

12-11-2020

## Confronting the Bias Dichotomy in Jury Selection

Brooks Holland

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# Confronting the Bias Dichotomy in Jury Selection

*Brooks Holland\**

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“Nothing is more basic to the criminal process than the right of the accused to a trial by an impartial jury. The presumption of innocence, the prosecutor’s heavy burden of proving guilt beyond a reasonable doubt, and the other protections afforded the accused at trial are of little value unless those who are called to decide the defendant’s guilt or innocence are free of bias.”<sup>1</sup>

“The use of peremptory challenges contributes to the historical and ongoing underrepresentation of minority groups on juries, imposes substantial administrative costs, results in less effective

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\* Professor of Law and J. Donald and Va Lena Scarpelli Curran Professor of Legal Ethics and Professionalism, Gonzaga University School of Law. The author has practiced for 26 years as a trial-level and appellate public defender in state and federal courts. The author thanks the Louisiana Law Review for including this paper in its 2020 symposium, *We the Jury: Conversations about the American Jury’s Past, Present, and Future*, and is especially grateful to symposium co-panelists Alexis Hoag, Gregory Parks, Daniel Haryana, and Sam Crichton. The author is also grateful to the faculty colleagues who provided feedback on this paper during Gonzaga law school’s 2020 faculty roundtable series. Gonzaga law student Jessica Trujillo provided outstanding research support.

1. *People v. Branch*, 389 N.E.2d 467, 469 (N.Y. 1979).

juries, and unfairly amplifies resource disparity among litigants—all without substantiated benefits. The peremptory challenge is an antiquated procedure that should no longer be used.”<sup>2</sup>

## INTRODUCTION

The American jury has generated boundless dissertations about its history, purpose, structure, and continuing vitality. The Louisiana Law Review’s 2020 Symposium contributes significantly to this literature, addressing historical perspectives on the jury, the jury as a political and cultural institution, and standards in criminal and civil jury trials.<sup>3</sup> I was honored to participate on a panel exploring the topic of jury impartiality in criminal cases.<sup>4</sup>

The American criminal jury is unique in the world by virtue of this country’s commitment to lay jurors from the local community wielding final authority over whether the state may exercise its power to punish.<sup>5</sup> The criminal law system’s expectation that these lay jurors will be “impartial” reflects not only an interest in decision-making fairness and accuracy, but also the fact that jurors decide cases in an adversarial system of dispute resolution. In criminal trials in particular, defense lawyers and prosecutors know that their zealous advocacy to the lay jury is what stands between the defendant and the state’s desire to punish. Thus, the jurors

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2. *State v. Saintcalle*, 309 P.3d 326, 348 (Wash. 2013) (González, J., concurring).

3. *See Symposium Objective and Purpose*, LSU LAW, <https://www.law.lsu.edu/symposium/> [<https://perma.cc/6D4T-2QGH>] (last visited May 1, 2020).

4. *See Schedule*, LSU LAW, <https://www.law.lsu.edu/symposium/schedule/> [<https://perma.cc/5RW3-AUFG>] (last visited May 1, 2020).

5. *See generally* *Williams v. Florida*, 399 U.S. 78, 100 (1970) (recognizing an “essential feature” in the lay jury of interposing the “commonsense judgment of a group of laymen” between the defendant and prosecution, and the “community participation and shared responsibility which results from that group’s determination of guilt or innocence”); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (affirming that the jury trial right “reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary power over the life and liberty of the citizen to one judge or a group of judges”). The uniqueness of this lay-jury system extends to specific doctrine, such as largely unimpeachable general verdicts and jury nullification. *See, e.g.*, FED. R. EVID. 606(b); *Peña-Rodríguez v. Colorado*, 137 S. Ct. 855, 865 (2017) (noting that “[s]ome version of the no-impeachment rule is followed in every State and the District of Columbia”); *State v. Ragland*, 519 A.2d 1361, 1372 (N.J. 1986) (observing that “[j]ury nullification is an unfortunate but unavoidable power” of the jury).

must be ready to receive the lawyers' partisan advocacy from arm's length, with an open mind.<sup>6</sup> This combination—partisan legal advocacy directed to an impartial audience of lay jurors—forms the heart of the American criminal jury trial. Indeed, for experienced trial lawyers, once the metaphorical pugilist bell rings to start a jury trial, the mindset narrows to “game on,”<sup>7</sup> with near tunnel vision on the jurors who will decide the outcome.<sup>8</sup>

Several features of the federal and state constitutions, statutes, and court rules contribute to juror “impartiality.”<sup>9</sup> The focus of this Article, however, is on the intersection of anti-bias norms and zealous advocacy in the selection of “impartial” jurors.<sup>10</sup> This intersection reveals a recurring and so far intractable<sup>11</sup> dichotomy of bias in jury selection. On the one

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6. Cf. MODEL RULES OF PROF'L CONDUCT r. 3.5 (AM. BAR ASS'N 1980).

7. Brooks Holland, *Anticipatory Self-Defense Claims as a Lens for Reexamining Zealous Advocacy and Anti-Bias Disciplinary Norms*, 49 TEX. TECH L. REV. 89, 117 (2016).

8. This narrowing of professional focus with the commencement of jury trial is implicitly reinforced by several Rules of Professional Conduct. See MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 2, 8, 9; r. 1.1–.3, 3.1–.7 (AM. BAR ASS'N 1980).

9. The law has not achieved a comprehensive understanding of impartiality in practice. See Richard Loren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 724 (2019) (commenting that “[c]ourts have struggled to advance a cohesive definition of impartiality that can reflect the jury's competing responsibilities”). The jury system, however, seeks juror impartiality early in the jury selection process with the fair cross-section requirement. See *Lockhart v. McCree*, 476 U.S. 162, 187 (1986) (connecting fair cross-section requirement to jury impartiality); *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975). How a trial court instructs prospective and sitting jurors also can affect impartiality. See, e.g., *Unconscious Bias Juror Video*, U.S. DIST. CT. W. DIST. WASH., <https://www.wawd.uscourts.gov/jury/unconscious-bias> [<https://perma.cc/DY2N-QVQ5>] (last visited June 1, 2020); *Criminal Jury Instruction—Unconscious Bias*, U.S. DIST. CT. W. DIST. WASH., <https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf> [<https://perma.cc/2GKP-4RNF>] (last visited June 1, 2020). The law increasingly has been willing to enforce impartiality post-verdict to expose racial bias in the deliberation room. See *Peña-Rodriguez v. Rodriguez*, 137 S. Ct. 855, 871 (2017); *State v. Behre*, 44 P.3d 1172 (Wash. 2019); see also Jolly, *supra*, at 740–50. For modernistic takes on jury impartiality, see Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935 (2016); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579 (2011).

10. For an examination of this intersection of zealous advocacy and anti-bias norms in other contexts, see Holland, *supra* note 7.

11. Cf. Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 829 (2012) (referring to the

hand, the U.S. legal system demands an impartial jury as critical to a fair trial.<sup>12</sup> Juror bias against a party or claim undermines this fundamental principle, and no one can discern case-specific biases better than the lawyers who have investigated and strategized the parties' theories of the case and who are tasked with proving and arguing that theory directly to the jury.<sup>13</sup> This jury trial system therefore entrusts the partisan lawyers in jury selection to contribute their dedicated mindset to the process of identifying and removing jurors who may harbor these biases. Working from *voir dire*, lawyers thus zealously seek and remove juror bias by exercising challenges for cause, plus a specified number of peremptory challenges.<sup>14</sup>

On the other hand, experience demonstrates that these same lawyers will deploy their *own* biases in examining and excluding jurors. Indeed, the phenomenon of lawyer bias in jury selection is not a bug but rather a feature of the system, because the jury selection process is all about bias—bias against jurors who may harbor prejudices against a party or claim, and bias in favor of jurors who may be receptive to that party or claim. But sometimes lawyer bias manifests as racial bias, sex or gender bias, or other invidious biases that violate the rights of jurors to serve their community free from discrimination. History is replete with the discriminatory exclusion of jurors based on race or sex,<sup>15</sup> and the peremptory challenge

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“intractable . . . challenge of creating a fair process for the selection of fair jurors”).

12. See U.S. CONST. amend. VI (guaranteeing right in any criminal prosecution to “trial, by an impartial jury”); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (observing that “the impartiality of the adjudicator goes to the very integrity of the legal system”); *People v. Branch*, 389 N.E.2d 467, 469 (N.Y. 1979) (opining that “[n]othing is more basic to the criminal process than the right of the accused to a trial by an impartial jury”); cf. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984) (recognizing jury impartiality in civil cases).

13. See *infra* Part II.

14. See *infra* Part II.

15. See Paul Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 918–21 (1997) (observing “our county’s sad history of excluding black people from juries”); cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1418–19 (2020) (Kavanaugh, J., concurring) (describing the non-unanimous jury verdict rule as “the last of Louisiana’s Jim Crow laws”); *id.* at 1411 (Sotomayor, J., concurring) (noting “legacy” of racial discrimination in Louisiana and Oregon jury systems, and that “the States’ legislatures never truly grappled with the laws’ sordid history”); *Peña-Rodríguez v. Rodríguez*, 137 S. Ct. 855, 867 (2017) (detailing history of racial discrimination in jury system).

has become the primary vehicle for this practice.<sup>16</sup> Modern jury selection practices may only be making this dynamic worse. As trial courts increasingly economize *voir dire*, which is the main source for transparent, evidence-based challenges to jurors, lawyers must turn more and more to opaque peremptory challenges and intuition to identify and strike biased jurors. The U.S. Supreme Court established a regime for regulating discriminatory peremptory challenges in *Batson v. Kentucky*,<sup>17</sup> but *Batson* has not succeeded in effectively regulating discriminatory peremptory challenges, leading some courts and commentators to call for eliminating peremptory challenges.<sup>18</sup>

A bias dichotomy results: zealous lawyers are an important safeguard against *juror* bias in criminal trials, yet our concern over *lawyer* bias may lead us to eliminate one of the legal safeguards against *juror* bias—the peremptory challenge. Both sides of this bias dichotomy implicate critical concerns for a just jury trial system, yet the status quo has become inadequate.

This Article will argue that this bias dichotomy may be resolved without resorting to zero-sum choices, such as the elimination of peremptory challenges. In particular, a novel experiment taking place in the State of Washington to reform the *Batson* test merits attention and

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16. See *Batson v. Kentucky*, 476 U.S. 79, 103–05 (1986) (Marshall, J., concurring) (reviewing discriminatory history of the peremptory challenge); Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1620 (2018) (reviewing history of racial discrimination in jury selection and noting shift to use of peremptory challenge as a principal tool after about 1935).

17. *Batson*, 476 U.S. 79.

18. See, e.g., *State v. Jefferson*, 429 P.3d 467, 481 (Wash. 2018) (Yu, J., concurring) (observing that “I . . . remain convinced that nothing short of complete abolishment of the peremptory challenge . . . will get us on the right path toward finally eradicating racial bias in jury selection”); *State v. Erickson*, 398 P.3d 1124, 1134 (Wash. 2017) (Yu, J., concurring) (calling “for the complete abolishment of peremptory challenges”); *State v. Saintcalle*, 309 P.3d 326, 348 (Wash. 2013) (González, J., concurring) (concluding that “it is time to abolish peremptory challenges”); see also *State v. Veal*, 930 N.W.2d 319, 340 (Iowa 2019) (Cady, C.J., concurring) (“[T]he solution in the future is to do away with the peremptory challenge.”); *id.* (Wiggins, J., concurring in part and dissenting in part) (“The only way to stop the misuse of peremptory challenges is to abolish them.”); *People v. Brown*, 769 N.E.2d 1266, 1273 (N.Y. 2002) (Kaye, C.J., concurring) (“My nearly 16-year experience with *Batson* persuades me that, if peremptories are not entirely eliminated (as some have urged), they should be very significantly reduced.”); cf. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182–83 (1995) (arguing that “[p]eremptory challenges should be eliminated”).

further study as a vehicle for confronting, and hopefully mitigating, the bias dichotomy in jury selection. Developed as a court rule, Washington Supreme Court General Rule 37 (GR 37)<sup>19</sup> materially alters the standards and procedures of the *Batson* rule to give judicial review of peremptory challenges the teeth it needs to minimize the vices of those challenges without altogether denying their virtues to litigants, especially criminal defendants. This Article will position GR 37 as a potential model for confronting the bias dichotomy in jurisdictions that are unsatisfied with the status quo in jury selection, yet seek to reform rather than to eliminate the peremptory challenge as an important feature of that process.

Part I of this Article will present the bias dichotomy in jury selection, pitting lawyer bias against juror bias. In defining this bias dichotomy, this section will explore three critical features to the selection of an impartial jury: (1) zealous advocacy from lawyers; (2) challenges for cause; and (3) peremptory challenges. Part II will explore the failings of the *Batson* regime in regulating the lawyer-bias side of this dichotomy, resulting in calls to eliminate the peremptory challenge, such as those in recent opinions by some justices of the Washington Supreme Court that have garnered national attention.<sup>20</sup> Responding to these calls to eliminate the peremptory challenge, Part III will defend these challenges as necessary to address the competing concern for juror bias and to realize other values of the jury trial system. This argument will not seek to diminish the valid concerns about peremptory challenges. Rather, the argument will reinforce the virtues of the peremptory challenge as a reason to continue to seek non-binary solutions to the bias dichotomy. Examining one such potential solution, Part IV will review Washington's GR 37 as an effort to rebalance these interests, so that lawyers can confront rather than succumb to the bias dichotomy in jury selection. The Article will close with some forward-looking observations about GR 37.

In addressing this bias dichotomy thesis, this Article will implicitly accept certain premises that permeate the paper and thus should be acknowledged. First, this paper often will examine the bias dichotomy through the lens of criminal defense values, with the assumption that these perspectives will track symmetrically for prosecutors and civil lawyers, as they typically do under the *Batson* regime.<sup>21</sup> The bias dichotomy, however,

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19. GR 37 is available at [https://www.courts.wa.gov/court\\_rules/pdf/GR/GA\\_GR\\_37\\_00\\_00.pdf](https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf) [<https://perma.cc/5QMP-TKC2>].

20. See *infra* notes 84–138.

21. See *Batson*, 476 U.S. 79 (holding that racially discriminatory peremptory challenges violate the Equal Protection Clause); *Georgia v. McCullom*, 505 U.S. 42 (1992) (applying *Batson* rule to peremptory challenges by the defense); *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying *Batson* rule

may scale quite differently for civil litigants and especially for prosecutors. Prosecutors and some civil litigants may not face the same concerns over juror bias as criminal defendants, nor might society have the same interests in regulating bias by lawyers against criminal defendants.<sup>22</sup> In particular, the State and its prosecutorial agents have a unique responsibility to represent the entire community.<sup>23</sup> Yet, the State and its agents also own a unique legacy of deploying the peremptory challenge discriminatorily as part of a racist criminal law system.<sup>24</sup>

Thus, if this paper's reflections and prescriptions for criminal defendants do not seem as good of a fit for civil litigators or prosecutors, the ideal arrangement might be to adopt asymmetrical rules for peremptory challenges between prosecutors, criminal defendants, and civil litigants.<sup>25</sup>

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to peremptory challenges by civil litigants); *cf. Batson*, 476 U.S. at 107 (Marshall, J., concurring) (arguing against disparate peremptory challenge rights between prosecution and defense, because “[o]ur criminal justice system ‘requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution’”).

22. See Holland, *supra* note 7, at 104–09. For the view that discriminatory peremptory challenges by the defense cause at least two of the three principal harms that arise from discriminatory peremptory challenges by prosecutors, see Audrey M. Fried, *Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311, 1320–22 (1997) (identifying harm to jurors and to the integrity of the criminal justice system).

23. See MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1980) (noting that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate”); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (famously holding “[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done”); *State v. Walker*, 341 P.3d 976, 984 (Wash. 2015) (noting that a prosecutor’s “advocacy has its limits,” and thus a prosecutor has the duty to ‘subdue courtroom zeal,’ not to add to it, in order to ensure that the defendant receives a fair trial”).

24. See *Batson*, 476 U.S. at 103–05 (Marshall, J., concurring); Frampton, *supra* note 16, at 1600–20. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

25. Some jury selection rules do implicitly recognize asymmetrical interests in jury impartiality by apportioning fewer peremptory challenges to the prosecution. See, e.g., FED. R. CRIM. P. 24(b)(2) (providing that in felony cases, the prosecution will have six peremptory challenges but the defense ten); see also David B. Rottman & Shauna M. Strickland, *State Court Organization 2004*, U.S. DEP'T JUST. (2004), <https://www.bjs.gov/content/pub/pdf/sco04.pdf> [<https://perma.cc/8XZZ-APB7>] (reporting that 42 states, the District of Columbia, and



If, however, the law continues to track symmetrically in this area between these three groups, then the law should be calibrated to the criminal defendant, whose unique, individual constitutional interests in both juror impartiality and zealous advocacy bring the bias dichotomy to its apex. Reforms should not resolve this bias dichotomy through uniform solutions that may fit the interests and responsibilities of the prosecutor or even the civil litigant unless they also fit the criminal defendant's distinct interests and responsibilities.

Second, this Article will work from the premise that the lay jury system in the United States remains a desirable practice that we should maintain.<sup>26</sup> Of course, many other legal systems boast effective criminal adjudication that does not rely entirely on lay jurors, or on lay jurors at all.<sup>27</sup> Moreover, the criminal law system in the United States is in truth a world of plea bargaining more than a world of jury trials.<sup>28</sup> As a result,

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Puerto Rico afford equal number of peremptory challenges to the defense and prosecution, and eight states provides the defense with more). Civil parties typically have fewer peremptory challenges than parties to a criminal case. *See, e.g.*, 28 U.S.C. § 1870 (2018) (providing only three peremptory challenges to each party in a civil case). One scholar has argued that symmetrical peremptory challenges between the prosecution and defense violates the Constitution. *See* Brittany L. Deitch, *The Unconstitutionality of Criminal Jury Selection*, 26 WM. & MARY BILL RTS. J. 1059 (2018).

26. Of course, historically, the lay jury in the United States has not been a static legal creature, but essential features have remained constant. *See* Josh Bowers, *Democratization and the Restoration of Moral Judgment: Upside-Down Juries*, 11 NW. U. L. REV. 1655, 1663 (2017) (noting that “even though jury practice has evolved significantly since the Founding, our aspirations for the institution have remained largely unchanged”).

27. *See, e.g.*, Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125, 126 (2009) (reporting that “[b]eginning in 2009, Japan will introduce juries into criminal trials,” in which “[m]ixed panels of lay assessors and professional judges will hear serious criminal cases and jointly determine guilt and sentences”); Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises*, 2001 U. ILL. L. REV. 791, 800–01 (2001) (reviewing French Court d’assises mixed-jury system for serious crimes, and Tribunal correctional non-jury system for less serious crimes); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 228 (2000) (noting that in the Italian Code of Criminal Procedure, criminal cases are adjudicated by a “single body of adjudicators—consisting of professional judges, that in the most serious cases sit together with lay assessors”).

28. “According to data from the Administrative Office of the U.S. Courts, trials accounted for 3.1% of federal convictions in 2008, 2.5% in 2012, and 2.4% in 2016. . . . [A]ccording to data from the National Center for State Courts, in

many criminal cases are not subject to the serious adversarial testing that this paper will champion, especially in misdemeanor cases.<sup>29</sup> Several commentators have proposed other mechanisms for criminal adjudication or other entry points for community participation in decision-making in criminal cases that could be more robust in the end than a jury trial exemplar that is rarely realized.<sup>30</sup> Even global events like the COVID-19 pandemic may demand consideration of new paradigms for adjudicating criminal cases.<sup>31</sup>

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2015 the felony trial rates for California, New York, and Texas were 2.3%, 4.0%, and 2.1%. Trials are even rarer in misdemeanor cases.” Williams Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1067, 1070 (2019); cf. Ronald F. Wright, Kami Chavis & Gregory Parks, *The Jury Sunshine Project: Jury Selection as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1421 (2018) (reporting that in a study of 100 North Carolina counties “[r]emarkably, the clerks in 10 of the 100 counties reported that *no jury trials at all* occurred in their counties between 2011 and 2013”).

29. Cf. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124–26 (W.D. Wash. 2013) (finding that “meet and plead” system for public defense representation in two Washington State cities systematically deprived defendants of the Sixth Amendment right to counsel, because “[a]dversarial testing of the government’s case was so infrequent that it was virtually a non-factor in the functioning of the Cities’ criminal justice system”); Gerard Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998) (arguing that American plea bargaining “as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than the adversarial model they idealize”).

30. See, e.g., Bowers, *supra* note 26, at 1659 (arguing that “we should move juries from the trial stage to the stages of arrest, bail, charge, bargain, and sentence”); Laura Appleman, *The Plea Jury*, 85 IND. L.J. 731, 734 (2010) (expressing a goal “to restore the community-jury right to the bulk of criminal adjudication by envisioning the community’s integration into the guilty plea”).

31. See, e.g., Matt Reynolds, *Could Zoom jury trials become the norm during the coronavirus pandemic?*, ABA J. (May 11, 2020, 8:00 AM), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic> [<https://perma.cc/7WSN-WWEG>] (exploring whether traditional jury trial practices can be replicated on the Zoom platform); Debra Cassens Weiss, *Potential jurors questioned via zoom for summary jury trial in Texas*, ABA J. (May 19, 2020, 10:25 AM), <https://www.abajournal.com/news/article/potential-jurors-questioned-via-zoom-for-summary-jury-trial-in-texas> [<https://perma.cc/96D9-P9YQ>] (reporting on first potential Zoom civil jury trial, including use of Zoom breakout rooms for the traditional practice of lawyers approaching the bench for a sidebar). Some courts in other countries are using Zoom for a wide range of criminal proceedings. See, e.g., John Geddie, *Man sentenced to death in*

For better or worse, the jury trial remains the quintessence of American criminal justice, and my experience with jury trials confirms their unique value, as well as their inefficiency, relative to other systems.<sup>32</sup> This Article does not seek to refute important discourse about new and more efficacious paradigms for criminal adjudication. Instead, this paper accepts the premise that the jury trial is the paradigm that the criminal justice system has adopted. The jury trial system therefore must confront the bias dichotomy that this paradigm presents.

### I. THE BIAS DICHOTOMY

The bias dichotomy arises with the jury selection process. Mileage varies widely from jurisdiction to jurisdiction, and even from judge to judge, on the precise features of the jury selection process. One federal judge, however, has effectively captured the essential components of this process in just about every courthouse:

Ordinarily, in civil and criminal cases in both state and federal courts, the panel of jurors that decides the case is selected from a much larger pool. *Voir dire* is the process of questioning prospective jurors about their qualifications to serve on the jury panel to decide the case. The rules of almost all courts, state and federal, provide that the questioning of prospective jurors may be conducted by the judge, the attorneys for the parties, or both. In the course of the questioning, both parties and the court may strike potential jurors for cause when the prospective juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." At the conclusion of *voir dire* the parties are also ordinarily authorized to make a certain number of "peremptory challenges" to strike jurors without stating a reason for doing so.<sup>33</sup>

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*Singapore on Zoom call*, REUTERS (May 19, 2020, 11:51 PM), <https://www.reuters.com/article/us-singapore-crime-idUSKBN22W0I6> [<https://per.ma.cc/XTN7-YNXS>] (reporting on judicial use of Zoom video platform to impose death sentences in Singapore and Nigeria).

32. *Cf. Rocha v. King Co.*, 460 P.3d 624 (Wash. 2020) (González, J., dissenting) (arguing that "[t]he benefits of jury service to the court, to the community, and to the jurors themselves, would be hard to overstate").

33. Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 158–59 (2010) (internal footnotes omitted); *see also* Tania Tetlow, *Why Batson Misses the Point*,

The jury selection process “is a critical part of trial and ought not to be treated as merely a prelude to the main event,”<sup>34</sup> because this process ensures an *impartial* jury, which is essential to a fair trial.<sup>35</sup> “Yet, despite the concept’s centrality, there is little agreement on what makes a jury impartial,”<sup>36</sup> and “[c]ourts have struggled to advance a cohesive definition of impartiality that can reflect the jury’s competing responsibilities.”<sup>37</sup> As a general matter, the best the law can do is declare that a prospective juror lacks impartiality if the juror’s views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”<sup>38</sup>

Notably, this standard of impartiality does not present a pure question of law for judges to decide. Rather, this question of juror competency is highly fact specific to the individual juror,<sup>39</sup> drawing on the many norms and values of the U.S. lay jury system, such as accuracy, legitimacy, fairness, and inclusiveness, all empowering a voice of community justice

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97 IOWA L. REV. 1713, 1715–16 (2012) (summarizing jury selection process); *see, e.g.*, FED. R. CRIM. P. 24; FED. R. CIV. P. 47; WASH. SUPER. CT. CRIM. R. 6.4 (2020); N.Y. CRIM. PROC. LAW § 270.05–.55 (LexisNexis 2020).

34. *In re Pers. Restraint of Meredith*, 422 P.3d 458, 467 (Wash. 2018) (Yu., J., concurring).

35. *See Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (observing that “the impartiality of the adjudicator goes to the very integrity of the legal system”); *People v. Branch*, 389 N.E.2d 467, 469 (N.Y. 1979) (“Nothing is more basic to the criminal process than the right of the accused to a trial by an impartial jury.”); *cf. Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *Ristaino v. Ross*, 424 U.S. 589, 594–95 (1976) (identifying relationship between *voir dire* and the State’s constitutional “obligation to the defendant to impanel an impartial jury”).

36. Jolly, *supra* note 9, at 714.

37. *Id.* at 724.

38. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 44 (1980)); *see, e.g.*, N.Y. CRIM. PROC. LAW § 270.20(1)(b) (permitting challenge for cause if the prospective juror “has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial”). Jurisdictions also provide for various statutory disqualifications for jurors who, for example, are related to a party or lack other qualifications, such as residency in the jurisdiction. *See, e.g., id.* § 270.20(1)(a), 270.20(1)(c). An interesting, recent case in Colorado nevertheless upheld a defendant’s conviction even though the trial judge’s own spouse served on the jury and the judge made numerous comments about their relationship during the trial. *See Richardson v. People*, No. 18SC686, 2020 WL 2829847 (Colo. June 1, 2020).

39. *See United States v. Salamone*, 800 F.2d 1216, 1226 (1986) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (noting that “[j]ury competence is an individual rather than a group or class matter”).

that operates independently of the state, including the judiciary.<sup>40</sup> Impartiality cannot be simplified into a convenient formula that limits the jury's ability to dispense independent community justice.

This jury system, therefore, does not entrust judges alone to determine jury impartiality as an objective legal equation reserved to judicial expertise. Rather, the system submits this legal question to the rigors of adversarial testing by the parties, a process that positions judges to impanel a jury whose impartiality that process has validated.<sup>41</sup> The adversarial

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40. See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (observing that “[j]ury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people”); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (recognizing that “the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence”); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (reviewing values underlying jury trial right); cf. *Rocha v. King Co.*, 460 P.3d 624 (Wash. 2020) (González, J., dissenting) (arguing that the “[t]he benefits of jury service to the court, to the community, and to the jurors themselves, would be hard to overstate,” and drawing specific values from Tocqueville’s *Democracy in America*); cf. Wright, Chavis & Parks, *supra* note 28, at 1431–32 (“Jury service creates a forum for popular participation in criminal justice.”); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 709–12 (1995) (arguing role of jury to counter “democratic domination” by racial and political majorities against minority communities); Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 L. & CONTEMP. PROBS. 205, 205 (1989) (noting potential superiority of deliberative jury to single judge because of the jury’s “ability to reflect the perspectives, experiences, and values of the ordinary people in the community—not just the common or typical perspective, but the whole range of viewpoints”); cf. Frampton, *supra* note 16, at 1620–21 (identifying various rationales for the jury system and importance of inclusion). This notion of the independent jury might be quite foreign to, and incongruous with, an inquisitorial legal system. See Lerner, *supra* note 27, at 814–17 (observing that in the French mixed-jury system, “[p]rofessional judges and lay jurors are treated more as colleagues and collaborators than as independent forces”).

41. Some observers would argue that this process does little to validate juror impartiality, and rather “often demean[s] jurors in actual practice.” Lerner, *supra* note 27, at 816; see also *id.* at 814, 816 (observing that jurors in France “are treated with respect. The parties are not allowed to pick them over with a fine-tooth comb; *voir dire* is brief and remarkably unintrusive,” and jurors thus are treated “as if they were responsible human beings with serious duties”). True that the United States jury system does often impose more bureaucratic inefficiencies on jurors as a group, and the *voir dire* process itself can be more intrusive to

process is rarely perfect in this validation, but the adversarial jury system relies on this same process in other analogous contexts to validate answers to partly normative legal questions. For example, in rejecting the constitutionality of judges admitting testimonial hearsay without cross-examination of the declarant on grounds that the testimony satisfies a legal test for reliability, the Supreme Court declared:

Admitting statements deemed to be reliable by a judge is fundamentally at odds with the right to confrontation. To be sure, the Clause's ultimate goal is to ensure the reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.<sup>42</sup>

For jury selection, one easily could substitute the term “impartial juror” in this adversarial constitutional equation for any of the Court’s references to reliable witnesses.

A jury trial is where a lawyer’s zealous advocacy naturally reaches its adversarial zenith. The jury trial system does not tolerate this behavior from lawyers simply because of the stakes and rigors of the jury trial. On the contrary, one expects zealous advocacy from the parties to ensure that the jury trial system functions according to adversarial norms:

As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. . . . A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on

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individual jurors. I am, however, not so certain that those experiences are necessarily disrespectful or demeaning to jurors. On the contrary, having tried dozens of criminal cases myself, my experience is that this process can reinforce, albeit laboriously sometimes, that each individual juror is unique and central to this important task. I rarely have observed jurors once selected not approach their task with individual seriousness and integrity, perhaps a product of the message conveyed by robust and individualized jury selection practices.

42. *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004); *see also id.* at 62 (quoting M. HALE, *HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* 258 (1713)) (“[A]dversarial testing ‘beats and bolts out the Truth much better.’”) (emphasis added).

behalf of a client and at the same time assume that justice is being done.<sup>43</sup>

Zealous advocacy holds a special currency for criminal defense lawyers once a jury trial commences. Numerous commentators have observed that “the case for undiluted partisanship is most compelling” in criminal defense.<sup>44</sup> This case for partisan advocacy has virtuous roots, as the duty of zealous advocacy has been associated with “autonomy, individual rights, a need to curb excesses by the state, client satisfaction, and the achievement of a substantively just result.”<sup>45</sup> The Rules of Professional Conduct themselves recognize the unique advocacy role of defense counsel in the adjudication of a criminal case, exempting defense counsel from the general prohibition on frivolous claims and defenses. A criminal defense lawyer may “defend the proceeding as to require that every element of the case be established.”<sup>46</sup> For these reasons, the law has embraced the following model of criminal defense advocacy, despite understandable critique:

[D]efense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and

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43. MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 2, 8 (AM. BAR ASS'N 1980); *see also id.* at Preamble ¶ 9 (including “the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests” as a basic principle underlying the Model Rules). Not all jurisdictions are enamored of the term “zealous advocacy.” *See, e.g.*, WASH. RULES OF PROF'L CONDUCT Preamble ¶¶ 2, 7, 8; r. 3.1 cmt. 1 (2006) (substituting “conscientious and ardent” advocacy for references to “zealous” advocacy).

44. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985); *see also* Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 775 (2006) (defending a robust model of client-centered advocacy when a lawyer represents a client in a criminal matter, because “the criminal defense lawyer is the client’s lone champion against a hostile world”).

45. Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1169 (2006); *see also* Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319 (2006) (exploring the history of, and defending, the ethical norm of zealous advocacy). *But cf.* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 66–67 (2005) (exploring another potential dichotomy, between traditional zealous advocacy and advocacy with “emphasis on personal conscience and discretion,” and instead suggesting “a third conception of advocacy ethics,” drawing on notions of “professional conscience”).

46. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2002).

is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. . . . Defense counsel need present nothing, even if he knows what the truth is. . . . Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. . . . In this respect . . . we countenance or require conduct which in many instances has little, if any, relation to the search for truth.<sup>47</sup>

This duty of zealous advocacy certainly extends to jury selection.<sup>48</sup> Impartiality is the goal for jurors, but not for the lawyers themselves, and most certainly not for criminal defense counsel. On the contrary, defense attorneys must approach jury selection with their knowledge of the client centrally in mind, while also anticipating the theory of the case, the witnesses and evidence, and the multitude of biases against the client that prospective jurors may bring with them into the courtroom. As a scholar of criminal defense advocacy observed, "It is hard enough for a criminal defendant standing trial; there are enough wrongful assumptions, prejudices, and hostilities directed toward the criminally accused. When one factors in that most criminal defendants are poor and disproportionately nonwhite, the situation is that much worse."<sup>49</sup>

For the lawyer, therefore, none of this jury-selection exercise is neutral or objective. A lawyer may approach jury selection with the goal of

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47. *United States v. Wade*, 388 U.S. 218, 256–58 (1967) (White, J., concurring in part and dissenting in part) (internal footnotes omitted). Of course, in *Wade*, Justice White, joined by Justices Harlan and Stewart, embraced this partisan model of criminal defense advocacy as a reason why defense counsel should have no right to participate in an investigative lineup, even post-charge. *See id.* at 258–59.

48. *See* Abbe Smith, "Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense, 67 *FORDHAM L. REV.* 523, 533, 565 (1998) (arguing that "[i]f a message can be gleaned from most of the scholarship and commentary on criminal defense, it is that jury selection is critical to the outcome of a criminal trial and, in this, as in all things, the client comes first and everything and everyone else be damned") (internal footnotes omitted).

49. *Id.* at 565; *cf.* Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 *DENV. L. REV.* 309, 314 (2019) (summarizing data about racial bias in the criminal law system, including that "African-American men receive federal prison sentences nearly 20% longer than white men for similar convictions," African-Americans comprise 38% of the prison population "despite constituting only 13% of the overall population," and the United States "'imprisons a larger percentage of its black population than South Africa did at the height of apartheid'").



producing an impartial jury by seeking individual jurors who lack or can address their own explicit or implicit biases, who can relate to the client as a member of a shared community, who will be open-minded to the client's factual and legal claims, and who bring appropriate skepticism to the State's claim and hold it to the burden of proof.<sup>50</sup> To the partisan lawyer's mind, everyone else can take a hike. Moreover, the lawyer knows that a more diverse jury may deliberate more meaningfully and accurately<sup>51</sup> and can better fulfill its role as an independent community check on governmental power.<sup>52</sup> Finally, the lawyer in a criminal case knows that the requirement of a unanimous verdict raises the stakes that even one rogue juror can defeat a verdict that the party otherwise might secure—guilty or not guilty.<sup>53</sup> These client-centric biases of the lawyer in selecting a jury are not only unavoidable in, but central to, the adversarial system.<sup>54</sup>

This biased perspective of lawyers of course does not determine who sits on the jury. Rather, this biased view of the parties provides the judge with critical, case-specific insight for setting the scope of necessary *voir dire* and for evaluating challenges for cause.<sup>55</sup> The lawyers' advocacy thus

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50. Cf. Smith, *supra* note 48, at 565.

51. Cf. Sarah E. Gaither et al., *Mere Membership in Racially Diverse Groups Reduces Conformity*, 9 SOC. PSYCH. & PERS. SCI. 402, 403 (2017) (observing that diversity on a jury can counteract bias by white jurors by heightening their sense of membership in a diverse group); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCHOL. 597 (2006) (seminal study finding that diverse juries examined more facts of the case, evaluated the evidence more deeply, deliberated longer, made fewer erroneous statements, and overall performed better than homogeneous control juries); cf. *State v. Saintcalle*, 309 P.3d 326, 337 (Wash. 2013) (reviewing studies and concluding that “[t]hese studies confirm what seems obvious from reflection: more diverse juries result in fairer trials”).

52. Cf. Ellsworth, *supra* note 40, at 205 (noting diverse juries' “ability to reflect the perspectives, experiences, and values of the ordinary people in the community—not just the common or typical perspective, but the whole range of viewpoints”).

53. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405–08 (2020) (requiring unanimous verdicts under the Sixth Amendment); cf. *id.* at 1427 n.94 (Alito, J., dissenting) (observing that “when unanimity is demanded, the work of preventing [a rogue juror from preventing a verdict] must be done in large measure by more extensive *voir dire* and more aggressive use of challenges for cause and peremptory challenges”).

54. See Smith, *supra* note 48 (embracing client-centered zealous advocacy).

55. Cf. Bennett, *supra* note 33, at 150, 160 (observing that “[f]or a variety of reasons, judges are in a weaker position than lawyers to anticipate implicit biases

reveals safe zones of juror impartiality to the judge through party agreement on the scope of *voir dire* and on individual juror qualifications. The advocacy also sharpens disputes over impartiality when a party makes or requests case-specific inquiries of jurors, or when that information animates challenges to whether a juror may, in fact, be biased. This advocacy, importantly, is always a two-way street in the adversarial system. Opposing counsel, therefore, can be quite active in using the *voir dire* process to contextualize or counter the other party's claim that a prospective juror is biased.<sup>56</sup> In this way, the adversarial system depends on bias from competent and diligent lawyers to investigate and reveal, and also to counter and resolve, concerns over potential juror bias.

This adversarial process initially informs the challenge-for-cause system through which the parties have a right to remove biased jurors.<sup>57</sup> These challenges, however, are often inadequate to the full task of ensuring an impartial jury.<sup>58</sup> The legal standard of removal for cause is high,<sup>59</sup> and “[t]rial judges have much discretion in conducting *voir dire* and

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in jurors and determine how those biases might affect the case,” including the fact that the “lawyers almost always know the case better than the trial judge”).

56. Juror “rehabilitation,” for example, is a common tactic for experienced trial lawyers and judges to retain jurors who have expressed bias. *See, e.g.*, Patrick T. Barone & Michael B. Skinner, *Breaking the Spell of the Magic Question During Voir Dire*, 39 CHAMPION 22 (2015) (examining judicial rehabilitation of jurors, and arguing that “[i]mproper rehabilitation always corrupts the jury trial process, but it prejudices criminal defendants much more often than the prosecution because there is a stronger initial bias against them. Either way, however, the result is the same—a corruption of the solemn right to a trial by an impartial jury”); Connie Henderson, *Your Honor, Stop Screwing Up My Voir Dire!*, WARRIOR, at 42, 43 (Winter 2016), available at [https://www.triallawyerscollege.org/media/5164/henderson\\_connie\\_voirdire.pdf](https://www.triallawyerscollege.org/media/5164/henderson_connie_voirdire.pdf) [<https://perma.cc/3VSM-UMBX>] (discussing the “evils of juror rehabilitation” by trial judges, and exploring advocate strategies to counter it after exposing juror bias). For a study on the effectiveness of judicial rehabilitation of jurors, see Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 L. & HUM. BEHAV. 212 (2010).

57. *See* sources cited *supra* note 33.

58. Jolly, *supra* note 9.

59. *See* *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (requiring challenge for cause when a prospective juror's state of mind would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath”); *see, e.g.*, *United States v. Salamone*, 800 F.2d 1216, 1225–27 (1986) (rejecting that jurors' membership in the National Rifle Association and other anti-gun control organizations implicitly demonstrated bias in a criminal case involving implementation of gun control statutes).

identifying and striking unqualified jurors.”<sup>60</sup> Casebooks are replete with examples of judges denying the defendant a challenge for cause with a juror who expressed reservations about being impartial because the juror promised to follow judicial instructions or to be fair.<sup>61</sup> These sanitizing “expurgatory oaths”<sup>62</sup> offered by jurors may follow active rehabilitation of the challenged juror by the prosecutor or even the trial judge.<sup>63</sup>

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60. Jolly, *supra* note 9, at 736; *see* Patton v. Yount, 467 U.S. 1025, 1038 (1984) (noting “special deference” afforded to trial judge’s determination of juror credibility and demeanor); State v. Holliday, No. 2017-KA-01921, 2020 WL 500475, at \*14–18 (La. Jan. 29, 2020) (noting broad discretion for trial court to determine scope of *voir dire* and rule on challenges for cause).

61. *See* C.J. Williams, *To Tell You the Truth, Federal Rule of Criminal Procedure 24(c) Should be Amended to Permit Attorneys to Conduct Voir Dire of Prospective Jurors*, 67 S.C. L. REV. 35, 44 n.67 (2015) (observing that “[p]rospective jurors often assert they can be fair and impartial, despite their beliefs, and that is generally sufficient to defeat challenges for cause,” and collecting cases).

62. *See* People v. Arnold, 753 N.E.2d 846, 850–51 (N.Y. 2000) (explaining that “a juror who has revealed doubt, because of prior knowledge or opinion, about her ability to serve impartially must be excused unless the juror states unequivocally on the record that she can be fair. While the [law] does not require any particular expurgatory oath or ‘talismanic’ words . . . jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict”); People v. Harris, 689 N.Y.S.2d 598, 598 (App. Term 1998) (observing that “[w]here a prospective juror reveals knowledge or expresses an opinion that creates a doubt regarding his or her ability or willingness to judge the case impartially and solely upon the evidence admitted at trial, the juror must be excused, unless the juror is willing to state unequivocally that prior knowledge or opinion will not influence his or her verdict and that it will be rendered impartially, solely upon the evidence. This is sometimes called an ‘expurgatory oath’”).

63. A common example from my experience might proceed as follows, perhaps following *voir dire* by the trial judge on the defendant’s presumption of innocence and the prosecution’s burden of proof:

Lawyer: Juror X, your response indicated you may have some reservations about presuming my client is innocent when the prosecution has accused him of a crime. That’s understandable. But despite those reservations, can you promise my client that you will presume this accusation is wrong and he is innocent, and will not convict him unless the district attorney proves his guilt beyond a reasonable doubt?

Juror X: I’m not sure I can. Your client’s been charged with a serious crime. That wouldn’t happen for no reason. I feel like your client should say something if he is innocent.

Lawyer: Thank you, Juror X.

Alternatively, the trial judge may simply restrict the allotted time and questions in *voir dire* so that the lawyer cannot develop an adequate record for a challenge for cause except for a few jurors.<sup>64</sup> *Voir dire* also depends heavily on an honor system for jurors responding to questions from judges and lawyers. The challenge-for-cause system thus fails to address juror biases that a juror is *unwilling* to disclose,<sup>65</sup> especially to a judicial officer in a formal court proceeding.<sup>66</sup>

Beyond these limitations in addressing explicit juror bias, the challenge-for-cause standard is deficient by design in its ability to detect *implicit* juror biases—those biases that a juror holds unconsciously that

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Court: Well, Juror X, let me ask you this question: If I instruct you that the law requires you to presume the defendant's innocence unless and until the State proves his guilt beyond a reasonable doubt, will you follow my instructions?

Juror X: Oh, yes, Your Honor, of course I will.

Whatever the accuracy of this juror's response to the judge's question, this juror likely no longer could be struck for cause. The defense lawyer nevertheless retains legitimate reasons to question whether this juror will be impartial toward her client in serving as a check on governmental power.

64. See Roberts, *supra* note 11, at 844–45; Bennett, *supra* note 33, at 160–61 (both examining the reluctance of some jurors to respond candidly to judicial questions about their biases, or to respond at all, when a candid response may be viewed as socially undesirable or as disappointing the judge).

65. I have suspected this potential dynamic many times during jury selection. For example, in a case I tried in the Bronx in the 1990s, my client was charged with attempted murder of four Bronx police officers in a shootout that followed an alleged taxicab robbery. A prospective juror during one round of *voir dire* was a police officer from another Bronx precinct. During *voir dire*, the prosecutor asked the officer, "Can you be fair to the defendant and keep an open mind even though she is accused of trying to murder other police officers?" The officer replied without hesitation, "I absolutely can." The prosecutor followed up, "Will you give the police witnesses any special weight because they are police officers?" "No," the officer responded, "I will treat all the witnesses the same." Call me a skeptic, but I did not buy it. Nor did my client. But I also could not eliminate this seemingly likely juror bias with a challenge for cause unless I could persuade the judge that the officer was not credible in his responses. I was not successful.

66. Bennett, *supra* note 33, at 160; Roberts, *supra* note 11, at 844–46 (exploring reasons why jurors may not disclose explicit biases during *voir dire*); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1675 (1985) (explaining that "jurors would naturally be reluctant to admit [discriminatory views], particularly since they know that social disapproval will be publicly expressed by dismissing them from the venire").

may affect the juror's judgment and decisions.<sup>67</sup> These undisclosed, implicit biases, which fall wholly outside the scope of a challenge for cause, often include race, gender, or other invidious biases.<sup>68</sup> These undisclosed biases, although largely invisible to judicial review, can be critical to a criminal defendant's ability to secure a fair trial.<sup>69</sup> One scholar recently found that "racial disparities pervade the exercise of challenges for cause," with little judicial oversight.<sup>70</sup>

For these reasons, the law in every jurisdiction affords criminal defendants and other parties a specified number of peremptory challenges.<sup>71</sup> A party need not offer any reason for a peremptory challenge.<sup>72</sup> The goal of the peremptory challenge is for parties to bring their case-specific knowledge and interests to bear on a limited number of prospective jurors who may be biased but who fall below the radar of a challenge for cause.<sup>73</sup> The Constitution does not provide a right to

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67. "Implicit social cognition is a branch of psychology that studies how mental processes that occur outside of awareness and that operate without conscious control can affect judgments about and behaviors toward social groups." L. Song Richardson & Phillip A. Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2629 (2013). See *State v. Saintcalle*, 309 P.3d 326, 353 (Wash. 2013) (González, J., concurring) (noting that "[j]urors sometimes conceal or are ignorant of their own biases"); Roberts, *supra* note 11, at 829 (observing that "[c]urrent doctrine fails to address the fact that jurors harbor not only explicit, or conscious bias, but also implicit, or unconscious bias"); Bennett, *supra* note 33, at 151–60 (exploring the science of implicit bias, and concluding that "judge-dominated" *voir dire* "does not begin to address implicit bias, which by its nature is not consciously known to the prospective juror").

68. See Richardson & Goff, *supra* note 67, at 2629–31 (explaining occurrence, prevalence, and power of implicit racial biases, with sources).

69. Roberts, *supra* note 11; Johnson, *supra* note 66 (expressing concern for these powerful biases evading challenge-for-cause system).

70. Thomas Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 788 (2020) (emphasis added).

71. See, e.g., FED. R. CRIM. P. 24; WASH. SUPER. CT. CRIM. R. 6.4 (2020); N.Y. CRIM. PROC. LAW § 270.25(1) (LexisNexis 2020).

72. See, e.g., N.Y. CRIM. PROC. LAW § 270.25(1) (providing that "[a] peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service").

73. See generally *Swain v. Alabama*, 380 U.S. 202, 219 (1965). One scholar has collected four traditional justifications for peremptory challenges:

First, the peremptory challenge allows the litigants to "eliminate extremes of partiality" on the venire. Accordingly, at least in theory, it operates to secure for the litigants a fair and impartial jury. Second, it gives the parties some control over the jury selection process and thereby

peremptory challenges,<sup>74</sup> and the limited number of these challenges requires a lawyer to be strategic in deploying them across the panel of prospective jurors. Nevertheless, these challenges afford each party an important opportunity: to contribute to jury impartiality that, unlike a challenge for cause, is not subject to judicial approval of that party's concerns for impartiality.

The problem with peremptory challenges, however, is that their opacity makes them unaccountable.<sup>75</sup> In the influential article *The Jim Crow Jury*,<sup>76</sup> Professor Thomas Ward Frampton reviewed why and how the peremptory challenge has become a primary tool for racial and other invidious discrimination against jurors.<sup>77</sup> Working from a robust dataset on jury selection practices in Louisiana, Professor Frampton concluded that “[p]rosecutors wield both peremptory strikes and for-cause challenges to eliminate black jurors at an extraordinarily disproportionate rate, and they do so with greater frequency when prosecuting black defendants.”<sup>78</sup> This study further found that prosecutors do not exercise a monopoly on the discriminatory use of peremptory challenges. Defense lawyers

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enhances the litigants' confidence in the proceedings and respect for the jury's ultimate verdict. Third, it permits litigants to probe for biases during voir dire without fear of alienating a potential juror. Even if no grounds for a challenge for cause appear, the litigant can exercise a peremptory challenge to exclude a panelist who may have been antagonized by the litigant's questioning. Fourth, it serves as a safety net of sorts for those instances when the challenge for cause is wrongly denied or cannot be demonstrated, but the litigant still believes that the jury panelist harbors bias.

Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire By Questionnaire and the 'Blind' Peremptory Challenge*, 29 U. MICH. J. L. REFORM 981, 985–86 (1996).

74. See *Stilson v. United States*, 250 U.S. 583, 586 (1919) (holding that “[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges”).

75. See Fried, *supra* note 22, at 1314 (noting that “the unlimited discretion historically conferred by peremptory challenges in order to facilitate the selection of an impartial jury also provides an opportunity for race and sex discrimination”).

76. See Frampton, *supra* note 16. The United States Supreme Court cited to *The Jim Crow Jury* in *Ramos v. Louisiana* in invalidating non-unanimous jury verdicts under the Sixth and Fourteenth Amendments. See *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

77. See Frampton, *supra* note 16, at 1620–25. Racial bias, of course, is a complex topic that has received much attention in the literature well beyond the scope of this paper. See Sundquist, *supra* note 49, at 335–46 (exploring the science of racial bias).

78. Frampton, *supra* note 16, at 1621–22 (internal footnote omitted).

disproportionately strike white prospective jurors, and even more so when representing a black client.<sup>79</sup> “The overall equilibrium is not evidence that the system is working,” Professor Frampton claimed, but rather “reflects systemic, mirror-image violations of both black and white jurors’ constitutional rights.”<sup>80</sup> Other studies of jury selection reinforce these conclusions.<sup>81</sup>

Consequently, a critical bias dichotomy surfaces: lawyers better minimize *jurors’* unfair biases when lawyers have diverse and robust advocacy tools for challenging jurors, including the peremptory challenge. Yet these same tools, especially the peremptory challenge, can activate and empower *lawyer* biases against otherwise qualified jurors.<sup>82</sup> This dichotomy presents a necessary choice to decide which bias merits more attention from the law: whether the right of a criminal defendant to deploy peremptory challenges in seeking an impartial jury outweighs the right of jurors to be free from discrimination, or whether jurors’ right to freedom from discrimination matters more than the value of the peremptory challenge.

*Batson v. Kentucky*<sup>83</sup> attempted to resolve this choice as a false dichotomy by creating a framework for judicial regulation of peremptory challenges. The nearly uniform view, however, is that *Batson* has failed in this effort.

## II. THE FAILED *BATSON* SOLUTION

*Batson* recognized the authority of trial judges to regulate peremptory challenges under the Equal Protection Clause of the Fourteenth

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79. *Id.* at 1634–35.

80. *Id.* at 1635.

81. *See id.* at 1624–25 (summarizing other studies); *see, e.g.*, Catherine M. Grosso & Barbara O’Brien, *Beyond Batson’s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Peremptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1627–28 (2013) (discussing ongoing empirical research finding that “black qualified jurors consistently faced a significantly higher risk of strike [by prosecutors] than all other qualified jurors,” and noting convergence other legal and social science research confirming “that race continues to play a role in jury selection”). For recent examples of this discrimination in action, *see, for example*, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Miller-El v. Dretke*, 545 U.S. 231 (2005).

82. *Cf. Bennett*, *supra* note 33, at 151 (noting value of lawyer advocacy in reducing juror bias, but the role of peremptory challenges in empowering the biases of lawyers).

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

Amendment.<sup>84</sup> The Supreme Court grounded this rule in three interrelated harms that racially discriminatory peremptory challenges cause: harm to the defendant's fair trial interests, harm to the juror's equality interests, and broader harm to the integrity of the legal system.<sup>85</sup> As the Court explained, "[R]espect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."<sup>86</sup>

The Supreme Court subsequently applied the *Batson* rule to govern civil litigants<sup>87</sup> and criminal defendants.<sup>88</sup> Moreover, the Supreme Court has extended *Batson* to sex discrimination.<sup>89</sup> Lower courts have applied *Batson* to other forms of invidious discrimination in jury selection, including discrimination against sexual orientation,<sup>90</sup> religious affiliation,<sup>91</sup> and color.<sup>92</sup>

This framework suggests a potentially robust opportunity for judicial regulation of discriminatory peremptory challenges during jury selection. To prevail under *Batson*, however, the complaining party must pass successfully through *Batson*'s familiar three-stage test:

First, a [party] must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the [responding party] must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the [complaining party] has shown purposeful discrimination.<sup>93</sup>

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84. *See id.* at 89.

85. *See id.* at 86–87.

86. *Id.* at 99.

87. *See* Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991) (applying *Batson* rule to peremptory challenges by civil litigants).

88. *See* Georgia v. McCullom, 505 U.S. 42 (1992) (applying *Batson* rule to peremptory challenges by criminal defendants).

89. *See* J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127 (1994) (applying *Batson* to gender discrimination).

90. *See* SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014) (applying *Batson* to sexual-orientation discrimination).

91. *See, e.g., In re Freeman*, 133 P.3d 1013, 1023–24 (Ca. 2006); *see also* Miller-El v. Dretke, 545 U.S. 231, 269–70 (2005) (Breyer, J., concurring) (collecting lower-court cases).

92. *See* People v. Bridgforth, 69 N.E.3d 611, 613–15 (N.Y. 2016) (recognizing skin color as a protected *Batson* classification in addition to race, gender, and ethnicity).

93. Snyder v. Louisiana, 552 U.S. 472, 475 (2008).



This *Batson* framework has generated what one scholar has characterized as “withering criticism”<sup>94</sup> of the rule’s ability to meaningfully regulate the lawyer side of the bias dichotomy in jury selection. The bases for this criticism abound, but it often focuses on five concerns, several of which Justice Thurgood Marshall himself anticipated in the *Batson* decision: (1) the requirement of lawyer *intent* to discriminate against the challenged juror is a difficult evidentiary standard to meet in the jury selection context<sup>95</sup> and does little to nothing to address implicit lawyer bias in using peremptory challenges;<sup>96</sup> (2) the structure and content of *Batson*’s three-stage test easily permits a guilty lawyer to hide a discriminatory strike behind a host of flimsy but legally satisfactory “race neutral” reasons for the strike;<sup>97</sup> (3) some trial judges may be reluctant to acknowledge *Batson* violations, because the required pretext finding under the third stage of analysis implies that the lawyer is a deceptive racist;<sup>98</sup>

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94. Frampton, *supra* note 16, at 1623.

95. *Cf. Batson v. Kentucky*, 476 U.S. 79, 105 (1986) (Marshall, J., concurring) (observing that “defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a *prima facie* case”).

96. *Cf. id.* at 106 (Marshall, J., concurring) (“Nor is outright prevarication by prosecutors the only danger here. ‘[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.’ A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not come to his mind if a white juror had acted identically.”) (alteration in original) (citation omitted); *see also* State v. Saintcalle, 309 P.3d 326, 335 (Wash. 2013).

97. *Cf. Batson*, 476 U.S. at 105–06 (observing that “[i]f such easily generated explanations are sufficient to discharge the prosecutor’s obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory”); Wright, Chavis & Parks, *supra* note 28, at 1413–14 (observing that “it is too easy for attorneys to fabricate race-neutral reasons, after the fact, to exclude minority jurors”); Grosso & O’Brien, *supra* note 81, at 1631–32 (confirming that prosecutor regularly evade *Batson* with racial neutral explanations for discriminatory strikes); Jeffrey Bellin & Juninho P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1090–1105 (2011) (reviewing federal *Batson* decisions from 2000 to 2009).

98. *See Saintcalle*, 309 P.3d at 338 (observing that “[a] requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a *Batson* challenge”); *cf. Batson*, 476 U.S. at 106 (Marshall, J., concurring) (commenting that “[a] judge’s own conscious or unconscious racism may lead him to accept [a lawyer’s] explanation as well supported”); Bellin & Semitsu, *supra* note 97, at 1113. An inference of unethical discrimination from a *Batson* violation is not

(4) *Batson* does not enhance jury diversity, because it embraces a “colorblind” ethos;<sup>99</sup> and (5) appellate courts defer heavily to the trial judge’s resolution of these issues of lawyer credibility.<sup>100</sup> The net perspective on *Batson* might be best captured by one law review article’s revealing title: *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*.<sup>101</sup>

These valid critiques of *Batson* have prompted creative judicial and academic proposals to modify and improve the *Batson* rule.<sup>102</sup> The intensifying critiques of *Batson*, however, have also invited renewed calls

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necessary as a disciplinary matter. See MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS’N 1980) (providing that “[a] trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)”).

99. See Tetlow, *supra* note 33, at 1714–15 (arguing that “*Batson* does not value diversity at all. Instead, *Batson* held unconstitutional the very idea that race and gender predict belief. . . . *Batson* [thus] actually interferes with the quest for jury impartiality”); see also *Saintcalle*, 309 P.3d at 334 (noting that “[a] growing body of evidence shows that *Batson* has done very little to make juries more diverse”).

100. See Wright, Chavis & Parks, *supra* note 28, at 1412, 1414 n.6 (observing that “appellate courts rarely reverse convictions based on *Batson* claims”).

101. See Bellin & Semitsu, *supra* note 97. One section heading in this article is also colorfully titled, “Jurors are more likely to be struck by lightning than to be struck by a violator of the Equal Protection Clause.” *Id.* at 1102; see also Grosso & O’Brien, *supra* note 81, at 1628 (noting convergence in legal and social science literature “that race continues to play a role in jury selection notwithstanding *Batson*’s prohibition”).

102. See, e.g., *City of Seattle v. Erickson*, 398 P.3d 1124, 1131–32 (Wash. 2017) (adopting “bright-line” rule that “the peremptory strike of a juror who is the only member of a cognizable racial group on a jury panel constitutes a *prima facie* showing of racial motivation” under *Batson*). For several academic proposals to reform *Batson* standards or procedures, see, for example, Bellin & Semitsu, *supra* note 97, at 1106–09 (summarizing proposals); Roberts, *supra* note 11, at 873–74 (implicit bias testing); Jen C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solutions for Ending the Problem of Racialized Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. & PUB. POL’Y 323, 337–38 (2003) (proposing blind questioning system for jury selection); Brian W. Stoltz, *Rethinking the Peremptory Challenge: Letting Lawyers Enforce the Principles of Batson*, 85 TEX. L. REV. 1031, 1047 (2007) (proposing peremptory “block” system by lawyers); Montoya, *supra* note 73, at 1115–25 (proposing *voir dire* questionnaire with blind peremptory challenges).

to eliminate the peremptory challenge.<sup>103</sup> One of the most compelling calls was delivered by Washington Supreme Court Justice Steven González in his influential concurring opinion to that court's decision in *State v. Saintcalle*.<sup>104</sup> This Article, therefore, will explore Justice González's opinion as an exemplar of the strongest critiques of the peremptory challenge under the *Batson* regime.

In *Saintcalle*, the Washington Supreme Court majority recognized the many shortcomings of the *Batson* rule in regulating lawyer bias: “[T]he fact of racial and ethnic disproportionality in [Washington’s] criminal justice system is indisputable.”<sup>105</sup> The court noted, however, that “[a] growing body of evidence shows that *Batson* has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges.”<sup>106</sup> To illustrate, the court acknowledged that “[in] over 40 cases since *Batson*, Washington appellate courts have *never* reversed a conviction based on a trial court’s erroneous denial of a *Batson* challenge.”<sup>107</sup> The court also lamented that *Batson* does not reach the prevalent dynamic of “unconscious prejudice and implicit bias.”<sup>108</sup> Nevertheless, the court was reluctant to decide whether and how to reform *Batson* in a litigated case in which the parties had not briefed the issue.<sup>109</sup>

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103. See cases cited *supra* note 18. These calls are not entirely new. Justice Thurgood Marshall himself called to abolish the peremptory challenge in *Batson* itself. See *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring) (“The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.”). In *Batson*, the Supreme Court was addressing peremptory challenges by the prosecution. Nevertheless, Justice Marshall further observed, “The potential for racial prejudice, further, inheres in the defendant’s challenge as well. If the prosecutor’s peremptory challenge could be eliminated only at the cost of eliminating the defendant’s challenge as well, I do not think that would be too great a price to pay.” *Id.* at 108. Interestingly, in the recent Supreme Court decision invalidating non-unanimous verdicts under the Sixth Amendment, Justice Kavanaugh analogized non-unanimous jury verdict rules to discriminatory peremptory challenges. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–18 (2020) (Kavanaugh, J., concurring) (noting, after reviewing the racist history of Louisiana and Oregon’s non-unanimous jury verdict rule, that “[i]n effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors”).

104. *State v. Saintcalle*, 309 P.3d 326 (Wash. 2013).

105. *Id.* at 334.

106. *Id.*

107. *Id.*

108. *Id.* at 335.

109. *Id.* at 337.

Accordingly, the court deferred the question to a future case or even the court's administrative rule-making process.<sup>110</sup>

Justice González was less enamored of waiting than the majority.<sup>111</sup> Instead, Justice González argued that the court had a duty to “ensure that none of our trial procedures propagate injustice.”<sup>112</sup> In detailing the ways in which peremptory challenges propagate injustice, Justice González first situated the peremptory challenge historically in a process where challenges for cause “remain[] the primary method by which we ensure impartial juries,”<sup>113</sup> juror impartiality means an ability to “follow instructions on the law,”<sup>114</sup> and trial judges have significant discretion in evaluating whether a juror is impartial.<sup>115</sup> Justice González thus framed the peremptory challenge as a historical supplement.<sup>116</sup>

In Justice González's view, this supplement in practice no longer fulfills its purpose of enhancing jury impartiality.<sup>117</sup> Instead, lawyers “simply use peremptory challenges to remove the prospective jurors they perceive to be least favorable to their position, regardless of whether such prospective jurors possess biases so severe as to render their participation unfair.”<sup>118</sup> The goal is to maximize juror “favoritism,” especially in “close cases.”<sup>119</sup> Justice González questioned whether an empirical basis even supports this partisan effort by lawyers. Instead, drawing on several sources of methods of trial practice, Justice González concluded that lawyers' peremptory-challenge strategies “all rely heavily on stereotypes and generalizations” and “superficial judgments, notwithstanding the fact that whatever directly relevant information is available either provides no indication that the prospective juror is unqualified or provides some indication that is only fairly debatable at best.”<sup>120</sup> Empirical studies indicate that lawyers, even when guided by jury selection experts, are not particularly effective, “even for the adversarial purpose of excluding unfavorable jurors.”<sup>121</sup>

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110. *Id.* at 338.

111. *See id.* at 347 (González, J., concurring) (noting that “[r]acial bias in jury selection is still a problem—‘Solutions to the Problem, Of Course, wait’”).

112. *Id.* at 349.

113. *Id.* at 352.

114. *Id.* at 351.

115. *Id.* at 352.

116. *Id.* at 352, 366–67.

117. *See id.*

118. *Id.* at 353.

119. *Id.*

120. *Id.* at 353–55.

121. *Id.* at 363–65.

This dynamic unsurprisingly prompts some lawyers to rely on racial and other invidious biases as a shortcut. Justice González identified several types of explicit and implicit racial bias that can inform lawyer intuition in striking jurors: (1) “straightforward, race-based stereotype or generalization”;<sup>122</sup> (2) “a simple or complex statistical juror profile that incorporates race as an indicator of favorability”;<sup>123</sup> (3) “a desire to obtain a particular racial dynamic on the jury as a whole”;<sup>124</sup> and (4) “unconscious racial bias.”<sup>125</sup> Justice González concluded that these racial biases are widespread and “occurring regularly” in jury selection.<sup>126</sup> This conclusion was reinforced with several studies,<sup>127</sup> including a survey of Washington lawyers that revealed that “42.6 percent of surveyed lawyers reported that prosecutors in Washington either ‘sometimes’ or ‘often’ use peremptory challenges to systematically exclude minorities from juries.”<sup>128</sup>

*Batson*, Justice González concluded, “cannot effectively combat the widespread racial discrimination that underlies the use of peremptory challenges throughout this state, and thus, such racial discrimination will

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122. *Id.* at 355.

123. *Id.* at 356.

124. *Id.*

125. *Id.* This catalogue of racial biases that apparently are impermissible in jury selection implies a fairly “colorblind” theory of juror impartiality. This theory does hold some jurisprudential currency. *Cf.* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *cf. id.* at 782 (Thomas, J., concurring) (arguing that “[o]ur Constitution is color-blind”). *But cf. id.* at 803 (Breyer, J., dissenting) (arguing for race-conscious decision-making when necessary and narrowly tailored to eliminate racial segregation in public schools). Not everyone would agree that color-blind jury selection always produces racial justice. For example, in critiquing *Batson* jurisprudence, Professor Tania Tetlow has argued as follows:

the Court purports to solve the problem of endemic jury discrimination by simply mandating a state of denial about it. The Court actually forbids any presumption that justice might turn on race. Because it would prove too ‘divisive’ to recognize the proven realities of jury discrimination, the Court instead works to force an aspirational colorblindness onto the lawyers selecting the jury.

Tetlow, *supra* note 33, at 1714 (internal footnotes omitted); *cf.* Wright, Chavis & Parks, *supra* note 28, at 1430 (empirical study finding that “juries with more white men were more likely to convict, particularly when the defendant was a black man. Thus, it is easy to see why defense attorneys might want to save more of their peremptory challenges for white male jurors”).

126. *See Saintcalte*, 309 P.3d at 356–57 (González, J., concurring).

127. *See id.* at 356–58.

128. *Id.* at 357–58.

continue unabated.”<sup>129</sup> Peremptory challenges thus cause numerous harms: the strikes perpetuate the “underrepresentation of minority groups on juries,”<sup>130</sup> impose “substantial administrative and litigation costs,”<sup>131</sup> produce “less effective and less productive” juries,<sup>132</sup> and “amplif[y] underlying resource disparity among litigants in a way that brings fundamental fairness into question.”<sup>133</sup>

Justice González acknowledged that “peremptory challenges are not always harmful or pernicious.”<sup>134</sup> However, in Justice González’s view, “trial and appellate courts cannot reliably identify which particular challenges involve racial discrimination and which do not.”<sup>135</sup> Accordingly, Justice González concluded, “Abolishing peremptory challenges is constitutionally required, given the need to prevent racial discrimination and the lack of any justification for allowing peremptory challenges.”<sup>136</sup> Alternatively, Justice González noted, “If we do not abolish peremptory challenges, we should at least take steps to augment the effectiveness of the current jury selection process under *Batson*.”<sup>137</sup>

Justice González’s *Saintcalle* opinion has justifiably been influential, including on the Washington Supreme Court itself.<sup>138</sup> This opinion also has garnered attention from jurists and academics around the country, prompting renewed assessment of whether the time has arrived to eliminate the peremptory challenge from the lexicon of jury selection.<sup>139</sup> Despite the compelling rationales proffered by Justice González and other critics, the record may not yet justify eliminating the peremptory challenge altogether, at least if criminal defense peremptories are to be buried in the same casket with prosecution peremptories.

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129. *Id.* at 358.

130. *Id.* at 362.

131. *Id.*

132. *Id.* at 363.

133. *Id.*

134. *Id.* at 348.

135. *Id.*

136. *Id.* at 367.

137. *Id.* at 369.

138. *See City of Seattle v. Erickson*, 398 P.3d 1124, 1134 (Wash. 2017) (Yu, J., concurring) (“I now join Justice González in calling for the complete abolishment of peremptory challenges.”).

139. *See, e.g., State v. Holmes*, 221 A.3d 407, 438 n.28 (Conn. 2019); *id.* at 441 (Mullins, J., concurring) (both citing to *Saintcalle* and Justice González’s concurring opinion in evaluating peremptory challenge reforms); *State v. Veal*, 930 N.W.2d 319, 356–58 (Iowa 2019) (Appel, J., concurring) (analyzing *Saintcalle* decision and Justice González’s concurring opinion in assessing the future of the peremptory challenge under *Batson*).

## III. A CAUTIOUS DEFENSE OF THE PEREMPTORY CHALLENGE

In responding to critiques of the peremptory challenge, this Article will not repeat well-established rationales that have been explored elsewhere.<sup>140</sup> Nor, in the face of *Saintcalle*'s persuasive knocks against the peremptory challenge, will this Article offer much of a defense for prosecution peremptory strikes. The prosecution already may come into jury selection benefitting from juror biases trending more in its favor.<sup>141</sup> Moreover, the state carries a continuing legacy of racial discrimination in almost every facet of its criminal law system, including in the peremptory challenge, operating as a system of oppression and control against racial minorities.<sup>142</sup> Not a great equation for lauding the peremptory challenge's value in the face of compelling critiques of this practice.

A criminal defendant, by contrast, stands in a distinct position as the very object of the state's desire to punish and control. Consequently, a zero-sum solution to the bias dichotomy, such as the abolition of peremptory challenges, may cause distinct harm. These harms should be weighed carefully before the same party seeking to punish a criminal defendant can strip the defendant of such a well-established tool to assure an unbiased jury will hear the State's accusation. While Justice González persuasively demonstrates in *Saintcalle* the many vices of this jury selection tool, even when used by criminal defendants, those vices may not operate "without substantiated benefits."<sup>143</sup>

To be clear, I am not advocating for special license for criminal defense lawyers to discriminate against jurors on the basis of race, sex, sexual orientation, gender identity, color, or other protected classification. Criminal defense lawyers are trained to fight against these biases, not to exacerbate them, and the rules of ethics quite properly subject all lawyers

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140. See generally Montoya, *supra* note 73, at 985–86 (identifying four traditional justifications for the peremptory challenge).

141. Cf. William S. Neilson & Harold Winter, *Bias and the Economics of Jury Selection*, 20 INT'L REV. L. & ECON. 223, 241 (2000) (observing that "for a defendant clearly in the minority . . . the only tradeoff to consider when awarding peremptory challenges is that between a decrease in the probability of a hung jury and an increase in the probability of a wrongful conviction").

142. See generally ALEXANDER, *supra* note 24. Cf. Butler, *supra* note 15 (exploring both the individual racism and structural white supremacy embedded in the criminal law system, with examples); see also Sundquist, *supra* note 49, at 314 (sharing data about racial biases in the criminal law system across multiple data points).

143. *State v. Saintcalle*, 309 P.3d 326, 350 (Wash. 2013). (González, J., concurring).

to this limit on zealous advocacy.<sup>144</sup> I, therefore, agree that “[r]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.”<sup>145</sup>

By eliminating the peremptory challenge, however, the law would impose a prophylactic solution to the bias dichotomy that would eliminate non-discriminatory peremptory challenges along with discriminatory challenges.<sup>146</sup> Yet, this proposal adds nothing new to lawyers’ advocacy toolkit for identifying and removing harmful juror biases that can unfairly skew outcomes.<sup>147</sup> Lawyers will rely on judge-determined challenges for cause, yet as one experienced jurist has observed:

Because lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome. . . . [T]he trial judge is probably the person in the courtroom least able to discover implicit bias by questioning jurors.<sup>148</sup>

To illustrate in even more practical terms: while the judge is evaluating whether jurors can be generally impartial in a sexual assault case, the defense lawyer is evaluating whether the jurors will respond fairly and critically to the anticipated cross-examination of the victim and will listen fairly to the client’s testimony, including cross-examination. The current challenge-for-cause system cannot realistically capture these juror biases.<sup>149</sup> A decision to eliminate peremptory challenges, therefore,

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144. See MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 1980); CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.6 (AM. BAR ASS’N 4th ed. 2017) (providing ethical duty for defense counsel to refrain from invidious bias, to eliminate those biases, and to detect, investigate, and eliminate “historically persistent biases like race, in all of counsel’s work”).

145. *Saintcalle*, 309 P.3d at 332–33.

146. See *id.* at 348 (acknowledging that “peremptory challenges are not always harmful or pernicious”).

147. See Sundquist, *supra* note 49, at 345 (noting that “racial bias on the jury has long been found to be clearly associated with distorted trial outcomes,” and even “can exert a causal effect on trial outcomes in some cases,” and especially can “impact decision-making with regard to guilt and the interpretation of ambiguous evidence”).

148. Bennett, *supra* note 33, at 160; Williams, *supra* note 61, at 61 (observing that “a trial judge will not know the case at the bar anywhere near as well as the lawyers trying the case”).

149. See Bennett, *supra* note 33, at 159–61.



may codify only that lawyers “worry more about discrimination *against* jurors than about discrimination *by* jurors.”<sup>150</sup>

Justice González appears to hold a skeptical view, however, of the goal of peremptory challenges and their value to juror impartiality:

[A]ttorneys use peremptory challenges to exclude unfavorable jurors, not to obtain an impartial jury. Peremptory challenges are used to remove prospective jurors who are qualified but who the attorney believes will be relatively unfavorable in what is probably a close case. That has nothing to do with furthering impartiality in our justice system.<sup>151</sup>

Even if this perspective is accurate in some cases, we should be clear about who unilaterally will decide juror qualifications and select the jury if lawyers have no peremptory challenges. *Judges* would pick the juries, as the selection of all trial jurors would depend entirely on challenges for cause, which depend on judicial permission.

Judges in criminal cases are agents of the same State that is also prosecuting the defendant.<sup>152</sup> Judges may have a different role than prosecutors, and judges and prosecutors may not feel like they are on the same team some days. Judges, however, are state actors nevertheless.<sup>153</sup> For example, the judge will enter a guilty verdict from the jury to give that condemnation the force of law, and the judge will finalize the judgment by imposing a sentence.<sup>154</sup> Many judges run for public election, and oftentimes these elections can include the typical themes of “criminal justice” for the public’s safety.<sup>155</sup> Other judges are appointed by an

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150. Tetlow, *supra* note 33, at 1715 (emphasis added).

151. *Saintcalle*, 309 P.3d at 363 (González, J., concurring).

152. This fact is precisely why the Supreme Court concluded that a defense peremptory challenge satisfies the state-action requirement for an equal protection violation against the removed juror. *See Georgia v. McCullom*, 505 U.S. 42, 51–55 (1992).

153. *See id.*

154. *See Bradley v. United States*, 410 U.S. 605, 609 (1973) (noting that “[f]inal judgment in a criminal case means sentence. The sentence is the judgment.” . . . In the legal sense, a prosecution terminates only when sentence is imposed”).

155. *See* Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 328 (2010) (observing that “the tough-on-crime message, or some derivation thereof, is among the most, if not the most, prevalent in judicial campaigns,” and that “[i]n one study of the 2000 judicial elections in four states . . . crime control or cracking down on criminals was the most frequent theme in televised causing advertisements”). A

executive officer who occupies the same branch of government as the prosecutor seeking to convict the defendant.<sup>156</sup> Eliminating the peremptory challenge thus would prevent defendants from having any say in their jury of peers, unless the defendant wins permission from a state actor.

In the United States criminal law system, with its legacy of state-sanctioned discrimination and mass incarceration of marginalized persons,<sup>157</sup> I maintain significant concerns about ceding this much unilateral control to the State over the composition of the jury. As Justice González’s opinion itself reinforces, trial judges exercise substantial discretion over *voir dire* and challenges for cause.<sup>158</sup> The judiciary, of course, includes many fair-minded jurists who would exercise this discretion patiently and with the best intentions to secure a fair trial for the defendant, but that benevolence would be lost with the judges who are not so fair-minded to the criminal defendant. In addition, any experienced trial lawyer can tell stories about trial judges who have exerted a heavy hand in controlling jury selection, maybe just for the sake of efficiency or perhaps for a preferred jury composition, against which only the peremptory challenge can defend.<sup>159</sup>

Moreover, even the most fair-minded judge can suffer from implicit biases—a human affliction that also influences judicial decision-making.<sup>160</sup> If we acknowledge that *voir dire* and challenges for cause are

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simple review of campaign videos on YouTube for judges in partisan judicial election states, such as Alabama, offers some colorful examples. *See* Content Creative Media, *Judge Sarah Stewart, Alabama Supreme Court – “Matters,”* YOUTUBE (Jan. 17, 2019), <https://youtu.be/0cx04p4rzqA> [<https://perma.cc/GXQ4-PX3F>] (portraying candidate as a pro-Trump judge who will “guard our nation against evil-doers”); Strategic Impact, *GREG SHAW: TRUMP TOUGH,* YOUTUBE (Feb. 17, 2020), <https://youtu.be/OYOJxATAva8> [<https://perma.cc/Q98R-35BZ>].

156. *Cf.* MODEL CODE OF JUDICIAL CONDUCT r. 4.3 (AM. BAR ASS’N 2010) (setting ethical responsibilities for candidates for appointment to judicial office).

157. *See supra* notes 15–17, 81, and 142.

158. *See supra* note 115.

159. *Cf.* Henderson, *supra* note 56; Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 54 (1994) (noting the importance of peremptory challenge for lawyers to address jury bias, despite and even in the face of judicial inquiry).

160. *See* *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (referring to “[a] judge’s own conscious or unconscious racism”); *State v. Veal*, 930 N.W.2d 319, 343 (Iowa 2019) (Appel, J., concurring) (“[A]ll of us—judges, lawyers, legislators, and jurors—have unconscious or implicit biases”); Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 42–43 (2014) (noting role of implicit bias in all courtroom actors, including judges who, “like everyone else, harbor their own set of implicit biases, shaped by their life

highly discretionary decisions by trial judges to which appellate courts will defer,<sup>161</sup> we should maintain an independent bias check to prevent the trial judge from skewing jury selection, even unintentionally. However, many of the calls to eliminate peremptory challenges by lawyers appear to imply superior judicial neutrality in selecting jurors, who themselves also are presumptively unbiased, including on matters such as race and gender.<sup>162</sup> That neutrality is not realistic or supported.<sup>163</sup> For example, studies on racial disparities in jury selection are not much friendlier to the bench than they are to the bar.<sup>164</sup> Studies similarly show how upcoming elections or

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experiences and identity”); Bennett, *supra* note 33, at 157–58 (reviewing studies demonstrating judicial implicit bias, including racial bias, because “judges rely heavily on intuitive faculties when deciding traditional problems from the bench”); *cf.* LETTER OF WASHINGTON SUPREME COURT TO THE JUDICIARY AND LEGAL COMMUNITY (June 4, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf> [<https://perma.cc/MMT6-K8CC>] (acknowledging both “conscious and unconscious biases” in the judiciary as part of the court’s commitment to “achieving justice by ending racism”).

161. *See supra* note 61.

162. *Cf.* *City of Seattle v. Erickson*, 398 P.3d 1124, 1134 (Wash. 2017) (Yu, J., concurring) (advocating that law should presume that all prospective jurors are “qualified” unless proven otherwise by a challenge for cause); *State v. Saintcalle*, 309 P.3d 326, 369 (Wash. 2013) (González, J., concurring) (deferring to judicial discretion and control in supervising *voir dire* and ruling on challenges for cause and describing rulings on challenge for cause as discernibly “objective”).

163. *Cf.* Nugent, *supra* note 159, at 5 (observing that through “blind faith in their impartiality . . . judges may gain a false sense of confidence in their decisions”).

164. *See* Frampton, *supra* note 70, at 790 (discussing research that revealed that “through challenges for cause . . . prosecutors allege (and judges confirm) that black jurors remain less ‘qualified’ than white jurors to participate in an institution frequently touted as central to American democracy”); Wright, Chavis & Parks, *supra* note 28, at 1426, 1430 (reporting empirical study of jury selection practices, finding that “[t]he data show that judges removed nonwhite jurors at a higher rate than they did for white jurors,” and inferring, *inter alia*, that “[t]he higher rate of judicial removals for cause for nonwhite jurors might also reveal how judges align themselves with prosecutors, and respond more favorably to their requested removals for cause”). A recent survey by the National Judicial College happily reported that “65 percent of the 634 judges who responded answered yes to the question, ‘Do you believe that systemic racism exists in the criminal justice system?’” *See* Anna-Leigh Firth, *Most judges believe the criminal justice system suffers from racism*, NAT’L JUD. C. (July 14, 2020), <https://www.judges.org/news-and-info/most-judges-believe-the-criminal-justice-system-suffers-from-racism/> [<https://perma.cc/TBQ6-Y4MM>]. This story,

appointment decisions can influence judicial decision-making, especially in the area of criminal law.<sup>165</sup> In the adversarial system, a party who intimately knows the theory of the case and the strengths and weaknesses of evidence might serve as an effective ballast to other biases influencing the jury's composition, including the judge's own.<sup>166</sup>

The peremptory challenge thus offers a critical virtue in criminal cases: it reinforces the jury's independence by preventing the State, intentionally or unintentionally, from stacking the deck.<sup>167</sup> If a central function of an impartial lay jury is to serve as an independent community check on governmental power,<sup>168</sup> one should not expect state-dominated jury selection to be nearly as effective at producing an independent group. If anyone will look for independent jurors, the criminal defendant will be most on the hunt for that independence as the person the State desires to

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however, thus also implicitly reports that about 222 of the 634 judges who were surveyed do *not* believe that systemic racism exists in the criminal justice system. These judges supervise jury selection, too.

165. See Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. JUST. (2015), <https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases> [https://perma.cc/L32F-LFHH] (last visited Aug. 24, 2020).

166. At a minimum, I question any legal regime that presumes a lack of bias from judges and jurors but presumes bias from lawyers. An adversarial approach to jury selection instead would presume that all the participants are vulnerable to bias, and they are each responsible for checking each other's biases.

167. Cf. Nugent, *supra* note 159, at 49 (noting the role of the jury as "the best means of protecting against the operation of the individual biases of judges"). Nevertheless, in my career, I have heard several judges claim, in one form or another, "We could work with the first twelve in the box." Cf. *Erikson*, 398 P.3d at 1133 (Yu, J., concurring) (arguing that "[w]e should assume that all members of the public who adhere to a summons to appear for jury service are qualified to hear a case unless otherwise shown"). By contrast, I more rarely recall prosecutors offering this perspective, and I cannot recall *any* experienced criminal defense lawyer endorsing it, nor any civil rights lawyer, nor for that matter many plaintiffs' lawyers. Some evidence may reinforce my experiential anecdotes. See Montoya, *supra* note 73, at 998–1003 (reporting a survey of San Diego trial lawyers, who consistently endorsed the value of the peremptory challenge). We should consider why these specific groups of party interests so often align in caring about the peremptory challenge. Outside of the prosecutors, these parties tend not to be the powerbrokers of social oppression, and more often, are on the receiving end of it.

168. See *supra* note 41 and accompanying text; cf. Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 829 (2014) (noting that a jury can "serve as a forum for citizens to realign their own allegiances as they attempt to apply the law to the defendant").

convict. The peremptory challenge does not give the defendant the dominant voice, or even the last word, on the jury's composition, but with the peremptory challenge, the State lacks the last word. Lawyers thus know that the jury is impartial, not because the judge says so, or because a party says so, but because the adversarial process shows as much.<sup>169</sup>

Justice González emphasized, however, that lawyers may not be nearly as accurate in using peremptory challenges for this adversarial purpose as they think.<sup>170</sup> Of course, peremptory strikes are not a bullseye practice, and Justice González's opinion raises legitimate questions about their efficacy, even in the hands of experienced and well-resourced lawyers.<sup>171</sup> Even if this efficacy claim is accurate as an empirical matter,

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169. *Cf.* Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (emphasizing the importance of adversarial testing to judicial determinations of constitutionally required standards for a criminal conviction under the Sixth Amendment).

170. *See* State v. Saintcalle, 309 P.3d 326, 363 (Wash. 2013) (González, J., concurring) (asserting that “peremptory challenges are generally ineffective even for the adversarial purpose of excluding unfavorable jurors”).

171. More comprehensive research that fully measures lawyers' use of the strike might be warranted to support this empirical conclusion. Trial lawyers deploy peremptory challenges for a diverse range of reasons that are not constant from trial to trial, or even from juror to juror. The strike, for example, might seek to *eliminate* juror six, or it might seek to *include* juror seven by removing juror six, or it might simply *tolerate* juror seven to eliminate juror six, or it might serve to placate a nervous client or seek demographic balance, life experiences, communication or listening skills in the jury, or many other purposes. Sometimes, the strike simply preserves a challenge-for-cause claim on appeal. Justice González takes the position that many of these purposes have “nothing to do with furthering impartiality in our justice system,” *Saintcalle*, 309 P.3d at 363 (González, J., concurring). Perhaps the concept of impartiality itself is the real point of disagreement, although I do agree that emerging empirical research will be important to the ultimate fate of the peremptory challenge. The Jury Sunshine Project is an important example. *See* JURY SUNSHINE PROJECT, <http://news.law.wfu.edu/tag/jury-sunshine-project/> [<https://perma.cc/8WWX-KXGB>] (last visited June 1, 2020). Researchers from this project have been awarded a grant to research whether peremptory challenges improve jury impartiality, or instead increase bias. *See Award Abstract #1628538: Do Peremptory Challenges Increase Bias on Juries?*, NATIONAL SCIENCE FOUNDATION, [https://www.nsf.gov/awardsearch/showAward?AWD\\_ID=1628538](https://www.nsf.gov/awardsearch/showAward?AWD_ID=1628538) [<https://perma.cc/7MUW-FCXS>] (last visited June 4, 2020) (proposed research in Minnesota courts to “test empirically the common assumption that peremptory challenges increase the impartiality of juries”); *cf.* Catherine Grosso & Barbara O'Brien, *A Call to Criminal Courts: Record Rules for Batson*, 105 KY. L.J. 651, 662 (2017) (emphasizing responsibility of local courts to preserve and share jury selection data for researchers in the pursuit of mitigating racial disparities in jury selection).

the peremptory challenge still contributes an important virtue: legitimacy. The community accepts most criminal verdicts, even some of the most difficult and controversial, because they are not imposed unilaterally by agents of the state.<sup>172</sup> To the contrary, an adversarial process in which every participant had a voice chose the members of that community to validate the State's accusation. State-dominated jury selection may diminish confidence that jury verdicts maintain the independence from State control that animates the commitment to a lay jury system in the first place.<sup>173</sup>

On a more local level, I cannot count the times I have exercised a peremptory challenge against a juror who exhibited legal "impartiality" like a pro during *voir dire*, because my client nevertheless feared the juror—maybe due to a background in law enforcement or other government position, an experience as a victim of crime, or another personal experience that triggered my client. When we were able to eliminate some of these jurors, my client and my client's family and loved ones were more consistently open to accepting the jury's decision as legitimate because my client had a say in the group that decided his or her fate. This virtue of the peremptory strike accrued even if we were to deem the strike inefficacious in terms of narrowly defined "impartiality." Participation and perception matter to fairness.<sup>174</sup>

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172. Cf. Wright, Chavis & Parks, *supra* note 28, at 1431 (noting that "[j]ury service creates a forum for popular participation criminal justice" and that "with other more 'favored' people issuing the verdicts, the legitimacy of the system suffers").

173. See *supra* note 41 and accompanying text.

174. Cf. JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* 271 (2d ed. 1990) (identifying the value of the challenge in that the parties "consequently are more likely to be accepting of the verdict"). *But cf. Saintcalle*, 309 P.3d at 351, 365 (González, J., concurring) (rejecting this party-centric concern, but acknowledging the value of the "appearance of a fairness"). Professor Akhil Reed Amar also has argued against this party-centric role of peremptory challenges as anti-democratic: "Juries should represent the people, not the parties." Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182–83 (1995). Professor Amar, however, focused on a fair cross-section of the community as key to a representative jury. See *id.* at 1182. The fair cross-section responsibility of the State does ensure that the trial jury in its selection will draw upon a representative group from the local community. See *Duren v. Missouri*, 439 U.S. 357, 359–60 (1979) (applying a fair-cross section requirement to invalidate the opt-out rule for prospective women jurors). The parties, however, have a direct interest in the jury's final deliberation and decision, and the peremptory challenge only marginally reshapes the fair cross-section into a case-specific deliberative group.

These observations are not to say that the peremptory challenge itself is an indispensable part of a fair trial or that critics do not make a strong point. The case against the peremptory challenge is formidable. Rather, the claim is that the peremptory challenge offers virtues in an adversarial, lay-juror system beyond narrow, judicially controlled conceptions of impartiality. Fair trial rules should not restrict themselves to best-case scenarios of jury pool demographics and judicial jury selection practices. The law also should account for the common and even worst-case scenarios that place countless defendants at a disadvantage in securing impartial and independent jurors. Before abandoning peremptory challenges, therefore, the legal system should consider other mechanisms that also could prevent jury selection from becoming a judge-dominated formality that presumes a lack of bias from everyone except the parties.

One intriguing possibility for making the loss of the peremptory challenge more palatable would be the expansion of *voir dire* to enhance the challenge-for-cause system. For example, Washington Supreme Court Justice Mary Yu has endorsed elimination of the peremptory challenge, but she also has noted, “Because jury selection is such an important part of trial, it may be time for us to require that counsel be afforded ample time for thoughtful questioning of prospective jurors . . . .”<sup>175</sup> With this added reform to jury selection, peremptory challenges might lose their import. Robust *voir dire* that permits the parties to directly engage *all* of the prospective jurors, and not just the strategic few permitted by the judge’s *voir dire* stopwatch, would permit much more evidence-based advocacy on juror qualifications.<sup>176</sup> Another helpful change involves adding a less deferential standard of appellate review for challenges for cause as a necessary feature to ensure that judges cannot unilaterally

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This feature seems like a modest, and reasonable, accommodation to representative democracy for a criminal defendant to have a voice in his or her own jury of “peers.”

175. *City of Seattle v. Erickson*, 398 P.3d 1124, 1134 (Wash. 2017) (Yu., J., concurring); *see also State v. Jefferson*, 429 P.3d 467, (Wash. 2018) (Yu, J., concurring) (calling for “complete abolishment of the peremptory challenge, coupled with further development of our ‘for cause’ challenge jurisprudence”). Justice González joined Justice Yu’s concurring opinions in *Erickson* and *Jefferson*.

176. *Cf. Bennett*, *supra* note 33, at 151 (asserting that “[t]he implicit bias of jurors can be better addressed by increased lawyer participation in voir dire, while the implicit bias of lawyers can then be curbed by eliminating peremptory strikes and only allowing strikes for cause”).

dominate the jury selection process.<sup>177</sup> A more robust record of juror *voir dire* should enable less deferential appellate review.

*Voir dire* reform, however, would need to happen simultaneously with the elimination of the peremptory challenge. Further, the *voir dire* reform would need to have appellate teeth to enforce it, not just a gentle recommendation of “best practices” to complement a stern elimination of peremptories. Otherwise, one might expect from experience that the elimination of the peremptory challenge would have the opposite effect on *voir dire*. Under current law, the peremptory challenge empowers more lawyer *voir dire*, because judicial *voir dire* alone typically does not provide the grist that lawyers need to exercise peremptory challenges intelligently.<sup>178</sup> Elimination of the peremptory challenge thus could justify curtailment of *voir dire*. At the same time, trial judges are often very concerned with time and efficiency, and some judges view jury selection as a burdensome sideshow, especially if they are skeptical about the role of lawyer advocacy in selecting the jury.<sup>179</sup> If trial judges are left without peremptory challenges and no enforceable directives to enhance *voir dire*,

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177. Cf. *Saintcalle*, 309 P.3d at 352 (González, J., concurring) (extolling deference to trial judge’s challenge for cause determinations); cf. Frampton, *supra* note 70, at 791 (calling for more robust judicial review of challenge-for-cause system).

178. See *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (noting that the purpose of *voir dire* is both to inform challenges for cause and to permit intelligent peremptory challenges); Williams, *supra* note 61, at 45–46 (observing that “the relationship between attorney participation in jury *voir dire* and attorneys being able to exercise peremptory strikes is positive, not inverse. Jury *voir dire* aids the parties in exercising peremptory strikes”).

179. This judicial skepticism is not always off-base, as not all lawyers train and prepare for *voir dire* meaningfully, but many lawyers do in a way that makes a real difference. For example, I handled a federal appeal a few years ago in an “alien-in-possession” firearm case that another lawyer had tried to a jury. See 18 U.S.C. § 924(g)(5)(a) (2018). After judicial *voir dire*, the lawyers were not successful with any challenges for cause, and the record fully supported that outcome. The defense lawyer would have needed to be active with peremptory challenges to remove anyone. This federal judge, however, allowed the lawyer some time to *voir dire* the jury directly. See FED. R. CRIM. P. 24(a)(2)(A) (permitting lawyer *voir dire* at judicial discretion). Due to the nature of the case, the lawyer focused extensively but sensitively on immigration and race with individual jurors. Within a short time, the lawyer had laid a foundation for five successful challenges for cause to which the prosecutor could not credibly object. My reading of this record reaffirmed my confidence in the value of zealous advocacy in jury selection, and my concern that, without it, judge-dominated jury selection does not as effectively reach juror bias.



one should expect less, not more, *voir dire* in many, if not the majority, of cases. This dynamic would only amplify concerns about judge-dominated jury selection, and likely would relegate jury selection to a bureaucratic exercise. In the alternative, an enforceable rule to enhance *voir dire* with robust judicial review of challenges for cause could be an effective offset to the loss of peremptory challenges.

In the meantime, however, gentle skepticism may be warranted before the law concludes that criminal defendants and other vulnerable or marginalized litigants should lose the virtues of the peremptory challenge altogether. At the same time, Justice González and other critics have indisputably demonstrated the vices of these challenges, and that the parties' right to advocate their position zealously cannot extend to invidious discrimination against jurors. A fair jury selection system demands an effective mechanism for judges to police discriminatory peremptory challenges. *Batson* has not adequately accomplished this objective, for all of the reasons that critics cite. Washington's GR 37, however, may provide *lagom* the law needs.<sup>180</sup> At the least, GR 37 merits extended study before resorting to complete abandonment of the peremptory challenge.

#### IV. CONFRONTING THE BIAS DICHOTOMY . . . AGAIN: WASHINGTON GR 37

The preceding sections of this Article may seem like extended prologue for the main event: an endorsement of Washington's GR 37, a rule that materially reframes the *Batson* test in regulating peremptory challenges.<sup>181</sup> This endorsement, however, should be taken in a specific context: not as a pit stop on a journey to the peremptory challenge's necessary demise, but rather, as mobilizing a response to *Saintcalle's* persuasive call for action. Instead of bluntly eliminating the peremptory challenge even for criminal defendants, the law should more effectively address lawyer bias in jury selection without wholly sacrificing the virtues

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180. See Thomas Oppong, *Lagom: How the Swedish Philosophy for Living a Balanced, Happy Life Can Help You Live a Meaningful Life*, MEDIUM (Jan. 31, 2018), <https://medium.com/thrive-global/lagom-the-swedish-philosophy-for-living-a-happy-life-might-just-help-you-live-a-more-balanced-and-9bed612b4f7c> (“It means ‘Not too little. Not too much. Just right.’”).

181. GR 37 is available at [https://www.courts.wa.gov/court\\_rules/pdf/GR/GA\\_GR\\_37\\_00\\_00.pdf](https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf) [<https://perma.cc/ZU4F-FLR4>].

of the peremptory challenge in securing an impartial jury in the adversarial system. GR 37's legislative history reinforces this perspective.<sup>182</sup>

As an initial matter, GR 37 is neither legislation that reframes the *Batson* rule, nor a judicial decision, but rather an administrative court rule. The Washington Supreme Court has a history of using its administrative-rule-making authority to influence the administration of justice in that state.<sup>183</sup> For example, the Washington Supreme Court established by administrative court rule Washington's influential, and controversial, Limited License Legal Technician Program.<sup>184</sup> The court also codified Washington's Indigent Defense Standards by administrative court rule.<sup>185</sup> GR 37 might be the administrative rule that saves the peremptory challenge from another administrative rule to kill it.<sup>186</sup>

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182. For a thorough examination of the legislative history of GR 37 with excellent sourcing to original documents and participant interviews, see Annie Sloan, Note, *What To Do About Batson?: Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CA. L. REV. 233 (2020). *See id.* at 246 n.88 (noting from telephone interviews with public defenders and civil plaintiff's lawyers that *Saintcalle* was a "call of arms to protect our right to a peremptory challenge").

183. *See* Justice Mary I. Yu, *How Injustice and Inequality Have Been Addressed (and Sometimes Ignored) by the Washington Supreme Court*, 54 GONZ. L. REV. 155, 163–64 (2018) (noting that "[o]ur State Supreme Court plays an affirmative role in trying to address injustice through our administrative work," and "we are also actively engaged in promoting justice through the promulgation of court rules"). *See generally* WASH. CT. GEN. R. 9 (detailing expansive authority and procedures for Washington State Supreme Court rule-making).

184. *See* WASH. ADM'N. & PRAC. R. 28; Appendix R. 28. For a detailed review of Washington's adoption of the Limited License Legal Technician (LLLT) program, see Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75 (2013). To the surprise of many access-to-justice advocates, the Washington Supreme Court "sunset" the LLLT program on June 4, 2020. Licensed LLLTs and LLLT candidates who are licensed by July 31, 2020, can maintain this practice authority. But "[n]o new LLLTs will be admitted after that date." Colin Rigley, *Limited License Legal Technician Program Under the Lens*, NWSIDEBAR (June 8, 2020), <https://nwsidebar.wsba.org/2020/06/01/limited-license-legal-technician-program-under-the-lens/> [<https://perma.cc/U39N-BBZ3>]. The decision prompted a vigorous dissent letter from Justice Barbara Madsen, who had been chief justice when the LLLT was adopted and who had spoken and written about the rule nationally. *See id.*

185. *See* WASH. SUPER. CT. CRIM. R. 3.1 Appendix A (2020).

186. *See* *State v. Saintcalle*, 309 P.3d 326, 338–39 (Wash. 2013) (noting that "as both we and Justice González's concurring opinion note, it might be more appropriate to consider whether to abolish peremptory challenges through the rule-making process instead of in the context of a specific case").

GR 37 as a proposal, however, did not originate in an administrative committee of the Washington Supreme Court. Rather, the American Civil Liberties Union of Washington initially proposed this rule as an opportunity “to protect Washington jury trials from intentional or unintentional, unconscious, or institutional bias in the empanelment of juries.”<sup>187</sup> Although this proposal championed *Saintcalle*’s valid concerns over racial discrimination in the use of peremptory challenges, implicit in this same proposal was the preservation of the peremptory challenge.<sup>188</sup> The proposed solution instead was “progressive reform” of the *Batson* framework for regulating these challenges.<sup>189</sup>

The twin goals of this proposal were to lower the threshold for an improper peremptory strike from *Batson*’s intent-dependent test, and to modify the *Batson* procedure to lessen the opportunity for lawyer stratagem or implicit bias to thwart effective judicial review.<sup>190</sup> The proposal thus was framed around an “objective observer” test that would judge the propriety of a challenged peremptory strike: “If the court determines that an objective observer could view race or ethnicity as a factor for the peremptory challenge, the challenge shall be denied.”<sup>191</sup> This standard would apply to all jury trials, criminal and civil.<sup>192</sup> Moreover, the proposal included commentary that identified several common “race-neutral” explanations for peremptory challenges as having “historically been used to perpetuate exclusion of minority jurors.”<sup>193</sup> The proposal thus established specific considerations and even presumptions that judges would need to apply in evaluating these race-neutral explanations by lawyers.<sup>194</sup>

In the months that followed, this proposal spurred an intensive debate with public meetings, public comments, and counter-proposals.<sup>195</sup>

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187. See *ACLU’s Suggested Change to the GENERAL RULES: Rule 36 – Jury Selection*, WASH. CTS., [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplay&ruleId=537](https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537) [<https://perma.cc/457R-STVB>] (last visited June 5, 2020) [hereinafter *ACLU Proposal*]. By way of disclosure, I previously served on the ACLU-WA’s Board of Directors, although not at the time of this workgroup.

188. See *id.*

189. See Sloan, *supra* note 182, at 247.

190. See *ACLU Proposal*, *supra* note 187; Sloan, *supra* note 182, at 247–48 (noting two purposes to the proposal).

191. WASH. CT. GEN. R. 37.

192. See *id.*

193. *Id.*

194. *Id.*

195. Published comments to the ACLU proposal are posted to a legacy website from the Washington Supreme Court, available at <https://www.courts.wa.gov>

Criminal defense lawyers generally supported the rule,<sup>196</sup> as did affinity bar groups<sup>197</sup> and social justice organizations.<sup>198</sup> Prosecutors, however, uniformly opposed the rule,<sup>199</sup> and submitted a counter-proposal that effectively codified *Batson* with some modifications to *voir dire* practices.<sup>200</sup> Other feedback supported the rule in principle but quarreled

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/court\_rules/?fa=court\_rules.commentDisplay&ruleId=537 [https://perma.cc/52LS-G38J]. See also *State v. Jefferson*, 429 P.3d 467, 477 (Wash. 2018) (summarizing legislative history of GR 37). The proposal also received significant unrecorded feedback at various town hall events that the sponsors hosted for different stakeholders around Washington State. I attended several of these events.

196. See Amy I. Muth & Leslie E. Tolzin, *Proposed New General Rule 36 – Jury Selection*, WASH. ASS’N CRIM. DEF. LAWS. (Apr. 27, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Amy%20Muth%20and%20Leslie%20Tolzin.%20WACDL.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Amy%20Muth%20and%20Leslie%20Tolzin.%20WACDL.pdf) (supporting proposal); Anita Khandelwal, *Comments on GR 36*, KING CNTY. DEP’T PUB. DEF. (May 1, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Anita%20Khandelwal.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Anita%20Khandelwal.pdf) (supporting proposal on behalf of public defense office).

197. See Chalia Stallings-Alai-ilima, *Proposed New General Rule 36 – Jury Selection*, LOREN MILLER BAR ASS’N (Mar. 31, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Chalia%20Stallings-Ala-ilima.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Chalia%20Stallings-Ala-ilima.pdf) (supporting proposal); David Perez, *Proposed General Rule 36*, LATINO/A BAR ASS’N WASH. (Mar. 17, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/David%20A.%20Perez.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/David%20A.%20Perez.pdf) (supporting proposal); Alexandro Kirigin, *Proposed New General Rule 36 – Jury Selection*, PIERCE CNTY. MINORITY BAR ASS’N (Apr. 27, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Alexandro%20Kirigin%20-%20PCMBA.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Alexandro%20Kirigin%20-%20PCMBA.pdf) (supporting proposal); Andrea Chin, *Letter*, ASIAN BAR ASS’N WASH. (Apr. 28, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Andrea%20Chin,%20ABAW.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Andrea%20Chin,%20ABAW.pdf) (supporting proposal).

198. See Robert S. Chang et al., *Proposed General Rule 36*, KOREMATSU CTR. L. & EQUAL. SEATTLE UNIV. SCH. L. (Apr. 21, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Korematsu%20Center%20for%20Law%20and%20Equality.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Korematsu%20Center%20for%20Law%20and%20Equality.pdf) (supporting proposal).

199. See Rich Weyrich, *Proposed Rule GR 36*, WASH. ASS’N PROSECUTING ATT’YS (Jan. 4, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Pam%20Loginsky.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Pam%20Loginsky.pdf) [https://perma.cc/Q9SK-MTMT] [hereinafter *WAPA Letter*] (“The Washington Association of Prosecuting Attorneys (WAPA) opposes the ACLU’s proposed rule”); John Juhl, *Proposed Rule GR 36*, SNOHOMISH CNTY. PROSECUTING ATTY (Jan. 31, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/John%20J.%20Juhl.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/John%20J.%20Juhl.pdf) (opposing proposal); Sloan, *supra* note 182, at 248 (observing that “[c]riminal prosecutors were the primary opponents of the ACLU proposed rule”).

200. See *WAPA Letter*, *supra* note 199 (inviting the Supreme Court “to adopt our alternative, which is a practical guide for implementing current standards on

with details, such as the omission of protection from biases against gender, sexual orientation, and gender identity,<sup>201</sup> or the procedure and standards for judicial review of challenges.<sup>202</sup> Law students from Gonzaga University even joined the conversation.<sup>203</sup>

In response to this multitude of perspectives, the Washington Supreme Court commissioned a formal GR 37 Workgroup from representative stakeholders, including civil practitioners, criminal defense lawyers, prosecutors, other members of the legal community, administrators, and members of the judiciary.<sup>204</sup> The Workgroup labored for several months,

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peremptory challenges”); Sloan, *supra* note 182, at 248–50 (describing WAPA proposal).

201. See *ACLU Proposal*, *supra* note 187; see, e.g., Sara Ainsworth, *Legal Voice Comments Regarding Proposed Changes to GR 36-Jury Selection*, LEGAL VOICE (Mar. 7, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Sara%20L.%20Ainsworth.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Sara%20L.%20Ainsworth.pdf) (supporting the proposal, but arguing that the rule also should protect against gender discrimination, sexual orientation discrimination, and discrimination against transgender people); cf. Sloan, *supra* note 182, at 249–50 (noting the controversy over the absence of gender bias from the initial proposal).

202. See Dominic Bacetich & Peter Meyers, *GR 36 Proposal*, WASH. STATE ASS’N JUST. (Apr. 3, 2017), [https://www.courts.wa.gov/court\\_Rules/proposed/2016Nov/GR36/Dominic%20Bacetich%20and%20Peter%20Meyers,%20WSAJ.pdf](https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Dominic%20Bacetich%20and%20Peter%20Meyers,%20WSAJ.pdf) (questioning the absence of gender and critiquing the procedure and standards).

203. This proposal was pending when I taught my Spring 2017 course, Advanced Criminal Procedure: Adjudication. In this course, my students spend significant time studying *Batson* jurisprudence, including the *Saintcalle* decision. We accordingly took advantage of this pending proposal for students to form five workgroups who separately analyzed and commented on the proposal. See Interview with Students, Gonzaga University School of Law, in Spokane, Wash. (Apr. 17, 2017). As I noted in my cover letter accompanying the student workgroup submissions, “These comments . . . offer a small sample of the perspectives that entering members of our profession have on this important topic after studying the issues.” *Id.* These student workgroup comments are insightful, and as one might expect, reflect a diversity of perspectives on the issue and proposal. *Id.*

204. See Lila J. Silverstein et al., *Proposed New GR-37—Jury Selection Workgroup: FINAL REPORT*, at 1, 15–16 (Feb. 16, 2018), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf> [hereinafter *Workgroup Final Report*] (explaining workgroup formation and membership). For a more detailed examination of the workgroup’s deliberations and final report, see Sloan, *supra* note 182, at 250–53.

soliciting additional input from numerous other stakeholders.<sup>205</sup> The Workgroup Final Report captures this process<sup>206</sup> and highlights several points of unresolved disagreement.<sup>207</sup> An important point of the Workgroup consensus, however, addressed the peremptory challenge itself: “Workgroup members discussed the idea of eliminating peremptory challenges and concluded that *they are still useful* as long as they are not based on the race or ethnicity of potential jurors.”<sup>208</sup>

The Workgroup Final Report thus submitted four major recommendations to the Washington Supreme Court: (1) adopt the proposed jury selection court rule to address racial discrimination in peremptory challenges; (2) review how the rule can be expanded to include gender and sexual orientation; (3) require education sessions for judges on implementing the new rule, preferably prior to its effective date; and (4) create a manual of “best practices” for jury selection under this new rule.<sup>209</sup> The Workgroup Final Report concluded with these observations:

Collectively, members agree that a general court rule is the best vehicle to address the discriminatory use of peremptory challenges during jury selection. The workgroup’s proposed rule is intended to shift the burden to the striking party to prove a race-neutral basis for the challenge, instead of the current standard that requires a judge to make sometimes subjective determinations about the motivations of a peremptory challenge.<sup>210</sup>

In April of 2018, the Washington Supreme Court accepted the Workgroup’s core recommendation and adopted GR 37.<sup>211</sup> This rule is a watershed development: it not only meaningfully regulates peremptory challenges, but also preserves the fundamental virtues of these challenges.

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205. See *Workgroup Final Report*, *supra* note 204, at 14 (submitting additional individual and organizational statements regarding proposal).

206. See *id.* at 2–5.

207. See *id.* at 5–6. Major points of disagreement included whether to add gender and sexual orientation to the rule, whether to mandate increased time for *voir dire*, whether the objective standard for sustaining an objection under the rule should be “could view” or “would view” race as a factor, and whether the rule should codify race-neutral reason for strikes that should be treated with caution or even presumptively invalid. See *id.*

208. *Id.* at 3 (emphasis added).

209. See *id.* at 7–8.

210. *Id.* at 8.

211. See WASH. CT. GEN. R. 37. GR 37 is available at [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=GR&ruleid=gagr37](https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr37) [<https://perma.cc/WJ2F-MVV6>] (listing effective date of April 24, 2018).

The rule applies to all jury trials<sup>212</sup> and is meant “to eliminate the unfair exclusion of potential jurors on race or ethnicity.”<sup>213</sup> The rule further authorizes any party, or the court on its own motion, to object to a peremptory challenge as improper under the rule.<sup>214</sup> These features of GR 37 smack of basic *Batson* jurisprudence. The major reforms to *Batson* codified in GR 37, however, include the following:

1. The rule eliminates *Batson*'s clunky three-stage, prima facie test once a party objects to a challenge. Instead, upon objection, “the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.”<sup>215</sup>
2. In evaluating the objection and response, the trial judge no longer evaluates whether the striking party engaged in *purposeful* discrimination sufficient for an equal protection violation. Rather, the trial judge examines the totality of circumstances to determine whether “an *objective* observer *could* view race or ethnicity as a factor in the use of the peremptory challenge.”<sup>216</sup> The “objective observer,” moreover, is defined as an “observer [who] is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”<sup>217</sup>
3. The rule invites judges to consider a range of evidence in assessing whether race could be a factor in the challenged strike, including traditional comparative evidence.<sup>218</sup> The rule, however, expressly defines certain race-neutral explanations as “presumptively” invalid, because they “have been associated with improper discrimination in jury selection in Washington State.”<sup>219</sup> Moreover, associating several other common justifications for strikes with improper discrimination, the rule

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212. *See id.* R. 37(b).

213. *Id.* R. 37(a).

214. *See id.* R. 37(c).

215. *Id.* R. 37(d).

216. *Id.* R. 37(e) (emphases added).

217. *Id.* R. 37(f).

218. *See id.* R. 37(g).

219. *Id.* R. 37(h). These reasons include, for example, prior contact with law enforcement, district of law enforcement or a belief that the police engage in racial profiling, a close relationship with persons who have been arrested or convicted, residence in a high-crime neighborhood, and not being a native English speaker. *See id.*

requires the party offering that justification to give notice so the court and opposing party can verify that information.<sup>220</sup> The judge or opposing lawyer's inability to verify this basis for the strike "shall invalidate the reason given for the peremptory challenge."<sup>221</sup>

GR 37 thus uniquely invites judges to critically examine peremptory challenges for implicit bias as well as explicit bias. In this assessment, the judge will consider the history of racial bias, individually and structurally, in the system of jury selection. Further, the rule does not excuse biased strikes that may co-exist with mixed motives not relating to race.<sup>222</sup> Also, the objecting lawyer no longer must effectively accuse opposing counsel of intentional racial discrimination. Rather, the responding lawyer must be persuasive based on the evidentiary record in defending the peremptory strike against the claim of objective bias. Resort to tired cliché or unsupported rationales will result in the juror being reseated. These reforms thus open a rich, new, objective field for judicial review of peremptory challenges that may limit their vices. Yet, these reforms also still draw on the adversarial process and lawyer advocacy to challenge and defend these independent strikes from parties as the primary process for achieving an impartial jury.

GR 37, however, does exclude some important details. First, the rule is limited to racial bias in the use of peremptory strikes. Claims of bias implicating gender, sexual orientation, or other protected classifications presumably still will be decided under the traditional *Batson* test. Trial judges thus may have to shuffle between two different tests during jury selection—GR 37 for race and *Batson* for everything else. This analysis could be especially complicated when challenges to individual jurors involve claims of intersectional bias, implicating, for instance, race and gender.<sup>223</sup> Perhaps the Washington Supreme Court will revisit this exclusion, which the Workgroup Final Report recommended.<sup>224</sup>

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220. *Id.* R. 37(i). These factors include many of the common body language and demeanor explanations for peremptory challenges that have been upheld under *Batson*, such as inattentiveness, non-responsive answers, failure to make eye contact, and facial expressions. *See id.*

221. *Id.*

222. *Contra Kesser v. Cambra*, 465 F.3d 351, 373–75 (9th Cir. 2006) (upholding mixed-motive analysis under *Batson*, and noting that “[e]very one of our sister circuits to have decided *Batson* cases in which mixed motives are present has come to this conclusion”).

223. *Cf. Wright, Chavis & Parks*, *supra* note 28, at 1427 (observing complexity of jury section patterns “[w]hen race and gender intersected”).

224. *See Workgroup Final Report*, *supra* note 204, at 7.



Second, GR 37 establishes no remedy for erroneous applications of the rule by trial judges. The rule does not even identify an appellate standard of review for these decisions. As an administrative rule, GR 37 does not draw naturally on pre-existing constitutional standards. The Washington Supreme Court, however, decided to leave these questions for another day. Nevertheless, lawyers, trial judges, and especially intermediate appellate courts need this insight in short order as practice develops around GR 37.

The Washington Supreme Court provided critical insight into GR 37 in *State v. Jefferson*.<sup>225</sup> This case presented a *Batson* claim, yet GR 37 was adopted after Jefferson's jury trial.<sup>226</sup> The court, therefore, concluded that it could not apply GR 37 retroactively to Jefferson's jury selection.<sup>227</sup> The court, however, reaffirmed that "*Batson* has failed to eliminate race discrimination in jury selection."<sup>228</sup> The court consequently decided that the *Batson* test "must be modified in order to prevent discrimination in jury selection."<sup>229</sup> The court thus substituted GR 37's "objective observer" standard for stage three of *Batson*'s analysis, the purposeful discrimination prong.<sup>230</sup> This inquiry includes GR 37's definition of the objective observer as "a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways."<sup>231</sup> The court further announced that the standard of appellate review on this "objective observer" question is not deferential at all, but rather *de novo*.<sup>232</sup> In the end, this importation of GR 37 into *Batson* sent a potentially strong message, because the court concluded Jefferson failed to establish a

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225. *State v. Jefferson*, 429 P.3d 467 (Wash. 2018).

226. *Id.* at 470–74.

227. *See id.* at 477–78.

228. *Id.* at 477.

229. *See id.* at 479.

230. *See id.* at 480. The precise legal stature of GR 37 is not entirely clear following *Jefferson*. GR 37 is an administrative rule, not a constitutional rule. *Jefferson* incorporates key parts of GR 37 into Washington's constitutional *Batson* test. In dissent, Justice Barbara Madsen claimed the majority effectively constitutionalized GR 37. *See id.* at 482, 483 ("[T]he lead opinion essentially adopts GR 37 into our *Batson* framework . . . . Indeed, GR 37 was never meant to be a constitutional rule backed by constitutional protections. . . . [T]he lead opinion creates a new constitutional rule in place of the third [*Batson*] element.").

231. *Id.* at 480.

232. *See id.* (noting that "we stand in the same position as does the trial court, and we review the record and the trial court's conclusions on this third *Batson* step *de novo*").

traditional *Batson* violation, but did establish a GR 37 violation.<sup>233</sup> The resulting message to lawyers and trial judges: GR 37 means business.

This combination of GR 37 and *Jefferson* thus positioned Washington as an exciting incubator for *Batson* reform while preserving the peremptory challenge.<sup>234</sup> Other state courts and advocates outside of Washington have noticed and are exploring the potential for similar reform, drawing on Washington's model.<sup>235</sup> The path forward, however, will be extremely important for determining whether GR 37 truly empowers the law to confront the bias dichotomy in jury selection or simply serves as a symbolic but ineffectual iteration of the *Batson* regime.<sup>236</sup> To maximize the opportunity for GR 37 to meet its goals, some forward-looking considerations are important.

#### CONCLUSION: LOOKING FORWARD

GR 37 preserves the peremptory challenge but creates almost a soft, reverse challenge for cause if an opposing party or a trial judge is concerned that the peremptory strike implicates racial bias. GR 37 thus arms the parties and the trial judge with much more effective means for policing racial discrimination in peremptory challenges, in all its forms, explicit and implicit, while still permitting the parties to have a direct voice in the jury's impartiality. So long as the challenge is not objectively based on race, the State's permission is not needed to exercise it.

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233. *See id.* at 481.

234. *Cf.* Sloan, *supra* note 182, at 263 (“I believe that GR 37 successfully departs from *Batson*'s failings and still maintains the spirit of peremptory challenges.”).

235. *See* State v. Holmes, 221 A.3d 407, 435 (Conn. 2019) (referring to GR 37 and referring “systemic considerations” to a jury selection task force); *see also* State v. Veal, 930 N.W.2d 319, 341 (Iowa 2019) (Appel, J., concurring in part and dissenting in part); People v. Bryant, 253 Cal. Rptr. 3d 289, 310 (Ct. App. 2019) (Humes, P.J., concurring). The Berkeley Law Death Penalty Clinic recently issued an extensive report on the history of racial discrimination by prosecutors in using peremptory challenges. *See* ELISABETH SEMEL ET AL., *WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS* (June 2020), <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf> [<https://perma.cc/3KT5-58EG>]. In recommending reform rather than advocating for the wholesale elimination of the peremptory challenge, the authors call for new peremptory challenge regulation that draws expressly on the model that GR 37 established. *See id.* at iv–xi.

236. *Cf.* Sloan, *supra* note 182, at 255 (commenting that “GR 37 is inadequate if it is merely symbolic and in effect repeats *Batson*”).

The significant reforms that GR 37 may accomplish could extend to *voir dire* itself, without the need for a new court rule. For lawyers and judges to anticipate, argue, and evaluate GR 37 claims, they will need to approach jury selection thoughtfully and sensitively, building an evidence-based, credible record for why lawyers struck jurors for party-centric concerns over impartiality that are rooted in more than just hunch and intuition.<sup>237</sup> *Jefferson's* standard of de novo review may reinforce the need for judges to permit and even encourage this engaged approach to *voir dire* across both challenges for cause and peremptory challenges.<sup>238</sup>

An engaged, evidence-based approach to *voir dire* and GR 37 determinations will not succeed, however, without training, training, and more training.<sup>239</sup> These programs should extend at a minimum to training in implicit bias, training in effective *voir dire* techniques, training in how to argue and analyze GR 37 claims, and even cultural training within courthouses and law offices.<sup>240</sup> This kind of training, importantly, is still client-centric for zealous advocates, because it helps lawyers more

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237. Cf. *State v. Saintcalle*, 309 P.3d 326, 364 (Wash. 2013) (González, J., concurring) (critiquing non-evidentiary foundations for some peremptory challenges).

238. Cf. Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J., (forthcoming 2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3587892](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587892) [<https://perma.cc/MYQ2-HD7M>] (rough draft, page 183) (noting that under GR 37 “[t]o an increasing extent, judges will need to be watchful of their own rationales for excusing jurors during the ‘cause challenge’ phase of jury selection proceedings. . . . The result will be more juries composed of individuals whose life experiences reflects that of the broader and diverse public”).

239. Cf. *Workgroup Final Report*, *supra* note 204, at 7–8 (advocating for judicial education and lawyer best practices training under GR 37).

240. Cf. Richardson & Goff, *supra* note 67, at 2641–48 (detailing training and best practices recommendations to minimize implicit bias in public defender practices); Adam Benforado & John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 325–26 (2007) (research supporting proposition that self-awareness and mindfulness about implicit biases can help actors to make fairer decisions). For a specific proposal, see Richard Gabriel, *Understanding Bias: Preserving Peremptory Challenges, Preventing Their Discriminatory Use, and Providing Fairer and More Impartial Juries*, CIV. JURY PROJECT, <https://civiljuryproject.law.nyu.edu/understanding-bias-preserving-peremptory-challenges-preventing-their-discriminatory-use-and-providing-fairer-and-more-impartial-juries/> [<https://perma.cc/9LBY-27XJ>] (last visited June 9, 2020) (making five recommendations on training and practices to reduce discrimination and enhance value with peremptory challenges).

accurately identify real, evidence-based concerns for juror bias. Untrained shots in the dark, by contrast, less often advance the client's cause.<sup>241</sup>

This training could even extend to the jurors themselves. For instance, the United States District Court for the Western District of Washington shows prospective jurors an educational video on implicit bias that jurors will bring with them into the *voir dire* process.<sup>242</sup> Western District judges also give jurors a number of legal instructions on implicit bias, including, when requested, instructions prior to *voir dire*.<sup>243</sup> If the goal of GR 37 is to reduce the influence of invidious biases in jury selection, including implicit biases, then engaging the jury itself on this issue might further that goal. With all of these practices under GR 37, lawyers may achieve far more good than when they solely “rely on intuition, lore, and anecdotal experience in exercising peremptory challenges.”<sup>244</sup>

Scholars also should measure GR 37 with reliable, extensive research to see whether it is achieving reduced racial bias, increased jury diversity and independence, and effective use of the peremptory challenge by advocates. Some of this research has started already. For instance, a student researcher has gathered interview data from lawyers in Washington about the early impact of GR 37.<sup>245</sup> Initial observations included that “lawyers have become hesitant to strike jurors of color,”<sup>246</sup> and “an increase in objections to peremptory challenges.”<sup>247</sup> One Washington public defender reported to this student that, post-GR 37, “prosecutors are not striking *anyone* who is visibly of color.”<sup>248</sup>

Another scholar has considered GR 37 in the context of a five-year field study of jury selection practices by Assistant United States Attorneys.<sup>249</sup> This scholar observed that “GR 37 is likely to impact prosecutors’ behavior . . . in unpredictable ways.”<sup>250</sup> The author explained to illustrate this point:

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241. Holland, *supra* note 7, at 144–45 (citing value of lawyer bias training to advocacy and client interests in the context of Model Rule 8.4(g)).

242. See *Unconscious Bias Juror Video*, *supra* note 9.

243. See *Criminal Jury Instruction—Unconscious Bias*, *supra* note 9.

244. *State v. Saintcalle*, 309 P.3d 326, 364 (Wash. 2013) (González, J., concurring).

245. See Sloan, *supra* note 182, at 255 (noting interviews of 21 people within six months of the rule’s enactment, including civil attorneys, criminal attorneys, two trial judges, one appellate judge, and a court administrator).

246. *Id.* at 255, 257.

247. *Id.* at 255.

248. *Id.* at 257.

249. See Offit, *supra* note 238.

250. *Id.* at 181.

Prosecutors who view the rarity of successful *Batson* challenges as reason to question their relevance may find reason to more meaningfully alter their behavior if an effect of GR 37 is to make challenges more prevalent and easily won. This development might amplify *Batson*'s deterrent potential by bringing the stakes of violations into view.<sup>251</sup>

At the same time, the rule's "reference to 'implicit, unconscious, and institutional' bias may nevertheless undercut *Batson*'s deterrent effect on those lawyers primarily concerned with the professional and reputational harm of a *Batson* challenge."<sup>252</sup>

A more extensive record than a few months of experience under GR 37 will be necessary for meaningful conclusions.<sup>253</sup> A particularly important long-term research agenda could be comparative in nature, measuring differences in practices and outcomes between Washington and jurisdictions that maintain the *Batson* regime, plus any jurisdictions that may decide to eliminate or significantly reduce peremptory challenges. If more jurisdictions adopt iterations of Washington's GR 37, this comparative research could become even more robust and illuminating. Research centers like the Jury Sunshine Project are already demonstrating rich expertise at examining jury selection patterns.<sup>254</sup>

This research could shed determinative light on whether new models like GR 37 can effectively confront the intractable bias dichotomy in jury selection. With such a viable option to address invidious bias in jury selection, however, one should be cautious about jumping precipitously to one-sided solutions like elimination of the peremptory challenge. Instead, the legal community should work on extending the hopeful success of GR 37 to other types of bias, such as gender and sexual orientation bias, within an adversarial jury selection process. Within this framework, perhaps the law better can fulfill the imperative of eliminating racism and other invidious biases on both sides of the bias dichotomy—lawyer and juror.

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251. *Id.* at 182.

252. *Id.*

253. *Cf.* Sloan, *supra* note 182, at 259–61 (proposing a four-part research agenda).

254. *See* JURY SUNSHINE PROJECT, <http://news.law.wfu.edu/tag/jury-sunshine-project/> [<https://perma.cc/68ZW-3P4W>] (last visited June 1, 2020).