One Step Forward, Two Steps Backward: Will Connecticut Accept the Ongoing Legacy of Racial Discrimination in Jury Selection?

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"The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box."[1]

INTRODUCTION

When the First Continental Congress met in Philadelphia in 1774, they decreed that the right to a jury of one's peers was a fundamental privilege.[2] King George III had deprived the colonists of this, and, thus, the Founding Fathers pledged "[their] lives, [their] fortunes, and [their] sacred honor" for the right to a trial by jury.[3] Since then, the right to a jury of one's peers has been at the cornerstone of American jurisprudence.[4] As the judicial system has progressed, it has become clear that the right to a jury of one's peers is not as fundamental as the Founding Fathers decreed it to be in 1774. Indeed, it was not fundamental to a large portion of the population for more than a hundred years.[5] Even after being explicitly granted the right to participate in their civic duty,[6] prosecutors and lawmakers routinely found ways to deny Black defendants a jury of their peers. Prosecutors would often use peremptory strikes to reject a juror based solely on their race, effectively excluding Black Americans from participating in juries and denying Black defendants a jury of their peers.[7]

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[1] HARPER LEE, TO KILL A MOCKINGBIRD 233 (1960).

[2] *Trial by Jury: "Inherent and Invaluable"*, W. VA. ASS'N FOR JUST., https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury.

[3] *Id.*

[4] *Id.*

[5] Deborah A. Ramirez & Nancy Gertner, *Batson v. Kentucky in the First Circuit: "The Emperor Has No Clothes"*, 83 MASS. L. REV. 58 (1998). In some states—Ohio, for example—Black Americans were not allowed to vote and, thus, could not serve on juries. Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RSRV. L. REV. 373, 376 (2004).

[6] In *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), the Supreme Court "established that the exclusion of [Black Americans] from grand and petit juries . . . violated the Equal Protection Clause, but the fact that a particular jury . . . does not statistically reflect the racial composition of the community does not in itself make . . . discrimination forbidden by the Clause." Washington v. Davis, 426 U.S. 229, 239 (1976) (discussing *Strauder* and its implications).

[7] *See, e.g.*, State v. Robinson, 846 S.E.2d 711, 717 (N.C. 2020) (discussing how in 1995 and 2011, North Carolina prosecutors were given training on using peremptory challenges to dismiss Black jurors from juries).

Racial discrimination has plagued the United States judiciary since the Founding Fathers created the nation. Over time, the country has worked to eradicate unequal treatment in the law.[8] Nevertheless, the country is still perpetuating unequal treatment of defendants and jurors. One of the clearest examples of discrimination in the legal system is the use of race-based peremptory strikes. In 1986, the Supreme Court determined that excluding a juror based solely on their race was unconstitutional in *Batson v. Kentucky*.[9] This landmark case in combatting racial discrimination in jury selection made great strides to the promise of a fundamental right to a jury of one's peers.[10] Since *Batson*'s imposition, however, it has had lukewarm success at eliminating discrimination in jury selection.[11]

Connecticut is one of a few states that have recognized the *Batson* test's ineffectiveness in preventing discrimination based on implicit bias and unequal protection of the law. In December 2019, the Connecticut Supreme Court decided to create a Jury Selection Task Force to identify and implement corrective measures for combatting the discriminatory use of peremptory challenges in jury selection.[12] This decision culminated from prosecutors frequently dismissing jurors for "race-neutral" reasons that turned on racially motivated implicit biases.[13]

In Part II, this article will address the historical use of peremptory strikes.[14] In Part III, this article will discuss the Batson test's ineffectiveness at addressing implicit bias,[15] and in Part IV, this article will discuss the high bar that *Batson* sets.[16] The remaining parts, V-IX, will compare Connecticut's response to the continued problem of racial discrimination in jury selection to that of other states who have attempted to quell the injustice

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[8] After the Civil Rights movement of the 1960s, the government progressed some and increased equal protection of the law. *See Civil Rights Movement*, HISTORY.COM (Jun. 23, 2020), https://www.history.com/topics/black-history/civil-rights-movement (commenting that at the end of the 1950s until the 1970s there was reform in equal protection of the law through education, enfranchisement, and protests that culminated in the 1964 Civil Rights Act which "guaranteed equal employment for all, limited the use of voter literacy tests and allowed federal authorities to ensure public facilities were integrated."). *Id.*

[9] Batson v. Kentucky, 476 U.S. 79, 79 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400, 402 (1991).

[10] *Batson,* 476 U.S. at 79.

[11] *See* Nathalie Greenfield et al., *Race-Based Peremptory Challenges*, CORNELL U. L. SCH., https://courses2.cit.cornell.edu/sociallaw/FlowersCase/peremptorychallenges.html (last visited Dec. 12, 2021) (examining the high bar that the *Batson* test presents but determining that the high bar is not enough to stop the discriminatory use of peremptory strikes). Specifically, the study examines the "legal ambiguity concerning evidentiary framework that is necessary for a proper understanding of empirical results in Batson cases." *Id.* It determined that the Supreme Court had upheld peremptory challenges when there was a racially motivated desire to remove African Americans from the Jury pool. *Id.*

[12] *See* State v. Holmes, 221 A.3d 407, 412 (2019).

[13] *Id.* at 411; *see also* 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, 150–51 (2010); Tania Tetlow, *How Batson Spawned Shaw-Requiring the Government to Treat Citizens as Individuals When It Cannot*, 49 LOY. L. REV. 133, 149–50 (2003) (arguing that the colorblind logic of Batson, which established race consciousness as its own constitutional harm, paved the way for the more controversial racial-redistricting cases).

[14] *See infra* Part II.

[15] *See infra* Part III.

[16] *See infra* Part IV.

that the *Batson* test continues to let into the court systems.[17] In sum, this article will discuss Connecticut's future jury system as it moves forward with prospective legislation and why the legislature may want to consider adopting retroactive legislation to right the historical wrong that *Batson* perpetuated.[18]

I. THE PROGRESSION OF PEREMPTORY CHALLENGES

Peremptory strikes are strikes for which counsel need not provide a reason for dismissing a juror.[19] Attorneys use peremptory strikes for many different reasons, and, historically, the court could not scrutinize or control the use of those peremptory strikes.[20] Accordingly, many attorneys abused this power and would dismiss jurors for no reason except for the color of their skin.[21]

In *Swain v. Alabama*, decided in 1965, the Supreme Court first determined whether Black jurors' exclusion via peremptory strikes, based solely on their race, violated a Black defendants' Equal Protection rights.[22] In that case, a Black man was indicted and convicted of rape in Alabama and sentenced to death.[23] The defendant motioned to quash the indictment, strike the trial jury venire, and void the petit jury, claiming that the prosecuting attorney had selected the jurors via "invidious discrimination."[24] The defendant based his claims on the Court's decision in *Strauder v. State of West Virginia,* where the Court held that a state statute qualifying only White people for jury duty violated the Fourteenth Amendment's Equal Protection Clause.[25] Moreover, the defendant argued that the prosecutor violated his Equal Protection rights by using his peremptory strikes to strike all the Black potential jurors based on their race alone.[26] Despite these arguments, the Court held that the defendant's Equal Protection rights were not violated when the prosecutor struck all of the Black jurors, because the defendant was only entitled to an impartial jury, not a jury that was representative of his race.[27] The Court noted, however, that if the defendant could show that there was a historical pattern of prosecutorial discrimination against jurors based solely on their race, then the court may have to address the issue because it would raise different Equal Protection questions.[28]

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[17] *See infra* Parts V–IX.

[18] *See infra* Part VI–IX.

[19] Ramirez & Gertner, *supra* note 5, at 58.

[20] H. Patrick Furman, *Peremptory Challenges: Free Strikes No More*, 22 COLO. LAW. 1449, 1449 (1993).

[21] All Things Considered, *Study: Blacks Routinely Excluded From Juries,* NAT'L PUB. RADIO (June 20, 2010, 2:18 PM), https://www.npr.org/templates/story/story.php?storyId=127969511.

[22] Swain v. Alabama, 380 U.S. 202 (1965).

[23] *Id.* at 203.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 209, 220–22.

[27] *Id.* at 208; *see also* Hugh Maddox*, Batson: From an Appellate Judge's Viewpoint*, 54 ALA. L. 316, 316 (1993) (stating, "Under *Swain*, a party could strike jurors because of their race, their color, their religion, their sex, their national origin, their economic status, or their eye color.").

[28] Furman, *supra* note 20, at 1449.

The next time the Court addressed the issue of discriminatory peremptory strikes came in *Batson v. Kentucky*.[29] The court ruled in *Batson* that prosecutors cannot dismiss jurors purely on the grounds of their race.[30] This holding held a promise of equality and the elimination of racial bias in jury selection.[31] Based on the ruling, defendants could now employ a new tool in their arsenal: a *Batson* challenge.[32] A court would still presume that prosecutors exercised peremptory strikes correctly, but now defendants could rebut the strikes with a *prima facie*[33] showing that the prosecutor issued a peremptory strike with the intent to discriminate.[34] The defendants could make a *prima facie* showing of discrimination by demonstrating that the defendant is a member of a cognizable racial group and that the prosecutor had used the peremptory strike to remove the venire person of that defendant's race.[35] *Batson*'s ruling, however, only applied to jurors who were within the same shared minority group as the defendant;[36] *Powers v. Ohio* expanded this requirement.[37]

Indeed, the *Powers* Court expanded defendants' and jurors' rights to focus on every citizen's Equal Protection right to sit on a jury.[38] This expansion solidified the Court's rationale that the juror's Equal Protection right is protected, not the defendant's Equal Protection right.[39] In sum, the court held the defendant and the juror shared a common interest in the discriminatory use of a peremptory strike.[40] The Court recognized that the Equal Protection Clause protected the juror from being discriminated against, but because it was unlikely that a juror would request remedy for being struck, the court grants the defendant standing to sue on behalf of the juror.[41] *Powers* rebutted the claim that a defendant can only object to a juror's peremptory strike who is within his shared minority status.[42] This holding led to the expansion of the right to challenge peremptory strikes

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[29] Batson v. Kentucky, 476 U.S. 79 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991); Furman, *supra* note 20, at 1449.

[30] Furman, *supra* note 20, at 1449; *see* Maddox, *supra* note 27, at 317 (discussing how the Supreme Court further emphasized that *Batson* prohibits the striking of jurors based on the race of the juror or the racial stereotypes held by the party in *Georgia v. McCollum*); Georgia v. McCollum, 505 U.S. 42, 59 (1992).

[31] Furman, *supra* note 20, at 1449.

[32] *Id.*

[33] LEGAL INFO. INST., *Prima facie*, https://www.law.cornell.edu/wex/prima_facie (last visited Jan. 3, 2022) ("Prima facie may be used as an adjective meaning 'sufficient to establish a fact or raise a presumption unless disproved or rebutted."').

[34] Ramirez & Gertner, *supra* note 5, at 58–59.

[35] *Id.* at 58.

[36] *Id.*; Batson v. Kentucky, 476 U.S. 79, 79 (1986).

[37] *See* Powers v. Ohio, 499 U.S. 400, 402 (1991) (expanding *Batson* rights).

[38] Furman, *supra* note 20, at 1450.

[39] *Id.*

[40] *Powers*, 499 U.S. at 413.

[41] *Id.* at 413–14; *see also* Furman, *supra* note 20, at 1450.

[42] Patricia McHugh Lambert & Mindy Mintz, *Batson: It's Not Just for Criminals Anymore*, 25 MD. BAR J. 36 (1992).

based on discriminatorily motivated claims to any race or gender, regardless of the defendant's race or gender.[43]

To recap the process, once a defendant has made a challenge to a peremptory strike based on racially motivated claims, he must bring a *prima facie* case showing that the prosecutor dismissed the potential juror based on their race by a preponderance of the evidence.[44] Then, it is up to the judge to decide whether or not the defendant reaches that standard.[45] The Court stated in *Batson*, "we have confidence that trial judges experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenge creates a prima facie case of discrimination."[46] As such, it is the judge's discretion and ultimate judgment as to whether a peremptory strike was discriminatory and violated the venire person's Equal Protection rights, and, thus, the defendant's Equal Protection rights.[47] Unfortunately, not all judges live up to the confidences that the *Batson* court instilled into them.

II. THE INEFFECTIVENESS OF THE *BATSON* TEST AT RESOLVING RACIAL DISCRIMINATION IN JURIES

It has been the subject of many law review articles,[48] and a few scathing judicial opinions,[49] that the *Batson* test does little to eliminate racial discrimination in jury selection because it only applies to purposeful discrimination and does not address implicit bias.[50] The current test does a poor job of reducing the discrimination of defendants by juries because the

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[43] *Id.* at 37.

[44] *Id.* at 36. This showing must be made by a preponderance of the evidence; not the highest standard possessed by the court. Under this standard it is, however, easy to rebut the challenge that a defendant makes and show that there was an underlying facially neutral reason that the prosecutor dismissed the juror. *Id.*

[45] *Id.*

[46] Batson v. Kentucky, 476 U.S. 79, 97 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991).

[47] Cheryl A.C. Brown, Comment, *Challenging the Challenge: Twelve Years after Batson, Courts Are Still Struggling to Fill in the Gaps Left by the Supreme Court*, 28 U. BALT. L. Rev. 379, 419–20 (1999).

[48] *See* Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection,* WIS. L. REV. 501 (1999); Lynn E. Blais, *The Problem with Pretext*, 38 FORDHAM URB. L. J. 963, 978–79 (2011); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001); Tanya E. Coke, *Lady Justice May Be Blind, but is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 333–50 (1994); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMPLE L. REV. 369 (1992).

[49] *See* State v. Saintcalle, 309 P.3d 326 (Wash. 2013) (creating a jury-selection task force to address implicit bias not covered by *Batson*); State v. Robinson, 846 S.E.2d 711 (N.C. 2020) (discussing why North Carolina created legislation to combat racial discrimination in jury selection); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (claiming that the *Batson* rule "in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact" (quoting Brown v. North Carolina, 479 U.S. 940, 941–942 (1986))); United States v. Nelson, 277 F.3d 164, 207–08 (2d Cir. 2002) (holding that *Batson* forbids district courts from adding and subtracting jurors in order to achieve a racially and religiously diverse jury).

[50] Jigar Chotalia & Richard Martinez, *Limitations of the* Batson *Analysis in Addressing Racial Bias in Jury Selection*, 46 J. AMER. ACAD. PSYCH. L. 533 (2018) (discussing how a prosecutor can justify a strike with the presentation of a race-neutral reason).

test effectively eliminates diverse jurors.[51] The *Batson* test requires that the party challenging a peremptory strike make a prima facie case that the juror was dismissed based on their race.[52] This is not a high bar to meet. The prima facie requirement is easily dismissed if the party who issued the strike can present a "race-neutral"[53] reason for dismissing the juror.[54] As such, this requirement of presenting a "race-neutral" reason creates a problem because the courts overlook implicit biases and accept the pretextual "race-neutral" reason.

A. Purposeful Discrimination

The Equal Protection Clause's core guarantee is to ensure citizens that the United States will not—and cannot—discriminate based on race.[55] This Clause comes from the Fourteenth Amendment, which states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[56] The Supreme Court, in *Washington v. Davis*,[57] has interpreted the Equal Protection clause to require purposeful discrimination.[58]

In *Batson*, the Court held that the guarantee of the Equal Protection Clause would be meaningless if the Court approved of the exclusion of Black jurors based on assumptions that Black jurors would be biased toward a Black defendant solely because of his race.[59] Thus, the Court held that if a defendant makes a timely objection to the removal of all Black persons on the venire and the court decides that the facts establish, prima facie, purposeful discrimination, and the prosecutor does not have a race-neutral reason for the strike, the strike is unconstitutional based on the Equal Protection Clause.[60] The Supreme Court, however, has not acknowledged that implicit biases not covered by the *Batson* test violate the Equal Protection Clause as well.[61] In its interpretation of the Equal Protection Clause, the Supreme Court created a baseline protection for defendants and jurors but required other courts to adopt enhanced rules if they want a higher degree of protection. As such, *Batson* merely applies to the "purposeful discrimination" test put forth by the Supreme Court in *Washington v. Davis*

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[51] One of Connecticut's issues was how to reduce implicit bias by jurors once they are in the jury box. To solve that issue, Connecticut implemented new jury instructions and other protections. *See infra* notes 239–252.

[52] Lambert & Mintz, *supra* note 42.

[53] A "race neutral" reason is any reason a prosecutor can put forth for dismissing the juror that does not turn on the juror's race (*e.g.*, fear or distrust of the police).

[54] Chotalia & Martinez, *supra* note 50.

[55] Batson v. Kentucky, 476 U.S. 79, 97–98 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991).

[56] U.S. CONST. amend. XIV, § 1.

[57] Washington v. Davis, 426 U.S. 229 (1976).

[58] *Id.* at 253 (Stevens, J., concurring) (discussing the purposeful discrimination requirement that the court imposed in the majority opinion). The Supreme Court has not recognized implicit discrimination as violating the Equal Protection Clause. *Id.* at 239.

[59] *Batson*, 476 U.S. at 97–98.

[60] *Id.* at 100.

[61] *See infra* notes 64–69.

in the context of peremptory strikes, while ignoring the other forms of discrimination that come into play, such as implicit bias and disparate impact.[62]

B. Implicit Bias

The inherent problem with the Court's analysis in *Batson* is that it does not consider reasons for striking that *appear* to be race-neutral reasons but are, in fact, reasons for removal borne from implicit biases. Every person brings with them their own biases from their unique human experiences.[63] Some of those biases are implicit. Judge Mark W. Bennett describes implicit biases as "the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement."[64] An example of implicit bias, given by Judge Bennett to explain his definition, is a White person walking down the street in a predominantly Black neighborhood, hearing footsteps behind him, and beginning to think he will be robbed, only to turn around and see a White person behind him and feel relieved and safe.[65] The implicit bias elicited here is that a White stranger is safer than a Black stranger.[66]

Implicit biases are mental shortcuts that provide faster ways to digest information and make connections, but they are not conscious connections.[67] Because implicit biases are subconscious, it is challenging to elucidate precise biases. These connections are made by stereotyping individuals and subconsciously making assumptions about the individual based on learned cultural and social cues.[68] In an attempt to research and study implicit biases, Project Implicit, "a non-profit organization and international collaborative network of researchers investigating implicit social cognition," was created in 1998 to advance scientific knowledge about stereotypes, prejudice, and other biases. Project Implicit has collected data via fourteen Implicit Association Tests ("IAT"); this paper will only discuss the Race IAT, which began in 2002.[69] The test includes one standard IAT, sets of explicit measures on racial attitude, personality and political opinion questions, and sets of demographic questions.[70] After taking the test, the website asks

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[62] *See Batson*, 476 U.S. at 97–98; *Washington*, 426 U.S. at 245–46.

[63] Tania Tetlow, *Solving Batson,* 56 WM. & MARY L. REV. 1859, 1877 (2015).

[64] Bennett, *supra* note 13, at 149.

[65] *Id.*

[66] *Id.*

[67] Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 81–82 (2020).

[68] *Id.*

[69] Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36 (2007). The anonymous data collected on the Project Implicit Demonstration website is publicly available so that scientists, journalists, educators, and others can use it to understand attitudes and stereotypes better. Project Implicit also maintains a list of published research papers that utilize data from the Project Implicit Demonstration website. *Id.*

[70] *About the IAT*, PROJECT IMPLICIT, https://www.projectimplicit.net/resources/about-the-iat/ (last visited on May 21, 2022). "The Implicit Association Test (IAT) measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g.,

debriefing questions about how respondents thought about their IAT score after completion.[71] The IAT "measures the strength of associations between concepts (e.g., Black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)."[72] The main point is that it is easier to respond when closely connected objects have the same answer key.[73] The test then gives a score of "slight," "moderate," or "strong."[74] The labels "slight," "moderate," or "strong" reflect the implicit preference's strength based on how much faster the respondent responds to the stimulus.[75]

From 2002 to 2017, there were 7,569,219 session IDs created for the Race IAT, and the overall completion rate was 45.1%.[76] Over 4 million participants completed the standard IAT part of the test, or 60.9% of the participants.[77] The tests' results indicate that almost every person has implicit biases that affect their perception of race.[78] These biases are subconscious and affect the person's view of a race and the characteristics associated with that race.[79] These biases impact perception and, as Professor Jerry Kang, of UCLA Law, states:

> There is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the IAT, predicts disparate behavior toward individuals mapped to that category. This occurs notwithstanding contrary explicit commitments in favor of racial equality. In other words, even if our sincere self-reports of bias score zero, we would still engage in disparate treatment of individuals on the basis of race, consistent with our racial schemas. Controlled, deliberative, rational processes are not the only forces guiding our behavior. That we are not even aware of, much less intending, such race-contingent behavior does not magically erase the harm.[80]

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athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key." *Id.*

[71] *See id.* The Race IAT is available on the Project Implicit demonstration website, https://implicit.harvard.edu/implicit/selectatest.html. To try, click on "Race IAT". PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/selectatest.html (last visited Jan. 3, 2022).

[72] *Id.*

[73] *Id. See also* Artika R. Tyner, *Unconscious Bias, Implicit Bias, and Microaggressions: What Can We Do About Them?*, AMER. BAR ASS'N. (Aug. 26, 2019), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/july-august/unconscious-bias-implicit-bias-microaggressions-what-can-we-do-about-them/ (stating that "implicit and explicit biases are related but distinct mental constructs.").

[74] PROJECT IMPLICIT, *supra* note 70.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] PROJECT IMPLICIT, https://osf.io/acqrh/ (last visited Jan. 3, 2022).

[79] *Id.*; *see also* Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISC. 210, 220–22 (2012) (discussing how implicit bias, specifically in the tragic death of Trayvon Martin, impacts the perception of a person based on their race alone).

[80] Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005) (internal citations omitted). *See also* Feingold & Lorang, *supra* note 79, at 222.

The test raises awareness and understanding of what implicit biases are, but the awareness must stem further than just acknowledging the existence of implicit biases.[81] When examining the *Batson* test, it is essential to remember that prosecutors, defense attorneys, judges, and defendants are all imperfectly human. These people were all forged in different circumstances, and they all come into the same trial with different heuristics, views of the world, and understandings. People rely on social schemas, or heuristics, in order to make sense of, classify, and predict how people will act or behave.[82] Generally, a decision-maker will use a person's salient characteristics to categorize them.[83] A study by psychologist Patricia Devine showed that even when presented with material shown so quickly that the observer does not consciously register it, the observer may trigger racial heuristics.[84] Further, when an attorney must explain why he dismissed a juror, as he is required to do when challenged, the attorney may, in good faith, think that he has identified race-neutral reasons without understanding that his own heuristics and unconscious biases distorted his decision.[85] As Florida International University College of Law Professor Antony Page states, an attorney may have "actually struck on the basis of race or gender, but she plausibly believes she was actually striking on the basis of a race- or gender- neutral factor. Because a judge is unlikely to find pretext, the peremptory challenge will have ultimately denied potential jurors their Equal Protection rights."[86]

By allowing defendants to challenge a prosecutor's peremptory strike of a juror if the strike seems to be racially motivated but accepting a facially neutral reason, the court allows the attorneys' implicit biases to impact the jury.[87] Moreover, the person with the power to decide whether a peremptory strike was racially motivated, the judge, is also a victim of her own implicit biases. A 2009 study found that judges "harbor the same kinds of implicit biases as others; that these biases can influence their judgment."[88] Further, judges "probably engaged in cognitive correction to avoid the appearance of

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[81] Project Implicit contends that no one should use the information from their data to determine someone's racial preference or determine if someone should or should not serve on juries. The test, however, can be used to understand implicit biases and help bring awareness to the potential effects of biases if left unchecked. As with any study, there is criticism of the methods and legitimacy of the test results. In general, the study has vastly expanded our knowledge and expectations of biases. For an in-depth look at the test's criticism, *see, e.g.*, Beth Azar, *IAT: Fad or Fabulous?*, APA (2008), https://www.apa.org/monitor/2008/07-08/psychometric.

[82] Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 210 (2005).

[83] *Id.* at 211 (finding that race, ethnicity, and gender are the most salient features).

[84] *Id.* at 213 (citing Patricia G. Devine, *Stereotypes and Prejudice: The Automatic and Controlled Components,* 56 J. PERSONALITY & SOC. PSYCH. 5, 8–9 (1989)).

[85] *Id.* at 234–35.

[86] *Id.* at 235.

[87] *Id.*

[88] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1195 (2009) (stating, "but that given sufficient motivation, judges can compensate for the influence of these biases.").

bias."[89] The judge in any given case may not recognize that an attorney dismissed a juror for a racially motivated reason, and the judge may engage in cognitive correction and accept the race-neutral reason while dismissing the racial bias pretext.

The *Batson* test is flawed because it does not recognize pretextual, implicit biases.[90] The Supreme Court's interpretation of the Equal Protection Clause is limited solely to intentional discrimination and is too narrow to achieve racial justice.[91] Moreover, the *Batson* test requires a challenge to a peremptory strike, and the strike is only unconstitutional if the lawyer purposefully discriminates in that strike.[92] The courts that employ the test almost always find no purposeful discrimination because the discrimination itself is often not *purposeful*.[93] Nevertheless, biases, stereotypes, schemas, and heuristics, while not purposeful, can lead to the same discrimination as purposeful discrimination.[94] Justice Marshall forewarned of these biases in his concurrence in *Batson*, stating:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported**. . . .** Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels- a challenge I doubt all of them can meet.[95]

The *Batson* test perpetuates a legal fiction by allowing the attorneys' and judges' implicit biases to go unchecked during jury selection.[96] For courts to meet the Equal Protection Clause's underlying purpose, this test must be changed to include implicit bias, and the courts must remove the requirement that defendants show intentional discrimination by the prosecutor to succeed.

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[89] *Id.* at 1223.
[90] *Id.*
[91] State v. Holmes, 221 A.3d 407, 411–12 (2018).
[92] Rachlinski et al., *supra* note 88; *see also supra* notes 27–35 and accompanying text.
[93] Bennett, *supra* note 13, at 161.
[94] Page, *supra* note 82, at 208.
[95] Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).
[96] Bennett, *supra* note 13.

III. THE HIGH BAR THAT *BATSON* SETS AND THE EFFECTS OF LOWERING IT TO INCLUDE IMPLICIT BIAS

The requirement of a prima facie case sets a high bar for success for defendants, but it also results in a potent remedy: a new trial.[97] Even when the defendant is found guilty, the court must order a new trial if it finds racial discrimination in the jury selection process.[98] The new trial for a guilty defendant may create an empirical loop of remand, a new trial, challenge, remand, a new trial, challenge, and onward because of continuing structural errors, not because the defendant is innocent. Indeed, even when there are explicit, purposeful discrimination cases, they may fail to produce infallible conclusions of a biased jury due to the "sensitive and subtle nature of the *Batson* inquiry, the passage of time, the fallibility of human memory, and the subconscious nature of racial bias."[99] Moreover, lowering the bar from purposeful discrimination to include implicit bias would burden judicial resources and give defendants who had been convicted based on overwhelming evidence of guilt a second chance. There is often a price to pay, however, when changing a flawed system so that it functions equally to everyone.

The Founding Fathers created this country on the belief that a defendant is innocent until found guilty.[100] While it may seem like a waste of resources to correct subtle mistakes of racism in jury selection when there is overwhelming evidence of guilt, the legal system was created in such a way that "it is better a hundred guilty persons should escape than one innocent person should suffer."[101] Moreover, it is impossible to effectively decide guilt under the shadow of racial discrimination. The legal system must adjust, even at the cost of judicial resources and time.

IV. OTHER STATES' LEGISLATION

It is not a novel idea that *Batson* is ineffective. Authors have written numerous articles, opinions, and papers about how ineffective the *Batson* test is in eliminating racial discrimination in jury selection.[102] This article

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[97] William H. Burgess & Douglas G. Smith, *The Proper Remedy for a Lack of* Batson *Findings: The Fall-Out from* Snyder v. Louisiana, 101 J. CRIM. L. & CRIMINOLOGY 1, 3 (2011). Practically speaking, this seldom happens.

[98] It is the position of this article that a *Batson* violation can never be a harmless error, no matter how strong the evidence of the defendant's guilt.

[99] Burgess & Smith, *supra* note 97, at 27.

[100] *Id.* Of course, at the time of the county's founding there was unequal protection of the law that must be acknowledged. Looking to the "innocent until found guilty" notion alone we see that it has nevertheless persevered through the passage of time and is still a part of the judicial system today as the presumption of innocence. Kenneth Pennington, *Innocent until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 110 (2003).

[101] Letter from Benjamin Franklin to Benjamin Vaughn (Mar. 14, 1785), *in* THE WORKS OF BENJAMIN FRANKLIN, (John Bigelow ed., 11th ed. 1904).

[102] *See* Tania Tetlow, *Why* Batson *Misses the Point*, 97 IOWA L. REV. 1713 (2012) (discussing how *Batson*'s ineffectiveness means the courts and legislature must reevaluate the entire peremptory challenge system as a whole); Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise*

argues that the two approaches outlined below are better equipped to handle racial discrimination in jury selection—prospective approaches and retroactive approaches.

States that implement prospective approaches are focused on creating legislation that will eliminate racial discrimination in future trials.[103] States that implement retroactive approaches seek to give reparations to defendants who have been impacted by racial discrimination in their jury selection and subsequent trials.[104] Connecticut should consider implementing both approaches.

A. Prospective Approach: Washington

The first state to strengthen *Batson*'s intentional discrimination requirement and implement a prospective plan to address implicit bias in jury selection was Washington.[105] The Supreme Court of Washington became the first court to adopt a court rule, General rule 37 ("GR37"), to prevent implicit and institutional bias.[106] This decision stemmed from a 2011 task force report, which stated that implicit biases play a role "[w]hen policymakers determine policy, when official actors exercise discretion, and when citizens proffer testimony or jury service."[107] The Washington Supreme Court created its task force in the hopes of ending the pervasive role that racism and bias had been playing in Washington's legal system.[108]

The Washington Supreme Court used the case *State v. Saintcalle* to discuss the failures of *Batson* and expand protections against racial bias.[109]

Unfulfilled, 58 UMKC L. REV. 361 (1990) (analyzing how *Batson* reform fails to combat racial discrimination in juror selection); Robin Charlow, Batson *Blame and its Implications for Equal Protection Analysis,* 97 IOWA L. REV. 1489 (2012) (discussing how *Batson* failed to live up to its promise); Nancy S. Marder, Foster v. Chatman*: A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137 (2017) (arguing that the Supreme Court must reexamine *Batson* and how it has failed to prohibit racial discrimination in jury selection); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters,* 1994 WISC. L. REV. 511, 524 (1994) (arguing that *Batson* is part of a "flawed methodology for eliminating racist influence in the jury selection process and supported by naive assumptions regarding the influence of race on the judicial process"); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy,* 22 REV. LITIG. 209, 214 (2003) (arguing that *Batson's* burden-shifting framework makes trial judges "more willing to accept proffered race-neutral explanations for alleged discriminatory use of peremptory challenges, no matter how suspect"); Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective,* 64 U. CHI. L. REV. 809, 835 (1997) (attacking as absurd the idea that the court can abrogate a right to be on a jury for "a universe of other unstated and unstatable reasons" but not for other specific reasons).

[103] *See infra* notes 106–120 and accompanying text.

[104] *See infra* notes 154–152 and accompanying text.

[105] Annie Sloan, "*What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233, 236 (2020).

[106] *New Rule Addresses the Failings of U.S. Supreme Court Decision,* AM. C.L. UNION (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury.

[107] Res. Working Grp. & Task Force on Race & The Crim. Just. Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 629 (2012).

[108] Sloan, *supra* note 1055, at 242.

[109] *Id.* at 245; *see* SeattleU, *Task Force 2.0*, KOREMATSU CTR. (Feb. 12, 2021), https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives-and-projects/race-and-criminal-justice-task-force/#d.en.3780216.

In that case, the jury convicted a Black man of first-degree felony murder.[110] The defendant raised a *Batson* challenge during *voir dire* after the state used a peremptory challenge to strike the only Black venireperson.[111] The state gave two "race-neutral" reasons for its strike.[112] The first reason was that the juror was inattentive during *voir dire*, and the second was that the juror's friend had recently been killed—making the juror biased vis-à-vis race-neutral reasons.[113] The trial court accepted these reasons as race-neutral and denied the *Batson* challenge.[114] The case was appealed and ended at the highest court of Washington where Justice Charlie Wiggins, writing for the Washington Supreme Court's plurality opinion, used this case to set forth recommendations on how to change *Batson*'s framework by abandoning the purposeful discrimination requirement and recognizing the problem of unconscious bias.[115] The problem with purposeful discrimination is, as Justice Wiggins stated, is that:

> [R]acism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.[116]

Even with Justice Wiggin's wise words ringing true, the court did not decide sua sponte to replace *Batson* and, instead, affirmed the conviction.[117] The court then began its task of creating a court rule by reaching out to the public for comments and solutions.[118]

Based on the decision in *Saintcalle*, the American Civil Liberties Union ("ACLU"), at the behest of Washington's Supreme Court, began drafting GR37, which included two significant changes: (1) it proposed a shift from the prevention of purposeful discrimination to the prevention of "intentional or unintentional, unconscious, or institutional bias," and (2) the ACLU

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[110] State v. Saintcalle, 309 P.3d 326, 332–34 n.1 (Wash. 2013) (plurality opinion), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

[111] Sloan, *supra* note 105, at 245.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] State v. Saintcalle, 309 P.3d 326, 335 (Wash. 2013) (plurality opinion), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

[117] *Id.* at 332 n.1 (discussing the 2011 report from Washington's Race and Equal Justice Task Force).

[118] AM. C.L. UNION WASH., *GR 9 Cover Sheet Suggested Change to the General Rules: Rule 36 Jury Selection* (July 14, 2016) (to be codified at Wash. Ct. Gen. R. 37), https://perma.cc/54WN-NCP4?type=image.

comments listed reasons that would *presumptively* be invalid because of bias.[119] After the ACLU submitted its work and the public comment period ended, the Washington Supreme Court created its task force to clarify the differing positions of prosecutors, judges, defense attorneys, bar associations, and others.[120] The group met and worked to create a rule that the Supreme Court could add to *Batson's* framework.[121] In April 2018, the Washington Supreme Court unanimously approved a highly protective rule.[122]

This new rule laid out the process for objecting: "[a] party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own."[123] Upon an objection to the use of a peremptory challenge, the party who exercised the peremptory challenge will then "articulate the reasons the peremptory challenge has been exercised."[124] The court will then decide, and if "the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied," and the judge will reinstate the juror to the trial.[125] Additionally, the rule explicitly states that everyone has implicit, institutional, and unconscious biases that result in the unfair exclusion of jurors, acknowledging that implicit bias plays a role in jury selection.[126] The rule then lays out the circumstances to be considered when making its determination:

> (g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:
>
> (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
>
> (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
>
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

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[119] *Id.*
[120] Sloan, *supra* note 105, at 250.
[121] *Id.* at 253.
[122] *Id.*
[123] WASH. CT. GEN. R. 37 (c).
[124] *Id.* at (d).
[125] *Id.* at (e).
[126] *Id*. at (f).

> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
> (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or past cases.[127]

Finally, the rule lays out reasons for peremptory strikes that are presumptively invalid due to their improper discrimination:

> (h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:
>
> (i) having prior contact with law enforcement officers;
> (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
> (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
> (iv) living in a high-crime neighborhood;
> (v) having a child outside of marriage;
> (vi) receiving state benefits; and
> (vii) not being a native English speaker.
>
> (i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed promptly. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.[128]

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[127] *Id.* at (g).

[128] *Id.* at (h)–(i). This section is significant because it shows that some "race-neutral" reasons are grounded in implicit bias. Moreover, this section acknowledges that the court can recognize that these reasons for striking a juror are *presumptively* biased.

The Washington Supreme Court completed its new rule by implementing the objective test outlined in GR37 in *State v. Jefferson*.[129] *Jefferson* occurred before GR37 was added to the books; nevertheless, the Supreme Court of Washington rejected *Batson*'s purposeful discrimination requirement explicitly in that case and used the framework from GR37 in its decision.[130] In *Jefferson*, the majority explained that by applying the objective observer test, the prosecution's exclusion of a Black juror may result from implicit bias and needed to be reversed and remanded.[131]

While Washington created added protections against discrimination for jurors and defendants, Washington ultimately chose not to eliminate peremptory challenges. Despite this, two of Washington's Supreme Court Justices have openly expressed that they are in favor of eliminating peremptory challenges instead of reforming or "simply tinkering with" *Batson.*[132] In fact, Justices Yu and Stephens call for "complete abolishment of peremptory challenges."[133] The two main arguments for abolishing peremptory challenges are that (1) peremptory challenges continue the ongoing historical wrong of "underrepresentation of minority groups on juries," and (2) attorneys would still be able to remove jurors "for cause" if they deemed it necessary.[134] Furthermore, in *Batson*, Supreme Court Justice Marshall called to eliminate peremptory challenges because the goal of eliminating discrimination in jury selection "can be accomplished only by eliminating peremptory challenges entirely."[135]

The working group for Washington's GR37 explained that they chose not to eliminate peremptory challenges because they "concluded that [peremptory challenges] are still useful as long as they are not based on the race or ethnicity of potential jurors."[136] Thus, Washington state determined that the benefits of keeping peremptory challenges outweighed the detriments.[137]

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[129] Sloan*, supra* note 105, at 253; *see* State v. Jefferson, 429 P.3d 467, 470 (Wash. 2018) (plurality opinion).

[130] *Jefferson*, 429 P.3d at 470.

[131] *Id.*

[132] City of Seattle v. Erickson, 398 P.3d 1124, 1133 (Wash. 2017) (Stephens, J., concurring).

[133] *Id.* at 1134 (Yu, J., concurring) (citing State v. Saintcalle, 309 P.3d 326, 335 (2013) (González, J., concurring), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (2017)).

[134] *Id.*

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

[136] JURY SELECTION WORKGROUP, PROPOSED NEW GR 37—JURY SELECTION WORKGROUP FINAL REPORT 3 (2017).

[137] *Id.* The working group does not discuss what the benefits are for keeping peremptory challenges, but legal scholars generally agree that there are four purposes: "[1] The peremptory challenge allows litigants to secure a fair and impartial jury. [2] It gives the parties some control over the jury selection process. [3] It allows an attorney to search for biases during the selection process without fear of alienating a potential juror. If, for example, a juror appears offended by the nature of the questioning, that juror can be excluded even if the answers she gives do not demonstrate bias. Finally, [4] the peremptory challenge serves as an insurance policy when a challenge for cause is denied by the judge and the challenging party still believes that the juror is biased." *Jury - Should the Peremptory Challenge Be Abolished? - Batson, Challenges, Race, and Gender*, LAW JRANK, https://law.jrank.org/pages/7925/Jury-SHOULD-PEREMPTORY-CHALLENGE-BE-ABOLISHED.html (last visited Jan. 3, 2022).

It has been about three years since GR37's enactment, and it could be too early to accurately determine long-term effects or ramifications.[138] Annie Sloan of the California Law Review, however, interviewed members of the ACLU workgroup, leaders of the groups that engaged in the court's workgroup, and criminal lawyers who submitted public comments from September-November of 2018, to assess the effects of GR37 in the Washington court system.[139]

The first issue that Sloan reported concerned the administration of the new standard.[140] GR37 states that if a court decides that an impartial observer could see race as a consideration in using the peremptory challenge, the court would have to dismiss it.[141] Lawyers who Sloan interviewed discussed their uncertainty and unease about how judges would interpret this rule.[142] Specifically, the lawyers were concerned that some judges would interpret the rule differently than others, which would cause issues of uniformity and consistency in trials.[143]

Secondly, Sloan stated that prosecutors in Washington fear that any prosecutor's violation of the new rule will lead to a vacated conviction because *Jefferson* instructs the courts to review *Batson* and GR37 appeals *de novo*.[144] Because of the deferential treatment, prosecutors may feel it is risky to strike a juror of color or raise an objection against the defense.[145] As a result of these concerns, one immediate effect of GR37 was less use of peremptory challenges against jurors of color, specifically by prosecutors.[146] Moreover, even with fewer strikes, GR37 will likely lead to an increase in objections to strikes.[147] In fact, within the first six months of GR37's enactment, Washington experienced multiple objections to the use of peremptory strikes.[148] While there are clear impacts of GR37's enactment, it is uncertain, right now, whether these impacts are permanent or temporary.

B. A Retroactive Approach: North Carolina

The State of North Carolina created the Racial Justice Act ("RJA") in 2009 to abolish racial discrimination in capital sentencing.[149] This act

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[138] Sloan, *supra* note 105, at 255.

[139] *Id.* at 255–56; *see* State v. Jefferson, 429 P.3d 467, 480–81 (Wash. 2018) (holding that "trial courts must ask if an objective observer could view race as a factor in the use of the peremptory challenge" and defining objective observer "as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways").

[140] Sloan, *supra* note 105, at 255–56.

[141] *Id*.

[142] *Id.* at 256.

[143] *Id.*; *see also* Eric F. Edmunds Jr., *Disparity and Discretion in Sentencing: A Proposal for Uniformity*, 25 UCLA L. REV. 323, 325 (1977) (discussing how judge's discretion can lead to different defendants getting different sentences for the same crime).

[144] Sloan, *supra* note 105, at 258.

[145] *Id.* at 258.

[146] *Id*. at 257.

[147] *Id.*

[148] *Id.* at 258.

[149] State v. Robinson, 846 S.E.2d 711, 714 (N.C. 2020).

prohibited the death sentence if race was "a significant factor in the decision to seek or impose the sentence of death."[150] Based on this act, prisoners on death row could file for relief under the RJA if they believed racial discrimination during jury selection impacted their trials.[151] The RJA was the first law in the country to challenge *Batson*'s purposeful discrimination test retroactively and allow for "a finding of racial discrimination during jury selection without requiring proof of intentional discrimination."[152] This new rule, however, did not give the standard remedy of a new trial for a *Batson* violation; instead, it merely took the defendant off of death row.[153]

This section will discuss a peculiar case from the state of North Carolina: *State v. Robinson*.[154] This case is an excellent example of a state recognizing the problem of implicit bias in the jury selection process and creating legislation to combat it retroactively.[155] In North Carolina, the courts took four defendants off death row because, under the state's implicit bias legislation, the state found racial discrimination in the selection of their juries.[156] In reaction to the court's taking four defendants off of death row, the legislature in North Carolina repealed the legislation and perversely attempted to put the defendants back on death row.[157]

In the case of *State v. Robinson*, Chief Justice Beasley, writing for the majority, emphasized throughout his opinion that racial discrimination continues to exclude Black citizens from serving on juries, despite the three-part test from *Batson,* and that the RJA was North Carolina's recognition that the *Batson* test was ineffective.[158] In 1994, defendant Robinson was convicted of first-degree murder and sentenced to death.[159] On August 6, 2010, he filed a motion for appropriate relief, pursuant to the RJA.[160] At his hearing, Robinson relied heavily upon a survey by Michigan State University College of Law, which found that Black jurors were more than two times as likely to be struck from the venire pool than other jurors.[161] Robinson also introduced evidence that prosecutors in North Carolina were trained to circumvent *Batson* by giving facially-neutral reasons for using peremptory strikes against Black jurors instead of complying with *Batson*.[162] Additionally, Robinson introduced evidence of implicit bias and how it can

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[150] North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (codified at N.C.G.S. §§ 15A-2010, 2011 (2009)) (repealed 2013).

[151] *Id.*

[152] *Robinson*, 846 S.E.2d at 715.

[153] This paper does not endorse the decision not to impose a new trial for a *Batson* violation but instead recognizes that creating a new trial after enacting retroactive legislation may be difficult due to the passage of time, infallibility of juror's memories, lost evidence, etcetera. Any remedy is an improvement, but it is not the proper remedy for discrimination in jury selection.

[154] *Robinson*, 846 S.E.2d at 711.

[155] *Id.* at 714.

[156] *See id.*

[157] *Id.*

[158] *See generally Robinson*, 846 S.E.2d at 714–17.

[159] *Id.* at 717.

[160] *Id.*

[161] *Id*.

[162] *Id.*

influence a prosecutor's dismissal of Black jurors, and he showed specific instances where prosecutors used pretextual reasons to dismiss a juror.[163] The trial court found that Robinson had clearly shown that racial discrimination was evident in his jury selection.[164] As a result, the court reduced Robinson's death penalty to life imprisonment without the possibility of parole per the RJA.[165]

On October 1, 2012, an evidentiary hearing found that racially motivated peremptory strikes had influenced three other defendants' trials as well, and the court reduced their sentences from the death penalty to life imprisonment without the possibility of parole.[166] Soon after the four defendants—Robinson and the three others—were taken off of death row in June of 2013, North Carolina repealed the RJA.[167] The repeal was made to be retroactive and voided all pending motions;[168] thus, Robinson and the three other defendants were placed back on death row.[169] Robinson appealed his reinstated sentence, and the case ended up before the North Carolina Supreme Court, where Robinson asked whether or not the legislature could void Robinson's reduced sentence and claim of racial discrimination in jury selection because the state had repealed the RJA.[170] The Supreme Court of North Carolina ultimately found that the RJA's repeal and retroactive application violated double jeopardy, and the state could not put Robinson back on death row because the legislature repealed the act.[171] The court did not rule that the repeal of the RJA was invalid.[172]

The most important part of this case is not the fact that the Supreme Court of North Carolina held that Robinson's acquittal through the RJA could not be revoked retroactively, but it is the fact that the North Carolina Supreme Court *recognized* that *Batson* is ineffective at keeping discrimination out of jury selection.[173] This opinion, as the dissent in *State v. Robinson*, points out, has a larger purpose: "to establish that our criminal

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[163] *Id.* at 718. Robinson's evidence of racial discrimination was as follows: "Robinson presented evidence that an African-American juror was struck from the jury because of his membership in a historic African-American civil rights organization, the NAACP, and that another juror was struck from the jury because she graduated from a historically black college and university, North Carolina A&T State University. Robinson further showed how African-American jurors were struck after being asked explicitly race-based questions, such as whether an African-American juror would be the "subject of criticism" by their "black friends" if they were to return a verdict of guilty. In multiple cases, prosecutors targeted African-American jurors by asking the jurors different questions than other jurors, such as whether their child's father was paying child support. African-American jurors were also struck for patently irrational reasons, such as membership in the armed forces. Robinson also showed more than thirty examples of prosecutors striking African-American jurors for objectionable characteristics yet passing on other similarly situated jurors." *Id.*

[164] *See id.* at 718.

[165] *Id.*

[166] *Id.*

[167] Act of June 13, 2013, S.L. 2013–154, § 5(a), 2013 N.C. Sess. Laws 368, 372.

[168] *Robinson*, 846 S.E.2d at 718.

[169] *Id.*

[170] *Id*. at 719.

[171] *Id*.

[172] *Id*. at 714.

[173] *See id.* at 726 (Newby, J., dissenting).

justice system is seriously—and perhaps irredeemably—infected by racial discrimination."[174]

North Carolina tried to right the historical wrong of racial discrimination in jury selection by retroactively changing defendants' sentences if they could show racial discrimination—including implicit discrimination—in their jury selection processes.[175] Nevertheless, once the legislation was proven to work, North Carolina repealed it.[176] In a devastating turn of events, North Carolina took one step forward and two steps backward. At the time of this Article's composition, there has been no further discussion in North Carolina of recognizing implicit bias in jury selection and applying either retroactive or prospective legislation to combat it.

V. WHAT IS HAPPENING IN CONNECTICUT?

In December 2019, the Connecticut Supreme Court recognized that the *Batson* test was insufficient in removing racial discrimination from jury selection.[177] In *State v. Holmes*, an African American juror, W.T., was struck from the jury pool by the prosecution.[178] The prosecution stated that they were dismissing him because W.T. had stated he had a fear and resentment of the police and distrust of law enforcement.[179] Defense counsel quickly filed a *Batson* challenge and argued that the prosecution actually only struck W.T. because W.T. was the only Black venireperson.[180] The defense counsel argued that W.T. had assured the court and the prosecutor that he could be a "fair and impartial juror."[181] The prosecution argued that they had a race-neutral reason for dismissing W.T. because W.T. commented about being fearful of police officers.[182] To counter the prosecution's argument, the defense compared the assurance from W.T., that he could be fair with the *voir dire* despite his fear of the police, to that of another, accepted, member of the venire, a young white man from New London, who had "said that he couldn't be fair because of incidents with . . . police officers."[183]

The trial court subsequently denied the *Batson* challenge, and the defendant was found guilty by the jury.[184] The defendant appealed, stating that the trial court improperly overruled his *Batson* challenge and argued that race disproportionately impacted his jury trial.[185] But the court found that the prosecution had produced a race-neutral reason for the strike: fear or

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[174] *Id*. at 726.
[175] *Id.* at 715.
[176] North Carolina Racial Justice Act, S.L. 2009-464, § 1 (2009) (codified at N.C.G.S. §§ 15A-2010, 2011 (2009)) (repealed 2013).
[177] State v. Holmes, 221 A.3d 407, 411 (2019).
[178] *Id.* at 417.
[179] *Id. a*t 416.
[180] *Id.* at 415.
[181] *Id.*
[182] *Id.* at 416–18.
[183] *Id.* at 416.
[184] *Id.* at 417.
[185] *Id.* at 417–18.

distrust of the police.[186] The Appellate Court upheld the conviction that resentment and distrust of the police are a race-neutral reason for exemption.[187] While the Appellate Court supported the defendant's disproportionate impact argument, it was bound to reject the argument due to precedent.[188]

The case moved up to the Supreme Court, which upheld the conviction.[189] Relying on the cases of *State v. King*,[190] *State v. Edwards*,[191] and *Hernandez v. New York*,[192] all of which held that fear or distrust of the police was a race-neutral reason for a peremptory strike, the Connecticut Supreme Court was also constrained to follow binding precedent.[193] The court stated, however, that "resentment of police and distrust of the criminal justice system are not racially neutral justifications for exercising a peremptory challenge because there is a much higher prevalence of such beliefs among African-Americans."[194] In so ruling, the Supreme Court of Connecticut endorsed the defendant's argument, even though the court held that the defendant's argument was not legally cognizable under the *Batson* rubric's second step because that step only requires a facially valid explanation.[195]

The Supreme Court of Connecticut upheld the Appellate Court's conviction because the defendant's claim was limited to the Constitution's Equal Protection Clause and the Supreme Court's interpretation of it.[196] Thus, implicit bias was not enough to violate the Equal Protection Clause and grant the defendant's motion.[197] The "broader themes of disparate impact and implicit bias," however, allowed the court to consider whether further action on the court's part was required to create fairness to all defendants in light of *Batson*'s ineffectiveness.[198] Following the Washington Supreme Court's example, the Supreme Court of Connecticut took this opportunity to examine whether Connecticut's *Batson* challenges were strong enough.[199] Ultimately, the Supreme Court found that the *Batson* challenge was ineffective at reducing discrimination in jury selection and ordered the creation of a task force to study the problem and resolve it via the state's rulemaking process.[200] The Connecticut Supreme Court was nevertheless forced to uphold the conviction of Holmes, even though it

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[186] *Id.* at 421.
[187] *Id.* at 418.
[188] *Id.* at 417–19.
[189] *Id.* at 439.
[190] 249 Conn. 645 (1999).
[191] 314 Conn. 465 (2014).
[192] 500 U.S. 352 (1991)
[193] *Holmes*, 221 A.3d at 420.
[194] *Id.* at 407.
[195] *Id.* at 420.
[196] *Id.* at 411–12.
[197] *Id.* at 412.
[198] *Id.* at 428.
[199] *Id.* at 434.
[200] *Id.* at 437.

recognized that *Batson* was ineffective at eliminating discrimination in jury selection and that Holmes' jury had been improperly infected with racial discrimination.[201]

A. What Connecticut can learn from other states and the future of the Batson test in Connecticut

As evident from the summer of 2020, the entire nation is still feeling the effects of racial discrimination. Following the deaths of George Floyd, Ahmaud Arbery, and Breonna Taylor, citizens of every state took to the streets to protests police officers' discriminatory practices in America.[202] The country understands the discrimination that led to the civil unrest of 2020 because it is explicit. What is less known, and a much more subtle form of discrimination is the discriminatory practices of using peremptory strikes based on facially race-neutral reasons (whether intentional or not) to discriminate against Black defendants and defendants of color. Connecticut is not alone in this practice, but as a state dedicated to constitutions,[203] it is imperative to uphold the values and dignity of Equal Protection and to remember how much weight the Founding Fathers placed in being tried against a jury of one's peers.[204]

The Connecticut task force implemented by the Supreme Court of Connecticut has met to determine what course Connecticut should take. The Supreme Court of Connecticut charged the task force to:

> Propose meaningful changes to be implemented via court rule or legislation, including, but not limited to (1) proposing any necessary changes to General Statutes § 51-232(c) which governs the confirmation form and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross-section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate Batson's requirement of purposeful discrimination.[205]

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[201] *Id.* at 411–12.

[202] *See* Janie Haseman et al., *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA TODAY (Jun. 29, 2020, 7:47 AM), https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/.

[203] Connecticut's official nickname is "The Constitution State." CT STATE LIBRARY, *Connecticut's Nicknames* (last visited Jan. 3, 2022), https://ctstatelibrary.org/CT-nicknames.

[204] W. VA. ASS'N FOR JUST., *supra* note 2.

[205] *Jury Selection Task Force*, CONN. JUD. BRANCH, https://www.jud.ct.gov/Committees/jury_taskforce/default.htm#Purpose (last visited Jan. 3, 2022).

For this article, the last two charges, drafting model jury instructions about implicit bias and creating new standards to eliminate the requirement of purposeful discrimination, will be discussed. Then, the benefits and detriments of the new legislation will be analyzed.[206] In *State v. Holmes*, the Supreme Court of Connecticut already hinted that the court would not entertain ideas of changing the law retroactively,[207] and, likely, the state will not enact retroactive legislation. Many people behind bars would benefit from legislation designed to help them because racial discrimination in jury selection impacted their trials. While Connecticut does not have the death penalty,[208] it does have life sentences, and a party whose trial was impacted by racial discrimination in his jury selection deserves to have a new trial, or at the very least, his sentence should be reexamined and possibly reduced or terminated because of that discrimination.[209]

B. The Task Force's Recommendations

At the Task Force's meeting on December 16, 2020, the group voted unanimously to send their final report and proposals to Chief Justice Richard Robinson to implement it in Connecticut's courts.[210] The group submitted proposals from the Data, Statutes & Rules Subcommittee, the Juror Summoning Process Subcommittee, the Implicit Bias and Batson Challenges Subcommittee, and the Jury Outreach and Education subcommittee.[211] The Final Report was made available on December 31, 2020.[212] The task force worked thoughtfully and diligently and effectively put forth recommendations, two of which will be discussed below.

1. Eliminating Discrimination

The task force recognized that the court must overcome *Batson*'s shortcomings by implementing a new general rule, similar to the Washington court's General Rule 37.[213] Though, there is a difference between Connecticut and Washington: Connecticut's peremptory challenges

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[206] *See infra* Parts VII–IX.

[207] State v. Holmes, 221 A.3d 407, 434–35 (2019).

[208] *Connecticut Abolishes the Death Penalty*, NAT'L CONF. STATE LEGISLATURES (Aug. 13, 2015), https://www.ncsl.org/research/civil-and-criminal-justice/connecticut-abolishes-the-death-penalty.aspx (discussing how Connecticut's Governor Dan Malloy abolished capital punishment in Connecticut in 2012; the bill applied retroactively and the remaining inmates on death row had their sentences reduced to life without the possibility of parole).

[209] Following North Carolina's example, it appears that we should start applying retroactive legislation to those who were most disparately impacted by discrimination: those who have life sentences. If the legislation imposes retroactive legislation, it may consider beginning with the life-sentence cases and then move to cases with lower sentences.

[210] *Meeting of the Jury Selection Task Force*, YOUTUBE (Dec. 16, 2020), https://www.youtube.com/watch?v=F-l6hCsNplk&feature=youtu.be.

[211] *Id.*

[212] JURY SELECTION TASK FORCE, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (Dec. 31, 2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf.

[213] *Meeting of the Jury Selection Task Force*, *supra* note 210.

are constitutionally, rather than statutorily, protected.[214] This created tension in the task force because it is more difficult to change the peremptory challenge rules in Connecticut.[215] The committee tasked with updating Connecticut's law on peremptory strikes, however, recognized that peremptory challenges contribute to implicit bias in Jury Selection.[216]

To recalibrate the state's peremptory challenges, the group first considered whether to eliminate them entirely.[217] The task force ultimately decided not to eliminate peremptory challenges for four reasons.[218] First, eliminating peremptory challenges would mean the Connecticut state constitution would have to be amended, which would be a "laborious process."[219] Second, peremptory challenges accomplish the aims of supplying parties and their counsel with a sense of power over their cases while simultaneously strengthening the public's perception of procedural justice; they safeguard against unchecked judicial authority and prohibit biased people from sitting on juries, and they save time.[220] Third, there is considerable resistance from judges and attorneys to removing peremptory challenges.[221] Finally, there was doubt regarding whether removing peremptory challenges would effectively eliminate unconscious bias in jury selection.[222]

Without eliminating peremptory challenges, the group still recommended changing the current system by creating a New General Rule on Jury Selection.[223] The New General Rule ("the Rule") starts in section (a) by stating its policy and purpose: "to eliminate the unfair exclusion of

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[214] JURY SELECTION TASK FORCE, *supra* note 212, at 27. "Section 19 of article first of the constitution is amended to read as follows: The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate." CONN. CONST. amend. IV (amendment added 1972). The Amendment to make peremptory challenges constitutionally protected was threefold: "This bill does three things: one, it amends and amplifies Connecticut's constitutional guarantees of jury trial. It clearly permits juries of six men in all cases, civil and criminal, except in capital cases where the accused could agree to be tried by less than twelve but preserves his right to be tried by twelve; two, it continues to preserve the rights of litigants to challenge prospective jurors peremptorily when necessary; and three, it preserves the valuable rights of litigants to have their perspective jurors individually questioned by their counsel and apart from the other veniremen." CONN. STATE LIBRARY, LEGISLATIVE HISTORY FOR CONNECTICUT RESOLUTION AMENDMENT ART. IV CONST. ART. I, SEC. 19, TRANSCRIPTS FROM THE JOINT STANDING COMMITTEE PUBLIC HEARING(S) AND/OR SENATE AND HOUSE OF REPRESENTATIVES PROCEEDINGS 1971, HJR 83, 32, at 75 (May 10, 1971), *compiled in* S-80 CONN. GEN. ASSEMBLY SENATE PROCEEDINGS 1971 VOL. 14 PART 5 1921-2435.

[215] *Jury Selection Task Force*, CONN. JUD. BRANCH, https://www.jud.ct.gov/Committees/jury_taskforce/default.htm#Purpose (last visited Jan. 3, 2022).

[216] JURY SELECTION TASK FORCE, *supra* note 212, at 28.

[217] *Id.* at 30.

[218] *Id.*

[219] *Id.*

[220] *Id.* at 30–31.

[221] *Id.* at 31.

[222] *Id.*

[223] *Id.* at 15.

potential jurors based upon race or ethnicity."[224] Then, in section (b), the rule explains the scope of the Rule.[225] "The rule applies to all parties in all jury trials," and a denial of an objection will be reviewed by an appellate court *de novo*, "except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard."[226] The Rule states that any party may object to the improper use of a peremptory challenge, or the court may raise an objection on its own.[227]

Once a party or the court has objected, the party exercising the challenge will state why they are exercising the challenge.[228] Then the court shall "evaluate from the perspective of an objective observer, as defined in section (f) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances;" the court defines an objective observer in section (f) as:

> **Nature of Observer.** For the purpose of this rule, an objective observer (1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity; and (2) is deemed to be aware of and to have given due consideration to the circumstances set forth in section (g) herein. [229]

The court will then look at the circumstances of the case:

> (g) **Circumstances considered**. In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; (v) if the party has used

[224] *Id.* at 16.
[225] *Id*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.* at 16–17.

> peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case; (vi) whether issues concerning race or ethnicity play a part in the facts of the case to be tried; (vii) whether the reason given by the party exercising the peremptory challenge.[230]

The rule outlines reasons for issuing a peremptory challenge that are presumptively invalid in section (h), just as the Washington rule did, and includes reasons that are biased because they are entirely based on the conduct of the juror in section (i).

> (h) **Reasons Presumptively Invalid**. Because historically the following reasons for was contrary to or unsupported by the record, peremptory challenges have been associated with improper discrimination in jury selection in Connecticut or maybe influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge: (1) 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; (vii) not being a native English speaker; and (viii) having been a victim of a crime. The presumptive invalidity of any such reason may be overcome as to the use of a peremptory challenge on a prospective juror if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.
>
> (i) **Reliance on Conduct**. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for

[230] *Id* at 17.

> a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A party who intends to exercise a peremptory challenge for reasons relating to those listed above in (i) shall, as soon as practicable, notify the court and the other party in order to determine whether such conduct was observed by the court or that party. If the alleged conduct is not corroborated by observations of the court or the objecting party, then a presumption of invalidity shall apply but may be overcome as set forth in subsection (h).[231]

The rule ends with a review process in section (j), stating that "[t]he chief justice shall appoint an individual or individuals to monitor issues relating to this rule."[232]

This new rule was created entirely in response to *Batson*'s failings.[233] It modifies Connecticut's current three-step *Batson* test and ensures that specific reasons for the exercise of peremptory challenges are presumptively invalid, following in Washington state's footsteps.[234] This legislation will prevent the exclusion of jurors of color who fear or distrust the police, as the juror in *Holmes* did, although it will not help Holmes himself. The committee unanimously adopted it.[235]

Although the committee unanimously adopted the legislation, there was some dissent among the committee during deliberations. The subcommittee's recommendation received some backlash concerning the new review method: reviewing a peremptory strike's credibility from the record, *de novo*.[236] Some committee members deeply contested the proposed appellate standard of review because they believed it to be an abuse of discretion.[237] The subcommittee tasked with creating this recommendation studied other states, including Washington, and concluded that the appellate standard of review was the best approach after calculating the feasibility and impact that judges' presence has on jury selection.[238]

2. Drafting Model Jury Instructions

While jury instructions impact the juror after attorneys utilize peremptory strikes, it is necessary to discuss the changes made to the jury instructions to illustrate how Connecticut is working to eliminate implicit bias from the courthouse in its entirety. As the group noted, "[i]mplicit bias

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[231] *Id.* at 17–18.
[232] *Id.* at 18.
[233] *Id*. at 19; for more discussion of Batson's failings, *see* Tetlow, *supra* note 102, at 1719–35.
[234] JURY SELECTION TASK FORCE, *supra* note 212, at 20.
[235] *Id.*
[236] *Id.* at 16.
[237] *Id.* at 22.
[238] *Id.* at 20.

impacts every step," and it is equally crucial for the jury to be aware of their biases.[239] The role of jury instructions is to inform jurors and help them come to a verdict that follows the laws of the court's jurisdiction.[240] The task force determined that, while Connecticut is one of the best models for giving jurors instructions about implicit bias, there is still more to be done to enhance jurors' understanding of unconscious bias.[241] A suggestion from the task force is to insert a "Juror Bill of Rights" to help jurors understand their duties and responsibilities and educate them about their role in the legal system.[242] To implement their recommendation, the subcommittee reviewed the current jury instructions, implicit bias instructions from other jurisdictions, and empirical and scholarly literature to determine how they can draft the model jury instructions to educate jurors about implicit bias and avoid it in their deliberations.[243]

The task force has put forth three recommendations to recalibrate the jury instructions. First, the group recommends "making modest revisions" to the jury instructions.[244] The second recommendation is to instruct about implicit bias in civil cases in addition to criminal cases.[245] Finally, the group recommends giving the instructions at the beginning and the end of the trial.[246]

Concerning the first recommendation, the task force determined that the jury instructions' most helpful change is to draft implicit bias instruction properly.[247] The group further noted that the most critical features of the instruction should be "explaining implicit bias and its effects; motivating jurors to avoid it; offering specific techniques for debiasing; and being written in clear, plain English."[248] As a result, the group suggests fully explaining implicit bias to jurors and cites the American Bar Association's *Achieving an Impartial Jury* proposed instruction as a guide.[249] The task force wants to create an instruction that *motivates* jurors to "try to correct

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[239] *Id.* at 30.

[240] *Jury Instructions and their Purpose*, USLEGAL, https://courts.uslegal.com/jury-system/jury-instructions-and-their-purpose/#:~:text=A%20jury%20instruction%20is%20a,the%20law%20of%20that%20jurisdiction (last visited Jan. 3, 2022).

[241] *Meeting of the Jury Task Force*, *supra* note 210.

[242] *Id.*

[243] JURY SELECTION TASK FORCE, *supra* note 212, at 34.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.* at 35.

[248] *Id.*

[249] *Id.* at 36; *Achieving an Impartial Jury (AIJ) Toolbox*, AMER. BAR ASSOC. 17–18 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf (last visited Jan. 3, 2022). "Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence." *Achieving an Impartial Jury (AIJ) Toolbox*, AMER. BAR ASSOC. 17–18 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf (last visited Jan. 3, 2022).

for the effects of the bias."[250] To do so, the group recommends explaining to jurors the goal they want to serve by eliminating implicit bias and including the jurors as part of an in-group together with the judge so that the jurors will be motivated to engage in the joint activity.[251] Moreover, the task force recommends providing specific examples of how to overcome or reduce juror bias in clear, direct, plain language so that it is easy to understand.[252] The committee believes that these changes will create changes in how jurors view bias, which will lead to a reduction, if not elimination, of implicit biases in the courtroom.

VI. PROSPECTIVE V. RETROACTIVE LEGISLATION

As the Connecticut courts look over the task force's recommendation, there is still part of the equation missing: the defendants whom implicit biases have already harmed. In *State v. Holmes,* the Connecticut Supreme Court stressed the fact that the *Batson* test was insufficient.[253] Nevertheless, the Court had to adhere to the precedent, which strictly interpreted that *Batson* protects against intentional discrimination, not implicit biases resulting in discrimination.[254] The Court reiterated this notion by stating:

> [T]he fundamental principle [is] that official action will not be held unconstitutional solely because it results in a racially disproportionate impact… Proof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause… Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the [decision maker] selected a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.[255]

By adhering strictly to the precedent, the Supreme Court of Connecticut followed jurisprudence, but the court ultimately failed the defendant. It is extraordinarily hopeful and vital that the court recognized *Batson*'s imperfections and chose, as a state, to offer more protection against implicit bias to defendants in the future. Still, the Court and the task force did not put forward legislation to address any retroactive solutions to help those who had implicit bias injure them in their trials.

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[250] JURY SELECTION TASK FORCE, *supra* note 212, at 36.
[251] *Id.*
[252] *Id.* at 38–39.
[253] State v. Holmes, 221 A.3d 407, 411–12 (2019).
[254] *Id.* at 412.
[255] *Id.* at 424–25 (quoting Hernandez v. New York, 500 U.S. 352, 359–360 (1991)).

VII. WHY CONNECTICUT SHOULD CONSIDER RETROACTIVE LEGISLATION

As a state, there are other options that we could put forth besides prospective legislation. For example, Connecticut could finish what North Carolina started[256] and enact legislation to give relief to defendants who had their trials impacted by implicit bias. In fact, Connecticut can use the exact format that the task force has already created to do so. The task force has already outlined what conduct constitutes implicit bias in jury selection.[257] Thus, it would be simple to implement those rules retroactively; a defendant would apply for relief if they believe implicit bias impacted their trial during jury selection. After that, a panel would determine whether or not there is sufficient evidence of implicit bias in the jury selection to warrant a new trial or a reduction of sentence, just as the North Carolina panel did.[258] The task force has provided a powerful blueprint for how to determine if implicit bias impacted a trial's jury selection, and Connecticut should use it for defendants suffering in prison who were wrongly discriminated against in the jury selection process.

The task force proposed a curative act, designed to help future victims, but failed to recognize the disease and rot that is already inside Connecticut's judicial system. Moving forward, it is impossible to heal without first clearing out the old wounds. As Professor Stephen Munzer of UCLA Law states, "[c]urative acts are often, in an interesting way, both entrenching and disentrenching."[259] Here, the Connecticut task force has attempted to cure implicit discrimination by entrenching the idea that implicit bias in jury selection violates a defendant's rights.[260] Nevertheless, it is easy to see the inequity in depriving the prior defendants of a bias-free trial merely because they were the catalyst to creating change but denied the benefit of the change.[261] The legislation should be applied retroactively to avoid the disentrenching effects of this new rule.

Furthermore, another benefit of applying the legislation retroactively is that it reflects the rule of law to do so.[262] As an ideal, the rule of law seeks

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[256] North Carolina Racial Justice Act, 2009 N.C. Sess. Laws 2009-464, § 1 (codified at N.C. GEN. STAT. § 15A-2010, 2011 (2009)) (repealed 2013).

[257] JURY SELECTION TASK FORCE, *supra* note 212, §§ (h)–(i), at 17.

[258] It would be up to the legislation to determine the remedy to be imposed upon the defendants retroactively. This article proposes a new trial, but that may not be feasible in some cases due to the passage of time, death of witnesses, impossibility of a fair trial, etcetera. Thus, this author understand why North Carolina decided to have a panel reduce sentences instead of imposing a new trial and would understand if the legislation in Connecticut determined that was the best approach as well.

[259] Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 469 (1982) (discussing how curative acts entrench perceived interests and expectations because they disentrench someone's actual legal position).

[260] JURY SELECTION TASK FORCE, *supra* note 212, at 19–22.

[261] *See* Munzer, *supra* note 259, at 469–70.

[262] There are different opinions on the rule of law. This article uses a liberal definition of the rule of law, for which the rule of law is a facilitator of justice and progress. *See, e.g.*, United Nations and the Rule of Law, *Rule of Law and Development*, UNITED NATIONS, https://www.un.org/ruleoflaw/rule-of-law-and-development/ (last visited Jan. 4, 2022). The argument against retroactive legislation given via

to promote utility and justice, which can be accomplished by enacting this legislation retroactively.[263] The rule of law is an individual's defensible right to have his acts controlled by publicly defined rules.[264] While retroactivity is generally frowned upon by legal entities who promote the rule of law because retroactivity unfairly punishes people who are unable to plan accordingly due to the law's unavailability when they are taking action, it would not be frowned upon here.[265] In this instance, retroactivity would not violate the rule of law because there would be no punishment to anyone for violating the defendant's rights. The only person affected by this legislation's retroactive application would be the defendant, who *would not be punished*.[266] As such, there would be no one held liable retroactively, and there would be no hindrance of persons' ability to form plans and carry them out with due regard to the current rights and privileges afforded to them.[267] Instead, a historical wrong would be corrected and the ideals that the rule of law seeks to advance would be promoted.[268] At the very least, retroactive legislation in this instance should be a particularly effective means of fostering fairness and usefulness to victims of discrimination in jury selection.[269]

Looking specifically at the case of *State v. Holmes,* the juror whom the court dismissed, W.T., was dismissed for something that the new rule

considers to be *presumptively invalid.*[270] It makes no sense for Holmes not to get a remedy for the implicit bias that was at play in his trial.[271] There is no justice in turning a blind eye to the defendants harmed by implicit bias before this legislation was drafted. Further, it is not a waste of judicial resources to allow these defendants to petition for a new trial or reduction in sentence because of the implicit discrimination they faced during and before their trial. It may even end up saving judicial resources if some defendants are released or given a reduced sentence because of implicit bias in their trials.[272] If one inmate is released just one year early, the state of Connecticut will save $62,159.[273] While it would be costly to have a new trial or hire a

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the rule of law is a politically conservative view. *See, e.g.*, F.A. HAYEK, THE ROAD TO SERFDOM 72–84 (George Routledge & Sons, 1944).

[263] Munzer, *supra* note 259, at 471.

[264] *Id.*

[265] *Id.*

[266] Another way of expressing this sentiment is to say that ex post facto concerns would not be implicated in this scenario.

[267] Munzer, *supra* note 259, at 427.

[268] *Id.*

[269] *Id.* at 471.

[270] JURY SELECTION TASK FORCE, *supra* note 212, §§ (h)–(i), at 17.

[271] *See id.*

[272] "A common measure used by states to understand this cost is the 'average cost per inmate,' calculated by taking the total state spending on prisons and dividing it by the average daily prison population." *Prison Spending in 2015: The Price of Prisons*, VERA, https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending (last visited Jan. 4, 2022).

[273] *Id.*

panel to hear appeals, those precise costs are unknown. Simply speaking, it may be in Connecticut's best interest to reexamine whether these inmates should be kept in prison on the taxpayer's dime.

It is an unfortunate and sad part of the legal world that there is minimal retroactive action to help those who have already been sentenced. Few are upset about moving forward with progressive legislation, but many fear enacting that same legislation retroactively. Connecticut seems to be taking one step forward and two steps backward. It is unknown yet whether this legislation will actually cure the deficiencies of *Batson*, but it is clear that if Connecticut does not adopt retroactive legislation then the people already affected will remain stagnant. It is deeply upsetting that the court rules will only help the next generation of defendants from the harmful effects of implicit bias and ignore those whom are already injured.

VIII. THE FUTURE OF *BATSON* IN CONNECTICUT: PROSPECTIVE LEGISLATION

Since 1986, the Supreme Court has adhered to the Court's *Batson* test.[274] The Supreme Court's adherence to *Batson* is due to the Supreme Court's interpretation that the Equal Protection Clause is limited to intentional discrimination.[275] It is unknown, at present, if the Supreme Court will ever overrule that interpretation. In the meantime, the states are free to protect jurors and defendants from the harmful effects of implicit biases that result in racial discrimination. In their own ways, Washington and North Carolina correctly concluded that implicit biases in jury selection result in racial discrimination for defendants and jurors. Based on this evidence that implicit biases result in racial biases that the Equal Protection Clause should preclude, Connecticut should be persuaded and is on the path to adopting legislation designed to shield defendants and jurors from the harmful effects of implicit discrimination.

With the introduction of new legislation, it is worth discussing whether the reforms recommended will yield different results from *Batson.* The Connecticut courts should analyze whether the recommended legislation will actually impact the racial composition of juries or if this new legislation will once again be a placebo[276] to ending discrimination in jury selection, like *Batson* was.[277] Additionally, the court should consider broader

[274] North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (codified at N.C.G.S. §§ 15A-2010, 2011 (2009)) (repealed 2013).

[275] *Id.*

[276] A placebo is something that seems real but is not. Joseph Saling, *What Is the Placebo Effect?*, WEBMD (FEB. 8, 2020), https://www.webmd.com/pain-management/what-is-the-placebo-effect. In this case, *Batson* is a placebo because it has the appearance of treating racial discrimination in the court systems, but it has little to no effect. Only the blatantly racist or explicitly discriminatory peremptory challenges will be thrown out while others can hide under pretextual reasons. Tetlow, *supra* note 63, at 1946 ("The current *Batson* rule constitutes a placebo that purports to solve the problem of discrimination by juries but really focuses only on purported discrimination against jurors.").

[277] *See* Sloan*, supra* note 105, at 263.

consequences that the rule may have and the public's perception of the rule.[278] By doing so, the court will determine whether it is worthwhile to introduce this legislation or if the court and the task force have more work to do. Finally, it is worth once again considering if we should abandon peremptory challenges altogether. Perhaps we have reached a point where the only solution to ending racial discrimination is to abolish all jury strikes besides for cause strikes.

CONCLUSION

Connecticut does not accept the ongoing legacy of racial discrimination in jury selection.[279] Indeed, Connecticut has directly attacked this legacy by proposing prospective legislation that will lead to a fairer system for people of every race. It is unlikely that Connecticut courts will adopt retroactive legislation, but a step forward is a step in the right direction. Hopefully, this recommendation can rid the courts of unintentional racism and provide hope and growth for a nation with deep racial divisions.

Still, there are racial disparities within the criminal justice system. By working to address one of these racial disparities, Connecticut is headed in the right direction. The task force's recommendations provide hope that Connecticut will take a dramatic departure from *Batson* and reform peremptory challenges, although not eliminate them. At its core, however, any reform to *Batson* is reminiscent of Justice Marshall's concurrence in *Batson* in which he encouraged eliminating peremptory strikes.[280] For the moment, it appears that peremptory strikes are here to stay. Enacting legislation to combat the racial impacts of implicit bias in jury selection begins to address the systemic issues that plague the criminal justice world, and it will open the door to a fundamental privilege that has remained inequal for too long.[281]

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[278] *Id.* at 261.

[279] This is a direct answer to Attorney Sloan's prompt after she declared that "the other forty-nine states [besides Washington] have a choice to make. They can accept [or reject] the ongoing legacy of racial discrimination in jury selection." *See id.* at 265.

[280] Batson v. Kentucky, 476 U.S. 79, 103 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991) (Marshall, J., concurring). It is worth considering eliminating peremptory strikes altogether, although that will be challenging to do in Connecticut.

[281] This author recognizes that enacting legislation is not a solution to eliminating racial bias in the court system as a whole. This is merely a step in the right direction; there is still much work to do to create equality within the law.