies step three’s dilemma as a question of how, exactly, a judge should determine pretextuality. She advocates four factors - relevance of the reason, whether the struck venireperson was questioned, disparities in questioning, and disparities in application of the reason - to be used by trial judges in deciding step three.²⁵ Galan (2001) notes a case in the U.S. Court of Appeals for the Tenth Circuit in which a trial judge’s acceptance of the “race neutral” reason for striking a venireperson - that a black McDonald’s employee would be overly sympathetic to minorities because of her job - was deemed valid at the appellate level.²⁶ Though Galan does not explicitly criticize the opinion, the subtext is clear: judges at trial and appellate levels accept likely pretexts at least sometimes.

In regard to the Sixth Amendment fair cross-section mandate, commentators tend to focus on the statistical degree to which certain minorities are represented. Reil (2007), for example, observes that as Hispanic populations grow in the United States, new questions arise about whether they are receiving jury summonses at the same rate as other groups. Reil argues that the Supreme Court should explicitly confirm that Hispanics are a distinct group for the purposes of the *Duren* test’s first prong. Characterizing the second prong as the “crux” of the *Duren* test, Reil highlights the need for accurate data about the proportion of jury-eligible residents in a given district to properly assess “substantial underrepresentation”; collecting such

²⁴ 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," *Harvard Law and Policy Review* 4, no. 1 (Winter 2010): 149-172.

²⁵ Tracy M.Y. Choy, "Branding Neutral Explanations Pretextual under *Batson v. Kentucky*: An Examination of the Role of the Trial Judge in Jury Selection," *Hastings Law Journal* 48, no. 3 (March 1997): 577-600.

²⁶ Galan, Thomas. "United States v. Ramirez-Soberanes: Is Sympathy towards Minorities a Race-Neutral Reason under *Batson v. Kentucky*?" *Touro Law Review* 17, no. 3 (Spring 2001): 679-694.

data regarding Hispanics is particularly difficult, as they face language and citizenship barriers to eligibility. Finally, Reil considers voter registration lists ideal for drawing venire.²⁷

Eades (2001) examined “shows” - potential venirepersons who responded to summonses - and no-shows - potential venirepersons who either ignored or did not receive summonses - in Dallas County, Texas. Just 2,214 out of 13,612 potential venirepersons appeared for jury duty, raising questions about which summonses went undelivered and why some recipients ignored their summonses. Eades found serious underrepresentation of “young adults (aged 18-34), Hispanic Americans, and “those living in households earning less than \$35,000 a year.” People in these groups are significantly less likely to get time off of work to serve; for example, “The No-shows were three times more likely than the Shows to receive no wages at all [during jury duty had they served].” Eades’ consideration of low-income people and young adults is atypical both for commentators and courts. Most do not go beyond racial minorities. Dallas County’s absolute disparities for Hispanics and low-income persons are 14% and 27%, respectively. Eades posits that although courts may find these figures troubling, it would be difficult to overcome the state’s retort that officials send summonses to randomly selected recipients from names on voter registrations and driver’s license lists. He advises fair cross-section claimants to highlight the features of Texas’ jury system, such as the six-dollar-per-day salary paid to jurors, that “make it so financially onerous that low-income people cannot afford to fulfill their civic duty.”²⁸

Re (2007) diverges from the statistical framework of other authors and focuses on theory. He identifies two conceptions of the fair cross-section requirement. The demographic conception, used in all or almost all jurisdictions in the United States, holds that juries should be drawn so that “the individuals making up a given petit jury appropriately reflect the demographic

²⁷ Stephen E. Reil, "Who Gets Counted - Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations under *Duren v. Missouri*," *Brigham Young University Law Review* 2007, no. 1 (2007): 201-258.

²⁸ Ted M. Eades, "Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County," *SMU Law Review* 54, no. Special Issue (2001): 1813-1826.

composition of the overall population.” The ultimate goal according to this conception is providing defendants with a “‘fair possibility’ of being judged by a demographically representative petit jury.” The enfranchisement conception, which Re advocates, holds that “a jury system is fairly cross-sectional when all eligible people have been given adequate—that is, fair—opportunity to participate in jury service, regardless of how demographically representative the resulting venires or juries may be.” Re’s enfranchisement approach conceives of jury duty as a form of democratic participation. Just as an election is considered legitimate when all eligible voters have the opportunity to vote, regardless of voter turnout, Re considers the Sixth Amendment’s fair cross-section requirement satisfied when all those eligible are given an equal opportunity to serve on a jury. Re argues that the demographic conception’s measurement of the representation of discrete groups is sisyphian, as it is impossible to adequately represent each of the countless groups in a given jurisdiction. He further contends that the demographic conception actually erodes impartiality by assuming certain groups are predisposed to decide cases in certain ways. The enfranchisement conception might also be more effective in promoting inclusive juries because courts need not make arbitrary judgments about the consequence of statistical figures. Instead of examining, for example, the Hispanic composition of a county versus the Hispanic composition of a jury, the enfranchisement conception asks only whether anyone, Hispanic or otherwise, has been systematically excluded. If so, there is a viable fair cross-section claim.²⁹

Many of the authors cited above consider individual state court rulings. Eades, for example, provides a window into Texas’ Sixth Amendment jurisprudence. None, however, provides a multi-state comparison of jury discrimination approaches. I will distinguish this thesis by examining five states. The treatises above also lack a joint review of *Duren* and *Batson* jurisprudence at the state level, even if there is plenty of discussion about these two approaches

²⁹ R. M. Re, “Re-justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury.” *Yale Law Journal*, 116 (2007), 1568-1614.

individually; Re discusses *Batson* to highlight flaws in the demographic conception approach, but he does not consider *Batson* reform. I will devote space to both areas of jury discrimination jurisprudence. Many authors advocate certain reforms of the jury system to ameliorate jury discrimination, such as eliminating peremptory strikes or increasing juror pay. Most of these reforms would start with jurisprudence revisions. I will make my own proposals to reform relevant jurisprudence while also considering potential statutory reforms, something less commonly seen in discussions of jury discrimination.

Statement of Purpose

Batson's federal origin distracts from jury discrimination's chief battleground: the state courts. Most defendants are tried in state courts alone; most venirepersons sit on or are excluded from state-level juries. Hence jury discrimination most often occurs, and is most often battled, without the media and scholarly commentary garnered by federal cases. To assess the fight against jury discrimination solely by examining federal cases is to overlook most of "the action." This thesis endeavors to shed light on the states' lamentably obscure implementations and interpretations of *Duren* and *Batson*. Five states - Connecticut, Florida, Louisiana, Illinois, and Washington - have been chosen for their geographical spread and varied approaches to jury discrimination. None of these states has significantly expanded upon *Duren*, and their implementations thereof evince a struggle to hew to the *Duren* Court's original intention. Three states - Connecticut, Florida, and Washington - have meaningfully expanded upon *Batson* in hopes of more effectively rooting out conscious and unconscious discrimination. Illinois and Louisiana have been comparatively unadventurous apropos *Batson*, though certain decisions of theirs merit close reading.

While I cannot provide a full nationwide picture of *Duren* and *Batson's* respective state-level statuses, I hope to introduce the reader to a representative selection of the endless improvements and perversions alike that these landmark cases have undergone, largely without the nationwide attention enjoyed by federal decisions. More importantly still, this thesis makes

the case that *Duren* and *Batson* direly need substantive reform. Jurisprudential reform of the necessary caliber requires the collaboration of federal and state courts. So far, the federal courts have neglected their share of this difficult work, leaving the state courts to enforce *Duren* and *Batson* with minimal guidance. It is not unrealistic to hope that recent state-level reform efforts in Washington and Connecticut will compel other state and federal courts to collaboratively contemplate new means of eradicating jury discrimination. For this to happen, legal minds must recognize and scrutinize state-level *Duren* and *Batson* jurisprudence beyond their own states' borders. This thesis aims to advance such study.

Chapter I: Five State-Level *Duren* Jurisprudences

Illinois

One would expect the serious constitutional responsibility of drawing a venire from a “fair cross-section of the community” to be supervised to prevent biased interference. Unfortunately, as the Illinois’ Third District Court of Appeals found in *People v. Hollins* (2006), jury coordinators sometimes have the leeway to manipulate venires as they see fit. During voir dire, the first sixteen venirepersons called belonged to a minority group. Thirteen were black. Defendant Hollins’ counsel, aware that the great majority of Kankakee County’s residents were white, motioned for a new trial on the grounds of racial disparity in the voir dire process.

A subsequent investigation revealed that the Kankakee County’s jury coordinator had manually changed the status codes of certain minority jurors to create a custom venire panel that intentional overrepresented minorities. Though the trial court ruled against Hollins, the Court of Appeals considered the manipulation of the venire sufficient to satisfy all three prongs of the *Duren* test even without the aid of demographic statistics to show that whites were underrepresented. Importantly, the *Hollins* court rejected the trial court’s conclusion that defense counsel waived the right to raise a *Duren* objection because he did not object during voir dire. Instead, the *Hollins* court cited the U.S. Supreme Court’s *Brookhart v. Janis* (1966), in which the Court ruled that “there is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was ‘an intentional relinquishment or abandonment of a known right or privilege.’”^{30 31}

Though the *Hollins* court did not address it directly, *Hollins* reveals a facet of jury discrimination rarely remarked upon and largely unaddressed. Unsupervised county employees can manipulate venires in relative secrecy. Although this incident is not necessarily

³⁰ *People v. Hollins*, 366 Ill. App. 3d 533 (2006).

³¹ *Brookhart v. Janis*, 384 U.S. 1 (1966).

representative of jury coordinators broadly, *Hollins* reminds us that those with responsibilities of constitutional magnitude need oversight. As importantly, the *Hollins* court was wise to cite *Brookhart*. Too often, potentially valid constitutional complaints are halted because of alleged waivers and other technicalities. Here, the court acknowledged that defense counsel could not have raised an informed objection during voir dire because he was unaware of the jury coordinator's conduct. No matter when counsel raises them, constitutional objections are too consequential for perfunctory defeat by technicalities.

Disconcertingly, the Third District Court has not been consistent in its consideration of *Duren* claims. In *People v. Bradley* (2004), the Third District Court set a precedent that it seems to have forgotten by the time it decided *Hollins*. Bradley appealed on the grounds that his trial counsel failed to object to the near-entirely white venire panel during voir dire. Just one of the 48 venirepersons was African-American. Trial counsel commented on this disparity, remarking, "[I]n 22 years of practicing law in these courts I've never seen a group, particularly African Americans, as underrepresented as in this case." Yet trial counsel did not advance an objection. On appeal, Bradley argued that his counsel was charged with statistically demonstrating that blacks were underrepresented; specifically, trial counsel should have shown the disparity between a county-wide black population of 28.8% and a venire representation of 3%. This is an absolute disparity of about 26%. The *Bradley* court rejected the defendant's argument on the grounds that he did not prove that a *Duren* objection would have changed the outcome of the case. The court disputed two assumptions allegedly made by the defendant: (1) that the statistics, had they been advanced by trial counsel, would have achieved a prima facie case of systematic exclusion; and (2) that the composition of the venire could not have occurred by chance. The *Bradley* court understood systematic exclusion as a trend that occurs over the

course of multiple venire assemblies, rather than as a defect that might occur in the context of a single venire.³²

Bradley and *Hollins* contemplated the *Duren* test, and by extension the constitutional rights it protects, fundamentally differently. The *Hollins* court recognized that manipulation of the venire might happen in an individual case without seeping into others, without remarking upon the jury coordinator's treatment of other cases. Yet in *Bradley*, the court opined that to satisfy the third *Duren* prong, "There needs to be some showing of underrepresentation as a pattern, with a particular group underrepresented on jury panels over a significant period of time."³³

These two approaches are at odds. Must defense counsel investigate how other venires have been assembled, or is it sufficient to show systematic exclusion in the context of one venire?

The second approach, that used in *Hollins*, is preferable, for it allows a more flexible and comprehensive view of systematic exclusion. Considering that *Hollins* followed *Bradley*, one might assume that the Third District Court changed its understanding of systematic underrepresentation in the two years separating the cases. But there is no indication that the court remembered, much less addressed, *Bradley* during this time. The *Hollins* opinion did not mention *Bradley*. This pair of opinions demonstrates not a gradual improvement in fair cross-section jurisprudence but an arbitrary, case-by-case approach.

Inconsistency is not the only troubling feature of Illinois' *Duren* jurisprudence. The Second District Court of Appeals' *People v. Flores* (1990) placed too high a burden on defendants who challenge county venire drawing methods. *Flores* alleged that Hispanics were underrepresented by Boone County's method. Statistics showed a concerning disparity: while 4.3% of Boone County was Hispanic according to the 1980 census, just 0.004% of venirepersons drawn between 1980 and 1987, or five out of 1,360, had Spanish surnames. *Flores* further argued that if Boone County's method drew venire from a truly fair cross-section

³² *People v. Bradley*, 348 Ill. App. 3d 677 (2004).

³³ *Id.*

of the community, each venire of 80 would contain about 3.44 Hispanics. Boone County's venire statistics showed a 4.6% likelihood of a twelve-person jury having one Hispanic member, yet on a representative jury that figure would be 31%. Underrepresentation stood at 90.7% based on the 1980 census. As for the venire drawing method itself, random selection from voter registrations, defense concluded that Hispanics may be less likely to vote and Boone County could better represent its minorities by selecting names from a driver's license holder list. The State leveled two arguments against the Flores' case: 1) the expert witness who analyzed the list of names was not a genealogist, and hence could not be relied upon to determine each surname's ethnicity; and 2) the census data was too old to be valid. The court accepted both of these arguments and ruled that Flores did not satisfy the second *Duren* prong.³⁴

The court's acceptance of the State's argument has concerning implications for defendants' burden of proof in *Duren* cases. First, the alleged necessity of a genealogist to determine whether a name is Hispanic conflicts with the distinctiveness of Hispanic names. Even if the expert witness had missed some Hispanics - e.g. Hispanic women who marry non-Hispanics and change their names - the defense's method would be sufficiently comprehensive to show the degree of representation. Assume that the five Hispanic names found are just a quarter of the true number of Hispanics called to venires in the relevant period; this would still constitute serious underrepresentation. The State, motivated to find as many Hispanic names as possible on the list of venirepersons called between 1980 and 1987, still found a grossly underrepresentative 14.³⁵ If the number of Hispanics called in this period reflected the Hispanic population in Boone County, we would expect to see Hispanics comprise about 4.3% of 1,360 venirepersons, or 58.48 Hispanic venirepersons. Neither the Flores' name count nor the State's name count, even if lacking, approaches 58.48 closely enough to assuage concerns about underrepresentation. It can further be surmised that Boone County did not keep any racial data

³⁴ *People v. Flores*, 193 Ill. App. 3d 501 (1990).

³⁵ *Id.*

about its venirepersons at all; otherwise, Flores would not have had to count Hispanic surnames. Requiring defendants to enlist a genealogist when there is no alternative to counting names creates too severe a burden on those seeking enforcement of their constitutional rights.

Worst of all, the *Flores* court foreclosed use of 1980 census data because of its seven-year vintage at the time of the trial, presenting a formidable barrier to advancing a *Duren* challenge. *Duren* challenges require demographic statistics to argue underrepresentation. If census data is ruled out, there may not be any other demographic data available, making the underrepresentation prong of the *Duren* test impossible to prove. Thus does the *Flores* court effectively place an insurmountable burden on *Duren* defendants without access to up-to-the-minute demographics. Any decision that effectively prevents the defense of one's constitutional rights has created too high a burden. A more prudent approach would be to permit the most recent census data available. *Flores* remains binding to this day. If today's Second District Court adheres to precedent, a defendant in 2019 may not use the most recent census data from 2010.

Connecticut

Connecticut is unusual for its use of the substantial impact test instead of absolute or relative disparity to determine whether a venire drawing procedure violates the fair cross-section requirement. In *State v. Castonguay*, decided by Connecticut's Supreme Court in 1984, the court stated that "the choice of a statistical method depends on the facts and circumstances of each case."³⁶ The disparity tests "are considered inaccurate when the distinctive group at issue represents a very small portion of the community," and the court argues that the substantial impact tests allows judges to consider underrepresentation "in terms of its impact on juries" rather than as abstract data.³⁷ ³⁸ Substantial impact is determined by calculating how many additional venirepersons of a certain ethnic group would have to be added to the average venire

³⁶ *State v. Castonguay*, 194 Conn. 416 (1984).

³⁷ *State v. Gibbs*, 254 Conn. 578 (2000).

³⁸ *State v. McCarthy*, 197 Conn. 247 (1985).

panel to achieve fully accurate representation. Connecticut has not adopted a bright line number at which systematic underrepresentation can be said to have occurred.

State v. Gibbs (2000) is a typical and instructive use of Connecticut's substantial impact approach. At the trial level, defense counsel argued that Hispanics were underrepresented on the venire and that Connecticut Gen. Stat. § 51-217(a)(3) (Rev. to 1995), which excludes from jury service anyone who "is not able to speak and understand the English language," violated the defendant's right to a jury comprised of fair cross-section of the community. The court found that "under the substantial impact test, approximately three (2.36) Hispanic persons would have to be added to every jury array of 100 persons in order to eliminate any underrepresentation," which "does not represent a substantial underrepresentation."³⁹ This figure's substantiality is completely subjective. Connecticut should either adopt a bright line number to clearly demarcate what is and is not substantial, or find a new way of determining disparity.

Jury discrimination has recently received a great deal attention in Connecticut, as the state Supreme Court's recently decided *State v. Moore* (2019) deals with venireperson diversity. Moore argued that Connecticut's judiciary must collect demographic data about venirepersons in order to make *Duren* challenges possible. The defendant in Illinois' *People v. Flores* ran against the same brick wall of insufficient demographic data, but did not go so far as to argue that the state should be required to make demographic records. Though Moore ultimately lost, the Connecticut Supreme Court's opinion indicates openness to reconsidering its *Duren* jurisprudence.

The Connecticut Appellate Court ruled against Moore in 2016. In regard to the Sixth Amendment, Moore argued that (1) the trial court incorrectly rejected his argument that blacks were underrepresented on the venire panel during voir dire and that (2) the appellate court should "mandate that the jury administrator collect demographic data so that it is able to follow

³⁹ Conn. Gen. Stat. § 51-217(a)(3) (Rev. to 1995).

the statutory directive to prevent [discrimination] in jury selection."⁴⁰ Connecticut's population is about 11% black as of the 2010 census and 6.5% black in New London County, where Moore was charged. Of about 120 prospective jurors, three African American females were the only blacks present. Moore, an African American man, filed a written objection and requested an evidentiary hearing. New London County draws venireperson names from four sources: the Department of Revenue Services, the Department of Motor Vehicles, the Department of Labor, and each town's voter registration list. Moore called six witnesses to reflect this diversity of sources. The Connecticut Judicial Branch's Jury Administrator, who organizes venires, testified that she does not collect racial data because such is not required. None of the directors of the four sources of venireperson names collects racial data about those on their lists.⁴¹

Connecticut General Statutes § 51-232 (c) requires that venireperson questionnaires include optional demographic questions including race and ethnicity "to enforce nondiscrimination in jury selection."⁴² Moore argued that this language constitutes a requirement that the state "assure a nondiscriminatory [venire] panel," and urged the Appellate Court to use its supervisory powers to enforce his reading of the statute. The State countered Moore's argument by contending that no underrepresentation had been proven, and that even had it been proven, Moore had not proven it to be caused by "race-blind" systematic venireperson selection methods. The Appellate Court ruled against Moore's underrepresentation claim because his statistics were insufficient: no demographics concerning the entire New London County jury pool or of jury-eligible black males were provided.⁴³

Although there is merit to Moore's ultimate conclusion that the court must mandate demographic data collection, his statutory argument is fatally misguided. The cited language in

⁴⁰ Defendant also claimed that the venire panel violated his right to equal protection, but this is unrelated to *Duren* claims and will not be covered here.

⁴¹ *State v. Moore*, 180 Conn. App. 116 (2018).

⁴² Conn. Gen Stat § 51-232 (2012).

⁴³ *State v. Moore*.

§ 51-232 (c) does not require the state to collect demographic data. A constitutional argument would be more persuasive. Assuming, as federal jurisprudence requires, that defendants have a Sixth Amendment right to what the *Taylor* Court described as a jury drawn from a “fair cross-section of the community,” defendants must be able to make informed challenges to venire panels. The informed challenge constitutes a subsidiary right implied by *Taylor* and by the Sixth Amendment itself. In order to make an informed challenge, defendants must have accurate demographic statistics concerning venirepersons, counties, and states. Such statistics require records of venireperson race, which New London County does not provide. Thus does New London County, likely unintentionally, deprive defendants of the opportunity to exercise their Sixth Amendment rights.

The Appellate Court’s own reasoning supports a constitutional argument for the requirement of demographic statistics collection: “Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts.”⁴⁴ New London County’s method of selecting venirepersons, and its associated failure to collect demographic statistics, prevents defendants from enforcing their Sixth Amendment right to a representative jury. Such a grave shortcoming is more than enough to satisfy the Appellate Court’s rigorous requirements for invoking supervisory authority.

Jury administrators may be reluctant to collect racial data because such could invade the privacy of venirepersons who wish not to disclose their race. But there is no need to attach a racial classification to the name of each venireperson; instead, only the number and proportion of each race and gender need be recorded. Members of the judiciary, ever concerned with precedent, may correctly point out that statistics collection has been the legislature’s territory

⁴⁴ *State v. Fuller*, 158 Conn. App. 378 (2015).

since the first census in 1790. Given the dire importance of Sixth Amendment rights, and the damage that could be done to the judiciary's public image if these rights are left unenforceable, the courts have not only a right but a responsibility to break with convention and begin collecting demographic data. This, rather than a statutory argument, was the most convincing reasoning Moore's counsel could have presented.

While Moore's argument could have been more persuasive, the Appellate Court's reasoning suggests indifference to what it calls the "dearth" of available data. The court comments that the defendant "did not even purport to provide the court with any evidence with respect to the racial and ethnic composition of that jury pool generally."⁴⁵ This characterization places the blame on the defendant for failing to provide such evidence. Indeed, such data would be required if we assume that a fair cross-section includes only those eligible for jury duty. But the defendant cannot be reasonably expected to collect demographic data himself. It must come from the state, for only the state has access to information about which residents are jury eligible. The court, in dismissing the defendant's limited evidence, foisted the state's data-gathering responsibilities onto the defendant.

Moore's climb up the appellate ladder ended when the Connecticut Supreme Court denied the appeal, on the ground the court has already authorized a Jury Selection Task Force to assess *Duren* and *Batson* jurisprudence and propose reform solutions.⁴⁶ The Task Force's organization is a milestone in the fight against jury discrimination. Connecticut is only the second state to consider overhauling *Duren* and *Batson* jurisprudence in this manner. We will examine this development further in the section below on Connecticut's *Batson* jurisprudence.

Louisiana

Louisiana's approach to jury discrimination incorporates statutory guidelines in addition to common law jurisprudence. The state's Code of Criminal Procedure article 419(A) provides:

⁴⁵ *State v. Moore*, Conn. App.

⁴⁶ *State v. Moore*, 334 Conn. 275 (2019).

“A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race.”⁴⁷ While statutory attention to jury discrimination can be laudable, this language actually constrains defendants’ ability to successfully challenge venires by adding burdens not required by the *Duren* test. Whereas the *Duren* test requires that the defendant prove that the group in question is distinctive, that the group is underrepresented on the venire, and that the underrepresentation is a result of systematic exclusion, Louisiana further requires the defendant to prove fraud, a vaguely worded “great wrong committed,” or exclusion based solely on race. The race language restricts defendants’ ability to object to underrepresentation of gender or religion in Louisiana. Worse, “great wrong committed” is so arbitrary a criterion that it cannot but create confusion and elicit strained interpretations from puzzled judges. *Duren* does permit statutes like article 419(A): “States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.”⁴⁸ But this language weakens *Duren* by allowing states to limit its jurisprudential power. While article 419(A) does not prove that Louisiana’s legislature intended to constrain the *Duren* process, its language suits such intent.

Article 419(A)’s application in fair cross-section cases has consisted with the potential for constraint outlined above. In *State v. Jacobs* (2005), Louisiana’s 5th Circuit Court of Appeal used this statute’s narrow language to dismiss the defendant’s arguments. Jacobs argued that Jefferson Parish, where he was charged, illegally exempted people of certain professions from jury duty. Police, medical personnel, and firefighters were among the professionals listed as exempt on a document entitled “List of Excusal Codes.”⁴⁹ (This document’s origin is not clarified

⁴⁷ LA Code Crim Pro 419.

⁴⁸ *Duren v. Missouri*.

⁴⁹ *State v. Jacobs*, 904 So. 2d 82 (2005).

in the opinion.) *Duren* itself declared gender-based exemptions from jury service unconstitutional.⁵⁰ Assuming that professions can constitute groups, as should be evident from the existence of unions, exempting these people should be equally unconstitutional. The *Jacobs* court dismissed Jacobs' reasoning regarding juror exemptions on the ground that the Clerk of Court's Director of Information Services "was unable to confirm or deny defendant's assertion that those groups are still regularly excluded."⁵¹ This dismissal is questionable given that the aforementioned document in question was marked as Defense Exhibit 1 of November 12, 2002. Since this postdates the defendant's indictment on August 15, 2002, the exemptions contained in the document were still current at the time of the defendant's trial, regardless of the Clerk's testimony.⁵²

Jacobs next argued that Jefferson Parish's potential juror database overrepresents certain people who, for example, changed their names upon marrying, or entered different names when registering to vote and obtaining a driver's license. The court concluded that this objection to the parish's venire drawing methods proved neither exclusion of a distinct group nor of a certain race per the terms of article 419(A).⁵³ This line of reasoning, unlike that regarding the exemption list, largely accords with *Duren's* tenets. Not only does the defendant's overrepresentation argument amount to little more than speculation, it does not identify an excluded and distinct group. The court's invocation of article 419(A), however, departs from *Duren* jurisprudence in its dependence on race as a criterion for systematic underrepresentation.

Jacobs concluded by arguing that Louisiana's exclusion of convicted felons from grand jury service under Louisiana's Code of Criminal Procedure article 401 constitutes exclusion, and

⁵⁰ *Duren v. Missouri*.

⁵¹ *State v. Jacobs*.

⁵² The court does not clarify whether the November 12, 2002 date reflects the date at which this document was entered into evidence or the date of the document's original creation; or both.

⁵³ *Id.*

is unconstitutional under Article I, § 20 of the Louisiana Constitution, which provides that “full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.” The court rejected this argument on the grounds that full rights of citizenship consist only of “basic rights such as the right to vote, work or hold public office;” additionally, Article V of the Louisiana Constitution provides that the legislature may qualify juror eligibility once a citizen reaches the age of majority.⁵⁴

The court’s reasoning defies the meaning of “full rights of citizenship.” “Full” implies “complete” and “whole” without qualification or caveat. Jury service, as a constitutionally protected component of citizenship, unequivocally falls under the “full rights” umbrella. There is no statutory or constitutional basis for the court’s conception of jury service as less essential to citizenship than voting or holding public office. Hence the *Jacobs* court’s reasoning devalued jury service and, with it, the judiciary, the very institution within which its members made a career. As for *Jacobs*’ argument, article 401 does appear to unconstitutionally withhold full citizenship rights from the distinct group comprised of convicted felons.

In assessing the *Jacobs* decision holistically, it bears notice that the court largely refrains from applying the *Duren* test despite mentioning the test and its steps at the outset of the analysis. Only the professional exemption argument receives scrutiny under the *Duren* test while the court rejects the defendant’s other arguments on different grounds. This approach suggests either unfamiliarity with or indifference to the federally prescribed approach to determining whether a fair cross-section violation has occurred. Moreover, the court’s two citations of article 419 (A) do nothing to advance the analysis, for, as discussed above, this statute does not accord with *Duren*.

Judges are but one source of jurisprudential misapplication and misinterpretation in Louisiana. In *State v. Matthews* (2003), defense counsel pointed out a discrepancy between the

⁵⁴ *Id.*

number of blacks on the venire - 12 out of 25 - and the number on the jury, one out of six. Defense counsel argued that this amounted to a fair cross-section violation and cited *Batson v. Kentucky*.⁵⁵ *Duren*, of course, provides the relevant jurisprudence and test for any inquiry regarding a Sixth Amendment fair cross-section violation, whereas *Batson* concerns Fourteenth Amendment equal protection. Defense counsel's mistake suggests that many attorneys are ill-prepared to raise fair cross-section claims. Indeed, many of the defense attorneys involved in the cases cited in this piece fail to request statistics or adequately explain why they believe systematic exclusion has occurred. In *State v. Brooks* (2002), for example, defense counsel did not attempt to offer evidence for the second and third steps of the *Duren* test in the face of an all-white jury.⁵⁶

Brooks' approach is no more effective than failing to raise an objection at all. Demographic statistics for the defendant's parish, Jefferson, or an overview of Jefferson's venire drawing process would have allowed the defendant's fair cross-section claim a chance at success, especially given the damning all-white jury. Brooks' failure here may be attributed to inexperience with the *Duren* process, lack of initiative, or both. Such conduct has grave consequences when constitutional rights are implicated as they are when a fair cross-section violation occurs. While judges' reasoning on fair cross-section claims is often troubling, *Matthews* and *Brooks* exemplify the all-too-common lack of experience attorneys have challenging jury discrimination.

Louisiana has also dealt with the perennial question of whether states must provide attorneys with the demographic statistics essential to their *Duren* claims, as in *State v. Lamondre Markes Tucker* (2015). Tucker, appealing his conviction for conspiracy to commit jury tampering in his first-degree murder trial, noted a disparity between Caddo Parish's 47% black

⁵⁵ *State v. Matthews*, 859 So. 2d 863 (2003).

⁵⁶ *State v. Brooks*, 807 So. 2d 1090 (2002).

population and his venire's 30% black composition. He blamed the use of voter registration rolls to draw venirepersons, and claimed that the trial court "erred in the denial of his subpoena for the jury venire records of Caddo Parish for the years 2006-2011 because it prevented him from asserting claims based upon an extensive set of data." The state countered that "the request for all jury venire records for the years 2006-2011 was untimely, oppressive, and a heavy burden on the Caddo Parish Clerk of Court;" pointed to Louisiana's digitized, "100% random" venireperson drawing system; and alleged that the defendant failed to make a prima facie case of "systematic exclusion of any distinct population from his jury venire." The Circuit Court concluded that because Tucker filed his subpoena 30 days before trial, the trial court has insufficient time to comply, making the "request for six years worth of complete jury venire data... arguably *burdensome and oppressive* [emphasis added]."⁵⁷

As discussed in the Connecticut and Illinois sections above, withholding demographic information about venirepersons amounts to blocking defendants from securing their Sixth Amendment right to a jury drawn from a fair cross-section of the instant county's population. Federal jurisprudence thus justifies the content of Tucker's subpoena. But the subpoena's timing, not its content, is at question here. The opinion omitted an estimate of how long compliance with the subpoena might have taken, instead referencing *State v. Graham* (1982), which upheld a trial court's subpoena quash because to comply would have entailed fitting three months of work into one week.⁵⁸ The court assumed without concrete factual basis that a similar burden would have befallen the trial court had they complied with Tucker's subpoena. Such cursory examination of the subpoena's timing failed to ascertain whether Tucker placed an undue burden on the trial court.

⁵⁷ *State v. Tucker*, 170 So. 3d 394 (2015).

⁵⁸ *State v. Graham*, 422 So. 2d 123 (1982).

Mentioning the two years Tucker had to file his subpoena accomplished nothing without further scrutiny of the relevant timeline, for Tucker was justified in waiting if 30 days was enough time for the trial court to comply with his subpoena. Ironically, Tucker's own burden likely exceeded the trial court's regardless of when he filed the subpoena. As discussed above, *Duren's* state-level implementations often burden claimants with proving underrepresentation, a near-insurmountable evidentiary hurdle without access to demographic statistics about venirepersons. The state and court's use of the words "untimely," "oppressive," and "burdensome" in reference to the trial court's burden distracts from and obscures the great burden placed on Tucker to secure his Sixth Amendment rights. There is no mention here and little mention in any opinion of the outsized burden placed on *Duren* claimants, an alarming lack of recognition of the evidentiary brick wall that meets *Duren* claimants. Constitutional rights-based claims need special insulation from restrictive technicalities. American courts must treat defendants' constitutional claims not as bureaucratic inconvenience but as sacrosanct exercise of individual agency in the face of dauntingly powerful state machinery.

Florida

Like Louisiana, Florida has a statutory framework in addition to its fair cross-section jurisprudence. Rule of Criminal Procedure 3.290 (1973) provides that:

The state or defendant may challenge the panel. A challenge to the panel may be made only on the ground that the prospective jurors were not selected or drawn according to law. Challenges to the panel shall be made and decided before any individual juror is examined, unless otherwise ordered by the court. A challenge to the panel shall be in writing and shall specify the facts constituting the ground of the challenge. Challenges to the panel shall be tried by the court. Upon the trial of a challenge to the panel the witnesses may be examined on oath by the court and may be so examined by either party. If the challenge to the panel is sustained, the court shall discharge the panel. If the challenge is not sustained, the individual jurors shall be called.

Florida's statute does not constrain the process to the same degree as Louisiana's; nonetheless, by requiring defendants to comply with this statute in addition to federal and state jurisprudence, the legislature may have decreased the likelihood that a defendant will raise and succeed on a fair cross-section claim. *Cargill v. State* (2013) exemplifies this possibility.

Defense counsel made the following objection: "Your Honor, I do have to make one procedural

objection just is that the panel, and I recognize that a lot of this has to deal with demographics, but the panel lacked any African-Americans this morning. So I just for that purpose would just like to lodge that objection just in case Mr. Cargill at some point in time needs to address that on appeal.” The appeals court ruled that because defense counsel made this statement after the petit jury had been selected, and made the objection verbally rather than in writing, the conditions of rule 3.290 went unmet and the objection was invalid. Hence, the appeals court deemed the trial court to have acted properly.⁵⁹ Had it not been for the technicalities created by rule 3.290, defense counsel might have been allowed to pursue a *Duren* objection more completely.

Though the legislature put Cargill at a disadvantage in regard to raising a fair cross-section claim, his counsel cannot be exempted from knowing the law and working within its parameters. A more extreme example of incomplete knowledge about fair cross-section law is found in *Gordon v. State* (2003). Gordon alleged that the trial court “erred in summarily denying his claim that trial counsel was ineffective in not effectively challenging the all-white venire from which his jury was selected.” The court rejected Gordon’s claim on the grounds that Gordon did not make a prima facie case of systematic exclusion of blacks on appeal; indeed, he did not explain what defense counsel should have done differently at the trial level.⁶⁰

Gordon contains two instances of inadequately argued *Duren* challenges: first, Gordon’s defense counsel at the trial level; second, appellant Gordon. Ironically, in alleging that his trial counsel failed to support the *Duren* challenge, appellant Gordon failed to support his own ineffective counsel claim with evidence of systematic underrepresentation of a distinct group. Gordon did not learn, in other words, from his trial counsel’s mistakes. The court’s only choice was to reject this poorly supported reasoning. *Gordon* is a testament to the frequent inefficacy of

⁵⁹ *Cargill v. State*, 121 So. 3d 1157 (2013).

⁶⁰ *Gordon v. State*, 863 So. 2d 1215 (2003).

Duren claims. On the rare occasion that a defendant makes such a claim, it is often given less than the maximum amount of support because defense counsel is unfamiliar with the case law. Granted, demographic information can be difficult to come by, as Illinois and Connecticut's *Duren* case history makes clear; even so, defendants should have the requisite knowledge about fair cross-section jurisprudence to put together more compelling arguments than seen here. If they cannot access the necessary information, defendants should underline this very constraint as part of their complaints.

As a multi-ethnic state, Florida sees frequent debates about what a representative venire should look like. While conventional views about representation have rarely gone beyond gender and skin color, what about those who are non-English speakers? *Woodel v. State* (2008) dealt with two challenges for cause against venirepersons who would have required Spanish-speaking interpreters in order to serve on a jury. *Woodel* "[recognized] that there was case law which prevented the court from permitting an interpreter to enter the jury room for deliberations but [argued] that this case violated the Constitution" by excluding non-English speakers in violation of the Sixth Amendment. The court rejected this reasoning on the grounds that "Hispanics who are not proficient in English" are not necessarily a distinctive group. Moreover, section 40.013(6), Florida Statutes (2005) provides for exemptions "upon a showing of hardship, extreme inconvenience, or public necessity." In this case, the court considered it "public necessity" that an interpreter not be present during jury deliberations to preserve the validity of the process.^{61 62}

The *Woodel* court's explanation of whether non-English speaking Hispanics are a distinctive group is too vague and perfunctory to be authoritative. Hispanics more broadly are uncontroversially distinctive on account of their racial identity; but should subsets of distinctive

⁶¹ FL Stat § 40.013 (2005). This statute was revised in 2016.

⁶² *Woodel v. State*, 985 So. 2d 524 (2008).

groups be considered distinctive in and of themselves? Or, could non-English speaking Hispanics be considered part of a broader spectrum of non-English speaking Americans?

Non-English speakers may share characteristics less commonly found among English-fluent Americans of immigrant descent: first-hand familiarity with the difficulties of immigration, experience with the discrimination and general hardship associated with adapting to an English-dominated society, and cultural values closer to those of their parent culture than to those of the United States. These characteristics, if found to be present in non-English speakers, could mark them as distinctive regardless of ethnicity; those with citizenship would thus have a theoretical right to jury service. Alternatively, many courts would decline to consider aspects of distinct group membership independent of ethnicity or gender, and would group non-English speaking Hispanics with Hispanics broadly rather than with non-English speakers broadly. These problems illustrate a deeper truth about the *Duren* process: groupings tend to be arbitrary. An individual might be part of dozens of groups at once; which of these are significant enough to require at least theoretical representation on venire panels?

Achieving consensus on this last question borders on impossibility. Richard Re's enfranchisement conception of the fair cross-section requirement could provide a solution. Re recognized the problem of overlapping group membership, and proposed that representation be determined by whether every eligible juror, regardless of group membership, has the opportunity to be included in the venire. If anyone were systematically denied this opportunity, the venire would be unrepresentative. No inquiry into group membership, much less the distinctiveness thereof, would be necessary. In regard to *Woodel*, the enfranchisement conception would focus not on the group membership of non-English speaking Hispanics but upon their opportunity to serve as jurors. As citizens, they would have a right to "jury

enfranchisement,” and any venire from which they are systematically excluded would be unrepresentative.⁶³

The *Woodel* court’s concerns about the presence of an interpreter during jury deliberations have merit. Interpreters could sway or influence the juror for whom they interpret, or they could make other jurors uneasy. Florida’s case law, especially *Dilorenzo v. State* (1998), supports this reasoning.⁶⁴ However, if interpreters take an oath not to unduly influence their assigned jurors, concerns about impartiality could abate; after all, the judiciary administers oaths to jurors and witnesses to ensure their impartiality. To sum, the question of whether to allow non-English speakers to serve on juries creates unique problems. Their eligibility depends on whether they are a distinct group, whether the judiciary adopts an enfranchisement approach, and whether interpreters would cause a disturbance during deliberations.

Another uncertain area of *Duren* jurisprudence is whether whole ideologies can properly be excluded from jury service. Faced with this question, the Florida Supreme Court’s *Hodges v. State* (2003) explored whether *Duren* should be extended to ideological subsets of a county population. After all, a jury cannot be truly representative if its jurors are drawn from an ideologically homogenous venire, for there exists no ideologically homogenous county. At trial, defense counsel claimed that “ [the State] is striking every one [sic] who has reservations about the death penalty,” and that “I think it’s going to invalidate our defendant’s right to a fair cross-section of the community.” Defense counsel appeared to conceive of those who oppose the death penalty as a discrete group within the community. The Florida Supreme Court ruled that the State’s striking for cause of most if not all venirepersons who had reservations about the death penalty did not constitute a fair cross-section violation. The opinion did not consider whether ideological cohorts are in fact groups meriting representation on venire panels.⁶⁵

⁶³ Re (2007).

⁶⁴ *DiLorenzo v. State*, 711 So. 2d 1362 (1998).

⁶⁵ *Hodges v. State*, 885 So. 2d 338 (2003).

Like non-English speakers, ideological cohorts fall outside the traditionally recognized categories of “group” outlined in fair cross-section jurisprudence. Generally, only race and gender receive protection. But ideological cohorts can be just as distinctive as these two more widely recognized classifications, and moreover, “distinctive” remains a vague and indefinite way to classify groups. What makes African Americans, for example, more distinctive than people who oppose the death penalty? Why is the former more deserving of accurate representation on a venire panel? If a community has a significant anti-death penalty population, surely it would be unrepresentative to exclude all of these people from jury service. Ideology is a group trait like race or gender, only without the same external visibility. An enfranchisement conception of jury service would limit the State’s ability to exclude jurors of a certain ideology by requiring that all eligible jurors have an opportunity to be called for any given case.

Concerns about bias are a plausible retort to the prospect that certain ideologies should be represented on venire panels. After all, an anti-death penalty juror might be unlikely to vote to impose the death penalty even before having heard the case facts. But this amounts less to an unfair, kneejerk prejudice against the State than to a personal conviction. Many such convictions, whether they are for or against the State, are reasonable. Moreover, bias is impossible to eliminate, for there is no “ideological default.” Everyone involved in the judicial process has some sort of bias. The role of voir dire is not to prevent representation of certain anti-State or anti-defendant ideologies but to weed out genuinely unfair prejudices, such as those that might come from knowing the defendant’s family personally or believing that government is inherently evil. A venire panel containing venirepersons who are against the death penalty will yield more ideologically diverse juries; ideologically diverse juries will have more engaging, spirited discussions, with thoroughly considered verdicts. Promoting ideological representation, then, could actually reduce juror bias. Opponents of this approach will point out the impossibility of representing every ideology, but all that is necessary is that every individual in a given jurisdiction has equal *opportunity* to serve on a jury.

Washington

Does banning felons from jury service constitute systematic underrepresentation of blacks? Felon exclusion appeared in the aforementioned Louisiana case, *State v. Jacobs* (2007), but Washington's *State v. Christian* (2013) differs in the defendant's argument that felon exclusion equates to black exclusion. As the court summarizes:

[Christian] argues that the cumulative effect of the disqualification provision and the racial bias in the production of felony convictions in King County is "to allow a deductive conclusion that, assuming all else in the operation of [Washington General Rule 18] is random and race-neutral ... the group summonsed to jury duty under that rule must under-represent people of color and black citizens in particular."

The State argued that blacks and felons are not interchangeable groups, and that only the former is excluded by law, so no unconstitutional underrepresentation had occurred. The court agreed and added that felons "cannot constitute a distinctive group in the community" because the exclusion of felons had been deemed constitutional in previous decisions.⁶⁶ But there is strong demographic evidence that felon exclusion has a disproportionate impact on blacks. As Uggen, Manza and Thompson (2006) found, felons and ex-felons comprise "22.3 percent of the black adult population, and an astounding 33.4 percent of the black adult male population."⁶⁷ Felon exclusion from jury service, then, could exclude one in five black adults and one in three black male adults. Proponents of felon exclusion will respond that any black exclusion is unintentional and a justifiable punishment for committing a felony. Such a response underrates the value of black participation in the judiciary. Endorsement of felon exclusion also underestimates the degree to which jury service is necessary for individuals to feel involved in and valued by society. The court's pious invocation of previous rulings upholding felon exclusion

⁶⁶ *State v. Christian*, 2009 Wash. App. LEXIS 1709 (Court of Appeals of Washington, Division One. July 13, 2009, Filed).

⁶⁷ C. Uggen et al. (2006), "Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders," *The ANNALS of the American Academy of Political and Social Science*, 605(1), 281–310, <https://doi.org/10.1177/0002716206286898>.

rules without reevaluating the issue is disingenuous, for courts can change jurisprudence when they conclude it treats litigants unfairly. This is a foundational tenet of American common law.

Felons are not the only group excluded from Washington's judiciary. Juror salaries are low enough to dissuade poor venirepersons from responding to summonses. In *In re Pers. Restraint of Yates* (2013), Yates argued that Washington's \$10 per day juror salary "excludes working class and nonelderly persons." Yates included demographics concerning the percentage of Pierce County venirepersons in the 18-65 and 65-plus age brackets. He did not include similar demographics about the working class or about "the percentage of members of the venire within each of these [two] categories." The Washington Supreme Court seized on these evidentiary deficiencies as reason to dismiss his argument.⁶⁸

Indeed, Yates' demographics do not satisfy the second *Duren* step, so the dismissal was justified. Nonetheless, his argument might have been persuasive had he provided a more complete demographic picture.⁶⁹ While jury service is as much a duty as a right, the judiciary cannot reasonably expect working class Americans to forego their daily wages without appropriate compensation. Washington's juror salary is too paltry to sustain low-income families during their breadwinners' work absences. It is only natural for struggling members of the working class to ignore summonses for the sake of their difficult livelihoods. Employers cannot be relied upon to compensate their employees during jury duty absences. Eades (2001) found that Texas' "no-shows," those who did not respond to summonses, "were three times more likely than the Shows to receive no wages at all [during jury duty had they served]."⁷⁰ Given the frequency of underrepresentation on venire panels, the no-show phenomenon is likely not unique to Texas. *Yates* suggests that jury service is equally disincentivized in Washington State. Thorough jury deliberation depends on representation, which in turn depends on low financial

⁶⁸ *In re Pers. Restraint of Yates*, 177 Wn.2d 1, (2013).

⁶⁹ Yates might not have had access to such a picture, reflecting the unfair burden on *Duren* claimants.

⁷⁰ Eades (2001).

risk for all eligible jurors. The solution is, for once, clear: either require jury duty compensation by employers or pay jurors an appropriate hourly wage.

Tracking disincentivization between people of different socioeconomic backgrounds is difficult without demographic records. Like Connecticut in *State v. Moore* (2016), Washington's judiciary has grappled with whether the state must record venireperson demographics so that defendants can include such in fair cross-section arguments. In *State v. Cienfuegos* (2001), the defendant argued (a) that because "12.38 percent of Skagit County residents are [non-white], jury venires should reflect this same statistical balance;" (b) that "it was error not to provide the names and addresses of the 700 people on the jury panel list;" and (c) that "[General Rule 18 (GR 18)] is unconstitutional because it does not identify jurors by race, which would allow defendants to quickly determine if the jury panel represents a fair cross section of the community." GR 18 (b) reads in relevant part:

(b) Jury source list. "Jury source list" means the list of all registered voters of a county, merged with a list of licensed drivers and identocard holders who reside in that county. The list shall specify each person's first and last name, middle initial, date of birth, gender, mailing address, and residence address.

The court rejected Cienfuegos' argument on the grounds that he did not provide evidence regarding the second and third *Duren* steps, and that his inability to make a proper *Duren* argument due to unavailable and withheld information was moot because "a bare allegation that the jury list is not representative is sufficient to bring this issue into play."⁷¹

Cienfuegos was able to make only a "bare allegation" because the county failed to provide him with the information required for a *prima facie* *Duren* claim; yet, by the court's logic, the county was not required to give him information because he made only a "bare allegation." This is circular reasoning. Rather than mooting his argument, the unavoidable "bareness" of Cienfuegos' case should signal that Washington State deprives defendants of the tools they need to secure their Sixth Amendment rights. To argue that the county need not provide these

⁷¹ *State v. Cienfuegos*, 144 Wn.2d 222 (2001).

tools when there is no other recourse is effectively to argue that the county need not protect defendants' Sixth Amendment right to a jury drawn from a fair cross-section of the population. Consider that the opinion cited above was issued by the Washington Supreme Court. That an institution of such repute would employ circular reasoning to deny a defendant's right to an informed *Duren* claim demonstrates the flippancy modern American courts accord jury discrimination. Given that defendants' Sixth Amendment rights concern the judiciary, the judiciary should take chief responsibility for enforcing these rights; hence the judiciary must secure each defendant's right to challenge their venire panel.

Cienfuegos, by making a constitutional argument, avoids to some degree the mistake made by Connecticut's defendant Moore; yet as GR 18 does not prohibit collection of juror demographics to aid *Duren* claimants, he ultimately cripples his argument by deeming GR 18 unconstitutional. Cienfuegos would be best served not by arguing that the Constitution invalidates GR 18, but that the Constitution demands collection of juror demographics to supplement GR 18's requirements.

Within any statute that concerns venire drawing, no matter how well-meaning, lies the potential for unforeseen exclusion. The Supreme Court of Washington contemplated Rev. Code Wash. (ARCW) § 2.36.055's effect on juror exclusion in *State v. Lanciloti* (2009). This statute provides: "In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area."⁷² Washington's legislature passed this statute in response to concerns by King County, which charged Lanciloti, that its venire drawing procedure discriminated against "poor and minority jurors." Formerly, venirepersons "were summoned to either courthouse randomly, without regard to proximity," forcing upon some venirepersons the inconvenience of

⁷² Washington Revised Code RCW 2.36.055: Jury Source List.

traveling to the farther courthouse. According to data gathered in collaboration between the Seattle-King County Department of Public Health and an area judge, “lower income and racial minority citizens were less likely than higher income and non-minority citizens to report to a court house more distant from their home.” The statute corrected this shortcoming by allowing King County to divide itself into two jury districts. Venirepersons would report to whichever courthouse was in their district, theoretically reducing average transit time and cost.⁷³ King County was almost certainly well-intentioned. On its face, the statute should have increased minority representation by easing travel to each of the two King County courthouses. Such a proactive approach to meeting *Duren’s* fair cross-section mandate might seem an unlikely candidate for a *Duren* challenge.

Yet Lanciloti argued that § 2.36.055 split one county into two unrepresentative halves in violation of the Washington Constitution’s guarantee “an impartial jury *of the county* in which the offense is charged to have been committed [emphasis added].” The case’s outcome depended on whether “of the county” entailed the entire county or any portion thereof. The court referenced its own precedents, such as *State v. Twyman* (2001), which opined that equating “of the county” with “of the entire county” was “unpersuasive on its face.” In *State v. Newcomb* (1910), the court ruled constitutional a statute that “divided up each county into multiple districts and required that each jury panel be drawn from more than one district,” for “the words ‘jury of the county,’ as used in our constitution, have never been held to mean more than that the jurors, when summoned, should come from some part of the county.” County redistricting “can be safely and properly left to legislative enactment,” ruled the *Newcomb* court. Shortly after, the court found in *State ex rel. Lytle v. Superior Court* (1913) that “the plain intent of the words ‘jury of the county’ is that the defendant is entitled to have the venire extended to the body of the county, and that it may not be restricted to a less unit; at least, without express legislative

⁷³ *State v. Lanciloti*, 165 Wn.2d 661 (2009).

sanction.” Lanciloti’s argument rested on what came before the semicolon, the court’s dismissal thereof resting on what came after. Finally, the court found that Lanciloti had not proven that demographic differences between the two new jury districts “amount to a systemic exclusion of a distinctive group.”⁷⁴

Lanciloti’s concerns about underrepresentation were not baseless. Bifurcating King County necessarily affected representation, as two halves of a county cannot be ideologically and demographically identical. If, inadvertently or otherwise, bifurcation left one district significantly poorer or more racially diverse than the other, poor or minority defendants charged in the richer and less diverse district might face less sympathetic jurors. Worse, bifurcating or otherwise dividing a county raises the specter of gerrymandering. The legislature could arbitrarily allocate county population subsets to courthouses in order to diffuse minority influence or maximize representation of, say, pro-death penalty venirepersons. On the other hand, the same power of allocation could increase fair representation by placing defendants before jurors drawn from their immediate community. For example, a Hispanic defendant might be tried by more Hispanic jurors if the venire is drawn from a smaller district containing the defendant’s Hispanic neighborhood than if the venire is drawn from a larger county. Sub-county districts could thus try defendants more representatively than counties if divided fairly. This latter scenario falls in line with the Washington Supreme Court’s proffered explanation of how § 2.36.055 was developed. King County’s own argument for § 2.36.055, that poor venirepersons had trouble getting to the farther courthouse, is persuasive in light of difficulties to venirepersons as revealed in *Yates*. Lanciloti’s argument that § 2.36.055 backfired, while facially plausible, could not succeed without the definite evidence of underrepresentation lacking from his argument.⁷⁵ The court was justified in rejecting his argument on these grounds.

⁷⁴ *Id.*

⁷⁵ As always, there is the possibility that the county unfairly denied Lanciloti definite demographic evidence.

While decisions concerning *Duren* claims often feature hasty and arbitrary reasoning, *Lanciloti* found the Washington Supreme Court vindicating a constructive reform to drawing venires. Though § 2.36.055 and statutes like it must be used with restraint, and courts must be wary of ulterior motives on legislatures' parts, large counties with multiple courthouses would do well to limit the hassle of jury duty and foster representation by dividing into jury districts.

Chapter II: Two Non-Reformed State-Level *Batson* Jurisprudences

Illinois

Over thirty years of *Batson* jurisprudence have yielded no national consensus on what constitutes a step one *prima facie* case of discrimination. At step one, strike opponents are to use “facts and any other relevant circumstances [to] raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race.”⁷⁶ But “relevant circumstance” has proven too nebulous to define conclusively, even after *Miller-El v. Dretke* (2005) propounded certain circumstances that trial courts may properly consider. What seems relevant to one trial court might seem trivial to another. Less clear still, how does a trial judge objectively determine whether the strike opponent has “raised an inference?”

The Illinois Supreme Court sought to resolve these uncertainties in *People v. Williams* (1996). Williams raised a *Batson* challenge when the State struck Harold Martin, an African American venireperson. The trial judge and parties appear to have disregarded the intended order of the three step *Batson* inquiry, defense counsel asking the State for his step two race neutral reasons before articulating a step one *prima facie* case. The State informed the court of this sequential error, yet proceeded with a race-neutral reason: “You saw he was a black man with red hair. You heard the answers to his questions, that he was not satisfied [with the outcome of an unrelated criminal case to which he had been privy]. I don't think we have to at this time come forward with any reasons why... this man was excluded.” Defense counsel countered that the State had accepted John Sterba, a white venireperson, despite Sterba's similar dissatisfaction with the resolution of a unrelated criminal case. But “[t]he State informed the trial judge that, at that point in the proceeding, the trial judge only had to determine whether a *prima facie* case had been established and did not need to compare Martin with Sterba.”⁷⁷ The trial judge compliantly directed defense counsel to focus on Martin for the purposes of step

⁷⁶ *Batson v. Kentucky*.

⁷⁷ *People v. Williams*, 173 Ill. 2d 48 (1996).

one, and, finding no *prima facie* case, did not formally proceed to step two. Williams appealed the trial court's finding. The Illinois Supreme Court, ruling that Williams failed to put forth a *prima facie* case of discrimination at step one, laid out the following relevant circumstances for use by future courts:

(1) racial identity between the defendant and the excluded venirepersons; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during voir dire examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses. A trial judge's determination of whether a *prima facie* case has been shown will not be overturned unless it is against the manifest weight of the evidence.⁷⁸

The *Williams* court considered which of these circumstances was applicable. Only the *Williams* court's assessment of factor (6) is troubling. Williams asked the court to consider that despite Sterba, white, and Martin, black, giving similar *voir dire* answers, only Martin was struck. The court refused to resolve this issue because factor (6) requires only comparison between venirepersons of the *same* race:

Although we have considered the nonracial characteristics common to stricken African-American venirepersons and non-African-American jurors in assessing heterogeneity, we find that this consideration is not mandatory in every case. See [People v. Henderson, (1990)] (it is not the role of the court to search for possible similarities between stricken black and accepted white venirepersons).⁷⁹

The relevance of Sterba and Martin's similarities is beyond question. If these men were alike in all but their race, yet only the African American was struck, an inference of racial discrimination would be all but irrefutable. Dismissing an obviously relevant circumstance because it is not "mandatory" is irresponsible. Just decision of *Batson* cases at the trial and appellate levels depends on consideration of *all* relevant circumstances. The *Williams* court continued in this vein by misguidedly approving the trial judge's direction to Williams that he focus his step one proceeding on Martin. Instead, the court should have recognized that Martin

⁷⁸ Id.

⁷⁹ Id.

and Sterba's similarities were relevant and thus fair game for inclusion by Williams in his step one presentation. Williams' *Batson* inquiry, with its sequential errors and exclusion of relevant details, proceeded improperly, and was thus ripe for remand. That the Illinois Supreme Court condoned these errors bodes poorly for Illinois' minority venirepersons.

Williams cannot surprise in light of the federal judiciary's failure to define what constitutes a "relevant circumstance" and an "inference of discrimination." In so failing, the *Batson* Court left lower courts to answer highly subjective questions prone to arbitrary answers. Illinois' list of seven relevant factors, though unsatisfying in its *Williams* application, is a reasonably comprehensive effort at solving these open-ended puzzles. Certain additions would hone the list. Factor (5) might further consider the types and length of questions addressed to minority venirepersons; if, for example, a prosecutor asks a minority venireperson five questions about her profession, yet asks an otherwise similar venireperson zero such questions, strike opponents and judges should consider this plainly relevant circumstance. Missing altogether from Illinois' list of factors is a given venireperson's statement of whether they can approach the instant case impartially. The peremptory strike of a minority venireperson who unequivocally states her willingness and ability to be impartial should be met with healthy skepticism, for such a strike would have no obvious justification. Venireperson statements of (im)partiality are therefore properly included in the strike opponent's case at step one.

"Relevant circumstance" raises another difficult question: how *many* suspicious circumstances must exist for a judge to find a *prima facie* case of discrimination? One highly suspicious circumstance might persuade a judge that an inference of discrimination has been reached, while five more trifling suspicious circumstances might cumulatively have the same effect. Most strike opponents assert some middling number of moderately suspicious circumstances. Williams presented two circumstances, basing his step one argument on the State's divergent treatment of Martin and Sterba and on the prosecutor's comment that Martin was a "black man with red hair." The *Williams* court took issue with neither of these

circumstances but did find that “factors suggesting purposeful discrimination include the racial identity between defendant and the excluded venireperson and the interracial nature of the crime.” So it was that two circumstances suggesting *prima facie* discrimination did not tip the scales. While this reasoning is not wrong per se, the *Williams* court did not explain whether it was the supposed insignificance of these two factors or their small number that foreclosed a *prima facie* finding. A federal bright-line rule for use at step one of the *Batson* inquiry could decide once and for all how many suspicious circumstances compel a *prima facie* finding, dispelling the sort of ad hoc reasoning employed in *Williams* and, no doubt, in other state courts. Exceptions could be made to such a bright-line rule for small numbers of suspicious circumstances judges nonetheless consider especially troubling. If a bright-line rule strikes the federal judiciary as micro-management, more precise definitions of “relevant circumstance” and “inference of discrimination” would be a worthy alternative.

Another area of *Batson* jurisprudence left unexplored by the federal judiciary is the *sua sponte* motion. The U.S. Supreme Court originally conceived the *Batson* challenge for use by defendants against prosecutors: “A *defendant* may establish a *prima facie* case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.”⁸⁰ *Georgia v. McCollum* (1992) granted prosecutors, too, the ability to raise *Batson* challenges.⁸¹ Yet there exist no federal guidelines for trial judges to raise a *sua sponte Batson* challenge. The Illinois Supreme Court devised its own such guidelines in *People v. Rivera* (2007) after a trial judge took it upon himself to challenge a defense attorney's peremptory strike.

At trial, defense counsel peremptorily struck venirewoman Deloris Gomez after her *voir dire* testimony. The trial judge requested that defense and State counsel join him in chambers for discussion. Without putting forth the *prima facie* case of discrimination required by step one,

⁸⁰ *Batson v. Kentucky*.

⁸¹ *Georgia v. McCollum*, 505 U.S. 42 (1992).

or indeed giving any basis for his *Batson* challenge, the trial judge asked defense counsel to “kindly articulate a basis of why you are excusing Ms. Gomez.” This request amounted to step two of a *Batson* inquiry. Defense counsel protested the *sua sponte* motion. The trial judge explained, “It is the citizen's right to sit as a juror, and I will implicate myself *sua sponte* if I feel somebody's right are being impinged upon.” Defense counsel’s step two race-neutral reason consisted of Gomez’s employment at a hospital, where she was exposed to gunshot victims like those involved in the instant murder case. The trial judge remarked during defense counsel’s step two testimony that “Mrs. Deloris Gomez appears to be an African-American,” then asked to “hear from” the prosecutor, who had hitherto been present for but uninvolved in the *Batson* inquiry. The prosecutor argued that defense counsel had put forth an insufficient basis for his strike. The trial judge concluded the inquiry: “I feel under these circumstances the reasons given by you, Mr. Decker, do not satisfy this Court. As far as I'm concerned, it's more than a *prima facie* case of discrimination against Mrs. Gomez. I'm not going to allow her to be excused. She will be seated as a juror over objection.”⁸²

Defense counsel’s further questioning of Gomez did not sway the court, as her hospital career took place in a “business office” setting where, presumably, she would have had limited contact with gunshot victims. The Illinois Supreme Court issued two *Rivera* opinions; in the first, the court found that “the articulated reason for a challenge is a matter of ‘concern’ only after a *prima facie* case has been established,” mooted the trial judge’s step two inquiry. Guidelines for a *sua sponte Batson* challenge in Illinois were as follows:

In sum, we hold that a trial court may raise a *Batson* issue *sua sponte*, but it may do so only when a *prima facie* case of discrimination is abundantly clear. Moreover, the trial court must make an adequate record consisting of all relevant facts, factual findings, and articulated bases for both its finding of a *prima facie* case and for its ultimate determination at the third stage of the *Batson* procedure.⁸³

⁸² *People v. Rivera*, 221 Ill. 2d 481 (2007).

⁸³ *Id.*

The court remanded for a hearing at which the trial judge could articulate his *prima facie* case for discrimination, as follows:

The jury was composed of a majority of women; I believe after a review of the transcripts, nine women and three men. One African-American female was accepted as a juror. Another whose race was in fact unknown was excused as well. Couldn't tell by her name what race she belonged to. No one had any personal recollection. One female was excused. She had been African-American as well. Defendant sought to excuse another female African-American, a Mrs. Gomez, peremptorily. She was the third female juror challenged by the Defendant.⁸⁴

In its second *Rivera* opinion, the court concluded that the trial judge had based his *prima facie* case on gender, but that neither the number of female venirepersons struck nor the questions asked of Gomez in fact amounted to a legitimate *prima facie* case of discrimination. This did not require reversal, for the U.S. Supreme Court's harmless error test enunciated in *Neder v. United States* (1999) - "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" - was answered in the negative.^{85 86}

The *Rivera* court's solution to the *sua sponte* issue evinces a deep commitment to the peremptory strike. Not even Illinois' trial judges may restrict this right without an "abundantly clear" *prima facie* case.^{87 88} Requiring judges to participate in the *sua sponte Batson* inquiry as an interested party as opposed to an (ideally) objective observer muddles the already complicated *Batson* framework. *Batson* challenges were designed for resolution through adversarial argument between two attorneys. A judge who finds a *prima facie* case of discrimination and consequently raises a *Batson* challenge is less likely to hear the strike proponent's step two race-neutral reason with the same objectivity as if that same judge were hearing an attorney's *Batson* challenge. In other words, this hypothetical judge is prejudiced

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Neder v. United States*, 527 US 1, (1999).

⁸⁷ *People v. Rivera*.

⁸⁸ A wording found nowhere in U.S. Supreme Court jurisprudence.

against the peremptory strike from the inquiry's outset, jeopardizing its legitimacy. Indeed, the trial judge in *Rivera* hardly entertained defense counsel's step two race-neutral reason.

Moreover, the *Rivera* court did not clarify the would-be strike opponent's⁸⁹ proper role in the *sua sponte Batson* inquiry: was the trial judge correct to ask the prosecutor's advice after step two, or should the prosecutor have abstained from the inquiry altogether? Any solution to opposing counsel's role in a *sua sponte Batson* inquiry is unsatisfying, for no counsel should be excluded from proceedings, yet a *sua sponte* challenge does not involve the would-be strike opponent at its outset. The *Rivera* court's guidelines thus confuse as much as they resolve. A cleaner solution would allow trial judges to disallow peremptory strikes as they see fit. Such would avert confusing inquiries with foregone conclusions. Questions about the would-be strike opponent's role would become moot. Inevitably, allowing trial judges the discretion to disallow peremptory strikes would stoke fears about the erosion of a sacred procedural right. But hesitant jurisdictions could limit judges to a certain number of disallowances, leaving the rest to the parties, who are more motivated to raise *Batson* challenges in the first place.

Rivera testifies to the federal judiciary's patchy *Batson* jurisprudence. Even if many state judges have the wisdom requisite for crafting procedures as complex as *sua sponte Batson* inquiries, *Rivera* notwithstanding, leaving so many *Batson* particulars to the states has resulted in uneven and confusing precedents. The *Batson* Court's deferral of implementation to the states was fully intentional: "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today."⁹⁰ Though Chief Justice Burger's dissent shortsightedly clung to the *Swain*-era peremptory challenge, his admonition that the Court "leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the

⁸⁹ In this case, the prosecutor.

⁹⁰ *Batson v. Kentucky*.

[*Batson*] morass” rings true.⁹¹ This dilemma should lead the federal judiciary not to renege on *Batson*’s aims, as Burger wished, but to fill gaps in precedent such as the *sua sponte* issue. Granting state courts interpretive autonomy is sensible only insofar as they are spared the confusion of filling federal gaps.

Louisiana

Louisiana’s legislature codified an attenuated version of *Batson*, Louisiana Code of Criminal Procedure (CCRP) 795, in 1986:

No peremptory challenge made by the state or the defendant shall be based *solely* upon the race or gender of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court *may* demand a satisfactory race or gender neutral reason for the exercise of the challenge, *unless* the court is satisfied that such reason is apparent from the voir dire examination of the juror [*italics added*].⁹²

Inclusion of the word “solely” could be read to permit partial discrimination; of the words “may” and “unless,” omission of *Batson*’s step two; and of the words “race or gender,” discrimination on the basis of venireperson traits other than these two. CCRP 795 concluded by mandating that “the court shall allow to stand each peremptory challenge for which a satisfactory racially neutral or gender neutral reason is given,” which can be read as defying federal jurisprudence by blocking trial judges from rejecting race-neutral explanations as pretextual.

In August 2019, Louisiana House Representative Mary DuBuisson (R - District 90)’s HB 477 received the Governor’s signature, amending CCRP 795 as follows:

No peremptory challenge made by the state or the defendant shall be motivated *in substantial part* on the basis of the race or gender of the juror. If an objection is made that a challenge was motivated in substantial part on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court *shall* demand a satisfactory race or gender neutral reason for the exercise of the challenge. Such demand and disclosure shall be made outside of the hearing of any juror or prospective juror. The court *shall* then determine whether the challenge was motivated in substantial part on the basis of race or gender [*italics added*].⁹³

⁹¹ *Id.*, Burger, C.J., dissenting.

⁹² H.B. 477, 2019 Reg. Sess. (La. 2019), <http://legis.la.gov/legis/ViewDocument.aspx?d=1144098>.

⁹³ *Id.*

Replacing “solely” with “in substantial part” targets partial discrimination, and replacing “may” and “unless” with “shall” compels fulfilment of steps two and three. Louisiana’s revision is laudable, especially considering CCRP 795’s former regressive phrasing. That a Republican introduced this measure is especially encouraging in light of the “tough on crime” stance common among conservative politicians. Viewed parallel to Washington and Connecticut’s recent reforms, HB 477 supports a cautiously optimistic reading of America’s current attitude towards jury discrimination reform. Even so, HB 477 does not solve CCRP 795’s preclusion of pretextuality findings; this persisting flaw serves as a reminder that current reform efforts, though heartening, are but emergent. Crucially, HB 477 catches Louisiana up with *Batson* instead of expanding on existing law.

None of HB 477’s proactivity is evident in Louisiana’s jurisprudence. A key example is the Louisiana Fifth Circuit Court of Appeal’s *State v. Youngblood* (2019), notable both for the number of African Americans struck by the State during *voir dire* - nine - and for the Circuit Court’s ruling on those peremptorily struck black venirepersons who shared key characteristics with accepted white venirepersons. Before considering the case’s particulars, a discussion of racial strike ratio - the ratio of minority to white venirepersons struck during *voir dire* - is in order. In *Youngblood*, nine blacks and one white were struck for a racial strike ratio of 9:1.⁹⁴ ⁹⁵ Often, even obscene racial strike ratios will pass muster if the strike proponent’s race-neutral explanations are remotely plausible. The U.S. Supreme Court’s Justice Thomas, commenting on a strike ratio of approximately 41:8⁹⁶ over the course of four trials in *Flowers v. Mississippi* (2019), typified a common attitude towards racial strike ratios: “The bare numbers are *meaningless* outside the context of the *reasons* for the strikes [first emphasis added].”⁹⁷ Thomas

⁹⁴ *State v. Youngblood*, 274 So. 3d 716 (2019).

⁹⁵ On appeal, *Youngblood* only challenged the strikes of five of the nine. The instant discussion considers all nine.

⁹⁶ The Supreme Court’s opinion leaves unclear whether the State struck any whites at *Flowers*’ second trial, so this ratio is approximate.

⁹⁷ *Flowers v. Mississippi*, Thomas J., dissenting.

and his ideological cohorts forget that extraordinary claims require extraordinary evidence. That a 9:1 or 41:8 racial strike ratio is race-neutral constitutes an extraordinary claim, and hence requires an extraordinarily compelling step two explanation. Judges should scrutinize step two explanations in proportion to strike ratios.

The State's step two explanations in *Youngblood* did not begin to account for the number of minority venirepersons struck. Venireman Bourgeois, in particular, was excused on flimsy grounds. Having already struck three African Americans, the State struck Bourgeois because "he had a negative experience with law enforcement, was previously arrested for narcotics with intent to distribute, and had an ongoing building construction project which would prevent him from staying focused." In response, "Defendant argues for the first time on appeal that two white male jurors also expressed that they either had a prior bad experience with law enforcement or had been previously arrested for a crime, yet were not stricken by the State."⁹⁸ This is called a comparative analysis argument. The *Youngblood* court acknowledged that, as ruled in the U.S. Supreme Court's *Miller-El v. Dretke* (2005), "More powerful than the bare statistics are side-by-side comparisons of some black venire panelists who were struck and white ones who were not. If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination."⁹⁹ Yet the *Youngblood* court declined to apply this principle: "The mere fact that a prosecutor excuses one person with a particular characteristic and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination." This statement served to exempt the court from following *Miller-El*. Alarming, such a self-granted exemption seems to authorize divergence from federal jurisprudence. The court continued: "The accepted juror may have exhibited traits which the prosecutor could have reasonably believed would make him desirable as a juror." Therein we find a presumption of

⁹⁸ *State v. Youngblood*.

⁹⁹ *Miller-El v. Dretke*.

non-discrimination accorded to the strike proponent. But with nine African Americans struck, that presumption is tenuous. Youngblood made several other *Batson* challenges similar to that made on Bourgeois' behalf, consistently arguing that the struck venirepersons shared key characteristics with accepted whites. The *Youngblood* court concluded its analysis of each by finding that Youngblood "waived this [comparative analysis] argument by failing to challenge the prosecutor's explanations on this ground at the trial court level."¹⁰⁰

Appellate courts generally dismiss arguments raised for the first time on appeal under the "general rule."¹⁰¹ As the U.S. Supreme Court ruled in *Singleton v. Wulff* (1976), "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."¹⁰² The general rule exists because, as the First Circuit Court of Appeals put it in *Poliquin v. Garden Way* (1993), "If lawyers could pursue on appeal issues not properly raised below, there would be little incentive to get it right the first time and no end of retrials."¹⁰³

Appellate judges may, however, except new arguments from the general rule should they find a compelling reason to do so: "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy."

Hormel v. Helvering, U.S. Supreme Court, (1941).¹⁰⁴ Universal application of the general rule, then, can hinder the pursuit of justice in certain contexts. In *United States v. LaGuardia* (1990), the First Circuit Court of Appeals explained as follows its decision to consider an argument not raised at trial: "Because appellants' challenge to the statutory scheme and the guidelines raises an issue of *constitutional magnitude* which, if meritorious, could substantially affect these, and

¹⁰⁰ *State v. Youngblood*.

¹⁰¹ Not to be confused with Washington State's General Rule 37.

¹⁰² *Singleton v. Wulff*, 428 U.S. 106 (1976).

¹⁰³ *Poliquin v. Garden Way*, 989 F.2d 527 (1993).

¹⁰⁴ *Hormel v. Helvering*, 312 U.S. 552 (1941).

future, defendants, we believe we should address their arguments despite the fact that they were not made below [emphasis added].”¹⁰⁵ The Connecticut Supreme Court put forth in *State v. Golding* (1989) a list of criteria which, when satisfied, allow (but do not compel) appellate judges to hear new issues: “(1) The record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail.”^{106 107} State and federal jurisprudence thus provides clear, albeit discretionary, justification for considering newly constitutional arguments on appeal.

A bright-line exemption from the general rule would be appropriate for what the *LaGuardia* court called “[issues] of constitutional magnitude,” for as designated interpreter of the Constitution, the judiciary has no higher purpose than to guard the rights enshrined therein. Now recall the *Youngblood* court’s ruling on Youngblood’s newly raised comparative analysis argument. Given the constitutional right of venirepersons against discriminatory peremptory strikes, and that of the defendant to a trial drawn from a fair cross-section of the community, Youngblood’s argument that the State struck African American venirepersons despite their similarity to accepted white venirepersons was an archetypal candidate for appellate consideration. In rejecting this argument, the *Youngblood* court cited *Delvalle v. Herbert* (2004):

¹⁰⁵ *United States v. LaGuardia*, 902 F.2d 1010 (1990).

¹⁰⁶ *State v. Golding*, 213 Conn. 233 (1989).

¹⁰⁷ Hypothetical application of Connecticut’s *Golding* criteria to Youngblood’s comparative analysis argument is informative. Youngblood’s argument certainly met prongs (2) and (4), and, assuming the relevant *voir dire* transcripts were preserved, met prong (1). Whether Youngblood’s argument met prong (4) is less obvious. A court might see the struck African Americans as so similar to the accepted whites that a constitutional violation would be plain. Alternatively, a narrow *Batson* application - the default in most jurisdictions - would lead a court to focus instead on the differences between struck blacks and accepted whites, however trivial.

“To withhold in the trial court a fact-specific argument in support of a *Batson* challenge carries with it all of the unfairness of holding challenges until ‘trial has concluded unsatisfactorily.’”¹⁰⁸ But the risk of Youngblood’s constitutional rights having been violated outweighed that of his counsel exploiting the appeals process. Youngblood’s new argument would have risked neither unfairness to the State, for the State had already put forth its race-neutral reasons and associated argument; nor abuse of the Fifth Circuit Court, for analyzing the new issue could hardly have overwhelmed the justices. Moreover, application of the general rule does not necessitate dismissal of Youngblood’s argument. Youngblood raised a *Batson* challenge at the trial level; his argument concerning the similarity of white accepted venirepersons could be considered a subsidiary component of that original challenge rather than an entirely new issue. *Youngblood’s* lesson applies at a systemic level: *Batson* claims are too constitutionally significant for defeat by the general rule.¹⁰⁹ Technicalities must not smother constitutional rights.

Louisiana’s recent fortification of its *Batson* codification is at odds with its underdeveloped *Batson* jurisprudence. Instead of expanding on *Batson*, the Louisiana judiciary tends to apply *Batson* so narrowly that strike opponents’ already slim chances of success shrink to pinhead dimensions. Trial and appellate courts alike stress strike proponents’ technical compliance with *Batson’s* race-neutrality mandate whenever wronged defendants pursue *Batson* inquiries and appeals. But technical compliance with a constitutional mandate is meaningless when the Constitution’s intended outcome is unrealized.

¹⁰⁸ *Delvalle v. Herbert*, 2004 U.S. Dist. LEXIS 14156.

¹⁰⁹ This is not an argument for the general rule’s abolition. I go no further here than the general rule’s applicability to *Batson* challenges.

Chapter III: Three Reformed State-Level *Batson* Jurisprudences

Florida

Florida was one of the few states to meaningfully address jury discrimination before the U.S. Supreme Court issued *Batson*. The Florida Supreme Court's first word on the matter, in *State v. Neil* (1984), responded to defendant Neil's complaint that the State had discriminatorily struck three of four black venirepersons during *voir dire* in violation of Neil's Sixth Amendment right to trial by an impartial jury. The trial court, apparently indifferent to the prospect of discrimination, had held that the State needed not explain its strikes and that no inquiry was necessary. On appeal, the District Court applied *Swain* and found no violation thereof, but certified *Neil* to the Florida Supreme Court nonetheless as "this issue is troublesome and capable of repetition." The Supreme Court, drawing from opinions issued in California, Massachusetts, and New York - hitherto only this handful had rejected *Swain*'s ineffective framework - devised a three-step *Neil* test by which trial courts might weed out discriminatory peremptory strikes. The *Neil* test resembles the *Batson* test, as the latter borrowed ideas from state court opinions, but with important differences:

A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a *strong likelihood* that they have been challenged solely because of their race [emphasis added]. If a party accomplishes this, then the trial court must decide if there is a *substantial likelihood* that the peremptory challenges are being exercised solely on the basis of race [emphasis added]. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race.¹¹⁰

Where *Neil* demanded a "strong likelihood" of discrimination from the strike opponent, *Batson* demanded a *prima facie* case of discrimination and an "inference" thereof. The *Batson* step one, while cripplingly vague and subjective in its own right, improved on *Neil*'s yet more burdensome equivalent. Difficult as it to persuade a trial judge of a *prima facie* case, only the

¹¹⁰ *State v. Neil*, 457 So. 2d 481.

most brazen, uncamouflaged attempt at discrimination has any chance of being deemed a “strong likelihood” by the typical *Neil*- and *Batson*-averse trial court. *Neil*'s step two likewise differed slightly but importantly from *Batson*'s:

If the [strike proponent] shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the [strike proponent] has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

Neil asked for more than the *Batson* “race-neutral reason” at step two, specifying acceptable bases for strikes. Specificity allows for easier interpretation in future cases, giving *Neil* an edge over *Batson* at step two. Trial courts could compare proffered step two bases with those articulated in the passage above instead of struggling to define “race-neutral.” *Neil*'s attempt at specificity, then, is laudable in a body of jurisprudence so mired in vague terminology. Florida's *State v. Slappy* (1988) further required a “clear and reasonably specific” [step two] explanation of [the strike proponent's] ‘legitimate reasons’ for exercising [a strike]” in accordance with *Batson*'s language.^{111 112}

The Florida Supreme Court's *Melbourne v. State* (1996) modified *Neil* by lowering the burden of proof placed on the strike opponent at step one. Instead of a “strong likelihood” of racial discrimination, *Melbourne*'s step one required only that the strike opponent “a) make a timely objection on [racial grounds], b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike.” This simplification handily dispensed with the difficulty inherent to determining “strong likelihoods” and *prima facie* cases. Trial courts can perform *voir dire* discrimination inquiries more effectively with a simple step one like *Melbourne*'s. Notably, by foregoing a steep burden of proof, *Melbourne*'s step one differed more significantly from *Batson*'s than did *Neil*'s. Florida's abolition

¹¹¹ *State v. Slappy*, 522 So. 2d 18 (1988).

¹¹² *Batson v. Kentucky*.

of a step-one *prima facie* or “strong likelihood” requirement at step one distinguishes from nearly every other state, hence its placement in this chapter of “reformed” *Batson* jurisprudences.

Melbourne's step two, by contrast, was more in line with *Batson*'s than was *Neil*'s, for it required a mere “race-neutral” explanation instead of *Neil*'s specifics.¹¹³ Such diminished specificity is a counterproductive evolution. More troubling was the *Melbourne* court's overt embrace of the U.S. Supreme Court's *Purkett v. Elem* step two, which “does not demand an explanation that is persuasive, or even plausible.”¹¹⁴ *Purkett*, as discussed in the *Batson* history overview in Chapter One, left the *Batson* inquiry even more toothless than its original 1986 form. Any step two strike explanation now sufficed to elude *Batson*, no matter how irrelevant to the case or how obvious its fabrication, allowing discriminators conscious and unconscious alike to operate unchecked. The *Melbourne* court could just as easily have required a case-relevant explanation; such would have accorded with the original *Batson* opinion and with *Slappy*, after all. Given the *Melbourne* court's willingness to differ its step one from the U.S. Supreme Court's, a parallel willingness to differ step two seems natural, yet did not materialize. Ultimately, the *Melbourne* court brought *Purkett*'s inanity to Florida's judiciary, and overruled *Slappy* to boot.

Melbourne also revised *Neil*'s step two burden distribution to reflect *Purkett*'s. In *Batson* and *Neil*, the “burden of persuading” the trial court fell on the strike opponent at steps one and three, and the strike proponent at step two.¹¹⁵ In *Purkett* and *Melbourne*, “the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.”¹¹⁶

¹¹⁷ This shift reflects the persistent fear that *Batson* inquiries impinge on counsel's right to peremptorily strike any venireperson; and that, unless saddled with the entire burden of

¹¹³ *Melbourne v. State*, 679 So. 2d 759 (1996).

¹¹⁴ *Purkett v. Elem*.

¹¹⁵ *State v. Neil*.

¹¹⁶ *Melbourne v. State*.

¹¹⁷ The strike proponent does bear the “burden of producing” a race-neutral reason at step two, a much easier burden to satisfy than that of persuasion.

persuasion or proof, strike opponents will trample the rights of proponents by obstructively quashing valid peremptory strikes.

This fear and *Purkett's* ill-conceived solution thereto are rooted in fallacious assumptions. First, unless otherwise stipulated by state constitutions like Connecticut's, peremptory strikes are not inalienable. The Fourteenth Amendment right to equal protection regardless of race, and the Sixth Amendment right to a jury drawn from a fair cross-section, however, are inalienable and as such should receive more robust protection than the peremptory strike. Second, a strike proponent's step two explanation should be more compelling than anything advanced by her opponent if she has truly acted without discriminatory intent, and correspondingly she should embrace the burden of persuasion as an opportunity to convince the court of her position; in other words, the burden of persuasion is not onerous to an honest strike proponent. Ideally, dishonest proponents (that is, would-be discriminators) could not overcome the burden of persuasion; but the peremptory strike's concerned guardians may rest assured that even dishonest proponents can invent permissible, case-relevant explanations to overcome the burden of persuasion with ease. Placing the burden of persuasion on strike proponents at step two, then, is not fatal to the peremptory strike, and even if it were, such burden distribution is so essential to outing discriminators that valid strike inquiries must implement it. *Melbourne* thus debased *Neil's* serviceable step two.

The Florida Supreme Court further edited its step two in *Dorsey v. State* (2003), a mix of clarifying and obfuscating revisions quite characteristic of *Batson's* progeny. During *Dorsey's* *voir dire*, the State struck an African American venireperson, Ms. George, who "appeared disinterested throughout. I was looking at her. She was sort of staring at the wall." Dorsey, raising a *Batson* challenge, claimed to the contrary that Ms. George "was very attentive, smiled in a lighthearted manner," and "when [defense counsel] asked who was happy to be here on jury duty, [Ms. George] was the only person [to] affirmatively respond she was happy." The trial court took the State "at her word" and denied Dorsey's *Batson* challenge. On appeal in Florida's

Third District, Dorsey argued that "a peremptory challenge based on body language would be unacceptable unless observed by the trial judge and confirmed by the judge on the record."¹¹⁸

The Third District Court rejected this reasoning on the grounds that *Melbourne* required only a "genuine" and not necessarily a "reasonable" explanation for the challenged strike at step two. Therein lay the question of whether a contended explanation unsupported by the record could count as genuine. On final appeal, the Florida Supreme Court answered that question the negative: "[T]he proponent of a strike based on nonverbal behavior may satisfy its burden of production of a race-neutral reason during the second step of the process described in *Melbourne* only if the behavior is observed by the trial court or otherwise has record support."¹¹⁹ This neatly resolved *Dorsey's* central conundrum. A step two explanation concerning nonverbal behavior can hardly be deemed genuine without evidence to confirm it. While the *Dorsey* court did not reach so far, it might also have deemed unsupported explanations presumptively invalid.

Immediately following the resolution of the record issue came this dictum: "Once this burden of production is satisfied, the proponent is *entitled* to the presumption that the reason is genuine [emphasis added]."¹²⁰ The *Dorsey* court's phrasing here allows more than one interpretation. Does "entitled" mean that if the record supports a step two explanation concerning nonverbal behavior, trial courts must uphold the challenged strike? Or can a finding of pretext overcome the proponent's entitlement? *Neil* held that "the *initial* presumption is that peremptories are exercised in a constitutionally proper manner [emphasis added]," meaning not that the trial court would accept *any* step two explanation supported by the record, but that at the *outset* of a *Neil* inquiry, a presumption of non-discrimination in the strike proponent's favor placed the initial burden of persuasion on the strike opponent. Trial judges could weigh this presumption against the strike opponent's "strong likelihood" case at step one to determine

¹¹⁸ *Dorsey v. State*, 806 So. 2d 559 (2002).

¹¹⁹ *Dorsey v. State*, 868 So. 2d 1192 (2003).

¹²⁰ *Id.*

whether the inquiry would proceed to step two. But *Neil* did not indicate that this presumption need extend beyond “the initial.”¹²¹ (With *Neil*’s “strong likelihood” requirement mooted by *Melbourne*, even this initial presumption now has indefinite significance.) The only certainty in *Dorsey*’s entitlement language is expansion of the *Neil* presumption beyond the inquiry’s outset when record-supported nonverbal behavior is at issue.

One of *Neil*, *Melbourne* and *Batson*’s key enforcement mechanisms was the trial judge’s ability to deny a strike as pretextual even when its proponent’s explanation was record-supported and race-neutral. This reflected an awareness that competent strike proponents could craft record-supported, race-neutral pretexts to disguise discrimination. An likely pretextual explanation, no matter how well supported by the record, deserves no presumption of genuineness. Precedent held that trial judges were in the best position to determine whether a given step two explanation was pretextual. Whether the *Dorsey* court intended to preserve the trial judge’s discretion to deny record-supported pretexts is unclear.

The *Dorsey* dissent postulated a very different problem: that the majority actually curbed the presumption of genuineness accorded to the strike proponent by requiring record-support of the step two explanation. The “broad presumption of nondiscriminatory intent in *Melbourne*,” the dissent argued, would have permitted the strike challenged by *Dorsey* without need for affirmation by the record.¹²² (This is not what the majority meant; see the last three paragraphs.) These concerns are remarkable not for their accuracy but as an example of the extent to which guardians of the peremptory strike wish to hobble *Batson* jurisprudence. Strike proponents’ exemptions from any burden of persuasion and from advancing a reasonable explanation at step two, which together make the strike opponent’s job nearly impossible even when a challenged strike is obviously discriminatory, were not enough for the dissent, which sought for strike proponents this additional exemption from having to support step two explanations with

¹²¹ *State v. Neil*.

¹²² *Dorsey v. State*, Wells, J. dissenting.

record-derived evidence. Those who fear the peremptory strike's extinction are unwilling to tolerate even the slightest increase of *Batson's* - or in this case, *Melbourne's* - power.

Certain Florida District Court opinions have considered *Dorsey's* ambiguities. In the Fourth District's *Harriell v. State* (2010), the court dealt with a *Melbourne* inquiry in which the State argued at step two that venireman Sanders had been sleeping; i.e., an undesirable nonverbal behavior. Harriell's counsel said she "didn't see him sleeping at all," with which the trial judge concurred. Harriell's counsel added, "Whether he's sleeping or not, if he had his eyes closed, it doesn't matter. He can still be listening. He could be resting his eyes." The *Harriell* court deemed the exchange unlike *Dorsey* in that defense counsel "did not expressly dispute the prosecutor's observations about juror Sanders."¹²³ In fact, Harriell's counsel's assertion that she had not seen Sanders sleeping was just such a dispute; the court's decision otherwise was a distortion of the transcript. The *Harriell* court concluded that the State satisfied its record-supported burden of production and was thus entitled to a presumption of genuineness per *Dorsey*. This conclusion suggests a reading of *Dorsey's* presumption-entitlement language in which the trial court *must* decide for the State upon advancement of a record-supported, race-neutral explanation. Such a reading jeopardize trial judge discretion to deny a strike on the basis of pretextuality when "inattentive venirepersons" are at issue.

The Fifth District's *Travelers Home & Marine Ins. Co. v. Gallo* (2018) allowed the trial judge more discretion in the face of presumption-entitlement. At trial, Travelers struck an African American woman and explained in response to Gallo's *Melbourne* challenge that she had been "inattentive and did not appear engaged in the jury selection process." The trial judge disallowed the strike on the basis that Travelers' step two explanation was "legally insufficient;" but as the Fifth District later ruled, such explanations concerning nonverbal behavior can in fact be legally sufficient per *Dorsey*. After the inquiry's conclusion, "Gallo's counsel placed on the record that

¹²³ *Harriell v. State*, 29 So. 3d 372 (2010).

his observations of this juror ‘were completely opposite of [Travelers’] counsel.’” The trial judge “commented that the [venireperson] was ‘not particularly different’ from other ‘introverted’ venirepersons that it sees on a regular basis, but it specifically agreed with Travelers’ counsel’s observation that this juror was ‘not particularly engaged.’” The Fifth District seized on this statement as confirming Travelers’ observations as genuine and record-supported, entitling Travelers to a presumption of genuineness. While the Fifth District reversed on the basis of the trial court’s erroneous conclusion of legal insufficiency, its opinion also substantively discussed presumption-entitlement: “[T]he presumption that Travelers’ peremptory challenge was genuine could have been rebutted by other relevant factors such as ‘the racial makeup of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged venireperson; or singling out the venireperson for special treatment.’”¹²⁴

Travelers thus resolved the *Dorsey* ambiguity about trial judge discretion in the trial judge’s favor (even as it reversed this specific trial judge’s decision). Trial judges may, per *Travelers*, deny a strike on the basis of pretextuality even if the strike proponent’s step two explanation concerns record-supported nonverbal behavior. It is unclear whether the *Dorsey* court intended this interpretation, which the *Harriell* court appears not to have shared. Trial judges cannot determine pretext objectively when the presumption-entitlement is binding. Therefore, with a mind to blocking pretextual step two explanations, *Travelers*’ interpretation is preferable to *Harriell*’s. Ideally, the *Dorsey* court would not have created this ambiguity in the first place. Given *Slappy*’s holding that “a judge cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact,” the case for the strike proponent’s entitlement to a presumption of genuineness at step three given a record-supported explanation concerning nonverbal behavior is tenuous.¹²⁵ Exemption from

¹²⁴ *Travelers Home & Marine Ins. Co. v. Gallo*, 246 So. 3d 560 (2018).

¹²⁵ *State v. Slappy*.

any burden of persuasion - an immoderate advantage - sufficiently protects strike proponents from spurious *Melbourne* inquiries, to the extent that any presumption of genuineness is unnecessary. *Dorsey's* presumption-entitlement language, then, ambiguous and overly accommodating of strike proponents, only sets back the decades-old *Neil* progeny. Florida's lower courts should follow the *Travelers* court's interpretive lead.

Another recent lower court decision, the Second District Court's *Spencer v. State* (2016), considered the trial judge's discretion to rule on a step two explanation's genuineness not in *Dorsey's* light but in that of the Florida Supreme Court's *Hayes v. State* (2012). The *Hayes* court ruled that a *Melbourne* inquiry had proceeded improperly because "the trial court erroneously relieved the State—the opponent of the strike—of its burden to establish that the reason for the challenge, despite being gender-neutral, was pretextual." In other words, the trial court had relieved the strike opponent of its burden of persuasion. The *Hayes* court maintained that as stipulated in *Melbourne*, "if the explanation is facially race-, ethnicity-, or gender-neutral, the court must determine whether the explanation is a pretext 'given all the circumstances surrounding the strike,' with the focus of this inquiry being the genuineness of the explanation."¹²⁶ Hence a determination of pretext is not optional but mandatory. These *Hayes* holdings, which go no further than restating existing precedent, were baselessly interpreted in *Spencer* to mean that a trial judge need not consider genuineness at step three unless the strike opponent specifically claims the strike proponent's step two explanation was pretextual. The *Spencer* court on determining pretext:

It simply is not the job of the trial court to develop the circumstances that may weigh against the genuineness of a proposed peremptory challenge. The trial court has an obligation to maintain its neutrality. See, e.g., *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983) ("Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge," and a court has the duty "to scrupulously guard this right." (quoting *State ex rel. Mickle v. Rowe*, 100 Fla. 1382, 1385, 131 So. 331 (1930))); *J.L.D. v. State*, 4 So. 3d 24 ... If the trial court is to maintain its position of neutrality, its job is merely to rule on this delicate and fact-intensive issue when the opponent has presented the issue for ruling under its burden of persuasion.

¹²⁶ *Hayes v. State*, 94 So. 3d 452 (2012).

Moreover: “[I]t is the better practice for a trial court to affirmatively ask an opponent to state all of the circumstances the opponent believes support a claim of pretext, but if the trial court omits this step, it should be incumbent upon the opponent to object and ask to place into the record the circumstances that it wishes the trial court to consider and the appellate court to review.”¹²⁷ By this reasoning, trial judges may skip the genuineness consideration if the strike opponent does not mention pretext specifically. The strike opponent’s already excessive burden thus swells even further. Moreover, a trial judge who independently concludes that a step two explanation is pretextual may not disallow a strike per *Spencer* if the strike opponent does not explicitly indicate agreement. Erosion of the trial judge’s discretion to disallow peremptory strikes, nascent in *Dorsey* and *Harriell*, is full-fledged in *Spencer*. This holding directly contradicts *Melbourne*’s aforementioned *requirement* that a genuineness inquiry occur. Indeed, a *Melbourne* inquiry cannot be said to have concluded until a genuineness inquiry occurs. *Spencer* thus licenses trial courts to undertake incomplete *Melbourne* inquiries. The importance of considering an explanation’s genuineness needs little qualification; strike proponents can and do lie at step two. Trial judges need in their procedural arsenal the ability to ferret out dishonesty and rule accordingly with or without prodding from the strike opponent.

As for the *Spencer* court’s concerns regarding trial judge neutrality, considering genuineness without being asked to do so hardly constitutes bias. After all, if, as Florida Supreme Court precedent requires, the presumption of non-discrimination cushions the strike proponent and the entire burden of persuasion falls on the strike opponent, the entire *Melbourne* process gives the proponent enough advantage to stamp out any hypothetical bias towards the opponent. A genuineness inquiry unsolicited by the strike opponent does not require the trial judge to “*develop* the circumstances that may weigh against the genuineness of a proposed peremptory challenge [emphasis added];” instead, the trial judge need only reflect on the *voir*

¹²⁷ *Spencer v. State*, 196 So. 3d 400 (2016).

dire proceedings she has just witnessed. No imagination is required. Moreover, as countless opinions testify, trial judges seldom rule against strike proponents in their genuineness inquiries (or whatever a given jurisdiction's equivalent might be). There is little danger of biased trial judges haphazardly using the genuineness inquiry to deny valid peremptory strikes, and hence no need to curtail trial judges' authority to consider genuineness as they see fit.

Importantly, the trial judge could just as well have *too much* discretion in the *Melbourne* or *Batson* process. Trial judges must not, for example, skip inquiry steps or permit step two explanations that they know are not race-neutral. But equally, jurisprudence must not restrict trial judges from acting when they suspect that discrimination has occurred. Appellate courts must not disallow findings of pretext when some arbitrary criterion, such as a lack of explicit remark by the strike opponent, is unmet. Rulings to the contrary allow discrimination to fly under the radar.

Florida has relied more on its own, state-level jurisprudence than most states in addressing jury discrimination. Its numerous rulings thereon, from courts high and low, attest to a proactive engagement with this issue. As discussed, *Neil* and *Melbourne* offer certain advantages over *Batson*, especially at Florida's simplified step one. Certain jurisprudential shortcomings, however, cannot be overlooked. If the Florida judiciary wishes for steps two and three of the *Melbourne* inquiry to proceed efficiently and effectively at the trial level - and, indeed, if it wishes to avoid a glut of confusing appellate rulings on these steps - it must clarify when and how the strike opponent's burden of persuasion can overcome the strike proponent's presumption of non-discrimination. Better yet, eliminate the presumption altogether, for the burden of persuasion is daunting enough that *Melbourne* inquiries are generally foreclosed in the proponent's favor regardless. Though Florida has taken action, its lesson echoes that of Illinois: the U.S. Supreme Court has irresponsibly dropped its knotty three-step framework, further confused by *Purkett*, onto bewildered state courts in hopes that they will solve the problem on their own. The continuing nonappearance of a true solution midway through

Batson's third decade of life heralds the need for state and federal courts to collaborate on an overhaul.

Washington

So profoundly has Washington changed the *Batson* process that the very *Batson* moniker rings inapplicable to Washington's revised jurisprudence. A chain of proactive *Batson* decisions ultimately led the Washington Supreme Court to drastically lower the burden of proof on the strike opponent at step one. This trajectory began with *State v. Rhone* (2005), in which a prosecutor struck the only black venireperson during *voir dire*. Rhone argued that striking the only member of a certain minority constituted a *prima facie* case of discrimination. Disagreeing, the trial court did not move the *Batson* inquiry beyond step one. *Rhone*'s subsequent climb up the appellate ladder attracted attention from the American Civil Liberties Union (ACLU). The ACLU proposed a bright-line rule in which striking the sole member of a cognizable group would constitute an automatic *prima facie* case of discrimination, arguing that the rule would "(1) ensure an adequate record for appellate review, (2) account for the realities of the demographic composition of Washington venires, and (3) effectuate the Washington Constitution's elevated protection of the right to a fair jury trial." The Washington Supreme Court's 2010 5-4 *Rhone* opinion concluded that "Adopting a bright-line rule would negate [step one] of the [*Batson* inquiry] and require a prosecutor to provide an explanation every time a member of a racially cognizable group is peremptorily challenged. Such a rule is beyond the intended scope of *Batson*, transforming a shield against discrimination into a sword cutting against the purpose of a peremptory challenge."¹²⁸ Cautious deference to *Batson* and to the peremptory strike itself mark this line of thought.

Rhone's dissent endorsed the bright-line rule. Diverging from the majority's stance that a bright-line rule lay outside *Batson*'s scope, the dissent argued, "So long as the State's purpose

¹²⁸ *State v. Rhone*, 168 Wn.2d 645 (2010).

in excluding the venire member is nondiscriminatory, it will be permitted to exercise its challenge and the purpose of the peremptory challenge will not be undermined.”¹²⁹ In other words, a bright-line rule would not unfairly encroach on the rights of honest strike proponents. Chief Justice Madsen’s concurrence contained the caveat that “going forward, I agree with the rule advocated by the dissent.”¹³⁰ With five justices in favor of the bright-line rule, its implementation was only a matter of time. The matter resurfaced in *State v. Saintcalle* (2013), in which the Washington Supreme Court noted:

Unconscious stereotyping upends the *Batson* framework. *Batson* is equipped to root out only “purposeful” discrimination, which many trial courts probably understand to mean conscious discrimination. See *Batson*, 476 U.S. at 98. But discrimination in this day and age is frequently unconscious and less often consciously purposeful. That does not make it any less pernicious. Problematically, people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it... Since *Batson*’s third step hinges on credibility, this makes it very difficult to sustain a *Batson* challenge even in situations where race has in fact affected decision-making.¹³¹

Here Washington’s conception of jury discrimination entered what might be considered a post-*Batson* phase, even if its jurisprudence did not yet progress correspondingly. Transcending *Batson*’s rigid focus on purposeful or conscious discrimination, the *Saintcalle* court recognized the need for a jurisprudence that recognizes the unconscious. Consider how many of the cases discussed in previous sections, in each of the five states studied herein, might have concluded differently if their judges had been watching for and rooting out unconscious discrimination. The State’s nine strikes of black venirepersons in Louisiana’s *State v. Youngblood* (2019), for example, were deemed free of conscious discrimination. This was itself an unpersuasive reading; but to find no unconscious discrimination in *Youngblood* would be patently naive. As for *Saintcalle*’s own case facts, the court found that despite evidence of unconscious discrimination - the State had again struck the venire’s sole black venireperson - the defendant’s argument

¹²⁹ *State v. Rhone*, Alexander, J., dissenting.

¹³⁰ *State v. Rhone*, Madsen, J., concurring.

¹³¹ *Id.*

precluded adoption of a bright-line rule as Saintcalle had not “asked for a new standard or framework.” The majority concluded that the bright-line rule “must wait for another case.”¹³²

City of Seattle v. Erickson (2017) was that case. The State’s strike of the sole African American on Erickson’s venire led his counsel to petition the Washington Supreme Court to adopt the bright-line rule first considered in *Rhone*. This was the opportunity *Saintcalle* had almost, but not quite, presented. The court announced its finding in Erickson’s favor: “In the past, this court has provided great discretion to the trial court when it comes to the finding of a *prima facie* case pursuant to a Batson challenge. To ensure a robust equal protection guaranty, we now limit that discretion and adopt the bright-line Rhone rule.”¹³³ Importantly, the bright-line rule is just one path strike opponents could take to proving a *prima facie* case. More conventional approaches remain available.

While ambitious, *Erickson* was not the transformative leap that effectively replaced *Batson* in Washington. Comprehensive change came in the form of the Washington Supreme Court’s General Rule 37 (GR 37), adopted April 24, 2018. GR 37 begins its revision in section (c) by excising the *prima facie* requirement from step one.¹³⁴ The strike opponent need only make a “simple citation to [General Rule 37]” to begin the inquiry. Section (d)’s step two asks an explanation of the prosecutor without any mention of race-neutrality. Step three changes radically in section (e): “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.”¹³⁵ This marks the first departure from a race-neutrality standard in jury discrimination inquiries. So many questionable *voir dire* circumstances permitted by the old framework - alarming numbers of African Americans struck, African Americans struck despite their similarity

¹³² *Id.*

¹³³ *City of Seattle v. Erickson*, 188 Wn.2d 721 (2017).

¹³⁴ Connecticut and Florida had already made this change well before GR 37’s adoption.

¹³⁵ Washington General Rule 37, adopted effective April 24, 2018.

to accepted white venirepersons, race-neutral reasons of no relevance to the instant case - demand a finding in the strike opponent's favor under GR 37 (e).

Such a departure from federal jurisprudence begs the question of whether Washington State has the authority to so change the federally prescribed discrimination inquiry. Recall the *Batson* Court's own answer to this question: "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today."¹³⁶ States thus have broad, albeit indefinite, authority to interpret *Batson* as they deem appropriate. Instead of rejecting the original *Batson* inquiry as fatally flawed and constructing their own approaches, state judges have largely (and often counterproductively) used their broad interpretive authority to actualize the Court's perceived intentions.¹³⁷ Washington, by lightening *Batson*'s central burdens of proof on the strike opponent, has excepted itself from this trend; and, in doing so, has posited a broad reading of the foregoing *Batson* quote. While GR 37 does not unequivocally "solve jury discrimination," it does ameliorate what has always been *Batson*'s chief fault: its overburdening of the strike opponent.

GR 37 section (g), "Circumstances Considered," further identifies five nonexclusive circumstances courts should consider in determining whether an objective observer could view the challenged peremptory strike as racially influenced:

- (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

¹³⁶ *Batson v. Kentucky*.

¹³⁷ Albeit, as discussed in the Illinois section above, with inconsistent results that can vary widely from state to state and even county to county.

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.¹³⁸

Section (g) thus provides the most comprehensive and specific definition available of what *Batson* referred to as a “relevant circumstance.” The circumstances most commonly disputed during *Batson* inquiries are accounted for here. Circumstances (iii) and (iv) are especially difficult for judges to consider in a conventional *Batson* inquiry, but section (g) requires consideration thereof. Section (h), “Reasons Presumptively Invalid,” bars seven step two reasons from passing muster:

- (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.

Other states consider step two reasons on a case-by-case basis, permitting judges to approve these seven. Many of these reasons have appeared in the cases discussed in previous sections. Applying section (g) to a case like Louisiana’s *State v. Youngblood*, in which venireperson Bourgeois expressed the distrust described in reason (ii), would have required a different ruling. Reason (vii), “not being a native English speaker,” notably challenges the U.S. Supreme Court’s holding in *Hernandez v. New York* (1991) that peremptory strikes may be used to remove non-English speaking venirepersons.¹³⁹

¹³⁸ GR 37.

¹³⁹ *Hernandez v. New York*.

One of *Batson*'s ambiguities is how to resolve an inquiry when the strike proponent alleges that the struck venireperson was inattentive, sleeping, etc., but the strike opponent and trial judge either dispute the allegation outright or are unsure of its veracity. (Refer to the discussion above of Florida's *Harriell v. State* for an example.) GR 37's concluding section, (i) "Reliance on Conduct," seeks to resolve this ambiguity:

(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.¹⁴⁰

Before examining (i), we pause to reflect upon GR 37's dramatic rebalance of the *Batson* framework's burdens of proof for strike opponents and proponents. The vast majority of jurisdictions require the strike opponent to put forth a *prima facie* case and rebut the strike proponent's step two strike explanation. All that these jurisdictions require of the strike proponent is a superficially race-neutral reason, to which trial and appellate judges usually defer. Unintentional discrimination is tacitly permitted. Intentional discrimination can fly under the radar if competently disguised. GR 37 has turned this norm on its head by dramatically reducing the strike opponent's burden of proof. Strike proponents, by contrast, face the increased burden of proving that "an objective observer could [not] view race or ethnicity as a factor in the use of the peremptory challenge." Now we come to (i) itself: strike opponents may "veto" those peremptory strikes based on "inattentive" venireperson behavior simply by disputing them. Whereas strike opponents were recently all but powerless to invalidate peremptory strikes, now they may do so - when venireperson "inattentiveness" is concerned - more or less at will in Washington State. One cannot overstate Washington's flip relative to conventional strike proponent-friendly inquiry procedure. We can expect backlash from those

¹⁴⁰ GR 37.

who prioritize the maintenance of unchecked peremptory strikes over systemic solutions to jury discrimination.

As though concerned that a general rule alone would be insufficiently compelling, the Washington Supreme Court further incorporated GR 37's provisions into Washington's common law in *State v. Jefferson* (2018). Faced with a case of likely jury discrimination before GR 37's adoption, the court found that *Batson* in its conventional form precluded a ruling in the complainant's favor. Instead, the court modified its common law *Batson* framework so that step three asks not whether the strike proponent's reason was race-neutral but whether, as stipulated by GR 37 section (e), "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." For statutory language to enter the common law is unusual. The majority bases its move (a) on the contention that "in order to meet the goals of *Batson*, we must modify the current test;" and (b) on the Supreme Court's ruling in *Batson* that states may implement the framework as they see fit. Justice Madsen's dissent lamented that the majority "essentially adopts GR 37 into our *Batson* framework, which is unnecessary and inappropriate. Indeed, GR 37 was never meant to be a constitutional rule backed by constitutional protections."¹⁴¹ But *Jefferson* provides a failsafe for GR 37's provisions should the rule be struck down; the converse also applies. It is better to enshrine constitutional venireperson protections in two places than one. To suggest that the rights accorded by GR 37 are unworthy of common law protection is to underestimate the threat of jury discrimination to the judiciary.

As an epilogue to Washington's arc, we now examine GR 37's application in a case decided by the Washington Supreme Court well after the rule's adoption. In *State v. Pierce* (2020), a venireperson asked whether the State was seeking a death sentence for the defendant.¹⁴² The answer was no, but the trial judge responded that per the Washington

¹⁴¹ *State v. Jefferson*, 192 Wn.2d 225 (2018).

¹⁴² This is the only case listed on Lexis Nexis that invokes GR 37, other than *Jefferson*.

Supreme Court's *State v. Townsend* (1994), venirepersons could not be informed whether a death sentence would be involved with the trial for which they might serve. The prosecutor posed a question to the venirepersons present for the *Pierce voir dire*: "[W]ith that in mind that the judge can't tell you and you won't know, does that cause you any concern about being a juror in this case where the charge is murder in the first degree?" Venirewoman 6, the only African American present, expressed doubt about her ability to convict if a death sentence was in the cards. Defense counsel's questioning led venirewoman 6 to explain, "I think that my views can be fair, and I think that they can be impartial. I am very hesitant about making a decision that would weigh that heavily upon somebody's life, but I feel that I am capable of making a fair and impartial decision." The State struck venirewoman 6 on the grounds that she "had a brother who was convicted of attempted murder and that the process of conviction and sentence 'left a bad taste in her mouth;'" the State also "repeatedly stressed that juror 6 frequently paused before answering questions[.]" *Pierce* argued on appeal that the prosecutor had improperly "death-qualified" venirepersons.¹⁴³

The Washington Supreme Court, in addition to overruling the precedent that banned discussing death sentences with venirepersons, found that the State's reasons for striking venirewoman 6 fell under General Rule 37's presumptively invalid reasons. A venireperson's aversion to the death penalty is no longer an acceptable step two explanation in Washington, as an objective observer could conclude that race influenced such an explanation. Consider that the State's race-neutrally phrased step two explanation would have demanded a Sisyphean interpretive task in almost any other state. No court can ever truly determine whether a strike proponent acted disingenuously during *voir dire*; by erring on the side of caution, GR 37 spares courts from attempting such determinations. Any other state Supreme Court might have spent pages explaining why venirewoman 6's statements could plausibly have elicited a peremptory

¹⁴³ *State v. Pierce*, 455 P.3d 647 (2020).

strike without any racial motive on the prosecutor's part. (Indeed, this thesis has examined many such decisions.) But GR 37's unambiguity allowed the court to explain its application of the rule in nine sentences. Whether Washington's sub-Supreme appellate courts will apply the new rule with any regularity remains to be seen.

Washington's new approach to fighting jury discrimination is of national significance. We can expect complicated and inefficient state-level *Batson* frameworks to evolve as other state courts follow the Washington Supreme Court's lead. One such state court, the Connecticut Supreme Court, has already embarked on a reassessment of its *Batson* jurisprudence.

Connecticut

Among Connecticut's first post-*Batson* pronouncements on the issue of jury discrimination was the Connecticut Supreme Court's *State v. Gonzales* (1988). Drawing from multiple influential opinions, the court listed six factors properly considered in determining pretext:

While *Batson* does not address the problem of pretext, other courts have discussed the types of evidence that are salient to a showing of pretext. See, e.g....*People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Slappy v. State*, 503 So. 2d 350, 355 (Fla. App. 1987). The following examples are by no means exhaustive: (1) The reasons given for the challenge were not related to the trial of the case; (2) the prosecutor failed to question the challenged juror or only questioned him or her in a perfunctory manner; (3) prospective jurors of one race were asked a question to elicit a particular response that was not asked of the other jurors; (4) persons with the same or similar characteristics but not the same race as the challenged juror were not struck; (5) the prosecutor advanced "an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically"; and (6) the prosecutor used a disproportionate number of peremptory challenges to exclude members of one race.¹⁴⁴

Here, the theme of state courts filling in *Batson*'s blanks recurs. Connecticut, lacking guidance from the U.S. Supreme Court, was forced to develop its own list of pretexts. Given how early *Gonzales* was decided in *Batson*'s lifespan, Connecticut's list is fairly comprehensive. A modern list of potential pretexts might also include step two strike explanations that, even if facially race-neutral, are associated with minorities, e.g. venireperson mistrusts police, lives in a high crime area, and so forth.

¹⁴⁴ *State v. Gonzalez*, 206 Conn. 391 (1988).

One atypical example of possible pretext gave rise to the Connecticut Supreme Court's *State v. Edwards* (2014). Pending Edwards' trial, a venirewoman of color, C.D., wrote on her juror questionnaire that her race was "human." During *voir dire*, the senior prosecutor asked C.D., "Anything in your background that would make it difficult for you to sit in judgment of other people?" Her response: "Besides being human, no." C.D. explained that human beings are naturally informed by the diverse experiences they bring to jury service. In regard to C.D.'s questionnaire response, the prosecutor asked, "Why did you do that?" C.D. answered, "Because that is the race I belong to." The State peremptorily struck C.D. after her questioning concluded and, upon defense counsel's *Batson* challenge, explained, "C.D.'s answer 'seemed outside the norm of what one would expect to have placed in a questionnaire box, and I just found that to be disconcerting and didn't think that someone who would fill in... a line like that would necessarily be appropriate to serve as a juror.'" Further, the State "emphasized that the peremptory challenge had 'nothing to do necessarily with [C.D.'s] race... [but had] to do with [her] response to the questionnaire, which struck me... as odd...'" Defense counsel countered that "he would 'probably [have] answer[ed] [the race] question the same [way C.D. had]' because 'we're all one race,'" asking, "what is race, really?" The trial court found the State's explanation "nondiscriminatory" and allowed the strike.¹⁴⁵

On appeal to the Connecticut Supreme Court, Edwards argued that by striking a venirewoman on the basis of her self-identified race, the State had discriminated against her; that the State's explanation was pretextual because minorities are more likely to identify as belonging to "unusual" races, because the prosecutor questioned C.D. perfunctorily, and because the prosecutor's step two explanation was irrelevant to the case; that the court should use its supervisory power to prohibit peremptory strikes based on responses to the race component of the juror questionnaire; and that the trial court had incorrectly found no evidence

¹⁴⁵ *State v. Edwards*, 314 Conn. 465 (2014).

of discrimination, necessitating a new trial. The State responded that the prosecutor had struck C.D. because her questionnaire response was itself unusual regardless of C.D.'s race. The court, siding with the state, used *Hernandez v. New York* to conclude that peremptory strikes based on venireperson characteristics associated with race that may impede a juror's ability to decide a case impartially are nondiscriminatory. As for pretextuality, the court found that contrary to the defendant's assertions, the State's step two explanation was neither "vague" nor irrelevant because such an "unusual" response on a questionnaire might indicate partiality. Finally, the court declined to use its supervisory power as the defendant requested, on the ground that "the defendant presents no evidence... that our current practices result in fewer racial minorities participating in the jury selection process."¹⁴⁶

An individual's racial self-identification is a proxy for or representation of their actual race. Exceptions arise when individuals purport to belong to ethnic groups to which they have no valid claim; e.g., an ethnic Brazilian could not validly claim to be an ethnic Han Chinese. C.D.'s response on the jury questionnaire was no such exception. Her racial self-identification, "human," was as valid a view of her race as whatever finer details a DNA test might turn up. Individuals have a right to present their race on their terms.¹⁴⁷ Perhaps C.D. did not want to share the particulars of her heritage with strangers; perhaps she took issue with conventional racial labels; or perhaps she did not know where her ancestors came from. Whatever the case, "human" represented whatever C.D.'s racial makeup might have been. Her racial self-identification was inextricable from her race itself. As such, there was no substantive difference between the prosecutor's stated basis for striking C.D. - her "unusual" racial self-identification - and a strike based on C.D.'s skin color. The State discriminated against C.D.'s race by proxy.

The prosecutor peppered his *voir dire* statements with the word "unusual," and the court followed suit in its opinion. There could be no clearer evidence of cloaked racial bias than

¹⁴⁶ *State v. Edwards*.

¹⁴⁷ Insofar as they do not embody the aforementioned exception.

reference to a brown woman's racial self-identification as "unusual." C.D.'s questionnaire response might well have struck the prosecutor as "unusual" because it forced him to confront her race in a way that "black" or "African American" would not have. In such a case, his resulting discomfort could only have informed his view of C.D. and, inevitably, that view would have informed his strike. Such a hypothesis concerning the prosecutor's course of action, while speculative, is also completely plausible. Attempting to rebut defense counsel's assertion of discrimination, the prosecutor stated, "[the peremptory strike] had nothing to do necessarily with [C.D.'s] race . . . [but had] to do with [her] response to the questionnaire, which struck me . . . as odd" This statement is self-defeating. The questionnaire response, as a form of racial self-identification, had everything to do with C.D.'s race. All the prosecutor proved was that he discriminated on the basis of C.D.'s racial identity, which no less violates the Equal Protection Clause than discrimination on the basis of skin color. The court, finding no fault with the prosecutor's statements, ruled that the peremptory strike was based "on the unusual manner in which she answered a question about race in the juror questionnaire." Yet that very "unusual manner," again, reflected C.D.'s racial identity. It is farcical to hold that discrimination on the basis of racial identity is substantively different from discrimination on the basis of race itself, much less to deem such conduct acceptable. Connecticut would do well to account for racial identity, for in failing to acknowledge its role in *Edwards*, the court perpetuated a form of discrimination no less insidious than that based on genetics.

Thankfully, *Edwards* is not representative of Connecticut's modern *Batson* jurisprudence. *State v. Holmes* (2019), recently decided in the State's favor by the Connecticut Supreme Court, broached the issue of whether peremptory strikes made on the basis of beliefs common among certain minorities can be considered race-neutral. During voir dire, the State asked African American venireman W.T.'s about his feelings toward the criminal justice system. W.T., who had worked with inmates through volunteer work with the Department of Corrections, expressed such sentiments as "just in the criminal justice system in general, I know how

sometimes people are not... given a fair trial or they maybe disproportionately have to go to jail;" "all various systems, there's a lot of discrimination still goes out;" and "I got a new car, I feared that, you know, I might get stopped [by police], you know, for being black, you know." W.T. indicated that he could be impartial to police testimony, and agreed with the prosecutor's statement "that [he] would listen to the evidence and decide it on the evidence and you wouldn't let any concerns that [he] had filter in."¹⁴⁸

The prosecutor peremptorily struck W.T. Defendant Holmes raised a *Batson* challenge on the grounds that "W.T. was the first African-American venireperson to be examined and that... W.T. had assured the court and the state that he could be a fair and impartial juror." The prosecutor responded that he would have struck any venireperson who expressed W.T.'s beliefs regardless of their race. The trial court deemed the prosecutor's strike facially race-neutral and overruled the *Batson* challenge. On appeal, Holmes argued that peremptorily striking African American venirepersons who are skeptical of police is not race-neutral because "there is a much higher prevalence of such beliefs among African-Americans." The Appellate Court rejected this "disproportionate impact" argument in light of *State v. King* (1999), in which the Connecticut Supreme Court deemed permissible a peremptory strike of an African American venireperson who believed that "African-American defendants often receive more sentences than white defendants for the same crimes."¹⁴⁹

The Connecticut Supreme Court affirmed the Appellate Court's decision of *Holmes*, agreeing with the State that "disparate impact and unconscious bias claims are not cognizable under the second step of the *Batson* analysis;" and that, as ruled in *King*, peremptory strikes of African American venirepersons who express skepticism of the criminal justice system are facially race-neutral and therefore permissible. *Hernandez v. New York* (1991)'s dictum "that official action will not be held unconstitutional solely because it results in a racially

¹⁴⁸ *State v. Holmes*, 176 Conn. App. 156 (2017).

¹⁴⁹ *Id.*

disproportionate impact” informed the court’s decision. Despite ruling for the State, the court concluded that Holmes’ arguments raised serious questions about *Batson*’s defects, and referenced Washington’s General Rule 37 (GR 37) as an inspiration for assembling a Jury Selection Task Force to “propose necessary solutions to the jury selection process in Connecticut, ranging from ensuring a fair cross section of the community on the venire at the outset to addressing aspects of the voir dire process that diminish the diversity of juries in Connecticut’s state courts.”¹⁵⁰

Rarely do courts recognize, much less resolve to rectify, *Batson*’s shortcomings. The Connecticut Supreme Court’s resolution to assemble a Jury Selection Task Force recognizes that accumulated precedent is no substitute for a definition of “race neutral reason for striking.” *Holmes* exemplifies the ambiguity inherent to reviewing precedent alone, however dispositive and necessary, without a precise definition of race neutrality. Once the Task Force deliberates, Connecticut judges can expect definitive guidance concerning whether to permit strikes of venirepersons who voice W.T.’s views or variations thereon. Existing jurisprudence does not amount to such definitive guidance. *Batson* itself demanded a “neutral explanation related to the particular case to be tried” at step two.¹⁵¹ *Purkett* lowered this threshold to permit “silly or superstitious” reasons at step two, naively trusting that “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination” at step three.¹⁵² Connecticut’s *State v. King* (1999) narrowly considered the prosecutor’s proffered reason for striking in the instant case - a very similar reason to that proffered by the prosecutor in *Holmes* - without offering a definition of race-neutrality for use in future cases.¹⁵³ None of these decisions defined race-neutrality precisely. The *Holmes* court addressed its state’s lack of a true definition

¹⁵⁰ *State v. Holmes*, 334 Conn. 202 (2019).

¹⁵¹ *Batson v. Kentucky*.

¹⁵² *Purkett v. Elem.*

¹⁵³ *State v. King*, 249 Conn. 645 (1999).

by assembling the Task Force and referencing Washington General Rule 37, which provides not a definition of race neutrality per se but equally valuable metrics in the form of five “circumstances the court should consider” “in making its determination” of whether a prosecutor’s proffered reason was race neutral, and seven “presumptively invalid” reasons for striking a venireperson.¹⁵⁴ While *Holmes* does not provide a definition of race neutrality or other appropriate metric, its Task Force likely will.

Though the degree to which the Task Force’s rule(s) will resemble Washington’s GR 37 remains to be seen, application thereof to the instant case is instructive. Two of Washington’s “presumptively invalid” reasons for striking a venireperson are “(i) having prior contact with law enforcement officers;” and “(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling.” W.T.’s testimony coupled with the prosecutor’s stated step two response - “the concerns that I did have [were] the—the comments that—about [a] disproportionate amount of people being sent to jail, disproportionate amount of jail time, the fact that he’s had family members who have been convicted and have served time” - meet the criteria for presumptive invalidity under GR 37.

Holmes’ argument that skepticism of police is a racially biased reason for a strike because of its prevalence in African American communities was not the most effective approach available in light of current Connecticut jurisprudence. Bias could have been more compellingly argued by presenting W.T.’s opinions as inextricable from his *individual* African American experience. Holmes in fact “emphasizes that W.T.’s ‘general concerns for his safety and equality as an African-American,’ on which the prosecutor relied as a race neutral explanation, are neither ‘unique to W.T. as an individual nor . . . a direct reflection of his personal experiences but, rather, a well understood reality to the majority of African-Americans.’” Negating the relevance of W.T.’s individual African American experience undermined Holmes’

¹⁵⁴ The Washington section below contains further discussion of General Rule 37.

case. It is harder to connect a venireperson's beliefs to an entire minority community than to that venireperson's individual experience as a member thereof. Holmes proved neither that African Americans largely feel as W.T. does nor that all other communities feel differently.

A more persuasive argument - again, given current Connecticut jurisprudence - might have highlighted that if not for W.T.'s individual experience as an African American, he would not have expressed such concerns as "I feared that, you know, I might get stopped, you know, for being black." Such an approach would have framed W.T.'s race as a "but-for" factor that determined the character of his voir dire testimony. If W.T.'s skepticism of the criminal justice system were presented as inextricable from his individual racial experience, the prosecutor's peremptory strike would have been harder to defend as race-neutral. This approach avoids the disproportionate impact weakness discussed in the court's opinion. The State might have countered that even if W.T.'s skepticism is a product of his individual African American experience, the prosecutor's strike concerned the skepticism itself and not that skepticism's origin. But individual experiences beget beliefs; the two are as inextricable as race and racial identity. W.T. would likely have had a different perception of the criminal justice system were he not an African American, and the prosecutor would therefore have been less likely to strike him.

This shortcoming in Holmes' argument highlights a shortcoming in *Batson* jurisprudence itself: *Batson* challenges cannot address unintentional disproportionate impact. Unintentional disproportionate impact consists of systemic exclusion of minority venirepersons caused by peremptory strikes based on "biases" especially prevalent among certain groups. If a hypothetical venire consists only of African Americans who express skepticism of the criminal justice system and of whites who express no such skepticism, *Batson* permits the State to peremptorily strike every African American venireperson on grounds of partiality. Only purposeful discrimination falls under *Batson*'s purview. While *Duren*'s fair cross-section mandate might seem the best way to challenge disproportionate impact, *Batson* should also have this ability because a) unintentional disproportionate impact is as pernicious as "selection

procedures that purposefully exclude black persons from juries;” b) unintentional disproportionate impact “undermine[s] public confidence in the fairness of our system of justice” no less than said selection procedures; and c) unintentional disproportionate impact offends the Equal Protection Clause’s undergirding principles no less than said selection procedures.^{155 156} While the court was correct to deem Holmes’ disproportionate impact argument unconvincing in light of current jurisprudence, a more comprehensive jurisprudence would demand proportionate impact.

Holmes is, as the Connecticut Supreme Court’s opinion recognized, less a definite example of racism pervading the courtroom than a signpost of *Batson*’s serious limitations. Our jurisprudence must address both a venireperson’s individual racial experience and the disproportionate impact of “bias”-based peremptory strikes on minority groups. While Washington’s General Rule 37 explicitly addresses neither of these issues, it resolves them by dramatically lowering the threshold for a finding of impermissible discrimination, purposeful or otherwise. Under GR 37, Holmes’ unconvincing argument would be effective as an argument concerned with W.T.’s individual racial experience. Should the Jury Selection Task Force decide not to adopt a rule like Washington’s, Connecticut defendants would be better served by the individual approach.

Less obviously, *Holmes* reiterates the dogma that certain beliefs are incompatible with jury service. Peremptory strikes effectively bar blacks and whites alike from jury service if they express skepticism of the criminal justice system. An entire ideological cohort thus lacks from our juries. Judges and attorneys guard this outcome, for they consider anti-justice system perspectives “partial” or “biased.” “Biased” jurors ostensibly have such a vendetta against the State that they cannot decide cases reasonably. These dogmas need reassessment. Our courts exclude “partial” jurors, yet cling to selection procedures that prioritize certain perspectives.

¹⁵⁵ *Batson v. Kentucky*.

¹⁵⁶ This is despite the Fourteenth Amendment’s chief concern with individuals as opposed to groups.

Such procedures are themselves irredeemably partial. To doubt the fairness of one who skepticizes the criminal justice system is to prejudge their reasoning faculties. A vehement justice system-skeptic can weigh evidence put forth by State and defendant as even-handedly as her punitive ideological opposite, yet *voir dire* advantages that opposite. Moreover, skepticism can be a force for progress, as it begets revision of antiquated norms. Excluding skeptics from any organization - governmental, corporate, nonprofit, etc. - fosters complacency and stagnancy. American election cycles never fail to put government-skeptics in office - why deny our judiciary this force for self-assessment?

Ideological exclusion also conflicts with certain foundational legal principles. Blackstone stipulated that juries be “indifferently chosen;”¹⁵⁷ exclusion of whole ideologies is hardly indifferent. The First Amendment prohibits the State from “abridging the freedom of speech,” yet our judiciary denies justice system-skeptics their constitutional right to jury service should they voice their convictions.¹⁵⁸ *Taylor v. Louisiana* (1975) demanded juries drawn from a “fair cross-section of the community,” yet peremptory strikes surgically exclude ideological swathes from that cross-section.¹⁵⁹ The Fourteenth Amendment, from which *Batson* draws, demands “equal protection of the laws” for all citizens, with no exception for those of certain persuasions.¹⁶⁰ The judiciary can better embody these principles by prohibiting belief-based exclusion except in those rare instances where a venireperson professes an ability to be impartial.

Connecticut’s reform effort is likely the first of many. That unconscious discrimination was so central to the *Holmes* decision is especially encouraging. Whatever the Task Force’s decision, we can take heart that jury discrimination reform’s long hibernation is over.

¹⁵⁷ Congressional Research Service, (n.d.). “Right to Trial by Impartial Jury.” Retrieved from <https://www.law.cornell.edu/constitution-conan/amendment-6/right-to-trial-by-impartial-jury>.

¹⁵⁸ U.S. Constitution Amend. I

¹⁵⁹ *Taylor v. Louisiana*.

¹⁶⁰ U.S. Constitution Amend. XIV

A Member of Connecticut's Jury Selection Task Force Weighs In

Connecticut Appellate Court Judge Douglas Lavine, appointed in 2006, is a member of the Jury Selection Task Force organized by the state's Supreme Court in its recent *State v. Holmes* (2019) opinion.¹⁶¹ Judge Lavine authored a concurring opinion for *State v. Holmes* at the appellate level, arguing that although “the peremptory challenge [in question] was properly exercised under prevailing law and practices... Connecticut should reform its jury selection process to eliminate the perverse way in which *Batson* has come to be used.” He kindly agreed to an interview concerning *Batson* reform. Drawn from decades of experience with the *Batson* framework, Judge Lavine's insights have proven instrumental to this thesis. Note that his statements do not represent the Connecticut Judicial Branch.

The most fundamental question before Connecticut's Jury Selection Task Force is what substantive *Batson* reform should look like. Options abound: the state might reduce the number of peremptory strikes available to counsel during *voir dire*, create an entirely new framework, abolish the peremptory strike, or adopt a version of Washington State's General Rule 37. Judge Lavine, who “[does] not favor abolishing peremptory challenges,” averred that “Rule 37 in Washington provides a good framework for an approach.”¹⁶² Implementing a version of GR 37 in Connecticut would require that judges determine at step three whether an “objective observer could view race or ethnicity as a factor in the use of the peremptory [strike].”¹⁶³ Certain step two explanations, such as a venireperson's negative experiences with police, would be “presumptively invalid.” Judge Lavine “generally [agrees] with this approach but [is] open to hearing arguments for and against.” He predicts that presumptive invalidity “will be the subject of vigorous discussion and debate among members of the jury task force.” Importantly, Judge

¹⁶¹ This section assumes familiarity with *State v. Holmes*, which I discuss in the Connecticut section above.

¹⁶² Lavine, Douglas. “*Batson*.” Message to John Lawson. March 12, 2020. Email.

¹⁶³ Washington General Rule 37, adopted effective April 24, 2018.

Lavine considers a “red line approach,” like GR 37, “the only solution that is practical and predictable.”¹⁶⁴

Judge Lavine touched on several specialized areas of *Batson* jurisprudence, among them *sua sponte Batson* challenges. A *sua sponte Batson* challenge, established in Illinois’ jurisprudence by *People v. Rivera* (2007) and in Washington by GR 37, consists of a judge challenging a potentially discriminatory peremptory strike when opposing counsel fails to do so. In Judge Lavine’s experience, *sua sponte Batson* challenges are rarely necessary, as “if a lawyer were attempting to use a peremptory challenge in an improper way, there is a 99.99 percent likelihood that opposing counsel would object.” Consequently, judges need rarely resort to *sua sponte* intervention. This reasoning confirms that, at least in Connecticut, attorneys use *Batson* reliably when *voir dire* sessions concern them. Hypothetically, “if [Judge Lavine] had a firm belief that a lawyer was attempting to use a peremptory challenge for an improper reason—based on race, gender, gender expression, national origin, and other similar categories— and opposing counsel just sat there like the prototypical potted plant, [he] would in all likelihood ask counsel if he intended to object, which would almost certainly prompt an objection.” In other words, Judge Lavine would prompt a *Batson*-shy attorney to challenge a plainly suspicious strike. Such is, however, “a very theoretical discussion in [his] view.”¹⁶⁵

Judge Lavine also discussed the respective burdens of proof for strike opponents and proponents. Recall that in most jurisdictions, strike proponents carry the burden of proving that a given strike had a race-neutral basis, while strike opponents must advance and prove a *prima facie* case of discrimination; *Batson* itself demands that the opponent prove an “inference of discrimination.”¹⁶⁶ Connecticut has lightened the strike opponent’s burden by removing the step one requirement of a *prima facie* case of discrimination. Judge Lavine opined that in *Batson*

¹⁶⁴ Lavine.

¹⁶⁵ *Id.*

¹⁶⁶ *Batson v. Kentucky*.

jurisprudence's "present incarnation, the burdens are appropriately apportioned." Connecticut needs neither lighten nor expand the burden of proof for either the strike opponent or proponent per this view. Judge Lavine added, "if a Rule 37 approach were adopted in Connecticut, of course, that would eliminate such concerns in a significant proportion of cases."¹⁶⁷ Indeed, by lowering the threshold for a strike to be ruled discriminatory, GR 37 mooted many concerns about burden imbalance.

Batson has come under fire in recent years for failing to address unconscious bias. Though genuinely racist strike proponents are increasingly less common, unconscious bias can still cause counsel to unwittingly factor race into peremptory strikes. GR 37's drafters responded by eliminating the need for strike opponents to prove intentional discrimination. Judge Lavine would like to see Connecticut respond as well, stating, "[A]s *Batson* presently functions, it does not do enough to address the problems of unconscious bias and the subtlety of racism." One thorny obstacle to tackling unconscious bias is the difficulty judges face in accusing attorneys of racism. As Judge Lavine put it, "Not only is it impossible to prove [conscious or unconscious racism], but on a human level, in a courtroom, usually the judges know the lawyers... The judge has to be willing to brand the prosecutor as a racist [in order to deny a peremptory strike]."¹⁶⁸ Judges can hardly be faulted for reluctance to denounce their colleagues. Any new *Batson* jurisprudence must allow judges to rule in the strike opponent's favor without causing professional friction. GR 37's approach, allowing judges to deny a peremptory strike on the ground that an objective observer - not necessarily the judge herself - could view race as a factor, may thwart unconscious bias without forcing judges to insinuate racism.

Before Connecticut's Jury Selection Task Force lies both a range of problems and an array of promising solutions. Judge Lavine's comprehensive knowledge thereof, and his openness to hearing the gamut of proposals, reflect well on the Connecticut Supreme Court's

¹⁶⁷ Lavine.

¹⁶⁸ *Id.*

choice of Task Force members. I encourage those invested in the battle against jury discrimination to stay up to date on the Task Force's progress in the coming months.

Conclusion

Too many Americans lump jury service in with such civic chores as filing taxes and visiting the DMV. Temporary confinement to a courthouse cuts into precious time that might otherwise be spent on work or recreation. Alas, these attitudes divert popular and academic attention from the danger jury discrimination poses to enforcement of this vital constitutional right. I need not remind the reader why jury discrimination is so profoundly dangerous to our carefully balanced republic, but will do so anyway.

The lay citizen has little edifying interaction with government beyond public school. Justified skepticism of elected officials suppresses voter turnout, to say nothing of suppressive voter qualification laws. The safety net's noble purpose does not slacken the stress of, say, applying for food stamps. Police have yet to move past racial profiling. But jury service is different. Sitting among one's peers, exercising one's critical thinking faculties for the public good, holding another's legal fate in one's hands: from this experience jurors learn compassion, cooperative skills, and, crucially, that engagement with one's society is not tedious but rewarding. Our market culture emphasizes detached personal gain over such meaningful engagement. We cannot afford to neglect as rich a source of interpersonal edification as jury service.

Jury discrimination, with the limited *Duren* and *Batson* as its unintended enablers, is just such a form of neglect. Too many venirepersons, especially minorities, are denied not only their constitutional rights but also the aforescribed edification jury service offers. No wonder minority venirepersons so often express skepticism of the judicial process - it has excluded their fellows since its inception! Proof of jury discrimination's rampancy can be found in almost any one of the cases included in this thesis. There is no pretending that the fair cross-section requirement is met with acceptable frequency - it *cannot* be, when peremptory strikes remove so many qualified venirepersons. The potential consequences are grave. Conscious or unconscious, jury discrimination seeds low public opinion of the judiciary and, indeed, of our

society as a whole. Low public opinion begets charges of illegitimacy, from which instability follows. As importantly, defendants suffer when jury discrimination goes unnoticed or unopposed. An ideologically homogenous jury has no impetus to scrutinize its preconceptions. By contrast, a diverse jury enjoys diverse perspectives, and thus reaches a more informed verdict. Minority defendants especially benefit from diverse juries, for an all-white jury has all the less incentive to put itself in minority shoes.

State and federal courts have not addressed jury discrimination in tandem. Existing literature has documented federal stagnancy. Meanwhile, as this thesis has explored, the states have a mixed track record of interpreting and implementing *Duren* and *Batson*. Decisions in the vein of Louisiana's *State v. Youngblood* outnumber those like Connecticut's *State v. Holmes*. Still, the latter offers hope that nascent reforms will spur a national movement. Federal judges need to add their voices, for state courts cannot complete the task of reform on their own. Let us hope that the U.S. Supreme Court will issue a decision more meaningful than the retread that was *Flowers v. Mississippi*. Critically, *Duren* and *Batson* are two halves of a whole, and both require attention. Most jury discrimination reform in the state courts has dealt with *Batson*. I saw fit to devote a chapter each to reformed and non-reformed state-level *Batson* jurisprudences, but state-level *Duren* jurisprudence remains underdeveloped enough that a single chapter sufficed. State and federal courts are overdue to reassess and strengthen *Duren's* aging yet essential ruling on how juries are to be drawn. Keeping demographic records is an ideal place to start.

Attachment to the peremptory strike and to outmoded methods of jury selection is reform's chief obstacle. Too many legal minds are more concerned with keeping the peremptory strike fully peremptory, and averting the expense of reconfiguring jury selection models, than with enforcing the Sixth and Fourteenth Amendments. Judges and attorneys must recognize that full protection of venirepersons' and defendants' rights is requisite to the continued legitimacy of their professions and of the judiciary itself.

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