BATTLING *BATSON*: *STATE V. ANDUJAR* AND NEW JERSEY'S EFFORTS TO FIX A BROKEN DOCTRINE

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Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically.[1]

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† *de•novo* Editor, *Cardozo Law Review*; J.D. Candidate, Benjamin N. Cardozo School of Law (June 2023). Special thanks to Professor Kathryn Miller for all her work as my Case Note advisor, and to the editors on *Cardozo Law Review*.

1 Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (alteration in original) (citation omitted) (quoting King v. County of Nassau, 581 F. Supp. 493, 502 (E.D.N.Y. 1984)).

INTRODUCTION

In 1986, the Supreme Court of the United States decided *Batson v. Kentucky*, hoping to end the practice of racially biased peremptory challenge use in the jury selection process.[2] Far from ending the discriminatory practice, *Batson* instead marked another step in a long line of cases attempting, but ultimately failing, to prevent discrimination.[3] In the years following, state and federal district courts alike have grappled with applying *Batson* and how to change a doctrine that has failed to root out the problems it aimed to address.[4]

The issue originates with the jury selection process itself. While the details of the process vary state to state, the general rule is that before the commencement of a jury trial, parties to the case conduct a voir dire process to gather information on the prospective jurors at court.[5] After information has been gathered, counsel most commonly dismiss the prospective jurors in one of two ways.[6] Counsel may request that the court dismiss the juror for cause, indicating the prospective juror's

2 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids the prosecution from challenging potential jurors based solely on their race).

3 *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (holding that the Equal Protection Clause prohibits states from implementing laws that bar citizens from jury service on account of their race); Swain v. Alabama, 380 U.S. 202 (1965) (holding that racial disparities in the jury pool did not constitute unlawful discrimination under the Fourteenth Amendment), *overruled by Batson*, 476 U.S. 79.

4 *See generally* EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/5X94-AZBS] (presenting a study and recommendations regarding the continued practice of racial bias in jury selection since the Supreme Court's decision in *Batson*).

5 *See* JONATHAN S. TAM, JURY SELECTION IN FEDERAL COURT 4–5 (2020), https://www.dechert.com/content/dam/dechert%20files/knowledge/publication/2020/5/Jury-Selection-in-Federal-Court.pdf [https://perma.cc/8ZLQ-MBR7].

6 *See id.* at 6.

inability to qualify or set aside bias in the case.[7] They may exercise an unlimited number of challenges for cause, but the judge must grant the challenge for the prospective juror to be dismissed.[8] Alternatively, counsel has a set number of peremptory challenges, which may be exercised to dismiss prospective jurors without further explanation.[9] Historically, peremptory challenges became a tool to strip juries of jurors of color,[10] as the Supreme Court refused to hold that intentionally striking Black jurors for the purpose of creating an all-white jury was impermissible.[11]

Batson and its progeny attempted to eliminate the discriminatory use of peremptory challenges but left exploitable loopholes that rendered their holdings largely futile.[12] One of *Batson*'s primary shortcomings is that it addresses only intentional discrimination,[13] yet scientific and psychological advances indicate that unintentional, implicit bias plays a pivotal role in discriminatory behavior as well.[14] Notably, implicit bias exists in attorneys, judges, and jurors in a courtroom alike.[15] Despite *Batson*'s laudatory goal, its flawed framework leaves room for prosecutors and defense attorneys to exploit peremptory challenges for racial reasons, either intentionally or unintentionally.[16] While *Batson* was decided in the Supreme Court of the United States and, thus, represents a floor, not a ceiling, most state courts have adopted its framework when interpreting their state constitutions, and, in doing so, have adopted its flaws as well.[17]

Batson's flaws have led to a discriminatory impact in the jury selection process nationwide,[18] such as overly white juries—like those in Houston County, Alabama—where prosecutors have utilized peremptory challenges to strike 80% of prospective Black jurors, resulting

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7 *Id.*

8 *Id.*; FED. R. CIV. P. 47(c).

9 TAM, *supra* note 5, at 6.

10 Batson v. Kentucky, 476 U.S. 79, 103–04 (1986) (Marshall, J., concurring).

11 *See* Swain v. Alabama, 380 U.S. 202, 221–22 (1965), *overruled by Batson*, 476 U.S. 79.

12 *See generally* EQUAL JUST. INITIATIVE, *supra* note 4 (discussing the continuing issues with the *Batson* doctrine and its exploitation in contemporary courtrooms).

13 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, 161–62 (2010).

14 *Id.* at 152–53.

15 *See* Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. BAR J. 40, 42–44 (2014).

16 *See* Bennett, *supra* note 13, at 161–62.

17 *See, e.g.*, State v. Andujar, 254 A.3d 606, 621 (N.J. 2021).

18 *See* EQUAL JUST. INITIATIVE, *supra* note 4, at 14.

in disproportionately white juries.[19] In other jurisdictions, prosecutors are explicitly trained in evading *Batson* in order to strike prospective jurors of color.[20] Many appellate courts afford lower courts' rulings on peremptory challenges a high degree of deference, seldomly overturning their dismissal of a challenge, even in egregious cases.[21] In light of these issues, a growing number of states are beginning to reassess *Batson*, bending to the rising calls for jury selection reform.[22] New Jersey joined those states in July 2021, taking a notable first step in addressing *Batson*'s flaws.[23]

In the groundbreaking case *State v. Andujar*, the New Jersey Supreme Court recognized implicit bias as one of *Batson*'s notable blind spots.[24] The court modified the state's *Batson* equivalent, finally extending its framework to juror discrimination through implicit bias.[25] Although the New Jersey Supreme Court took a pivotal first step in acknowledging the flaws in *Batson*, *Andujar* only addressed half the problem.[26] The New Jersey approach to jury selection remained insufficient to provide a defendant with an impartial jury under the New Jersey Constitution since it failed to fix the fundamental errors in the

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19 *Id.* Peremptory challenge usage often compounds other issues in the selection process, most notably the racial makeup of the pool of potential jurors. *See* Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries*, 39 J. CRIME & JUST. 75, 81–82 (2016) (studying two venire pools and finding that both were disproportionately white to begin with before any prospective jurors were dismissed).

20 EQUAL JUST. INITIATIVE, *supra* note 4, at 16; *see also* Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors [https://perma.cc/33T4-JHDX] (discussing several instances of prosecutors training to avoid *Batson* claims, including a North Carolina prosecutors' association that would conduct training sessions, and a video depicting a Philadelphia district attorney telling new prosecutors how to question Black prospective jurors to avoid *Batson*).

21 *See* EQUAL JUST. INITIATIVE, *supra* note 4, at 19–23; *see also* Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 1001 (1994) (stating Texas state and federal appellate courts review *Batson* challenges using a highly deferential, "clearly erroneous" standard); People v. Randall, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996) ("[W]e now consider the charade that has become the *Batson* process. The State may provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile.").

22 Death Penalty Clinic, Batson *Reform: State by State*, BERKELEY L., https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state [https://perma.cc/CW98-UJ5N].

23 *Id.*

24 254 A.3d 606 (N.J. 2021).

25 *See infra* Section II.C.

26 *See infra* Section I.A.

Batson test.[27] Further, New Jersey's system post-*Andujar* left opportunities for parties to exploit peremptory challenges for discriminatory purposes.[28] In the wake of *Andujar*, the New Jersey courts have moved to align their rules with those emerging from other states.[29] These rules provide more adequate safeguards against racially biased peremptory challenges by lowering the threshold needed to succeed on a *Batson* challenge and by eliminating many common "race-neutral" reasons given to dismiss Black prospective jurors.[30] In just over a year, New Jersey vastly improved its *Batson* equivalent, but even its new rules contain flaws and potential loopholes.[31] As jurisdictions nationwide begin reevaluating the *Batson* standard, examining New Jersey's process can provide guidance for other states seeking to reform their jury selection process.[32]

This Case Note explores *Andujar* and its impact, before discussing solutions to the issues left unaddressed in *Andujar*. By highlighting New Jersey's successes and remaining flaws, this Case Note seeks to provide guidance to other states as they look to implement changes to their *Batson* equivalents. Part I will discuss *Batson* in greater detail and explain New Jersey's doctrinal equivalent. Part II will explore *Andujar* itself and the New Jersey Supreme Court's holding. Part III will describe the progress *Andujar* made in extending *Batson* to include implicit bias but will also conclude that the New Jersey Supreme Court ought to have gone further, both in rethinking the *Batson* test and New Jersey's peremptory challenge system itself. Part IV will discuss possible solutions to *Andujar*'s shortcomings, including the ones New Jersey courts have already adopted.[33] It will also briefly explore legislative solutions, namely the abolition of the peremptory challenge and the implementation of blind voir dire. The focus of Part IV will be on how New Jersey's response following *Andujar* compares to laws recently passed in Washington and California to ensure that *Batson* more effectively prevents discriminatory

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27 *See infra* Section III.B.

28 *See infra* Section III.C.

29 *See infra* Section IV.A.

30 *See infra* Section III.B.

31 *See infra* Section IV.A.

32 *See generally* Death Penalty Clinic, *supra* note 22.

33 *Cf.* N.J. CTS., NOTICE TO THE BAR AND PUBLIC: JURY REFORMS—SUPREME COURT ACTION: (1) ADMINISTRATIVE DETERMINATIONS ON THE REPORT AND RECOMMENDATIONS OF THE COMMITTEE OF THE JUDICIAL CONFERENCE ON JURY SELECTION; (2) AMENDMENTS TO THE RULES OF COURT; AND (3) AUTHORIZATION OF A PILOT PROGRAM FOR ATTORNEY-CONDUCTED VOIR DIRE (2022), https://www.njcourts.gov/sites/default/files/notices/2022/07/n220713a.pdf [https://perma.cc/3WVX-8AVG] (delineating solutions New Jersey has adopted, including reducing the number of peremptory challenges, adding a list of justifications for a challenge that are presumed to be discriminatory, and implementing judicial training on implicit bias).

peremptory challenges. Finally, the Conclusion will provide closing thoughts on the issue and discuss the need for more research nationwide.

I. BACKGROUND AND PRIOR LAW

A. Batson v. Kentucky

1. The Origins of *Batson*

Despite its numerous flaws, at the time of its decision in 1986, *Batson* represented a great leap forward in protecting prospective jurors from discrimination.[34] Up until 1879, states were permitted to bar citizens of color from serving on juries entirely.[35] In *Strauder v. West Virginia*, the Court struck down such laws as a violation of a juror's rights under the Equal Protection Clause of the Fourteenth Amendment.[36] However, despite the *Strauder* decision, states continued to enable racial discrimination in jury selection through the use of peremptory challenges.[37] The Court, for many years, refused to restrict counsel's ability to use peremptory challenges in a discriminatory manner.[38] In *Swain v. Alabama*, the Court refused to hold that striking Black prospective jurors is a denial of equal protection of the laws under the Fourteenth Amendment and declined to mandate that prosecutors provide reasons for their peremptory challenges.[39] However, the *Swain* Court did consider that there could be limitations on the use of peremptory challenges on prospective jurors of color.[40] If a state was excluding Black prospective jurors for reasons unrelated to the result of the trial or systematically removing all prospective jurors of color across all cases, the Court noted that these practices might violate the Fourteenth

34 *See* EQUAL JUST. INITIATIVE, *supra* note 4, at 11–13 (discussing the history of the peremptory challenge pre-*Batson*).

35 Strauder v. West Virginia, 100 U.S. 303 (1879) (finding unconstitutional statutes barring jurors based on race).

36 *Id.* at 310.

37 Flowers v. Mississippi, 139 S. Ct. 2228, 2239–40 (2019).

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

39 *Id.* at 221–22.

40 *Id.* at 223–24.

Amendment.[41] *Swain*'s relatively permissive stance on peremptory challenges was revisited in *Batson* in 1986.[42]

Batson altered the landscape of peremptory challenges and implemented a new three-part test to detect impermissible discrimination in the use of such challenges.[43] In the decision below, the Kentucky Supreme Court had relied on *Swain* to affirm a criminal conviction, requiring a defendant claiming discriminatory peremptory challenge practices to demonstrate "systematic exclusion of a [particular] group of jurors."[44] The *Batson* Court reversed the decision and implemented a new test to determine the constitutionality of a party's peremptory challenge usage.[45] The test consists of three steps.[46] First, the defendant must challenge the prosecution's use of a peremptory challenge by making a prima facie showing of purposeful racial discrimination, in light of all the facts and circumstances.[47] The Court expanded the evidence that may be considered in this showing, allowing more case-specific evidence of discrimination, instead of exclusively requiring a larger, systematic showing of discrimination.[48] The prima facie case must demonstrate that the defendant is a member of a targeted racial group, that the prosecution has used peremptory challenges on prospective jurors of the same race, and that the facts and circumstances raise an inference that the prosecution used that practice to exclude those prospective jurors because of their race.[49] Second, if the initial showing is made, the burden shifts to the prosecution to explain the exclusion.[50] Here, the Court requires only a racially neutral explanation for the exclusion.[51] Third, the trial court must decide whether the defendant has established purposeful discrimination on the part of the prosecution.[52]

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41 *Id.* Note that the *Swain* Court simultaneously refused to "hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." *Id.* at 222.

42 *Batson*, 476 U.S. at 98–100.

43 *Id.* at 96.

44 *Id.* at 84.

45 *Id.* at 96–98.

46 *See id.* at 93–98.

47 *Id.* at 93–94.

48 *Id.* at 95.

49 *Id.* at 96. The Court would later allow a defendant to challenge the prosecution's discriminatory use of a peremptory challenge on a prospective juror, even if the juror is not the same race as the defendant. Powers v. Ohio, 499 U.S. 400 (1991).

50 *Batson*, 476 U.S. at 94.

51 *Id.* at 97–98.

52 *Id.* at 98.

Although the *Batson* standard was a necessary improvement on *Swain*, its test came with significant flaws.[53] In his concurring opinion to *Batson*, Justice Thurgood Marshall outlined several critiques to the majority's articulated test.[54] In particular, two of Justice Marshall's criticisms would ring true over the decades following the *Batson* decision.[55] First, Justice Marshall opined that, even when a defendant makes the requisite prima facie showing, it is exceedingly easy for the prosecution to articulate racially neutral reasons for the challenge.[56] Furthermore, in such cases, it is difficult for a trial court to assess the prosecution's true motives.[57] Second, Justice Marshall commented that unconscious racism—not only intentional discrimination—might contribute to the discriminatory use of peremptory challenges.[58] These criticisms proved prescient and remain issues with the *Batson* standard in its contemporary form.

2. *Batson*'s Application and Flaws

Since 1986, the Court has tweaked its holding in small ways, typically by increasing the evidence courts may consider in assessing intentional discrimination. In 2005, the Court decided *Miller-El v. Dretke*, which reversed a defendant's conviction from a Texas court on *Batson* grounds.[59] The Court looked beyond the specific explanations from the prosecution and instead focused on the larger patterns in its jury selection process.[60] For instance, the prosecution used peremptory strikes to exclude 91% of the Black prospective jurors, which the Court noted was unlikely to occur by happenstance.[61] The Court also looked at the disparity in the way different jurors were questioned.[62] The Court compared how the prosecution treated similar answers between jurors of different races, where one answer was used as the basis to dismiss a Black prospective juror while a similar answer from a white prospective juror was ignored.[63] The Court also noted that the prosecution, at times, asked questions differently depending on whether they were directed at non-

53 *See generally* EQUAL JUST. INITIATIVE, *supra* note 4.

54 *See Batson*, 476 U.S. at 102, 105–08 (Marshall, J., concurring).

55 *See* EQUAL JUST. INITIATIVE, *supra* note 4, at 4.

56 *Batson*, 476 U.S. at 105–06 (Marshall, J., concurring).

57 *Id.*

58 *Id.* at 106.

59 545 U.S. 231, 237 (2005).

60 *Id.* at 240–41.

61 *Id.* at 241.

62 *Id.*

63 *Id.* at 244–45.

Black or Black prospective jurors.[64] Based on these findings, the Court found that the prosecution had dismissed prospective jurors due to their race, in violation of *Batson*.[65]

As of the publication of this Case Note, the most recent Supreme Court application of *Batson* came in 2019, in *Flowers v. Mississippi*.[66] In *Flowers*, the defendant challenging the use of peremptory challenges had gone through a series of trials.[67] In deciding whether the defendant had made a successful challenge under *Batson*, the Court analyzed the prosecutors' use of peremptory challenges across all six trials, despite reviewing the challenge only in the defendant's sixth and final trial.[68] The Court additionally highlighted the technique of disparate questioning by the prosecution, in this case asking the eleven white prospective jurors 12 questions, while asking the five Black prospective jurors 145 questions.[69] Finally, the Court acknowledged that the prosecution misstated or made outright false statements to the trial court when providing racially neutral reasons for its peremptory challenges, which the Court inferred was likely intentional.[70] In recognizing this conduct as indicative of prejudice, the Court expanded the factors which can be analyzed during a *Batson* challenge to include the results from past trials.[71]

Despite the Court's incremental broadening of *Batson* since 1986, the issues outlined by Justice Marshall in his *Batson* concurrence have remained prevalent.[72] The first major *Batson* flaw is that prosecutors frequently circumvent *Batson* through the use of pretextual or fraudulent "race-neutral" reasons for dismissals.[73] Many prosecutors are trained in how to find and utilize race-neutral reasons for the use of peremptory challenges on Black prospective jurors in order to preclude a successful *Batson* challenge.[74] Others give reasons that are race-adjacent but do not

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64 *Id.* at 255–56.

65 *Id.* at 266.

66 139 S. Ct. 2228 (2019).

67 Curtis Flowers was convicted in his first three trials but all three convictions were reversed on appeal due to prosecutorial misconduct. The two following trials each ended with hung juries. *Id.* at 2235 (discussing the previous trials).

68 *Id.* at 2245.

69 *Id.* at 2246–48.

70 *Id.* at 2250.

71 *Id.* at 2245.

72 *See* Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

73 EQUAL JUST. INITIATIVE, *supra* note 4, at 16–17.

74 YouSchtupp, *Jury Selection with Jack McMahon*, YOUTUBE (Nov. 3, 2015), https://www.youtube.com/watch?v=HPIZ6pe3ScQ (last visited Feb. 15, 2023) (showing a training video created by a Philadelphia prosecutor, advising people how to find ways to strike Black prospective jurors); EQUAL JUST. INITIATIVE, *supra* note 4, at 16; *see also* People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) ("Surely, new prosecutors are given a manual, probably

actually mention race, which are frequently accepted by judges.[75] For example, some prosecutors have justified a prospective juror's dismissal on seeking to avoid an all-Black jury, on the prospective juror living in a high crime area, being unemployed, receiving welfare, or being a single parent.[76] Others have dismissed jurors because they could not "connect" with them.[77]

Batson's second major flaw is its failure to address implicit bias.[78] Implicit bias in this context is frequently harder to measure since prosecutors themselves may be unaware of their biases, yet evidence suggests it remains an issue in criminal jury selections.[79] *Batson* is concerned only with showings of purposeful discrimination, not with cases that arise unintentionally due to unconscious biases.[80] However, through unconscious or implicit bias, people have subliminal preferences towards certain races, genders, and other aspects of individuals' identities.[81] Thus, when a prosecutor dismisses a prospective juror due to reliance on an internal stereotype or because their unconscious prejudice influences the way they perceive otherwise innocuous acts, the resulting discrimination against a prospective juror may be unintentional, but it is a discriminatory action nonetheless.[82]

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entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.' It might include: too old, too young, divorced, 'long, unkempt hair,' free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, 'lived in an area consisting predominantly of apartment complexes,' single, over-educated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same 'age bracket' as defendant, deceased father and prospective juror's aunt receiving psychiatric care." (footnotes omitted)).

75 EQUAL JUST. INITIATIVE, *supra* note 4, at 16–17.

76 *Id.* at 17.

77 *Id.* at 18.

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

79 Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 841 (2012) ("Thus, attorneys often rely on stereotypes in their peremptory strikes, including unconscious stereotypes. Whereas the Batson doctrine exists to protect against purposeful discrimination by attorneys against potential jurors, the doctrine fails to protect against the implicit bias of attorneys." (footnotes omitted)); *see also* Bennett, *supra* note 13, at 150 ("[T]he Batson process . . . is thoroughly inadequate. It both allows the implicit and explicit biases of attorneys to impact jury composition . . . .").

80 *See Batson*, 476 U.S. at 96.

81 Sarah E. Fiarman, *Unconscious Bias: When Good Intentions Aren't Enough*, 74 EDUC. LEADERSHIP 10, 10 (2016).

82 Roberts, *supra* note 79, at 841–42.

B. *The New Jersey Approach:* State v. Gilmore

Batson is the quintessential case for discriminatory peremptory challenges, and many states have adopted their own, frequently identical version through their state constitutions.[83] A year after *Batson*, the New Jersey Supreme Court adopted an equivalent test, grounded in the New Jersey Constitution, in *State v. Gilmore*.[84] The New Jersey Constitution is embedded with protections against discrimination, especially in regards to access to civil rights, that go beyond those enumerated in the U.S. Constitution.[85] Article I, paragraphs 5, 9, and 10 of the New Jersey Constitution have been interpreted as guaranteeing criminal defendants the right to trial by an impartial jury, absent discrimination on the basis of race.[86] This right is also referred to as a right to a jury consisting of a "representative cross-section of the [defendant's] community."[87] This interpretation of the New Jersey Constitution was the driving force behind the state's adoption of a *Batson*-like standard.[88]

Gilmore was heavily influenced by the Supreme Court's ruling in *Batson*, and adopted a nearly identical test.[89] *Gilmore* saw all nine Black prospective jurors dismissed by the prosecution, seven via peremptory challenges.[90] The New Jersey Supreme Court ultimately held that this conduct was in violation of the state constitution[91] after implementing a new test to be used going forward.[92] Like the *Batson* test, the *Gilmore* test consisted of three steps.[93] First, the party, generally the defendant, had to object to a peremptory challenge and make a prima facie showing that the peremptory challenge was used on the basis of race.[94] The *Gilmore* court noted that the required showing is minimal and that the trial court should

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83 *See, e.g.*, State v. Gilmore, 511 A.2d 1150 (N.J. 1986).

84 *See id.* at 1164–65.

85 N.J. CONST. art. I, ¶ 5 ("No person shall be denied the enjoyment of any civil . . . right, nor be discriminated against in the exercise of any civil . . . right . . . because of religious principles, race, color, ancestry or national origin."); *id.* art. I, ¶ 9 ("The right of trial by jury shall remain inviolate . . . ."); *id.* art. I, ¶ 10 ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury . . . .").

86 *Gilmore*, 511 A.2d at 1156–58. *See generally* sources cited *supra* note 85.

87 *Gilmore*, 511 A.2d at 1158.

88 *See id.* at 1154.

89 *Compare id.* at 1163–67 (describing New Jersey's test for racially motivated peremptory challenges), *with* Batson v. Kentucky, 476 U.S. 79, 93–98 (1986) (describing the federal standard for racially motivated peremptory challenges, which is essentially identical to New Jersey's).

90 *Gilmore*, 511 A.2d at 1154.

91 *Id.* at 1169.

92 *Id.* at 1163–67.

93 *Id.*

94 *Id.* at 1164.

consider all relevant circumstances.[95] Second, the opposing party, generally the prosecution, had to state a race-neutral reason for its challenge.[96] Third, the trial court decided, in light of the first two steps, whether the peremptory challenge was based on impermissible grounds.[97] The test was essentially identical to the *Batson* test and was subsequently tweaked in *State v. Osorio* to further conform to the *Batson* standard.[98] The standard was so similar that the New Jersey Supreme Court, at times, referred to it as the *Batson*/*Gilmore* framework.[99]

II. FACTS AND PROCEDURAL HISTORY OF *STATE V. ANDUJAR*

This Part will discuss the facts of the *Andujar* case and describe how the case progressed through the New Jersey court system. The discussion will start at the trial court,[100] then progress through the Appellate Court,[101] culminating at the New Jersey Supreme Court and its ultimate holding.[102] In doing so, this Part will detail the events at trial, which led to a *Batson* issue.

A. *The Trial*

Edwin Andujar was accused of murdering his roommate in August 2014 in Essex County, New Jersey.[103] Andujar's roommate was stabbed twelve times with a knife and a witness saw Andujar holding a bloody knife on the night in question, while another heard the victim say Andujar had stabbed him and was killing him.[104] Andujar admitted to the police that he had stabbed the victim but claimed self-defense, alleging that his roommate had attacked him with a knife first.[105]

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95 *Id.* at 1164–65.

96 *Id.* at 1165.

97 *Id.* at 1166.

98 *State v. Osorio* changed the first step of the *Gilmore* test, lowering the threshold showing required to make a prima facie case, to better reflect the federal standard. 973 A.2d 365, 501–02 (N.J. 2009); *see also* State v. Andujar, 254 A.3d 606, 621 (N.J. 2021) (discussing the modifications made in *Osorio*).

99 *Andujar*, 254 A.3d at 617.

100 *See infra* Section II.A.

101 *See infra* Section II.B.

102 *See infra* Section II.C.

103 *Andujar*, 254 A.3d at 612.

104 *Id.*

105 *Id.*

Andujar's murder trial occurred from May to June 2017, with controversy arising almost immediately.[106] Issues arose surrounding the prosecution's treatment of a juror, F.G.,[107] a Black man from Newark, New Jersey.[108] F.G. was questioned for roughly half an hour, spanning over thirty pages of the trial transcript.[109] Despite consistently relaying that he believed he could be a fair and impartial juror throughout the ordeal, the prosecution repeatedly questioned his fitness to be a juror.[110] Upon being asked, F.G. informed the prosecution that he had two cousins in law enforcement, and that he knew five or six people who had been accused of committing a crime in the past.[111] Four of those individuals had been imprisoned for drug offenses—F.G. stated that he believed one was treated fairly, and while he had no opinion on the others, he had no problems with any of their prosecutions.[112] F.G. further relayed that two of his cousins had been murdered; one had been stabbed to death fifteen years earlier without the alleged killer being convicted.[113] He again asserted that he did not think those experiences made him any better or worse than any other prospective juror but that a diverse background was the point of having juries in the first place.[114] F.G. was also asked to clarify his background and he stated that, when he was younger, he had a lot of friends who hustled and sold drugs.[115] The prosecution then asked him about his work history, and finally whether he believed the criminal justice system was fair and effective.[116] F.G. provided his employment history and said he believed the system was fair.[117]

After the voir dire concluded, the prosecutor asked that F.G. be dismissed for cause.[118] The prosecutor reasoned that F.G. knew family and friends who were accused of crimes or were victims of crime, some crimes of which were similar to the crime at issue in the case at hand.[119] The prosecutor also cited F.G.'s language and how he spoke about the criminal justice system, in addition to his experience with the system

106 *Id.*
107 *Id.*
108 *Id.* at 627.
109 *Id.* at 612.
110 *Id.* at 612–14.
111 *Id.* at 612.
112 *Id.* at 612–13.
113 *Id.* at 613.
114 *Id.*
115 *Id.* at 613–14.
116 *Id.* at 614.
117 *Id.* ("F.G. responded, 'I believe so because you are judged by your peers.'").
118 *Id.*
119 *Id.*

through his family and friends.[120] Another prosecutor added that the activities of F.G.'s friends called into question whether F.G. respected the criminal justice system and would obey the rules of the court.[121] Both prosecutors implied that they did not believe he was being completely forthcoming in his answers.[122] In opposition, the defense pointed out that the prosecution's statements would apply to a large swath of Black men in Newark, and that F.G. had never implicated himself in any of his friends' activities.[123] The trial court denied the prosecution's request, citing that F.G. had continuously represented that he did not have bias against either party to the case and that he would be fair and impartial.[124]

Following the trial court's denial of the dismissal, the prosecution broke from the general norms of trial practice and took matters into its own hands.[125] After a failed attempt to dismiss a prospective juror for cause, the next step would generally be to utilize a peremptory challenge to dismiss the juror, a process which is subject to the *Batson* or *Gilmore* analysis.[126] Instead, the prosecution used its law enforcement resources to run a background check on F.G.[127] The background check found that he had a previous arrest and an outstanding warrant for his arrest.[128] Before alerting the trial judge to the situation, the prosecution notified law enforcement to arrest F.G. on his outstanding warrant.[129] Upon informing the judge of the results, the prosecution renewed its motion for a dismissal for cause, this time unopposed by the defense.[130] The prosecution justified their actions with the same concerns they raised in their motion to dismiss F.G. for cause and denied that race played a role in their actions.[131] The defense took issue with a single juror being targeted by the prosecution and requested an additional peremptory challenge to compensate for the prosecution's use of a background

120 *Id.* (quoting a prosecutor's statement that F.G. "uses all of the lingo about, you know, the criminal justice system, talked about people getting picked up, talked about people getting trigger locked, talked about CDS, talks about the lifestyle").

121 *Id.*

122 *Id.*

123 *Id.* at 614–15.

124 *Id.* at 615.

125 *See id.* at 615–17.

126 *See supra* Part I.

127 *Andujar*, 254 A.3d at 615.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* at 615–16.

check.[132] The court denied the defense's motion.[133] F.G. was arrested outside the presence of the other jurors.[134]

At the conclusion of the jury selection process, the defense had two remaining peremptory challenges, while the prosecution had one.[135] In the subsequent trial, the jury convicted Andujar.[136]

B. *The Appellate Division*

Andujar appealed to the Superior Court of New Jersey, Appellate Division, which reversed the conviction.[137] The Appellate Division did not reach the issue of whether a prosecutor may use a criminal record check during the voir dire.[138] Instead, it commented that the trial court should have applied the *Batson*/*Gilmore* analysis to the prosecutor's use of a background check.[139] However, the Appellate Division concluded that there were insufficient findings of fact regarding the prosecution's use of the background check or other challenges, making review impossible on appeal.[140] Instead, it noted that the trial court could have refused the motion for cause even with the outstanding warrant, and, as such, reversed the conviction and ordered a new trial.[141]

C. *The New Jersey Supreme Court*

The New Jersey Supreme Court largely agreed with the Appellate Division's view that the trial court ought to have applied the *Batson*/*Gilmore* analysis but went further in rendering a holding that would require substantial change to the New Jersey jury selection process.[142]

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132 *Id.* at 616.

133 *Id.* at 617.

134 State v. Andujar, 228 A.3d 236, 243 (N.J. Super. Ct. App. Div. 2020).

135 *Andujar*, 254 A.3d at 617.

136 *Id.* at 612.

137 *Id.* at 617; *Andujar*, 228 A.3d at 238.

138 *Andujar*, 254 A.3d at 617.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.* at 611, 617. This Case Note does not discuss the New Jersey Supreme Court's holding on the use of background checks on prospective jurors at length. *See id.* at 623. The court acknowledged the power disparity in running background checks since only the State may conduct criminal history checks on prospective jurors. *Id.* at 624. However, the court also acknowledged the strong interest in selecting fair juries consisting of qualified jurors. *Id.* at 626. The court held that

The New Jersey Supreme Court expanded the *Batson*/*Gilmore* analysis beyond peremptory challenges reflecting purposeful discriminatory intent to those based on implicit bias.[143] The court found that the prosecution in *Andujar* did not appear to have acted with a purposeful intent to discriminate on the basis of race.[144] However, it reiterated that the New Jersey Constitution provides a right to a jury free from racial discrimination and one that consists of "a representative cross-section of the community."[145] Given this right, the court found that it did not matter whether a prosecutor intended to discriminate, as the unconstitutional discriminatory result remains the same whether due to intentional discrimination or implicit bias.[146] Thus, the court expanded the *Gilmore* analysis to include implicit bias, acknowledging that the state test provided more protections in that regard than the federal *Batson* standard.[147]

Following the extension of *Gilmore*, the court applied the test to the facts of Andujar's case.[148] The court acknowledged that, after the prosecution's motion to dismiss F.G. for cause had been denied, the proper next step would have been to use a peremptory challenge on F.G., thus triggering *Gilmore*.[149] As such, the court engaged in a *Gilmore* analysis of F.G.'s dismissal.[150] The court found that the prosecutor in this case displayed strong evidence of implicit bias towards F.G., enough to meet the minimal burden of a prima facie *Gilmore* test.[151] The prosecutor could not rebut that finding with a legitimate, nondiscriminatory reason for the dismissal as the trial court had already discredited its given reasoning.[152] Thus, looking at the entirety of the evidence, the record established by a preponderance of the evidence that F.G.'s removal was based on impermissible group bias in violation of *Gilmore*.[153]

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parties seeking to utilize a criminal history check on a prospective juror require the trial court's permission to do so. *Id.* Such a request must be based on a reasonable, good-faith belief that the check may reveal relevant information that the parties were unlikely to discover through the voir dire process. *Id.* Law enforcement would conduct the checks, not the prosecution itself. *Id.* These changes would have prevented the prosecution's actions at Andujar's trial.

143 *Id.* at 623.

144 *Id.* at 627–29.

145 *Id.* at 620 (quoting State v. Gilmore, 511 A.2d 1150, 1158 (N.J. 1986)).

146 *Id.* at 623.

147 *Id.*

148 *Id.* at 628–31; *Gilmore*, 511 A.2d at 1155–57.

149 *Andujar*, 254 A.3d at 628.

150 *Id.*

151 *Id.* at 629.

152 *Id.*

153 *Id.*

The New Jersey Supreme Court also acknowledged that the need for systematic reform in the jury selection process was not satisfied by the mere extension of *Gilmore* and called for a Judicial Conference on Jury Selection to assist the court in creating new rules.[154] The Conference took place on November 10 and 12, 2021, and was open to the members of the Bar and public to discuss how to improve the jury selection process in New Jersey.[155] The official recommendations of the Committee of the Judicial Conference on Jury Selection were released on April 28, 2022.[156] The recommendations covered an array of topics, including some of the recommendations made in this Case Note.[157] On July 12, 2022, the New Jersey Supreme Court officially adopted most of the recommendations proposed by the Committee.[158] Several of the adopted changes will be discussed later in this Case Note.

III. ANALYSIS

A. *The Court's Extension of* Gilmore

The New Jersey Supreme Court's holding that implicit bias in the jury selection process violates the New Jersey Constitution and its extension of its peremptory challenge analysis to include implicit bias is consistent with a modern understanding of racial discrimination. Contemporary studies have recognized and supported the frequent presence of implicit bias in individuals' decision-making,[159] which can impact the decisions of judges, lawyers, and jurors.[160] Thus, New Jersey

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154 *Id.* at 631.

155 *See* N.J. CTS., NOTICE TO THE BAR AND PUBLIC: JUDICIAL CONFERENCE ON JURY SELECTION—PRELIMINARY INFORMATION AND INVITATION TO PARTICIPATE 1 (2021), https://www.njcourts.gov/sites/default/files/notices/2021/09/n210930a.pdf [https://perma.cc/9CHV-WNGD].

156 *See* N.J. CTS., NOTICE TO THE BAR & PUBLIC: JURY REFORM—RECOMMENDATIONS OF THE COMMITTEE OF THE JUDICIAL CONFERENCE ON JURY SELECTION—PUBLICATION FOR COMMENT 6 (2022), https://www.njcourts.gov/sites/default/files/notices/2022/04/n220428a.pdf [https://perma.cc/67YB-K6LA].

157 The Committee, for instance, recommends that courts continue to develop better implicit bias training for judges and gather data on reducing the number of peremptory challenges, as well as some changes to the peremptory challenge rule. *Id.* at 3–5; *see infra* Section III.C.

158 N.J. CTS., *supra* note 33.

159 Michael Brownstein, *Implicit Bias*, STAN. ENCYC. PHIL., Fall 2019, at 1, 1 ("Research on 'implicit bias' suggests that people can act on the basis of prejudice and stereotypes without intending to do so.").

160 *See* Bennett, *supra* note 13, at 151–52; *see also* Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1

must account for implicit bias to ensure the constitutional right to a jury free of racial discrimination.[161]

Implicit bias impacts all people.[162] In recent years, testing has confirmed that the prevalence of implicit bias, which occurs through schemas, shortcuts our brains' use in mental processing.[163] In utilizing schemas, our brains automatically associate people with characteristics that may not be accurate, reflecting our implicit attitudes and stereotypes.[164] Among the most prevalent implicit attitudes observed in studies are the associations of Black people, particularly Black men, with negative qualities, such as being dangerous, aggressive, and less intelligent.[165] Implicit bias becomes increasingly problematic in the courtroom, where it may impact litigation.[166] For instance, prosecutors have extensive discretion at trial, which raises issues when implicit bias tests show that the majority of Americans implicitly associate Black people with aggression and hostility.[167] These implicit biases coupled with prosecutorial discretion may at least partly explain why prosecutors are more likely to charge Black suspects than white suspects, and are more favorable in plea deals with white suspects.[168] Prosecutors also more frequently blame young Black defendants' delinquent actions on their negative personality traits.[169] Other studies have found a correlation between harsher punishment for, and prosecutorial dehumanization of, Black defendants.[170] Prosecutors are not alone either, as studies indicate that judges give harsher sentences to Black defendants than non-Black defendants.[171]

As previously discussed, *Batson*/*Gilmore* did not address implicit bias prior to *Andujar*.[172] By ignoring implicit bias, *Batson*/*Gilmore* often enabled the very process they were meant to prohibit: the use of

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POL'Y INSIGHTS FROM BEHAV. & BRAIN SCIENCES 103, 106–07 (2014); Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 180–82 (2015); Bernice Donald, Jeffrey Rachlinski & Andrew Wistrich, *Getting Explicit About Implicit Bias*, JUDICATURE, Fall/Winter 2020–21, at 75, 76–79 (discussing judges' implicit bias).

161 *See generally* N.J. CONST. art. I, ¶¶ 5, 9–10.

162 Hyman, *supra* note 15, at 41.

163 *See id.*

164 *Id.*

165 *Id.*

166 *Id.* at 41–42.

167 *Id.*

168 *Id.* at 42.

169 *Id.*

170 *Id.*

171 Donald, Rachlinski & Wistrich, *supra* note 160, at 78.

172 *See supra* Section II.C.

peremptory challenges on prospective jurors due to racial bias.[173] The *Batson* framework and its progeny permitted a prosecutor to use peremptory challenges on prospective jurors of color, even if the way they perceived the challenged juror was affected by internal racial stereotypes.[174] Furthermore, this type of biased peremptory challenge is even harder to detect, as the attorney in question might genuinely believe that their reasoning is non-prejudicial.[175] These issues necessitated change in the *Batson*/*Gilmore* analysis.

Prior to *Andujar*, New Jersey suffered from racial disparities in its juries, in part due to the discriminatory use of peremptory challenges by prosecutors.[176] In 2021, Dr. Mary R. Rose conducted one of the few in-depth studies into New Jersey's jury selection practices and New Jersey's juries' racial demographic breakdown.[177] Dr. Rose found that New Jersey's juries face the same demographic issues plaguing much of the country, with Black jurors underrepresented in every county in the state.[178] Hispanic or Latin American jurors fared slightly better across the findings of the study but were still heavily underrepresented.[179] Dr. Rose's report found peremptory challenges to be only a part of New Jersey's systematic jury selection issues that result in a racial disparity amongst New Jersey jurors.[180] The study reflected on a series of issues, going far beyond any one practice.[181]

Unfortunately, Dr. Rose prefaced her findings on peremptory challenges with a disclaimer that they may be unreliable, given the small sample sizes and difficulty measuring the use of peremptory challenges in the study.[182] Although Dr. Rose found that their impact is only one non-primary factor of many that affect the large issue of jury diversity in New Jersey,[183] her results still suggest that peremptory challenges open the door for case-specific instances of racial bias. Of the eighty-five studied trials where a peremptory challenge was used on a Black juror, 15% of the

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173 *See* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 177–78 (2005).

174 *See id.* at 208.

175 *Id.* at 177.

176 *See* MARY R. ROSE, FINAL REPORT ON NEW JERSEY'S EMPIRICAL STUDY OF JURY SELECTION PRACTICES AND JURY REPRESENTATIVENESS, at i–ii (2021).

177 *Id.* at i.

178 *See id.* at 40.

179 *Id.* at 10–11. Dr. Rose named the group as "Hispanic/Latino," defined as those who identify themselves as "Hispanic or Latin American" based on U.S. Census definitions, as opposed to defining themselves as "[n]ot Hispanic or Latin American." *Id.* at 21 n.4.

180 *Id.* at 14.

181 *Id.*

182 *Id.* at iv–v, viii.

183 *Id.* at ii, 14.

trials saw over a quarter of the Black jurors present at the venire dismissed.[184] Of the thirty-three studied cases in which no Black prospective juror made the final jury, 48% of the cases saw at least one Black juror struck using a peremptory challenge.[185] Although the primary method for dismissing prospective jurors was the dismissal for cause,[186] the numbers indicate that peremptory challenges still play a role in the removal of Black prospective jurors from these juries.[187] These numbers were even more severe for Hispanic or Latino prospective jurors.[188] In cases where at least one Hispanic or Latino prospective juror was struck using a peremptory challenge, 20% of the cases saw a quarter or more of the prospective Hispanic or Latino jurors struck.[189] Thus, although peremptory challenges may not be the primary contributor to a larger systematic elimination of prospective jurors of color, New Jersey's system permits racially skewed juries due to the use of peremptory challenges on nonwhite prospective jurors.[190]

Dr. Rose's study did not analyze how often a prosecutor's implicit bias influenced a peremptory challenge or whether any of the peremptory challenges drew a *Gilmore* challenge.[191] However, it is clear from the study that New Jersey's jury selection process results in disproportionate underrepresentation of Black jurors.[192] Thus, the New Jersey Supreme Court's decision to reinterpret the *Batson*/*Gilmore* standard partly addressed one issue impacting the diversity of New Jersey's juries.

B. *Unaddressed Constitutional Issues in* Gilmore

Although New Jersey has begun to alter *Gilmore*, the *Andujar* court did not do enough to remedy *Gilmore*'s remaining flaws, which continued to violate the New Jersey Constitution.[193] The largest remaining issue with *Gilmore* was a prosecutor's ability to give race-neutral reasons to justify a peremptory challenge, even if it was racially motivated.[194] This loophole, as well as other flaws, continued after the

184 *Id.* at 63.

185 *Id.* at 64.

186 *Id.* at 16.

187 *Id.* at 65.

188 *Id.*

189 *Id.* at 67.

190 *Id.* at 69–70.

191 *See generally id.*

192 *Id.* at 40.

193 *See generally* N.J. CONST. art. I, ¶¶ 5, 9–10. Post-*Andujar*, New Jersey adopted new rules to remedy some of the issues discussed in this Section. *See infra* Section IV.A.

194 *See supra* Section I.B.

Andujar decision to violate New Jersey's constitutional rights to a jury free of discrimination and representative of a cross-section of the community.[195]

In many jurisdictions, prosecutors are trained in how to give neutral reasons for a peremptory challenge.[196] So long as the prosecutor gives racially neutral reasons for the challenge, they will likely satisfy the second prong of the *Batson* test.[197] The reasons given need not be persuasive or even plausible, just facially race-neutral.[198] Judges are frequently willing to accept even overtly racial reasons for a dismissal.[199] As such, this allows for discrimination through the use of pretextual, facially race-neutral dismissals, or even race-adjacent dismissals if they are not explicitly motivated by race.[200] Thus, while New Jersey took the first step by extending *Batson*/*Gilmore* to implicit bias, by retaining the *Batson*/*Gilmore* standard for evaluating whether a peremptory challenge was motivated by impermissible bias, the New Jersey Supreme Court retained a key aspect of *Batson*/*Gilmore*'s preexisting flaws.[201] *Batson*/*Gilmore*'s framework permitted the prosecutor to engage in intentional racism without fear of detection and thereby failed to root out cases of the intentional bias it explicitly denounced, revealing the loopholes in its analysis.[202] This flaw has not gone unnoticed, as states have begun to close the loophole.

Washington was the first state to attempt substantial *Batson* reform, with the Washington Supreme Court issuing General Rule 37 in 2018.[203] General Rule 37 was essentially aimed at creating a lower standard for a

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195 *See generally* N.J. CONST. art. I, ¶¶ 5, 9–10.

196 EQUAL JUST. INITIATIVE, *supra* note 4, at 16.

197 *Id.*; *see also* Batson v. Kentucky, 476 U.S. 79, 94–95, 97 (1986).

198 Purkett v. Elem, 514 U.S. 765, 767–68 (1995).

199 *See, e.g.*, United States v. Clemmons, 892 F.2d 1153, 1159–60 (3d Cir. 1989) (Higginbotham, J., concurring) (denying a *Batson* claim after a prosecutor dismissed a man because he appeared Indian, so the prosecutor believed him likely to be Hindu, and stated that "Hindus tend . . . to have feelings a good bit different than ours about all sorts of things . . . and I can be more certain with an American juror" (emphasis omitted)); Davis v. State, 596 So. 2d 626, 628–29 (Ala. Crim. App. 1991) (per curiam) (denying a *Batson* claim for the dismissal of a Black juror in part because they dyed their hair blonde and noting the prosecutor's claim that Black women who do so are "not cognizant of their own reality and existence," thus implying they are unfit to serve as a juror).

200 EQUAL JUST. INITIATIVE, *supra* note 4, at 16–17; *see Clemmons*, 892 F.2d at 1160 (using religion as a race-adjacent reason); *Davis*, 596 So. 2d at 628 (using other physical characteristics in combination with race as a reason for a dismissal).

201 EQUAL JUST. INITIATIVE, *supra* note 4, at 16 (discussing the issues with the *Batson* test that *Andujar* left in place). *Compare* State v. Gilmore, 511 A.2d 1150, 1163–67 (N.J. 1986) (describing New Jersey's test for racially motivated peremptory challenges), *with Batson*, 476 U.S. at 93–98 (describing the federal standard for racially motivated peremptory challenges, which is essentially identical to New Jersey's).

202 Roberts, *supra* note 79, at 843; *see also* Bennett, *supra* note 13, at 150.

203 WASH. GEN. R. 37.

Batson challenge and limiting the opportunity for lawyers to use race-neutral reasoning to circumvent the challenges entirely.[204] To make a challenge more likely to succeed, the Washington rule alters the *Batson* test as follows: First, a party must object to a peremptory challenge and raise the issue of improper bias.[205] The objection need not make a prima facie case, just cite to the rule.[206] Second, the opposing party must state the reasons that justify the peremptory challenge.[207] The big difference comes in the trial judge's determination: the judge must decide whether an objective viewer could think that race was a factor in the use of the peremptory challenge.[208] In making that evaluation, the objective viewer is assumed to be aware of the institutional and unconscious biases that may be present in the courtroom and the historical context for those biases.[209] Thus, the Washington system retains the general framework of *Batson* but lowers the standard for finding a constitutional violation to whether an objective person *could* believe that race is a *factor* in the use of the challenge, while understanding the historical misuse of peremptory challenges.[210] This bar is much lower than the *Batson* test requiring a preponderance of the evidence showing that the peremptory challenge was based on purposeful discrimination.[211] Further, the rule explicitly bars many of the common "race-neutral" reasons used to avoid *Batson*, such as previous interactions with law enforcement.[212] Thus, the rule addresses one of the longstanding issues with *Batson*: that a prosecutor can easily circumvent the rule by giving a pretextual, race-neutral reason for the challenge.[213]

The Washington rule prevents prosecutors from circumventing *Batson*/*Gilmore* altogether, but it is not without flaws. The rule required an additional step of judicial clarification because it did not specify a remedy or a standard of review.[214] Without a remedy, it was unclear what a successful challenge amounted to under the rule, and a lack of standard

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204 Brooks Holland, *Confronting the Bias Dichotomy in Jury Selection*, 81 LA. L. REV. 165, 206 (2020).

205 WASH. GEN. R. 37(c).

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *See generally id.*

211 Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

212 WASH. GEN. R. 37(h) (barring additional reasons, such as expressing distrust of law enforcement, living in a high-crime area, or being a nonnative English speaker).

213 EQUAL JUST. INITIATIVE, *supra* note 4, at 16–17.

214 *See* State v. Jefferson, 429 P.3d 467 (Wash. 2018) (en banc).

of review left appellate courts without sufficient instruction on appeal.[215] The issue was not resolved until the Washington Supreme Court incorporated the rule into the state's existing *Batson* framework, including *Batson*'s remedy and de novo standard of review.[216]

California followed in Washington's footsteps, with the legislature enacting reform in 2021 that took effect on January 1, 2022.[217] California's law is similar to Washington's in that it lowers the standard for a successful *Batson* challenge and bars many pretextual, "race-neutral" justifications for a *Batson* challenge.[218] Learning from Washington's mistakes, California included a remedy—one that goes beyond the *Batson* remedy of seating the juror in question, and instead provides a range of remedies including seating the juror, starting selection anew, or giving the objecting party additional challenges.[219] The law also codified a de novo standard of review within the text of the law itself in order to ensure the law was properly applied.[220]

By not using the *Andujar* decision to adopt a lower burden for a successful *Batson*/*Gilmore* claim, as seen in Washington and California, the New Jersey system continued to permit racial discrimination, thereby violating its state constitutional right to an impartial jury free of discrimination.[221] Although *Andujar* extended *Batson*'s final prong to show by a preponderance of the evidence that the peremptory challenge was based on purposeful or implicit discrimination or biases,[222] the standard retained the core flaws of the *Batson*/*Gilmore* analysis by failing to introduce the objective observer standard adopted in Washington.[223] Like the Washington Supreme Court, the New Jersey Supreme Court has the power to make rules governing the state courts' administration,

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215 Annie Sloan, Note, *"What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 253–54 (2020).

216 *Id.* (discussing the rule's shortcomings and *Jefferson*'s judicial fix in more detail); *Jefferson*, 429 P.3d at 480–81 (ordering a new trial as the remedy for noncompliance with the rule); *see id.* at 482 (Madsen, J., concurring in part and dissenting in part) (arguing that the incorporation of the rule into the existing *Batson* framework was an overstep).

217 CAL. CIV. PROC. CODE § 231.7 (West 2022).

218 *Id.* § 231.7(d)–(e). California's list of barred justifications is much more extensive than Washington's, and includes dress or attire, lack of employment, and the ability to speak another language, amongst other reasons. *Id.* § 231.7(e).

219 *Id.* § 231.7(h).

220 *Id.* § 237.1(j); *cf. Jefferson*, 429 P.3d at 482–83 (Madsen, J., concurring in part and dissenting in part) (arguing for a different application of Washington's General Rule 37 because it did not include a remedy).

221 *See generally* N.J. CONST. art. I, ¶¶ 5, 9–10.

222 State v. Andujar, 254 A.3d 606, 623 (N.J. 2021).

223 *Compare* WASH. GEN. R. 37(e)–(f), *with* N.J. CTS., *supra* note 33, at 19 (introducing recommended jury selection reforms because New Jersey has yet to adopt the objective observer standard).

practice, and procedure.[224] Thus, when the court heard *Andujar*, it had the power to enact rules changing New Jersey's peremptory challenge procedure to follow the models established in Washington and California. Although the court refused to make such a sweeping change in *Andujar*, it has since adopted a version of the Washington rule, as discussed below, which has helped address the issue.[225]

C. *Retained Systematic Issues*

In *Andujar*, the New Jersey Supreme Court acknowledged the number of allotted peremptory challenges may be an issue, but did not include it in the holding.[226] Even after *Andujar*, New Jersey's peremptory challenge system may be inherently flawed due to the number of challenges afforded to the parties to a case, which risks violating the right to an impartial jury representing a cross-section of the community.[227] New Jersey courts allow up to twenty total peremptory challenges in most severe criminal cases,[228] compared to a mere ten in the federal court system.[229] By affording parties so many challenges, New Jersey risks allowing more opportunities for peremptory challenge abuse.[230]

New Jersey remains a statistical outlier nationwide in regard to the number of peremptory challenges it allows for criminal trials.[231] The state allows six peremptory challenges in civil cases, above the national mode of three,[232] and ten peremptory challenges in misdemeanor cases, by far the most in the country.[233] Nationwide, the mode is three peremptory

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224 N.J. CONST. art. VI, § 2, ¶ 3 ("The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.").

225 *See infra* Section IV.A.

226 *Andujar*, 254 A.3d at 631.

227 *Id.* at 620, 631.

228 N.J. CT. R. 1:8-3(d).

229 FED. R. CRIM. P. 24(b)(2). In most federal felony cases, the government receives six peremptory challenges, and the defendant receives ten. *Id.* If the government seeks the death penalty, that number increases to twenty challenges for each side. *Id.* at 24(b)(1). Note that in most severe New Jersey criminal actions, the government receives twelve challenges, and the defendant receives twenty. N.J. CT. R. 1:8-3(d).

230 *See* Michael O. Finkelstein & Bruce Levin, *Clear Choices and Guesswork in Peremptory Challenges in Federal Criminal Trials*, 160 J. ROYAL STAT. SOC'Y 275, 284–85 (1997).

231 *See Comparative Data*, CTR. FOR JURY STUDS., NAT'L CTR. FOR ST. CTS., https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz (click the "Peremptory Challenges" tab) (last visited Feb. 16, 2023).

232 *Id.*

233 *Id.*

challenges, and the second-highest number is six.[234] New Jersey also allows by far the most peremptory challenges in noncapital felony cases—twenty—far above the mean of six or the second-highest total of fifteen.[235]

Peremptory challenges are frequently used to remove jurors of color, thereby elevating one party's goal of winning above the goal of a fair and impartial jury.[236] There are no in-depth studies of discriminatory peremptory challenges in New Jersey specifically, nor on the impact of New Jersey's allotted sum of peremptory challenges. However, there are studies from around the nation indicating peremptory challenges are still used disproportionately to strike jurors of color.[237] Studies show that in capital punishment cases—cases generally allowing the most peremptory challenges—prosecutors strike a disproportionate number of Black prospective jurors, as well as women prospective jurors, compared to their average strike rates.[238] Furthermore, studies show that the use of peremptory challenges themselves is inherently motivated by racial dynamics.[239] One study gave two groups of attorneys the role of prosecutor and presented them with two profiles of prospective jurors.[240] The two groups were given the same descriptions of the prospective jurors, with the only variable being the jurors' race.[241] The lawyers chose to dismiss jurors 36% more often when the juror was depicted as Black.[242] The study was repeated with law students and college students, with the

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234 *Id.*

235 *Id.*

236 *See generally* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (suggesting that Black prospective jurors are more likely to be subjected to peremptory strikes than white prospective jurors); Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535 (2016) (discussing the ways peremptory challenges are used to make a jury more conservative, a guise of making the jury whiter given that the overwhelming majority of Black Americans are liberal); April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 STAN. J.C.R. & C.L. 1 (2020) (discussing modern peremptory challenge strategies, including using the challenge to promote a political ideology).

237 *See, e.g.*, EQUAL JUST. INITIATIVE, *supra* note 4, at 4.

238 David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001). The study shows that, in Philadelphia, prosecutors used strikes on Black jurors 27% in excess of their overall rate and were able to eliminate all young Black men from its pool of strike-eligible prospective jurors 56% of the time when one or more young Black prospective juror was present. *Id.* at 97–98.

239 *See* Sommers & Norton, *supra* note 236, at 262–63.

240 *Id.* at 266.

241 *Id.*

242 *Id.* at 267.

findings remaining largely consistent.[243] In reality, studies observing prosecutorial behavior confirm that prosecutors disproportionately dismiss Black jurors.[244] Given the disproportionate use of peremptory challenges, increasing the number of peremptory challenges risks increasing a party's ability to utilize peremptory challenges in a discriminatory way and influence the racial makeup of the jury.

The New Jersey Constitution provides that a defendant has the right to a jury free of discrimination on the basis of race.[245] Furthermore, the New Jersey Supreme Court has interpreted a right to a representative jury.[246] If New Jersey's current system allows parties too many peremptory challenges, it creates an opportunity for abuse that violates New Jersey's constitutional right. All things being equal, lawyers are more likely to use a peremptory challenge on a juror if they are Black, as opposed to white.[247] Thus, by allowing prosecutors an excessive number of challenges, New Jersey gives parties more opportunities to abuse peremptory challenges on a case-specific basis.[248] Even if a party has legitimate non-racial reasons for executing some peremptory challenges, the sheer number of possible challenges allows parties the opportunity to make additional, racially-biased, challenges.[249] In several counties, the number of peremptory challenges allowed to defendants in many criminal prosecutions outnumber the likely number of Black or Hispanic/Latin American venire members.[250] Thus, lowering the number

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243 Law students were 22% more likely to pick a juror if they were Black, whereas college students were 21% more likely to do the same. *Id.*

244 One recent study conducted in Mississippi courts confirms that prosecutors still disproportionately strike Black potential jurors. Whitney DeCamp & Elise DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. RSCH. CRIME & DELINQ. 3, 24–25 (2020); *see also* David C. Baldus, Catherine M. Grosso, Robert Dunham, George Woodworth & Richard Newell, *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425 (2012).

245 State v. Andujar, 254 A.3d 606, 620–21 (N.J. 2021).

246 *Id.* at 620.

247 Sommers & Norton, *supra* note 236, at 267.

248 *See* Finkelstein & Levin, *supra* note 230, at 282 (suggesting that the vast majority of peremptory challenges, about 80%, are "guess" challenges, meaning challenges that are not made for clear reasons).

249 *Id.* at 284.

250 New Jersey provides defendants with twenty peremptory challenges in most serious criminal offenses. N.J. CT. R. 1:8-3(d). In Dr. Rose's study, the average criminal trial venire size was 144 individuals. ROSE, *supra* note 176, at 28. At that venire size, Bergen, Camden, Gloucester, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, and Somerset counties would all average fewer than twenty Black venire members using the average venire compositions from Dr. Rose's study, while a party may have twenty peremptory challenges in the trial. *Id.* at 59. Using the same logic, Burlington, Camden, Gloucester, Mercer, Monmouth, Morris, Ocean, and Somerset counties would also average fewer than twenty Hispanic/Latin American venire members. *Id.*

of peremptory challenges could force parties to focus on their legitimate challenges and limit the opportunity for racially-biased challenges.[251] This aspect of peremptory challenges has not been studied in depth. The scholarly community should explore whether there is a correlation between the number of peremptory challenges and the degree of whiteness of the resulting juries.

Since the *Andujar* decision, New Jersey has begun to consider lower numbers of peremptory challenges.[252] As of September 1, 2022, New Jersey began a pilot program to experiment with new jury selection systems.[253] The program includes a reduction of peremptory challenges, with each party receiving five in most criminal cases.[254] Notably, for enumerated crimes, including kidnapping, murder, manslaughter, sexual assault, and robbery, amongst others, the prosecution receives six peremptory challenges, while the defense receives eight.[255] The pilot program provides a valuable opportunity to study whether lowering the number of challenges impacts the racial demographics of juries, as well as the impact of providing the state with fewer challenges than the defendant. The implementation of an asymmetrical number of challenges between the prosecution and defense may provide an additional safeguard against discriminatory peremptory challenges.[256] Studies show that prosecutors have a higher success rate for *Batson* claims and more often target prospective jurors of color, while the defense is more likely to target white prospective jurors, who tend to disproportionately make up jury pools and lack historic exclusions from jury service.[257] Thus, depending on the resulting impact, New Jersey ought to consider implementing an asymmetric system with fewer peremptory challenges statewide, and their findings should be useful for other states considering similar reforms.

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251 Finkelstein & Levin, *supra* note 230, at 284–85.

252 N.J. CTS., *supra* note 33, at 29.

253 *Id.* at 25.

254 *Id.* at 29.

255 *Id.*

256 *See generally* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503 (2015).

257 *Id.* at 1520–22.

D. Andujar*'s Categorical Issues*

New Jersey must expand its focus beyond racial discrimination into other categorical discriminatory issues. Although it is not the focus of this Case Note, it is important to acknowledge that peremptory challenges can be used to discriminate on bases other than race.[258] At the federal level, *Batson*'s approach for prohibiting racial discrimination in peremptory challenge use was extended to instances of gender discrimination with *J.E.B. v. Alabama* in 1994.[259] Likewise, in New Jersey, *Gilmore* extended *Batson*'s reasoning not just to issues of race discrimination but to cases involving peremptory challenges based on other marginalized identities.[260] While much of the legal community's focus has been on the use of peremptory challenges to discriminate against prospective jurors of color, the *Batson*/*Gilmore* analysis is also flawed with respect to discrimination based on other group biases.[261] Although the judicial system's focus has largely been on race-based peremptory challenges,[262] biased removal of prospective jurors based on other group identities or intersectional identities still prevent truly representational juries. Furthermore, in some cases, the *Batson* analysis has not been extended towards groups that may experience group bias.[263] Protection for

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258 *See generally* Hyman, *supra* note 15.

259 511 U.S. 127, 144–45 (1994).

260 State v. Gilmore, 511 A.2d 1150, 1164 (N.J. 1986); *see also* State v. Andrews, 78 A.3d 971, 972, 976 (N.J. 2013) (discussing the doctrine's extension to gender).

261 *See, e.g.*, Baldus, Woodworth, Zuckerman, Weiner & Broffitt, *supra* note 238, at 60 (suggesting that even among racial groups, prospective jurors of certain ages were distinctly favored or disfavored and noting, for example, the study's finding that prosecutors favored older prospective jurors over younger prospective jurors, as well as men over women); *see also* Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U. L. REV. 299, 334–35 (2017) (finding that prosecutors used 59% of their peremptory strikes on women, although that impact is somewhat mitigated by defense attorneys using roughly the same percentage of strikes on men); WILL CRAFT, PEREMPTORY STRIKES IN MISSISSIPPI'S FIFTH CIRCUIT COURT DISTRICT 6 (2017), https://www.apmreports.org/files/peremptory_strike_methodology.pdf [https://perma.cc/9BGA-3VWK] (finding that, in the studied sample, prosecutors used their peremptory challenges on women 58% of the time, a rate of 1.16 times that of men).

262 *See generally supra* Section I.A. The Court did not address discriminatory peremptory challenges based on sex, for example, until *J.E.B.* in 1994, almost thirty years after the Court began to address race-based peremptory challenges in *Swain*. *See generally J.E.B.*, 511 U.S. 127.

263 *See* Goodman v. Lands End Homeowners Ass'n of Hilton Head, Inc., 961 F.2d 211 (4th Cir. 1992) (unpublished table decision) (holding that it was not an abuse of discretion for a trial judge to allow a peremptory challenge for the stated purpose of a prospective juror being effeminate).

LGBTQ+ and gender non-conforming jurors, for example, has been non-existent at the federal level.[264]

The same implicit bias that was at issue in *Andujar* is also an issue towards other groups.[265] Despite that fact, *Andujar*'s ruling is silent as to whether it extends its analysis of implicit bias to groups other than race.[266] New Jersey's new rule on peremptory challenges does expressly prohibit the use of challenges on the basis of gender and sexual orientation.[267] However, the rule and its list of presumptively invalid justifications for peremptory challenges is still largely based on race discrimination.[268] In order to guarantee juries that consist of a representative cross-section of the community, the New Jersey Supreme Court must take further steps to address *Batson*/*Gilmore*'s flaws at eliminating group-based discrimination, implicit or intentional, beyond race. By failing to clearly do so, New Jersey continues to allow discrimination in its jury selection process.

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264 Julia C. Maddera, Note, Batson *in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 COLUM. L. REV. 195, 206 (2016). California has acted to prohibit peremptory challenges based on a juror's sexual orientation. Mark E. Wojcik, *Extending* Batson *to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1, 19–21 (2019).

265 *See* Page, *supra* note 173, at 184 ("This research has compellingly demonstrated the existence of unconscious race-[ ]and *gender-based* stereotyping." (emphasis added)).

266 State v. Andujar, 254 A.3d 606, 618 (N.J. 2021) ("[I]mplicit bias is a form of racially disparate treatment . . . ."); *see also id.* at 623 ("*Gilmore*'s reasoning, therefore, logically extends to efforts to remove jurors on account of *race* either when a party acts purposely or as a result of implicit bias." (emphasis added)).

267 N.J. CTS., *supra* note 33, at 19–20.

268 *See* Sloan, *supra* note 215, at 251 ("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.'" (quoting WASH. CT. JURY SELECTION WORKGROUP, PROPOSED NEW GR 37—JURY SELECTION WORKGROUP: FINAL REPORT 12 (2018), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf [https://perma.cc/AE9B-C9WK])). New Jersey's list of presumptively invalid reasons is almost identical, with only two additional reasons. N.J. CTS., *supra* note 33, at 20; *see also supra* Section IV.A.

IV. SOLUTIONS

A. *Adoption of the Washington/California Rules*

In the aftermath of *Andujar*, the New Jersey Supreme Court approved several rule changes to the jury selection system to align with the Washington/California rules, although ultimately the rule changes fall short of California's.[269] The new rule makes sweeping changes to the jury selection processes in New Jersey as a whole, and notably alters the *Batson*/*Gilmore* standard.[270] Under the new rule, a peremptory challenge can be used for any reason other than to exclude a prospective juror due to protected class membership.[271] Upon use of a peremptory challenge, the other party may call for a review of the challenge, at which point the challenged party states their reasons, and the judge determines whether, given the circumstances, a reasonable and fully informed person would find the challenge violated the rule.[272] This appears to be a more onerous standard than the Washington or California rules, which only require that an objective person *could* view race as a factor or that there is a *substantial likelihood* that an objective person would view race as a factor, respectively.[273] Given the documented racial disparities in its juries,[274] New Jersey should have gone further in implementing a lower burden to succeed on a challenge under the new rule, thus providing more protection for targeted prospective jurors. However, in keeping with Washington and California, New Jersey's rule provides a list of presumptively invalid bases for a challenge, encompassing many of the commonly used pretextual justifications.[275] Notably, New Jersey also instructed judges to consider disparate questioning in their analysis.[276]

New Jersey's rule improves the Washington and California rules in some ways. As previously discussed, the Washington rule initially failed

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269 *Compare* N.J. CTS., *supra* note 33, at 18–19, *and* WASH. GEN. R. 37, *with* CAL. CIV. PROC. CODE § 231.7(d)(1) (West 2022). For instance, New Jersey lowered the threshold for a successful *Gilmore* challenge and added a list of presumptively invalid justifications for a peremptory challenge. N.J. CTS., *supra* note 33, at 18–19. For a discussion of Washington and California's rules, see *supra* Section III.B.

270 N.J. CTS., *supra* note 33, at 4–11.

271 *Id.* at 18. This includes "race or color; religion or creed; national origin, nationality, or ancestry; sex, pregnancy, or breastfeeding; sexual orientation; gender identity or expression; disability; marital status or domestic partnership/civil union status; and liability for military service." *Id.* at 19–20.

272 *Id.* at 18–19.

273 WASH. GEN. R. 37(e); CIV. PROC. § 231.7(d)(1).

274 *See supra* Section III.B.

275 N.J. CTS., *supra* note 33, at 20.

276 *Id.* at 21.

to include a remedy or a standard of review, meaning there was no determined consequence for violating the rule and it was unclear how appeals should be treated by higher courts.[277] California fixed these issues, implementing a new jury selection process or new trial as a remedy and setting a de novo standard of review.[278] Although New Jersey's rule omitted a standard of review, it does include a list of remedies in the event of a violation, including reseating the juror, forfeiture of challenges, use of subsequent challenges at a sidebar, granting of additional challenges to the opposing party, dismissing the empaneled jurors and beginning the voir dire again, or a combination of the above.[279] The remedies improve on those in California's rule by providing a trial court with more options in the event of a successful challenge.[280] Further, some courts have expressed discomfort in applying Washington's de novo standard of review to assess potential racial bias when the court cannot see the appearance of the prospective juror.[281] Given that appellate courts are often overly deferential to trial courts' *Batson* challenge denials, a de novo standard of review is preferable since it forces appellate courts to assess the situation anew.[282] New Jersey has added race, ethnicity, and gender to its questionnaire, as a possible aid for appellate courts applying a de novo standard, in its pilot program, mentioned above, with the intent to implement the questions in all counties by 2023.[283] However, the questions pertaining to demographic information on the questionnaires

277 *See* WASH. GEN. R. 37; Sloan, *supra* note 215, at 253–54.

278 CIV. PROC. § 231.7(h)(2), (j).

279 N.J. CTS., *supra* note 33, at 22.

280 *Compare id.*, *with* CIV. PROC. § 231.7(h). New Jersey provides a trial court with additional options to order forfeiture of challenges and/or require future challenges to be made at sidebar. N.J. CTS., *supra* note 33, at 22. However, New Jersey does not include the catchall remedy in California's rule. *See* CIV. PROC. § 231.7(h)(5).

281 State v. Listoe, 475 P.3d 534, 545–46 (Wash. Ct. App. 2020) (Melnick, J., concurring) (discussing the difficulty of applying a de novo standard when it comes to matters of race that the judges themselves cannot see); *see also* State v. Lahman, 488 P.3d 881, 885 (Wash. Ct. App. 2021) (stating there could be difficulty in assessing discrimination when a court cannot see potential jurors).

282 *See* EQUAL JUST. INITIATIVE, *supra* note 4, at 19–23; Carlson, *supra* note 21, at 1001.

283 N.J. CTS., *supra* note 33, at 8. *See generally Jury Research Update: Getting the Most Out of Jury Questionnaires*, NAT'L LEGAL RSCH. GRP., INC., https://www.nlrg.com/our-services/jury-research-division/jury-research-publications/getting-the-most-out-of-jury-questionnaires [https://perma.cc/4K77-B7RU]. Some even suggest going further, and having jurors answer questions about their views on handling racial issues when the facts of a case make those perspectives relevant. *See, e.g.*, Joy, *supra* note 160, at 181–82; Shaila Dewan & Tim Arango, *What Are the Questions for Potential Jurors in the Derek Chauvin Trial?*, N.Y. TIMES (Oct. 5, 2021), https://www.nytimes.com/2021/03/07/us/jury-george-floyd-derek-chauvin-trial.html (last visited Nov. 27, 2022).

are voluntary for prospective jurors, which risks the omission of that information raising the same issues with a de novo standard on appeal.[284]

Although New Jersey's new rule has its successes, it is not without its shortcomings. New Jersey's list of presumptively invalid reasons for a challenge is based on Washington's rule and therefore excludes justifications that California added.[285] For instance, California's rule makes attire or the ability to speak another language presumptively invalid bases for a challenge, while New Jersey does not.[286] Further, the burden of overcoming a presumptively invalid reason is much more subjective under New Jersey's new rule. In California, a justification from the enumerated list may only be accepted if the party proves by clear and convincing evidence that the rationale was not related to the prospective juror's protected characteristic but was about their ability to be fair and impartial.[287] New Jersey's rule requires only that the party prove to the court's satisfaction that the reasoning was not related to the prospective juror's protected characteristic but was instead about their ability to be fair and impartial.[288] This standard is far less clear and leaves more to a judge's discretion, and may therefore be easier to overcome than California's rule. In combination with its higher standard for a successful challenge and shorter list of presumptively invalid bases for a challenge, New Jersey's rule falls short of California's improvements. Additionally, although New Jersey's rule addresses disparate questioning in obtaining the peremptory challenge, a party may still evade the peremptory challenge rule altogether by asking enough questions of a juror to get them dismissed for cause, even if they do not ask the same questions to other jurors.[289] Thus, New Jersey's standard may need to extend its disparate questioning analysis to some dismissals for cause.[290]

As part of its reforms, New Jersey committed itself to broadly continue to require implicit bias training for judges and their staff, and the courts should commit themselves to creating effective training.[291]

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284 N.J. CTS., *supra* note 33, at 8.

285 *Compare id.* at 20, *with* CIV. PROC. § 231.7(e).

286 *Compare* CIV. PROC. § 231.7(e), *with* N.J. CTS., *supra* note 33, at 8. California's list also includes employment in a field disproportionately worked by members of a protected class and lack of employment, which New Jersey's list does not. *Compare* CIV. PROC. § 231.7(e), *with* N.J. CTS., *supra* note 33, at 8.

287 CIV. PROC. § 231.7(e).

288 N.J. CTS., *supra* note 33, at 20–21.

289 *Accord* State v. Teninty, 489 P.3d 679 (Wash. Ct. App. 2021) (affirming a conviction when a prosecutor extensively questioned a prospective juror of color then successfully obtained a dismissal for cause).

290 *See generally* Miller-El v. Dretke, 545 U.S. 231 (2005) (discussing the issue of disparate questioning but only in the context of peremptory challenges).

291 N.J. CTS., *supra* note 33, at 9–10.

New Jersey's modified rule preserves *Batson*'s final step of a judicial evaluation and allows a party to overcome a presumptively invalid justification for the challenge by convincing the trial judge that it was not racially motivated, as addressed above. Judges are overwhelmingly white, male, and disproportionately from a prosecutorial background, as opposed to a defense background, and thus may be more likely to share a prosecutor's implicit bias or less likely to find that a prosecutor behaved in a racist manner.[292] In 2019, only 16.6% of the New Jersey judiciary identified as nonwhite,[293] while in 2021, 28.1% of its population identified as nonwhite.[294] As previously discussed, judges are prone to implicit bias.[295] One study reflects that white judges tend to carry a white racial preference and tend to be harsher on defendants when primed with Black-associated words, such as "Black," "Harlem," "rap," "afro," or "gospel," among others.[296] However, the same study indicates that judges who are made aware of their potential biases are often able to counteract their implicit racial bias.[297] Other studies corroborate that judges may be able to engage in "cognitive correction," meaning that they can correct for biases they are aware may exist.[298] Furthermore, judges are tasked with discerning the presence of implicit bias in others, an overwhelmingly difficult assignment given that, for example, lawyers may genuinely believe that their reasons for a peremptory challenge are not driven by race.[299] Judges must be adequately trained in recognizing implicit bias, both in themselves and others, to ensure that they are a neutral party in

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292 *See Diversity of the Federal Bench: Current Statistics on the Gender and Racial Diversity of the Article III Courts.*, AM. CONST. SOC'Y, https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench [https://perma.cc/N89K-ZNNH] (finding that, as of January 2022, 71.79% of Article III judges are white, while 64.86% are men); Casey Tolan, *Why Public Defenders Are Less Likely to Become Judges—and Why That Matters*, SPLINTER (Mar. 18, 2016), https://splinternews.com/why-public-defenders-are-less-likely-to-become-judges-a-1793855687 [https://perma.cc/M4ZT-LNAZ] (finding that, in 2015, 14% of President Obama's judicial appointments had worked in public defense, whereas 41% had worked in prosecution). *See generally* Donald, Rachlinski & Wistrich, *supra* note 160.

293 N.J. SUP. CT. COMM. ON MINORITY CONCERNS, 2017–2019 REPORT 34 (2019), https://www.njcourts.gov/sites/default/files/minorityrpt.pdf [https://perma.cc/59H4-LK5D].

294 *QuickFacts: New Jersey*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/NJ [https://perma.cc/J3QX-8PXZ]. In 2021, while 71.9% of New Jersey residents identified as white alone, 17.3% of New Jersey residents identified as white alone but also identified as Hispanic or Latino. *Id.*

295 *See supra* Section III.A; *see also* Bennett, *supra* note 13, at 156–58; Hyman, *supra* note 15, at 43–44.

296 Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1213 & n.86 (2009).

297 Hyman, *supra* note 15, at 44.

298 Bennett, *supra* note 13, at 157.

299 Page, *supra* note 173, at 234–35.

making a *Gilmore* determination.[300] As such, New Jersey should continue to improve its implicit bias training program for judges, focusing not just on awareness of implicit bias but on "manag[ing] . . . bias[], chang[ing] . . . behavior, and track[ing] . . . progress" to ensure training is effective.[301]

B. *Calls for Further Changes in the Jury Selection Process*

Batson's flaws have drawn attention within the legal community, and while Washington, California, and New Jersey have enacted solutions, there have been other proposals that merit discussion and consideration, even if only briefly, in this Case Note.

1. Abolition of Peremptory Challenges

One of the most prominent proposals for altering the jury selection process is the complete abolition of the peremptory challenge, a proposal which has been adopted in Arizona.[302] Justice Marshall's now-famous concurrence in *Batson* was a call to abolish the peremptory challenge in its entirety.[303] Advocates point to the peremptory challenge's racist history and modern uses to argue that the challenges are inextricably linked to racist purposes.[304] Others argue for a more limited abolition for prosecutors alone, given their disproportionate use of peremptory challenges against people of color and the high proportion of objections to such challenges made by defense attorneys.[305]

In opposition to the call for abolition, some argue that peremptory challenges eliminate the extreme prospective jurors on both sides,

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300 *See supra* Section III.A.

301 Francesca Gino & Katherine Coffman, *Unconscious Bias Training That Works*, HARV. BUS. REV., Sept.–Oct. 2021, at 114. Some authors even advocate for judges to keep personal records of their discretionary choices in areas where implicit bias plays a role so that they may study the results for early warning signs of implicit bias. Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 CT. REV. 78, 88–89 (2021).

302 *See, e.g.*, Butler Weihmuller Katz Craig LLP & Scott Frank, *Is Arizona the Beginning of the End for Peremptory Challenges?*, JD SUPRA (Sept. 9, 2021), https://www.jdsupra.com/legalnews/is-arizona-the-beginning-of-the-end-for-2765505 [https://perma.cc/VJL5-HDMF].

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

304 Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 827–30, 833–37 (1997).

305 Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1174–75 (2014).

creating a middle ground.[306] Furthermore, proponents claim the peremptory challenge gives litigants themselves more control over trials,[307] thereby increasing the perception of fairness,[308] and argue that peremptory challenges are only fair if available to both parties.[309]

In 2021, Arizona became the first state to abolish peremptory challenges,[310] which went into effect January 1, 2022.[311] Given that New Jersey is currently in the process of *Batson* reform and that there has not yet been a substantial opportunity to study the impact of Arizona's rule, the leap to total abolition of the peremptory challenge may be premature. However, Arizona's reform provides a unique opportunity to study how abolishing peremptory challenges impacts the jury composition, which may inform future changes to other states' jury selection processes.

2. Blind Voir Dire

A second proposal for reforming the jury selection process is a blind voir dire, wherein the parties to the case would not see the jurors themselves during the process but could still ask questions and uncover information.[312] Such a proposal could leave the peremptory challenge system largely untouched but be effective in minimizing bias against prospective jurors.[313] However, this would not prevent an attorney from using a peremptory challenge based on race proxies such as neighborhood, occupation, or religion.[314] A significant limitation with this proposal is the makeup of the jury selection pool in the first place.[315]

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306 Laurel Johnson, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide*, 5 U. DENV. CRIM. L. REV. 215, 224 (2015).

307 *Id.* at 228.

308 Savanna R. Leak, Comment, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution*, 111 J. CRIM. L. & CRIMINOLOGY 273, 297–98 (2020).

309 *Id.* at 302.

310 Brenna Goth, *Arizona Bans Use of Peremptory Strikes in State Jury Trials*, BLOOMBERG L. (Aug. 30, 2021, 7:01 PM), https://news.bloomberglaw.com/us-law-week/arizona-bans-use-of-peremptory-strikes-in-state-jury-trials [https://perma.cc/6ARH-GMBK].

311 *Id.*

312 Stanley P. Williams Jr., *Double-Blind Justice: A Scientific Solution to Criminal Bias in the Courtroom*, 6 IND. J.L. & SOC. EQUAL. 48, 90 (2018); *see also* WASH. CT. JURY SELECTION WORKGROUP, *supra* note 268, at 5 (illustrating that blind voir dire was proposed, but rejected, as one of Washington's alterations to its jury selection rules).

313 *See* Williams, *supra* note 312, at 90.

314 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, 1018 (1996).

315 *See, e.g.*, Mary R. Rose, Raul S. Casarez & Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378 (2018).

Dr. Rose's study suggests that the New Jersey prospective juror pool itself often is not a proportional cross-section of the community,[316] meaning that even a blind jury selection process may not assist in creating a jury consisting of a representative cross-section of the community, as guaranteed by the New Jersey Constitution.[317]

CONCLUSION

Batson has deep flaws that often result in discriminatory peremptory challenges, even though they are ostensibly prohibited by the doctrine itself.[318] Although the focus of this Case Note is New Jersey's jury selection system, *Batson* and its progeny impact the jury selection process in every state, necessitating a broader fix to ensure a more just system nationwide.[319] While, as of now, only Washington, California, Connecticut,[320] and New Jersey have amended their state equivalents of *Batson*, and Arizona has eliminated peremptory challenges altogether, other states are actively engaged in debates around the issue.[321] Several states are considering a rule modeled after Washington's *Batson* equivalent.[322] As previously mentioned, Arizona has abolished the peremptory challenge, while New York is discussing a bill to do the same in criminal cases.[323] In total, thirteen states have considered the issue in some form, with many engaging in ongoing discussion around the issue.[324]

Even as states amend their individual iterations of *Batson*, the original ruling is precedent in the federal court system. As such, *Batson* reform must occur at the national level. A transformative Supreme Court decision seems unlikely in the next decade based on the current conservative Court,[325] which has employed only limited tweaking in cases

316 ROSE, *supra* note 176, at 38, 40.

317 *See* N.J. CONST. art. I, ¶¶ 5, 9–10.

318 *See supra* Introduction; *see also* EQUAL JUST. INITIATIVE, *supra* note 4, at 5–6.

319 *See* Sloan, *supra* note 216, at 234–36; *see also* EQUAL JUST. INITIATIVE, *supra* note 4, at 5–7.

320 Connecticut's new rule was adopted in July 2022 and was effective as of January 1, 2023. CONN. PRAC. BOOK § 5-12 (2023). While not discussed in this Case Note, the Connecticut rule implements many of the same elements as California and Washington's, including an objective observer standard and presumptively invalid justifications for a challenge. *Id.*

321 Death Penalty Clinic, *supra* note 22.

322 *Id.*

323 *Id.*

324 *Id.*

325 *See* Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (Sept. 30, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html (last visited Nov. 28, 2022).

like *Flowers*.[326] However, Congress has the power to create procedural rules in federal courts as well.[327] Given that the Supreme Court is unlikely to do so, Congress must amend the *Batson* doctrine to ensure it is effective in prohibiting discriminatory peremptory challenges.

As states nationwide grapple with discrimination in the jury selection process, New Jersey has taken decisive steps to tangibly change its system. New Jersey's efforts were not without flaws, but the state created a rule vastly better than its original *Batson*/*Gilmore* standard. As states continue to debate the efficacy of their own *Batson* equivalent, New Jersey's process shines a guiding light to effective changes being made to the jury selection process, as well as to places where further reforms are needed.

326 *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2245–46 (2019) (expanding the factors that a court may assess in a *Batson* challenge to the parties' conduct in previous trials).

327 JOANNA R. LAMPE, CONG. RSCH. SERV., IF11557, CONGRESS, THE JUDICIARY, AND CIVIL AND CRIMINAL PROCEDURE 1–2 (2020). *See generally* FED. R. CRIM. P. 24 (governing how the parties in a federal criminal trial interact with prospective jurors—including their questioning and the number of available peremptory challenges).