"What to do about *Batson*?"[1]: Using a Court Rule to Address Implicit Bias in Jury Selection

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In Batson v. Kentucky, 476 U.S. 79 (1986), the U.S. Supreme Court attempted to eliminate racial discrimination in jury selection by prohibiting the use of peremptory challenges to intentionally strike prospective jurors based on their race. Today, more than thirty years later, Batson's now-familiar three-part framework is widely considered to be a toothless and inadequate decision that fails to reduce the unfair exclusion of jurors of color. In 2018, the Washington Supreme Court took a remarkable step by enacting a first-of-its-kind court rule that substantially altered the Batson framework. Specifically, the new court rule rejects Batson's intentional discrimination requirement and instead expressly addresses implicit and institutional bias.

This Note is the first to discuss Washington's historic court rule. In this Note, I offer both a descriptive account of the rule's enactment and a normative assessment of the rule's framework. Through interviews with lawyers and judges in Washington, I explore the backdrop and debate over the rule's implementation as well as its initial effects. Considering the values at stake in jury selection, I argue that the rule's expansion of Batson is a desirable step toward improving jury diversity and enhancing judicial integrity.

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1. State v. Saintcalle, 309 P.3d 326, 337 (Wash. 2013) (plurality opinion), *abrogated on other grounds by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

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INTRODUCTION

The exclusion of Black jurors has long plagued American courts. In recent decades, racial bias in jury selection has largely endured through the use of peremptory challenges against prospective Black jurors. In *Batson v. Kentucky*, decided in 1986, the U.S. Supreme Court attempted to address this issue by prohibiting intentional discrimination in the use of individual peremptory challenges.[2] *Batson* was significant because it departed from Supreme Court precedent that essentially gave unfettered discretion to prosecutors to strike Black jurors.[3] Recognizing that prosecutors' peremptory challenges were "largely immune from constitutional scrutiny," the *Batson* Court lowered the evidentiary burden for defendants to combat discrimination in jury selection.[4] The now-familiar *Batson* framework entails first that the challenging party establish a prima facie showing of discrimination; second that the striking party provide a race-neutral reason for the strike; and third that the judge determine, in light of the parties' submissions, if the challenging party showed purposeful discrimination.[5]

2. 476 U.S. 79, 79–80 (1986).
3. *See id.* at 91–92, 100 n.25 (overruling Swain v. Alabama, 380 U.S. 202 (1965)).
4. *Id.* at 92–93.
5. *Id.* at 97–98. *Batson* was initially limited to the government's strikes of Black jurors in criminal trials with Black defendants, but the Court eventually extended the holding to other contexts.

Yet *Batson* challenges are rarely successful.[6] The decision is widely understood as failing to bring an end to discriminatory peremptory challenges primarily for two reasons.[7] First, even where overt racism prompts a party to strike a juror, it is too easy for the striking party to articulate a race-neutral justification. So long as a lawyer can assert *any* facially neutral reason for the strike, the *Batson* framework—and thus the judges who employ it—tend to allow the peremptory.[8] After all, for a *Batson* challenge to succeed, the judge must determine that the striking party purposefully discriminated against the juror. Consequently, in rejecting a race-neutral reason, the judge in a sense calls the striking party both dishonest and racist—harsh accusations for a judge to cast upon a legal colleague. Second, *Batson*'s intentional discrimination framework does not account for a party's "unconscious racism," more commonly referred to today as implicit bias.[9] Implicit biases "are activated involuntarily and without an individual's awareness or intentional control."[10] In the context of peremptory challenges, a party may not *intend* to discriminate against a juror based on the juror's race, but the party may nonetheless act on biases without realizing. Under *Batson*, strikes of this nature escape judicial inquiry.

The disturbing result of *Batson*'s dual flaws is that prospective jurors of color continue to be excluded from jury service, raising concerns about the individual rights of defendants and prospective jurors, and about judicial integrity more broadly. Despite persistent criticism and growing evidence of

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See J.E.B. v. Ala. *ex rel*. T.B., 511 U.S. 127 (1994) (extending *Batson* to strikes based on gender); Georgia v. McCollum, 505 U.S. 42 (1992) (extending *Batson* to criminal defendants generally); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) (extending *Batson* to civil trials); Powers v. Ohio, 499 U.S. 400 (1991) (extending *Batson* to parties of all races).

6. In addition, "[m]any defense lawyers fail to adequately challenge racially discriminatory jury selection because they are uncomfortable, unwilling, unprepared, or not trained to assert claims of racial bias." EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 6 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/8PSG-R953].

7. *See, e.g.*, Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 716–23 (2018) (describing *Batson*'s practical failings at the trial level); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093 (2011) (calling *Batson* as "ineffective as a lone chopstick"); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501 (lamenting *Batson*'s "infinitely cumbersome procedural obstacle course" and "toothless bite").

8. *See* People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) (considering the "charade that has become the *Batson* process" and listing facially race-neutral explanations that other courts have accepted).

9. *See Batson*, 476 U.S. at 105 (Marshall, J., concurring).

10. *State of the Science: Implicit Bias Review 2015*, KIRWAN INST. STUDY RACE & ETHNICITY (2015), http://kirwaninstitute.osu.edu/research/understanding-implicit-bias [https://perma.cc/UM94-D5MN]; *see also* 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, 149 (2010) (describing implicit biases as the "plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious"); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (discussing implicit bias in the legal field).

Batson's inadequacy—and even though states ostensibly enjoy "flexibility" in applying *Batson*[11]—the insufficient framework has remained the law across the country. That is, until now.

In April 2018, one state—Washington—rejected decades of resigned acceptance of *Batson*'s flaws and instead attempted an innovative solution to address them. After years of hearing *Batson* claims, the Washington Supreme Court was deeply troubled by the discriminatory impact of peremptory challenges against jurors of color.[12] Feeling constrained by the established *Batson* framework, the Washington Supreme Court turned to its rulemaking authority and promulgated a first-of-its-kind court rule, known as "GR37," that changed and expanded *Batson*.[13] Six months later, the court took another unprecedented step by expanding the third prong of *Batson* in a court decision.[14]

Washington's GR37 substantially alters the *Batson* framework in two key ways. First, the rule rejects *Batson*'s necessary finding of purposeful discrimination and instead incorporates "implicit, institutional, and unconscious" biases.[15] GR37 disallows peremptory challenges if an "objective observer could view [a juror's] race or ethnicity as a factor in the use" of the strike.[16] Second, GR37 combats the use of common race-neutral reasons that are historically associated with improper discrimination in jury selection. For example, the rule lists presumptively invalid reasons for a strike including expressing a belief that law enforcement engages in racial profiling, having prior contact with law enforcement, and living in a high-crime neighborhood.[17] GR37 also makes it more difficult to strike a juror based on a behavioral reason such as failing to make eye contact or exhibiting a "problematic" attitude.[18]

GR37's enactment did not go unopposed. Years of debate and several iterations of a draft court rule preceded its promulgation. Prosecutors in particular objected to the rule, partially out of concern that the modifications

11. *See* Johnson v. California, 545 U.S. 162, 168 (2005) (recognizing that "States do have flexibility in formulating appropriate [*Batson*] procedures"); Batson v. Kentucky, 476 U.S. 79, 99 & n.24 (1986) (declining "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges" and making "no attempt to instruct the[] courts how best to implement" the holding).

12. *See, e.g.*, State v. Saintcalle, 309 P.3d 326, 334 (2013) (plurality opinion) (acknowledging the "growing body of evidence show[ing] that *Batson* has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges"), *abrogated on other grounds by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

13. *See* Wash. Sup. Ct. Order No. 25700-A-1221 (Apr. 5, 2018) (adopting WASH. CT. GEN. R. 37).

14. *See* State v. Jefferson, 429 P.3d 467, 470 (Wash. 2018) (plurality opinion).

15. WASH. CT. GEN. R. 37(f).

16. *Id.* 37(e). The rule defines an objective observer as someone 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." *Id.* 37(f).

17. *Id.* 37(h)–(i). The other presumptively invalid reasons for a strike are: having a close relationship with people who have been stopped, arrested, or convicted of a crime; having a child outside of marriage; receiving state benefits; and not being a native English speaker.

18. *Id.*

were slanted against the State. Trial court judges also worried about administrability and the deferential standard of review likely required by an objective inquiry. Nonetheless, in the end the advocates for momentous reform won out.

This Note explores Washington's groundbreaking reforms and assesses their desirability. To conduct my research, I spoke with representatives from the majority of organizations that participated in a jury selection workgroup convened by the Washington Supreme Court. Additionally, I contacted prosecutors and criminal defense attorneys who submitted public comments to the court. I communicated with twenty-one people across the state, including civil attorneys, criminal attorneys, trial judges, an appellate judge, trial attorneys, appellate attorneys, and a court administrator.

In Part I, I provide a brief overview of *Batson*, its progeny, and the failure of other reform efforts. In Part II, I focus on the recent reforms in Washington. Based on archival research and information provided in interviews with Washington attorneys and judges, I explore the political and judicial will that led to Washington's shift from *Batson*'s familiar but disdained framework. I first offer a historical and legal backdrop to the changes by describing racial disparities in Washington's criminal justice system and discussing relevant Washington precedent that applied before GR37's adoption. I then offer a descriptive account of GR37, detailing the process in which it was promulgated. Finally, in Part III, I offer a normative assessment of GR37. I discuss the initial implementation of the rule, consider its advantages and disadvantages, and set forth criteria under which to evaluate it. In turn, I argue that GR37 is a necessary rejection of *Batson*'s unworkable framework, and I suggest that the rule is a desirable step that other states should emulate.

The pervasive nature of racial bias in the criminal justice system, coupled with lawyers' preference to continue long-standing yet questionable legal tradition, often makes changes to the legal process overwhelming and slow to come. Following more than three decades of unyielding criticism heaped upon *Batson*, Washington is admirable for being the first state to throw caution to the wind and attempt a bold reform.

I.
THE INADEQUACY OF *BATSON* TO ELIMINATE RACIAL DISCRIMINATION FROM JURY SELECTION

A. Batson's Focus on Race-Neutral Reasons and Conscious Racism

Throughout American history, racial discrimination has been rampant in jury selection. The U.S. Supreme Court first addressed this issue in 1880 soon after Reconstruction ended when it invalidated a state law banning Black citizens

from jury service.[19] Nonetheless, local jurisdictions easily circumvented the Supreme Court's holding through facially neutral laws that still resulted in all-white juries, such as restricting jury service based on alleged "intelligence" or literacy tests.[20]

Peremptory challenges were another facially neutral mechanism for eliminating prospective Black jurors. The jury selection process provides two ways to strike prospective jurors: (1) for-cause challenges and (2) peremptory challenges. Prospective jurors can be eliminated for cause if they demonstrate severe enough bias, prejudice, or prior knowledge such that they would not be able to impartially weigh the evidence. Essentially, jurors are struck for cause on a "narrowly specified, provable and legally cognizable basis of partiality."[21] On the other hand, peremptory challenges, of which there are a limited number per side, are permitted without explanation.

It was not until 1965, in *Swain v. Alabama*, that the Court finally acknowledged the unconstitutionality of using peremptory challenges to purposefully eliminate Black jurors.[22] However, the Court held only that the "systematic" use of peremptory challenges to intentionally discriminate against prospective jurors violated a defendant's equal protection rights.[23] For a claim to prevail, the *Swain* Court imposed the difficult task of proving a long-running pattern of exclusion of Black jurors;[24] a single act of invidious discrimination was not enough.[25] The near-impossibility of meeting this stringent evidentiary burden soon made the decision the "subject of almost universal and often scathing criticism."[26]

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19. *See* Strauder v. West Virginia, 100 U.S. 303, 309–10 (1880) (holding that race-based exclusion from jury selection violates the Equal Protection Clause).

20. *See* ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES, SELECTION OF THE TRIAL JURY: PEREMPTORY CHALLENGES § 7.3 (2014) (describing the development of law surrounding jury selection after Reconstruction) (citing Williams v. Mississippi, 170 U.S. 213 (1898); State v. Speller, 47 S.E.2d 537 (N.C. 1948)); *see also* EQUAL JUSTICE INITIATIVE, *supra* note 6, at 9–11 (outlining the exclusion of Black people from jury service since the Civil War).

21. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

22. *Id.*

23. *Id.* at 223–24.

24. The Court established that:

> [W]hen the prosecutor . . . in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.

See id.

25. *Id.* at 221–23.

26. *See* McCray v. New York, 461 U.S. 961, 964 (1983) (Marshall, J., dissenting) (citations omitted).

Two decades later, in *Batson v. Kentucky*, the Court finally overruled *Swain* and rejected its "crippling burden of proof."[27] The Court prohibited purposeful racially discriminatory peremptory strikes and created a three-part framework to adjudicate claims of discrimination.[28] First, the objecting party must make a prima facie showing of purposeful discrimination.[29] Second, the burden shifts to the striking party to respond with a race-neutral explanation for its strike.[30] Third, the trial court makes credibility findings and determines if the objecting party has proven a case of purposeful discrimination.[31]

In his concurrence, Justice Thurgood Marshall was skeptical that the majority opinion's framework would actually inhibit the use of discriminatory strikes. Though he described the decision as a "historic step," he predicted that peremptory challenges would continue to "inject" racial discrimination into jury selection.[32] Specifically, Justice Marshall warned that prosecutors could easily assert facially neutral reasons to strike a juror.[33] In addition, he reasoned that many discriminatory strikes were due to the "unconscious racism" of both prosecutors and judges, and thus would be impossible to address under the majority's purposeful discrimination framework.[34]

Ultimately, Justice Marshall's two concerns proved prescient: like *Swain* before it, *Batson* has overwhelmingly been criticized as failing to prevent racial discrimination in jury selection.[35] First, striking parties have wide latitude to

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27. Batson v. Kentucky, 476 U.S. 79, 92–93 (1986).

28. *Id.* at 93. Prior to *Batson*, some state courts had already relied on state constitutional provisions to prohibit case-specific discriminatory strikes. *See, e.g.*, People v. Wheeler, 583 P.2d 748, 768 (Cal. 1978) (holding that discriminatory use of peremptory challenges violates a defendant's right to trial by jury as required by the California constitution), *overruled in part by* Johnson v. California, 545 U.S. 162 (2005); Commonwealth v. Soares, 387 N.E.2d 499, 518 (Mass. 1978) (holding that discriminatory use of peremptory challenges violates a defendant's right to trial by jury as required by the Massachusetts constitution).

29. *Batson*, 476 U.S. at 97–98.

30. *Id.* at 97.

31. *Id.* at 97–98.

32. *Id.* at 103 (Marshall, J., concurring).

33. *Id.* at 106.

34. *Id.*

35. *See, e.g.*, EQUAL JUSTICE INITIATIVE, *supra* note *6*, at 4 ("Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries."); Abel, *supra* note 7, at 718 ("The criticism of *Batson* is so persistent that it seems everyone who writes about the doctrine must emphasize its failings."); Bellin & Semitsu, *supra* note 7, at 1077 ("[T]he Court has allowed discrimination to flourish by failing to place significant limits on race-based jury selection's primary enabler—the peremptory challenge."); Jere W. Morehead, *When a Peremptory Challenge is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 632–33 (1994) ("Regrettably, the stereotypical attitudes that have guided the use of the peremptory challenge have been difficult to change."); Camille A. Nelson, Batson*, O.J., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008) ("*Batson*'s promise of protection against racially discriminatory jury selection has not been realized."). Various judges have also voiced concern about *Batson*'s flaws. *See, e.g.*, People v. Hardy, 418 P.3d 309, 359 (Cal. 2018) (Liu, J., dissenting) ("[I]t is notable that more than 30 years have passed since this court has found the peremptory strike of a black juror to be improperly motivated by race. . . . In this day and age,

provide race-neutral explanations, which courts are quick to accept.[36] For example, courts commonly allow strikes based on a prospective juror's demeanor, such as failure to make eye contact;[37] reasons that disproportionately affect prospective jurors of color, such as having an arrest record;[38] and explanations with potentially vague connections to the case, such as a juror's place of employment.[39] Judges may be hesitant to question neutral reasons provided by a party, particularly when the case involves an attorney who often appears before the judge.[40] Likewise, Justice Marshall's second concern—that focusing on purposeful discrimination ignores the influence of implicit biases—has also found its way into modern critiques of *Batson*.[41] And since trial courts

we are unlikely to encounter direct evidence of purposeful discrimination in jury selection."); State v. Holmes, 169 A.3d 264, 291 (Conn. 2017) (Lavine, J., concurring) ("I suggest an alteration in the way *Batson* is administered in Connecticut to ameliorate the negative effects of the present regime."); Flowers v. State, 947 So. 2d 910, 937 (Miss. 2007) (citations omitted) ("Because racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down . . . , we agree that it is 'necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole.'"), *cert. granted in part*, 139 S. Ct. 451 (2018), *and rev'd and remanded*, 139 S. Ct. 2228 (2019); Tennyson v. State, No. PD-0304-18, 2018 Tex. Crim. App. LEXIS 1206, at *20 (Tex. Crim. App. Dec. 5, 2018) (Alcala, J., dissenting) ("If this record is inadequate to establish a *Batson* violation, then the problem lies with *Batson*'s framework and it must be reformed to provide more than illusory protections against racial discrimination.").

36. *See* Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) ("Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race neutral.").

37. *See* Bellin & Semitsu, *supra* note 7, at 1091–94 (citing Simon v. Epps, No. 04-26, 2007 WL 4292498, at *31 (N.D. Miss. Nov. 30, 2007)) (examining race-neutral reasons for a peremptory challenge based on demeanor and vague hunches); Mimi Samuel, *Focus on* Batson*: Let the Cameras Roll*, 74 BROOKLYN L. REV. 95, 97 (2008) (citing United States v. Sherrills, 929 F.2d 393, 394 (8th Cir. 1991)) (assessing "neutral reasons that rely on intangibles such as eye contact, tone of voice, demeanor, posture, and laughing or coughing").

38. *See* Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 394 (2016) (arguing that prosecutors strike prospective jurors based on their arrest records as a means of achieving a whiter jury); *see also* United States v. Lee, 549 F.3d 84, 94 (2d. Cir. 2008) (affirming trial court's acceptance of the purportedly race-neutral reason that the juror read *The Amsterdam News*, a Black newspaper geared toward the Black community); United States v. Carter, 111 F.3d 509, 511 (7th Cir. 1997) (affirming prosecutor's strike of a juror for being "pro-black").

39. *See* Bellin & Semitsu, *supra* note 7, at 1094–97 (surveying strikes with tenuous connections to the trial) (citing Carter v. Duncan, No. C 02-0586 SBA, 2005 U.S. Dist. LEXIS 48778, at *28 (N.D. Cal. Sept. 26, 2005)) (striking a prospective juror because he worked for the postal service).

40. *See* Coombs v. Diguglielmo, 616 F.3d 255, 264 (3d Cir. 2010) (acknowledging that it may be "uncomfortable and unpleasant" for a trial judge to assess counsel's reasons for striking a juror). Similarly, attorneys may refrain from using *Batson* challenges in the first place so as not to offend opposing counsel, against whom they might frequently face in litigation.

41. *See* Bennett, *supra* note 10, at 158–59 (arguing that *Batson* exacerbates the problem of implicit bias in jury selection and trials because it sanitizes and provides cover for biased selections of jurors); Antony Page, Batson*'s Blind Spot: Unconscious Stereotyping & the Peremptory Challenge*, 85 B.U. L. REV. 155, 160 (2005) (explaining that "race- and gender-based stereotypes almost inevitably affect people's judgment and decision-making, even if people do not consciously allow these stereotypes to affect their judgment").

receive strong deference on factual findings and issues of credibility, an appellate court reversal of a trial court's *Batson* decision is rare.[42]

B. The Failure of Post-Batson Reforms

In response to *Batson*'s failings, commentators and legal scholars have proposed a range of alternatives and solutions. One response is to eliminate peremptory challenges, as Justice Marshall advocated in his *Batson* concurrence, and as Justice Stephen Breyer has since also advocated.[43] Other proposals, however, attempt to modify the peremptory process,[44] including moving to blind voir dire[45] or, on the other hand, creating race-conscious affirmative voir dire.[46] Still other ideas propose ways to dissuade attorneys from using discriminatory strikes, such as implicit bias trainings, sanctions, or alternative remedies.[47]

Yet there has not been any significant reform in over thirty years. Indeed, outside of the legal academic sphere these proposals have not gained much

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42. *See, e.g.*, Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957 (2016) (stating that in the thirty years after *Batson*, the North Carolina Supreme Court never found discrimination against a juror of color). *But see* James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, 2018 CHAMPION 28, 28–29 (citing four recent Nevada appellate decisions reversing convictions on *Batson* grounds).

43. *See* Miller-El v. Dretke, 545 U.S. 231, 266–67, 273 (2005) (Breyer, J., concurring) (questioning peremptory challenge system as a whole); Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring).

44. *See, e.g.*, Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1539 (2015) (arguing for a return to an asymmetrical allocation of peremptory challenges wherein the defense has more available strikes than the prosecution); Abbe Smith, *A Call to Eliminate Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1164 (2014) (arguing for complete elimination of the prosecution's use of peremptory challenges); Brian W. Stoltz, *Rethinking the Peremptory Challenge: Letting Lawyers Enforce the Principles of* Batson, 85 TEX. L. REV. 1031, 1034, 1047 (2007) (calling for the creation of a new system of peremptory "blocks").

45. *See* Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J. L. & PUB. POL'Y 323, 338 (2003) (proposing a system of blind peremptory challenges); Jean Montoya, *The Future of the Post-*Batson *Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J. L. REFORM 981, 1015 (1996) (proposing a similar system of blind peremptory challenges).

46. *See* Bennett, *supra* note 10, at 168 n.80 (suggesting a "reverse of the peremptory challenge system" allowing parties the right to affirmatively choose jurors on the basis of race); Donna J. Meyer, Note, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 CASE. W. RES. L. REV. 251, 254, 280 (1994) (proposing a model that allows for the inclusion of a juror by the defense, without contest or removal by the prosecution).

47. *See, e.g.*, Bellin & Semitsu, *supra* note 7, at 1109–15 (suggesting a new remedy for reseating improperly stricken jurors); Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1483–87 (2012) (recommending that prosecutors' offices implement reforms such as implicit bias training as a way to neutralize biases that might lead to discriminatory strikes); Andrew G. Gordon, *Beyond* Batson v. Kentucky*: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 713 (1993) (advocating for an American Bar Association ethical rule prohibiting race-based peremptory strikes); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1117, 1122 (1994) (arguing for increased sanctions for prosecutors who use discriminatory strikes).

traction.[48] Despite numerous scholarly commentaries, pleadings, cases, and studies illustrating the failings of *Batson*, the three-part framework remained the law of jury selection across all fifty states until Washington's reforms in 2018. Other states have instead attempted modest modifications only, such as reducing the allotted number of peremptory challenges per side[49] or lowering the burden at step one of the inquiry.[50] Further, while some states have codified *Batson* through court rule, none before Washington used a rule to expand protections beyond intentional discrimination.[51]

II.
WASHINGTON STATE'S GR37: A NOVEL SOLUTION TO *BATSON*'S INADEQUACY

In April 2018, the Washington Supreme Court thus took a remarkable step when it used its rulemaking authority to promulgate a court rule that expressly addresses implicit and institutional racism with the intent of "eliminat[ing] the unfair exclusion" of prospective jurors based on their race.[52]

A. The Catalyst for GR37: The Unusual Focus of Washington's Courts on Racial Disparities in Jury Selection

Washington's groundbreaking modifications to *Batson* were born of decades of discussions, both inside and outside of the courtroom, about the pervasive role that racism and bias played in Washington's legal system. In 1980, criminologist Scott Christianson triggered alarm when he published findings that Washington had the highest disproportionate imprisonment of Black residents of any state in the United States.[53] Noting widespread concerns about Christianson's findings, the Washington state legislature commissioned a study to examine this racial disparity.[54] Soon after, in response to these and other

48. *See* Bellin & Semitsu, *supra* note 7, at 1108 (noting that proposals to modify *Batson* "are unlikely to resonate beyond the academy").

49. *See* KATHLEEN SHAMBAUGH, INST. FOR COURT. MGMT., REDUCING PEREMPTORY CHALLENGES IN CALIFORNIA 17–20, 28–30 (2014) (discussing efforts to reduce or refine peremptory challenges in California, New Jersey, and Tennessee).

50. *See, e.g.*, State v. King, 735 A.2d 267, 279 n.18 (Conn. 1999) (eliminating the prima facie requirement pursuant to the court's "supervisory authority over the administration of justice").

51. *See, e.g.*, LA. CODE CRIM. PROC. ANN. § 795 (2019); MINN. R. CRIM. P. 26.02 (2019); TEX. CODE CRIM. PROC. ANN. art. 35.261 (West 2019).

52. *See* WASH. CT. GEN. R. 37(a).

53. *See* Scott Christianson, *Corrections Law Developments: Racial Discrimination and Prison Confinement—A Follow-Up*, 16 CRIM. L. BULL. 616, 617 (1980); *see also* Exhibit 2: Declaration and Report of Robert D. Crutchfield, Ph.D. at 245, Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987 (E.D. Wash. Jan. 27, 2006) [hereinafter Crutchfield Declaration] (finding that in 1980, 3 percent of Washington's general population was Black, but 28 percent of Washington's jail and prison population was Black).

54. *See* Crutchfield Declaration, *supra* note 53, at 244 (citing George S. Bridges & Robert D. Crutchfield, *Racial and Ethnic Disparities in Imprisonment*, INST. FOR PUB. POL'Y & MGMT., U. WASH. 26 (1986)) (surveying almost 900 felony arrests and determining that race affected how the cases proceeded, with worse outcomes for non-white defendants).

findings, the legislature established a Minority and Justice Commission to further assess the treatment of people of color throughout the state court system.[55] In 1990, the Commission, comprising judges, lawyers, and other stakeholders, released a report concluding that bias pervaded the state legal system.[56] Specifically, the 1990 Report noted among other findings that people of color were underrepresented in jury pools and jury panels.[57] In the subsequent years, many other studies followed, "making Washington one of, if not the most, studied states on the topic of race and criminal justice processing."[58]

Decades later, the enduring existence of racial disparities in Washington continued to spur public concern and debate. In October 2010, two then-Washington Supreme Court justices sparked outcry when they suggested at a court meeting that disparities existed because Black people commit a disproportionate number of crimes.[59] One justice commented that "certain minority groups" have a "crime problem."[60] To critics, the justices oversimplified Washington's racial history[61] and ignored disproportionate treatment in policing, arrests, and sentencing.[62] Notably, likely in part due to his comments and the public coverage they received,[63] one justice lost his next judicial election.[64] But the ripple effects of the justices' comments lasted.

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55. CHARLES Z. SMITH, WASHINGTON STATE MINORITY AND JUSTICE TASK FORCE: FINAL REPORT xxi (Dec. 1990) [hereinafter TASK FORCE 1990 REPORT].

56. *Id.*

57. *Id.* at xxi, 26, 43.

58. Crutchfield Declaration, *supra* note 53, at 244.

59. Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES (Oct. 21, 2010), https://www.seattletimes.com/seattle-news/two-state-supreme-court-justices-stun-some-listeners-with-race-comments [https://perma.cc/F73K-MMAN].

60. *Id.*

61. *See* LIVE UNITED, UNDERSTANDING KING COUNTY RACIAL INEQUITIES 24 (2015), https://www.uwkc.org/wp-content/uploads/ftp/RacialDisparityDataReport_Nov2015.pdf [https://perma.cc/N95Y-PBZY] (analyzing racial inequities in King County and noting that fueling poorer outcomes for people of color are "systems of structural and institutional racism that produce policies [and] procedures" that determine how resources and opportunities are allocated); *Segregated Seattle: From Redlining to Gentrification*, SEATTLE.GOV (Mar. 13, 2018), https://seattlechannel.org/misc-video?videoid=x90339 [https://perma.cc/B2G7-VQXP] (discussing racial divides caused by economic displacement).

62. *See* Research Working Grp. & Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 87 SEATTLE U. L. REV., WASH. L. REV., GONZ. L. REV., 1, 9–14 & n.63–65 (2012) [hereinafter Task Force 2011 Report] (citing studies that conclude "that Washington cannot justify its disproportionate minority incarceration rates on the sole basis that minorities commit more crimes").

63. *See* Editorial, *Don't Re-elect Justice Richard Sanders for State Supreme Court*, SEATTLE TIMES (Oct. 24, 2010), http://old.seattletimes.com/html/editorials/2013234733_edit25sanders.html [https://perma.cc/TYK3-UYWH].

64. After he lost the election, the justice published an op-ed in *The Seattle Times*, attacking the paper for mischaracterizing his statements: "The Times has garbled its facts. . . . [T]he reporter allowed the impression that I believe African Americans are inclined to commit crimes because of their race. As if there is a criminality gene in African Americans! Of course I never said that and I don't believe it." Richard B. Sanders, *Justice Sanders Explains His Comments About Race and Criminality*, SEATTLE TIMES (Dec. 2, 2010), http://old.seattletimes.com/html/opinion/2013580631_guest03sanders.html

In response to the comments, a judge on the King County Superior Court and a professor at the Seattle University School of Law formed a new Task Force on Race and the Criminal Justice System.[65] The Task Force's first meeting occurred within a month of the justices' comments and included a wide range of representatives from Washington legal organizations, law schools, minority bar associations, prosecutor offices, and criminal defense offices.[66]

In 2011, the Task Force's research working group released a preliminary report ("2011 Report") that analyzed studies about racial disparities in Washington, focusing in particular on implicit racial bias.[67] The 2011 Report concluded that the majority of Washington disparities stem from facially neutral policies that have racially disparate effects.[68] While the 1990 Report published by the Minority and Justice Commission briefly acknowledged the existence of "subtle" or unconscious bias,[69] the 2011 Report explored the more recent cognitive neuroscience and psychology research on the topic.[70] The 2011 Report explained that even when racial biases are "undetectable," they may still influence decision-making.[71] Implicit biases play a role "[w]hen policymakers determine policy, when official actors exercise discretion, and when citizens proffer testimony or jury service."[72] The 2011 Report advised that implicit bias research should inform policymaking and training.[73]

[https://perma.cc/YS78-PKSV]. The other justice associated with the comments, who ran unopposed in 2010, left the bench in 2014, citing health reasons. Brian M. Rosenthal, *State Supreme Court Justice Jim Johnson to Retire*, SEATTLE TIMES (Mar. 17, 2014), http://blogs.seattletimes.com/politicsnorthwest/2014/03/17/state-supreme-court-justice-jim-johnson-to-retire [https://perma.cc/TU4Z-UEP9].

65. The Task Force's co-founders were Steven C. González, the Chair of the Washington State Access to Justice Board and then-King County Superior Court judge, and Robert S. Chang, Professor of Law and Director of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law. (In 2012, Steven C. González became an Associate Justice on the Washington Supreme Court.) Unlike the ongoing, previously-established Minority and Justice Commission which focused on bias within the court system itself, the specific goals of this new Task Force were to address racial disparities in the broader criminal justice system. Task Force 2011 Report, *supra* note 62, at 4, 14 (rejecting the premise of the justices' comments as a "gross oversimplification").

66. *See Race and Criminal Justice Task Force*, KOREMATSU CTR. L. & EQUALITY, https://law.seattleu.edu/centers-and-institutes/korematsu-center/reports/race-and-criminal-justice-task-force [https://perma.cc/C6RF-ASY6].

67. Task Force 2011 Report, *supra* note 62, at 25–27, 51–54.

68. *Id.* at 4–6, 22–23 (finding, for example, that youth of color faced harsher sentencing outcomes than similarly situated white youth, and defendants of color were significantly less likely than similarly situated white defendants to receive sentences below the standard range).

69. TASK FORCE 1990 REPORT, *supra* note 55, at 29, 91 (recognizing subtle discrimination within the courtroom, and during the hiring process for candidates of color applying for judicial positions).

70. Task Force 2011 Report, *supra* note 62, at 42–44, 46–47.

71. *Id.* at 8.

72. *Id.* at 6.

73. *Id.* at 48 (citing Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 169 (2010); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 241–43 (2001)).

Moreover, the report paved the way for the Washington Supreme Court's pronouncement on racial bias in jury selection, in particular in a 2013 plurality opinion.[74] In *State v. Saintcalle*, multiple members of the nine-justice Supreme Court expressed deep concerns that the overall *Batson* framework was not "robust enough" to effectively combat race discrimination in jury selection.[75] Though the court affirmed the trial court's rejection of a *Batson* challenge, it used the case as an opportunity to discuss the failures of the 1986 decision.[76]

In the case, Kirk Saintcalle, a Black man, was convicted of first-degree felony murder. During voir dire, Saintcalle raised a *Batson* challenge when the State used a peremptory challenge to strike juror thirty-four, the only Black person in the jury pool. After the trial court found a prima facie showing of discrimination, the State gave two reasons for its strike: first, juror thirty-four's "inattention" during voir dire; second, the recent murder of juror thirty-four's friend.[77] The trial court denied Saintcalle's *Batson* challenge and accepted the recent death of juror thirty-four's friend as a "proper race-neutral reason" for the strike.[78] Juror thirty-four was thus struck from the jury.[79]

The lead opinion echoed the primary concerns Justice Marshall voiced in his *Batson* concurrence and presented an impassioned call for enhanced protections against discrimination in jury selection. Pointing to extensive literature critiquing *Batson*, Justice Charlie Wiggins acknowledged that a "strict 'purposeful discrimination' requirement . . . blunts *Batson*'s effectiveness and blinds its analysis to unconscious racism."[80] Recognizing that the parties themselves had not proposed a modification of *Batson*, Wiggins nonetheless set forth recommendations for how to change the framework:

> As a first step, we should abandon and replace *Batson*'s "purposeful discrimination" requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion. For example, it might make sense to require a *Batson* challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory or where the judge finds it is more likely than not that, but for the defendant's race, the peremptory would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining

74. State v. Saintcalle, 309 P.3d 326, 332–34 & n.1 (Wash. 2013) (plurality opinion) (discussing the Task Force 2011 Report), *abrogated on other grounds by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

75. *Id.* at 329.

76. *See id.*

77. *See id.* at 329–32.

78. *Id.* at 332.

79. On the other hand, the judge sustained Saintcalle's *Batson* challenge against the prosecution's strike of the sole Mexican-American juror in the venire. *Id.* at 332.

80. *Id.* at 338.

a *Batson* challenge.[81]

Wiggins's opinion did not immediately change the *Batson* framework, nor was it uniformly well received. Other justices on the court took issue with Wiggins's approach, with one concurring justice calling for the elimination of peremptory challenges[82] and other justices urging "restraint amidst the enthusiasm to craft a new solution."[83] While this debate proved significant, the court declared that "[i]t must wait for another day to determine how to adapt *Batson* to the realities of continuing race discrimination."[84]

Yet, paving the way for GR37, the lead opinion specifically suggested the rulemaking process as the "best" and "most effective" way to address *Batson*'s failures.[85] Moreover, even the justices who disagreed with the lead opinion's bold proclamations nonetheless also highlighted the possible avenue of a court rule.[86] Other *Batson*-related opinions following *Saintcalle* also commented on the potential of the rulemaking process.[87]

B. The Origins of GR37: Washington's Court Rulemaking Process

Unsurprisingly then, *Saintcalle* served as a call to action to Washington legal advocates to propose ambitious changes to the *Batson* framework, and notably to do so through rulemaking.[88] The court's rulemaking guidance was of particular significance to the ACLU of Washington, which had filed multiple

81. *Id.* at 339.

82. *Id.* at 348 (González, J., concurring).

83. *Id*. at 346–47 (Stephens, J., concurring); *see also id*. at 344–45 (Madsen, C.J., concurring) ("In my view, the analysis in this case should be limited to the issues raised by the parties.").

84. *Id.* at 341 (majority opinion).

85. *Id.* at 338–39.

86. *See id.* at 345 (Madsen, C.J., concurring) ("The range of resources expands tremendously when, rather than our own research and that provided by the parties, we have in addition input from other interested entities—when a new court rule is proposed, for example."); *id.* at 368 (González, J., concurring) ("We should also engage in our formal rule-making process in order to consider additional proposals for improving jury selection, including ways to further the goals of inclusion and diversity.").

87. *See* City of Seattle v. Erickson, 398 P.3d 1124, 1133 (Wash. 2017) (Stephens, J., concurring) ("Unconstrained by the limitations of the *Batson* framework, the rule-making process will be able to consider important policy concerns as well as constitutional issues."); State v. Meredith, 306 P.3d 942, 946 (Wash. 2013) (Stephens, J., concurring) ("Finding a meaningful solution [to the *Batson* problem] will require consideration of issues far beyond the briefing in these two cases and legislative and social resources beyond what this court can devote.").

88. The decision also motivated advocates who were indifferent to Wiggins's concerns but were alarmed by one concurrence's suggestion of abolishing peremptory challenges altogether. *See* Telephone Interview with Civil Plaintiff's Attorney (Oct. 11, 2018) (explaining that the concurrence that suggested an end to peremptory challenges "caught [his] ear" because he "like[s] and think[s] it's critical to have peremptory challenges when properly used"); Telephone Interview with Public Defender (Nov. 1, 2018) [hereinafter Public Defender Interview (Nov. 1, 2018)] (explaining that after *Saintcalle*, the Washington Association of Criminal Defense Lawyers created a Task Force on Peremptory Challenges to focus on preserving peremptory challenges going forwards) ("We saw it as a call of arms to protect our right to a peremptory challenge.").

amicus briefs urging the court to address the problems created by *Batson*.[89] Indeed, soon after the *Saintcalle* decision, the ACLU hosted a legal education program to discuss how to respond.[90] From there, a core group of advocates who supported a progressive reform of *Batson* emerged.[91]

Taking heed of the justices' advice, the advocates began to rely on Washington's somewhat unusual rulemaking process to craft a rule to send to the Supreme Court for approval.[92] Throughout 2015, they developed a court rule that addressed the issues raised by various justices in *Saintcalle*. In drafting the rule, they turned to numerous studies and research identifying *Batson*'s flaws and also relied on their own experiences as trial and appellate attorneys.[93] In addition, they reached out to other stakeholders, including the state's Minority and Justice Commission, the Superior Court Judges' Association, and specialty bar associations.[94] Finally, almost three years after *Saintcalle*, the ACLU submitted a rule to the court.[95]

Citing *Saintcalle*, and in line with Justice Marshall's original critiques of *Batson*, the proposed ACLU rule included two significant changes. First, it proposed a shift from the prevention of purposeful discrimination to the prevention of "intentional *or* unintentional, unconscious, or institutional bias."[96] Second, the comments of the proposed ACLU rule listed presumptively invalid

89. *See, e.g.*, Brief for ACLU of Washington as Amicus Curiae Supporting Petitioner, State v. Rhone, 229 P.3d 752 (Wash. 2010) (No. 80037-5); Brief for ACLU of Washington as Amicus Curiae Supporting Petitioner, State v. Hicks, 181 P.3d 831 (Wash. 2008) (No. 79143-1).

90. Telephone Interview with Staff Attorney, ACLU of Wash. (Oct. 8, 2018).

91. The core drafting group included ACLU attorneys Nancy Talner, Jeffery Robinson, and La Rond Baker; and cooperating attorneys Lila Silverstein (criminal defense appellate attorney), Sal Mungia (civil plaintiff's attorney), David Zuckerman (criminal defense appellate attorney), and Jim Lobsenz (appellate attorney in constitutional law, criminal defense, and civil rights). *See Washington Supreme Court is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, ACLU (Apr. 9, 2018), https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection [https://perma.cc/BX79-7XZU].

92. In Washington, the rulemaking process for court rules is governed itself by a court rule. *See* WASH. CT. GEN. R. 9. The rule allows any person or group to propose a court rule directly to the Washington Supreme Court. If the court deems the suggested rule worthy of consideration, it seeks feedback and comment from the state bar association, state judges' associations, and any other relevant groups. Following this review, the court has the option to reject the rule or publish it for public comment. Finally, considering all of the comments, the court may then adopt, amend, or reject the proposed rule, or take "other action as [it] deems appropriate." *Id.*

93. Telephone Interview with Staff Attorney, ACLU of Wash. & Drafting Group Member (Oct. 8, 2018); Telephone Interview with Criminal Defense Appellate Attorney & Drafting Group Member (Oct. 2, 2018).

94. Telephone Interview with Civil Plaintiff's Attorney, *supra* note 88.

95. The ACLU initially submitted its rule as General Rule 36. However, during the comment period, the court promulgated another rule, and consequently, the ACLU rule became GR37. WASH. CT. JURY SELECTION WORKGROUP, PROPOSED NEW GR 37—JURY SELECTION WORKGROUP FINAL REPORT, at 1 (2018) [hereinafter WORKGROUP FINAL REPORT].

96. ACLU of Wash., GR 9 Cover Sheet Suggested Change to the General Rules: Rule 36 – Jury Selection (July 14, 2016) (to be codified at WASH. CT. GEN. R. 37) (emphasis added), https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537#_ftnref13 [https://perma.cc/54WN-NCP4].

reasons for a strike.[97] The drafters acknowledged that certain race-neutral reasons have long been used to perpetuate the exclusion of jurors of color. They believed that without naming common pretextual reasons for a strike, the rule would risk judicial implementation that did not extend beyond *Batson*. After all, judges themselves also harbor their own implicit biases.[98]

The Washington Supreme Court published the proposed ACLU rule for public comment, drawing both support and opposition.[99] Criminal prosecutors were the primary opponents of the proposed ACLU rule.[100] The Washington Association of Prosecuting Attorneys (WAPA), for example, argued that the rule was "slanted" against the State because it could require prosecutors to seat jurors biased against their witnesses.[101] In fact, WAPA was so resistant to the proposed ACLU rule that it submitted an alternative rule that essentially codified *Batson* and its progeny.[102] WAPA itself described its rule as a "practical guide for implementing current standards on peremptory challenges."[103] Nonetheless, WAPA asserted that its rule would still reduce the impact of implicit bias in jury

97. *Id*.

98. *See* Bennett, *supra* note 10, at 156–58 (describing how implicit bias permeates judicial institutions).

99. *November 2016 – Proposed Rules Published for Comment*, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedDetails&proposedId=1099 [https://perma.cc/QQ9X-QY6A]. During the comment period, which ran through April 30, 2017, the court received comments from twenty-eight distinct legal groups and individuals across the state. *See* Comments for GR 37 – Jury Selection, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.commentDisplay&ruleId=537 [https://perma.cc/J6TM-4FJA]*; see also* WASH. GEN. R. 9(f)(3), (g) (requiring public comment period for proposed rules approved by the Supreme Court); *Proposed Rules Published for Comment*, *supra* (stating that the proposed rules published in November 2016 have a comment period which expires on April 30, 2017).

100. Seth Fine, Prosecutor, Comment Letter on Proposed Rule GR 36 (Apr. 28, 2017) (arguing that the "proposed [ACLU] rule would profoundly alter jury selection in a way that will hamper fair trials"); Michelle Hyer, Pierce Cty. Deputy Prosecuting Attorney, Comment Letter on Proposed Rule GR 36 (Mar. 24, 2017) (opposing the ACLU's proposed rule); John J. Juhl, Snohomish Cty. Deputy Prosecuting Attorney, Comment Letter on Proposed Rule GR 36 (Jan. 31, 2017) (writing in opposition to the ACLU's rule). In addition to prosecutors, other individuals and groups voiced opposition, including civil defense attorneys and trial judges. *See* Dist. & Mun. Court Judges' Ass'n, Comment Letter on Proposed Rule GR 36 (Apr. 17, 2017) (opposing the proposed ACLU rule because it "creates standards that would be difficult, if not impossible, to implement"); Wash. Def. Trial Lawyers, Comment Letter on Proposed Rule GR 36 (Apr. 28, 2017) (rejecting the proposed ACLU rule because of its "inadequate clarity as to when a peremptory strike is improper" and its risks of "unintended consequences and various opportunities for abuse").

101. *See* Wash. Ass'n Prosecuting Attorneys, Comment Letter on Proposed Rule GR 36, at 3–4 (Jan. 4, 2017), https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Pam%20Loginsky.pdf [https://perma.cc/PT8H-TBD4] (citing the proposed ACLU rule's presumptively invalid reasons for a strike, such as having a close relationship with people who have been stopped, arrested, or convicted of a crime).

102. *See id.*; WORKGROUP FINAL REPORT, *supra* note 95, at 1; Wash. Ass'n Prosecuting Attorneys, *Statement*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 35 ("[T]he original WAPA proposal [] essentially codified existing law under *Batson v. Kentucky*.").

103. Wash. Ass'n Prosecuting Attorneys, Comment, *supra* note 101, at 1.

selection because of procedural safeguards like providing parties sufficient time for voir dire and directing judges to perform a comparative analysis of strikes.[104] However, these suggestions came primarily from U.S. Supreme Court precedent addressing *Batson* challenges; unlike the proposed ACLU rule, the proposed WAPA rule did not fundamentally change existing law.[105]

In addition, WAPA introduced the issue of gender bias in jury selection. For its part, WAPA objected to the proposed ACLU rule's sole focus on racial bias in jury selection and its exclusion of gender bias.[106] WAPA thus also proposed codifying the 1994 U.S. Supreme Court decision, *J.E.B. v. Alabama ex rel. T.B.*,[107] which held gender-based peremptory challenges to be unconstitutional.[108] Undergirding WAPA's efforts was the perception that criminal defense attorneys commonly exercise gender discrimination in jury selection in domestic violence cases.[109]

Soon enough, the ACLU group of advocates recognized the growing pushback over its initial omission of gender. They began to hear complaints about *Batson*'s insufficiency to protect against gender discrimination, "especially in domestic violence and sexual abuse cases."[110] For example, one lawyer told me that after he gave a presentation about the proposed ACLU rule to the Superior Court Judges' Association, he kept hearing the same inquiry: "'Why didn't you include gender? Especially in domestic violence cases, we are seeing women get struck and we can tell it's because they are women.'"[111] In

104. *Id.*

105. *See id.* at 6–7 (citing Foster v. Chatman, 136 S. Ct. 1737, 1754–55 (2016); Snyder v. Louisiana, 552 U.S. 472, 477 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); People v. Lenix, 187 P.3d 946, 962 (Cal. 2008)).

106. *Id.* at 1–2 ("The proposed [ACLU] rule is also under inclusive as it fails to address the constitutional right of prospective jurors to not be excluded based solely upon gender.").

107. 511 U.S. 127 (1994).

108. *See id*. at 146; Wash. Ass'n Prosecuting Attorneys, Comment, *supra* note 101, at 1–2 ("A party may not exercise a peremptory challenge on the basis of gender, race, color or ethnicity.").

109. *See* Telephone Interview with Criminal Deputy Prosecutor (Nov. 2, 2018) ("There is a perception among prosecutors that gender discrimination by [the] defense in jury selection is common in some kinds of cases in some areas, particularly domestic violence cases."); *see also* J.E.B. v. Ala. *ex rel*. T.B., 511 U.S. 127, 148–49 (O'Connor, J., concurring) (citations omitted) (discussing studies that show that female jurors are more likely than male jurors to vote to convict in rape cases and suggesting that "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case"). *But see* Jean Montoya, "*What's so Magic[al] About Black Women?" Peremptory Challenges at the Intersection of Race and Gender*, 3 MICH. J. GENDER & L. 369, 380–81 (1996) (arguing that women may be biased in favor of male defendants in sexual harassment cases and citing "polls conducted during the Clarence Thomas confirmation hearings [that] demonstrated that women who have been harassed may be skeptical of another woman's claims").

110. *See* ACLU, Comment Letter on Proposed GR 36, at 1 (Feb. 24, 2017).

111. Telephone Interview with Civil Plaintiff's Attorney, *supra* note 88.

response, the ACLU submitted a revised rule that preserved the content and form of its initial proposal but added enhanced protection against gender bias.[112]

C. The Promulgation of GR37: Washington Supreme Court's Jury Selection Workgroup

Following the public comment period, the Washington Supreme Court called for its own workgroup, which included a broader array of perspectives, like those of prosecutors and additional judges.[113] The workgroup consisted of stakeholders from seventeen different organizations and backgrounds, including the ACLU, WAPA, the Washington Association of Criminal Defense Lawyers (WACDL), civil lawyers' organizations, minority bar associations, and trial court judges' associations.[114] The purpose of the workgroup was to clarify and integrate the various positions.[115]

Ultimately, however, the workgroup was unable to come to a complete agreement. After six months of discussions, it submitted to the Washington Supreme Court a report summarizing both agreements and outstanding disagreements.[116] The report included a final draft rule denoting sections with alternative language supported by different stakeholders.[117] In addition, some workgroup members submitted individual comments explaining and advocating their views.[118]

That said, the workgroup surprisingly agreed on at least some aspects of the two broad critiques raised in *Saintcalle* and by Marshall in *Batson* itself. First, all parties agreed that the threshold for showing a prima facie case was too high.[119] In its place, the workgroup proposed that a party or judge be able to raise an objection simply by citing to the rule. Second, all members agreed that the rule should go beyond codifying *Batson* and should, somehow, recognize implicit bias.[120] Unsurprisingly, though, their views on what exactly that should look like continued to vary drastically.

In particular, workgroup members disagreed about four sections. First, one divisive disagreement concerned the standard a judge should use in determining whether a party has impermissibly exercised a peremptory challenge based on

112. ACLU, Comment, *supra* note 110, at 3 (submitting "a version of the proposed rule that protects against gender bias while also not perpetuating the failed *Batson* test as the WAPA proposed alternative does").

113. *See* WASH. CT. GEN. R. 9(h)(1) (allowing the Supreme Court to "take such other action as [it] deems appropriate"); WORKGROUP FINAL REPORT, *supra* note 95, at 16.

114. WORKGROUP FINAL REPORT, *supra* note 95, at 16.

115. *See id.*, at 1–2.

116. *See* Thomas M. O'Toole & Taki V. Flevaris, *Understanding Washington's New General Rule on Racial Bias in Jury Selection*, KING COUNTY BAR ASS'N BAR BULL. 7 (2018) (stating date of report submission).

117. WORKGROUP FINAL REPORT, *supra* note 95, at 1.

118. *Id.* at app. 2.

119. *Id.* at 4.

120. *See id.* at 3.

race. Though most members agreed that the court should adopt an "objective observer" standard for denying peremptory challenges, there was fierce division about how judges should apply the standard. The ACLU, WACDL, and the Black and Latino bar associations ("the ACLU coalition") pushed for a more protective standard that would require a court to deny a peremptory challenge if an objective observer "could view" race or ethnicity as a factor in the use of the challenge.[121] Others, including WAPA, the Washington Defense Trial Lawyers (WDTL), and three of the four judges in the workgroup, advocated a less protective "would view" standard that would require a court to deny a peremptory challenge if an objective observer "would view" race or ethnicity as a factor. WAPA also proposed a far stricter "reasonably prudent and disinterested observer" standard.[122]

The debate over the standard centered on the administrability of the scheme. Opponents of the "could view" standard considered it "too vague and hypothetical."[123] The ACLU coalition countered that the "would view" standard was not meaningfully different from *Batson*'s purposeful discrimination test.[124] Likewise, the ACLU coalition considered the "could view" standard necessary to avoid the accusatorial nature of objecting to a strike.

Second, the workgroup was equally divided about the inclusion of two sections that warned against using peremptory challenges based on common pretextual reasons. The ACLU coalition advocated a section listing presumptively invalid reasons for a challenge, all of which correlate with race or ethnicity:

> (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.[125]

Accounting for structural racism and racial disparities in the criminal justice system, described in Part II.A, the ACLU coalition argued that the practice of excluding jurors from jury service because of their income level or contact with the legal system is "doubly discriminatory."[126]

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121. ACLU Wash., *Statement, in* WORKGROUP FINAL REPORT, *supra* note 95, at 28, 28 (emphasis added).

122. Wash. Ass'n Prosecuting Attorneys, *Statement*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 35, 41.

123. Wash. Def. Trial Lawyers, *Comments on the Workgroup Draft GR 37*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 2; Wash. Ass'n Prosecuting Attorneys, *Statement*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 35, 38 (arguing the "could view" standard was "impossible to meet").

124. ACLU Wash., *Statement, in* WORKGROUP FINAL REPORT, *supra* note 95, at 29–30.

125. *Id.* at 12.

126. *Id.* at 32–33. In federal courts and many states, people with felony convictions are barred from serving on juries. In recent years, advocates have actively fought to restore jury service for people with felony convictions. *See* Jacob Rosenberg, *Jury Duty is the Next Big Step for Felons' Rights*,

Similarly, the ACLU coalition pushed for a section requiring that the court or opposing party corroborate strikes based on a juror's conduct, such as body language or demeanor. Strikes of this nature are also historically associated with discrimination.[127] In fact, Justice Marshall identified this problem in his *Batson* concurrence when he warned that a party's "own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."[128] Critics of both sections argued that they were inappropriate because the trial court should have discretion to assess the reasons given for a strike.[129]

Third, the issue of gender bias remained a disputed topic among workgroup members. In the end, a majority of members, including a representative from a women's legal organization, advised that the rule should focus only on racial and ethnic bias.[130] While most members agreed that the rule could be expanded in the future, they felt that the workgroup did not have time to give "thoughtful consideration" to the inclusion of gender.[131]

Finally, workgroup members disagreed on a section determining appellate review for disallowed peremptory challenges. Under Washington law, the erroneous denial of a peremptory challenge is a structural error resulting in reversal.[132] Four workgroup members advocated the inclusion of a section stating that denying a peremptory challenge under the rule would not be a reversible error, absent a showing of prejudice.[133] But the majority of members

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MOTHER JONES (May 21, 2019), https://www.motherjones.com/politics/2019/05/jury-duty-is-the-next-big-step-for-felons-rights [https://perma.cc/AUP6-CFX2]. These efforts are very significant but they address just one hurdle to jury service for people with felony convictions. As discussed, the use of peremptory challenges against people with felony convictions is another way to exclude these prospective jurors. Similarly, some state courts have held that a prospective juror may not be excused for cause because of their belief that the criminal justice system treats Black people differently than it treats white people. *See, e.g.*, Commonwealth v. Williams, 116 N.E.3d 609, 617 (Mass. 2019). However, the consequence of this holding is somewhat limited if a party can still use a peremptory challenge against a juror for expressing this belief.

127. ACLU Wash., *Statement, in* WORKGROUP FINAL REPORT, *supra* note 95, at 33–34.

128. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

129. *See* Wash. Ass'n Prosecuting Attorneys, *Statement*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 35, 39–40.

130. *See* WORKGROUP FINAL REPORT, *supra* note 95, at 5 (postponing discussions on gender-based strikes because of the court's requested time frame and recommending that the court independently review how the rule can be expanded to include gender in the future).

131. *See id.* at 5. WAPA, however, continued to favor the inclusion of gender, and also of sexual orientation. *See* Wash. Ass'n Prosecuting Attorneys, *Statement*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 35, 37 (calling the workgroup's decision to postpone the inclusion of gender "ill-advised").

132. *See* State v. Vreen, 26 P.3d 236, 240 (Wash. 2001) (holding that the "erroneous denial of a litigant's peremptory challenge cannot be subject to harmless error analysis when the objectionable juror sits on the panel that convicts the defendant"). *But see* Rivera v. Illinois, 556 U.S. 148, 156 (2009) (holding that the erroneous denial of a peremptory challenge does not require automatic reversal of a defendant's conviction).

133. Wash. Ass'n Prosecuting Attorneys, *Statement*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 35, 41.

recommended that the court not include any language pertaining to appellate review.[134]

In April 2018, the court unanimously approved the most protective version of the rule, which the ACLU coalition supported.[135] The final rule went into effect later that month.[136] Most notably it replaced the purposeful discrimination requirement with an objective "could view" inquiry, and it barred common race-neutral reasons historically associated with discrimination.

D. The Final Step: State v. Jefferson

Even after the rule's promulgation, the Washington Supreme Court sustained its commitment to addressing *Batson*'s inadequacy. Six months after the rule's enactment, the court, in *State v. Jefferson*, took the rare step of modifying the third prong of *Batson* in a judicial opinion.[137] Unlike in *Saintcalle*, the *Jefferson* defendant, whose trial occurred before GR37's enactment, explicitly asked the court to reject *Batson*'s purposeful discrimination standard.[138] In a divided six-to-three opinion, the *Jefferson* court replaced *Batson*'s purposeful discrimination test with an objective inquiry, almost identical to the one articulated in GR37.[139]

Jefferson was noteworthy because it provided constitutional backing to the objective inquiry and ensured a remedy for GR37 violations. A *Batson* violation, grounded in equal protection, is a structural error that results in reversal.[140] While proponents of GR37 likely intended for its violation similarly to be a reversible error, the rule itself did not expressly specify a remedy. As a result, GR37

134. WORKGROUP FINAL REPORT, *supra* note 95, at 13 n.16.

135. The court unanimously adopted the rule, but Justice Madsen disagreed with sections (h) and (i) addressing "reasons presumptively invalid" and "reliance on conduct." *See* Wash. Sup. Ct. Order No. 25700-A-1221 (Apr. 5, 2018) (adopting WASH. CT. GEN. R. 37); *see also* WASH. CT. GEN. R. 37.

136. WASH. CT. GEN. R. 37; *see also* State v. Jefferson, 429 P.3d 467, 478 (Wash. 2018) (clarifying GR37's effective date).

137. 429 P.3d at 481.

138. Petition for Review at 24–25, *Jefferson*, 429 P.3d 467 ("Because the current standard is inadequate to stem the tide of race-based peremptory challenges, Jefferson requests that Washington courts deny the exercise of any peremptory strike 'if there is a reasonable probability that race was a factor in the exercise of the peremptory.'") (citing State v. Saintcalle, 309 P.3d 326, 339 (Wash. 2013)).

139. *Jefferson*, 429 P.3d at 481 (holding that "trial courts must ask if an objective observer could view race as a factor in the use of the peremptory challenge" and defining 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"). Interestingly, Justice Sheryl Gordon McCloud, the author of the majority opinion, was elected to the Washington Supreme Court in 2012, after winning an election against ex-Justice Richard Sanders, who was ousted in 2010 following his comments about racial disparities in Washington's criminal legal system. *See State Supreme Court Features First-Ever Female Majority*, KOMONEWS (Jan. 14, 2013), https://komonews.com/news/local/state-supreme-court-features-first-ever-female-majority-11-21-2015 [https://perma.cc/3GJ6-VHXG]. Justices Mary Yu and Steven González concurred with Justice McCloud's opinion and analysis but wrote separately to share their sustained convictions that "nothing short of complete abolishment of the peremptory challenge . . . will get [the court] on the right path toward finally eradicating racial bias in jury selection." *Jefferson*, 429 P.3d at 481 (Yu, J., concurring).

140. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 100 (1986) (reversing and remanding).

opponents would likely argue that a GR37 violation was merely a harmless error that should not result in reversal. *Jefferson* therefore will help foreclose any such claims. Indeed, in a partial dissent, three justices lamented that GR37 was "never meant to be a constitutional rule backed by constitutional protections," and pointed to the rule's lack of remedy for noncompliance.[141] The dissenting justices attacked the majority for inappropriately and unnecessarily incorporating GR37 into the *Batson* framework, calling the opinion an "unfounded move" that rendered GR37 "superfluous."[142]

The court also clarified that, consistent with other areas of law involving objective standards, the objective inquiry requires de novo review.[143] The court held that the third prong's determination is no longer a finding of fact and thus the appellate court stands in the same position as the trial court.[144] In doing so, the *Jefferson* court rejected the role the trial court has long held in evaluating *Batson* claims.[145] In the past, *Batson*'s deferential standard of review made it nearly impossible for defendants to successfully raise a *Batson* claim on appeal. For example, of the more than forty Washington cases challenging *Batson* claims between 1986 and 2013, appellate courts affirmed every single one.[146]

Jefferson and GR37 end this trend. The *Jefferson* decision itself demonstrates the consequence of an objective inquiry and a less deferential standard. The majority explained that, under the previous *Batson* purposeful discrimination test, the trial court's ruling was not clearly erroneous and would have been affirmed.[147] But, in applying the new objective observer test and reviewing the facts de novo, the court concluded that the State's exclusion of a Black juror "'could' support an inference of implicit bias," and the court instead reversed and remanded.[148]

141. *Jefferson*, 429 P.3d at 482.

142. *Id.* at 483 (Madsen, J., concurring/dissenting). Yet, as discussed in Part II.C, GR37 does more than just change the third prong of *Batson*; it also eliminates the requirement of a prima facie showing of discrimination, lists reasons that are presumptively invalid, and requires corroboration for strikes based on conduct. *See* WASH. CT. GEN. R. 37.

143. *Jefferson*, 429 P.3d at 480 & n.15 (citations omitted).

144. *Id.* at 480.

145. *See id.* at 476–77; Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (noting that *Batson* determinations involve a trial court's evaluation of the striking party's credibility and the juror's demeanor).

146. *See* State v. Saintcalle, 309 P.3d 326, 335 (Wash. 2013) (plurality opinion) (citing Suppl. Br. of Petitioner at 2, App. A), *abrogated on other grounds by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

147. In a partial concurrence, three justices concluded that the juror's dismissal constituted racial discrimination under the traditional *Batson* framework. *Jefferson*, 429 P.3d at 484 (Madsen, J., concurring/dissenting).

148. *Jefferson*, 429 P.3d at 480 (majority opinion).

III.
THE DESIRABILITY OF WASHINGTON'S *BATSON* REFORMS

By rejecting *Batson*'s purposeful discrimination test, the Washington Supreme Court created a more protective framework to prohibit peremptory challenges based on improper racial bias. At its core, GR37 intends to increase jury diversity and enhance judicial integrity. But GR37 is inadequate if it is merely symbolic and in effect repeats *Batson*. After all, *Batson* ostensibly had the same goals—but so clearly failed to meet them. In addition, a reform like GR37 also risks producing new concerns or problems. Thus, we must query the effects of GR37 and its costs and benefits. All things considered, I argue that GR37 is a desirable reform, but I also call for research to better understand its impact.

A. A Study of GR37

Less than two years after GR37's enactment, it is too early to assess its longer-term impact or consequences. Yet, through my discussions with Washington attorneys and judges, I provide a narrow glimpse into the initial reception to GR37.[149] To conduct this research, I contacted members of the ACLU workgroup, representatives of the organizations that participated in the court's workgroup, and criminal prosecutors and criminal defense attorneys who submitted public comments.[150] In the end, I spoke or emailed with twenty-one people including civil attorneys, criminal attorneys, two state trial judges, a state appellate judge, trial attorneys, appellate attorneys, and a court administrator. My communications occurred between September and November 2018, approximately six months after the rule was enacted. Some of my conversations occurred before *Jefferson* was decided and some occurred after it was decided.

In this section, I provide takeaways based on these conversations and my broader research. To begin with, concerns about administrability of the new standard will likely wane as the reforms become more familiar to lawyers and judges. More significantly, the reforms have at least initially changed lawyers' approaches to jury selection. In particular, lawyers have become more hesitant to strike jurors of color. Further, the reforms may lead to an increase in objections to peremptory challenges.

After it was promulgated, GR37 prompted initial concerns about judicial uniformity and administrability. As discussed above, GR37 instructs a court to

149. It is worth noting that the extent of the rule's impact will vary depending on the county's demographics and culture of the bar. The reforms will likely be less relevant in counties with fewer people of color. Compare the Lincoln County demographics (91% of the population is white, non-Hispanic) with the King County demographics (59% of the population is white, non-Hispanic). *QuickFacts: United States*, U.S. CENSUS BUREAU (July 1, 2018), https://www.census.gov/quickfacts/fact/table/kingcountywashington,pacificcountywashington/PST045218 [https://perma.cc/89WC-DD4J].

150. I also emailed with one criminal prosecutor and spoke with two criminal defense attorneys who did not submit public comments but who were referred to me by attorneys who did.

deny a peremptory challenge if it determines that, considering the totality of circumstances, an "objective observer" "could view" race as "a factor" in the use of the challenge.[151] Some lawyers I spoke with raised questions about how judges will interpret and enforce the "could view" objective inquiry. In fact, one prosecutor I contacted had already noticed a lack of uniformity among judges in his county.[152] He described to me in an email that "with some judges it is essentially impossible to use a peremptory challenge against a 'perceived minority' juror; with others, it has been essentially business as usual."[153] Similarly, some lawyers wondered if the rule would be applied evenly to the prosecution and the defense. One prosecutor contemplated that some judges may apply the rule more harshly against the State.[154] Nonetheless, according to public defenders and prosecutors in different counties, the rule has already been used against the defense, including by judges sua sponte.[155]

Fears about judicial uniformity will likely fade as time goes by and the rule becomes more established in trial procedure. After all, judges always apply a rule or standard somewhat differently. Moreover, the text of the rule provides guidance to trial judges about how to implement it: (1) GR37 codifies U.S. Supreme Court decisions indicating circumstances that judges should consider when assessing the nature of a strike, (2) it lists presumptively invalid reasons for a strike, and (3) it requires corroboration for strikes based on a juror's conduct.[156] Greater familiarity with the rule should thus lead to increased consistency. Mandated judicial and legal trainings concerning the rule's implementation may also help in this regard. Last, appellate review will clarify how trial judges should apply the new objective observer standard.

To be sure, the reforms necessarily require a higher degree of confidence that race was not a factor—even an unconscious one—in a party's decision to strike a juror. This core aspect of GR37 inevitably invokes divergent responses. GR37 in a sense flips *Batson* on its head: while a judge previously considered if the party offered a neutral, non-biased reason for the strike, now a judge considers instead if there could be a non-neutral, biased reason. While GR37 proponents consider this result to be precisely what makes the rule effective,

151. WASH. CT. GEN. R. 37(e). The rule defines an objective observer as someone aware that "implicit, institutional, and unconscious biases . . . have resulted in the unfair exclusion of potential jurors." *Id.* 37(f).

152. E-mail from Criminal Deputy Prosecutor, to author (Oct. 31, 2018, 12:05 PST) (on file with author).

153. *Id.*

154. Telephone Interview with Criminal Deputy Prosecutor, *supra* note 109. *But see* Roberts, *supra* note 44, at 1520 (describing conclusions of empirical investigations of *Batson*'s application that show a higher probability of success for *Batson* claims made by the prosecution than by the defense).

155. *See e.g.*, Telephone Interview with Public Defender (Nov. 14, 2018) [hereinafter Public Defender Interview (Nov. 14, 2018)]; Telephone Interview with Criminal Deputy Prosecutor, *supra* note 109; Public Defender Interview (Nov. 1, 2018), *supra* note 88.

156. WASH. CT. GEN. R. 37 (g)–(i).

many opponents fear this result makes the rule unworkable in practice.[157] For example, a superior court judge lamented to me that the new standard went too far because anything is possible.[158] He suggested that, under an objective observer "could view" standard, a judge could always make a finding of potential bias when a party strikes a juror of color.[159] Another judge echoed these concerns in his workgroup comments. He opined that GR37 could "virtually result in the denial of every peremptory challenge exercised" if a party objected to it.[160] However, this apprehension may be overblown; I spoke to lawyers who had already seen judges deny GR37 objections.[161]

Given these concerns, some lawyers described to me an immediate consequence of GR37: a light chilling effect on the use of peremptory challenges against jurors of colors. Lawyers, particularly prosecutors who risk reversal on appeal, expressed to me that they have become more hesitant and less willing to exercise peremptory challenges against jurors of color. In June 2018, two prosecutors led a GR37 training session, in which they warned other prosecutors that a peremptory challenge needs to be "almost as strong as a for-cause challenge."[162] In an interview, one of the prosecutors who led the training told me that he was urging prosecutors "above all" to have a reason for a peremptory challenge, not base any challenge on "gut feelings," and have that reason always relate to something the juror has said or done.[163] He feared that GR37 had made it "extremely difficult" to exercise a peremptory challenge against a juror of color, no matter the circumstances.[164]

I spoke with public defenders who had already noticed prosecutors' increased reluctance to strike jurors. A public defender from the same county as the prosecutor quoted above told me, "[o]ne of the most interesting immediate things we noticed is that prosecutors are not striking *anyone* who is visibly of color."[165] He noted that he had conducted several trials since GR37's enactment where the prosecutor did not strike jurors, even when a juror said things that "in the old days . . . would've gotten you struck."[166] Another public defender in a neighboring county similarly observed that her office had not encountered the

157. *See, e.g.*, E-mail from Criminal Deputy Prosecutor, to author (Oct. 30, 2018, 10:08 PST) (on file with author) (calling the rule a "cure which is far worse than the disease").

158. Telephone Interview with Superior Court Judge (Oct. 26, 2018).

159. *Id.* ("You could be from Mars, that is possible, but it's likely not true."). Before the rule's implementation, in his thirteen years as a trial judge, he had never seen a *Batson* challenge. *Id.*

160. Judge Franklin L. Dacca, *Individual Statement*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 25, 26.

161. Telephone Interview with Criminal Deputy Prosecutor, *supra* note 109 (estimating that half of the GR37 objections he had seen had been denied).

162. Jury Selection Under GR 37, WAPA CLE PowerPoint Presentation, at 35 (June 2018) (on file with author).

163. Telephone Interview with Criminal Deputy Prosecutor, *supra* note 109.

164. *Id.*

165. Public Defender Interview (Nov. 14, 2018), *supra* note 155.

166. *Id.*

same kind of strikes from prosecuting attorneys that it faced before the rule's enactment.[167]

Specifically, the less deferential standard of review generated animated concern among prosecutors with whom I spoke. While no Washington appellate court has yet reviewed a grant or denial of a GR37 objection, *Jefferson* instructs that courts will review *Batson* and GR37 appeals de novo and also ensures that a prosecutor's violation would likely lead to a vacated conviction.[168] Even though the rule applies both to the prosecution and to the defense,[169] prosecutors may thus feel it is too risky for them to strike a juror of color or to raise an objection against the defense.[170] I spoke to one prosecutor who described himself as a "purist" opposed to withholding peremptory challenges against jurors of color.[171] He described a hypothetical scenario in which a prosecutor strikes a white juror for Reason X but, for fear of reversal, refuses to strike a non-white juror for Reason X.[172] In his view, the prosecutor who takes this position discriminates by "treating one juror differently than another entirely because of his or her race."[173] Yet, in the wake of *Jefferson* and because of the increased risks of reversal, even he had begun to "reconsider" this perspective.[174]

Notwithstanding any decreased use of peremptory challenges against jurors of color in the first place, Washington's reforms will likely lead to an increase in objections to strikes.[175] For example, prosecutors who had rarely faced *Batson* challenges in the past told me that their county experienced multiple GR37 objections in the first six months of the rule's enactment.[176] Educational trainings

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167. Telephone Interview with Public Defender (Nov. 9, 2018) [hereinafter Public Defender Interview (Nov. 9, 2018)].

168. State v. Jefferson, 429 P.3d 467, 480 (Wash. 2018); *see also supra* Part II.D.

169. *See* Powers v. Ohio, 499 U.S. 400, 401 (1991) (prohibiting the defense from using discriminatory strikes). *But see* Smith, *supra* note 44, at 1165, 1175–76 (citations omitted) (arguing for elimination of peremptory challenges for the prosecution because "it is more important that the accused have a say in the jurors deciding his or her fate in order to accept their judgment than it is for the government").

170. *See, e.g.*, Telephone Interview with Criminal Deputy Prosecutor, *supra* note 109 (describing the "inherent asymmetry" between prosecution and defense use of peremptory challenges and *Batson* objections); *see also* Jury Selection Under GR 37, WAPA CLE PowerPoint Presentation, *supra* 162, at 23 (warning prosecutors that, though the rule applies equally, it is riskier for the prosecution to raise).

171. Telephone Interview with Criminal Deputy Prosecutor, *supra* note 109 .

172. *Id.*

173. Telephone Interview with Criminal Deputy Prosecutor, *supra* note 109.

174. *Id.* Considering many prosecutors' hesitance to strike jurors of color in the first place, the first appellate review of a GR37 motion may very well be from a defendant arguing that the rule was used improperly against him.

175. Because the rule gets rid of the prima facie requirement, parties also face a lesser hurdle in making the objection itself. Even if parties are shy to object, judges may raise a GR37 motion on their own. *See* WASH. CT. GEN. R. 37(c). Before GR37, Washington judges could already raise a *Batson* claim sua sponte. *See* State v. Evans, 998 P.2d 373, 379–80 (Wash. 2000).

176. Telephone Interview with Criminal Deputy Prosecutor, *supra* note 109 (estimating that his office had faced approximately six GR37 objections from May to October 2018 and that half had been granted and half had been denied); E-mail from Criminal Deputy Prosecutor, to author (Oct. 30, 2018,

about the reforms may also lead to more objections, particularly from attorneys who had seldom made *Batson* challenges previously.[177] The new emphasis on implicit bias may also lead to more challenges because it lessens the accusatorial nature of objections. That said, some attorneys worry that the force of a GR37 motion may still carry the same stigma as a *Batson* challenge.[178] One public defender, for example, voiced concern that prosecutors will "always immediately take umbrage that you're suggesting somehow that they are racist when you make a *Batson* challenge or a GR37 challenge."[179] He feared that GR37 was just "another effort that in the long run" will not be that successful or meaningfully different from *Batson*.[180]

B. A Research Agenda to Assess GR37

Whether GR37 and *Jefferson* will yield different results from *Batson* is a fundamental inquiry. The initial responses to the reforms suggest that the answer is yes. The next crucial inquiry thus becomes if the reform efforts are worthwhile. In this section, I outline a four-part research agenda to assess GR37 that focuses on (1) the impact the rule has on the racial composition of juries, (2) the administrability of the rule, (3) the public perception of the rule, and (4) any broader consequences the rule might have. This information will inform both Washington state stakeholders, who may wonder if the rule is beneficial, and advocates in other states, who may consider embracing a change to the *Batson* framework.[181] After all, interested parties and judges in other states have already taken notice of Washington's reforms.[182] In fact, a state supreme court justice in Iowa has specifically called for, in certain circumstances, an objective test similar to the one introduced in GR37.[183] In another case, a California appellate

15:38 PST) (on file with author) ("*Batson* challenges were rare. I think we have had more challenges under this rule than we ever did with *Batson*.").

177. *See, e.g.*, Telephone Interview with Civil Plaintiff's Attorney, *supra* note 88 (noting that, even before the rule was enacted, civil trial lawyers began making more *Batson* challenges as a result of the increased conversations within the civil bar about the GR37 court workgroup).

178. Public Defender Interview (Nov. 1, 2018).

179. *Id.*

180. *Id.* ("I think we are going to get the same problem though as before. [Prosecutors have] now been told what reasons they can't use, so they will come up with another reason.").

181. After the U.S. Supreme Court decided *Swain* in 1965, some state courts quickly realized the decision's shortcomings and applied a more protective evidentiary framework, similar to what the Court eventually adopted in *Batson*. *See supra* Part I.A; *supra* note 28 and the accompanying text. In *Batson*, the Court eased various concerns about the new framework by pointing to the lack of serious administrative burdens the other states had experienced. *See* Batson v. Kentucky, 476 U.S. 79, 133 (1986).

182. *See* State v. Gentry, 449 P.3d 707, 711 (Ariz. Ct. App. July 30, 2019) (rejecting a defendant's request that the court adopt Washington's approach to peremptory challenges) (citing GR37 and *Jefferson*); Tennyson v. State, No. PD-0304-18, 2018 Tex. Crim. App. LEXIS 1206, at *19 n.6 (Tex. Crim. App. Dec. 5, 2018) (Alcala, J., dissenting) (discussing *Batson*'s failures and noting *Jefferson*'s modified inquiry).

183. *See* State v. Veal, No. 17-1453, 2019 Iowa Sup. LEXIS 66, at *104 (Iowa May 24, 2019) (Appel, J., concurring in part and dissenting in part) (recommending that "greater scrutiny" is necessary

judge highlighted Washington's reforms in calling on California's legislature, Supreme Court, and Judicial Council "to consider meaningful measures to reduce actual and perceived bias in jury selection."[184]

First, researchers need to assess the rule's impact, if any, on the racial makeup of jury panels in Washington. The primary purpose of GR37, after all, is to reduce the improper exclusion of prospective jurors of color. If fewer attorneys use peremptory challenges against jurors of color, the expected result is more people of color on jury panels. Similarly, if judges sustain more GR37 objections, the expected result again is more diverse juries. That said, Seattle and Washington jury pools have lacked racial diversity for decades, a problem that cannot be fixed by a modification to *Batson*.[185] Researchers in Washington thus should track the racial composition of jury panels, accounting also for any changes to the racial makeup of jury pools generally.[186]

Second, researchers should track the use and outcomes of GR37 objections. It may be difficult to obtain statewide data on a trial mechanism like GR37, but it is not impossible. Researchers in another state have been able to collect information about the use of peremptory challenges and the results of *Batson*

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when a peremptory challenge is used against the last non-white juror in the jury pool and suggesting that, in those circumstances, step three of *Batson* should mimic the Washington approach and the court "should objectively determine whether the asserted reason was in fact race neutral or whether race may have played a role in the strike") (citing GR37 and *Jefferson*).

184. People v. Bryant, 253 Cal. Rptr.3d 289, 310 (Cal. Ct. App. 2019) (Humes, P. J., concurring) (lamenting that California has been "slow to adopt [*Batson*] reforms") (citing GR37 and *Jefferson*).

185. *See, e.g.*, Lynne Baab, *Jury Duty in Seattle: Am I in 1930s Mississippi?* SEATTLE TIMES (Jan. 26, 2018), https://www.seattletimes.com/opinion/jury-duty-in-seattle-am-i-in-1930s-mississippi [https://perma.cc/A9R2-GRSQ] (describing predominantly white jury pools in Seattle Municipal Court); Anita Khandelwal & Judge Cathy Moore, *Seattle's Lack of Jury Diversity is an Urgent Problem. We Must Do Something About It Now.*, STRANGER (Feb. 19, 2018), https://www.thestranger.com/slog/2018/02/19/25822139/guest-editorial-seattles-lack-of-jury-diversity-is-an-urgent-problem-we-must-do-something-about-it-now [https://perma.cc/H6VY-36J5] (calling for short-term and long-term plans to diversify juries in Seattle); Patricia Murphy, *Justice So White: King County Juries Have a Diversity Problem*, KUOW.ORG (May 30, 2017) https://kuow.org/stories/justice-so-white-king-county-juries-have-diversity-problem [https://perma.cc/G9JP-JW3T] (describing predominantly white jury pool in King County District Court); *see also* Brief of Northwest Justice Project as Amicus Curiae Supporting Petition for Review, Washington v. Catling, 2018 WL 3966035 at 8–9 ("The right to 'fully participate as a Washington citizen' is an important right that should not be easily dismissed. In recognition of this important right, this Court recently adopted GR 37. . . . However, GR 37 only works if jurors of different races and ethnicities qualify to serve as jurors.").

186. Washington judicial officials, particularly in King County, are currently expending other efforts to diversify jury pools. *See, e.g.*, Judge Ed McKenna, *A Judge Explains Why Jury Diversity is a Work in Progress*, SEATTLE TIMES (Feb. 2, 2018), https://www.seattletimes.com/opinion/a-judge-explains-why-jury-diversity-is-a-work-in-progress [https://perma.cc/3JSB-43S4] (discussing development of juror survey); Washington State Minority and Justice Commission, Meeting Notes 3 (Jan. 19, 2018), http://www.courts.wa.gov/content/publicUpload/MJC%20Meeting%20Materials/20180119_m.pdf [https://perma.cc/RM4G-ATSW] (describing creation of a Jury Diversity Task Force).

challenges.[187] Washington should gather this type of jury selection data. Additional research in this area will help determine how implementation of the rule varies, while taking into account county demographics. Researchers should also compare new GR37 data with any existing information about *Batson* challenges in Washington. In doing so, researchers should observe the emergence of appellate decisions reviewing GR37 motions and post-*Jefferson Batson* challenges. In Washington, as in most states, appellate courts regularly affirmed trial courts' *Batson* decisions. Legal researchers should study the broader effects of de novo review and consider how this influences trial strategy and trial court decisions.

Third, researchers need empirical data capturing the attitudes of attorneys, judges, jurors and prospective jurors, and criminal defendants. My research was limited in both time and scope: I spoke with only a small number of individuals across the state, and I did so just six months after the rule was enacted. In addition, the majority of people with whom I spoke had strong opinions about the rule. After all, most of them served on at least one drafting group or had submitted a public comment about the rule. Surveys of a far wider range of stakeholders will better inform how GR37 is being received. Moreover, reception to the rule may change as it becomes more familiar to lawyers, or as appellate courts begin to review trial court decisions applying the rule.

Fourth, it will be significant to observe if the principles on which GR37 relies seep into other areas of Washington law or advocacy. By enacting GR37, the Washington Supreme Court acknowledged the pervasive nature of implicit bias, particularly in the courtroom itself. Legal advocates and judges may use GR37 as a foundation for other innovative ways to address implicit and institutional racism in the legal system. For example, GR37's rejection of a purposeful discrimination standard has already influenced another part of the jury process in Washington. In July 2019, the Washington Supreme Court unanimously held that GR37's standards apply to claims of juror misconduct "when it is alleged that implicit racial bias was a factor in the jury's verdict."[188]

This research agenda and any consequences it reveals will help inform advocates across the country about how to address implicit bias in jury selection.

C. An Evaluation of Institutional Competence and GR37

Notwithstanding unanswered inquiries about GR37, advocates interested in reforming *Batson* should consider their state's court rulemaking process because it offers several advantages. The rulemaking process does not require movement

187. *See* Lisa Snedeker, *North Carolina Jury Sunshine Project Findings Now Available for Journalists Covering 2018 Elections*, WAKE FOREST U. SCH. L. NEWS & EVENTS (July 30, 2018), http://news.law.wfu.edu/2018/07/north-carolina-jury-sunshine-project-findings-now-available-for-journalists-covering-2018-elections [https://perma.cc/5C5M-J69Y]*; see also infra* Part III.C.

188. State v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019).

from the state legislature, a branch of government notoriously slow to act.[189] A court rule may also be more amenable to future revisions. Further, peremptory challenges are a procedural element of trial practice. Accordingly, courts, rather than legislatures, may be better equipped to assess changes to the process.[190] And, compared to litigation, the rulemaking process is more flexible in enabling multiple stakeholders to submit opinions and provide suggestions.[191]

That said, depending on the state's court rulemaking process, creation of a robust rule may require support and encouragement from the state supreme court. In Washington, the court itself suggested the rulemaking process and did so only after years of litigated *Batson* issues. As discussed above, the Washington Supreme Court also repeatedly articulated its concerns about racial bias in the criminal legal system, and particularly in jury selection. Moreover, Washington has two judicial commissions dedicated to issues of race and justice, allowing for myriad data detailing racial disparities throughout the state's legal system.[192]

However, Washington is not alone in its concerns about racial disparities in the criminal justice system. In fact, other states have access to detailed information specifically related to discrimination in their courts' jury selection procedures. For example, Bryan Stevenson's Equal Justice Initiative released a report in 2010 discussing the ongoing legacy of illegal racial discrimination in jury selection, particularly in various southern states.[193] Additionally, in 2018, researchers at Wake Forest Law School built a new database tracking jury selection outcomes in North Carolina.[194] In an op-ed published in *The New York Times*, one of the creators called for other states to do the same and "plainly make all jury selection information available online and keyword searchable, easing access for journalists and voters."[195] Lawmakers, advocates, and judges should utilize information of this nature to advise any *Batson* reform efforts.

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189. *See* Bellin & Semitsu, *supra* note 7, at 1106–08 (surveying plans to reform peremptory challenges but noting most are "particularly unlikely to resonate with legislatures who must implement any such reform proposal"). For example, state legislatures have even faced obstacles passing legislative bills that merely make minor changes to the peremptory challenge process, such as limiting the number of strikes. *See* SHAMBAUGH, *supra* note 49 (describing New Jersey's failed efforts to reduce the number of peremptory challenges via legislation).

190. To be sure, some state legislatures may be currently ready and equipped to focus on implicit bias in jury selection. For example, in 2019, members of the California state legislature introduced three bills that would address implicit bias in the courts, in the healthcare system, and in law enforcement. *See* B.I.A.S. (Breaking Implicit Attitudes & Stereotypes) Bill Package, ASSEMBLYMEMBER SYDNEY K. KAMLAGER-DOVE, https://a54.asmdc.org/bias-breaking-implicit-attitudes-stereotypes-bill-package [https://perma.cc/LK9S-AZZS]. Given these legislators' recent attention to implicit bias intervention, a legislative fix to *Batson* may be possible in California.

191. Granted, litigation allows for amicus briefs, but the public comment period opens the door to many more voices and gives more flexibility to the form that these opinions can take.

192. *See supra* Part II.A.

193. *See* EQUAL JUSTICE INITIATIVE, *supra* note 6.

194. Snedeker, *supra* note 187.

195. Ronald Wright, *Yes, Jury Selection is as Racist as You Think. Now We Have Proof*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html [https://perma.cc/4H66-R2FH].

D. A Consideration of GR37 and the Complete Elimination of Peremptory Challenges

The proponents of GR37 envisioned it to be a dramatic departure from *Batson*, but one that nonetheless reforms peremptory challenges without eliminating them. As the above discussions illustrate, the enactment of GR37 and the court's decision in *Jefferson* have not foreclosed discussion in Washington about the use of peremptory challenges.

In the background of, if not at the heart of, the debate over GR37 is Justice Marshall's original call to eliminate peremptory challenges entirely.[196] At least two Washington Supreme Court justices also support eliminating peremptory challenges.[197] And two judges on the court's workgroup ultimately embraced abolition of peremptory challenges as a better alternative to the adopted rule.[198] Some opponents believe that GR37 so erodes the essence of peremptory challenges, which are meant to be "exercised with full freedom," that it functionally forbids them.[199]

I believe that GR37 successfully departs from *Batson*'s failings and still maintains the spirit of peremptory challenges, barring only strikes rooted in bias, implicit or otherwise. Certainly, the rule prompts parties to reflect and think twice about using a peremptory challenge against a juror of color, particularly if the proffered reason would be an often-used, often-pretextual one. But it is for this reason that the rule does not go too far. Rather, following an ongoing legacy of juror exclusion, it is actually an overdue and welcome change. Improving jury diversity and judicial integrity is worth making an adjustment to the voir dire process.

Besides, eliminating peremptory challenges would not end debates about race and jury selection. Instead it would likely result in an expansion of for-cause challenge jurisprudence, including appellate review of for-cause challenges.[200]

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

197. *See* State v. Jefferson, 429 P.3d 467, 481(Wash. 2013) (Yu, J., concurring) (voicing sustained conviction that "nothing short of complete abolishment of the peremptory challenge . . . will get [the court] on the right path toward finally eradicating racial bias in jury selection"); State v. Saintcalle, 309 P.3d 326, 369 (Wash. 2013) (González, J., concurring) (arguing that "the need to abolish peremptory challenges is abundantly clear"), *abrogated on other grounds by* City of Seattle v. Erickson, P.3d 1124 (2017).

198. *See* Judge Franklin L. Dacca, *Individual Statement*, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 25, 26 (recommending that the use of peremptory challenges be abolished entirely if the court adopts the "could view" objective standard); Letter to Chief Justice Mary Fairhurst from Judge Blaine Gibson, *in* WORKGROUP FINAL REPORT, *supra* note 95, at 16, 16 (concluding that the only way to eliminate discrimination in jury selection is through the elimination of peremptory challenges).

199. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965) (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)); *see also* WASH. REV. CODE § 4.44.140 (2018) (defining a peremptory challenge as an objection "for which no reason need be given").

200. *See* State v. Jefferson, 429 P.3d 467, 481 (Wash. 2013) (Yu, J., concurring) (acknowledging that abolition of peremptory challenges would need to be coupled with "further development" of the court's for-cause challenge jurisprudence); WORKGROUP FINAL REPORT, *supra* note 95, at 3 (expressing concern that "removal of peremptory challenges would force appellate courts to examine

Jurors, like attorneys and judges, hold racial biases, both implicit and explicit.[201] Theoretically, for-cause challenges should rid the jury pool of jurors who would be so biased against one side that they would not impartially view the evidence. But litigants, and in particular criminal defendants whose liberty is at risk, may not trust the use of for-cause challenges to weed out biased jurors, especially racially biased ones.[202]

Ultimately, peremptory challenge reform efforts must take into account the rights of criminal defendants.[203] Peremptory challenges remain necessary to enhance fairness at trial, particularly considering the disproportionate number of non-white criminal defendants.[204] This is especially true when juries so regularly do not reflect the communities from which defendants often come. Greater juror diversity will help mitigate the risk that an individual juror's biases will control jury deliberation; one juror's human experience can combat another juror's biases. To be sure, GR37, like *Batson*, is not driven solely by a juror impartiality rationale, but instead by an equal protection analysis. But with the hurdles to jury diversity being what they are, GR37 is a better solution to achieving a fair and impartial jury than a complete overhaul of peremptory challenges. To that end, other states seeking *Batson* reforms should take a renewed focus on jury impartiality as a driving force for improvements. As GR37 indicated, it is indeed possible to push for transformative changes beyond the limits of what currently exists in the law.

CONCLUSION

Too often, despite overwhelming evidence of failure and no readily apparent solution, courts and lawmakers alike sit at a stalemate, claiming their hands are tied. With the adoption of GR37, the Washington Supreme Court rejected this convention and directly confronted the pervasive problem of racial

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the challenges for cause, which could lead to an inconsistent or possibly unwanted outcome"). Expanded appellate review of for-cause challenges would likely occur because in a world without peremptory challenges, the trial judge would become the sole gatekeeper of juror bias. If a trial judge found that a prospective juror's biases did not meet the threshold of a for-cause challenge, the juror would end up sitting on the jury. If the opposing party raised the juror-bias issue on appeal, the appellate court would have to decide if the trial court was correct in finding that the juror was impartial enough to serve.

201. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868–70 (2017) (discussing cases that involve racially biased jurors and warning that racial bias is a "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice").

202. *See e.g.*, Public Defender Interview (Nov. 14, 2018), *supra* note 155 ("The problem with [abolition] is that I don't trust judges and I think most trial attorneys don't trust judges to do [the] right thing when it comes to a for-cause objection based on race, especially in light of our experiences with *Batson*."); Public Defender Interview (Nov. 1, 2018), *supra* note 88 ("That debate on elimination of peremptory challenges, I cannot support that in any fashion, but I understand the theory of why you might do it. I don't trust the court, I don't trust the prosecutors.").

203. *See, e.g.*, Tania Tetlow, Batson *at Twenty-five: Perspectives on the Landmark, Reflections on its Legacy*: *Why Batson Misses the Point*, 97 IOWA L. REV. 1713 (arguing that *Batson*'s focus on discrimination *against* jurors ignores the significant problem of discrimination *by* jurors).

204. See *supra* Part II.A.

bias in jury selection. Deeply informed by research and stakeholder feedback, the court attempted a divisive change to better ensure integrity in the justice system it oversees. Where courts and legal advocates may sometimes feel constrained by the limits of antidiscrimination law and its focus on intentional discrimination, Washington's reforms signify the potential of innovative legal thinking. Though we need further evaluation and research to fully assess the consequences of GR37 and *Jefferson*, they are notable denunciations of *Batson*'s failings.

Today, the other forty-nine states have a choice to make. They can accept the ongoing legacy of racial discrimination in jury selection. Or they can act to reject this history by modifying a framework that harms defendants and would-be jurors and tarnishes the judiciary. By recognizing that unintentional and institutional racism play a role in the use of peremptory challenges, Washington's reforms represent one blueprint of the latter choice. Though the first to embrace the path toward a fairer justice system, Washington will likely not be the last.