WHITEWASHING THE JURY BOX

How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors

Berkeley Law | Death Penalty Clinic

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Founded in 2001, the Berkeley Law Death Penalty Clinic seeks justice for individuals facing the death penalty by providing them with high-quality representation; offers students a rich opportunity for meaningful hands-on experience in high-stakes, complex litigation; and exposes problems endemic to the administration of capital punishment. More information about the clinic is available at https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic.

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Thousands of California citizens have been denied the right to serve on juries because of their race or ethnicity, and thousands of California criminal defendants have been tried by juries from which those citizens were excluded. The authors hope this report will serve as a catalyst for reform that results in vigorous enforcement of the constitutional rights of those whose lives depend upon a fair and equitable jury selection system and of those who are eligible to serve on juries. In this regard, the authors thank Assemblymember Dr. Shirley K. Weber (Dist. 79) for her leadership in introducing Assembly Bill 3070, which offers California the opportunity to eliminate discriminatory peremptory challenges.

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EXECUTIVE SUMMARY, FINDINGS, AND RECOMMENDATIONS

Racial discrimination is an ever-present feature of jury selection in California. This report investigates the history, legacy, and continuing practice of excluding people of color, especially African Americans, from California juries through the exercise of peremptory challenges. Unlike challenges for cause, each party in a trial has the right to excuse a specific number of jurors without stating a reason and without the court's approval. In California, peremptory challenges are defined by statute.

Historically, the main vice of peremptory challenges was that prosecutors wielded them with impunity to remove African Americans from jury service. These strikes were part and parcel of the systematic exclusion of Blacks from civil society. We found that prosecutors continue to exercise peremptory challenges to remove African Americans and Latinx people from California juries for reasons that are explicitly or implicitly related to racial stereotypes.

In 1978, in *People v. Wheeler*, our state supreme court was the first court in the nation to adopt a three-step procedure intended to reduce prosecutors' discriminatory use of peremptory challenges. Almost a decade later, in *Batson v. Kentucky*, the United States Supreme Court approved a similar approach with the goal of ending race-based strikes against African-American prospective jurors. An essential feature of the "*Batson*/*Wheeler* procedure" is that it only provides a remedy for *intentional* discrimination. Thus, at step one, the objecting party must establish a sufficient showing—known as a "prima facie case"—of purposeful discrimination. At step two, if the trial court agrees that the objecting party has made such a showing, the burden of producing evidence shifts to the striking party to give a "race-neutral" reason. At step three, the trial court decides whether the objecting party has established purposeful discrimination. If the court finds that the striking party's reason was credible, it denies the *Batson* objection.

In his concurring opinion in *Batson*, Justice Thurgood Marshall warned that *Batson*'s three-step procedure would fail to end racially discriminatory peremptory strikes. He anticipated that prosecutors would easily be able to produce "race-neutral" reasons at *Batson*'s second step, and that judges would be ill-equipped to second-guess those reasons. Further, Justice Marshall doubted *Batson*'s efficacy because the procedure did nothing to curb strikes motivated by unconscious racism—known more often today as implicit bias.

Justice Marshall was prescient: 34 years after *Batson* was decided, prosecutors in California still disproportionately exercise peremptory challenges to exclude African Americans and Latinx people from juries.

The Berkeley Law Death Penalty Clinic explored the shortcomings of the *Batson* procedure. Our report investigates how the California Supreme Court went from a judiciary that championed the eradication of race-based strikes to a court that resists the United States Supreme Court's limited efforts to enforce *Batson*. We conclude that *Batson* is a woefully inadequate tool to end racial discrimination in jury selection.

FINDINGS

1. Many decades after *Wheeler* and *Batson* were decided, California prosecutors' use of peremptory challenges to exclude African Americans and Latinx citizens from juries is still pervasive.

2. Historically and still today, in California, the overwhelming number of *Batson* objections are brought by defense attorneys against prosecutors' peremptory challenges.

3. Empirical evidence overwhelmingly shows that implicit biases play a significant role in prosecutors' peremptory challenges. Strikes based on these biases most often adversely affect Black defendants and Black jurors. Implicit biases are, by definition, deeply held and reflexive. Inasmuch as each of us acts on them without awareness, lawyers most often will not recognize their biases, much less be able to acknowledge them. Judges are no better at identifying them. *Batson*'s requirement that the objecting party prove intentional discrimination allows these biases to operate unchecked.

4. Our empirical analysis of California appellate court opinions shows that prosecutors routinely and successfully cite a Black or Latinx prospective juror's distrust of law enforcement or the criminal legal system to justify a peremptory strike against the juror. Social science research demonstrates that most African Americans and Whites do not share the same views of law enforcement or the criminal legal system. The differences in attitude are long-standing and rooted in the nation's history of institutional racism, as well as the present-day differential treatment of Blacks and Latinx people by actors in the criminal legal system, including by members of law enforcement. More than 40 years ago, in *Wheeler*, the California Supreme Court announced that these differences do not support the exercise of peremptory challenges: "The representation on juries of these differences in juror attitudes is precisely what the representative cross-section standard . . . is designed to foster." California courts long ago lost sight of this goal.

5. District attorney training manuals on peremptory challenges encourage discriminatory strikes in at least three respects:

    - Prosecutors are trained to identify the "ideal juror" as a person who most resembles them—"attached to the community, educated, stable, [and] professional[]." They are likewise advised to avoid individuals who are members of groups in which people of color are overrepresented, that is, "less educated people and blue collar workers," and those who are "unemployed or underemployed" or who have family members experiencing similar economic hardship.

- Prosecutors are instructed to strike jurors based on their "gut reactions" to jurors' facial expressions, body language, clothing, and hairstyle, and to rely on lengthy stock lists of court-approved "race-neutral" reasons to explain their challenges. Social science has repeatedly shown that "gut reactions" are often the product of implicit biases that correlate with racial and ethnic stereotypes.

- Prosecutors are trained to strike prospective jurors who have had or whose relatives have had a negative experience with law enforcement or are distrustful of the criminal legal system. They are, in other words, instructed to exploit the historic and present-day differential treatment of Whites and people of color, especially African Americans and Latinx people, by the police, prosecutors, and the courts.

6. The California Supreme Court's definition of a "race-neutral" reason is so expansive that any explanation short of the admission of a discriminatory motive will suffice at *Batson*'s second step, and, ultimately, defeat a *Batson* challenge. This also allows prosecutors to rely successfully on a laundry list of judicially approved "race-neutral" reasons when they explain their peremptory challenges. Courts have consistently upheld reasons such as a juror's prior arrest, a juror's loved one's incarceration, or a juror's distrust of the criminal legal system as facially race-neutral and, overwhelmingly, sufficient to defeat a *Batson* objection.

7. We evaluated nearly 700 cases decided by the California Courts of Appeal from 2006 through 2018, which involved objections to prosecutors' peremptory challenges. In nearly 72% of these cases, district attorneys used their strikes to remove Black jurors. They struck Latinx jurors in about 28% of the cases, Asian-American jurors in less than 3.5% of the cases, and White jurors in only 0.5% of the cases.

    - Prosecutors most often gave demeanor-based justifications for their strikes. The next most common reason related to a prospective juror's relationship with someone who had been involved in the criminal legal system. This was followed almost as frequently by a prospective juror expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- and/or class-biased.

    - Prosecutors in these cases successfully used their peremptory challenges against African Americans because they had dreadlocks, were slouching, wore a short skirt and "blinged out" sandals, visited family members who were incarcerated, had negative experiences with law enforcement (often many years before they were called for jury duty), or lived in East Oakland, Los Angeles County's Compton, or San Francisco's Tenderloin.

    - Prosecutors also successfully struck Latinx prospective jurors for frowning, seeming confused, wearing large earrings, stating that a loved one had been wrongfully accused of a crime, expressing a belief that the criminal legal system treats people differently

based on their race, or being "kicked off a ladder by a border patrol officer who was chasing" undocumented people three decades earlier.

8. Between 2003 and 2019, the United States Supreme Court issued a series of decisions that signaled the need for lower courts to more rigorously enforce *Batson*. The California Supreme Court has largely disregarded those directives. Here are three examples:

- For years, at step one of the process, the California Supreme Court required the objecting party to show that it was more likely than not that the strike was based on intentional discrimination. Unless the standard was satisfied, the striking party did not have to give reasons for the peremptory challenge. In 2005, in *Johnson v. California*, the United States Supreme Court rejected California's test as unduly burdensome and inconsistent with *Batson*'s rule that step one is a low threshold; the objecting party need only raise an inference of discrimination. Despite the United States Supreme Court's intervention, in the 42 step-one cases the state supreme court has since decided, the court has not once found *Batson* error.

- The United States Supreme Court has left no doubt that *Batson* requires the *attorney* to provide the reasons for the strikes, and that the trial judge and reviewing courts must base their rulings on the reasons the attorney offers. However, the California Supreme Court has consistently approved speculation by trial and appellate courts about reasons the prosecution could have (but did not) offer for its strikes in order to uphold the denial of a *Batson* objection.

- Since 2003, the United States Supreme Court has decisively endorsed a method of analyzing a *Batson* objection known as "comparative juror analysis," an approach central to each of its subsequent favorable *Batson* decisions. In over 30 years, the California Supreme Court has never used this analysis to expose discrimination. Rather, in case after case, the state supreme court has declined to engage in comparative analysis, restricted its application, or conducted the analysis but found it unpersuasive. The court's resistance to this powerful analytic tool also explains its extraordinarily high affirmance rate.

9. California courts—the California Supreme Court and Courts of Appeal—have an abysmal record in *Batson* cases. In the last 30 years, the California Supreme Court has reviewed 142 cases involving *Batson* claims and found a *Batson* violation only three times (2.1%).

10. It has been more than 30 years since the California Supreme Court found a *Batson* violation involving the peremptory challenge of an African-American prospective juror.

11. It has been more than 30 years since the California Supreme Court found that a trial court committed error in denying a defendant's objection to the prosecutor's use of peremptory challenges at the first step of the *Batson* procedure.

12. California Courts of Appeal, which follow the state supreme court's precedent, rarely find error when trial courts deny defense attorneys' *Batson* motions challenging the removal of Black and Latinx jurors. From 2006 through 2018, our appellate courts found error in just 18 out of 683 decisions (2.6%).

13. In our examination of California state cases between 1993 and 2019, which were later reviewed by the Ninth Circuit Court of Appeals in habeas corpus proceedings, the Ninth Circuit granted *Batson* relief 15% of the time—almost six times more often than the California Courts of Appeal and over seven times more frequently than the California Supreme Court. This is particularly noteworthy because the Ninth Circuit, applying federal law, is obliged to use a much stricter standard of review than that employed by our state courts.

14. In two opinions in 2019, California Supreme Court and Court of Appeal justices urged immediate, decisive action to remedy *Batson*'s failure in California. In the words of Supreme Court Justice Goodwin Liu, it is "past time for course correction." Justice Liu has repeatedly dissented from the majority in *Batson* cases since joining the court in 2011. He has criticized the court's persistent failure to apply *Batson*'s precedents with the "vigilance required by the constitutional guarantee of equal protection of the law." Justice Jim Humes, a member of the California Court of Appeal, similarly urged that "the time has come" for the state "to consider meaningful measures to reduce actual and perceived bias in jury selection." In May 2020, in another dissenting opinion, Justice Liu declared that the "*Batson* framework, as applied by this court, must be rethought in order to fulfill the constitutional mandate of eliminating racial discrimination in jury selection."

15. Across the country, members of the state and federal bench—including United States Supreme Court Justice Stephen Breyer—legal scholars, and some state supreme courts have acknowledged *Batson*'s failure as a mechanism for eliminating discriminatory peremptory challenges, and have called for or implemented reform. In 2018, the Washington Supreme Court took a leadership role when the court adopted General Rule 37 to reform *Batson*.

16. We acknowledge the California Supreme Court's interest in studying *Batson*'s shortcomings by announcing the formation of a "work group" in January. There has been no subsequent statement regarding the goals of the work group or its membership. Over the last three decades, the court has declined many opportunities to remedy these inequities. The legislature—through the passage of AB 3070—is better suited to effectively address persistent discrimination in jury selection in a timely manner. As this report makes evident, the topics identified for study by the "work group" have been amply studied. The questions posed have been answered. The time for a decisive "course correction" by the California Legislature is now.

RECOMMENDATIONS

Batson has failed in part because the California Supreme Court has declined to enforce it vigorously and consistently. But more fundamentally, *Batson* has failed because its approach was flawed from the outset. Only a drastic course correction that encompasses significant changes to the *Batson* procedure can eliminate the exercise of discriminatory peremptory challenges. For purposes of our recommendations, we use the term "protected group" to refer to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation.

We recommend the following:

1. ***Batson*'s first step should be eliminated.** If a party objects that the opposing party exercised a peremptory challenge based on discrimination against one of the protected groups, the trial court should always require the striking party to state the reason(s) for the strike. The elimination of *Batson*'s first step prevents a trial court's own implicit bias from insulating potentially discriminatory strikes from direct judicial inquiry. This reform makes the determination of whether the peremptory challenge is legally permissible more expeditious and avoids unnecessary appellate litigation.

2. **The burden of proof should rest with the party exercising the peremptory challenge.** Under *Batson*, the burden rests with the objecting party to prove that the challenging party acted with intentional discrimination. If peremptory challenges are to continue to have a legitimate place in the jury selection process, the challenging party should bear the burden of justifying challenged strikes. This reform takes into account the significant role peremptory challenges have played and continue to play in the exclusion of African-American and Latinx citizens from juries.

3. **The trial court should be required to act with awareness of the role implicit, institutional, and unconscious bias has played in the discriminatory exclusion of jurors in California.** Making explicit that which has gone unsaid and unacknowledged is an essential feature of the proposed reforms. This change will ensure that trial courts scrutinize peremptory challenges to better root out the vestiges of historical and present-day discrimination in the jury selection process.

4. **The trial court should be required to evaluate the striking party's reasons for the peremptory challenge in light of the totality of the circumstances.** A requirement that the trial court make its ruling in light of the totality of the circumstances pertaining to the objection retains *Batson*'s approach, which appropriately encourages careful and thorough decision-making.

5. **The court should sustain the objection if it determines that an objective observer could view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation as a factor in the exercise of the peremptory challenge.** *Batson*'s requirement that the objecting party prove intentional discrimination has perpetuated the use of strikes based on implicit and institutional bias and the resulting disproportionate exclusion of African-American and Latinx citizens from jury service. A wholesale reform of the standard, which this recommendation endorses, is imperative. The adoption of an objective standard ensures that the court will be attentive to bias in all its forms. At the same time, it eliminates the stigma associated with a subjective finding of intentional discrimination, e.g., that the court, in making its ruling, is labeling the striking party "racist."

6. **The trial court should be required to explain its ruling on the record**. A requirement that the trial court explain its ruling on the record encourages careful and thorough decision-making, and enables appellate courts to fully and fairly evaluate the trial court's ruling.

7. **There should be a presumption that reasons historically associated with improper discrimination are invalid.** Restricting the use of reasons historically associated with improper discrimination will reduce the influence of implicit, unconscious, and institutional biases in the jury selection process.

    a. *The following reasons should be presumptively invalid*:

        1. Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system;
        2. Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner;
        3. Having a close relationship with people who had prior contact with law enforcement or criminal legal system;
        4. A prospective juror's neighborhood;
        5. Having a child outside of marriage;
        6. Receiving state benefits;
        7. Not being a native English speaker;
        8. Having the ability to speak another language;
        9. A prospective juror's dress, attire, or personal appearance that is historically associated with a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation;
        10. Employment in a field that is disproportionately occupied or that disproportionately serves members of a protected group;

11. The prospective juror's unemployment or underemployment or that of a prospective juror's family member;
12. Friendliness with another prospective juror who is a member of the same protected group as the prospective juror; and
13. Any other reason that applies to a seated juror who is not a member of the same group as the struck juror.

b. *The following reasons are historically associated with improper discrimination. They should be presumptively invalid unless they are corroborated by the trial court or opposing counsel*:

1. A party that intends to strike a juror for specified demeanor-based reasons should provide reasonable notice to the trial court and the opposing party so that all parties can verify and address the behavior. The court should find these reasons invalid if it or opposing counsel cannot corroborate them.
2. These reasons include:
    a. Sleeping, appearing inattentive, or staring;
    b. Failing to make eye contact;
    c. Exhibiting a lack of rapport;
    d. Exhibiting a problematic attitude, body language, or demeanor; and
    e. Providing unintelligent or confused answers.

8. **Courts should be prohibited from speculating or hypothesizing about the reasons the striking party offered or did not offer, and from substituting their reasons for those of the striking party**. Trial and appellate courts should not speculate about or assume the existence of reasons for the challenge that the striking party did not offer. The appellate court should not offer its own reasons to explain the striking party's failure to challenge similarly situated jurors who are not members of the same protected group as the challenged juror. This prohibition requires parties and the trial court to make a complete record. Of equal importance, it prevents trial and appellate courts from substituting their explanation for a peremptory challenge for that of the striking party, and thereby shielding impermissible strikes from proper judicial scrutiny.

9. **Appellate courts should review trial court rulings de novo.** An appellate court should be required to review the trial court's ruling de novo, which is to say that the appellate court should do so without deferring to the trial court's ruling. However, an appellate court should be permitted to defer to the trial court's determination verifying a prospective juror's demeanor, unless clearly erroneous. This standard of review ensures that deference will not shield objectively discriminatory strikes while crediting certain factual findings that the trial court is in the best position to make.

I.

A BRIEF HISTORY OF DISCRIMINATORY EXCLUSION

African Americans have historically been, and continue to be, disproportionately excluded from juries. This exclusion, which affects both who is summoned for jury duty and who serves on the trial jury, has evolved over time, responding primarily to changes in the law that prohibit intentional racial discrimination in these processes. Prosecutors have whitewashed juries through the exercise of peremptory challenges for as long as African Americans have been eligible for jury service. The practice is still widespread today. While both the California and United States Supreme Courts sought to curb discriminatory strikes through decisions announced in 1978 and 1986, respectively, the courts' remedial mechanisms have proved ineffective. Further, the California Supreme Court has been reluctant to follow recent United States Supreme Court decisions that were meant to strengthen the procedure, further crippling this state's judicial response to racially discriminatory jury selection.

A. The Exclusion of African Americans from Juries

Prosecutors' current use of peremptory challenges to exclude African Americans from juries has its roots in the history of slavery and the wholesale exclusion of Black citizens from all aspects of civil society in many states following Reconstruction.[1] Although today African Americans have "secured a place on the jury rolls," many prosecutors continue to prevent them from serving on juries through the exercise of racially discriminatory peremptory challenges.[2]

After the nation abolished slavery, the federal government attempted to "guarantee the meaningful inclusion of African-Americans in the social, political and legal fabric of the United States" through the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment.[3] During Reconstruction, legislatures in many Southern states repealed formal race-based jury requirements.[4] The Civil Rights Act of 1875 included a provision outlawing race-based discrimination in jury service.[5] However, the provision was never effectively enforced.[6]

In 1879, in *Strauder v. West Virginia*, the United States Supreme Court held unconstitutional state statutes that, on their face, restricted jury service to Whites.[7] It was, however, becoming apparent that institutional opposition to Black enfranchisement and political participation had taken hold in the South, ushering in "the Jim Crow era of white supremacy, state terrorism, and apartheid . . . ."[8] Although laws no longer explicitly barred African Americans from jury service, in many states, "local officials achieved the same result by . . . implementing ruses to exclude black citizens."[9] For example, some jurisdictions employed jury lists in which the names of Whites and Blacks were "printed on different color paper" or instituted "vague requirements" for jury service—"such as intelligence, experience, or good moral character"—to conceal, albeit thinly, their intention of keeping African Americans off the rolls.[10] "In essence, the right not to be excluded from jury service because of one's race promised only the *possibility* of having members of one's racial group sitting on a particular jury, nothing more."[11]

In opinion after opinion following *Strauder*, the Supreme Court placed procedural barriers between local- and state-sanctioned discrimination and federal judicial review.[12] The Court concluded either that the defendant's case was insufficient to merit federal review, or that "racist

state practices were inevitability protected by a futile search for discriminatory purpose on the part of state officials."[13]

In 1935, in *Norris v. Alabama*, the Supreme Court finally addressed the total and systematic exclusion of African Americans from jury pools in the second trial of one of the "Scottsboro Boys."[14] Clarence Norris, one of nine Black teenagers falsely accused of raping two White women, was twice tried, convicted, and sentenced to death by an all-White jury.[15] The Court agreed that the "long-continued, unvarying, and wholesale exclusion" of Blacks from the grand and petit jury venires denied him equal protection under the Fourteenth Amendment.[16] The opinion "signaled a major shift: the Court would no longer tolerate the *total exclusion*, by law or by practice, of black citizens from jury rolls."[17]

Following *Norris*, "state officials became more imaginative in their efforts to limit minority participation on juries," allowing token African Americans to serve on juries to avoid total exclusion.[18] Thus, the discriminatory use of peremptory challenges "immediately counteracted" the limited gains of African-American inclusion on the jury rolls.[19] Some counties in California continued the wholesale exclusion of Black jurors, even if statutes prohibited the practice. For example, in *People v. Hines,* an all-White jury convicted a Black defendant of shooting and killing a Black man.[20] The California Supreme Court overturned Hines's conviction because, despite constituting 8% of the population, "no negro had ever been placed on the venires or called for jury service in criminal cases in Merced county."[21] The court found that discrimination did not stem from the law as written, but from the "custom of the officers to exclude negroes in selecting and impaneling juries in Merced county."[22]

The United States Supreme Court also retreated from *Norris* by deferring to state court decisions and focusing on the subjective intent of local officials rather than statistical proof.[23] For example, in *Akins v. Texas*, a death-sentenced defendant challenged the racial composition of his grand jury, which included only one Black juror.[24] He provided statistical evidence that African Americans were underrepresented on county grand juries.[25] Several grand jury commissioners had testified in the trial court that they intended to place "just one negro on the grand jury," and had deliberately done nothing to include more than one African-American member.[26] The Supreme Court, however, was "unconvinced" that the commissioners intentionally limited the number of Black grand jurors.[27]

It was not until the 1960s and '70s, when the Supreme Court adopted a "fair cross-section" standard—requiring the jury and grand jury pools to reflect the demographics of the jurisdiction—that some progress was made in increasing the representation of citizens of color in jury pools.[28]

B. The Exclusion of African Americans from California Jury Rolls

As briefly summarized above, the United States has a long history of denying full citizenship rights to African Americans, women, and members of other groups. People of color—especially African Americans—are disproportionately excluded at every stage of jury selection.[29]

Prospective jurors summoned to appear in California courts reflect that underrepresentation.[30] The exercise of peremptory challenges, which occurs at the last stage of jury selection, exacerbates the underrepresentation that occurs at the front end. However, it is essential to at least describe the disproportionate exclusion of people of color from the process by which jury rolls are assembled.

The superior court judges of each county appoint the county's jury commissioner who, at least once a year, creates a master list of prospective jurors by randomly selecting names from source lists of eligible citizens in the community.[31] As mandated by article 1, section 16 of the California Constitution, a state statute specifies that source lists be "inclusive of a representative cross section of the population of the area served by the Court."[32] Also by statute, the source list of registered voters ("ROV") and licensed drivers from the Department of Motor Vehicles ("DMV") are "appropriate source lists for selection of jurors and shall be considered inclusive of a representative cross section of the population, within the meaning of subdivision (a), which defines a fair cross section."[33] As a result of this statute, every California county uses only the ROV and DMV databases as jury source lists.[34]

Names are drawn from the source lists to create a master list.[35] The jury commissioner's office notifies individuals whose names are selected from the master list to appear in court for possible jury selection and appearance in the venire.[36]

Studies have shown that using ROV and DMV records as source lists results in the underrepresentation of African Americans.[37] One study, which surveyed a total of 1,275 community residents on a master list in Orange County, revealed that when both the ROV and DMV lists were used, African Americans were underrepresented by 18.92% relative to their numbers in the population.[38] An early, but still cited, study on jury composition estimated that the use of ROV lists automatically excludes approximately one-third of the adult population, reducing the number of people of color, including African Americans, in the master lists.[39]

The same study reported that 41.3% of jury-eligible individuals in California are not on ROV lists.[40] Of the 41.3% of jury-eligible individuals who do not appear on California ROV lists, a disproportionately large number are African American. This is due in part to felony disenfranchisement.[41] Until January 2020, Californians who had a felony conviction were not permitted to serve on juries.[42]

Of those African Americans who are eligible to vote, additional socioeconomic barriers make them less likely to register than Whites.[43] People with unstable employment experience higher rates of residential and geographic mobility.[44] These factors have been shown to decrease the likelihood that they will register to vote and therefore appear on ROV lists.[45] Using national data over a three-year period, one study found that 48% of African Americans were geographically transient, compared to only 25.2% of Whites.[46] This makes it less likely African Americans will appear on ROV lists than Whites.[47]

Several studies have demonstrated that using multiple source lists increases the percentage of African Americans in the master list.[48] The use of additional source lists such as tax lists, property lists, utility customer lists, city and telephone directories, and welfare or public benefit payment lists would increase the number of African Americans on the master list.[49] To date, only one California county uses source lists beyond the ROV and DMV; no California courts supplement their lists with welfare or unemployment records.[50]

It has been more than 35 years since the California Supreme Court found that a defendant had established underrepresentation of people of color in the composition of a jury sufficient to satisfy the state or federal constitutional fair cross-section requirement.[51] In several cases, however, courts of appeal have acknowledged findings that African Americans are underrepresented in jury venires.[52] Some California studies also confirm that these disparities exist in California jury pools. For example, a 2010 survey conducted in Alameda County showed underrepresentation of African Americans in its jury pools.[53] The survey found that African Americans "represent 18% of the eligible jury pool in the county but comprised only 8% of the people who appeared for jury duty" in the trials studied.[54] Whites comprised the same percentage of the jury pool as the percentage of jury-eligible Whites in Alameda County, suggesting that Whites may not be affected by the many legal and non-legal obstacles that result in the underrepresentation of African Americans in jury source lists.[55]

C. Peremptory Challenges: From Judicial Intervention to Judicial Retreat

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[56] The peremptory challenge has its roots in English common law.[57] As early as the 14th century, however, Parliament began to restrict the right of the King's counsel to exercise peremptory challenges.[58] In American courts, the right of the defendant to exercise peremptory challenges "was accepted as part of the common law."[59] However, the prosecution was not universally entitled to exercise peremptory challenges in the United States until the late 19th century.[60] Unlike challenges for cause, peremptory challenges are not constitutionally guaranteed.[61]

1. The United States Supreme Court's Resistance to Remedying Exclusion

The United States Supreme Court has readily acknowledged that the peremptory challenge is "'frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.'"[62] For almost two centuries, state and federal courts in this country accepted these strikes as "a necessary part of trial by jury."[63]

In 1965, in *Swain v. Alabama*, the Court ruled for the first time that the prosecution's exercise of peremptory challenges against Black prospective jurors *might*, in very specific circumstances, violate the Equal Protection Clause.[64] In *Swain*, an Alabama case in which a Black man was convicted and sentenced to death by an all-White jury for the rape of a White woman,[65] the

prosecutor struck all six of the prospective Black jurors.[66] The Court found that the utility of peremptory challenges in "the institution of the jury trial" precluded it from examining the prosecution's strikes in the specific case, much less finding that those challenges violated the Equal Protection Clause.[67] The Court expressed a willingness to entertain a constitutional argument, but only upon a showing that the prosecution exercised strikes systematically, in trial after trial, so as not "to leave a single Negro on any jury in a criminal case."[68]

2. California's Intervention in People v. Wheeler

In 1977, *American Law Reports* published a nationwide review of the use of peremptory challenges and the application of the *Swain* standard in civil and criminal cases.[69] The author analyzed every criminal case decided in the 10 years after *Swain* in which courts had considered an objection to the exercise of peremptory challenges against Black jurors.[70] The report found that, under the *Swain* standard, it was nearly impossible to prove that a peremptory challenge was based on race.[71] "[I]n all of the cases involving this issue thus far, *all of which have dealt with blacks as the group peremptorily challenged*, no defendant has yet been successful" in proving the peremptory challenges were exercised in a discriminatory manner.[72]

A year later, in *People v. Wheeler*, our state supreme court, relying on the independent force of article 1, section 16 of the California Constitution, acknowledged the injustice that the United States Supreme Court would not begin to address until eight years later.[73] In *Wheeler*, as the prosecutor struck all the prospective Black jurors, the defense attorneys repeatedly moved for a mistrial, arguing that the prosecutor's challenges made it impossible for the defendants to be tried by "'a fair cross section of the community.'"[74] The trial judge denied their motions, and the two Black defendants were tried and convicted of the murder of a White man by an all-White jury.[75] The California Supreme Court reversed their convictions.[76] The court held that, in a criminal case, when any party exercises a peremptory challenge because the juror belongs to "an identifiable group distinguished on racial, religious, ethnic, or similar grounds," the conduct "violates the right to trial by a jury drawn from a representative cross-section of the community."[77]

The court in *Wheeler* found it intolerable that, under *Swain*, defendants had a federal constitutional right to equal protection that they could not secure because the standard made it "virtually impossible" to do so.[78] A defendant could only meet the *Swain* bar by proving that the prosecutor struck every Black juror in "an undetermined number of individual trials."[79] The court observed that "numerous black defendants have attempted to comply with [the *Swain* burden of proof], but none has succeeded."[80] Criminal defendants had neither the time nor funds to conduct the research, nor was the data—including a record of the race of each struck juror in every trial—reasonably available.[81] The court cited the 1977 *American Law Reports* article, and agreed that the "California experience has been identical."[82]

The California Supreme Court in *Wheeler* acknowledged the high court's unwillingness to disturb the "nature and operation" of peremptory challenges.[83] The court recognized that the

Supreme Court would reject any challenge under any provision of the federal Constitution that might diminish the prosecution's ability to strike jurors free from scrutiny, and declared, "*Swain v. Alabama* is not to be followed in our courts."[84]

The *Wheeler* opinion announced a procedure by which a party could demonstrate that the opposing attorney was exercising a peremptory challenge based "on the ground of group bias alone."[85] In its search for a remedy, the court looked to legal scholars.[86] However, two unexamined premises restricted the court's options: (1) the assumption that retaining at least some peremptories serves a necessary function in ensuring the parties' ability to excuse some jurors who have invidious biases, but who are not so clearly biased as to be subject to a cause challenge; and (2) the assumption that prosecutors will act honestly, fairly, and free of racial prejudice in exercising strikes unless and until the defense shows the contrary.[87] Given these assumptions, proposals to eliminate peremptory challenges or allow them only for the defense were off the table.[88] Although the court's decision was grounded in the state Constitution's fair cross-section provision, the court adopted an approach that was lifted from equal protection analysis.[89] This report explains why the chosen remedy was destined to fail and how that failure has played out over the last 40-plus years.

Wheeler adopted a three-step test. First, the attorney objecting to the strike, having made a record of what has transpired, must show both that the jurors who were the subject of the strikes belong to "a cognizable group" and establish "a strong likelihood" of a fair cross-section violation, also known as a prima facie showing.[90] Second, if the judge finds a prima facie showing (which *Wheeler* also referred to as "a reasonable inference"), the burden shifts to the party who made the peremptory challenges to show that the party did not act on the basis of "group bias alone."[91] Third, the trial judge determines the validity of the reasons.[92] If the court finds that any one of the challenges was based on group bias, the fair cross-section requirement has not been met, and the judge must dismiss the venire and begin jury selection again.[93]

As we explain below, when the United States Supreme Court reversed *Swain* in *Batson* in 1986 on equal protection grounds, the Court adopted a similar three-step procedure.[94] For simplicity, when discussing objections to peremptory challenges, we refer throughout the report to the *Batson* procedure—rather than to the *Batson*/*Wheeler* procedure—unless there is a specific reason to reference *Wheeler*.[95]

3. *The United States Supreme Court Decides* Batson v. Kentucky

In 1986, the United States Supreme Court decided *Batson v. Kentucky*, announcing that *Swain*'s evidentiary burden was "crippling," and that "a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[96] The Court held that discriminatory jury selection practices "harm" the defendant, the excluded juror, and "the entire community" because they "undermine public confidence in the fairness of our system of justice."[97] The Court's identification of these three interests was foundational to its extension of *Batson*'s protections in subsequent opinions.[98]

Unlike *Wheeler*, the decision in *Batson* was grounded squarely in the Fourteenth Amendment's Equal Protection Clause.[99] But like *Wheeler*, the Supreme Court in *Batson* adopted a three-step (or three-stage) procedure for determining whether the prosecution purposefully discriminated against a Black prospective juror in the exercise of a peremptory challenge.[100] At step one, the defendant must establish a "prima facie case" of purposeful discrimination.[101] To do so, the defendant need only raise an "inference" of discrimination based upon "all relevant circumstances."[102] If the trial court agrees that the defendant has made a prima facie showing, the inquiry moves to the second step. At step two, the prosecution must "come forward with a neutral explanation for challenging black jurors," which must be "related to the particular case to be tried."[103] The majority stated that a prosecutor may not rebut the prima facie showing by simply "denying" that he had "a discriminatory motive" or insisting that he acted in "good faith."[104] At the third step, the trial court decides whether the defendant has established purposeful discrimination.[105] The Court left no doubt that, consistent with all other equal protection challenges, the defendant must establish a "'racially discriminatory purpose'" to prevail on a *Batson* motion.[106]

Justice Thurgood Marshall concurred in *Batson* to acknowledge that the Court had taken a "historic step," but cautioned that the eradication of racial discrimination in jury selection "can be accomplished only by eliminating peremptory challenges entirely."[107] He offered several reasons for his view. First, while a three-step procedure similar to the one adopted in *Batson* was already the law in states such as California and Massachusetts, the small numbers of African Americans in the venire made it exceedingly difficult for the defendant to establish a prima facie showing.[108] Second, he described the ease with which prosecutors could "assert facially [race] neutral reasons," especially when they rely on a prospective juror's demeanor, thus creating a "difficult burden" for judges who must assess the credibility of those reasons.[109] Last, Justice Marshall addressed the issue of "conscious or unconscious racism," which leads prosecutors to characterize Black jurors in negative terms—especially with regard to demeanor—and judges to credit those reasons.[110] This report shows how, in case after case, decade after decade, Justice Marshall's predictions have been borne out.

Batson only prohibited prosecutors from striking Black jurors in trials involving Black defendants.[111] In later decisions, the Supreme Court extended *Batson* to apply to civil and criminal trials, to all trials irrespective of the race of the parties, to defense attorneys as well as prosecutors, and to strikes based on ethnicity or gender.[112] Some lower federal courts and state courts have expressly extended *Batson* to other groups such as those who have in common national origin, sexual orientation, or religious affiliation.[113] Some states prohibit discrimination in jury selection under their state constitutions, by statute, or both.[114]

4. California Codifies the Prohibition Against Discriminatory Strikes

Ten years after *Wheeler*, in 1988, the California Legislature consolidated the relevant Penal and Civil Code sections into the Trial Jury Selection and Management Act, which governs "the selection of jurors, and the formation of trial juries, for both civil and criminal cases, in all trial

courts of the state."[115] California Code of Civil Procedure section 231.5 now states, "A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in section 11135 of the Government Code, or similar grounds."[116] This section codifies the *Wheeler* decision. Government Code section 11135(a) prohibits discrimination by any state entity "on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation."

5. California Declines to Enforce Batson

From 2003 through 2008, the United States Supreme Court issued a series of opinions in *Batson* cases. Several decisions clarified aspects of the *Batson* procedure in a way that signaled the need for lower courts to be more vigilant in disallowing discriminatory peremptory challenges: *Miller-El v. Cockrell* (*Miller-El I*), *Johnson v. California*, *Miller-El v. Dretke* (*Miller-El II*), and *Snyder v. Louisiana*.[117] As we detail in Section III.E, dissenting justices on the California Supreme Court often rely on those decisions to demonstrate that the majority is failing to adhere to the high court's *Batson* precedents.

In *Johnson*, the Supreme Court concluded that the test applied by California courts for determining whether a party has made out a prima facie case of purposeful discrimination at the first step of the *Batson* procedure was an "inappropriate yardstick."[118] For decades, at step one, our state courts required a party to demonstrate "'it is more likely than not'" that the peremptory challenge was based on group bias.[119] The Supreme Court in *Johnson* reaffirmed *Batson*'s stage-one requirement: a party need only show that all of the circumstances give "'rise to an inference of discriminatory purpose.'"[120] Writing for the majority, Justice John Paul Stevens explained, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[121] Therefore, when there is an inference that a peremptory challenge was based on race, the trial judge should not speculate about the purpose because "a direct answer can be obtained by asking a simple question": What was the reason for the strike?[122] Since *Johnson* was decided in 2005, the California Supreme Court has not found step-one error in a single case.[123] In Sections III.E.1 and III.E.2, we discuss how the California Supreme Court, employing a variety of analytic techniques—including hypothesizing about reasons the prosecutor never offered—continues to impose an heightened threshold at step one.

Miller-El II, a Texas death penalty case, involved the third step of the *Batson* procedure, that is, whether, considering all of the circumstances, a party intentionally exercised a peremptory challenge based on race.[124] The prosecutor in *Miller-El II* used his peremptory strikes to remove 10 of 11 African-American prospective jurors.[125] The Supreme Court commented, "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."[126] This approach, known as comparative juror analysis, was central to the Court's decision in *Miller-El II*,[127] even under

the highly deferential standard of review that applies when federal courts review state court judgments in habeas corpus proceedings.[128] The Court compared the struck Black panelists to the seated White jurors in several respects, including the similarity of their answers to specific questions and the prosecution's disparate questioning of Black and White jurors on the same topic.[129] The Court in *Miller-El II* also emphasized that this type of comparison requires only that the jurors be "similarly situated," not that they be "identical in all respects."[130] "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[131] Because the party exercising the strike bears the burden of providing an explanation, the majority warned against speculation by trial or reviewing courts that might "imagine a reason" when "the stated reason does not hold up."[132] The Court also declared that when a reason turns out to be false, unsupported by the record, or pretextual, any "new explanation" is highly suspect.[133]

In *Snyder*, a Louisiana death penalty case, the prosecution struck all the African Americans in the venire, but the Supreme Court decided the *Batson* issue based on just one of the peremptory challenges.[134] The prosecutor said that he struck Mr. Brooks, an African-American man who was studying for his teaching credential, based on his demeanor (nervousness) and his university-related obligations, which the prosecutor asserted might lead the juror to convict Snyder of a lesser included offense in order to avoid sitting through a penalty phase trial.[135] Because there was no record as to whether the trial judge credited the demeanor-based reason, the Court would not "presume" that the judge had done so, and decided the issue solely on the second reason.[136] The Court reviewed the voir dire transcript and acknowledged the "implausibility" of the reason concerning the juror's schedule.[137] The Court then compared the struck juror's situation to that of two seated White male jurors. It found that the White jurors had "conflicting obligations that appear to have been at least as serious as Mr. Brooks'," and concluded that the strike was the result of intentional discrimination.[138]

There are at least three important take-aways from *Snyder* when considering how the California Supreme Court has applied the opinion. First, the high court reaffirmed its position in *Batson* that the "Constitution forbids striking even a single prospective juror for a discriminatory purpose."[139] Second, when the party making the strike gives two reasons, one based on the juror's demeanor and the other a non–demeanor-based reason, if the trial court denied the motion "without explanation," a reviewing court may not defer to the demeanor-based reason.[140] Third, consistent with *Miller-El II*, the Supreme Court conducted a comparative juror analysis.[141] The Court contrasted the prosecutor's questioning of the struck Black juror about his obligations with his questioning of the White seated jurors about their conflicting responsibilities.[142] It concluded that the prosecution gave a "pretextual explanation."[143]

In Section III.E.5, we examine the California Supreme Court's application of *Miller-El II* and *Snyder*. We describe barriers the court has erected to the meaningful application of comparative juror analysis based on the majority's fundamental reservations about the approach. These hurdles, dissenting justices explain, cannot be reconciled with the high court's robust use of the analysis.

In two more recent decisions, *Foster v. Chatman* and *Flowers v. Mississippi*, the Supreme Court employed comparative juror analysis in deciding that the prosecution had violated *Batson*.[144] In *Foster*, for example, the prosecutor gave eight reasons for removing a Black juror, including the age of the juror's son (close to the defendant's), his "confused" view about the death penalty, and his wife's work at a hospital for "mentally ill people."[145] The Court found, however, that the prosecutor retained White jurors whose sons were young men and who also expressed "confusion about the death penalty questions," and did not strike a White juror who worked at the same hospital.[146] In *Flowers*, the state challenged a Black woman because, among other reasons, she was acquainted with members of the defendant's family. [147] The Court concluded that the explanation was pretextual because her relationship with the family was similar to that of other seated White jurors.[148] Employing "side-by-side" juror comparisons as a critical method of analysis in both cases, the Court adhered to its view that any justification that applies equally to both the struck juror and one or more seated jurors is evidence of discriminatory intent, regardless of whether the jurors were dissimilar in other respects.[149] By contrast, as Section III.E.5 explains, the California Supreme Court continues to raise the bar for finding *Batson* error using this approach by requiring that the Black struck jurors and seated White jurors be substantially similar in all respects.

This brief overview shows that, historically, California was not exempt from the wholesale exclusion of people of color—especially African Americans—from jury service and that underrepresentation in jury venires is a present-day inequity in our judicial system. Although the California Supreme Court in *Wheeler* was a leader in addressing discriminatory peremptory challenges, today's court does not adhere to the United States Supreme Court's directives aimed at enforcing *Batson*. Through our empirical investigation of court of appeal opinions and prosecution training practices, analysis of social science research on discrimination, and an examination of the California Supreme Court's jurisprudence, we expose the intractable and irremediable nature of discriminatory peremptory challenges under the *Batson* regime.

II.
EMPIRICAL FINDINGS

We conducted an empirical study to understand how prosecutors use peremptory challenges and how California courts review *Batson* claims. We found that prosecutors across California use peremptory strikes to disproportionately remove African-American and Latinx citizens. Further, California appellate courts seldom reverse trial court decisions for *Batson* error, instead upholding prosecutors' reasons for striking Black and Latinx jurors as race-neutral and credible. Taken together, these findings suggest both that California has a serious *Batson* problem and lacks an effective judicial mechanism (or the judicial will) to address it. This section first describes our empirical findings about how prosecutors in California use peremptory challenges against Black and Latinx jurors, offering examples from cases that illustrate the insidiousness of purportedly "race-neutral" justifications. Second, this section catalogues the state supreme court and court of appeal *Batson* cases, revealing the shockingly low rate at which they find *Batson* error. Finally, comparing the reversal rate in our state courts with that of the Ninth Circuit in its review of *Batson* cases under a highly restrictive standard, we show that the circuit nonetheless finds *Batson* error over seven times more often than the California Supreme Court and almost six times more often than the California Courts of Appeal.

A. California Prosecutors Use Peremptory Strikes to Disproportionately Remove Black and Latinx Jurors

We reviewed 683 decisions of the California courts of appeal involving *Batson* claims from 2006 through 2018.[150] (Appendix A sets out the methods used in the data collection and analysis). During this 12-year period, defense counsel objected to prosecutors' strikes in 670 cases, 98.0% of the total number of cases involving *Batson* claims.[151] *See* Figure 1. Of these 670 cases, 71.6% (480) involved objections to prosecutors' use of peremptory challenges to remove Black jurors. Of the remaining cases, prosecutors removed Latinx jurors in 28.4% (190) of cases, Asian-American jurors in 3.4% (23) of cases, and White jurors in three cases (0.5%). Only 14 cases (2.0% of the total) involved claims that defense counsel had exercised discriminatory peremptory strikes. Defense counsel struck Asian-American jurors in four cases, White jurors in four cases, Black jurors in three cases, and Latinx jurors in one case.[152] *See* Figure 2.

Percentage of *Batson* Motions by Party

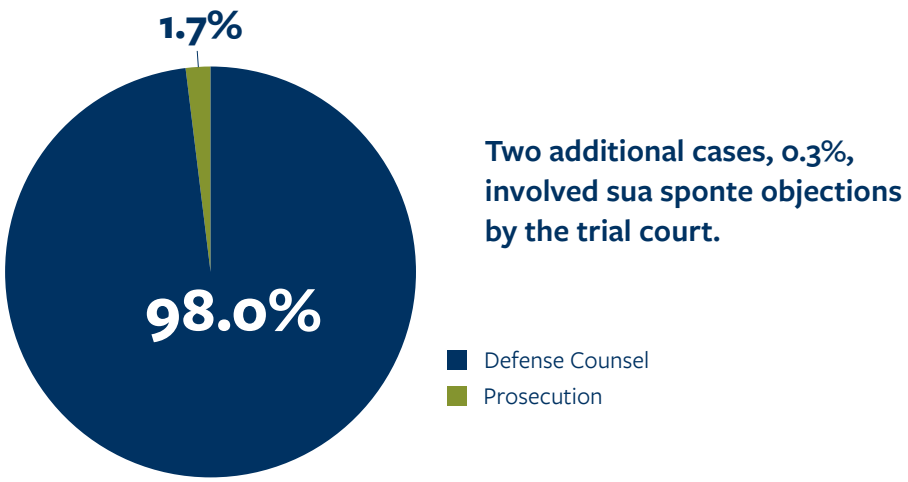

Figure 1[153]

Strikes by Race and Ethnicity

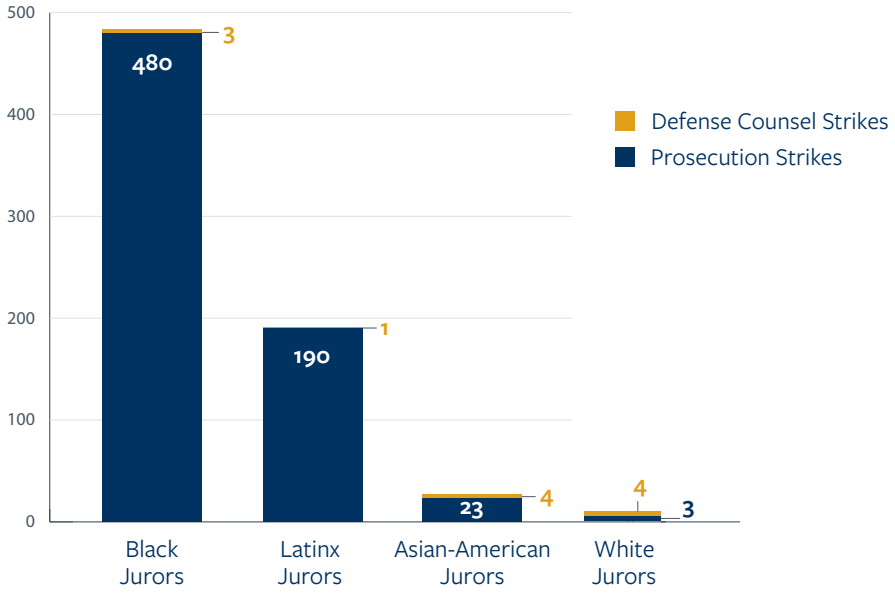

Figure 2

B. California Prosecutors Rely on Racial and Ethnic Stereotypes to Remove Black and Latinx Jurors

We coded the reasons prosecutors gave for striking jurors into six categories. These categories are nearly identical to those listed in subsections (h) and (i), respectively, of Washington Supreme Court General Rule 37 ("GR 37"): "Reasons Presumptively Invalid" and "Reliance on Conduct." We discuss GR 37 in Section IV.C. A copy of GR 37 is Appendix B to the report. GR 37 declares that the enumerated "reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State."[154] The categories are:

a. having prior contact with law enforcement officers;
b. expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
c. having a close relationship with people who have been stopped, arrested, or convicted of a crime;
d. living in a high-crime neighborhood;
e. having a child outside of marriage; and
f. demeanor-based conduct.[155]

We did not include two of GR 37's categories, (h)(vi) "receiving state benefits" and (h)(vii) "not being a native English speaker," because these were almost never used.

For most of the analysis that follows, we report data at the case level. However, we also coded the reasons offered for peremptory challenges at the juror level to accurately account

for cases in which more than one juror was struck. We use that data to report the type of challenge raised against jurors of different races and ethnicities below. For more information see Appendix A.

1. Reliance on Racial and Ethnic Stereotypes: Case-Level Data

Prosecutors' reasons for striking jurors correlate with racial stereotypes. (Sections III.A, III.C, and III.D discuss implicit and explicit racial stereotypes.) As Figure 3 below shows, prosecutors relied on demeanor as a reason for their peremptory challenges in over 40% of the cases.[156] Demeanor-based explanations were used to exclude jurors who exhibited a poor attitude, were sleeping, appeared confused, or failed to make eye contact with the prosecutor. In 35% of the cases, prosecutors relied on a juror's close relationship with people who had been stopped, arrested, or convicted of a crime. Nearly as often, in over 34% of the cases, prosecutors explained that the struck jurors distrusted law enforcement or the criminal legal system or believed that law enforcement or the criminal legal system is racially- or class-biased. Prosecutors gave prior contact with law enforcement or the criminal legal system as a reason in more than 21% of the cases. And in approximately 4% and 1.5% of the cases, respectively, prosecutors struck jurors because they lived in a high-crime neighborhood or had a child outside of marriage.

Prosecution's Reasons for Challenging Jurors by Case

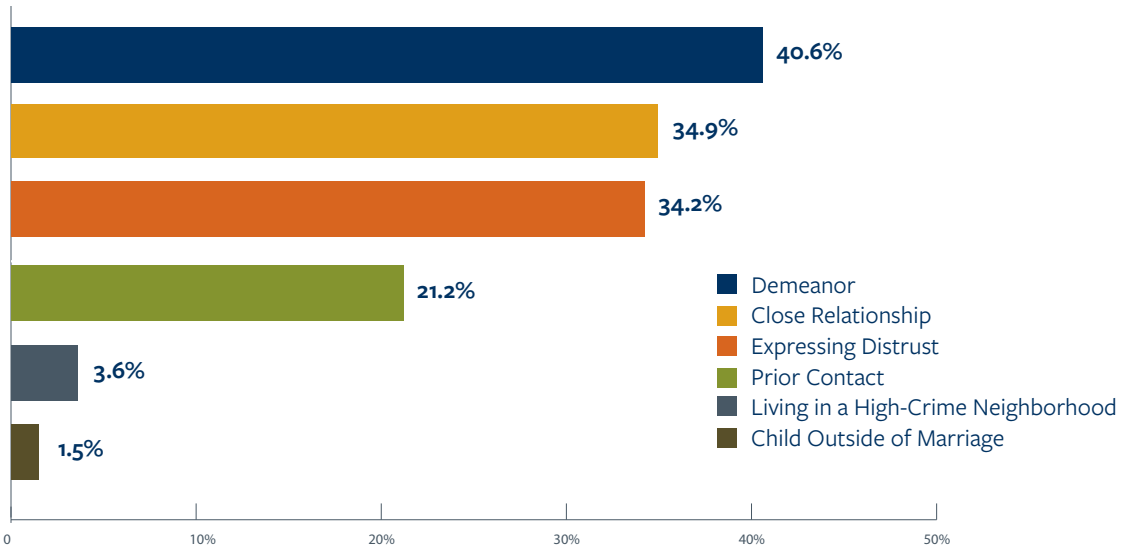

Figure 3[157]

A review of these cases leaves no doubt that prosecutors' exercise of race-based peremptory challenges is very much a present-day practice. Consistent with the findings of every other study, prosecutors in California disproportionately use peremptory challenges to exclude Blacks from juries.[158] As in other jurisdictions, prosecutors often offer many reasons—a "laundry list"—for each strike.[159] For example, an Alameda County prosecutor struck a Black juror because he was slouching, pursuing a criminal justice degree, believed the criminal legal system was unbalanced, and cited the events in Ferguson, Missouri to explain why he no longer wanted to be a police officer.[160]

2. "Race-Neutral" Reasons: Strikes of Black Jurors

Our study found that prosecutors disproportionately strike Black prospective jurors and justify these strikes because of the prospective jurors' demeanor, appearance, distrust of the criminal legal system, relationship with someone who had a negative experience with law enforcement, and place of residence. Here, we report on the reasons prosecutors gave for striking Black jurors and the frequency with which they gave these reasons for their strikes.

We determined that prosecutors most often relied on demeanor as a reason for striking Black jurors. Of the 480 cases in which prosecutors struck Black jurors, they offered a demeanor-based reason in 37.5% (180 cases) of these cases. As we discuss in Sections III.A and III.C, these reasons correlate with racial stereotypes of African Americans because we unconsciously and reflexively categorize people based on demeanor. For example, in a 2014 trial, an Alameda County prosecutor struck a Black juror, in part, because he "'had a very harsh demeanor . . . [The juror] was an imposing individual who gave short curt answers . . . [and] was falling asleep.'"[161] In a 2014 trial, a Los Angeles County prosecutor struck two Black jurors because both did not make eye contact with her, and one was "'sleeping out in the hallway" during a break.[162] In another Los Angeles County trial, a prosecutor excused a Black juror because she "'felt that he just wasn't that bright.'"[163] In yet another Los Angeles County case, a prosecutor struck a Black juror because she "had few interactions with others in the hallway and had not made friends with the other jurors, as well as seem[ed] animated and attentive to defense topics and questions, but not so animated during prosecution questions."[164] A Riverside County prosecutor struck a Black juror who he described as "'very defensive, because she had her arms crossed, and . . . seemed a little hostile by her body language.'"[165] In another Riverside County trial, a prosecutor excluded a Black juror because he was "over-eager . . . and did not stay focused."[166]

"Appearance" was not one of the GR 37 categories, and therefore we did not separately code appearance as a category. However, prosecutors also offered both demeanor- and appearance-based reasons as grounds for a single peremptory challenge with sufficient frequency to warrant mention. As we discuss in Section III.D, California prosecutors are trained to avoid successful *Batson* objections by justifying strikes based on a prospective juror's appearance. Section III.A shows that these reasons also correlate with racial stereotypes of African Americans: we unconsciously and reflexively categorize people based on their appearance. For example, a Riverside County prosecutor struck a Black juror because he was wearing dollar sign diamond earrings and, thus, was not the ideal conservative juror.[167] A Los Angeles County prosecutor explained that she struck a Black juror because his dreadlocks touched the floor, which made him incompatible with a "'cohesive group' of persons made of persons 'of the same, kind of fall into societal norms.'"[168] Another Los Angeles County prosecutor exercised a peremptory challenge against a Black woman because "'she was wearing a very short skirt, 12-inch earrings, and had on these sandals that were blinged out with . . . at least 100 cubic zirconia on each one.'"[169] Yet another Los Angeles County prosecutor said that she struck a Black juror because the juror had "'extraordinarily long pink fingernails' and braided hair" and

therefore was likely "'fairly liberal.'"[170] In a 2015 trial, a Yolo County prosecutor explained that she struck a Black juror because she was "'morbidly obese,'" stating that she has "'concern about people who are morbidly obese, how they might interact with other jurors, [and] what motivates them.'"[171] A Sacramento County prosecutor struck one Black juror because "'he was wearing dreadlocks. And it's my understanding . . . that dreadlocks are somewhat associated with a Reggae culture . . . [that] promotes drug use . . . in general.'"[172]

When a prosecutor challenges a juror based upon the juror's status (such as employment, age, education level) or statement, or based upon an inference the prosecutor has drawn from the juror's status or statement, the record—the jury questionnaire and/or the voir dire transcript—can refute or confirm the accuracy of the explanation. When a prosecutor relies on demeanor or appearance, there are only two checks on the accuracy of the reasons: (1) the defense counsel's rebuttal, if any; and (2) the court's ruling, which often does not address the accuracy of the prosecutor's description and is highly susceptible to the judge's implicit biases.[173] As Section III.A discusses, judgments based upon demeanor and appearance are particularly susceptible to implicit bias. In ruling on the motion, the trial judge is as likely as the prosecutor to be influenced by implicit bias.

Nearly as often as demeanor-based reasons, prosecutors struck Black jurors for expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- or class-biased. This occurred in 34.8% (167 cases) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors. In Sections III.A and III.C, we discuss the racialized content of these reasons, including African Americans' greater distrust—compared to Whites'—of law enforcement and the criminal legal system based on the history of anti-Black racism in the United States and their lived experiences. For instance, an Alameda County prosecutor struck a Black juror because, according to the prosecutor, the juror would not be willing to follow the law since "'she hopes the system is fair but it does need some overhaul when it comes to minorities being arrested and jailed more than non-minorities, especially in reference to drugs.'"[174] In a Los Angeles County case, a prosecutor struck a Black juror because the juror may have struggled "'to determine whether [the defendant] is guilty or not'" since the juror saw "'flaws'" in the criminal legal system, such as better outcomes for wealthy criminal defendants.[175] In another Los Angeles County trial, a prosecutor struck a Black juror because the prosecutor concluded that the juror expressed "'a lack of faith in law enforcement'" because the juror was "robbed of jewelry at gunpoint yet had failed to report the crime to the police."[176] The prospective juror, however, "claimed he had not reported the crime because he was not physically injured and only material items were taken . . . ."[177] In yet another Los Angeles County case, a prosecutor excluded a Black juror because the juror described her husband's arrest when he was a minor as a "'victim of [police] decision,'" stating, "'I feel that shows a bias.'"[178] A San Joaquin County prosecutor struck a Black juror because he stated that he had been "'falsely accused'" and spent four months in jail, which, according to the prosecutor and despite the juror's assertion otherwise, "'gave him a lot of empathy and . . . sympathy for . . . [the] defendant.'"[179]

Next, prosecutors relied on the juror's close relationship with someone who had negative contact with law enforcement—that is, a person who had been stopped, arrested, or convicted of a crime—as the reason for the strike. As Section III.C discusses, African Americans are more likely to be stopped, arrested, and convicted of a crime than any other racial or ethnic group. Prosecutors offered this reason for striking Black jurors in 33.3% (160) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors. For example, in an Alameda County case, the prosecutor explained that she struck a Black juror because the prosecutor believed that the juror could not be fair "'in light of the fact that her family members all have had dealings with the Oakland Police Department.'"[180] A Los Angeles County prosecutor struck a Black juror because "'her son was arrested for a D.U.I.'"[181] In another Los Angeles County case, a prosecutor struck six of the nine Black jurors he ultimately removed because they all had family members who were convicted of a crime or were in prison.[182] In a Sacramento County case, the prosecutor struck a Black juror because he had visited his two siblings when they were incarcerated.[183] In another Sacramento County case, a prosecutor excluded a Black juror because she reported in her questionnaire that her "son had been in jail for unlawful driving or taking of a vehicle," but noted that he had "'done wrong and had to serve time.'"[184] In another Alameda County trial, a prosecutor removed a Black juror because, according to the prosecutor, the juror stated that "'a number of her family members were involved in crimes and that she doesn't deal with them.'" [185] The prosecutor said, "'I find that kind of hard to believe that even if it were true.'"[186] In none of these instances did the jurors state that they could not be fair as a result of their relationships with individuals who had been arrested or incarcerated.

In 21.7% (104) of these cases, prosecutors struck African Americans because the juror had a negative experience with police or the criminal legal system, although the juror may not have expressed a general distrust of law enforcement or the system. A Los Angeles County prosecutor struck a Black juror because he had been, in the juror's own words, "'detained for being in the wrong part of town while black.'"[187] In an Alameda County trial, a prosecutor excused a Black juror because she "had been arrested for purse snatching and placed on probation as a juvenile, and had on another occasion . . . been arrested by the Oakland Police Department and jailed."[188] Another Alameda County prosecutor struck a Black juror because the prosecutor believed that the "traffic citation she received more than 10 years previously for driving without her seat belt . . . weighed heavily" on the juror.[189] In a 2005 Alameda County trial, a prosecutor excluded a Black juror who expressed dislike for a particular law enforcement officer who had ticketed her for running a stop sign in 1982.[190] In a 2013 trial, a Contra Costa County prosecutor explained that she struck a Black juror because of his 1962 "'experience with a police officer . . . [who] he thought . . . was being racist,'" although the juror made it clear that this event was "'in the past.'"[191]

Prosecutors also gave Black jurors' residence in a particular neighborhood as the reason for striking them.[192] Prosecutors offered this justification in 2.5% (12) of cases. Given the history of slavery, Jim Crow, redlining, and the home-ownership gap between Blacks and Whites, the neighborhood in which African Americans live highly correlates with racial stereotyping. *See* Section III.C. In a San Francisco County case, the prosecutor explained that when asked about

"quality of life," a Black juror who "'lives in the Tenderloin . . . had no response"[193] A prosecutor in Alameda County said that she struck a Black juror because the juror "appeared desensitized to violence, based on the fact [*sic*] she lived in East Oakland and had been burglarized 15 times."[194] A Los Angeles County prosecutor removed a Black juror because he was raised around gangs in Compton.[195] In another Los Angeles County case, the prosecutor struck a Black juror because the prosecutor found it "incredible" that she lived in South Central Los Angeles but had no contact with gang members.[196]

3. "Race-Neutral" Reasons: Strikes of Latinx Jurors

Prosecutors exercised peremptory challenges against Latinx jurors for reasons similar to those they gave for their strikes against African-American jurors, but not nearly as frequently. Prosecutors removed Latinx jurors in 28.4% (190) of cases. As with Black jurors, prosecutors most often, in 41.1% (78) of these 190 cases, offered demeanor-based reasons for striking Latinx jurors. For example, in a Tulare County case, the prosecutor struck two Latino jurors based on their demeanor: one because he frowned and the other because he "'seemed like he was confused.'"[197] A Fresno County prosecutor struck a Latina juror because she "did not seem very friendly or communicative."[198] In an Orange County case, the prosecutor said that they struck the Latina juror because they "'didn't like her,'" and described her as "'flippant'" and someone who spoke "'like a Valley Girl or like a teenager.'"[199] A Los Angeles County prosecutor struck three Latinx jurors because one seemed "unsure of herself," another had a "strong, aggressive personality," and the other "was anti-social and withdrawn."[200] Another Los Angeles County prosecutor struck a Latino juror because the juror had "the most dialogue" with defense counsel.[201] A San Bernardino prosecutor struck four of the six Latinx jurors he challenged because one talked and thought "slow," another was "'very timid,'" the third did not "appear 'too bright,'" and the last was "'very timid' . . . and also lacked intelligence."[202]

Prosecutors also offered appearance-based reasons for striking Latinx jurors. In a 2015 Los Angeles County case, a prosecutor struck a Latino juror because of his "'big lobe earrings. . . .'"[203] The prosecutor said, "'[I]t is almost like somebody walking in . . . with their pants falling down and showing their underwear.'"[204] A Contra Costa County prosecutor struck two Latino jurors based on their appearance—one because he wore "'a large earring'" and had "'a goatee,'" and the other because he had "'extremely long, curly hair.'"[205] In a 2011 Santa Clara County case, a prosecutor gave a Latino juror's attire as a reason:

> '[He] was wearing long shorts. Hanging out of . . . one of the shorts pockets was a red San Francisco 49ers lanyard, which is the type of lanyard you see being handed out in San Jose by the bail bonds people as a free gift . . . He had long white tube socks on pulled up to his knees and Nike Cortez sneakers on, which I know to be attire of somebody who is a gang member.'[206]

A San Mateo County prosecutor struck a Latina juror for her "youthful and untraditional appearance, which included blue nail polish and very torn jeans."[207]

Nearly as often as demeanor-based reasons, prosecutors based their strikes on a Latinx juror's close relationship with someone who had a negative experience with law enforcement, including having been stopped, arrested, or convicted of a crime. Prosecutors offered this reason in 33.7 % (64) of cases. A Riverside County prosecutor excluded three Latinx jurors because they all had family members who were incarcerated.[208] In a Contra Costa County trial, the prosecutor struck a Latina juror because someone in her family had been in prison, notwithstanding the fact that (1) the family member was a stepson who had been incarcerated 10 years earlier and with whom she had little contact, and (2) her deceased husband had been a police officer for two decades.[209] In a 2015 Los Angeles County case, the prosecutor struck two Latinx jurors because he was "concerned that they both had a close family member involved with the criminal justice system," though he acknowledged that the jurors "believed they could be fair."[210] In a 2016 Los Angeles County trial, the prosecutor struck one Latino juror because his wife had pleaded guilty to welfare fraud, even though the juror stated "that would not prevent him from being fair."[211] A Fresno County prosecutor struck a Latina juror because of possible bias from the search and arrest of her husband, despite her assertion that she would not hold this incident against the police.[212]

In 26.8% (51) of cases involving challenges to Latinx jurors, prosecutors removed them for expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- or class-biased. In a Yolo County case, the prosecutor struck a Latina juror because she had a negative experience with law enforcement that led her to conclude "'anyone can be accused of something they didn't do and are treated like a criminal even when the police report states otherwise.'"[213] A Santa Clara County prosecutor struck a Latina juror because she stated that her cousin had been treated unfairly by the criminal legal system, which the prosecutor believed gave her "sympathy for defendants."[214] In a Sacramento County case, the prosecutor struck a Latina juror because she indicated on her juror questionnaire that "the justice system treats people unfairly because of race or ethnic background."[215]

In 17.4% (33) of cases involving challenges to Latinx jurors, prosecutors cited jurors' own prior experience with law enforcement or the criminal legal system as a reason for their peremptory challenges. A Los Angeles County prosecutor struck a Latino juror because, in the 1970s, the juror and a Black friend had a negative experience with police officers in which the officers hit his friend.[216] The juror "stated that nonetheless he did not harbor any resentment toward officers."[217] In another Los Angeles County case, a prosecutor struck a Latina juror because she had an eight-year-old D.U.I. conviction, despite her belief she had been treated fairly in those proceedings.[218] In a 2008 Yolo County trial, the prosecutor removed a Latino juror because 42 years earlier, as a teenager, he "had been kicked off of a ladder by a border patrol officer who was chasing" undocumented people.[219] A Tulare County prosecutor struck a Latino juror because he had been charged with a D.U.I., which the prosecutor assumed biased him against law enforcement.[220]

In 6.3% (12) of cases involving strikes of Latinx jurors, prosecutors offered a juror's neighborhood as the reason for their peremptory challenge. For example, a Kern County prosecutor struck a Latina juror because the juror had "'just moved out of Wasco,'" and the prosecutor had a "'degree of skepticism about anybody from Wasco'" because of "'the people in that town and their criminality.'"[221] In a Riverside County case, the prosecutor struck a Latina juror because the prosecutor found it "'very difficult to believe'" that the juror was from Moreno Valley and had not seen graffiti or was not aware of gangs in the area.[222] A Contra Costa County prosecutor struck a Latino juror because the juror was "'from the San Pablo area which is a lower class area within our county.'"[223]

4. Reliance on Racial and Ethnic Stereotypes: Juror-Level Data

We coded the reasons for each of the jurors by race and ethnicity—that is, the juror was the unit of analysis. *See* Figure 4. Of the total number of Black jurors they struck, prosecutors asserted that:

1. 25.6% expressed a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- or class-biased;
2. 23.5% had a close relationship with people who had prior contact with law enforcement or the criminal legal system;
3. 23.2% had inappropriate demeanor;
4. 13.2% had prior contact with law enforcement or the criminal legal system;
5. 1.4% lived in a high-crime neighborhood; and
6. 0.6% had a child outside of marriage.[224]

Of the total number of Latinx jurors they struck, prosecutors asserted that:

1. 20.8% had inappropriate demeanor;
2. 15.8% had a close relationship with people who had prior contact with law enforcement or the criminal legal system;
3. 10.8% expressed a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially- or class-biased;
4. 6.9% had prior contact with law enforcement or the criminal legal system;
5. 2.1% lived in a high-crime neighborhood; and
6. 0.9% had a child outside of marriage.[225]

Prosecution's Reasons for Challenging Jurors By Juror Race/Ethnicity

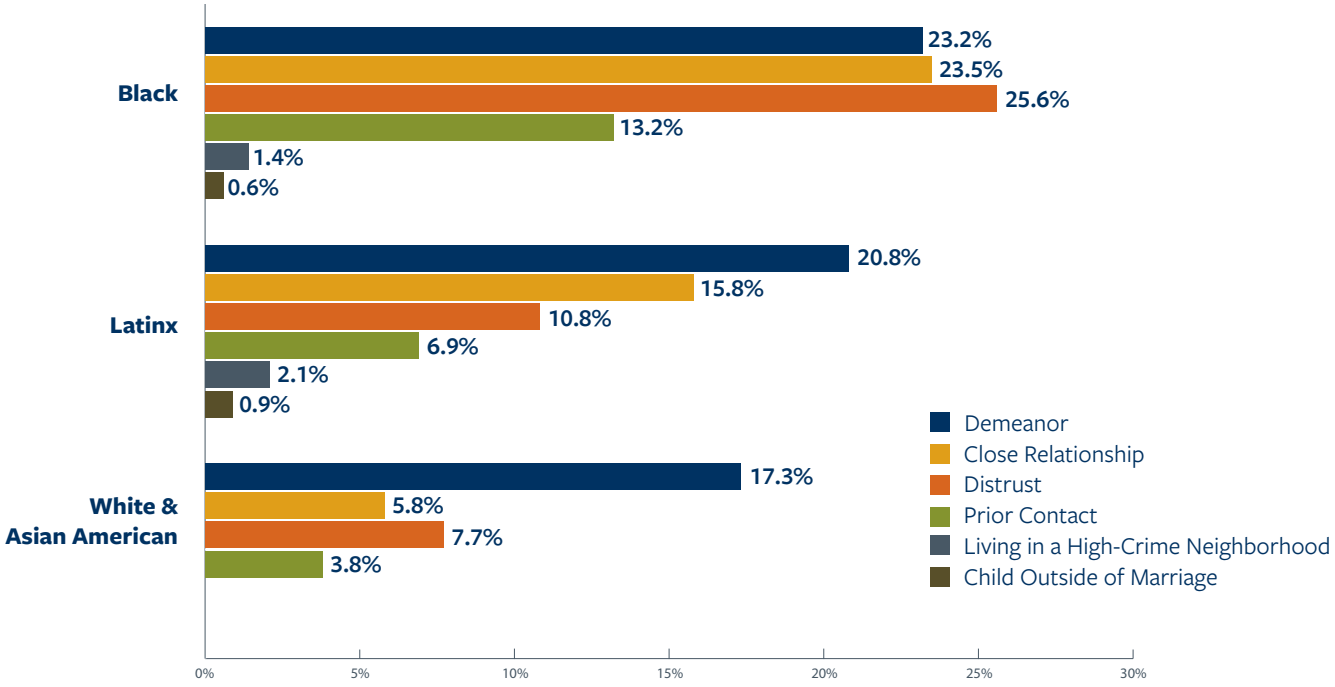

Figure 4[226]

5. Strikes of Cognizable Subgroups: Women of Color

Gender cases involving race or ethnicity are difficult to categorize. In Appendix A, we explain our decision not to report the data on the frequency of strikes against racial and ethnic subgroups. Neither the United States Supreme Court nor most lower federal courts have held that racial or ethnic subgroups—Black women, for example—are cognizable.[227] The California Supreme Court, however, has long held that subgroups can comprise a distinct cognizable class.[228] Irrespective of how defense counsel, the trial court, or the court of appeal characterizes the *Batson* objection, some California appellate opinions reveal both the sexism and racism embedded in prosecutors' reasons—either implicit or explicit.[229] When striking female jurors, prosecutors offered the following reasons with sufficient frequency to warrant mention: jurors' nail length and color, heel height and shoe color, hairstyle and color, and clothing style, including type of jewelry, especially when the prospective juror was an African-American woman. The following are representative examples of these explanations:

> "'I did not like the way she was dressed and presented herself . . . to me that's a sign of lack of maturity. Low cut clothing with sandals.'"[230]

> "'The other part of my reason is, frankly, her orange hair color which indicates to me she is not really one to conform with others.'"[231]

> "Juror B. was a single mother who had her first child at age 18 and her second at age 21, by different fathers. Juror B. seemed to have a very nontraditional and 'kind of counter cultural' lifestyle . . . . [T]he prosecutor cited her 'red streakish hair.' She believed Juror B. was 'not someone who would be . . . a conservative juror that would convict somebody.'"[232]

> "'I excused this person based on her physical appearance as she came in yesterday. She was wearing 5-inch heels, red pumps. She had gray, 3-inch claw nails. She had folded arms the entire time. She was wearing a spider pin. Her entire appearance seemed to me like the type of person who has her own personality, someone who is not afraid to be different, someone who may be a problem in the jury room, . . . someone who can maintain her position and, therefore, possibly hang the jury.'"[233]

The California courts of appeal are sources of precedent in *Batson* cases. Our study finds that the opinions overwhelmingly affirm the use of peremptory challenges to exclude Black and Latinx jurors. Although most of these opinions are unpublished, they serve to validate prosecutors' reliance on explicitly or implicitly discriminatory stereotypes as permissible and effective, and incentivize prosecutors to continue to employ these explanations.

C. California Courts Rarely Find *Batson* Error

Our review of California *Batson* cases revealed not only that prosecutors disproportionately use peremptory challenges to strike Black and Latinx prospective jurors, but that our state supreme court and courts of appeal rarely find that these strikes were unconstitutionally race-based. The California Supreme Court has found *Batson* error in 2.1% of the cases it reviewed in the last 30 years. The courts of appeal error rate was only 2.6% between 2006 and 2018. By, contrast, the Ninth Circuit found *Batson* error in of the 15% the California cases it decided between 1993 and 2019, and did so applying a much more stringent standard of review than our state courts employ.

1. The California Supreme Court's Abysmal Batson *Record*

The California Supreme Court's record in enforcing *Batson* is abysmal. Over a 30-year period (1989-2019), the court reviewed 142 *Batson* cases and found error only three times (2.1%).[234] *See* Figure 5. In 2019, Justice Goodwin Liu observed that it has been "more than 30 years since this court has found *Batson* error involving the peremptory strike of a black juror."[235] As he commented and our report and numerous studies show, "'Racial discrimination against black jurors has not disappeared here or elsewhere during that time."[236]

California Supreme Court *Batson* Ruling Decisions

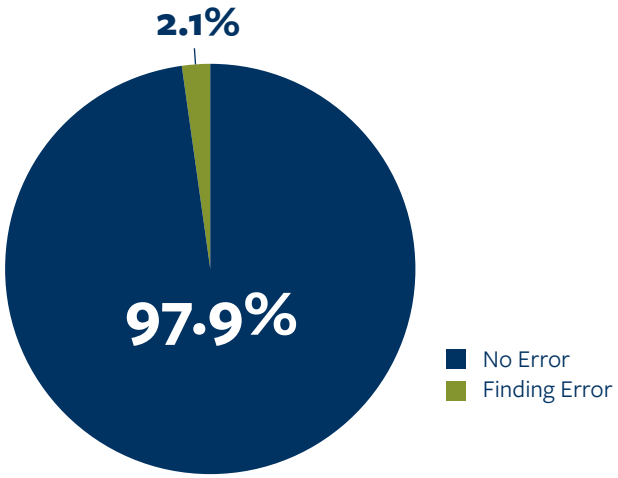

Figure 5

In Section III.E, we look closely at the opinions that produced the court's *Batson* record.

2. The California Courts of Appeal's Almost Equally Abysmal Record

The record of California's courts of appeal in *Batson* cases is only marginally better than that of the state supreme court. From January 1, 2006, through December 31, 2018, the courts of appeal issued a total of 683 opinions involving *Batson* claims. The six appellate districts found *Batson* error in only 18 cases (2.6%) and remanded three cases (0.4%) for the trial court to rehear the *Batson* motion.[237] *See* Figure 6.

Courts of Appeal *Batson* Decisions

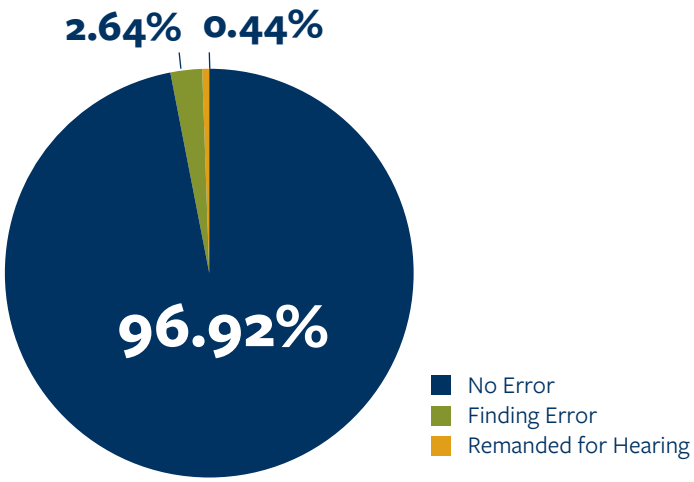

Figure 6

3. *The Ninth Circuit's More Rigorous Adherence to* Batson

The Ninth Circuit has been more willing than California appellate courts to apply *Batson* precedent and uphold the Equal Protection Clause.[238] The disparity between grants of *Batson* relief in the California courts and the Ninth Circuit is notable because the circuit decided 18 of the 21 habeas cases from California under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[239] As we explain, under the AEDPA, federal courts are extraordinarily constrained by the degree of deference they must afford to the state court decision.

Since 1993, the Ninth Circuit has found *Batson* error in 21 (15%) of the 140 cases the circuit reviewed in which relief had been denied by California appellate courts, including the state supreme court.[240] *See* Figure 7. In at least two other cases, the Ninth Circuit remanded the matter to the district court for a hearing, which led to a grant of relief.[241] As discussed above, the California Supreme Court granted relief in just three of 142 *Batson* cases decided between 1989-2019. Thus, the Ninth Circuit has granted *Batson* relief over seven times as often as the California Supreme Court.[242]

Ninth Circuit *Batson* Ruling Decisions

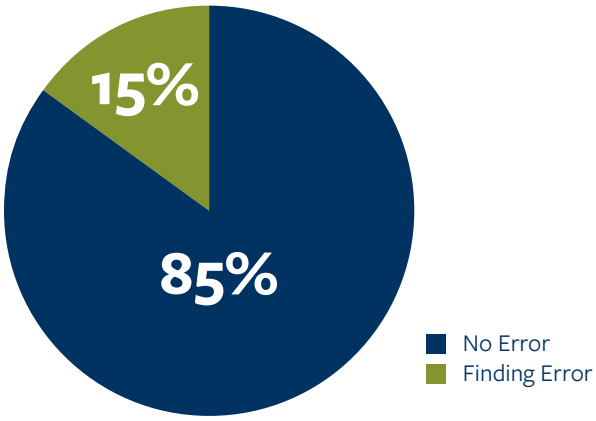

Figure 7

A defendant who has been convicted in a California court may seek relief in federal court only after the defendant has presented his or her claims in state appellate and habeas corpus proceedings.[243] Because "state courts are the principal forum for asserting constitutional challenges to state convictions," federal courts will not consider claims rejected in state court on procedural grounds or on the merits unless one of the AEDPA's statutory exceptions applies.[244] The federal habeas corpus statute reflects the view that "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal."[245]

The AEDPA imposes a "highly deferential standard" of review.[246] The federal court may not grant a habeas petition with respect to any claim decided on the merits in state court unless

the state court decision was: (1) "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'"; or (2) "'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"[247] Simply put, the AEDPA permits federal courts to grant habeas relief only in cases "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with the precedents of the United States Supreme Court.[248]

The Ninth Circuit's repeated disapproval of our state courts' failure to follow *Batson*, that is, to enforce the Equal Protection Clause, is well-illustrated by its decisions involving step one of the *Batson* procedure. For example, in *Fernandez v. Roe,* California courts failed to find that there was a prima facie case of discrimination after the prosecutor used his peremptory strikes against four of seven Latinx jurors and the only two African-American jurors in the venire.[249] The California Court of Appeal agreed with the trial judge that the defendant had not established a prima facie case because he "had not shown a 'strong likelihood' that the prosecutor had challenged the prospective jurors on account of their race or ethnicity."[250] The Ninth Circuit reversed.[251] It found that in *Fernandez* and other cases, California courts "erroneously required a defendant to show a 'strong likelihood' of discrimination in order to establish a *prima facie* case rather than just an 'inference' of discrimination as required by *Batson*."[252] The circuit remanded the case for an evidentiary hearing to apply the constitutionally proper test.[253]

Even after the Ninth Circuit disapproved of the heightened prima facie standard in cases such as *Fernandez*, California courts continued to require that defendants satisfy the higher standard. At step one, defendants still had to show that "it is more likely than not" the opposing party's strike "was based on impermissible group bias,"[254] rather than simply raise "an inference" of discrimination as *Batson* requires.[255] After years of insistence by California courts that the party making the *Batson* objection must meet this onerous standard, the United States Supreme Court intervened in *Johnson v. California*.[256] It held that California's test was an "inappropriate yardstick by which to measure the sufficiency of a prima facie case."[257] Even after *Johnson* was decided, California appellate courts, in practice, continue to require an elevated threshold at step one, contradicting clearly established federal law as determined by the high court.[258]

Below are but two examples of cases in which the Ninth Circuit, applying the AEDPA's highly deferential standard, reversed California state court convictions for *Batson* error at step three. In *Kesser v. Cambra*, the Ninth Circuit reversed the California Court of Appeal's decision that the prosecutor's removal of three Native American women from the jury did not violate the Equal Protection Clause.[259] The prosecutor offered several reasons for striking the Native American women. He described one woman as a "'darker skinned female.'"[260] He expressed concern that because the prospective juror worked for a tribe, she would be more likely to identify with the culture and beliefs of the tribe than "'the mainstream system.'"[261] The prosecutor also described Native Americans as "'resistive'" and "'suspicious'" of the criminal justice system, and stated that "there are a whole bunch of people that violate our laws that are Native Americans."[262] The state appellate court acknowledged "some degree of racial stereotyping," but concluded that the prosecution presented sincere, nonracial reasons for striking the Native American prospective jurors.[263] The California Supreme Court denied review.[264]

The Ninth Circuit in *Kesser* held that the California courts had unreasonably accepted the prosecution's "nonracial motives as genuine" by failing to consider any "evidence outside the prosecutor's own self-serving *Batson* testimony."[265] Unlike the trial court and state court of appeal, the Ninth Circuit reviewed the voir dire transcript and juror questionnaires, which "clearly and convincingly" refuted each of the prosecutor's nonracial grounds.[266] The comparative juror analysis revealed that the prosecutor's "ostensibly 'race-neutral' reasons show[ed] themselves to be only a veneer, a pleasing moss having no depth."[267] The circuit court declared that "the racial animus behind the prosecutor's strikes is clear."[268] The court concluded, "We cannot deny Kesser a representative jury by turning a blind eye to the prosecutor's pretextual, make-weight justifications for his race-based strikes. . . . [S]tate courts must review the record to root out such deceptions."[269]

More recently, in *Castellanos v. Small*, the Ninth Circuit found a *Batson* violation after a prosecutor struck four Latinx jurors.[270] The trial court did not conduct a comparative juror analysis and found no purposeful discrimination at step three.[271] The state appellate court also did not engage in a comparative juror analysis or examine the record to determine whether the prosecutor's reasons were pretextual.[272] Therefore, the Ninth Circuit conducted its own analysis of the record.[273]

The circuit court found that the prosecutor's explanation that he struck a Latina juror because she had no children was pretextual for several reasons.[274] First, the question to which the juror responded was: "Do you have adult children; if so, how many?"[275] The prosecutor's reason was "factually erroneous" because the prospective juror stated that she had two adult children.[276] Second, three other jurors who did not have adult children were ultimately seated as was another seated juror who refused to answer the question.[277] Third, the circuit court found that the prosecutor's question was "a rather odd way of getting at what the prosecutor purportedly sought to identify," which was whether jurors could understand young children such as the prosecution's child witness.[278] The Ninth Circuit held that because comparative juror analysis "reveals such significant evidence of pretext," the California court's finding to the contrary amounted to an "unreasonable determination of the facts in light of the evidence presented."[279]

Despite the heightened burden and procedural hurdles in federal habeas cases, criminal defendants have been significantly more successful in the Ninth Circuit than in our state courts because of the Ninth Circuit's willingness to more faithfully adhere to United States Supreme Court precedent.

III.

WHY RACIAL DISCRIMINATION IN JURY SELECTION PERSISTS

As Justice Marshall presaged in his concurring opinion, the procedure the Court announced in *Batson v. Kentucky* would not be adequate to eradicate the discriminatory use of peremptory challenges.[280] Justice Marshall identified three flaws in *Batson* that would destine it to fail. The first concerned the extent to which the requirement that the defendant make a prima facie showing would defeat *Batson*'s goal, especially in jurisdictions in which there are few Black jurors in the venire and fewer still who remain after cause challenges.[281]

Second, Justice Marshall warned that prosecutors could "easily assert facially neutral reasons" when challenged for striking a Black prospective juror and that "trial courts are ill equipped to second-guess those reasons."[282] Because prosecutors could so readily mask discriminatory peremptory strikes with race-neutral justifications, Justice Marshall feared that "the protection erected by the Court today may be illusory."[283]

Third, Justice Marshall doubted the efficacy of the *Batson* procedure because it failed to account for prosecutors' and judges' unconscious racism.[284] He warned, "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."[285] That is, even assuming that attorneys and judges make a good faith attempt not to use peremptory strikes in a discriminatory manner, the *Batson* procedure does nothing to ferret out the unconscious biases that infect nearly every person's decision-making. Justice Marshall further observed that prosecutors' "seat-of-the-pants instincts" about a juror, on which they often rely in exercising peremptory strikes, may "be just another term for racial prejudice."[286]

This section explores why, 34 years after *Batson* was decided, racial discrimination in jury selection persists in California. It reveals that Justice Marshall was prescient: the flaws in *Batson* he identified in 1986 continue to cripple its efficacy today. In Section I.B, we surfaced Justice Marshall's first concern: the ongoing underrepresentation of African Americans in California jury venires. Here, we address how unconscious racism—more commonly referred to now as implicit bias—affects the exercise of peremptory challenges and judicial rulings, and contributes to the disproportionate exclusion of African Americans from juries. We also explore prosecutors' long-standing resistance to *Batson*. We show how prosecutors' frequent use of facially "neutral" reasons, such as having a negative view of the criminal legal system, exploits the different views Blacks and Whites hold due to historical and personal experiences. We investigate how California prosecutors are trained to overcome *Batson* objections by employing the very tactics Justice Marshall anticipated, e.g., "gut instincts" and ready-made lists of "race-neutral" reasons. As Justice Marshall predicted, *Batson* allows this prosecutorial behavior to continue unchecked with pernicious results. Finally, we assess the ways in which the California Supreme Court has failed to enforce *Batson*'s mandate.

A. Implicit Bias Taints Peremptory Challenges

1. Overview of Implicit Bias and Batson

"Implicit bias" is bias based on subconscious attitudes or stereotypes.[287] Implicit biases encompass stereotypes about a range of identities, including race, ethnicity, gender, religion, body weight, and disability.[288] This section focuses on how implicit bias affects understandings of race, particularly as it concerns African Americans.

Implicit bias, in part, explains prosecutors' race-based strikes. Social science research has illuminated the direct impact that implicit biases have on the exercise of peremptory strikes. The results led one legal scholar to conclude that the *Batson* framework is "psychologically naïve" in its reliance on self-reporting.[289] She explained that because of the "wide dissociative gap between what we believe our feelings to be and what they actually are,"[290] a lawyer's inability to assess how a "juror's race has affected her decision to strike" also means that "she will be unable to explain it."[291] The commentator concluded that "*Batson* rests on outdated and inaccurate assumptions about human behavior."[292] These are the same assumptions Justice Marshall identified in 1986 as fatal to *Batson*'s prospects.[293] It is now both unrefuted and widely acknowledged that "powerful and pervasive" implicit biases affect the exercise of peremptory challenges as well as how judges rule on the lawfulness of those challenges.[294] The *Batson* procedure "both allows the implicit and explicit biases of attorneys to impact jury composition and may provide a false veneer of racial neutrality to jury trials."[295]

Writing for the majority in *Batson v. Kentucky*, Justice Lewis Powell declared that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[296] His words acknowledged the "purposeful" racial bias that the Court's three-step analysis of peremptory strikes was intended to ameliorate, if not altogether eliminate.[297] As noted elsewhere in this report, Justice Marshall concurred in the opinion, but cautioned that the Court's prescription "will not end the racial discrimination that peremptories inject into the jury-selection process."[298] Justice Marshall gave several reasons for his warning, including the following:

> 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.[299]

Well before *Batson*, social science research had documented the stereotypic association of Black Americans as violent and criminal.[300] A year following the decision, a legal scholar wrote:

> [R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of

> what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.[301]

Within several years, another legal scholar criticized the *Batson* inquiry on the ground that it "focused almost entirely on proof of the discriminatory state of mind of the striking party," and could not effectuate its mandate of prohibiting all race-based discrimination.[302]

More than 30 years later, a wealth of empirical evidence confirms Justice Marshall's observation that individual actors in the criminal legal system are incapable of being fully aware of their race-based biases.[303] The studies leave no doubt that the "old tools of detecting racism—asking people to report on their own attitudes"—are largely ineffective.[304] Post-*Batson* research has shown that implicit biases in the exercise of peremptory challenges are unconscious and therefore impossible to elicit from the party exercising the strike.[305] These studies provide insight into modern understandings of racism as often subtle, unintentional, and unconscious, and offer one way to understand our empirical findings that race-based strikes persist in California courts.[306]

Implicit biases are particularly challenging to regulate because they occur when people "discriminate without intending to do so."[307] Simply put, "one does not have to be a Racist with a capital R . . . to harbor implicit racial bias."[308] Implicit bias "suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions."[309] These implicit biases "produce behavior that diverges from a person's avowed or endorsed beliefs or principles."[310] Such biases make the *Batson* framework, which depends upon the subjective judgments of the parties and judges, incapable of ferreting out invidious unconscious biases and stereotypes.[311]

2. A Half Century of Research on Implicit Bias

By 1954, researchers had hypothesized that racialized schemas[312] could be activated unconsciously.[313] The next major breakthrough in this research was the development of the distinction between "controlled" and "automatic" information processing made by cognitive psychologists who discovered that automatic processing is "difficult to alter, to ignore, or to suppress once learned."[314] Many studies in the following two decades demonstrated the pervasiveness of unconscious processing and found that awareness of stereotypes can manifest in social judgments and behaviors that are uncontrolled and differ from the subjects' reported attitudes.[315]

In the 1980s, research on "implicit-memory" led scholars to develop two new understandings of implicit thought development in humans: "implicit attitudes" and "implicit stereotypes."[316] Researchers defined implicit attitudes as an evaluative disposition that "indicates favor or disfavor toward some object but is not understood by the actor as expressing that attitude."[317]

They defined implicit stereotype as "a mental association between a social group or category and a trait."[318] Researchers then identified "implicit biases" as "discriminatory biases based on implicit attitudes or implicit stereotypes."[319]

A deeper understanding of implicit bias based on race was solidified in a groundbreaking study in 1989. In that study, researchers showed that even the preconscious presentation of racial material (material shown so quickly that the observer is not able to consciously register it) is sufficient to trigger the use of racial stereotypes.[320]

Development of the Implicit Association Test (IAT) in 1998 also expanded scientific understanding of the scope of implicit bias.[321] When respondents were asked about their "favoritism toward advantaged versus disadvantaged groups" across a dozen topics including race, gender, ethnicity, religion, and sexual orientation, 42% of respondents "expressed exact or near-exact neutrality" between advantaged and disadvantaged groups.[322] By contrast, data analysis of IAT results—the objective reality of those same respondents' implicit or unconscious views—revealed that "only 18% of respondents demonstrated sufficiently small implicit bias to be judged implicitly neutral."[323] These results show that implicit biases are far more pervasive than explicit biases.[324]

Studies have found that implicit bias extends beyond "in-group preference," which is defined as "favoritism toward groups to which one belongs."[325] Implicit bias establishes a general pattern of attributing positive attributes to White individuals and negative attributes to Black individuals, regardless of the race of the respondent.[326] Another study using the IAT found that there is a stronger association between the word "pleasant" and European Americans than there is between "pleasant" and African Americans.[327] The findings also demonstrate that there is a "greater favoritism to advantaged groups found in IAT measures than in explicit measures," revealing that discrimination across racial groups has a higher prevalence in an individual's implicit biases than any existing overtly racist views.[328]

A 2000 neurological study analyzed levels of activation in the amygdala—the area of the brain that controls fear—when participants were shown unfamiliar Black and White male faces with neutral, non-menacing expressions.[329] The results revealed that White participants exhibited the highest increased levels of activation in the amygdala when presented with Black faces.[330] The display of African Americans "evoke[d] differential amygdala activity" that is "related to unconscious social evaluation."[331] A later social psychological study further evaluated the associative link between African Americans and fear, and found that Whites hold strong associations between race and crime and are most fearful of the risk of crime when "in the presence of black strangers."[332] White respondents' estimates of "victimization risk" were "heavily influenced by racial composition," even though the study also made plain that actual crime risk is "not affected by racial composition."[333]

3. Pervasive Implicit Bias in the Criminal Legal System and in the Exercise of Peremptory Challenges

A growing body of social science research on implicit bias focuses on the pervasiveness of implicit biases in the criminal legal system.[334] The findings, confirmed by articles in peer-reviewed journals, are that "[i]mplicit biases—by which we mean implicit attitudes and stereotypes—are both pervasive (most individuals show evidence of some biases), and large in magnitude, statistically speaking. In other words, we are not, on average or generally, cognitively colorblind."[335] Much of the research has shown that implicit bias is widespread in all aspects of the criminal legal system, resulting in discrimination against both Black defendants and Black jurors by various actors, including police officers, attorneys, judges, and jurors.[336]

Empirical research confirms that individuals generally associate persons of color—particularly African Americans—with criminality more often than they do Whites. This association has had and continues to account for "a disproportionate amount of crime arrests" of African Americans,[337] a higher likelihood of conviction when charged with a crime jurors associate with Blacks,[338] and lengthier sentences for Black defendants than those imposed on comparable White defendants.[339] Most of the social science research has focused on the Black-White dichotomy. However, studies examining the effects of implicit bias on other people of color have produced similar results.[340]

In a five-study publication, researchers determined that the association between African Americans and criminality is bidirectional; exposure of participants to Black male faces "lowers the perceptual threshold at which they detect degraded images of crime-relevant objects (e.g., guns and knives)" and, conversely, "exposing people to crime-relevant objects prompts them to visually attend to Black male faces."[341] These findings demonstrate the "durability" of the association between African Americans and criminality.[342] In another study, researchers showed that the unconscious association of African Americans with criminality is so strong that it impacted response times in gun use against an individual viewed as a threat. Participants were quicker to "shoot" an armed Black target than an armed White target and were slower to "not shoot" an unarmed Black target than an unarmed White target.[343]

Implicit racial biases affect decision-making in jury deliberations, and studies have shown that racially diverse juries reduce deliberation inaccuracies and racially discriminatory decision-making. For example, a mock jury study found that racial diversity motivated White participants to contribute more fact-based, unbiased commentary during the deliberations, which reduced racial disparities in the outcomes.[344] Another mock jury study concluded that heterogeneous groups produced higher quality deliberations in that the jurors "deliberated longer and considered a wider range of information than did homogeneous groups."[345] In mock jury deliberation situations in which Black participants were present, White participants raised more case facts, made fewer factual errors, and "were more amenable to discussion of race related issues" than when they deliberated in a non-diverse group.[346]

Researchers have demonstrated that implicit bias against African Americans affects jury selection, specifically influencing the exercise of peremptory challenges.[347] For example, 28 practicing attorneys with jury trial experience, 90 undergraduate college students, and 81 law students participated in a study involving a hypothetical burglary case with DNA evidence.[348] They were asked to assume the role of the prosecutor and to exercise their final peremptory strike against one of two prospective jurors.[349] The juror profiles were designed to be equally unattractive to the prosecution: the first hypothetical juror had "written articles about police misconduct," and the second hypothetical juror was skeptical of statistical evidence.[350] Each participant responded to two different scenarios. In the first experiment, Juror #1 was Black and Juror #2 was White.[351] In the second experiment, the race of the juror profiles was switched.[352]

The study found that the participants' strike decisions varied sharply by race. When the first juror—the individual familiar with police misconduct—was Black, "participants challenged him 77% of the time; this same individual was challenged just 53% of the time when he was White."[353] The second juror—the individual who was skeptical of statistical evidence, like DNA testing—was challenged "47% of the time when he was Black, compared to 23% when he was White."[354] Despite these disparities, participants "rarely cited race as influential, focusing instead on the race-neutral characteristics associated with the Black prospective juror,"[355] even though the characteristics of the juror profiles remained exactly the same and only the race of the juror switched in the two scenarios. Researchers found that "a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence."[356]

Although not directly addressing the issue of race, research on implicit bias with respect to gender shows that explicit instructions against the use of gender in exercising peremptory strikes is ineffective in altering the effects of implicit bias on behavior.[357] In research involving two studies, college students were asked to assume the role of a prosecutor and exercise a single peremptory challenge against one of two prospective jurors in the mock trial of a female defendant accused of killing her husband.[358] Both studies used the same prospective juror profiles, which "included at least one characteristic that could be construed as unattractive to a prosecutor."[359] In the first study, "juror selection was driven by gender. Across conditions, 71% of participants chose to eliminate the female juror."[360] The results revealed that "jurors with otherwise identical profiles were likely to be retained when male but excused when female."[361] In the second study, the mock prosecutors in one group were given an explicit instruction that "according to the U.S. Supreme Court, you may not decide to remove a juror because of his or her gender"; the mock prosecutors in the second group did not receive this instruction.[362] This warning "failed to decrease gender bias": 59% of jurors who received the warning removed the female juror.[363] Similarly, 60% of participants in the second group—who did not receive the warning—also removed the female juror.[364] The researchers found that "warnings against bias led participants to go to greater lengths to conceal that bias."[365] In considering remedies for

discrimination in peremptory challenges discussed in Section IV, the authors concluded that instructing attorneys about implicit bias will not significantly reduce discriminatory peremptory challenges.

In the face of this growing body of research, California judges have expressed similar concerns about implicit biases and *Batson*'s inability to identify and preclude them. In September 2019, concurring in *People v. Bryant*, two California Court of Appeal justices announced that the "case highlights the serious shortcomings with the *Batson* framework," aligning with others "who are calling for meaningful reform."[366] In his concurring opinion, Justice Jim Humes wrote that the *Batson* procedure, which is limited to acts of intentional discrimination, "plainly fails to protect against—and likely facilitates—implicit bias."[367] Quoting United States Supreme Court Justice Stephen Breyer, Justice Humes explained that "it is not hard to wonder, '[h]ow . . . trial judges [can] second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor.'"[368]

Concurring last year in *People v. Smith*, Court of Appeal Justice Jon Streeter discussed courts' overreliance on the seating of jurors who are the same race as the struck jurors to legitimize a prosecutor's peremptory challenges.[369] The trial court in *Smith* found a prima facie showing of discrimination based upon the prosecutor's use of peremptory challenges to strike four Black jurors.[370] In the trial judge's view, however, the fact that one Black juror was seated and another Black juror served as an alternate constituted "'powerful evidence' supporting the credibility of the prosecutor's proffered reasons for excusing jurors."[371] Justice Streeter objected that attaching "too much significance to the prosecutor's willingness to pass the panel with one or two same-race jurors in it 'would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion.'"[372] Justice Streeter explained that because "the Constitution forbids striking even a single prospective juror for a discriminatory purpose," the question before the trial court was whether the prosecutor's reasons for excusing the four jurors "were pretextual, not whether his decision to pass on some other juror was free of discrimination."[373]

Justice Streeter turned to the psychological literature demonstrating that discrimination can be "masked by a discriminator's attempt to demonstrate lack of prejudice on a prior occasion."[374] He pointed to the same language in Justice Thurgood Marshall's opinion in *Batson* quoted at the beginning of this section as "[a]nticipating the need to apply concepts of implicit bias to the discriminatory use of peremptory challenges," as well as the influence of "[a] judge's own conscious or unconscious racism" in issuing a ruling.[375] Thus, he wrote that the prosecutor's retention of two Black jurors, "may have been indicative of good faith, but good faith in and of itself was not the issue. Many perpetrators of discrimination are sincere."[376]

B. Prosecutors' Continued Resistance to *Batson*

Prosecutors' efforts to oppose remedies to discriminatory jury selection practices are long-standing. When the United States Supreme Court was considering *Batson*, the National District Attorneys Association ("NDAA") filed a brief in support of the state of Kentucky.[377] The NDAA argued, "Prosecutorial peremptory juror challenges to remove . . . all members of a defendant's race is not violative of a defendant's right to be tried by an impartial jury . . . under the sixth amendment of the United States Constitution."[378] In Justice Marshall's concurring opinion in *Batson*, he wrote that the "misuse of the peremptory challenge to exclude black jurors has become both common and flagrant."[379] Justice Marshall referenced an instruction book used by the Dallas County, Texas District Attorney's Office, which "explicitly advised prosecutors that they conduct jury selection so as to eliminate 'any member of a minority group.'"[380] Until 2010, the NDAA refused to adopt *Batson* as a standard. Instead, the organization recommended that prosecutors "be familiar with the decisions . . . [and] closely follow other cases that develop . . . *Batson* . . . issues."[381]

Prosecutors across the country are trained in how to use peremptory strikes against African Americans and other jurors of color without violating *Batson.* A year after *Batson*, then-Philadelphia Assistant District Attorney Jack McMahon gave a videotaped training session to prosecutors in his office. He instructed them to circumvent *Batson* by thoroughly questioning Black jurors so that "you [have] more ammunition to make an articulable reason as to why you are striking them, not for race."[382] At a 1995 North Carolina Conference of District Attorneys training program, attendees received a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives."[383] It provided 10 vague reasons such as inappropriate dress, physical appearance, poor attitude, or body language. [384] In 2004, a list of purportedly race-neutral justifications was distributed to Texas prosecutors that included suggestions such as "Watched gospel TV programs" and "Agreed with O.J. Simpson verdict."[385] A 2005 edition of a national trial manual for prosecutors did not once refer to *Batson*.[386] As we show below, exploiting *Batson*'s deficiencies in order to strike jurors of color is by no means restricted to prosecutors in states other than California.

C. Prosecutors Strike Black Jurors Based on Their Different Experiences with the Criminal Legal System

Consistent with other studies, our empirical research found that prosecutors often use peremptory strikes against jurors of color who hold negative views of the criminal legal system or law enforcement.[387] The California Supreme Court has repeatedly held that these reasons are facially race-neutral, therefore sufficient to get prosecutors past *Batson*'s second step and, almost always, adequate to defeat a defense objection.[388] Indeed, as Section III.D shows, prosecution training manuals often cite these very reasons as legally sound, "race-neutral" bases for peremptory strikes, and urge prosecutors to use them as justifications.

The effect, however, of using peremptory strikes to remove jurors who hold negative views of law enforcement or have been involved with the criminal legal system is anything but "race-neutral." Overall, African Americans and Whites differ in their attitudes towards the criminal legal system.[389] African Americans are more likely than Whites to view the system as racially discriminatory and unjust, and are therefore less supportive of punitive criminal justice policies.[390] These attitudes are embedded in the nation's long history of racial oppression, and the differential treatment of African Americans by the criminal legal system, including by members of law enforcement.[391] Moreover, because of the racially discriminatory nature of policing and mass incarceration, African-American prospective jurors are more likely to have had personal or familial involvement with the criminal legal system.

Both the reality and prosecutors' perceptions of these differences in opinion between Blacks and Whites lead prosecutors to disproportionately—and successfully—exercise peremptory challenges against African Americans. Whether a challenge is based on a prosecutor's sincere (though demonstrably false) belief that the criminal legal system treats everyone fairly and equally irrespective of race or the strike is simply a tactical decision to remove a prospective juror the prosecutor instinctively believes will be unsympathetic, the result is discriminatory in at least two respects. As noted (and as will be detailed presently), African Americans generally have sound reason to doubt the fairness of the criminal justice system; thus using that as a reason to eliminate prospective jurors necessarily has a disparate impact on the proportion of their representation on the jury. Moreover, the *a priori* assumption that *every* African American is going to be hostile to law enforcement is a paradigmatic example of "group bias"—the very evil that *Wheeler* set out to cure. Yet both prosecutors and the judges who pass on the legitimacy of their peremptory challenges continue to give credence to such biased views, consciously or unconsciously, with the result that African Americans and other persons of color continue to be eliminated disproportionately.[392]

1. African Americans' Distrust of the Criminal Legal System Is Rooted in Its Racist History

When slavery was abolished, Whites turned to new methods of social and economic control. For the all-too-brief Reconstruction period (1865-77), African-American men began to gain a toehold in civil society.[393] They held elected office, gained the right to vote and serve on juries, and began to establish "businesses, churches, schools and other legacy institutions."[394] However, the White backlash against Reconstruction's civic reforms was brutal and swift.[395] Though the South was defeated in the Civil War, "white supremacist ideologies continued, unbridled and disengaged from the institution of slavery."[396] States in the South "began to look to the criminal justice system to construct policies and strategies to maintain the subordination of African Americans."[397] They found inspiration in the text of the Thirteenth Amendment, which outlawed slavery and involuntary servitude "except as a punishment for a crime."[398] Southern states enacted "Black codes" and adopted vagrancy laws, which "essentially made it a criminal offense not to work and were applied selectively to blacks."[399] Once convicted, Blacks were often "contracted out as laborers to the highest private bidder" as part

of the brutal system known as convict leasing.[400] Thus, the institution of slavery was revived in all but name for African Americans who were caught up in the criminal legal system.

Beginning around the turn of the century, an "epidemic of lynchings" engulfed the South; thousands of African Americans were tortured and killed.[401] Extrajudicial executions profoundly impacted race relations in the United States and "shaped the geographic, political, social, and economic conditions" of African Americans in ways that are still visible today.[402] Across the South, "someone was hanged or burned alive every four days from 1889 to 1929."[403] Most of the southern Black population had "witnessed a lynching in their own communities or knew people who had."[404]

The specter of lynching reached far beyond the South. During the Great Migration, which lasted from the early 1900s through the 1970s, "some six million black southerners left the land of their forefathers and fanned out across the country for an uncertain existence in nearly every other corner of America."[405] Not only were people lynched throughout the United States, including in California, but those African Americans who left the South during the Great Migration brought with them their lived experiences and fears.[406] Therefore, "a potential unintended consequence of the 'Great Migration' was a cultural transmission of the history of southern lynchings among African Americans" all over the country.[407]

The administration of the criminal law is interwoven with the history of lynching in ways that "continue to contaminate the integrity and fairness of the justice system."[408] In particular, extrajudicial lynchings in the South were increasingly replaced by state executions.[409] The decline in lynchings "relied heavily on the increased use of capital punishment imposed by court order following an often accelerated trial."[410] White leaders in the South "acknowledged that capital punishment could serve the same function as lynchings—the control and intimidation of African Americans."[411] Indeed, both White and Black Southerners viewed state executions as "legal lynchings."[412] Therefore, African Americans' widespread opposition to capital punishment is linked to this history and to the use of capital punishment by the state as a way to replace and reinvent the racial terrorism of lynching.[413]

Throughout the 20th century, the criminal legal system continued to disproportionately punish African Americans. The use of the criminal legal system as a vehicle for segregating and oppressing Blacks was far from a uniquely Southern phenomenon. On the contrary, "disparate enforcement of various laws against 'suspicious characters,' disorderly conduct, keeping and visiting disorderly houses, drunkenness, and violations of city ordinances made possible new forms of everyday surveillance and punishment in the lives of black people in the Northeast, Midwest, and West."[414] As a result of racist laws, policing, and enforcement, Whites came to associate Blacks with crime and used that harmful stereotype to justify further discriminatory policies. "The high arrest and incarceration rates of black Americans—though based on . . . racist policies . . . served to create what historian Khalil Gibran Muhammad has called a 'statisti-

cal discourse' about Black crime in the popular and political imagination, and this data deeply informed national discussions about racial differences that continue to this day."[415]

As the Jim Crow regime was slowly dismantled through the gains of the Civil Rights Movement, explicitly racist calls for White supremacy and segregation were replaced by racially coded appeals to "law and order."[416] "Proponents of racial hierarchy found they could install a new racial caste system without violating the law or new limits of acceptable political discourse, by demanding 'law and order' rather than 'segregation forever.'"[417] Public figures and the media amplified paranoia about urban crime in ways that reinforced racial stereotypes. The messaging worked: "By 1968, 81 percent of those responding to the Gallup Poll agreed with the statement that 'law and order has broken down in this country,' and the majority blamed 'Negroes who start riots' and 'Communists.'"[418]

Over the succeeding decades, mass incarceration boomed, fueled by racially discriminatory stereotypes of African-American criminality. "As law enforcement budgets exploded, so did prison and jail populations."[419] By the 1990s, "the Sentencing Project reported that the number of people behind bars in the United States was unprecedented in world history."[420] Today, the "American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories."[421]

The present-day criminal legal system is unique not just in its massive size, but its racially discriminatory character. The statistics are dizzying: "Black men comprise about 13 percent of the U.S. male population, but nearly 35 percent of all men who are under state or federal jurisdiction with a sentence of more than one year."[422] One-third of Black men born in 2001 will likely be incarcerated in their lifetime.[423] "Black people are incarcerated in state prisons at a rate 5.1 times greater than that of white people."[424] In 2010, 8% of American adults had been convicted of a felony compared to 33% of Black men.[425]

Further, African Americans and Whites have significantly different experiences with law enforcement. Recent Bureau of Justice Statistics data confirm that Black Americans are "more likely to be stopped by police than white or Hispanic residents, both in traffic and street stops."[426] Once stopped, Black drivers are "far more likely to be searched and arrested" than Whites.[427] This is true even though police find contraband at a lower rate when they search Black drivers as compared to White drivers.[428] "In 2016, Black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population."[429] Only 15% of children in the United States are Black, yet 35% of juvenile arrests in 2016 were of Black children.[430] In 2015, 25% of people arrested for drug infractions were Black, despite evidence that suggests "drug rates do not differ substantially by race or ethnicity."[431]

Blacks are also disproportionately the victims of police violence. In 2018, police "were twice as likely to threaten or use force" against African Americans and Latinx people than Whites during stops.[432] This violence can be fatal. Black men are "2.5 times more likely than White men and boys to die during an encounter with cops."[433] About one in 1,000 Black men in America will be killed by the police.[434]

The egregious racial disparities summarized here also play out in criminal case prosecutions and outcomes. Our criminal legal system continues to treat Whites and Blacks differently. For example, federal "prosecutors . . . are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than similarly situated whites."[435] And state "prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws."[436] In addition, judges are more likely to "sentence people of color than whites to prison and jail and to impose longer sentences, even after accounting for differences in crime severity, criminal history, and education level."[437]

2. Blacks and Whites Differ in Their Views of the Criminal Legal System

Decades of social science research confirms that African Americans and Whites differ in their views of the criminal legal system, with more Blacks consistently expressing the opinion that the system is racially discriminatory. The reasons for the divide in perception are embedded in the historic and present-day differences, described above, between how the two groups experience the criminal legal system, including their interactions with law enforcement.

Blacks consistently support the death penalty at lower rates than Whites. For example, "only around a third of blacks (36%) support capital punishment . . . compared with nearly six-in-ten whites (59%)."[438] Scholars have further noted that "doubts about capital punishment cut across socioeconomic, political, and religious lines within the African American community."[439] Unsurprisingly, Blacks' opposition to the death penalty is rooted at least in part in the historical awareness and/or lived experience that it is racially discriminatory.[440] A 2015 survey revealed that "77% of blacks said that minorities are more likely than whites to be sentenced to death for committing similar crimes."[441] Research confirms that, in California, African-American support for the death penalty is lower than among Whites. For example, in a 2011 survey, 45.1% of African Americans in California favored abolishing capital punishment, compared to just 25.5% of Whites.[442] Similarly, 66% of African Americans said that they preferred life imprisonment without parole over the death penalty, while 45% of Whites reported the same.[443] Two surveys conducted in Solano County in 2014 and 2016 show a clear and consistent difference between Black and White support for the death penalty.[444] In the 2016 survey, just "27% of African-American respondents supported the death penalty compared to 66% of white respondents."[445]

Importantly, African Americans' relatively higher opposition to the death penalty leads to their disproportionate removal from juries in capital cases.[446] Capital juries are almost always "death qualified," which means that prosecutors can successfully challenge for cause jurors who have reservations about the death penalty.[447] Because African Americans are more likely than Whites

to oppose the death penalty, African Americans are routinely removed from capital juries before the prosecution exercises any peremptory strikes. Death qualification is yet another part of the jury selection process that contributes to the whitewashing of juries.[448]

Research published in 2019 showed that almost 80% of African Americans—as compared with more than 30% of Whites—consider the treatment of people of color by the criminal legal system to be a significant problem.[449] Similarly, around 90% of African Americans believe that "blacks are generally treated less fairly by the criminal justice system than whites," while only about 60% of Whites hold that view.[450] A 2013 study revealed that more than two-thirds of Blacks surveyed perceived the criminal justice system as biased against Blacks, compared to just one-quarter of Whites.[451] These African Americans described their personal experiences with the criminal legal system—and the system itself—as "[u]nfair, illegitimate, and excessive."[452]

These recent findings illustrating stark differences in how Blacks and Whites view the criminal legal system are consistent with social science research conducted during the past several decades. An empirical study published in 2007 found that "African Americans and Whites do not conceptualize 'American justice' in the same terms. Whereas Whites tend to see the scales of justice as reasonably balanced, African Americans are inclined to believe that unfairness, based on race, is integral to the operation of the criminal justice system."[453] Research analyzing national data collected between late 2000 and early 2001 showed that "while 74.0% of Blacks do not agree that the justice system treats people fairly and equally, only 44.3% of whites express similar sentiments."[454] The research also revealed that 61% of Blacks, compared to 26% of Whites, "do not trust the courts to give a fair trial."[455]

Empirical studies from the 1990s, 1980s, and 1970s are consistent with these findings and reveal that skepticism of the criminal legal system among African Americans is not a new phenomenon. For instance, a national survey conducted in 1999 found that African Americans had less confidence in the performance of the courts than all other groups in the sample.[456] Based on their research, scholars writing in 1997 similarly concluded that "African Americans see the criminal justice system as racially biased, while the majority of whites generally believe the system is racially neutral and reflects the ideal of equal treatment before the law."[457] They noted that their research "results point to a deep and persisting racial cleavage in perceptions of racial injustice."[458] In 1982, John Hagan and Celesta Albonetti published the results of a study conducted in 1977 that surveyed Americans' views of the criminal legal system.[459] "The salient finding," they wrote, was "the persistent and often striking influence of race on the perception of criminal injustice."[460] The research showed that, even controlling for socioeconomic class, Blacks were far more likely than Whites to view the criminal legal system as unjust.[461]

The differences between how Whites and African Americans view the fairness of the criminal legal system apply to their opinions about law enforcement. Blacks are more likely than Whites to hold negative views of the police. For example, one study found that "Blacks are three times more likely than are whites—39% versus 12.8%—to have unfavorable opinions of their local police and four times more likely—30.3% versus 7.7%—to have unfavorable views of the state police."[462] Blacks are also less likely than Whites to say that the police do a good job of

interacting with members of their community.[463] A 2015 literature review of 92 studies found that "individuals who identified themselves as black, non-white, or minority were more likely to hold negative perceptions and attitudes toward police as compared to whites."[464]

Significantly more Whites than Blacks believe that the police in their communities treat racial and ethnic minorities equally.[465] For example, according to a 2019 Pew Research Center report, "84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites. A much smaller share of whites—though still a 63% majority—said the same."[466] A similar study in 2016 found that only about one third of Blacks—compared to three-quarters of Whites—believe that their local police do a good job "treating all racial and ethnic minorities equally."[467] A 2002 survey showed that both Blacks and Latinxs were more likely than Whites to perceive the police as racially biased.[468] According to the research, "three-quarters of blacks and half of Hispanics expressed that the police treated blacks and Hispanics worse than whites in their city."[469] By contrast, a vast majority of Whites (about 75%) said that "the police treated all of these groups equally."[470] This empirical data further support the findings discussed above: Blacks are more likely to view aspects of the criminal legal system negatively because they perceive the system to be racially discriminatory, while Whites are more trusting of the system because they believe it operates fairly.

Blacks are also much more likely than Whites to report that police have treated them unfairly and to report that they had a negative experience with the police. In a 2016 Pew Research Survey, nearly half of all African-American respondents (44%) reported that they had been "unfairly stopped by police because of their race or ethnicity."[471] Just 9% of Whites said the same.[472] According to research published in 2010, "one of every three African Americans reported being treated unfairly by the police because of their race, whereas closer to only one of ten whites reported unfair treatment for any reason at all."[473] This disparity is consistent with research published in the preceding decade. For example, in 2002, 40% of Blacks reported "having been stopped by the police because of their race."[474] The same study found that 95% of Whites said that they had never been the victim of racial profiling.[475]

Similar fissures exist between Whites and Blacks on the issue of police use of force. In a 2016 study, 75% of Whites expressed the view that "their police do an excellent or good job when it comes to using the right amount of force for each situation" compared to just 33% of Blacks."[476] Consistent with the findings cited above, this disparity has persisted for decades. For example, in a 1999 Gallup poll that surveyed Americans about police brutality in their communities, "58% of non-whites believed police brutality took place in their area, in contrast to only 35% of whites."[477]

African Americans and Whites also react differently to the high-profile police killings of unarmed Black men that have garnered media attention in recent years.[478] For about eight in 10 Blacks these killings "signal a larger problem between police and the black community," in contrast to a narrow majority of Whites.[479] Additionally, Blacks and Whites differ in their perceptions of protests in response to the killings. A substantial majority of Whites (85%) saw anti-police bias as a "significant reason" for such protests.[480] By comparison, only 56% of Blacks shared that view.[481] "Blacks are also about twice as likely as whites to attribute a great deal of the motivation for the demonstrations to the desire to hold officers accountable (55% v. 27%)."[482]

In sum, Blacks are more likely than Whites to view the criminal legal system as racially discriminatory, to hold critical views of the police, and to have personally experienced negative interactions with law enforcement. African Americans are therefore more skeptical of the fundamental fairness of the administration of justice.

As a result of the view that racial bias infects the criminal legal system, African Americans are generally less punitive than Whites, who largely believe that the system operates in race-neutral and legitimate ways.[483] Whites' support for specific criminal justice policies reflects their more punitive views. For example, a "national survey conducted between 2000 and 2001 showed that 70% of whites, in contrast to 52% of blacks, supported 'three strikes' laws that compelled life sentences for people convicted of a third serious offense."[484] The same survey asked respondents whether, in some circumstances, juveniles should be tried as adults.[485] A majority of Whites (60%) agreed that they should, while 46% of Blacks held that view.[486]

Although Whites are the victims of crime far less often than African Americans, they consistently support harsher crime policies.[487] Blacks are more likely than Whites to be the victims of household burglary, motor vehicle theft, robbery, sexual assault, aggravated assault, and homicide.[488] A 2018 survey found that "black adults were roughly twice as likely as whites to say crime is a major problem in their local community (38% vs. 17%)."[489]

Despite Blacks' greater likelihood of being crime victims, Whites are more punitive. This is because African Americans' "negative encounters with the criminal justice system and greater recognition of the root causes of crime temper their preferences for punitive policies."[490] By contrast, Whites "have less frequent and more positive criminal justice contact, endorse more individualistic causal explanations of crime, and are more likely to harbor overt racial prejudice."[491] It is clear that racial biases—and particularly misperceptions about *who* commits crime—lead Whites to be both trusting of the criminal legal system and punitive.

The stark racial nature of the American criminal legal system has led commentators to liken it to a modern racial caste system: "the New Jim Crow" or a revival of the "peculiar institution."[492] Given both its history and its current administration, it is unsurprising that many African Americans view the criminal legal system differently—and, generally, more negatively—than Whites. That view is inarguably legitimate in light of historical and modern-day circumstances; Blacks have been targeted and persecuted by the criminal legal system in ways that Whites have not. The criminal legal system has historically treated Whites and Blacks unequally and continues to do so. In the context of jury selection, however, prosecutors and judges do not treat these two viewpoints—though both are grounded in history and lived experience—equally. Rather, our study shows that prosecutors in California continue to use peremptory strikes against Black jurors based on both their perceived distrust of the criminal legal system and the specific reality of their negative experiences with that system. Our courts continue to approve the legitimacy of these strikes. As this report demonstrates, the *Batson* framework, which requires a showing of purposeful discrimination, never had the capacity to remedy these entrenched racial disparities and has most assuredly failed to do so.

D. Training Manuals Instruct Prosecutors to Conceal Race-Based Strikes

Prosecutor training is likely a key driver of California prosecutors' disproportionate removal of Black and Latinx prospective jurors through the exercise of peremptory challenges. Indeed, our review of district attorney training materials from 15 counties in California between 1990 and 2019 demonstrates that the *Batson* regime has failed in this state for the very reasons Justice Marshall predicted in his concurring opinion.[493] The training of prosecutors—as evidenced by these documents—all but ensures the continuation of the pernicious legacy of racial discrimination in jury selection in several ways. First, the materials teach prosecutors to select an "ideal juror" prototype that, explicitly or implicitly, directs them to strike Black jurors and other jurors outside of their "in-group." Second, they instruct prosecutors to rely on their gut in deciding whether to dismiss jurors, belying decades of empirical research demonstrating that implicit biases fuel intuitive or instinctive decisions.[494] Third, the materials are a playbook for contravening *Batson*. They include tips for concealing implicit and explicit bias through extensive, ready-made lists of "race-neutral" reasons for striking Black jurors and provide trial tactics to avoid the appearance of racism.

At their core, the materials instruct prosecutors to strike jurors based on "group bias," precisely the stereotypical reasoning the California Supreme Court prohibited in *People v. Wheeler*.[495] The court defined group bias as the assumption that certain jurors are biased merely because they are members of an identifiable group.[496] *Wheeler* held that exercising a peremptory challenge based on "group bias" violates the state constitutional right to trial by a jury drawn from a representative cross-section of the community.[497] The court declared, "'Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.'"[498]

The United States Supreme Court in *Batson* and subsequent opinions also condemned group bias in jury selection. In *Batson*, the Court stated, "Competence to serve as a juror ultimately depends on . . . individual qualifications and ability impartially to consider evidence presented at a trial."[499] Later, in *J.E.B. v. Alabama ex rel. T.B.*, the high court observed that reliance on a juror's membership in a group as a proxy for competence or impartiality "'open[s] the door to . . . discriminations which are abhorrent to the democratic ideals of trial by jury.'"[500]

Training prosecutors to rely on group characteristics such as occupation, age, marital status, or education allows prosecutors (consciously or unconsciously) to use those characteristics as proxies for race based on the characteristics' implicit or explicit association with race.[501] For example, the manuals do not direct prosecutors to inquire about how a prospective juror's occupation has influenced the juror's views about issues relevant to the case on trial.[502] Rather, stereotypes about how an individual who has a given profession or occupation would sympathize with a defendant or distrust the prosecution serve as the basis for a peremptory challenge.[503] Striking the juror simply *because* he is a social worker and might work or identify with Black communities, without evidence of specific bias towards the defendant or against the prosecution, constitutes the very group bias *Batson* and *Wheeler* condemned.[504]

1. Identifying the "Ideal" Prosecution Juror

An Orange County training document explains: "The law says we want 12 fair and impartial jurors" but "[i]n reality, if we had our choice, we would pick 12 biased jurors in our favor."[505] Thus, prosecutors must "ferret out [jurors'] biases and then select the jurors who are most biased for us."[506]

Prosecutors are instructed explicitly and implicitly to preference jurors who are most demographically similar to themselves. The first question many of the materials pose is: Who is the ideal juror for your case? *Ned's Compleat* [*sic*] *Voir Dire Manual*, a publication by New Prosecutor's College used in San Diego County, states that a "Prosecution Jury" will include people who "have a stake in the community," "homeowners," and people who "have children in the home" and "can work together" with other people in "'committee-like' environments."[507] It also includes a list of "GOOD PEOPLE," consisting of "middle class, middle aged homeowners," people with a "steady job," and "persons with traditional lifestyles."[508] Likewise, one Orange County directive "on whom to excuse" states that "Good" jurors are "attached to community, educated, stable, [and] professionals."[509] Other Orange County materials explain that the ideal prosecution jurors "Have a Stake in the Community," "Can Work Together," are "Mature Individuals," "Respect the System,"[510] and are "Normal, regular people."[511]

On the other hand, training documents advise prosecutors against accepting certain types of jurors. For example, a Ventura County trainer is "very cautious about . . . people who are marginalized by societal norms."[512] *Ned's Compleat* [*sic*] *Voir Dire Manual* lists "BAD PEOPLE," who are defined as those who are "unusual or weird," have themselves or their family members had "previous arrests or convictions . . . for the same/similar offense," or have "occupations sympathetic to defendants."[513]

Nearly all of the training materials emphasize that *Batson* permits prosecutors to base their strikes on membership in groups in which African Americans are overrepresented, e.g., "less educated" people, "blue collar workers," and both "ex-felons" and relatives of those who are incarcerated.[514] The message is that if a prosecutor relies on characteristics that are facially neutral but in fact apply disproportionately to members of a protected group, they will survive a *Batson* objection.[515] Directing prosecutors to use non-cognizable group labels encourages them to evade accountability under *Batson* for discriminatory peremptory challenges.

Using employment status as a basis for a peremptory challenge disproportionately excludes Black and Latinx jurors. Between 1954 and 2013, "the unemployment rate for blacks has averaged about 2.2 times that for whites," varying between 2.77 at its highest and 1.67 times higher at its lowest.[516] According to a review of multiple studies conducted between 1989 and 2015, "[o]n average, white applicants receive 36% more callbacks than equally qualified African Americans . . . representing a substantial degree of direct discrimination. White applicants receive on average 24% more callbacks than Latinos."[517] Compared to White men, Black and Latino men are less likely to be called for interviews for low-wage jobs based on their resumes,

to be hired, and to be offered a job involving customer service.[518] While more than half of Americans experience some period of poverty, 84% of African Americans "spend at least a year in poverty over their lifetime."[519]

The characteristics of the "ideal juror" are all but identical to those of most prosecutors. Almost by definition, prosecutors are well-educated, have stable employment and strong community ties, and are predominantly White. In California in 2015, 69.8% of prosecutors were White and only 5.8% of prosecutors were Black, although Whites constituted only 38.5% of the population.[520] In 2018, the national average salary for entry-level prosecutors was $56,200, and was $84,400 for prosecutors with 11 to 15 years of experience.[521] In California, district attorneys' salaries are significantly higher than the national average. For example, an entry-level district attorney in Tulare County earns between $62,277 and $75,899 annually[522] and the majority of managing deputy district attorneys in Riverside County have an annual salary of $214,649.26.[523]

Social psychologists have demonstrated the tendency for people, especially Whites, to show "implicit preferences for groups with higher social status [such as Whites,] to groups with lower social status."[524] Specifically, social scientists have shown that individuals display "implicit in-group favoritism," a phenomenon whereby "people automatically associate the in-group, or 'us,' with positive characteristics, and the out-group, or 'them,' with negative characteristics."[525] As of 2005, "nearly one hundred studies" had demonstrated the effects of "ingroup favoritism."[526] For example, people "judge same-group members more positively, see and describe failures as situational rather than dispositional, overrate achievements considerably, [and] punish more leniently."[527] Both conscious and implicit bias in favor of in-groups do not develop because of "invidious dislike of the outgroup, but rather 'because positive emotions such as admiration, sympathy, and trust are reserved for the ingroup.'"[528]

Thus, prosecutorial training embraces in-group favoritism towards White jurors explicitly through the typology of an "ideal juror." The training also does so implicitly by validating trust and respect for those in the in-group.

2. Racial Stereotyping by Reliance on "Gut Instincts"

District attorney trainings direct prosecutors to trust their gut reactions when exercising peremptory challenges. The training materials are replete with reminders that a mere hunch is a sufficient basis for a strike. For example, Monterey County uses a jury selection worksheet emblazoned with "FOLLOW GUT INSTINCTS" in large capital letters.[529] San Diego County prosecutors are told to "go with your gut."[530] Orange County prosecutors are instructed that when watching jurors' body language: "'GO WITH YOUR GUT INSTINCTS !!,'"[531] "ALWAYS, ALWAYS--TRUST YOUR INSTINCTS,"[532] and do not "ignore your personal reaction to a prospective juror."[533] Specifically, they are directed: "If you have a vague feeling that there is something wrong about a prospective juror, don't gamble."[534] Ventura County tells its prosecutors: "When in doubt, Kick 'em Out (don't let your intellect get in the way of your instincts)."[535] The same materials instruct prosecutors that "gut instincts mean everything in jury selection."[536] Unsurprisingly, absent from every training manual is any discussion of how "gut instinct" is influenced by unconscious racial biases.

Gut reactions, which have been central to prosecutorial training for decades, are now recognized as quintessential opportunities for individuals to act based upon unconscious biases.[537] Psychological research has demonstrated that the goal of our unconscious thinking system "is to detect patterns in the environment as quickly as possible and to signal the person as to whether they are good or bad."[538] One type of unconscious, "automatic thinking is the tendency to categorize and stereotype."[539] Once learned, stereotypes are applied "non-consciously, unintentionally, uncontrollably, and effortlessly."[540] Researchers have found that decision-makers increase their use of stereotypes when they have a strong motivation to "predict the behavior of a person[,] . . . 'time pressure, a need for closure, [and] moderate cognitive load.'"[541] Thus, attorneys exercising peremptory challenges under the constraints of trial are particularly susceptible to the use of stereotypes in the exercise of peremptory strikes.

Prosecutors are no different from the general public; even when they condemn overt racism, implicit biases—most often associating African Americans with negative views—remain key components of their decision-making.[542] The activation of implicit biases is such an automatic reaction that prosecutors may not even realize they are relying on race-based stereotypes in their choices.[543] Instead, they are likely to interpret evidence as supporting their gut reaction—e.g., if there are Blacks on the jury, the jury is more likely to fail to agree on a verdict.[544] This is because "once a correlation is learned, the nonconscious system tends to see it where it does not exist, thereby becoming more convinced that the correlation is true."[545] As soon as a prosecutor categorizes a prospective juror into a group, the prosecutor will "tend to remember the person's behaviors that are associated with that group."[546]

Decisions based upon demeanor and appearance are highly susceptible to implicit bias.[547] As Justice Marshall wrote in *Batson*, "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."[548] Yet, prosecutors are explicitly taught to select the "ideal jury" through the observation of jurors' nonverbal cues as well as their answers to questions. The training documents encourage prosecutors to note jurors whose body language they deem "Hostile," "Defensive,"[549] "Unfriendly" or if the juror demonstrates an "unwillingness or inability to interact with other jurors."[550] One training manual instructs prosecutors that "[t]he way a juror is dressed should give you some idea as to whether or not he or she is a conformist. It should also give you a clue as to how seriously he or she takes jury duty."[551] An Orange County training document states even more directly that "Dress and grooming can telegraph a juror's conformance with social norms" and "Race, religion, gender, socioeconomic status and culture all have their own nonverbal markers."[552] Another training guide instructs prosecutors to "[p]ay attention to the physical, non-verbal responses. 'Body language' is very telling."[553] More pointedly, a San Diego County deputy district attorney instructed her colleagues to "Watch [the jurors] whenever and wherever you can. Locate the loners, big mouths and losers; then execute them."[554]

"[S]ocial psychological research strongly supports the conclusion that . . . [w]hen a lawyer sees a potential juror, she will almost instantaneously categorize that person . . . on the basis of race."[555] This categorization activates stereotypes, not necessarily consciously, so that the

lawyer will assign the stereotypical attributes to the potential juror.[556] Even if she is not aware of the stereotypes and even if she does not believe them, she will "search for, and pay greater attention to information that confirms her expectations."[557] Then, "she will encode the information in a different way, and recall it more easily."[558]

Other research, as discussed in Section III.A, demonstrates that individuals are more likely to associate ambiguous behavior as aggressive when exhibited by a Black person.[559] Police officers have been found to "interpret ambiguous behaviors performed by blacks as suspicious [and criminal] . . . while similar behaviors engaged in by whites would go unnoticed."[560] Another study found that both Black and White students considered "relatively innocuous" acts by Black males as "more threatening than the same behaviors by white males."[561] Legal scholars have interrogated the pervasive stereotype of the "Angry Black Woman" as one who is "out of control, disagreeable, overly aggressive, physically threatening, loud (even when she speaks softly), and to be feared."[562] This scholarship all but draws a direct line between prosecutors' reliance on body language, facial expressions, or eye contact and racially discriminatory strikes. As Section II.B.1 shows, on a case-by-case basis, California prosecutors use demeanor-based reasons more often than any other explanation when exercising peremptory challenges against Black and Latinx jurors.

Prosecutors' implicit biases can also negatively impact their treatment of Black jurors, causing a Black juror to appear uncomfortable. For example, when a prosecutor questions Black prospective jurors, the interaction "might activate any of these negative stereotypes as well as more general negative implicit attitudes" causing the prosecutor to "project this negativity through body language and gestures."[563] This could, in turn, "cause jurors to avoid eye contact, provide awkward or forced answers that make the juror appear less intelligent, or simply fidget and look nervous."[564]

While the empirical evidence demonstrates that demeanor- and appearance-based reasons for striking a juror often are proxies for race or race and gender, these explanations are insulated from scrutiny under *Batson* because courts almost always find them to be facially neutral.[565] For example:

> A prosecutor looking for "deferential" jurors might interpret a venire woman's words as "aggressive," but interpret the same words stated in the same way by a man merely as "assertive," or perhaps not even notice the words at all. The prosecutor remembers this evaluation, rather than simply the words themselves, and might therefore strike the woman from the venire. But for the potential juror's gender, the prosecutor would not have exercised the strike.[566]

Even though the prosecutor unconsciously struck the juror based on her gender, a court would be unlikely to find a violation because the prosecutor "subjectively believes that she struck the juror because she was too aggressive, which is a gender-neutral reason."[567] The cases in which courts have held that demeanor- and appearance-based reasons are proxies for race are few and far between.[568] It has been almost 20 years since the California Supreme Court has discredited a prosecutor's demeanor- or appearance-based reason.[569]

Only one court has addressed these pretextual explanations. Washington Supreme Court General Rule 37 makes it more difficult for courts to credit demeanor-based reasons for "peremptory challenges [that] have historically been associated with improper discrimination in jury selection."[570] For example, if a party strikes a juror because he was "inattentive," "exhibited a problematic attitude, body language, or demeanor[,] or provided unintelligent or confused answers[,]" the opposing counsel or judge must corroborate the observation or the court will reject the reason for the strike.[571]

Consistent with the data presented in Section II.B, as long as *Batson* remains the procedure in California, prosecutors will continue to offer reasons for striking Black jurors based on their "Gut instinct" about jurors' demeanor, body language, clothing, and hairstyle.[572] Courts will continue to sanction those explanations. Continued reliance on these rationales validates Justice Marshall's warning that "'seat-of-the-pants instincts' may often be just another term for racial prejudice."[573]

3. Reliance on Stock "Race-Neutral" Reasons and Other Tactics that Facilitate Discriminatory Strikes

District attorney training materials combine "practical tips"[574] from *Batson* case law with encyclopedias of stock, court-approved "race neutral"[575] reasons and so-called proven strategies aimed at avoiding "the Wheeler problem."[576] For example, a 2019 Orange County training document offers practical tips to prosecutors: (1) keep a member of a cognizable group on the jury if possible and (2) give multiple reasons for each challenge.[577]

Prosecutors are directed to rely on their biases, both explicit and unconscious, in deciding which jurors to strike, but to conceal them by offering judicially sanctioned "race-neutral" reasons.[578] Los Angeles County goes so far as to tell its prosecutors to "bite your tongue" if their reasons for excusing a juror "sound bogus or pretextual."[579] Similarly, a California District Attorneys Association ("CDAA") publication states that "any justification that even hints at racism must be avoided . . . ; if it sounds at all offensive, do not say it."[580] The lesson: Racism—whether it is conscious or unconscious—is acceptable as long as you do not place it on the record.

Prosecutors' exhaustive lists of go-to reasons enable them to readily produce a "race-neutral" response to any imaginable *Batson* objection. For example, a Los Angeles training manual directs: "Take to court a list of acceptable justifications which have been affirmed on appeal."[581] The CDAA advises prosecutors to offer "quotations where it would be most useful to know and *emulate particular language that has been deemed proper*."[582] The manual *Mr. Wheeler Goes to Washington* includes a section titled "*Wheeler* Words That Work: A Primer on Providing Peremptory Challenge Justifications."[583] It lists 16 race-neutral reasons for dismissing jurors and an additional 18 demeanor-based explanations so that prosecutors can "give detailed verbal expression to . . . subjective instincts."[584] For each of these reasons, the manual provides extensive citations to opinions in which a reviewing court upheld the reason as race-neutral.[585] The manual explains that the "key attribute [from a case] is noted in boldface," presumably so that the prosecutor can easily identify a facially neutral reason to strike the juror.[586]

The *Inquisitive Prosecutor's Guide* lists 77 race-neutral reasons for striking a juror.[587] The list of race-neutral justifications encompasses over a fifth of the entire guide, consisting of almost 30 single-spaced pages.[588] This list instructs that a prosecutor may use both the fact that a prospective juror had too much or too little education as a race-neutral reason to strike a juror.[589] A prosecutor may strike a juror for lack of community or family ties or too many of those relationships.[590] And a prosecutor may excuse a prospective juror for having previously served on a hung jury or on a jury that acquitted, or because they never served on a jury.[591] The list aptly illustrates Justice Powell's observation in *Batson* that "peremptory challenges . . . permit—'those to discriminate who are of a mind to discriminate.'"[592]

Some counties distribute a two-page document entitled the "*Wheeler*/*Batson* Guide," written by an Orange County deputy district attorney, which appears to be intended for use as a quick reference during jury selection.[593] The first page lists the seminal cases, the *Batson* procedure, and other important aspects of the doctrine.[594] The second page lists each cognizable group, non-cognizable groups, and 32 race-neutral justifications.[595] Similar to other lists, this document reduces the case law into quick-reference group characteristics. This enables the prosecutor—without the need for any reflection on the competence of the individual as a prospective juror—to select a court-approved, race-neutral reason from the list when facing a *Batson* objection.

Although they can function as cover for purposeful discrimination, reliance on these pre-approved lists of race-neutral reasons does not necessarily mean that a prosecutor's strike is intentionally racist. Rather, the lists allow district attorneys to act based upon on their gut reactions, "often reflecting an attorney's own unconscious stereotypes."[596] It offers prosecutors an easy pick of facially nonracial reasons for the strike, including a "reason [that] may be covering for implicit bias."[597] As a result, "[t]he remaining jurors are likely to be those who the attorney believes fit a favorable stereotype."[598]

Although the first of the Orange County strategies perversely directs prosecutors to explicitly consider race in selecting juries in order to defeat *Batson* challenges, it has been widely employed. In 2006, the CDAA instructed: "If possible, keep on the jury one or more members of each cognizable group from which you are challenging persons" to "create a record that will justify any challenges you make."[599] That advice was already perceived wisdom among prosecutors; in 1988, a San Diego trainer wrote, "I personally favor having a defendant being told by members of his own race rather than from some other race, that they disapprove of his conduct and that they would like to see him in the state prison. So, I try never to have a jury that does not have at least one person that is a member of the defendant's race."[600]

This is, of course, simply racial discrimination in another form. It also is directly contrary to the United States Supreme Court's decision in *Miller-El II*. There, 11 African Americans remained on the panel after jurors were excused for cause or by agreement. [601] The prosecutor struck 10 of the Black prospective jurors, but made a "late-stage decision to accept a [Black] panel member willing to impose a death sentence."[602] The Court called the move an effort "to obscure the otherwise consistent pattern of opposition to seating" Black jurors.[603] But while the Supreme Court was not fooled by this transparent effort at violating *Batson* without facing

the consequences, California courts have too frequently sanctioned this tactic and held that the inclusion of one or more members of the protected group is persuasive evidence that no discrimination occurred.[604]

Often, instructional materials encourage district attorneys to offer *many* race-neutral reasons for striking a juror. For example, an Alameda County training document directs prosecutors to "be certain to state all the reasons for your challenge, beyond what is stated in your written notes."[605] Another Alameda training instructs: "Prosecutors need to give a full explanation of the reasons for their challenges. . . . One of the reasons for this thoroughness is comparative juror analysis."[606] Orange County—on a slide discussing comparative analysis—urges prosecutors, "Don't just state a single reason, but give all applicable reasons."[607] The Ventura County District Attorney's Office directs prosecutors to:

> try to show that excused panelists in the alleged subject group had similar characteristics to other excused panelists or that you had a non-discriminatory reason for excusing the juror. Do not assume one justification will suffice. Case law indicates there is strength in quantity. One should not fail to mention any justification because it seems trivial.[608]

The underlying assumption is that if a prosecutor offers many reasons, when a trial or appellate court conducts a comparative juror analysis, the court will be less likely to view the struck and seated jurors as similar.[609] A San Francisco County manual states, "If you develop multiple reasons, any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons."[610] The more justifications on the record that demonstrate dissimilarity between the two groups, the higher the chance that the judge will overrule the *Batson* motion.[611]

However, the United States Supreme Court has criticized the prosecution's use of "a laundry list of reasons" to justify a strike.[612] The California Supreme Court initially expressed concern that the "laundry list" approach "carries a significant danger," noting that a "prosecutor's positing of multiple reasons, some of which, upon examination, prove implausible or unsupported by the facts, can in some circumstances fatally impair the prosecutor's credibility."[613] However, the state supreme court has not found *Batson* error when prosecutors employed this strategy in striking jurors.[614]

The training materials compile lists of other ways to avoid *Batson* challenges. For example, the CDAA suggests strategies such as the following: (1) "using [a] juror questionnaire to avoid [a] claim of disparate questioning";[615] (2) making "notes of demeanor attributes, looking for differences between those of potential challenges and potential keepers";[616] (3) giving "a detailed verbal expression to such subjective instincts," which can be accomplished by using the 18 "acceptable attributes for demeanor challenges";[617] and (4) using "tactical voir dire dynamics reasons" such as the "desire to seat more favorable-looking members of the venire."[618]

The organization also advises district attorneys to "always kick off your most hateful juror earliest in the process, before your opponent has built up enough steam to make a successful *Wheeler* challenge."[619]

Batson may have reduced explicit directives in prosecutorial training materials to striking Black prospective jurors, other jurors of color, and women. However, as Justice Marshall predicted, *Batson* failed to account for implicit bias and the ease with which prosecutors would find workarounds for excusing Black jurors. The training materials' reliance on ready-made, race-neutral, and judicially approved reasons should leave no doubt that California courts will not put an end to prosecutors' long-standing practice of using peremptory challenges to remove Black prospective jurors.

E. The California Supreme Court's Resistance to *Batson*

Certainly, credit goes to the California Supreme Court for its *Wheeler* opinion in 1978, adopting measures to reduce peremptory challenges motivated by group bias almost a decade before the high court's decision in *Batson*.[620] The state supreme court's ambition, however, was short-lived.

Beginning in the late 1980s, in almost every significant post-*Batson* decision, a majority of the California Supreme Court took a wrong turn. As this section shows, the court did so over the objections of dissenting justices as well as criticism by the Ninth Circuit. Rather than acknowledge the flaws in the *Batson*/*Wheeler* procedure, the majority disregarded them. For instance, when, more than a decade ago, the United States Supreme Court began to issue opinions calling upon lower courts to enforce *Batson* more rigorously, our state supreme court balked. Thus, in three decades, the California Supreme Court has all too often selected the course least likely to restrain prosecutors' use of discriminatory peremptory challenges, least likely to ensure trial court accountability, and most likely to produce one affirmance after another. Though it is by no means an all-inclusive account of the shortcomings in the court's *Batson* precedents, this sub-section serves to elucidate the course the state supreme court has pursued.

As noted in Section II.C.1, over a 30-year period (1989-2019), the court reviewed 142 *Batson* cases and found error only three times. The first two of the three reversals were in death penalty cases.[621] In these first two cases, decided in 1991 and 2001, the prosecutors' intentional removal of jurors of color through their peremptory challenges was patent. In *People v. Fuentes*, the first reversal, the prosecutor was found to have violated *Batson* only "a few months earlier," and then used "[t]en of his first 11 challenges" to remove Black jurors, leading one judge to remark that the prosecutor had "failed—or refused—to learn his lesson."[622] In the second case, *People v. Silva*,[623] "the prosecutor, believing that the jury in the first trial had 'hung . . . on racial grounds,' struck all five Hispanic members of the venire and all but announced his desire not to have any Hispanic person serve on the second jury."[624]

In *People v. Gutierrez*, a non-capital case and the third reversal, the court granted a *Batson* claim for "the first time in 16 years, and the second time in over 25 years."[625] The opinion stands out because it is difficult to distinguish the circumstances in *Gutierrez* from the many cases in which the court found no error, some of which we discuss in this section of the report. The court did not overrule its precedent; it simply looked past it. At the time of the *Batson* objection, the prosecutor had used 10 of 16 strikes to remove Latinx prospective jurors.[626] The seated jury included

one Latino.[627] The majority did not disapprove of its policy of "reflexive application of deference" (discussed in this section) to unexplained trial court rulings.[628] Rather, the court pointed to the inadequacy of the trial judge's ruling as one of the factors in its decision to scrutinize the prosecutor's peremptory challenge.[629] The majority found that the trial court "never clarified why it accepted [the prosecution's explanation] as an honest one" and had made a "global finding" that the prosecutor's reasons did not appear "to be a pretext in this particular case."[630] Taking a page from Justice Liu's critical analyses of the court's *Batson* jurisprudence (discussed in this section), the majority, *in this anomalous case*, found error, concluding it was not satisfied that the trial judge had "made a *reasoned* attempt to determine whether the justification was a credible one."[631]

1. Elevating Batson*'s Step-One Low Threshold to an Unconstitutional Burden*

As discussed in Section I.C.5, in 2005, in *Johnson v. California*, the United States Supreme Court declared that California's step-one test was unconstitutional because it imposed an undue burden on the party making the *Batson* objection.[632] The California Supreme Court last found a *Batson* violation at the first stage in 1986, more than 30 years ago.[633] To put this in perspective, it is quite likely that in thousands of California trials, judges improperly refused to require prosecutors to give reasons for their strikes, and in hundreds of appellate cases, reviewing courts improperly short-circuited *Batson* claims. Over the decades, the court's majority deflected criticism from dissenting justices and repeated admonitions by the Ninth Circuit that it had gone off course.[634] For example, in 1992, Justice Joyce Kennard took issue with the majority's view that the prosecutor's strikes against the only two Black prospective jurors was a "meager" prima facie showing.[635] Consistent with Justice Thurgood Marshall's warning in *Batson*, Justice Kennard declared that when there is a small number of African Americans in the venire, the prosecutors' removal of "all the African-American jurors who were tentatively seated" is sufficient for a prima facie showing. [636] Justice Kennard wrote, "To hold otherwise would improperly sanction the use of racially motivated challenges when only one or two members of the targeted race are present in the venire."[637]

People v. Carasi[638] is one of several cases that illustrate the state supreme court's tenacious application of an elevated standard at step one, notwithstanding *Johnson* and the court's subsequent acknowledgement that the prima facie showing involves only a "low threshold."[639] In the 2008 opinion, the court independently applied the *Johnson* test to a *Batson* claim arising out of a case tried before *Johnson*.[640] The majority found that the prosecutor's use of 20 of his 23 peremptory challenges against women prospective jurors was insufficient to raise an inference of discrimination.[641] Justice Kennard wrote separately to object to the majority's dismissal of the overwhelming statistical evidence, especially in a trial in which the co-defendant was a woman.[642] She pointed to the trial judge's observation that the percentages of the prosecutor's challenges against women were "'eyebrow-raising, to say the least,'" a comment the majority never mentioned.[643] Justice Kennard stated that had the pattern been "the only evidence on this issue," she would have found a prima facie showing of discrimination.[644] Her assessment was in line with *Johnson*'s reaffirmation that satisfying step one requires only "producing evidence" of an inference of discrimination.[645]

At the end of 2019, in *People v. Rhoades*, Justice Liu criticized the majority's "latest steps on what has been a one-way road" that "'improperly elevated the standard . . . beyond the showing that the high court has deemed sufficient to trigger a prosecutor's obligation to state the actual reasons for the strike.'"[646] The prosecutor in *Rhoades* peremptorily challenged four of eight Black prospective jurors, thereby stripping the jury box of all African Americans.[647] Justice Liu commented on the similarity between the facts in *Rhoades* and *Johnson v. California*.[648] In *Johnson*, even applying the unconstitutionally burdensome "strong likelihood" standard at step one, the trial court observed that the showing was "'very close,'" and the state supreme court agreed that the prosecutor's removal of all three Black prospective jurors from the jury "'certainly looks suspicious.'"[649] The circumstances in *Rhoades*, Justice Liu submitted, were sufficient for the majority to have found an inference of discrimination under the standard mandated by *Johnson*.[650]

Justice Liu remarked that in the 14 years since *Johnson*, the California Supreme Court had decided 42 cases involving *Batson*'s first step, all of them capital cases.[651] Although each case was tried before *Johnson*, when California trial courts were applying the heightened step-one standard, the state supreme court reviewed the cases independently using the correct test and did not find error in a single case.[652] As a result, in Justice Liu's estimation, it "is past time for a course correction."[653] In Section IV.A, we discuss Justice Liu's proposed alternatives for a change in the court's "analytical approach."[654]

2. Disregarding the High Court's Prohibition Against Judicial Speculation at Step One

In addition to disapproving of the California Supreme Court's step-one test, the Supreme Court in *Johnson* reiterated the prohibition against judicial speculation.[655] The Court explained, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[656] Thus, trial judges are precluded from hypothesizing, that is, coming up with "'good reasons'" a proponent "'might have had'" for a strike; they are limited to considering "'the real reason.'"[657] Simply put, when the strike opponent has raised an inference of discrimination, the trial court must obtain "a direct answer" from the strike proponent "by asking a simple question."[658]

Justice Liu's dissenting opinions in step-one cases also illustrate how the California Supreme Court repeatedly ignores *Johnson*'s directive against judicial speculation.[659] For example, in *People v. Harris*, the jury could not reach a verdict in the defendant's first trial, with the only Black juror voting to acquit.[660] At the second trial, the defense objected to the prosecution's strike of the first two of three Black prospective jurors.[661] Defense counsel argued that African Americans were "underrepresented in the venire, not[ing] that the holdout juror from [the defendant's] first trial was African-American" and that the prosecutor had challenged the jurors in the belief they would vote to acquit, as a Black juror in the first trial had done.[662] The trial court denied the *Batson* motion because the defense had not made a prima facie showing of purposeful discrimination.[663] The California Supreme Court affirmed, *offering its own possible reasons* for the prosecutor's strikes.[664]

Justice Liu concurred in the result, but wrote separately to explain that the majority's *Batson* precedents conflict "with principles set forth by the United States Supreme Court."[665] In *Harris*, Justice Liu described the court's "pattern of decisions" that misapply *Johnson* to defeat the United States Supreme Court's "objective" of obtaining "'actual answers'" from the prosecution at step one.[666] He explained that "the mere fact that a court can find *possible* race-neutral reasons in the record for a prosecutor's strikes does not negate an inference of discrimination at *Batson*'s first step."[667] Given the "'inherent uncertainty present in inquiries of discriminatory purpose,'" Justice Liu pointed out that *Johnson* demands refusal to "'engag[e] in needless and imperfect speculation when a direct answer can be obtained by asking a simple question'" of the prosecutor.[668] In *Harris*, Justice Liu called for reform from another body: "The fact that our jurisprudence appears quite entrenched only heightens the need for a course correction by higher authority."[669]

In *People v. Reed*, the defendant, who is Black, objected to the prosecution's use of five of its first eight peremptory challenges to remove five of the six Black prospective jurors in the jury box.[670] The trial judge, applying the "strong likelihood" test, ruled that Reed had not made a prima facie showing of discrimination and denied the *Batson* objection.[671] The California Supreme Court independently reviewed the ruling and, applying the *Johnson* test, upheld the trial judge's decision on several grounds. They included: (1) the total number of strikes the prosecutor exercised throughout jury selection (not just at the time of the objection); (2) race-neutral reasons the majority discerned from the record that would have supported the strikes; and (3) a comparison of the struck Black jurors with some of the seated White jurors.[672]

Justice Liu dissented and found fault with the court's analysis on all counts.[673] At bottom, his disagreement—shared by Justice Kennard—was both with the court's failure to adhere to the United States Supreme Court's directives in *Johnson* and the court's inconsistent application of its own precedent.[674] Here, we highlight the former, specifically the court's practice of hypothesizing reasons for a prosecutor's strike, a practice the Supreme Court "has never approved."[675] Justice Liu carefully examined the majority's hypothesized reasons, demonstrating that they did not hold up, especially when compared to the circumstances or answers of White jurors whom the prosecution retained.[676] For example, the majority speculated that the prosecutor may have had reservations about struck jurors Janice C. and Mary C. because, according to their questionnaires, their spouses "had prior contact with law enforcement.[677] The court cited its long-standing precedent that "'a negative experience with the criminal justice system is a valid neutral reason for a peremptory challenge.'"[678] Justice Liu pointed out that "at least three non-black jurors seated on the final jury had relatives who had been arrested."[679] Concluding that the trial court should have required the prosecutor to give his reasons for removing five of six Black jurors, Justice Liu wrote, "Today's opinion does exactly what the high court says we should not do: it indulges 'the imprecision of relying on judicial speculation to resolve plausible claims of discrimination.'"[680]

The same day the California Supreme Court issued its opinion in *Rhoades*, the court decided *People v. (Joe Edward) Johnson*, again upholding a trial judge's ruling that the defendant had not made a prima facie showing of discrimination.[681] The defendant, who is Black, was sentenced to

death for the murder of a White man.[682] The prosecution, in support of the death penalty, introduced evidence that the defendant had been convicted of the rape of a White woman.[683]

Before jury selection commenced, the prosecutor announced that he had run a criminal history check on "'some of the jurors.'"[684] He learned that one of the African-American prospective jurors, Kenneth M., had two misdemeanor convictions, though the juror indicated on his questionnaire that he had never been accused of or arrested for a crime.[685] The trial judge rejected the defendant's motion that the prosecution turn over the information about all the jurors it had investigated, agreeing that the prosecution might be required to do so if the defendant made a prima facie showing of a *Batson* violation.[686] Over the defendant's objection, the prosecutor used three of his first 15 peremptory challenges to remove three of the five Black jurors who, at different times, were seated in the jury box.[687] The trial court found that the defendant had not satisfied step one as to any of the objections.[688] When Kenneth M. was called to the box as a prospective alternate juror, the prosecutor struck him over the defendant's objection.[689] The trial court again ruled that the defendant had not made a prima facie showing of discrimination, and found that nothing about the prosecution's investigation of Kenneth M. supported such a showing.[690] The seated jury included three African Americans.[691] On appeal, the California Supreme Court held that there was no *Batson* error at step one. The court was not persuaded by the number of strikes against Black jurors, the rate at which the prosecutor removed African Americans, or the prosecutor's background check on Kenneth M. and some of the other jurors.[692] The majority was primarily influenced by the number of Blacks on the seated jury, i.e., the fact that the prosecutor had accepted those jurors.[693]

Justices Goodwin Liu and Mariano-Florentino Cuéllar dissented. Justice Cuéllar criticized the majority for turning "a blind eye" to discrimination against Black prospective jurors.[694] He wrote:

> The trial court had compelling evidence that the prosecutor, even before striking any African American jurors, had singled out African American jurors for special—and unlawful—scrutiny. Yet when the prosecutor sought to excuse a majority of the African American prospective jurors from the jury that would decide whether defendant Joe Edward Johnson would be subject to the death penalty, no one asked the prosecutor to explain his reasons.[695]

Justice Cuéllar faulted the majority for not taking into account four factors, which demonstrated that the record was "more than sufficient" to raise an inference of discrimination: (1) "issues of race were salient in this case"; (2) "the prosecutor appeared to single out African American jurors in conducting his extrajudicial criminal history investigation"; (3) the prosecutor excluded most Black jurors who were in the box and struck them "at a far higher rate than other jurors"; and (4) neither the record nor the majority offered reasons "that would necessarily dispel any inference of bias."[696] Justice Cuéllar called the majority opinion "a road map for ensuring that unlawful discrimination evades judicial scrutiny."[697] The decision, he explained, "encourages prosecutors to . . . single out the disfavored group for intensive investigation prior

to jury selection, use the results to disqualify as many members of that cognizable group as possible in voir dire, and then stonewall any inquiry into whether the investigation was mere racial profiling."[698]

Justice Liu, who joined Justice Cuéllar's dissenting opinion, separately described *Johnson* as "yet another case in which a black man was sentenced to death for killing a white victim after a jury selection process in which the prosecution disproportionately excused black prospective jurors," and "yet another case in which this court has refused to find any inference of discrimination in jury selection."[699] He commented: "[I]f the facts in this case do not give rise to an inference of discrimination, then I am not sure what does."[700] Justice Liu reiterated his "'serious doubts'" about the majority's adherence to "'*Batson*'s mandate.'"[701] Though he addressed each of the "three dimensions of harm" *Batson* was intended to remedy—the denial of equal protection to the Black defendant who is tried by a jury from which Blacks have been excluded, deprivation of the individual Black juror's citizenship rights, and subversion of the public's faith in the criminal legal system—here, Justice Liu emphasized the latter.[702] Justice Liu wrote, "Today, as when *Batson* was decided, it is a troubling reality, rooted in history and social context, that our black citizens are generally more skeptical about the fairness of our criminal justice system than other citizens."[703] Justice Liu's observation coheres with our findings regarding the "reality" of many African Americans' experiences and perceptions, how both are exploited by prosecutors to disproportionately strike Black jurors, and how California courts, applying the three-step procedure, largely facilitate discrimination.

3. Denying Meaningful Appellate Review of the Prosecution's Reasons for Its Strikes

The great weight of authority requires that an appellate court reach the ultimate question—did the trial court commit *Batson* error?—if the striking party gave reasons for the strike and the trial judge ruled on the *Batson* objection.[704] For decades, the California Supreme Court vacillated on this issue. In some opinions, the court followed the majority of federal and state courts, and in others, the court revisited the first step of the procedure to conclude that the defendant had not made a prima facie showing of discrimination.[705] In the latter circumstance, dissenting justices insisted that the majority was ignoring "federal constitutional law."[706]

Several years ago, in *People v. Scott*, a majority of the court, acknowledging that its decisions have "not always been entirely consistent," resolved that it would, once and for all, go its own way.[707] To clarify its past practices, the court held that when a trial judge finds no prima facie showing at step one, but "allows or invites" the prosecution to offer its explanation, and then denies the motion, a reviewing court "should begin its analysis . . . with a review of the first-stage ruling."[708] Justice Liu, joined by Justice Leondra Kruger, objected that, in so doing, the court had overruled its own recent precedent, which held that once the prosecutor states a reason and the court rules on the reason, "the first stage of the *Batson* inquiry . . . is moot."[709] As had some of his predecessors on the court, Justice Liu pointed out that the decision also put California "at odds with the majority of state high courts and federal circuit courts that have considered the issue."[710]

In *Scott*, Justice Liu also wrote that the majority's departure "scrambles . . . clear and well established [*Batson*] procedure."[711] As a result, "the court opts to resolve *Batson*'s inquiry into discriminatory purpose based on 'needless and imperfect speculation' as to why the prosecutor might have struck [the juror] even though 'actual answers' to that question were stated by the prosecutor and evaluated by the trial court."[712] Justice Liu predicted, "Under today's decision, when a prosecutor has stated a facially neutral reason that nonetheless reveals discrimination . . ., the *Batson* violation will evade appellate review so long as the trial court did not err in its first-stage ruling."[713]

4. Reflexive Deference: Allowing Trial Courts to Avoid Their Gatekeeping Responsibility

As a general rule, appellate courts afford "great deference" to trial court findings of fact, such as a finding of purposeful discrimination at step three of the *Batson* procedure.[714] This is because the ruling is largely determined by credibility assessments.[715] For about a decade after *Wheeler*, the California Supreme Court required that the trial judge make a "sincere and reasoned" attempt to evaluate a prosecutor's explanation for each peremptory challenge to which the defense objected before the court would defer to the judge's denial of a *Batson* objection.[716] Applying this standard, the court reversed for step-three *Batson* error in several cases.[717] The court's resolve, however, waned in the late 1980s, as it began to defer to trial judges' unexplained decisions while continuing to pay lip service to the rule.[718] In the 1990s, the California Supreme Court moved towards abandoning the rule.[719]

In 2001, in *People v. Silva*, the court offered the following nonbinding comment, known as "dictum": "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings."[720] Justice Liu later observed that this language had "come to comprise the rule that crucially qualifies the trial court's obligation to make a sincere and reasoned attempt to evaluate the prosecutor's explanations at *Batson*'s third stage."[721] He pointed out that, two years later, in *People v. Reynoso*, reversing the appellate court's finding of *Batson* error, the court "turned *Silva*'s dicta into doctrine."[722]

Reynoso was a 4-3 decision from which Justices Joyce Kennard, Kathryn Werdegar, and Carlos Moreno dissented.[723] Both Justice Kennard's opinion and that of Justice Moreno concluded that the majority had done grave damage to the right of Latinx citizens—the subject of the prosecution's strikes—to serve on California juries.[724] Justice Moreno wrote that the decision constituted "a significant retreat" from the court's "*Wheeler* jurisprudence and strikes a major blow against a defendant's constitutional right to a fair, impartial, and representative jury."[725] Observing that the majority's "standard of appellate review . . . effectively insulates discriminatory strikes from meaningful scrutiny at both the trial and appellate stages," Justice Kennard predicted what has come to pass at the court.[726] A decade later, Justice Liu explained that the "practical effect" of deferring to a trial court's unexplained denial of a *Batson* objection "is to hold that what a trial court leaves unsaid in denying a *Batson* claim will be construed on appeal *in favor of the prosecution*."[727] In his estimation, the impact of the majority's rule is all the more intolerable "in light of what decades of research have revealed about the stubborn role of race in jury selection."[728]

It would be a mistake to suggest that Justice Liu's criticism of the majority's "reflexive deference" to unexplained trial court *Batson* rulings is based simply on a preference for the court's rule prior to *Reynoso*. Rather, he objects to the California Supreme Court's "fail[ure] to evaluate [the] defendant's claim in the manner that high court precedent requires."[729] The following two relatively recent opinions illustrate how the court's current practice of automatic deference continues to strike a "major blow" to the rights of prospective jurors of color and those of criminal defendants.[730]

In *People v. Williams*, a capital case, defense counsel made three *Batson* motions in response to the prosecutor's use of peremptory challenges against five Black women.[731] The court asked the prosecutor to provide explanations for the first objection, involving the first three strikes, to which the prosecutor replied that each of the three Black women seemed reluctant to impose the death penalty.[732] The trial judge denied the motion without explanation.[733] The defense objected separately to the prosecution's strikes of the fourth and fifth African-American women.[734] The prosecutor gave the same reason—his belief that each would be reluctant to impose the death penalty—for excusing both women, emphasizing that he based his opinion more on the jurors' demeanor and the delivery of their responses than what they actually said.[735] The trial judge declared that she did not have any recollection of the fourth African-American woman the prosecutor struck and had not taken any notes, but "would accept the prosecutor's explanation."[736] As to the fifth, the trial court declared that it did not recall the juror, again had not taken any notes, "could only go by what the prosecutor was saying, and it accepted the prosecution's explanation."[737] Defense counsel then requested that the trial court review the statistical racial makeup of the jury.[738] The trial judge responded: "I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it difficult no matter what it is.'"[739] The California Supreme Court deferred to the trial court's ruling, and held that there was no *Batson* violation.[740]

Dissenting in *Williams*, Justice Liu found that there was no basis—such as a "'sincere and reasoned effort'" by the trial judge to analyze all of the relevant circumstances—for the California Supreme Court to defer to the judge's decision.[741] He wrote that deference where a trial judge merely announces a ruling without evaluating the prosecutor's reasons "all but drains the constitutional protection against discrimination in jury selection of any meaningful application."[742] Justice Liu concluded, "The upshot of this erroneous application of deference is the denial of defendant's *Batson* claim despite the fact that *no court*, trial or appellate, has ever conducted a proper *Batson* analysis."[743]

Justice Werdegar joined Justice Liu's dissent and wrote separately.[744] She found it unnecessary to engage in line-drawing about appellate deference because of "[t]he egregious circumstances of the present case" in which the trial judge had no notes or recollection of the fourth and fifth Black jurors, relied solely on what the prosecutor said, and supported her ruling with her observation about "Black women['s]" views on capital punishment.[745]

In *People v. Hardy*, the defendant, who is African American, was convicted and sentenced to death for the rape-murder of a White woman.[746] The prosecutor exercised her peremptory challenges to remove the only African American, Frank G., who was in the jury box during the selection of the 12 jurors who would decide the case.[747] She struck the first two Black prospective jurors from the alternate panel, though one African American remained after the parties had exhausted their challenges.[748] In response to the defendant's *Batson* motion, the trial judge found that he had not made a prima facie showing of discrimination.[749] However, the prosecutor volunteered her reasons—offering six for striking Frank G.—and the trial judge ultimately denied the motion because the prosecutor had "explained race neutral reasons for excusing the jurors."[750] On appeal, the California Supreme Court, which the year before had rejected a trial court's "global finding" in *Gutierrez*, announced it was satisfied that deference to the trial court was appropriate here because "'the prosecutor's stated reasons are both inherently plausible and supported by the record.'"[751] To the extent there was ambiguity and indeed an outright mistake about a juror's answer in one of the prosecutor's reasons, the court blamed defense counsel for neglecting to call the judge's attention to the prosecutor's error.[752]

Justice Liu dissented on several grounds, among them, the majority's willingness to defer to the trial court's ruling.[753] The majority, he explained, acknowledged that "at least two of the [prosecutor's] reasons are 'weak,' the demeanor-based reason finds no support in the record," and, upon examination, the prosecutor's reasons are also not self-evident.[754] Justice Liu further criticized the majority for assigning blame to defense counsel, writing that "this reasoning is at odds with what we said in *Gutierrez*."[755] In *Williams*, *Hardy*, and other cases, Justice Liu has urged that where a trial court bypasses its duty to explain its decision, United States Supreme Court precedent does not sanction deference.[756] In cases such as these, deference all but "dispense[s] with appellate review . . . since it is so easy to rationalize a silent record with a cacophony of presumptions."[757]

5. Constraining Comparative Juror Analysis at Step 3: Undermining Batson's *Most Effective Tool*

> Reflexive application of deference where there is nothing in the record to defer to, judicial speculation as to the reasons for a strike where the prosecutor has offered none, and unduly limited and grudging application of comparative juror analysis *combine to erect a virtually impossible hurdle* for *Batson* claims to surmount.[758]

As discussed in Sections I.C.5, comparative juror analysis—the side-by-side comparison of struck and seated jurors—is an effective method of assessing whether discrimination has occurred. The California Supreme Court approved this approach in *Wheeler*, and employed it often in subsequent opinions such as *People v. Trevino*.[759] In 1989, in *People v.* (*James Willis*) *Johnson*, a majority of the court retrenched.[760] The court held that *Trevino* had "placed undue emphasis" on these comparisons.[761] Observing that the "majority pay[s] lip service to the *Batson* rule, but in fact violate[s] both its letter and its spirit," Justice Stanley Mosk dissented because the court found no error in a case in which "the prosecutor deliberately struck all the

Blacks, all the Asians, and all the Jews from the jury that condemned [the defendant] to death."[762] He enumerated the ways in which the majority had disregarded other *Wheeler* precedents.[763] Justice Mosk was especially baffled by the majority's "attack" on the comparative juror analysis described in *Trevino*.[764] Calling it "a highly useful analytical tool," Justice Mosk observed, "Virtually every one of our decisions both before and after *Trevino* relied on this same analytical technique."[765]

The United States Supreme Court endorsed comparative juror analysis in 2003 and 2005 in *Miller-El v. Cockrell* (*Miller-El I*) and *Miller-El v. Dretke* (*Miller-El II*).[766] As we described above, this powerful analytic approach was central to the court's grant of relief in *Miller-El II* and three subsequent *Batson* cases: *Snyder v. Louisiana, Foster v. Chatman,* and *Flowers v. Mississippi*.[767]

Three years after *Miller-El II*, the California Supreme Court, in *People v. Lenix*, reluctantly conceded that its "practice of declining to engage in comparative juror analysis [at step three] for the first time on appeal" could not be reconciled with *Miller-El II* and *Snyder* because the practice "unduly restricts review based on the entire record."[768] The court, however, wasted no words in expressing its reservations about this approach, and signaled its intention to conduct the analysis sparingly.[769] The California Supreme Court listed several reasons for its view that the approach has limited utility on appeal, e.g., comparative juror analysis is "performed on a cold record" and may miss the "nuances" of live communication; jury selection is "a fluid process" that changes until the jury is sworn; and "[v]oir dire is a process of risk assessment" about how a juror will act individually and how the group will act collectively.[770] In opinion after opinion, the court has relied on these and other like objections to constrain the efficacy of comparative juror analysis as a tool for ferreting out discriminatory peremptory challenges.[771]

The approach, as conceptualized by the United States Supreme Court, is not complicated: it involves "side-by-side comparisons" of "similarly situated" struck Black and non-Black jurors.[772] To be similarly situated, jurors need not be "identical in all respects."[773] The Court agreed that such a requirement "would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[774] If the prosecutor's reason for the strike "applies just as well" to a struck and "otherwise-similar" seated juror, "that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."[775]

The United States Supreme Court has conducted a comparative analysis of the prosecution's treatment of struck and seated jurors in a variety of circumstances, including: (1) asking most Black jurors different questions about executions than White jurors;[776] (2) eliciting assurances from White jurors who had scheduling conflicts that they could serve, but asking for no such assurances from Black jurors;[777] (3) striking an African-American juror because of his wife's employment at a hospital while retaining a White juror who worked in the same hospital;[778] (4) asking a large number of questions of the struck Black jurors and relatively few of the seated White jurors;[779] and (5) investigating the background of struck Black jurors while conducting no investigation of seated White jurors.[780]

In *Miller-El II*, the Supreme Court also reaffirmed the prohibition on speculation at the step-three determination, faulting the federal court of appeals' "substitution" of its own reason for the prosecution's strike of one of the African-American jurors.[781] The Court, wrote: "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."[782] Our state supreme court also relies on hypothesized reasons to uphold prosecutors' peremptory challenges, and in particular, to conclude that the excused Black or Latinx jurors were not sufficiently similar to the White jurors whom the prosecutor retained to warrant a finding of *Batson* error.

The court's decision in *People v. Jones*, illustrates this practice.[783] The *Batson* claim involved the prosecution's strikes against three African-American jurors.[784] The prosecutor gave several reasons for removing one of them, Juror G.G., including the fact that the juror was a bus driver in the area where the crime had occurred, and might substitute his own views about the bus routes for the witnesses' testimony.[785] He stated that he was also concerned about other jurors who were bus drivers in that area.[786] The trial judge denied the motion.[787] On appeal, Jones argued that the prosecutor did not strike two White jurors who were bus drivers in the area.[788] The California Supreme Court concluded that "[t]he record strongly suggests race-neutral reasons why he chose to accept the others despite his concern that they were bus drivers."[789] The court found that the two seated jurors were "'strongly in favor'" of the death penalty—a reason the prosecutor never offered for striking Juror G.G. —whereas the struck juror was "'moderately in favor.'"[790] Notwithstanding *Miller-El II*'s rule against speculation, the court concluded that the United States Supreme Court's decisions presented no obstacle to substituting reasons never offered by the prosecutor that might explain why he did not peremptorily challenge the seated jurors to whom the struck juror was compared.[791]

The state supreme court has done more than hypothesize reasons a prosecutor might have had to strike a juror of color. The court has also speculated about characteristics never offered by the prosecution as reasons for its strike that "*would have made* [*the seated jurors*] *more attractive 'in the eyes of a prosecutor* seeking a death sentence.'"[792] The court's practice defies the Supreme Court's requirement that "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives."[793]

Increasingly, the California Supreme Court has required that the seated jurors expressed "'a substantially similar *combination* of responses,' in all material respects, to the jurors excused."[794] In *People v. Winbush*, Justice Liu cautioned that the majority's approach "appears in tension" with *Miller-El II*, *Snyder*, and *Foster*.[795] He pointed out that in the Supreme Court cases, the prosecutor had given more than one reason for each disputed peremptory challenge, but that in making its analysis, the high court "drew inferences of discrimination by comparing struck and seated jurors with respect to one or more of the stated reasons *considered individually*."[796]

The United State Supreme Court's approach in *Foster* is illustrative. There, the court called the prosecutor's 11 reasons for striking Marilyn Garrett, an African-American woman, a "laundry list."[797] It is noteworthy that most of the prosecution's explanations were similar to those (1) California district attorney training manuals recommend; (2) California prosecutors routinely give; and (3) California courts endorse as "race neutral."[798] They included the juror's employment as a teacher's aide for "disadvantaged youth," the fact that she "kept looking at the ground during voir dire," the shortness of her answers, her "nervous" appearance; her youth; "misrepresent[ation of] her familiarity with the location of the crime," her failure to "disclose that her cousin had been arrested on a drug charge," and the fact that she was divorced and had two children.[799] The Supreme Court engaged in a thorough analysis of each of the 11 explanations, and found that a number of the reasons were "contradicted by the record," and others "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror."[800] The court went through the same careful examination of the eight reasons the prosecution gave for striking Eddie Hood, an African-American man, with the same result; most of the justifications were unsupported by the evidence or applied equally to seated White jurors.[801] The Supreme Court, however, did not examine whether each of the seated White jurors matched Ms. Garrett or Mr. Hood in all respects. Instead, taking the prosecution's explanations one after another, the court identified seated White jurors who were similarly situated to Ms. Garrett or Ms. Hood as to *that particular reason*.[802] The court held: "Two peremptory strikes on the basis of race are two more than the Constitution allows."[803]

In *People v. Hardy*, introduced above in our discussion of "reflexive deference," the court agreed that the prosecutor's strikes merited "close scrutiny" because she had removed every African American she could strike and the "case had definite racial overtones."[804] The majority concluded, however, that Frank G., who the prosecutor struck and who was the only Black prospective juror on the main panel, was distinguishable from the seated White jurors to whom Justice Liu, in dissent, compared him.[805]

Justice Liu also parted company with the majority opinion on its comparative juror analysis.[806] Examining several of the prosecutor's explanations for removing Frank G., Justice Liu identified at least two other seated non-Black panelists whose answers to specific questions were no more favorable to the prosecution than those of Frank G.[807] Consider the prosecution's concern that Frank G., who is not a lawyer, supervised civil litigation for a major car rental company, knew many attorneys, and spoke with lawyers on a daily basis.[808] The majority was satisfied that no seated non-Black jurors were similarly situated.[809] Yet, as Justice Liu showed, the seated jury included a legal secretary who "knew 'too [many] lawyers to name,'" two jurors whose family members are lawyers, and one juror who was studying to be a paralegal and had "close lawyer acquaintances."[810] Consider also the prosecutor's objections to Frank G.'s death-penalty views. Her sixth reason for striking Frank G. was his belief that "life without the possibility of parole [is] . . . a worse punishment than death."[811] Justice Liu pointed to two seated non-Black jurors whose questionnaire responses were "substantially similar."[812] Both also explained why they held this view, whereas "Frank G., who favored the death penalty and thought it was used 'too seldom,'" also stated that "he could accept that death was the worse penalty, as the law

required."[813] Justice Liu wrote that the majority's insistence that the comparator jurors "exactly match[]" the struck jurors "'leave[s] *Batson* inoperable; potential jurors are not products of a set of cookie cutters.'"[814]

In *People v. Smith*, citing *Foster*, the California Supreme Court suggested that a prosecutor's strategy of offering "multiple reasons," may "fatally impair the prosecutor's credibility" as some prove to be "implausible or unsupported by the facts."[815] The court cautioned against replicating a trial court's "shortcut" by "picking one plausible item from the list and summarily accepting it without considering . . . the prosecutor's explanation as a whole."[816] Despite the opportunity to disapprove of the use of a "laundry list" in several cases, the court has taken the opposite tack. For example, the prosecutor in *People v. Armstrong* gave eight reasons for excusing Juror E.W.[817] Rather than evaluate all of them, the trial court and the majority focused on the juror's two statements about capital punishment, dismissing the other six as "lesser factors," which could "fairly" cause the prosecutor to hesitate to retain E.W. on the jury.[818]

The dissent in *Armstrong*—Justice Liu, joined by Justice Cuéllar and by Justice Dennis Perluss of the Court of Appeal—began by acknowledging the "'definite racial overtones'" that "'raise[] heightened concerns about whether the prosecutor's challenge was racially motivated.'"[819] First, the defendant, a Black man, was sentenced to death for the rape-murder of a White woman.[820] Second, "[i]n the capital trial of Armstrong's confederate, Warren Hardy, the same prosecutor struck every black juror she could have removed and gave six reasons for striking a black man, Frank G., from the main panel."[821] Third, here, the prosecutor's peremptory challenges against four African-American male jurors left no Black men on the jury.[822] The majority noted these facts, but did not include them in their consideration of "all relevant circumstances" at step three as *Batson* requires.[823]

With regard to the strike of E.W., the third African-American man removed by the prosecutor, the dissent in *Armstrong* reviewed each of her eight reasons.[824] The dissent concluded that the majority's handpicking of just two of the prosecutor's explanations was inconsistent with the court's statement in *Smith*, which in turn was grounded in the Supreme Court's holding in *Foster*.[825] Concluding, the dissent returned to the deficiencies in the record—explanations that were "implausible, misleading, contradicted by the record, or difficult to credit in light of the prosecutor's disparate treatment of similarly situated jurors" and the trial court's failure to "press[] the prosecutor on these points."[826] The record, Justice Liu wrote, showed "'it was more likely than not that the challenge was improperly motivated.'"[827]

In *People v. Chism*, the California Supreme Court imposed yet another limitation on comparative juror analysis that runs counter to the plain language of United States Supreme Court precedent, and, as Justice Liu explained, conflicts with the state supreme court's precedent. The majority in *Chism* announced that an appellate court will only compare a struck juror to jurors seated at the time the judge ruled on the *Batson* objection unless the defendant renews the objection to allow for a comparison to jurors who were seated after the ruling.[828] This constraint defies the Supreme Court's mandate that reviewing courts, as well as trial judges, are obliged to evaluate a *Batson* claim based on "'*all* of the circumstances that bear upon the issue of racial animosity.'"[829]

Justice Liu observed that the majority's "new law" in *Chism* will restrict the use of comparative juror analysis in cases in which that approach would substantially support a *Batson* claim.[830] In *People v. Manibusan*, for example, the prosecutor struck a Black woman who had previously served on a jury that was unable to reach a verdict, stating that he had "'an absolute policy of getting rid of people whose only jury experience resulted in a hung jury.'"[831] After the trial court denied the *Batson* motion, jury selection continued, and the prosecutor accepted two non-Black jurors whose only prior jury experience was serving on juries that did not reach a verdict.[832] Under *Chism*'s crabbed approach, the truth about the prosecutor's "policy" would escape judicial review. Justice Liu observed that *Chism* was the second opinion in one year in which the court had rejected a defense objection to the prosecution's removal of Black women from the jury.[833] He wrote, "Our *Batson* jurisprudence . . . leaves one to wonder whether any circumstances, short of an outright admission by the prosecutor . . . will ever suffice to prove a violation."[834]

In case after case, the California Supreme Court has devised rationales to avoid comparative analysis, to restrict its application, to speculate about jurors' similarities and differences rather than adhere to the record, or to find the analysis itself unpersuasive. The court's hostility to and parsimonious application of this approach cannot be reconciled with the Supreme Court's generous use of the analysis.

IV.

REFORM OPTIONS

Ultimately, our empirical findings that prosecutors continue to disproportionately strike Black and Latinx prospective jurors despite *Batson* should not be surprising. To the extent that *Batson* can make some progress in reducing discriminatory strikes, it requires vigorous judicial enforcement, which our state courts have not provided.

Batson has failed and was destined to fail. Prosecutors across the state persist in disproportionately striking Black and Latinx jurors. They justify these strikes on the basis of "race-neutral" reasons that are often thinly veiled ethnic or racial stereotypes, which courts at every level tolerate. The California Supreme Court has found *Batson* error only three times in the last three decades. *Batson* is an ineffective judicial mechanism. We agree with Justice Goodwin Liu that it is "past time for a course correction."[835]

Members of the bench and legal scholars have called for an end to the *Batson* procedure, or at least, for dramatic reform. In this section, we explore those critiques and the various reform options proposed by judges, legal scholars, social scientists, and public figures. We examine actions taken by other states to remedy discrimination in jury selection—most notably, Washington Supreme Court General Rule 37 ("GR 37").[836] We note that the California Supreme Court recently announced that it will convene a "workgroup" to study peremptory challenges. We urge, however, that comprehensive legislation is the only realistic, expeditious means of eliminating the discriminatory jury selection practices detailed in this report.

A. Judicial Calls for *Batson* Reform

Recognizing its deficiencies, justices in California have called for substantial *Batson* reform.[837] Dissenting from the California Supreme Court's final *Batson* opinion of 2019, Justice Liu proposed several concrete measures to move the majority in the direction of enforcing the Equal Protection Clause.[838] First, he proposed that the United States Supreme Court "could make clear that reliance on hypothesized reasons in first-stage *Batson* analysis is generally impermissible."[839] Thus, a trial judge could no longer offer his or her own race-neutral reasons to explain a prosecutor's peremptory challenge. Rather, the trial court would have to rely on the prosecutor's reasons in ruling on the *Batson* objection.

Second, Justice Liu suggested that the California Supreme Court, the California Judicial Council, or the California Legislature "follow the lead of several state high courts that have essentially eliminated *Batson*'s first step."[840] Once a party objects, the party making the strike would have to provide reasonably "'specific and clear race-neutral explanations for the strike.'"[841] This reform, Justice Liu explained, would serve the goals of "promoting transparency, creating a record for appellate review, and ensuring public confidence in our justice system, while imposing 'the comparatively low cost of requiring a party to state its actual reasons for striking a minority prospective juror.'"[842] He wrote that "our Legislature has passed laws expanding protections against discrimination in jury selection (see, e.g., Code of Civ. Proc., § 231.5), and it can do so again."[843] Justice Liu's proposal to eliminate the first step of the *Batson* procedure is a core feature of AB 3070.

In September 2019, two Justices of the California Court of Appeal published an unusual opinion urging that "[t]he time has come" for California government, including the legislature, "to consider meaningful measures to reduce actual and perceived bias in jury selection."[844] The opinion's author, Justice Jim Humes, pointed to several possible reforms, including Washington Supreme Court General Rule 37—the model for AB 3070—discussed below.[845]

Justice Humes observed that there are "good reasons to question whether [*Batson*'s] promise is being realized."[846] He focused on several significant deficiencies in the California Supreme Court's *Batson* precedents, and, more broadly, the *Batson* procedure itself. First, Justice Humes noted that because *Batson* is limited to identifying "intentional discrimination in jury selection, it plainly fails to protect against—and likely facilitates—implicit bias. Implicit bias is increasingly accepted as pervasive throughout the criminal justice system, and it is particularly pernicious in the context of peremptory challenges."[847]

Second, Justice Humes wrote that because *Batson* tolerates explanations that appear to be facially non-discriminatory, the procedure "makes it easy to assert justifications that mask bias" and "makes it nearly impossible for trial courts to meaningfully evaluate those justifications."[848] Here, Justice Humes singled out the reasons prosecutors frequently give for exercising peremptory challenges against Black jurors, such as "negative experience with law enforcement or skepticism about the fairness of the criminal justice system."[849] He explained that, in view of "the undeniable evidence" of racial bias by law enforcement and in the criminal legal system more broadly, "[r]eflexively allowing these strikes compounds institutional discrimination" by removing jurors of color, "diminish[ing] public confidence" in the legal system, and "undermin[ing] the value of having juries that represent a fair cross-section of the community."[850]

Third, Justice Humes explained that the "inadequacies of the *Batson* framework at the trial-court level are, in turn, exacerbated on appeal" because appellate courts must defer to the trial court's step-three credibility determination.[851]

B. Alternatives to *Batson*

In addition to the judicial call for *Batson* reform, legal scholars and social scientists have proposed wide-ranging alternatives to remedy the pervasive race-based discrimination the *Batson* procedure has failed to eliminate. These reforms vary greatly in their approach. Some focus on "category-conscious" jury selection.[852] The strongest of these category-conscious options calls for a "certain minimum number or percentage of minorities" on the seated jury,[853] ranging from a proposal that at least half of the members of the jury be of the same race as the defendant on trial[854] to a minimum number of three same-race jurors.[855] However, it is reasonably likely that, given its recent equal protection jurisprudence, the current Supreme Court would find this race-conscious approach unconstitutional.[856]

Other reforms focus on affirmative selection of the jury, rather than the dismissal-based structure of the current peremptory challenge scheme.[857] Parties in this jury selection structure would have the "right to choose affirmatively some or all of the potential jurors, and generally could use race" as a basis for their selection.[858] Again, race-conscious selection procedures would likely not survive a challenge under the federal Constitution.[859]

Other proposals include expanded voir dire[860] and greater use of jury questionnaires.[861] It does not require a study to predict that both proposals would likely impose new costs on the judicial system. One team of researchers suggested requiring attorneys to "articulate before voir dire the juror characteristics they prefer for their case."[862] This would "permit more meaningful scrutiny of peremptory challenge use" and make it more challenging for a prosecutor to justify a strike that goes against those prior stated goals.[863] This proposal will be largely ineffective as long as the courts are limited by the *Batson* procedure, particularly its tolerance for "race-neutral" reasons and its requirement that the objecting party prove intentional discrimination. As Section III.D discusses, district attorneys know precisely "the juror characteristics they prefer for their case." And they are well-schooled in how to eliminate prospective jurors who do not have those characteristics by relying on "race-neutral" explanations approved by the California Supreme Court and Courts of Appeal.

Scholars have also called for a series of incentive-based reforms that would impose severe sanctions on the attorney responsible for exercising a racially discriminatory peremptory challenge. These proposals include: an ethical rule that a *Batson* violation is professional misconduct;[864] providing additional peremptory challenges to the non-striking party or reducing the number of available challenges to the party who improperly exercised a peremptory challenge;[865] and considering disciplinary actions against prosecutors, such as complaint citations, censure, or suspension.[866] However, California courts already have latitude in devising remedies for *Batson* violations, including sanctioning attorneys, and there is no evidence to suggest alternative remedies have reduced discrimination.[867] The most extreme of these proposals is "'dismissal of the criminal prosecution with prejudice' arguing by analogy to the exclusionary rule" when a prosecutor exercises a discriminatory peremptory challenge.[868] The authors see no real prospect that the legislature or the courts are prepared to adopt such a severe penalty.[869]

C. The Washington State Supreme Court's *Batson* Reform

One state supreme court, acknowledging *Batson*'s failings, has taken an active role in pursuing reforms. In 2018, the Washington Supreme Court adopted General Rule 37 ("GR 37"), which altogether replaces the *Batson* procedure.[870] In response to a proposal by the American Civil Liberties Union to create an alternative to the *Batson* framework, the Washington Supreme Court convened a "workgroup" to draft a rule that would significantly reduce, if not end, discriminatory jury selection procedures.[871] The Connecticut Supreme Court followed Washington's example, and announced in December 2019 that it will convene a task force to examine racial discrimination in jury selection in that state.[872]

Washington's *Batson* reform has four key features. First, GR 37 eliminates *Batson*'s first step; once there is an objection, the party who made the peremptory challenge must offer an explanation.[873] Second, the trial court serves as "an objective observer . . . aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors."[874] Third, the court must deny the peremptory challenge if it finds that "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."[875] Fourth, GR 37 lists reasons for peremptory strikes that are presumptively invalid because they have been historically associated with racial or ethnic discrimination, and acknowledges the role demeanor-based reasons have played in the exercise of discriminatory strikes.[876]

D. Assembly Bill 3070 and the California Supreme Court

Assembly Bill (AB) 3070 was introduced by Asssemblymember Dr. Shirley Weber on February 21, 2020.[877] Passage of AB 3070 would support growing efforts in all branches of California government to reduce the impacts of implicit bias in the criminal legal system, particularly as they adversely affect African Americans. In 2016, California Supreme Court Chief Justice Tani Cantil-Sukuaye told a joint session of the legislature that "implicit bias is a factor in the national discussion about race and justice."[878] The Chief Justice highlighted "implicit bias education and training" for judges.[879] Just last year, the legislature enacted a law requiring mandatory trainings on implicit bias for lawyers and judges.[880] Acknowledging the need for these measures, the legislature stated that "most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent."[881] In addition to our Chief Justice, other members of the bench have commented on the need to address implicit bias in the criminal legal system, including in the jury selection process.[882]

The California Supreme Court recently expressed interest in examining *Batson*'s limitations. On January 29, 2020, Chief Justice Cantil-Sakauye announced that a jury selection work group would "study whether modifications or additional measures are needed to guard against impermissible discrimination in jury selection."[883] According to the news release, "[i]n the coming weeks," the Chief Justice would "appoint a diverse group of members" to consider issues such as: whether an alternative to *Batson*'s purposeful-discrimination standard is appropriate; the role of "unconscious bias" in jury selection; whether exclusion of prospective jurors on grounds such as their negative experience with law enforcement leads to "disproportionate exclusion of jurors of certain backgrounds;" and whether there are "other impediments to eliminating impermissible discrimination."[884] We note that, as of the publication of this report, the Chief Justice has not publicly named anyone to the work group. The authority, if any, of the group to be a catalyst for change is at best unknown. The work group is not under the umbrella of the Judicial Council, which is the "policy making body of the California courts"[885] that operates "primarily through the work of its advisory committees and task forces."[886]

We acknowledge the state supreme court's interest in studying *Batson*'s shortcomings. However, the legislature—through the passage of AB 3070—is better suited to effectively address persistent discrimination in jury selection in a timely manner. In our view, and as this report makes evident, the topics identified for study by the work group have been amply studied. The questions posed have been answered. The time for a decisive "course correction" by the California Legislature is now.[887] We need look no further than Washington's example to make this point. Studies leading to the adoption of GR 37 identified the same intractable discriminatory jury selection practices under *Batson* as this report has detailed.[888] The Washington Supreme Court implemented a practical, workable solution through GR 37, which is the basis for AB 3070. There is a bill before the legislature that will effectively remedy the long-standing deficiencies of the *Batson* procedure. It is past time for a work group to spend years re-examining this issue.

APPENDICES

A. California Courts of Appeal Research Method

Our primary research objective was to determine whether there were patterns of racial, ethnic, and gender discrimination in jury selection in California non-capital felony trials. This study investigated the following questions: (1) from 2006 to 2018, how many times did the courts of appeal decide a *Batson* claim in cases involving non-capital felony convictions; (2) in these cases, how frequently did defense attorneys make *Batson* objections to prosecution strikes and how frequently did prosecutors make *Batson* objections to defense strikes; (3) in how many of these cases did prosecutors and defense attorneys exercise peremptory challenges to exclude Black, Latinx, Asian-American, White, women, and men jurors; and (4) when examining the reasons for these strikes, did prosecutors and defense attorneys offer some reasons more frequently than others when required to explain their challenges?

In California, trial records and appellate briefs for felony trials not resulting in a death sentence are not readily accessible or easily reviewable.[889] Therefore, the data set for the study consisted of the opinions—mostly unpublished[890]—of the courts of appeal.[891] Employing the search parameters discussed below, we identified every appellate opinion issued between January 1, 2006, and December 31, 2018, in which the court decided a claim of *Batson* error. Of the 767 opinions, 683 were relevant for the purposes of the study.[892] *See* Section II. From this group of cases, we determined the following: (1) the number of cases in which prosecutors and defense attorneys exercised strikes against prospective jurors of a specific race, ethnicity, and/or gender;[893] (2) the identity of the party exercising the strike(s) (defense or prosecution); (3) the reason(s) for the peremptory challenge given by the party exercising the strike; and (4) whether the appellate court found a *Batson* violation.[894]

Although the data set was constant, the unit of analysis varied depending upon the query. In our investigation of how frequently the courts of appeal decided *Batson* claims between 2006 and 2018, the unit of analysis was the case, specifically the court of appeal case. In our investigation of the number of prosecution and defense strikes, the unit of analysis was the case, i.e., the court of appeal case. In our determination of how frequently jurors of color and women were struck, the unit of analysis was also the case. In our examination of the number of cases in which the parties offered the defined categories as reasons for their strikes, the unit of analysis was the case. In our examination of how often the parties offered the defined categories as reasons for their strikes of jurors by race and ethnicity, the unit of analysis was the juror.

In some appellate cases, multiple peremptory challenges were at issue and multiple reasons were offered. The following explains how we coded the data in these circumstances: (1) the *Batson* motions of both the prosecution and defense were at issue on appeal, resulting in one *Batson* motion code for both sides (a total of two) for a single case; (2) both a Black and Latinx juror were struck, resulting in codes for both a race- and ethnicity-based strike for a single case; (3) in a given case, each reason offered, regardless of frequency, was coded to the case once; and (4) for a given juror, if multiple reasons were offered for the strike that fit into the defined categories, each reason was coded to that juror.

Question 1: From 2006 to 2018, how many times did the courts of appeal decide a *Batson* claim in cases involving non-capital felony convictions?

We used Thomson Reuters Westlaw to conduct the search. We limited the search to opinions that mentioned "*Batson*/*Wheeler*" or "*Wheeler*/*Batson*,"[895] included both published and unpublished opinions, set the date range from January 1, 2006, through December 31, 2018, and restricted the search to California courts of appeal opinions.[896] The search returned 767 opinions. We omitted from the study opinions in which the appellate court did not reach a decision on the merits of the *Batson* claim, e.g., the claim was not properly preserved. We counted as a single opinion cases that were appealed more than once, e.g., a decision was appealed, remanded for a *Batson* hearing, and appealed again following the hearing. After eliminating duplicates, we determined that the courts of appeal decided 683 opinions involving *Batson* claims between 2006 and 2018.

Question 2: In how many cases did defense counsel object to prosecution strikes, and in how many cases did prosecutors object to defense strikes?

We coded all observations, i.e., cases, based upon which party's *Batson* motion was at issue on appeal.[897] In 670 of our observations, defense counsel had objected to prosecutors' strikes. Therefore, we coded 98.0% of the total number of cases involving *Batson* claims as prosecution strikes. *See* Section II.A. Only 14 cases involved claims that defense counsel had exercised racially discriminatory peremptory strikes. *See* Section II.A. The 14 cases included two in which the trial court found *sua sponte* that defense counsel's peremptory strikes were based on race or ethnicity, two cases in which the prosecution objected to defense strikes based on gender, and one case in which the defense objected to some of the prosecution's strikes based on race and vice versa. Because each side made a *Batson* objection that was at issue on appeal in this last instance, there are a total of 684 "cases" in the study as opposed to the 683 relevant "opinions." This is why adding the count for both sides results in one more than the total number of opinions issued.

Question 3: In how many of these cases did prosecutors and defense attorneys exercise peremptory challenges to exclude Black, Latinx, Asian-American, White, women, and men jurors?

In determining the number of cases in which White jurors, jurors of color, men, and women were struck, the unit of analysis was the case. We coded these observations by race and ethnicity. Below and in Section II.B.5, we explain the difficulty of teasing out the number of cases in which gender, uncoupled from race or ethnicity, was the basis for a strike. Therefore, we did not report the data on any gender-based strikes.

Using each case as a unit of analysis, we determined the number of cases in which a party made at least one peremptory strike to remove a juror of color. Four hundred fifty cases involved challenges to multiple jurors.

We acknowledge that race and ethnicity are social constructs and are mindful that these categories can be misleading, especially as the number of people who identify as multiracial or

multiethnic increases.[898] For purposes of the data analysis, the study categorizes as "Latinx" individuals who self-identified or have a Spanish surname or whom the trial or appellate court identified as "Latino," "Chicano," or "Hispanic."[899] The study categorizes as "Asian American" individuals who self-identified or whom the trial or appellate court identified as Filipino, Samoan, Pacific Islander, Vietnamese, South Asian, or Indian.[900]

We explored the option of analyzing the frequency of peremptory challenges against racial or ethnic subgroups by gender, e.g., Black women, and determined that we could not do so reliably based upon the available source material, which was limited to appellate court cases.[901] There was insufficient consistency in how attorneys (almost always defense counsel) characterized their objection to strikes of racial or ethnic subgroups, how trial judges ruled on the objection, and how appellate courts framed their decisions. For example, even if the attorney objected to strikes against "Hispanic women," more often than not, the trial judge's ruling was based on either the race/ethnicity or the gender of the struck jurors, but not on both. Even when the appellate court acknowledged that the objection was based on a racial or ethnic subgroup by gender, the appellate court analyzed the trial judge's determination in the way in which the trial judge characterized the ruling, which most often was solely race or ethnicity. Therefore, we decided that the only reliable measure for the study was race or ethnicity rather than racial or ethnic subgroups by gender.

Question 4: When examining the reasons for these strikes, did prosecutors and defense attorneys offer some reasons more frequently than others when required to explain their challenges?

We used subdivisions (h) and (i) of Washington Supreme Court General Rule 37 ("GR 37") as a starting point for categorizing the reasons for the peremptory challenges.[902] GR 37 is Appendix B to the report. Subdivision (h) identifies specific reasons as "presumptively invalid" when offered as explanations for a peremptory challenge because they "have historically been associated with improper discrimination in jury selection in Washington State." The reasons are: "(i) having prior contact with law enforcement; (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."[903] As we explain in Section II.B, we did not code "receiving state benefits" and "not being a native English speaker" because prosecutors almost never gave them as reasons.

We used two different approaches to answering this question. In calculating the number of cases in which these reasons appeared, the unit of analysis was the case. For example: "Prosecutors relied on demeanor as a reason for their peremptory challenges in over 40% of the cases." Because we also coded cases by the race and ethnicity of the struck jurors, we also coded the reason(s) offered for that racial or ethnic group. For the racial and ethnic breakdown by reasons per case, we calculated the percentages by dividing the number of cases/observations in which the reason appeared for that race or ethnicity by the total number of cases/observations

in which the prosecutor struck that race or ethnicity. For example: "Of the 480 cases in which prosecutors struck Black jurors, they offered demeanor in 37.5% (180 cases) of these cases." In determining how frequently parties offered the defined categories as reasons for strikes by race and ethnicity, the unit of analysis was the juror. *See* Section II.B.4, Figure 4. We coded each struck juror's race or ethnicity and the reason(s)stated for the peremptory challenge. We calculated the percentages by dividing the frequency with which reasons were offered for that race or ethnicity by the total number of times prosecutors struck jurors of that race or ethnicity. *See* Table A and Section II.B.4, Figure 4.

Reason(s) Given by Prosecutors	Black	Latinx	White & Asian American
Demeanor	23.2%	20.8%	17.3%
	(N=218)	(N=117)	(N=9)
Close Relationship	23.5%	15.8%	5.8%
	(N= 221)	(N= 89)	(N=3)
Distrust	25.6%	10.8%	7.7%
	(N=241)	(N=61)	(N=4)
Prior Contact with Law Enforcement	13.2%	6.9%	3.8%
	(N=124)	(N=39)	(N=2)
Living in a High-Crime Neighborhood	1.4%	2.1%	--
	(N=13)	(N=12)	--
Child Outside of Marriage	0.6%	0.9%	--
	(N=6)	(N=5)	--
Total N of Racial Category	940	563	52

Table A

We expanded two GR 37 categories in our study. We expanded the category "prior contact with law enforcement officers" to "prior contact with law enforcement or the criminal legal system." Using this expanded category, we coded an observation—the case and the juror—when a party struck a juror because the juror had been stopped, arrested, charged with a crime, and/or convicted of a crime. We also coded an observation when a party struck a juror because the juror had reported a crime to law enforcement and had a negative experience as a result.

We expanded the category "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling" to "expressing a distrust of law enforcement

or the criminal legal system or a belief that law enforcement officers or the criminal legal system is racially- or class-biased." We coded an observation when a party struck a juror because (1) the juror expressed distrust of law enforcement or the criminal legal system (e.g., "The system is rigged in favor of wealthy defendants."); (2) the prosecutor concluded that the juror was distrustful based upon the juror's statement (e.g., "I believe that the Black Lives Matter movement has raised a lot of important issues."); (3) the juror had a negative experience with law enforcement or the criminal legal system and the prosecutor concluded that the juror was distrustful (even where the juror said otherwise); or (4) the juror said that a family member or someone to whom the juror is close had a negative experience, and the prosecutor concluded that the juror was distrustful (even when the juror said otherwise).

We assigned the code "having a close relationship with someone who has been stopped, arrested, or convicted of a crime" to any juror struck because the juror's family member or another person to whom the juror was close had been stopped by police, arrested, or convicted of a crime.

We assigned the code "living in a high-crime neighborhood" to any juror struck because the juror lived in a neighborhood that was labeled "gang" or "low-income" or "urban."

We assigned the code "a child outside of marriage" to any juror struck because the juror had a child with someone to whom the juror was not married. This included challenges for which the prosecutor gave as a reason the fact that the juror had children below the age of 18 but was "single" or "unmarried."

There is significant overlap among the first three categories: (1) prior contact with law enforcement or the criminal legal system; (2) expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement officers or the criminal legal system engage in racial profiling; and (3) having a close relationship with someone who has been stopped, arrested, or convicted of a crime. For example, parties struck some jurors because they expressed (or the prosecutor concluded they did) distrust of law enforcement or the criminal legal system based on their own experiences and those of family members. Therefore, we coded all three of these reasons.

Subdivision (i) of GR 37 states that "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, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers."[904] We coded "demeanor" for any strike based on one or more of the reasons listed in subdivision (i).

If a party struck a juror based upon a reason that did not fit into any of the above categories, the reason was not coded. In the course of this study, however, it became evident that prosecutors offered explanations that were not included in GR 37 (h) or (i)—and therefore not part of the study design—but were also historically associated with discrimination. *See* Section II.B. These reasons include hair style or color, fingernail color or length, makeup, tattoos, clothing, jewelry, current or previous employment as a social worker or in the postal service, and gang affiliation. Prosecutors offered these reasons with sufficient frequency to warrant mention.

If the trial court, before or during the denial of the *Batson* motion, offered reasons for the strike that fit into the categories above, we did not code those reasons in the data analysis. However, if the court offered one or more of these reasons, and the striking *party* said that the court's reasons were the reasons for the party's strike(s), we coded the reason(s) for purposes of the data analysis.

B. Washington Supreme Court General Rule 37

GR 37
Jury Selection

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. 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. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(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;

(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 in past cases.

(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 in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

[Adopted effective April 24, 2018.]

ENDNOTES

1 Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 9 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

2 *See People v. Miles*, No. S086234, 2020 WL 2760163, at *64 (Cal. May 28, 2020) (Liu, J., dissenting) ("With today's decision, this court extends its record of not having found *Batson* error involving the peremptory strike of a black juror in more than 30 years — despite the fact that '[t]he high court's opinion [in *Batson*] responded specifically to the pernicious history of African Americans being excluded from jury service, calling such exclusion "a primary example of the evil the Fourteenth Amendment was designed to cure."'" (alterations in original) (quoting *People v. Hardy*, 5 Cal. 5th 56, 124 (2018) (Liu, J., dissenting))); *People v.* (*Joe Edward*) *Johnson*, 8 Cal. 5th 475, 528 (2019) (Liu, J., dissenting) (describing the majority opinion as "yet another case in which a black man was sentenced to death for killing a white victim after a jury selection process in which the prosecution disproportionately excused black prospective jurors," and "yet another case in which this court has refused to find any inference of discrimination in jury selection"); *People v. Bryant*, 40 Cal. App. 5th 525, 544-46 (2019) (Humes, J., with Banke, J., concurring) (discussing the *Batson* procedure's inability to preclude strikes based on implicit bias, describing courts' "[r]eflexive[]" approval of prosecutors' reasons for striking Black jurors as "compound[ing] institutional racism," and supporting the call for "meaningful reform"); *Flowers v. State*, 947 So. 2d 910, 937, 939 (Miss. 2007) (finding that "racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down," warranting reassessment of the *Batson* inquiry and peremptory challenges, and warning prosecutors that if they continue to violate *Batson*, changes are likely); *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124 (2017) (finding that "[t]wenty-six years later it is evident that *Batson*, like *Swain* before it, is failing" to eliminate racial discrimination in jury selection); *id.* at 335 ("In over 40 cases since *Batson,* Washington appellate courts have *never* reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge."); David Cole, No Equal Justice 120 (1999) ("*Batson* has by all accounts done relatively little to eliminate the use of race-based peremptory strikes."); Randall Kennedy, Race, Crime and the Law 208 (1997) ("Despite *Batson*, prosecutors continue to deploy racially motivated peremptory challenges."); Ursula Noye, Reprieve Austl., Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office (2015), https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf (examining data from 300 felony jury trials between 2003 and 2012, and finding that prosecutors struck Black jurors at three times the rate of non-Black jurors); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 10 (2001) (summarizing the empirical studies to date; examining 317 Philadelphia capital murder cases tried in the 1980s, and finding that, post-*Batson*, discriminatory strikes based upon race and gender remain "widespread," and prosecutors are significantly more successful than

defense counsel in "control[ling] jury composition" with the result that their conduct increased "the probability of death for all defendants," as well as the racially discriminatory application of capital punishment, and significantly decreased the chance that black men would serve as jurors in the trials of black defendants"); David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 Iowa L. Rev. 1425, 1446-65 (2012) (examining the race-based practices of one experienced Philadelphia prosecutor); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011) (examining 269 federal civil and criminal *Batson* decisions over a nine-year period, and finding that relief in the form of a new trial was granted in fewer than seven percent of the cases and that in "85.1% [of the] cases, the court rejected the *Batson* claim altogether"); Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 Wis. L. Rev. 511, 584 (1994) (examining every federal case decided post-*Batson* through May 1993, and finding the "inability" of *Batson*'s procedure, which "search[es] for discriminatory purpose and pay[s] deference to trial court findings, to eliminate or even identify race-based challenges"); Douglas L. Colbert, *Challenging the Challenge: The Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 96 (1990) ("[T]he *Batson* remedy has proven to be ineffective against prosecutors whose trial strategy involves the elimination of prospective black jurors."); Equal Justice Initiative, *supra* note 1, at 4 (presenting two years of research in eight southern states that "uncovered shocking evidence of racial discrimination in jury selection in every state"); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 1973 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1533, 1538-39 (2012) (employing a data set including more than 7,400 peremptory strikes by North Carolina prosecutors in 173 capital trials between 1990 and 2010, and finding that prosecutors struck 51% of prospective Black jurors as compared to 26% of all other jurors, resulting in a removal rate for Blacks that was 2.5 times the rate for all other jurors); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 448, 458-59 (1996) (examining "virtually every relevant reported decision of every federal and state court applying *Batson*" between mid-1986, when *Batson* was decided, and the end of 1993, and finding that criminal defendants brought more than 95% of the objections to peremptory strikes and that discrimination persists); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1959, 1962-63 (2016) (examining published cases, and finding that it had been 30 years since the North Carolina Supreme Court found a *Batson* violation, but noting that, during this period, the state's appellate court had remedied two instances of "'reverse *Batson*' claims where the court found purposeful discrimination against white jurors challenged by black defendants.") (citing *State v. Hurd*, 246 N.C. App. 281 (2016); *State v. Cofield*, 498 S.E. 2d 823 (1998)); Ronald F. Wright et al., *The Jury Sun-*

shine Project: Jury Selection Data as a Political Issue, 2018 U. Ill. L. Rev. 1407, 1425 tbl.2 (2018) (examining data on over 29,000 North Carolina prospective jurors in non-capital felony trials between 2011 and 2012, and finding that prosecutors exercised peremptory challenges against Black jurors at twice the rate as white jurors).

3 Brand, *supra* note 2, at 532-34.

4 Michael J. Klarman, From Jim Crow to Civil Rights 10, 39 (2004).

5 Ch. 114, § 4, 18 Stat. 335, 336-37 (an act to protect all citizens in their civil and legal rights).

6 *See* Equal Justice Initiative, *supra* note 1, at 9-10 (citing Kennedy, *supra* note 2, at 172.

7 *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

8 *See* Equal Justice Initiative, *supra* note 1, at 9.

9 *Id*. at 10.

10 *Id.*; *see also* Klarman, *supra* note 4, at 42.

11 Brand, *supra* note 2, at 542.

12 *Id*. at 539-49; *see* Equal Justice Initiative, *supra* note 1, at 9-10.

13 Brand, *supra* note 2, at 539-49; *see* Equal Justice Initiative, *supra* note 1, at 9-10.

14 *Norris v. Alabama*, 294 U.S. 587, 588 (1935).

15 *See generally* Dan T. Carter, Scottsboro: A Tragedy of the American South (rev. ed. 1979).

16 *Norris*, 294 U.S. at 597.

17 Equal Justice Initiative, *supra* note 1, at 11.

18 Brand, *supra* note 2, at 556; *see also* Kennedy, *supra* note 2, at 178-79.

19 Equal Justice Initiative, *supra* note 1, at 12; *see also* Brand, *supra* note 2, at 564.

20 *People v. Hines*, 12 Cal. 2d 535, 537 (1939).

21 *Id*. at 538.

22 *Id*. at 539; *but see People v. Parman*, 14 Cal. 2d 17, 19-20 (1939) (affirming a conviction and death sentence by an all-male jury where, although women were legally eligible to serve, Placer County did not place any women on the jury list in 1939, and distinguishing *Hines* because the exclusion was not based on the race of the defendant).

23 Brand, *supra* note 2, at 556; *see Swain v. Alabama*, 380 U.S. 220 (1965).

24 *Akins v. Texas*, 325 U.S. 398, 399-400 (1945).

25 *Id*. at 405.

26 *Id*. at 406-07.

27 *Id*. at 407.

28 Equal Justice Initiative, *supra* note 1, at 11; *see e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 53 (1975) (holding that the systematic exclusion of women from the venire violates the fair-cross-section requirement of the federal Constitution).

29 Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 UCLA Nat'l Black L.J. 238, 238 (1994) (finding that, at every stage of the jury selection process, there are legal and non-legal factors that play a role in excluding African Americans from petit and grand juries such that "potential jurors with specific human capital factors, such as higher income, higher education, and white racial background, were more likely to be represented on juries"); Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. Black Stud. 196, 197 (1991) (finding that African Americans are disproportionately excluded from the jury pool). The article used the word "pool" to describe, broadly, the "jury selection process." *Id.* at 199.

30 Hiroshi Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process*, 23 Int'l J. Comp. & Applied Crim. Just. 55, 74 (1999) (finding that African Americans are disproportionately excluded throughout the jury selection process in California courts).

31 Cal. Civ. Proc. Code § 198(b).

32 *Id.* § 197(a).

33 *Id.* § 197(b).

34 Judicial Council of Cal., Final Report: Task Force on Jury System Improvements 10 (2003), https://www.courts.ca.gov/documents/tfjsi_final.pdf (recommending that one or more California counties conduct a pilot study supplementing the DMV and

ROV lists with other comprehensive lists of persons living in California, such as welfare and unemployment lists).

35 Civ. Proc. § 198(a)-(b).

36 *Id.* § 198(c).

37 Fukurai & Butler, *supra* note 29, at 250; Fukurai, *supra* note 30, at 56; David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Calif. L. Rev. 776, 819 (1977) (arguing that the use of multiple source lists increases minority representation in jury pools). The article uses the term "pool" to refer to individuals who have met the "established requirements for jury service." *Id.* at 822.

38 Fukurai, *supra* note 30, at 70 tbl.2.

39 Kairys et al., *supra* note 37, 805-06.

40 *Id.* at 809, tbl.D.

41 *See* Cal. Elec. Code § 2101.

42 With the passage of S.B. 310, effective January 1, 2020, persons convicted of a felony are permitted to serve on juries unless they are incarcerated, under any form of supervision, or are a registered sex offender. *See Governor Newsom Signs Criminal Justice Bills to Support Reentry, Victims of Crime and Sentencing Reform*, Office of Governor Gavin Newsom (Oct. 8, 2019), https://www.gov.ca.gov/2019/10/08/governor-newsom-signs-criminal-justice-bills-to-support-reentry-victims-of-crime-and-sentencing-reform/.

43 Fukurai, *supra* note 30, at 2; Fukurai et al., *supra* note 29, at 201-03.

44 Fukurai et al., *supra* note 29, at 202.

45 *Id.* at 202; Fukurai, *supra* note 30, at 6.

46 Ronald J. McAllister et al., *Residential Mobility of Blacks and Whites: A National Longitudinal Survey*, 77 Am. J. Soc. 445, 448 (1971).

47 Fukurai et al., *supra* note 29, at 203.

48 Thomas G. Munsterman et al., Paula L. Hannaford-Agor & G. Marc Whitehead, Jury Trial Innovations 10 (2d ed. 2006); Paula L. Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 780 (2011) (suggesting that multiple source lists will increase "demographic representation" of minorities); Kairys et al., *supra* note 37, at 819.

49 *See* Kairys et al., *supra* note 37, at 825-26 (discussing how to increase representation of "people with lower socio-economic status and minority groups").

50 Judicial Council of Cal., *supra* note 34, at 11 ("Although no California courts supplement their source lists with welfare or unemployment lists, the Superior Court of Modoc County supplements its master list with public utility customer lists."). Senate Bill 1001, introduced in the California Senate on February 13, 2020, would have expanded the source lists beyond the ROV and DMV lists to require the inclusion of the Franchise Tax Board (FTB) as a third source list. The author withdrew SB 1001 due to the COVID-19 pandemic.

51 *People v. Harris*, 36 Cal. 3d 36, 59 (1984) (holding that the defendant met all three prongs of the *Duren* test and established a "prima facie showing of a gross disparity resulting in a violation of defendant's right to an impartial jury drawn from a fair cross-section of the community"). *Harris* was abrogated by *People v. Bell*, 49 Cal. 3d 502, 526 n.12 (1989), which concluded that "the *Harris* court erred in . . . accepting total population figures regardless of the actual availability of more refined data." Both opinions refer to two leading United States Supreme Court cases that set standards for the fair cross-section requirement. In *Duren v. Missouri*, 439 U.S. 357, 364 (1979), the high court held that in "order to establish a prima facie violation of the fair cross-section requirement, the defendant must show: (1) the group is a "distinctive group" in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process." In *Berghuis v. Smith*, 559 U.S. 314, 329 (2010), the court observed that "neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools," such as "absolute disparity, comparative disparity, and standard deviation." *See* Nina Chernoff, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, Champion 18 (2013), http://www1.cuny.edu/mu/law/files/2014/01/chernoff-kadane_december_2013_16things.pdf (explaining that the Supreme Court has declined to decide which method of measuring disparity must be used so that measures of absolute disparity, comparative disparity, standard deviation analysis, and probability analysis are all permissible). The California Supreme Court most recently considered a jury composition challenge in *People v. Henriquez*, 4 Cal. 5th 1 (2017). The court concluded that that the defendant failed to carry his burden of showing that underrepresentation of African Americans in jury pools was the product of systematic exclusion. *Id.* at 20. *See also People v. Ramos*, 15 Cal. 4th 1133, 1155 (1997) (explaining that neither the United States nor California Supreme Courts has articulated the constitutional limit of permissible disparity—either comparative or absolute—between the representation of the distinctive group and its size in the general community for the purposes of the second prong of the *Duren* test).

52 *See People v. Currie*, 87 Cal. App. 4th 225, 235 (2001) ("The underrepresentation of African-Americans on Contra Costa County jury venires . . . is a longstanding problem, dating back at least 20 years."); *People v. Jones*, 151 Cal. App. 3d 1029, 1031 (1984)

(agreeing with the evidentiary showing that African Americans over 18 years of age constituted 8.1% of Contra Costa's population in that age group, and that only 4.2% of persons called for jury service were African American); *People v. Black*, 160 Cal. App. 3d 480, 483 (1984) (Racanelli, J., concurring) (agreeing with the evidentiary showing that African Americans comprised 8.1% of Contra Costa's voter-eligible population but only 2.86% of the "prospective jurors in the jury pool for the week involved," and that this reflected the "seemingly chronic appearance of unrepresentative criminal juries in Contra Costa County").

53 ACLU of N. Cal., Racial and Ethnic Disparities in Alameda County Jury Pools 1 (2010), https://www.aclunc.org/sites/default/files/racial_and_ethnic_disparities_in_alameda_county_jury_pools.pdf (finding that the "Alameda County Superior Court suffers from systemic underrepresentation of African-American and Latino jurors in its jury pools"). The report used the word "pool" to describe groups of jurors who were summoned to appear and "sent to a court room for trial . . . including jurors ultimately dismissed for hardships." *Id*. at 2. The researchers collected the demographic data of nearly 1,500 prospective jurors in 11 felony cases set for trial from 2009 through 2010. *Id*. They used the 2000 Census data to estimate the county's jury eligible population. *Id*.

54 *Id.* at 3.

55 *Id*. The ACLU study identified several potential causes of the disparity. Among them were that "[i]ndividuals with less money are more likely to move within a year, and African Americans and Latinos are more likely to be lower income." *Id.* at 4.

56 *Swain,* 380 U.S. at 220.

57 *Id.* at 217-18.

58 Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, 1719 n.21 (1977) [hereinafter *Limiting the Peremptory Challenge*] (citing Jon Van Dyke, Jury Selection Procedures 147-48 (1977)).

59 *Id*.

60 *Id*. (citing *Hayes v. Missouri*, 120 U.S. 68 (1887); *Swain*, 380 U.S. at 220).

61 *Rivera v. Illinois* 556 U.S. 148, 152 (2009) ("The right to exercise peremptory challenges in state court is determined by state law."); *see also Swain*, 380 U.S. at 219.

62 *Swain*, 380 U.S at 220.

63 *Id*. at 219.

64 *Id*. at 223-24.

65 *Id*. at 231 (Goldberg, J., dissenting).

66 *Id*. at 205 (majority opinion).

67 *Id*. at 222.

68 *Id*. at 224.

69 James Pearson, Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3d Art. 14 (1977).

70 *Id*.

71 *Id*.

72 *Id*. at 19 (emphasis added).

73 *People v. Wheeler*, 22 Cal. 3d 258, 265-66, 272 (1978). The court made explicit its reliance on the state Constitution's fair-cross section guarantee rather than on any provision of the United States Constitution. *Id*. at 270.

74 *Id*. at 262-65.

75 *Id*.

76 *Id*. at 287.

77 *Id*. at 276-78, 282 n.29 (declining to decide whether the decision applied to civil cases).

78 *Id*. at 287.

79 *Id*. at 286.

80 *Id*.

81 *Id*. at 285-86.

82 *Id*. at 286.

83 *Id*. at 284.

84 *Id*. at 284-85, 287.

85 *Id.* at 280.

86 *Id.* at 278-80 nn.19, 23, 25 (citing the scholarly literature the Court considered in formulating a remedy).

87 *See id.* at 274-75 & n.16 (citations omitted) (explaining that the peremptory challenge also "allows a party to remove a juror whom he has offended by a probing voir dire or by an unsuccessful challenge for cause" as well as ensure that "the defendant will not be tried by anyone whom he intuitively dislikes"); *id.* at 278 (stating "the proposition . . . that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground.").

88 *Id.* at 278 n.19 (stating that recent scholarship has offered "a variety of solutions . . . that do not seem entirely satisfactory," and listing articles, including Note, *Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss. L.J. 157, 164 (1967) (proposing approaches to address discriminatory peremptory strikes, including "the total abolition of the peremptory challenge" and "giving the defendant exclusive use of the peremptory challenge"), and Lewis H. LaRue, *A Jury of One's Peers*, 33 Wash. & Lee L. Rev. 841, 873 (1976) (proposing, among other solutions, "curtail[ing] sharply, and perhaps eliminat[ing] entirely, the currently used challenge procedures")).

89 *Id.* at 280 n.25 (explaining that the "solution" adopted "is supported, with variations, by a substantial body of scholarly opinion" and listing some of the scholarship). For example, the court cited Roger Kuhn's extensive analysis on "discrimination in the selection of juries in state courts." *Id.* (citing Roger Kuhn, *Jury Selection: The Next Phase*, 41 So. Cal. L. Rev. 235, 237 (1968)). Kuhn proposed permitting the defense to question the prosecution's strikes "only when the prosecution's use of its challenges gives rise to a reasonable inference of discrimination." Kuhn, *supra,* at 294. It should be noted that the commentators on whom the court relied anticipated that the three-step inquiry would be employed much more robustly than it has been. *See Wheeler*, 22 Cal. 3d at 280 n.25 (citing *Limiting the Peremptory Challenge, supra* note 58, at 1738-41). For example, the Yale Law Journal note proposed that a trial court automatically find a prima facie showing whenever there is a statistical disproportion between the "actual rate of exclusion" and the "expected rate of exclusion" and require that the prosecution's justifications "have been applied consistently to similarly situated jurors of other groups, and [are] reasonably relevant to the particular trial or to non-group characteristics of the parties or witnesses." *Limiting the Peremptory Challenge, supra* note 58, at 1739-40.

90 *Wheeler,* 22 Cal. 3d at 280-81. The court did not define the term "cognizable group" as there was "no doubt that the blacks in the present case constitute a cognizable group." *Id.* at 280 n.26.

91 *Id.* at 281.

92 *Id.* at 280-82.

93 *Id*. at 282. The remedy was modified so that "the trial court, acting with the [injured party]'s assent, [has] discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury." *People v. Willis*, 27 Cal. 4th 811, 815 (2002) (brackets in original). *See also People v. Mata*, 57 Cal. 4th 178, 185-86 (2013) (holding that the assent may be given by counsel rather than by the party, and that failure to object to the trial court's proposed alternative remedy "when the opportunity to do so arises" constitutes an implied waiver of "the right to the default remedy of quashing the entire venire" and an implied consent to the alternative remedy).

94 *See Batson v. Kentucky*, 476 U.S. 79, 82 n.1, 95-98 (1986).

95 Courts have held that an objection brought under *Wheeler* will also be deemed an objection under *Batson*. *See, e.g.*, *Tolbert v. Gomez,* 190 F.3d 985, 987 (9th Cir. 1999) ("In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge." (citing *People v. Jackson*, 10 Cal. App. 4th 13, 21 n.5 (1992)); *People v. Lenix*, 44 Cal. 4th 602, 610 n.5 (2008) ("An objection under *Wheeler* suffices to preserve a *Batson* claim on appeal." (citing *People v. Lancaster*, 41 Cal. 4th 50, 73 (2007); *People v. Gray*, 37 Cal. 4th 168, 184 n.2 (2005))).

96 *Batson*, 476 U.S. at 92, 96.

97 *Id*. at 87.

98 *See e.g*., *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242-43 (2019); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 237-38 (2005); *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Powers v. Ohio*, 499 U.S. 400, 404, 412 (1991). For more information about the way in which jury participation increases civic engagement, see generally, John Gastil, et al., The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation (2010), and The Jury and Democracy Project, https://jurydemocracy.la.psu.edu/.

99 *Batson*, 476 U.S. at 84 (declaring that the Court has "'consistently and repeatedly'" reaffirmed the amendment's prohibition against a "State's purposeful or deliberate denial" of Blacks' participation in juries (quoting *Swain*, 380 U.S. at 203-04)); *id*. at 89 ("[T]he State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause.").

100 *Id*. at 93-98.

101 *Id*. at 93-94.

102 *Id*. at 93-94, 96. The major substantive difference between *Batson* and *Wheeler* was at step one, the prima facie showing. *Batson* made it unmistakable that this showing was satisfied when the objecting party raised an "inference" of purposeful discrimination. *Batson*, 476 U.S. at 93-94, 96. In *Wheeler*, the California Supreme Court used the terms

"strong likelihood" and "reasonable inference" to describe the standard at step one. *Wheeler*, 22 Cal. 3d at 280. For decades, the California Supreme Court insisted, in the face of repeated disagreement by the Ninth Circuit, that these two phrases described the same standard, and that the standard was consistent with *Batson*. *See People v. Johnson*, 30 Cal. 4th 1302, 1312-18 (2003) (discussing the history of the court's reasoning and its dispute with the Ninth Circuit, and explaining that the term "more likely than not" has also been used by California courts to describe the stage-one test). The issue was finally resolved by the United States Supreme Court in *Johnson v. California*, 545 U.S. 162 168 (2005), discussed in Section III.E.1, which rejected the California Supreme Court's interpretation.

103 *Batson*, 476 U.S. at 97-98. The reason offered at step two need not be "'persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam)).

104 *Batson,* 476 U.S. at 98.

105 *Id.* In later opinions, the Court affirmed the trial court's duty to decide the ultimate question based upon "'all of the circumstances that bear upon the issue of racial animosity.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)); *see also Miller-El II*, 545 U.S. at 252 (directing that the step-three ruling must be made "in light of all evidence with a bearing on it").

106 *Batson*, 476 U.S. at 98 (quoting *Washington v. Davis*, 46 U.S. 229, 240 (1976)) (citing other equal protection cases). Other sections of the report discuss the application of the three-stage framework by the United States and California Supreme Courts over the decades, including opinions that curtailed *Batson*'s promise and others that arguably sought to advance it.

107 *Id*. at 102-03 (Marshall, J., concurring).

108 *Id*. at 105.

109 *Id*. at 105-06.

110 *Id.* at 106.

111 *Id.* at 92, 96-98.

112 *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* to gender-based strikes); *McCollum*, 505 U.S. 42 (holding that *Batson* applies to peremptory challenges by defense counsel in criminal trials); *Hernandez v. New York*, 500 U.S. 352 (1991) (extending *Batson* to Latinx prospective jurors); *Edmonson v. Leesville Concrete Co*., 500

U.S. 614 (1991) (holding that *Batson* applies to civil trials); *Powers*, 499 U.S. 400 (applying *Batson* to any litigant regardless of race).

113 *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 486 (9th Cir. 2014) (recognizing "sexual orientation" as a cognizable group for *Batson* purposes); *United States v. Brown*, 352 F.3d 654, 669-70 (2d Cir. 2003) (holding that a peremptory strike based on religious affiliation violates *Batson*); *People v. Douglas*, 22 Cal. App. 5th 1162, 1172 (2016) (holding that a peremptory challenge based on sexual orientation violates California's fair cross-section guarantee and the Fourteenth Amendment); *State v. Fuller*, 862 A.2d 1130, 1132-33 (N.J. 2004) (holding that a peremptory challenge based on religious affiliation violates *Batson*).

114 Some state constitutional guarantees encompass religious groups. *See State v. Gilmore*, 511 A.2d 1150, 1159 n.3 (N.J. 1986) (decided shortly after *Batson*, but grounded solely in the state Constitution's representative cross-section rule prohibiting discrimination based on "religious principles, race, color ancestry, national origin, and sex"); *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990) (relying on the Hawaii Constitution); *Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998) (en banc) (relying on the Mississippi Constitution); *People v. Langston*, 163 Misc. 2d 400 (N.Y. Sup. Ct. 1996) (prohibiting a strike against a Muslim juror based upon the Equal Protection Clause of the New York Constitution); *State v. Eason*, 445 S.E.2d 917, 921-23 (N.C. 1994) (holding that article I, section 26 of the North Carolina Constitution prohibits exclusion "from jury service on account of sex, race, color, religion, or national origin").

115 Cal. Civ. Proc. Code § 192. The consolidation was contained in AB 2617, which created Chapter One of the California Code of Civil Procedure.

116 Passed in 2015 and effective January 1, 2016, California Assembly Bill 87 amended Code of Civil Procedure section 231.5 to prohibit a party from using a peremptory challenge to strike a juror on the basis of any characteristic listed in section 11135 of the Government Code. Prior to its amendment, section 231.5 prohibited a party from striking a juror on the basis of "his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds." *Id.* § 231.5 (2001) (amended by Stats. 2015, c. 115 (A.B. 87), §1, eff. Jan. 1, 2016).

117 *Snyder v. Louisiana,* 552 U.S. 472 (2008); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005); and *Miller-El v. Cockrell* (*Miller-El I*), 543 U.S. 322 (2003). *See infra* note 766 for an explanation of the Supreme Court's use of comparative juror analysis in *Miller-El I*. As we discuss in Section III.E., the state supreme court was out of step with *Batson* and retrenching from its own *Wheeler* precedents long before 2003.

118 *Johnson*, 545 U.S. at 168.

119 *Id.* (quoting *Johnson*, 30 Cal. 4th at 1318).

120 *Id*. at 163 (quoting *Batson*, 476 U.S. at 94).

121 *Id*. at 172.

122 *Id*.

123 *See People v. Rhoades*, 8 Cal. 5th 393, 458 (2019) (Liu, J., dissenting).

124 *Miller-El II*, 545 U.S. at 235.

125 *Id*. at 240-41.

126 *Id* at 241.

127 Justice Thomas objected to the majority's use of comparative juror analysis in *Miller-El II* because this approach was not presented by the petitioner to the Texas courts. *Id*. at 281 (Thomas, J., dissenting). The *Miller-El II* majority disagreed, holding that this analysis is entirely proper where "the evidence on which [a defendant] bases his arguments"—such as the voir dire transcript—is before the appellate court. *Id*. at 241 n.2.

128 *Id*. at 235. This type of review, which is governed by the Antiterrorism and Effective Death Penalty Act, is explained in Section II.C.3.

129 *Id*. at 244-45, 247-51, 255-63.

130 *Id*. at 247 n.6.

131 *Id*.

132 *Id*. at 252.

133 *Id*. at 246.

134 *Snyder,* 552 U.S. at 476-78.

135 *Id*. at 478.

136 *Id*. at 479.

137 *Id*. at 482-83.

138 *Id*. at 482-83, 485-86.

139 *Id*. at 478 (internal quotation marks omitted).

140 *Id*. at 479.

141 *Id*. at 485.

142 *Id*.

143 *Id*.

144 These are, respectively, 136 S. Ct. 1737 (2016) and 139 S. Ct. 2228 (2019).

145 *Foster*, 136 S. Ct. at 1751-52, 1754.

146 *Id.*

147 *Flowers*, 139 S. Ct. at 2249.

148 *Id*.

149 *See id*. at 2247, 2249; *Foster*, 136 S. Ct. at 1751-52, 1754.

150 As of 2014, "from the sentence of death to the California Supreme Court's disposition of the automatic appeal, between 11.7 and 13.7 years will have elapsed." *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1057 (C.D. 2014), *reversed by Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). The federal district court in *Jones* further explained that "much of that time" passes while defendants wait for the court to appoint counsel and schedule oral argument. *Id*. (The Ninth Circuit opinion reversing *Jones* was based on procedural grounds, and therefore did not take issue with the district court's evidentiary findings. 806 F.3d at 543.) The authors therefore thought it important to examine appellate opinions reviewing more recent trials. Many non-capital appeals are decided within a couple of years of trial. *See, e.g.*, *People v. Davis*, No. B259412, 2016 WL 3960036 (Cal. Ct. App. July 21, 2016) (stating that the trial court judgment was on October 7, 2014). We commenced our analysis in 2019, and examined California courts of appeal opinions during the preceding 12-year period. The study includes a total of 683 courts of appeal "opinions" and 684 "cases." The discrepancy between the numbers is based on one opinion in which both the prosecution and defense counsel made *Batson* objections to the others' use of peremptory challenges. For that reason, we counted this "opinion" as two "cases." *See* Appendix A.

151 Throughout this subsection and the next, the authors use "case" when referring to an appellate court opinion.

152 In a total of 12 cases, prosecutors made *Batson* motions to defense peremptory challenges. The 14 cases include two involving sua sponte *Batson* motions by the trial court challenging defense counsel's peremptory strikes, two cases in which the prosecution objected to defense strikes based on gender (not described above), and one case in which the defense objected to some of the prosecution's strikes and vice-versa. In the

latter case, the trial court denied the defendant's *Batson* motion and granted the prosecution's. On appeal following his conviction, the defendant challenged both rulings.

153 In nearly every court of appeal opinion, a *Batson* claim involves a defense objection to the prosecution's peremptory challenge(s) at trial. This finding is consistent with previous studies. *See, e.g.*, Melilli, *supra* note 2, at 448, 457 (examining "virtually every relevant reported decision of every federal and state court applying *Batson*" between mid-1986, when *Batson* was decided, and the end of 1993, and finding that more than 95 percent of the challenges were brought by criminal defendants).

154 Wash. Ct. R. General Applicability, General R. 37(h) [hereinafter GR 37]; *see* Proposed New GR 37—Jury Selection Workgroup Final Report App. 2 (2018) [hereinafter GR 37 Workgroup Final Report] (citing Task Force on Race and Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System 7 (2011), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf) (Statement of American Civil Liberties Union of Washington, et al.).

155 GR 37(h)(i)-(v), (i).

156 *See id.* 37(i).

157 *See* Appendix A.

158 *See supra* note 2.

159 *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (describing the prosecutor's 11 reasons for striking a Black juror); *see also People v. Hardy*, 5 Cal. 5th 56, 110-11 (2018) (Liu, J., dissenting) (quoting *Foster* and criticizing the court's failure to examine the prosecutor's "'laundry list'" of six reasons for striking a Black juror); Brief for Joseph diGenova et al., as Amici Curiae in Support of Petitioner, *Foster*, 136 S. Ct. 1737 (No. 14-8349).

160 *People v. Tabron*, No. A144079, 2018 WL 6426375, at *6 (Cal. Ct. App. Dec. 7, 2018). Not every opinion contains information about the date of the trial and/or the county in which the case was tried. To the extent that the information is not in the opinion, it can be found by searching the case docket on the website of the appellate court that issued the opinion.

161 *People v. Torrence*, No. A142592, 2018 WL 1376741, at *6 (Cal. Ct. App. Mar. 19, 2018). Unless otherwise indicated, internal quotation marks in subsections II.A and II.B refer to statements by the prosecutor or the juror.

162 *People v. Russell*, No. B258669, 2017 WL 588031, at *3 (Cal. Ct. App. Feb. 14, 2017).

163 *People v. Jones*, No. B197793, 2008 WL 4060941, at *5 (Cal. Ct. App. Sept. 3, 2008).

164 *People v. Anderson*, No. B251527, 2015 WL 4477688, at *14 (Cal. Ct. App. July 22, 2015).

165 *People v. Jamison*, No. E041904, 2008 WL 2933867, at *7 (Cal. Ct. App. July 31, 2008).

166 *People v. Christian*, No. E059966, 2015 WL 5145693, at *4 (Cal. Ct. App. Sept. 2, 2015).

167 *Jamison*, 2008 WL 2933867, at *8.

168 *People v. Harris*, No. B223174, 2011 WL 925723, at *8 (Cal. Ct. App. Mar. 18, 2011).

169 *People v. Crosby*, No. B251779, 2015 WL 340803, at *16 (Cal. Ct. App. Jan. 27, 2015).

170 *Davis*, 2016 WL 3960036, at *4.

171 *People v. Soto*, No. C079705, 2016 WL 6472879, at *2 (Cal. Ct. App. Nov. 2, 2016).

172 *People v. Duncan*, No. C049739, 2006 WL 3480375, at *2 (Cal. Ct. App. Dec. 4, 2006).

173 Because the trial judge makes a credibility determination at step three, "a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986). As Section III.E.4 explains, the California Supreme Court routinely defers to the trial court's denial of a *Batson* objection, even when the trial court makes no "explicit findings or analysis" of the prosecutor's reasons. *People v. Mai*, 57 Cal. 4th 986, 1062 (2013), *as modified on denial of reh'g* (Oct. 2, 2013) (Liu, J., concurring). The state supreme court's failure to require a trial court to give a reasoned explanation of its ruling increases the likelihood that prosecutors' demeanor-based reasons will escape judicial scrutiny. *See* Section III.E.4.

174 *People v. Edwards*, No. A139460, 2018 WL 2426168, at *6 (Cal. Ct. App. May 30, 2018).

175 *People v. Austin*, No. B266558, 2018 WL 2011470, at *9 (Cal. Ct. App. Apr. 30, 2018).

176 *People v. Miller*, No. B276572, 2018 WL 1465807, at *3 (Cal. Ct. App. Mar. 26, 2018).

177 *Id.*

178 *People v. Garcia*, No. B231949, 2012 WL 3538984, at *5 (Cal. Ct. App. Aug. 17, 2012).

179 *People v. Dungo*, No. C055923, 2013 WL 4494710, at *5 (Cal. Ct. App. Aug. 21, 2013).

180 *People v. Jordan*, 146 Cal. App. 4th 232, 239-40, 242 (2006). The Oakland Police Department had arrested the juror's brother at least five times, her sister two or three times, and her son at least once. *Id.*

181 *People v. Marquez*, No. B259210, 2017 WL 3484548, at *8 (Cal. Ct. App. Aug. 15, 2017).

182 *People v. Sullivan*, No. B216780, 2011 WL 1549702, at *3-6 (Cal. Ct. App. Apr. 26, 2011).

183 *People v. Thomas*, No. C068672, 2012 WL 6604993, at *3 (Cal. Ct. App. Dec. 19, 2012).

184 *People v. Jones*, No. C058674, 2009 WL 1177055, at *1-2 (Cal. Ct. App. May 4, 2009).

185 *People v. Winters*, No. A122443, 2010 WL 2691622, at *4-5 (Cal. Ct. App. July 8, 2010).

186 *Id*.

187 *People v. Brooks*, No. B283558, 2018 WL 3153552, at *4 (Cal. Ct. App. June 28, 2018).

188 *People v. Brown*, No. A118569, 2011 WL 1197465, at *9 (Cal. Ct. App. Mar. 30, 2011).

189 *People v. Johnson*, No. A112111, 2007 WL 594355, at *1 (Cal. Ct. App. Feb. 27, 2007).

190 *People v. Jenkins*, No. A109403, 2006 WL 3042944, at *12 (Cal. Ct. App. Oct. 27, 2006).

191 *People v. Fuller*, No. A143419, 2017 WL 1131822, at *7-8 (Cal. Ct. App. Mar. 27, 2017).

192 Some courts, including the Ninth Circuit, have held that a juror's neighborhood may be a reason that is *not* racially neutral and therefore insufficient to pass muster at step two of the *Batson* analysis. *See, e.g.*, *United States v. Bishop*, 959 F.2d 820, 822 n.2 (9th Cir. 1992), *overruled on other grounds by United States v. Nevil*s, 598 F.3d 1158 (9th Cir. 2010) (where the prosecution struck a Black woman because she lived in Compton and would likely be sympathetic to those who are not "upper middle class" and also hostile to law enforcement, finding that the challenge was a proxy for race, and noting that African Americans made up about three-fourths of Compton's population) (internal quotation marks omitted). The California Supreme Court has not adopted this view. In *People v. Gutierrez*, 2 Cal. 5th 1150, 1154 (2017), a murder case involving several Latinx defendants, the prosecutor used 10 of 16 peremptory challenges to remove Latinx prospective jurors. He struck a Latina teacher on the ground that she lived in Wasco—the home base of a gang in which one of the defendants was allegedly a member—and was unaware of gang activity in her community. *Id*. at 1160. The prosecutor used the same explanation for challenging at least one other Latinx juror. *Id*. at 1161. The trial court made a "global finding that the prosecutor's strikes were neutral and nonpretextual," including the strike of this juror. *Id*. at 1157. Although the court noted that Wasco's population is more than 75% Latinx, it found "the Wasco reason to be facially neutral." *Id*. at 1167-68. However, the California Supreme Court reversed the judgment because the prosecutor's reason was "not self-evident," and the trial judge failed to state that it had credited the reason." *Id*. at 1171.

193 *People v. Walker*, No. A121341, 2009 WL 2973551, at *4 (Cal. Ct. App. Sept. 17, 2009). The prosecutor also objected that the juror, who was a "merchant seaman," lacked hygiene and "seemed disheveled," stating that some witnesses described the defendant "that way," so that the juror "may identify with the defendant." *Id*.

194 *People v. Ivey*, No. A120368, 2009 WL 1668994, at *3 (Cal. Ct. App. June 15, 2009).

195 *People v. Cox*, 187 Cal. App. 4th 337, 347-48 (2010).

196 *People v. Nino*, No. B221514, 2011 WL 5314895, at *3 (Cal. Ct. App. Nov. 7, 2011).

197 *People v. Barajas*, No. F066418, 2015 WL 3566803, at *6 (Cal. Ct. App. June 9, 2015).

198 *People v. Deanda*, No. F072163, 2018 WL 2148288, at *6 (Cal. Ct. App. May 10, 2018).

199 *People v. Medina*, No. G043130, 2011 WL 4091493, at *6 (Cal. Ct. App. Sept. 15, 2011). When the judge pointed out that the prosecutor had confused this juror with another Latina juror, the prosecutor added yet another reason: the prospective juror was "a self-professed cat lady." *Id.* The court again corrected the prosecutor's error—the juror "stated simply she is 'single, no children, single with a cat'"—and questioned the reliability of the prosecutor's note-taking. *Id*. The prosecutor then offered two additional explanations, the second based on demeanor: (1) the juror's friends dated police officers and (2) the juror did not give the prosecutor "a good vibe." *Id*. at *7.

200 *People v. Jiminez*, No. B279690, 2018 WL 1616735, at *1 (Cal. Ct. App. Apr. 4, 2018).

201 *People v. Torres*, No. B266700, 2016 WL 4150707, at *4 (Cal. Ct. App. Aug. 4, 2016).

202 *People v. Tonga*, No. E054683, 2013 WL 32143, at *5-7 (Cal. Ct. App. Jan. 3, 2013).

203 *People v. Moya*, No. B264683, 2018 WL 1081909, at *10 (Cal. Ct. App. Feb. 28, 2018).

204 *Id.*

205 *People v. Barajas*, No. A137263, 2014 WL 49856, at *1-2 (Cal. Ct. App. Jan. 7, 2014).

206 *People v. Vale*, No. H037358, 2013 WL 5278501, at *3 (Cal. Ct. App. Sept. 19, 2013).

207 *People v. Martinez,* No. A134714, 2013 WL 3777125, at *3 (Cal. Ct. App. July 18, 2013).

208 *People v. Martinez*, No. E056034, 2014 WL 970214, at *2 (Cal. Ct. App. Mar. 13, 2014).

209 *People v. Ruiz*, No. A139127, 2016 WL 1120858, at *11 (Cal. Ct. App. Mar. 22, 2016).

210 *People v. Kim*, No. B267523, 2017 WL 372008, at *5 (Cal. Ct. App. Jan. 26, 2017).

211 *People v. Celaya*, No. B270857, 2017 WL 4004371, at *3 (Cal. Ct. App. Sept. 12, 2017).

212 *People v. Fernandez*, No. F058462, 2011 WL 199510, at *1-2 (Cal. Ct. App. Jan. 24, 2011).

213 *People v. Sanchez*, No. C059763, 2011 WL 3806264, at *8 (Cal. App. Dist. Aug. 30, 2011).

214 *People v. Valdivia*, No. H038360, 2015 WL 4385858, at *8-9 (Cal. Ct. App. July 17, 2015).

215 *People v. Bee Vue*, No. C055534, 2008 WL 4412089, at *13 (Cal. Ct. App. Sept. 30, 2008).

216 *People v. Mojarro*, No. B223035, 2011 WL 3055345, at *4 (Cal. Ct. App. July 22, 2011).

217 *Id.*

218 *People v. Solis*, No. B196976, 2008 WL 3508160, at *4-5 (Cal. Ct. App. Aug. 14, 2008).

219 *Sanchez*, 2011 WL 3806264, at *7-8.

220 *People v. Salinas*, No. F058255, 2010 WL 5073340, at *3 (Cal. App. Dist. Dec. 14, 2010).

221 *People v. Parker*, No. F060839, 2012 WL 1239249, at *4 (Cal. Ct. App. Apr. 13, 2012).

222 *People v. Rodriguez*, No. G041444, 2011 WL 1885327, at *4 (Cal. Ct. App. May 18, 2011).

223 *People v. Stevenson*, No. A121825, 2010 WL 709183, at *1 (Cal. Ct. App. Mar. 2, 2010). The full text of the prosecutor's reasons amply demonstrate that the juror's neighborhood was a proxy for race: "He also was unemployed which is a reason that is common for us to kick individuals. It tends to be an indication that they do not work with the other twelve people in the panel. They're not productive members of society. He also does not have children, indicating that he is not a contributing member of society. He's from the San Pablo area which is a lower class area within our county."

224 Across the 670 cases in which their strikes were at issue, prosecutors struck 940 Black jurors.

225 Across the 670 cases in which their strikes were at issue, prosecutors struck 563 Latinx jurors.

226 *See* Appendix A.

227 The United States Supreme Court has not addressed the issue, and federal courts of appeal have yet to recognize subgroups. *See* Elisabeth Semel, Batson *and the Discriminatory Use of Peremptory Challenges in the 21st Century, in* Jurywork: Systematic Techniques 278 (2019-20 ed.).

228 *See, e.g.*, *People v. Garceau*, 6 Cal. 4th 140, 171 (1993), *abrogated on other grounds by People v. Yeoman*, 31 Cal. 4th 93, 117 (2003) (upholding the defendant's contention that Spanish-surnamed women are a distinct group); *People v. Clair*, 2 Cal. 4th 629, 652 (1992) (holding that "Black women are a cognizable subgroup for *Wheeler*"); *People v. Gray*, 87 Cal. App. 4th 781, 788-89 (2001), *as modified on denial of reh'g* (Apr. 3, 2001) (holding that African-American men are a distinct group).

229 *See* Brief for the Nat'l Cong. of Black Women & the Black Women Lawyers Ass'n of L.A., Inc., as Amici Curiae Supporting Petitioner, *Williams v. California*, 571 U.S. 1197 (2014) (No. 13-494), 2013 WL 6091783, at *11 (observing that "African-American

women are often subjected to a double dose of discrimination in jury selection") (citing *People v. Motton*, 704 P.2d 176, 181 (Cal. 1985) (in bank))); Jean Montoya, *"What's So Magic[al] About Black Women?" Peremptory Challenges at the Intersection of Race and Gender*, 3 Mich. J. Gender & L. 369, 400 (1996)).

230 *People v. Dean*, No. B258927, 2017 WL 5898578, at *7 (Cal. Ct. App. Nov. 30, 2017).

231 *People v. Ware*, No. B200018, 2008 WL 5147841, at *2 (Cal. Ct. App. Dec. 4, 2008).

232 *People v. Brooks*, No. A110696, 2007 WL 1785473, at *7 (Cal. Ct. App. June 21, 2007).

233 *People v. Bordeaux*, No. B200449, 2009 WL 323859, at *4 (Cal. Ct. App. Feb. 11, 2009).

234 The three reversals in chronological order are *People v. Fuentes*, 54 Cal. 3d 707 (1991); *People v. Silva*, 25 Cal. 4th 345 (2001); and *People v. Gutierrez*, 2 Cal. 5th 1150 (2017). To calculate the total number of decisions, we started with Justice Liu's finding that, between 1993 and 2013, the California Supreme Court reviewed 102 cases with claims of racial discrimination in jury selection, and reversed only one. *See People v. Harris*, 57 Cal. 4th 804, 892-98 (2013) (Liu, J., concurring). We determined that between 1989 and the start of Justice Liu's calculation in 1993, the court decided 12 *Batson* cases, and reversed one. We determined that between 2013 and 2019, the court decided another 28 *Batson* cases, and reversed one. Consistent with Justice Liu's method, our search parameters included all cases in which a *Batson* issue was raised in the appeal whether or not the court decided the claim on the merits. Information on file with the Berkeley Law Death Penalty Clinic.

235 *People v. Rhoades*, 8 Cal. 5th 393, 457-58 (2019) (Liu, J., dissenting) (citing *People v. Snow*, 44 Cal. 3d 216, 242 (1987)).

236 *People v. (Joe Edward) Johnson*, 8 Cal. 5th 475, 528 (2019) (Liu, J., dissenting) (quoting *People v. Hardy*, 5 Cal. 5th 56, 124 (2018) (Liu, J., dissenting)); *see supra* note 2.

237 The authors used the same data for this analysis as they used for their analysis of California prosecutors' peremptory challenges against Black and Latinx prospective jurors. *See* Section II.A & B.

238 The authors used Thomson Reuters Westlaw to conduct the search of federal habeas petitions originating in California courts involving *Batson* claims. We conducted two methods of research to produce the most exhaustive list. First, we searched the Ninth Circuit Court of Appeals cases and used the search terms "*Batson*" and "2254" and "California." We included both published and unpublished opinions, and set the date

range from January 1, 1993 until December 31, 2019. This search returned 174 opinions. Second, we ran a search based on the *Batson* citing references. We narrowed the citing references by using the search terms "2254" and "California" and limited the results to the Ninth Circuit between January 1, 1993 and December 31, 2019. After cross-listing all the cases, there were an additional 11 cases that were not included in the first search. We recorded but did not count duplicates and opinions that mentioned but did not address *Batson* claims. Duplicates include opinions in which the case and the *Batson* claim were before the circuit more than once. Opinions that mentioned but did not address *Batson* claims include opinions that mentioned *Batson* in passing and those in which the claim was not preserved during trial or raised properly on appeal. Thus, we concluded that the Ninth Circuit decided 140 unique federal habeas petitions involving *Batson* claims originating in California state court during the relevant period.

239 Antiterrorism and Effective Death Penalty Act § 107, Pub. L. 104-132, 110 Stat. 1214, 1221 (1996).

240 *Currie v. McDowell*, 825 F.3d 603 (9th Cir. 2016); *Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015); *Crittenden v. Chappell*, 804 F.3d 998 (9th Cir. 2015); *Williams v. Pliler,* 616 Fed. App'x 864 (9th Cir. 2015); *Pao Lo v. Kane*, 584 Fed. App'x 885 (9th Cir. 2014); *Castellanos v. Small*, 766 F.3d 1137 (9th Cir. 2014); *Love v. Cate*, 449 Fed. App'x 570 (9th Cir. 2011); *Reynoso v. Hall*, 395 Fed. App'x 344 (9th Cir. 2010); *Ali v. Hickman*, 584 F.3d 1174 (9th Cir. 2009); *Paulino v. Harrison*, 542 F.3d 692 (9th Cir. 2008); *Green v. LaMarque*, 532 F.3d 1028 (9th Cir. 2008); *Calhoun v. Harrison*, 225 Fed. App'x 724 (9th Cir. 2007); *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006); *Currie v. Adams*, 149 Fed. App'x 615 (9th Cir. 2005); *Thomas v. Roe*, 138 Fed. App'x 936 (9th Cir. 2005); *Lewis v. Lewis*, 321 F.3d 824 (9th Cir. 2003); *Daniels v. Roe*, 53 Fed. App'x 476 (9th Cir. 2002); *McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000); *Ricardo v. Rardin*, 189 F.3d 474 (9th Cir. 1999); *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997); *Johnson v. Vasquez*, 3 F.3d 1327 (9th Cir. 1993). Additionally, the Ninth Circuit found that California courts had committed error in other cases, but could not grant relief due to the AEDPA's highly deferential standard of review. *See, e.g.*, *Lewis v. Calderon*, 189 F. App'x 658, 659 (9th Cir. 2006) ("The issue in the context of this case is close and we may not have reached the same conclusion as the state court had we reviewed the record on direct appeal. The statutory limitations on the scope of federal court review compel affirmance of the district court's denial of relief."); *Nieblas v. Rimmer*, 203 F. App'x 56, 57 (9th Cir. 2006) ("Though petitioner makes some colorable arguments against it, under the deferential standard we are required by AEDPA to apply, we cannot conclude that the state court made 'an unreasonable determination of the facts in light of the evidence presented' or otherwise acted 'contrary to, or involved an unreasonable application of,' *Batson.*").

241 *Johnson v. Finn*, Nos. Civ. S 03-2063 JAM JFM P, Civ. S 04-2208 JM JFM P, 2012 WL 4050068, at *1 (E.D. Cal. Sept. 13, 2012); *Williams v. Runnels*, 640 F. Supp. 2d 1203 (C.D. Cal. 2009).

242 Compare the 2.1% *Batson* reversal rate in the California Supreme Court to the 15% reversal rate in the Ninth Circuit.

243 *See* 28 U.S.C. § 2254(b).

244 *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

245 *Id.* at 102–03 (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)).

246 *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (internal citation omitted).

247 *Richter*, 562 U.S. at 97-98 (quoting 28 U.S.C. § 2254(d)). A state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or arrives at a result "opposite to that reached by [the Supreme] Court" when confronted with facts "that are materially indistinguishable from a relevant Supreme Court precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court engages in an "unreasonable application" of federal law if it "identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the prisoner's case." *Id.* at 413.

248 *Richter,* 562 U.S. at 101.

249 *Fernandez v. Roe,* 286 F.3d 1073, 1075-76 (9th Cir. 2002).

250 *Id.* at 1076.

251 *Id.* at 1077.

252 *Id.* (quoting *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000)).

253 *Id.* at 1080.

254 *Johnson v. California*, 545 U.S. 162, 168 (2005); *see supra* note 102 (explaining the genesis of California's step-one standard in *Wheeler*, 22 Cal. 3d at 280, and its demise in the United States Supreme Court's *Johnson* decision).

255 *Paulino v. Castro*, 371 F.3d 1083, 1090 (2004) (internal quotations and citations omitted) (reiterating its holding that California's test "'is impermissibly stringent'" (quoting *Wade*, 202 F.3d at 1997)).

256 *Johnson*, 545 U.S. at 168.

257 *Id.*

258 *See Shirley*, 807 F.3d at 1101, *as amended* (Mar. 21, 2016) ("The California Court of Appeal acted contrary to clearly established law when it based its prima facie analysis on the discredited, pre-*Johnson,* standard articulated by the California Supreme Court. . . .") (internal citation and quotation marks omitted). The authors did not identify any published court of appeal opinions post-*Johnson* finding error at step one. After an extensive search, we found two unpublished step-one reversals involving prosecutors' objections to defense strikes. *See People v. Gonzales*, 2012 WL 413868, at *10-13 (Cal. Ct. App. Feb. 8, 2012) (finding error at both steps one and three in a case involving a prosecutor's *Batson* objection to the defendant's strike of an Asian-American juror); *People v. Nino*, 2007 WL 211011, at *8, *10 (Cal. Ct. App. July 24, 2007) (holding that the trial court erred "by incorrectly determining that no prima facie case of jury discrimination existed," and reversing without a remand because, based on the record, it was unreasonable to conclude that the prosecutor could provide reasons additional to those given at the first trial, which were "inadequate as a matter of law"). *See also Rhoades*, 8 Cal. 5th at 458 (Liu, J., dissenting) (observing that in the 14 years since *Johnson* was decided, the California Supreme Court has never found step-one error).

259 *Kesser*, 465 F.3d at 353.

260 *Id*. at 353.

261 *Id*. at 354.

262 *Id*. at 354, 356.

263 *Id*. at 357.

264 *Id*.

265 *Id*. at 358.

266 *Id*. at 360.

267 *Id*. at 362.

268 *Id*. at 357.

269 *Id*. at 371.

270 *Castellanos*, 766 F.3d at 1140.

271 *Id*. at 1143.

272 *See People v. Castellanos*, No. B190581, 2007 WL 2660214, at *5 (Cal. Ct. App. Sept. 12, 2007).

273 *Castellanos*, 766 F.3d at 1148-49.

274 *Id.*

275 *Id.* at 1141 (internal quotation marks omitted).

276 *Id.* at 1148.

277 *Id.* at 1149.

278 *Id.*

279 *Id.* at 1150.

280 *Batson v. Kentucky*, 476 U.S. 79, 102-103 (1986) (Marshall, J., concurring).

281 *Id.* at 105.

282 *Id.* at 106.

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.*

287 Cheryl Staats et al., Kirwan Inst. for the Study of Race & Ethnicity, State of the Science: Implicit Bias Review 14 (2016), http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf.

288 *See* Project Implicit, http://projectimplicit.net/ (last visited May 14, 2020). Project Implicit was founded in 1998, and is an "international collaboration between researchers who are interested in implicit social cognition." *See About Us*, Project Implicit, http://projectimplicit.net/about.html (last visited May 14, 2020). Project Implicit has been collecting the results from Implicit Association Tests (IAT). *See Education: About the IAT,* Project Implicit, https://implicit.harvard.edu/implicit/iat-details.html (last visited May 14, 2020). The project measures implicit attitudes and stereotypes on topics including race, gender, age, politics, and disability. *See* Project Implicit, https://implicit.harvard.edu/implicit/ (last visited May 14, 2020) (tests). Between 1998 and 2018, there were over 20 million visitors to the site. *See Tracking the Use of Project Implicit Data*, Project Implicit: Blog (May 30, 2018), https://implicit.harvard.edu/implicit/blog.html.

289 Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. Crim. L. & Criminology 1, 30 (2014). Morrison also explained that if lawyers are exercising strikes based on implicit bias, they "will have the double incentive of not losing the strike by admitting that race was a factor and the generally shared desire not to appear racially biased." *Id.* at 32.

290 *Id.* at 32.

291 *Id.*

292 *Id.* at 31.

293 *Id.* (citing *Batson*, 476 U.S. at 106 (Marshall, J., concurring)).

294 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 (2010).

295 *Id.*

296 *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

297 *Id.* at 98-99.

298 *Id.* at 102-03 (Marshall, J., concurring).

299 *Id.* at 106. At least a decade before *Batson*, legal scholarship began to focus on the role unconscious bias plays in juror attitudes and, in turn, the relationship between unconscious bias and peremptory challenges. *See Limiting the Peremptory Challenge, supra* note 58, at 1720 & n.25 (1977); *id.* at n.28 (discussing the role of social scientists in "identifying unconscious bias in jurors in important trials during the last decade").

300 *See* Gordon W. Allport, The Nature of Prejudice (1954) (studying the nature and roots of prejudice, and theorizing that prejudice causes discrimination); Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping Blacks*, 34 J. Personality & Soc. Psychol. 590 (1976) (finding that subjects reported observed behaviors as more violent when the individual performing the behavior was Black than when he was White); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. Personality & Soc. Psychol. 590 (1980) (finding that both Black and White sixth-graders rated aggressive behavior as meaner and more threatening when the individual performing the behavior was Black than when he was White).

301 Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 323 (1987).

302 *See* Brand, *supra* note 2, at 599.

303 *See generally* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. Personality &. Soc. Psychol. 1314 (2002); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (1989); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. Experimental Soc. Psychol. 399 (2003); Anthony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155 (2005); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181 (2001).

304 Page, *supra* note 303, at 184.

305 Samuel R. Sommers & Michael J. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 Am. Psychologist 527, 533 (2008).

306 Page, *supra* note 303; Nilanjana Dashupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. Experimental Soc. Psychol. 316, 316-17 (2000) (finding that despite a decline in overt racism, "subtle and implicit forms of prejudice and discrimination remain pervasive").

307 Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 795 (2012).

308 Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1577 (2013).

309 Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 946 (2006).

310 *Id.* at 951.

311 Page, *supra* note 303, at 235; Sommers & Norton, *supra* note 305, at 533 (explaining that, in their study, "self-report measures did not reflect the significant influence of race on peremptory challenge use").

312 Page, *supra* note 303, at 189. The term "schema" has been defined by social scientists to mean an "active organization of past reactions, or past experiences, which must always be supposed to be operating in any well-adapted organic response." *Id.* at 189

n.158 (citing F.C. Bartlett, Remembering: A Study in Experimental and Social Psychology 201 (1932) (finding that memory is a process of reconstruction based on the socialization of the actor)). Schemas "serve as the basis for all human information processing, e.g. perception and comprehension, categorization and planning, recognition and recall, and problem-solving and decision-making." Ronald W. Casson, *Schemata in Cognitive Anthropology*, 12 Ann. Rev. Anthropology 429, 430 (1983).

313 Allport, *supra* note 300, at 17-27.

314 Richard M. Shiffrin & Walter Schneider, *Controlled and Automatic Human Information Processing: Perceptual Learning, Automatic Attending, and a General Theory*, 84 Psychol. Rev. 127, 127 (1977).

315 *See, e.g.*, Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. Personality & Soc. Psychol. 272, 278 (1993); Devine, *supra* note 303, at 6, 15; Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, *in* Dual-Process Theories in Social Psychology 339-60 (Chaiken & Trope eds., 1999); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psychol. Rev. 4, 15 (1995).

316 Greenwald & Krieger, *supra* note 309, at 948.

317 *Id.*

318 *Id.*

319 *Id.* at 951.

320 Devine, *supra* note 303, at 8-12 (using three studies to test automatic processes in subjects' perceptions of the personality traits of African Americans).

321 *See About Us*, *supra* note 288.

322 Greenwald & Krieger, *supra* note 309, at 955.

323 *Id.*

324 *Id.* at 959-60; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 471 (2010).

325 Greenwald & Krieger, *supra* note 309, at 951. Research has found that "those who belong to social groups deemed to be 'good' (e.g., . . . European Americans . . .) show strong preference for their own group." Kang & Lane, *supra* note 324, at 476.

326 Greenwald & Krieger, *supra* note 309, at 953.

327 *Id.*

328 *Id.* at 956, 957 tbl.1.

329 Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. Cognitive Neuroscience 729, 730 (2000).

330 *Id.* at 732.

331 *Id.* at 733.

332 Lincoln Quillian & Devah Pager, *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization*, 73 Soc. Psychol. Q. 79, 82 (2010).

333 *Id.* at 95.

334 *See* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. Davis L. Rev. 745, 784 (2018) (finding that Afrocentric features affect the length of sentences); Jennifer L. Eberhardt et al., *Looking Deathworthy, Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383, 384 (2006) (finding that, in cases involving a White victim, the more stereotypically Black defendants are perceived to be, the more likely defendants will receive a death sentence); Eberhardt et al., *supra* note 303, at 889 (finding that police officers exhibit a pattern of attitudinal bias that "associate[s] Blacks with the specific concept of crime"); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & Econ. 285, 285, 300-12 (2001) (finding that federal judges imposed sentences on Black defendants that were 12% longer than those imposed on comparable White defendants, and that Black defendants were "less likely to get no prison term when that option [was] available; less likely to receive downward departures; and more likely to receive upward adjustments"); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1196, 1221 (2009) (finding that judges harbor the same kinds of implicit biases as the general American population); Sommers & Norton, *supra* note 305, at 533 (finding that implicit biases result in the underrepresentation of Blacks on juries, in part because "prospective jurors were significantly more likely to be challenged when Black than when White").

335 Kang & Lane, *supra* note 324, at 473.

336 *See supra* note 334.

337 Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. Contemp. Crim. Just. 276, 286 (2007).

338 Christopher S. Jones & Martin F. Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision-Making and Information-Processing Strategies*, 25 Basic & Applied Soc. Psychol. 1, 9 (2003).

339 Mustard, *supra* note 334 at 306, 307 tbl.9 (finding also that "blacks and Hispanics are much less likely than whites to be assigned no prison term when that is an option").

340 *See* Jaihyun Park et al., *Implicit Attitudes Toward Arab-Muslims and the Moderating Effects of Social Information*, 29 Basic & Applied Soc. Psychol. 35, 38 (2007) (comparing reactions to Arab and Muslim names and Eurocentric White names and finding implicit bias in favor of White names); Wade C. Rowatt et al., *Patterns and Personality Correlates of Implicit and Explicit Attitudes Toward Christians and Muslims*, 44 J. for Sci. Study Religion 29, 35-36 (2005) (finding implicit prejudice towards Muslims based on comparing Muslim and Judeo-Christian names with pleasant and unpleasant words as stimuli for the IAT).

341 Eberhardt et al., *supra* note 303, at 878.

342 *Id.* at 877.

343 Correll et al., *supra* note 303, at 1315-17 (describing the test procedure); *see also* Greenwald et al., *supra* note 303, at 401-03 (finding similar results).

344 Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & Hum. Behav. 232, 232 (2019).

345 Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 606 (2006).

346 *Id.*

347 *See* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 L. & Hum. Behav. 261 (2007).

348 *Id.* at 265-66.

349 *Id.*

350 *Id.* at 265.

351 *Id.* at 266.

352 *Id.*

353 *Id.* at 267.

354 *Id.*

355 *Id.* at 269.

356 *Id.*

357 Michael J. Norton et al., *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. Behav. Decision Making 467, 475 (2007).

358 *Id.* at 473-74.

359 *Id.* at 470, 473. In the first study, participants were asked to make their strikes in two scenarios. *Id.* at 471. The researchers used the same juror profiles in each scenario, except that they switched the jurors' gender in the second scenario. *Id.*

360 *Id.* at 471.

361 *Id.*

362 *Id.* at 474. The researchers did not alter the gender of the jurors in the second study because their "interest was in exploring the impact of an explicit warning." *Id.* at 473.

363 *Id.* at 474.

364 *Id.*

365 *Id.* at 474.

366 *People v. Bryant*, 40 Cal. App. 5th 525, 544 (2019) (Humes, J., with Banke, J., concurring).

367 *Id.* at 545. In Section IV.A, we discuss the various deficiencies in the *Batson* procedure that the author, Justice Jim Humes, enumerated.

368 *Id.* (quoting *Rice v. Collins*, 545 U.S. 333, 343 (2006) (Breyer, J., concurring)).

369 *People v. Smith*, 32 Cal. App. 5th 860, 883 (2019), *as modified on denial of reh'g* (Mar. 1, 2019), *review denied* (May 15, 2019) (Streeter, J., concurring).

370 *Id.* at 871.

371 *Id.*

372 *Id.* at 881 (quoting *People v. Snow*, 44 Cal. 3d 216, 225 (1987)).

373 *Id.* at 883 (citing *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)) (describing the "net result" of the opinion as a "'zero tolerance' policy" for discriminatory strikes).

374 *Id*. at 883.

375 *Id*. at 884.

376 *Id*. at 883.

377 Brief for the Nat'l Dist. Attorneys Ass'n as Amicus Curiae Supporting Respondent, *Batson v. Kentucky*, 476 U.S. 79 (1976) (No. 84-6263), 1985 WL 669927, at *4.

378 *Id.*

379 *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

380 *Id.* The defendant in *Miller-El v. Dretke* was tried in Dallas before *Batson*. *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 236 (2005). He presented evidence that the district attorney's office "'had adopted a formal policy to exclude minorities from jury service,'" including a training manual containing an article "'outlining the reasoning'" for the policy. *Id*. at 264 (quoting *Miller El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 334 (2003)). The manual "instructed its prosecutors to exercise peremptory strikes against minorities: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Miller-El I*, 537 U.S. at 334-35. The Court noted that the manual "remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial." *Id.* at 335.

381 NDAA, *Jury Selection Standards*, cmt., *in* National Prosecution Standards 206 (2d ed. 1991). The NDAA's current policy is found in NDAA, Nat'l National Prosecution Standards 74 (3d ed. 2010), https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf. Standard 6-2.3 provides: "A prosecutor should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law." The commentary to this standard reminds prosecutors that they represent "all of the people in [their] jurisdiction[s]" and states that "it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group." *Id.*

382 Nancy S. Marder, *The Jurisprudence of Justice Stevens: Justice Stevens, the Peremptory Challenge, and the Jury*, 74 Fordham L. Rev. 1683, 1726 (2006). McMahon offered other advice such as the following: "'My experience, young black women are very bad. There's an antagonism. I guess maybe they're downtrodden in two respects. They are women and they're black . . . so they somehow want to take it out on somebody, and you don't want it to be you.'" Barry Siegel, *Storm Still Lingers over Defense Attorney's Training Video*, L.A. Times (Apr. 29, 1997), https://www.latimes.com/archives/la-xpm-1997-04-29-mn-53632-story.html. The title refers to the fact that, after he left the District Attorney's Office, McMahon became a defense lawyer. *Id.*

383 The handout is available online through the American Civil Liberties Union. Batson *Justifications: Articulating Juror Negatives* [hereinafter Batson *Justifications*], https://www.aclu.org/legal-document/north-carolina-v-tilmon-golphin-christina-walters-and-quintel-augustine-batson (last visited May 13, 2020); *see also* Jacob Biba, *Did Prosecutors Use a "Cheat Sheet" to Strike Black Jurors in North Carolina Death Penalty Case?*, The Appeal (Sept. 4, 2018), https://theappeal.org/did-prosecutors-use-a-cheat-sheet-to-strike-black-jurors-in-north-carolina-death-penalty-case/.

384 Batson *Justifications*, *supra* note 383.

385 Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, New Yorker (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors.

386 *See generally* Prosecutors Research Inst., Basic Trial Techniques for Prosecutors (2005), https://ndaa.org/wp-content/uploads/basic_trial_techniques_05.pdf. The manual's discussion of peremptory challenges informs prosecutors that they may strike whomever they wish provided the strikes are not made "in a discriminatory manner," and that when challenging "a member of a suspect or protected class, they should be prepared to provide the court with a logical reason." *Id.* at 9.

387 *See generally supra* note 2.

388 *See, e.g.*, *People v. Winbush*, 2 Cal. 5th 402, 436-37 (2017) (affirming that "a negative attitude toward law enforcement" or "a juror's negative experience with law enforcement" is "a valid reason for exclusion" and citing earlier opinions holding the same); *id.* at 439 (stating that "[a] prospective juror's distrust of the criminal justice system is a race-neutral basis for excusal" and citing earlier opinions holding the same); *id.* (observing that "[s]kepticism about the fairness of the criminal justice system to indigents and racial minorities has also been recognized as a valid race-neutral ground for excusing a juror" and citing earlier opinions holding the same).

389 *See, e.g.*, Nazgol Ghandnoosh, Sentencing Project, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies 3 (2014), https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf; John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, Pew Res. Ctr. (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/.

390 *See, e.g.*, Gramlich, *supra* note 389.

391 *See generally* Equal Justice Initiative, *supra* note 1, at 3; Ghandnoosh, *supra* note 389, at 4.

392 *See Bryant*, 40 Cal. App. 5th at 546 (Humes, J., with Banke, J., concurring) (explaining that because of the "undeniable evidence" of racial bias in law enforcement and the criminal legal system, "[r]eflexively allowing these strikes compounds institutional discrimination").

393 Henry Louis Gates, Jr., The Stony Road: Reconstruction, White Supremacy, and the Rise of Jim Crow xi (2019).

394 *Id.* at 2, 7-8; *see also* Michelle Alexander, The New Jim Crow 36-37 (anniversary ed. 2020); Equal Justice Initiative, *supra* note 1, at 9.

395 Equal Justice Initiative, *supra* note 1, at 9 ("By 1880, a backlash against black enfranchisement and political participation was already underway in the South, and the Jim Crow era of white supremacism, state terrorism, and apartheid had begun.").

396 Gates, *supra* note 393, at 14.

397 Bryan Stevenson, *A Presumption of Guilt*, N.Y. Rev. Books, July 13, 2017, at 8.

398 U.S. Const. amend. XIII.

399 Alexander, *supra* note 394, at 35.

400 *Id.* at 38. Both states and private businesses used convict labor. Michelle Alexander describes how, in Mississippi, convict labor became the foundation of the state's prison system. *Id.* at 39. "The state of Mississippi eventually moved from hiring convict labor to organizing its own convict labor camp, known as Parchman Farm." *Id.* Parchman Prison is still operating as a maximum security facility today. *See* W. Ralph Eubanks, *Mississippi's Notorious Parchman Prison Doesn't Have to Be a Death Machine*, CNN (Feb. 8, 2020), https://www.cnn.com/2020/02/08/opinions/parchman-prison-mississippi-deaths-eubanks/index.html.

401 James D. Unnever & Francis Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 J. Res. Crime & Delinq. 124, 128 (2007).

402 Equal Justice Initiative, Lynching in America: Confronting the Legacy of Racial Terror at 3 (3d ed. 2017), https://lynchinginamerica.eji.org/drupal/sites/default/files/2019-08/lynching-in-america-3d-ed-080219.pdf.

403 Isabel Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 39 (2010).

404 *Id.*

405 *Id.* at 9.

406 Ken Gonzales-Day, Lynching in the West, 1850-1935, at 46 (2006).

407 Unnever & Cullen, *supra* note 401, at 128.

408 Equal Justice Initiative, *supra* note 402, at 3.

409 Unnever & Cullen, *supra* note 401, at 128 (citing James Clarke, *Without Fear or Shame, Lynching, Capital Punishment, and the Subculture of Violence in the American South*, 28 British J. Pol. Sci. 269 (1998)).

410 Equal Justice Initiative, *supra* note 402, at 5.

411 Unnever & Cullen, *supra* note 401, at 128.

412 *Id.*

413 *Id.* at 148 ("This firmness of the racial divide in death penalty attitudes again leads us to suggest that it may be rooted in African Americans' shared history of racial oppression—epitomized by the use of lynchings as a mechanism of racial control in the South—that causes Blacks generally to be wary of the use of lethal action by the state.").

414 Elizabeth Hinton et al., Vera Inst., An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System 2 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

415 *Id.* at 3 (quoting Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2011)).

416 Alexander, *supra* note 394, at 49-50.

417 *Id.* at 50.

418 *Id.* at 59-60.

419 *Id.* at 71.

420 *Id.*

421 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

422 Hinton et al., *supra* note 414, at 1.

423 *Id.*

424 *Id.*

425 Sentencing Project, Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance 9 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities.

426 Alexei Jones, *Police Stops Are Still Marred by Racial Discrimination, Data Shows*, Prison Pol'y initiative (Oct. 12, 2018), https://www.prisonpolicy.org/blog/2018/10/12/policing/.

427 Sentencing Project, *supra* note 425, at 5.

428 *Id.*

429 *Id.* at 2.

430 *Id.*

431 *Id.* at 3.

432 Jones, *supra* note 426.

433 Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. Times (Aug. 6, 2019), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men.

434 *Id.*

435 Sentencing Project, *supra* note 425, at 7-8.

436 *Id.*

437 Ghandnoosh, *supra* note 389, at 26.

438 Gramlich, *supra* note 389.

439 Unnever & Cullen, *supra* note 401, at 147-48.

440 *See, e.g.*, *id.* at 149 ("[W]ithin the African American community, executions are more likely to raise questions about whether justice has been served—whether the accused is truly guilty or, if guilty, whether a White offender would have received the same penalty.").

441 Gramlich, *supra* note 389.

442 Field Research Corp., Tabulations from a Survey of California Registered Voters About the Death Penalty and Life in Prison Without the Possibility of Parole 317 (2011), https://media.sacbee.com/smedia/2011/09/28/19/33/HSgPj.So.4.pdf.

443 Mark DiCamillo & Mervin Field, Support for Death Penalty Still Very Strong. But Increasing Preference for Life in Prison Without Parole for those Convicted of Serious Crimes 4 (2011), https://web.archive.org/web/20120529145007/http://www.field.com/fieldpollonline/subscribers/Rls2393.pdf.

444 Mona Lynch & Craig Haney, *Death Qualification in Black and White, Racialized Decision Making and Death-Qualified Juries*, 40 L. & Pol'y 148, 157 (2018). The Berkeley Law Death Penalty Clinic has litigated challenges to death qualification on behalf of defendants in four California counties based upon the disproportionate exclusion of African-American prospective jurors. Information on file with the Berkeley Law Death Penalty Clinic.

445 *Id.*

446 *See, e.g*, *id.* (using data from surveys of Solano County, California, jury-eligible respondents to show that death qualification disproportionately excludes African Americans based on their opposition to the death penalty); Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 Ne. U. L.J. 299, 333-34 (2017) (finding that a majority of those Blacks removed for cause from South Carolina capital juries were excused because of their death-penalty opposition, in comparison to Whites); Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 Ind. L.J. 113, 137 (2016) (finding, in a study of Louisiana capital juries, that Blacks were 1.8 times more likely to be removed based upon their opposition to the death penalty than Whites).

447 Both the United States and California Supreme Courts have held that, while not required, "death qualification" is constitutional. *See, e.g*, *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Lockhart v. McCree*, 476 U.S. 162, 167 (1986); *Hovey v. Superior Court*, 28 Cal. 3d 1, 63 (1980). Although *Morgan*, 504 U.S. at 729, provides that death qualification is supposed to apply equally to "automatic" death penalty opponents and supporters, empirical evidence is to the contrary. Cause challenges are primarily used to remove jurors who voice opposition to, rather than support for, the death penalty. *See, e.g.*, Cover, *supra* note 446, at 133-34 (finding that "an average of 22%" of the jury was removed based upon death-penalty opposition in contrast to "an average of 12.4%" of venire members who were excluded based upon their death penalty support).

448 *See* Lynch & Haney, *supra* note 444, at 157.

449 Gramlich, *supra* note 389. While there is significantly less empirical research comparing multiple racial groups on this question, a 2002 survey revealed that both Blacks and Latinx people were more likely than Whites to perceive the police as racially biased. Ghandnoosh, *supra* note 389, at 13; *see also* H. Peck, *Minority Perceptions of the Police: A State-of-the-Art Review*, 38 Policing: An Int'l J. Police Strategies & Mgmt. 173, 173 (2015). *But see* Yuning Wu, *Race/Ethnicity and Perceptions of the Police: A Comparison of White, Black, Asian and Hispanic Americans*, 24 Policing & Soc'y 135, 148 (2014) (discussing a study conducted in Seattle, finding that Blacks are significantly more likely to experience police as biased, compared to Whites, Asians, and Latinx people, and finding that the latter three groups did not significantly differ from each other).

450 Gramlich, *supra* note 389.

451 Ghandnoosh, *supra* note 389, at 4.

452 *Id.* at 33.

453 Unnever & Cullen, *supra* note 401, at 146.

454 Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. Pol. 762, 768-69 (2005).

455 *Id.* at 769.

456 Nat'l Ctr. for State Courts, How The Public Views The State Courts: A 1999 National Survey 7, 22 (1999), https://www.flcourts.org/content/download/217619/1971660/publicop_natl.pdf.

457 Francis T. Cullen & Martha L. Henderson, *The Impact of Race on Perceptions of Criminal Injustice*, 25 J. Crim. Just. 447, 455 (1997).

458 *Id.*

459 John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 Am. J. Soc. 329, 339 (1982).

460 *Id.* at 343.

461 *Id.*

462 Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 Criminology 435, 443 (2002).

463 Gramlich, *supra* note 389.

464 Peck, *supra* note 449, at 173.

465 Gramlich, *supra* note 389.

466 *Id.*

467 Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, Pew Res. Ctr. (Sept. 29, 2016), http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/.

468 Ghandnoosh, *supra* note 389, at 29 (citing Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 Soc. Forces 1009, 1017 (2005)).

469 *Id.*

470 *Id.*

471 Gramlich, *supra* note 389.

472 *Id.*

473 Ghandnoosh, *supra* note 389, at 29 (citing Jon Hurwitz & Mark Peffley, Justice in America: The Separate Realities of Blacks and Whites 41-42 (2010)).

474 Weitzer & Tuch, *supra* note 462, at 443. The study revealed just how common it is for young African Americans to be racially profiled by the police: "nearly three quarters (72.7%) of black men in the 18-34 year age group claiming to have been victimized by racial profiling at least once." *Id.* Further, "young black women—although much less likely than young black men to report being stopped—are 13 times more likely than young white women to say that they have been stopped because of their race." *Id.*

475 *Id.*

476 Morin & Stepler, *supra* note 467.

477 Ghandnoosh, *supra* note 389, at 29.

478 In the past several years, the killings of Michael Brown and Eric Garner, for example, catalyzed a national conversation about race and policing. *See* Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, Smithsonian (July 27, 2017), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/. However, police violence against African Americans and Black communities had its origins in colonial "slave patrols." *See, e.g.*, Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, Nat'l L. Enforcement Museum: Blog: On the Beat (July 10, 2019), https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/. As we published this report, protests were taking place across the country in response to the police-killing of George Floyd. *See, e.g.*, Dionne Searcey & David Zucchino, *Protests Swell*

Across America as George Floyd Is Mourned Near His Birthplace, N.Y. Times (June 6, 2020), https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html.

479 Morin & Stepler, *supra* note 467.

480 *Id.*

481 *Id.*

482 *Id.* The study did not have participants name just one factor that might have motivated the protests, which explains why the percentages add up to greater than 100%.

483 Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 Du Bois Rev.: Soc. Sci. Res. on Race 151, 151 (2004) (discussing a 2004 study which explained that as "a result of beliefs about the extent of racial bias" in the criminal legal system, African Americans are "consistently less punitive than whites").

484 Ghandnoosh, *supra* note 389, at 8-9.

485 *Id.* at 9.

486 *Id.*

487 *Id.* at 3.

488 *Id.* at 10. Specifically, in 2008, Blacks "were 78% more likely than whites to experience household burglary, [and] 133% more likely to experience motor vehicle theft." *Id.* In 2011, the "homicide rate for blacks was 6.2 times higher than for whites." *Id.* at 11. In 2012, "blacks were 66% more likely than whites to be victims of sexual assault, robbery, aggravated assault, and simple assault." *Id.* at 10.

489 Gramlich, *supra* note 389; *see also* Ghandnoosh, *supra* note 389, at 12 ("African Americans are more likely than whites to report dissatisfaction with their level of safety: in 2003, 43% of Blacks said they were 'very satisfied' about their physical safety in contrast to 59% of Hispanics, and 63% of whites.").

490 Ghandnoosh, *supra* note 389, at 6.

491 *Id.*

492 *See* Alexander, *supra* note 394, at 13; Bobo & Johnson, *supra* note 483, at 153 (observing that "sociologist Loic Wacquant characterizes current rates of Black incarceration and changes in policing practices and policy as tantamount to a new 'peculiar institution' or fourth stage of American racial oppression aptly termed the 'carceral state'") (internal citation omitted).

493 *See* Section I.C.3. County district attorney offices provided the training materials in response to requests by the American Civil Liberties Union of Northern California ("ACLU-NC") pursuant to the California Public Records Act ("CPRA") requests. The materials are on file with the Berkeley Death Penalty Clinic. All citations to the training materials use the format "[Name of] County, at [page number]" unless otherwise noted. The Berkeley Law Death Penalty Clinic posted the training materials on a webpage: https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/california-district-attorney-training-materials/.

494 *See* Section III.A.

495 *See* Section I.C.2; *People v. Wheeler*, 22 Cal. 3d 258 (1978).

496 *Wheeler*, 22 Cal. 3d at 276. Group bias stands in contrast to specific bias, which is "a bias relating to the particular case on trial or the parties or witnesses." *Id*.

497 *Id.* at 276-77.

498 *Id*. at 268 (quoting *Thiel v. S. Pac. Co*., 328 U.S. 217, 220 (1946)).

499 *Batson*, 476 U.S. at 87 (citing *Thiel,* 328 U.S. at 223-24).

500 *J.E.B. v. Alabama ex rel. T.B*., 511 U.S. 127, 145 n.19 (1994) (quoting *Thiel*, 328 U.S. at 220).

501 *See, e.g.*, Santa Clara Cty. Dist. Attorney's Office, *The Inquisitive Prosecutor's Guide* 4-5, 73-79 (June 10, 2016) [hereinafter *The Inquisitive Prosecutor's Guide*]. This edition of the bi-weekly publication was obtained through the ACLU-NC's CPRA request. Although the guide is a Santa Clara County publication, the manual is likely used by prosecutors statewide as it is available on a password-protected portal on the CDAA website. *See also* San Francisco County, at 11; Orange County, at 8-9; San Diego County, at 112 (listing "occupations sympathetic to defendants" and "social workers," "teachers," "scientists," "cosmetologists/barbers," and "bartenders" as "BAD PEOPLE").

502 *See, e.g.*, *The Inquisitive Prosecutor's Guide*, *supra* note 501, at 73-79; San Francisco County, at 11; Orange County, at 8-9; San Diego County, at 112.

503 Alameda County, at 78 (explaining that a valid reason for dismissing a juror is that a "Juror (or Spouse of Juror) is Employed In a Job or Engages in Activities That Reflect an Orientation Towards Rehabilitation and Sympathy for the Defendants)," 404; Marin County, at 40; Riverside County, at 243; Ventura County, at 193; The Inquisitive Prosecutor's Guide, at 78.

504 *See Batson*, 476 U.S. at 87; *Wheeler*, 22 Cal. 3d at 276-77.

505 Orange County, at 412.

506 *Id.*

507 San Diego County, at 106.

508 *Id.* at 111.

509 Orange County, at 288.

510 *Id.* at 406.

511 *Id.* at 198.

512 Ventura County, at 28.

513 San Diego County, at 112.

514 *See, e.g.,* Los Angeles County, at 7; Monterey County, at 7; Orange County, at 563, 612; Riverside County, at 67, 259; San Francisco County, at 11; San Mateo County, at 209; Tulare County, at 13; Ventura County, at 70-71, 176.

515 *See Batson*, 476 U.S. at 96; *Winbush*, 2 Cal. 5th 402, 436-37 (2017); *see supra*, note 388 (discussing the California Supreme Court's well-established precedent that a juror's negative experience with or negative attitude toward law enforcement as well as a juror's skepticism about the fairness of the criminal legal system are race-neutral reasons for a peremptory challenge).

516 Drew Desilver, *Black Unemployment Rate Is Consistently Twice that of Whites*, Pew Res. Ctr. (Aug. 21, 2013), https://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/.

517 Lincoln Quillian et al., *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 Proceedings Nat'l Acad. Sci. 10870, 10871 (2017).

518 Am. Psychological Ass'n, Stress and Health Disparities: Contexts, Mechanisms, and Interventions Among Racial/Ethnic Minority and Low Socioeconomic Status Populations 13-14 (2017), https://www.apa.org/pi/health-disparities/resources/stress-report.pdf.

519 *Id.* at 15.

520 Katherine J. Bies et al., Stanford Criminal Justice Ctr., Stuck in the '70s: The Demographics of California Prosecutors 10 (2015), https://law.stanford.edu/wp-content/uploads/2015/08/Stuck-in-the-70s-Final-Report.pdf.

521 Press Release, Nat'l Ass'n for Law Placement, New Public Service Attorney Salary Figures from NALP Show Slow Growth Since 2004, at 3 (July 9, 2018), https://www.nalp.org/uploads/PSASR_7-9-18_FINAL.pdf.

522 Tulare County District Attorney Job Posting, Gov't Jobs, https://www.governmentjobs.com (last visited Apr. 13, 2020) (search job title field for "district attorney" and search city field for "Tulare, CA").

523 California Deputy District Attorney Salary Comparison for 2018, Transparent Cal., https://transparentcalifornia.com (last visited Apr. 20, 2020) (search salaries field for "managing deputy district attorney" and search year field for "2018").

524 Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System,* 66 Ala. L. Rev. 871, 878 (2015). *See also* Greenwald & Krieger, *supra* note 309, at 955-57; John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 Pol. Psychol. 881, 889-90 (2004).

525 Smith et al., *supra* note 524, at 895.

526 Page, *supra* note 303, at 196.

527 *Id.* at 195-96.

528 *Id.* at 198 (quoting Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. Soc. Issues 429, 438 (1999)).

529 Monterey County, at 21.

530 San Diego County, at 128, 178, 181.

531 Orange County, at 406.

532 *Id.* at 447.

533 *Id.* at 326.

534 *Id.*

535 Ventura County, at 129.

536 *Id.* at 154.

537 *See generally* Page, *supra* note 303, at 177, 177 n.97 (explaining that attorneys often strike jurors based on "a hunch, instinct, or gut feeling," which, in fact, is the result of implicit bias, but the attorney "will neither know what the reason actually was nor even know that she does not know").

538 Timothy D. Wilson, Strangers to Ourselves: Discovering the Adaptive Unconscious 50 (2002).

539 *Id*. at 53.

540 *Id*.

541 Page, *supra* note 303, at 212 (quoting Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 Psychol. Sci. 56, 57 (2005).

542 *See* Alexander, *supra* note 394, at 147 ("Numerous studies have shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the offender."); *see also* Page, *supra* note 303, at 190 (citations omitted) ("[P]eople's conscious (or explicit) attitudes and their unconscious (or implicit) attitudes (or associations, or beliefs) are often different, or to use the psychological term, dissociated.").

543 *See* Greenwald & Banaji, *supra* note 315, at 4; *see also* Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem and Self-Concept*, 109 Psychol. Rev. 3 (2002).

544 Wilson, *supra* note 538, at 54.

545 *Id*.

546 Page, *supra* note 303, at 220.

547 *See* Bennett & Plaut, *supra* note 334, at 785 (stating that "repeated studies" find that "Blacks with darker skin tones and stronger Afrocentric facial features 'activate automatic associations with negative behavioral stereotypes of Black men, such as aggression, violence, and criminality'"); *see also* Page, *supra* note 303, at 227 ("A prosecutor who sees a potential juror with messy hair as similar to herself may attribute the curious hairstyle to windy conditions (transient, external) whereas if she sees the potential juror as dissimilar she may attribute it to a slovenly character (stable, internal).").

548 *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

549 San Francisco County, at 58.

550 *The Inquisitive Prosecutor's Guide, supra* note 501, at 63, 64.

551 Orange County, at 325.

552 *Id*. at 437.

553 *Id*. at 326.

554 San Diego County, at 6.

555 Page, *supra* note 303, at 228.

556 *Id*.

557 *Id*.

558 *Id*.

559 Devine, *supra* note 303, at 7-8; Eberhardt et al., *supra* note 334, at 881, 883, 885-87.

560 L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 Minn. L. Rev. 2035, 2062 (2011).

561 Bennett & Plaut, *supra* note 334, at 786 (citing Sagar & Schofield, *supra* note 300, at 596).

562 Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 Iowa L. Rev. 2017, 2049 (2017).

563 Smith & Levinson, *supra* note 307, at 819.

564 *Id.*

565 *See, e.g.*, *People v. Lenix,* 44 Cal. 4th 602, 613 (2008) ("A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons."); *People v. Gutierrez*, 28 Cal. 4th 1083, 1125 (2002) ("Hostile looks from a prospective juror can themselves support a peremptory challenge"); *see* Sections II.A, II.B (discussing the authors' study of California appellate opinions in *Batson* cases); Semel, *supra* note 227, at 342-46 (citing cases and studies); *id.* at 343 (commenting that "*Batson* jurisprudence is littered with federal and state court decisions upholding demeanor-based strikes").

566 Page, *supra* note 303, at 224-25.

567 *Id*. at 225.

568 *See, e.g.*, *Kesser v. Cambra*, 465 F. 3d 351, 364 (9th Cir. 2006) (finding that the prosecutor's reason was not race-neutral where he struck a Native American juror for being "misty" because she "'teared up' when talking about her daughter's molestation"); *Clayton v. State*, 341 Ga. App. 193, 199 (2017) ("The potential iconoclasm of having gold teeth does not negate its usage in American culture as a stereotypical proxy for (or association with) the African-American race. Under these circumstances, striking the African-American juror because he had a full set of gold teeth cannot be said to be race neutral.").

569 *See People v. Silva*, 25 Cal. 4th 345, 385-86 (2001).

570 GR 37(i).

571 *Id.*

572 *Inquisitive Prosecutor's Guide*, *supra* note 501, at 15.

573 *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (internal citation omitted).

574 Orange County, at 596.

575 *Id.* at 612.

576 San Diego County, at 110.

577 Orange County, at 32.

578 *See Id.* at 35.

579 Los Angeles County, at 44.

580 San Francisco County, at 57.

581 Los Angeles County, at 44.

582 San Francisco County, at 46 (emphasis added).

583 *Id.*

584 *Id.* at 47-55, 58.

585 *Id.* at 47-56.

586 *Id.* at 49.

587 *The Inquisitive Prosecutor's Guide*, *supra* note 501, at 4-6, 51-80.

588 *Id.*

589 *Id.* at 71.

590 *Id.* at 79.

591 *Id.* at 71-72.

592 *Batson,* 476 U.S. at 96 (quoting *Avery*, 345 U.S. at 562).

593 *See, e.g.*, Orange County, at 74-75; San Mateo County, at 208-09; San Francisco County, at 10-11.

594 Orange County, at 74-75

595 *Id*.

596 Chris C. Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 Berkeley La Raza L.J. 18, 31 (2008).

597 *Id*. at 31-32.

598 *Id*. at 31.

599 San Francisco County, at 34.

600 San Diego County, at 174.

601 *Miller-El II*, 545 U.S. at 241-42.

602 *Id.* at 250.

603 *Id*. Other courts and individual judges have been critical of the reliance on the number of seated jurors in the cognizable group as a basis for denying a *Batson* motion, reasoning, for example, that "a prosecutor who intentionally discriminates against a prospective juror on the basis of race can find no refuge in having accepted others [*sic*] venirepersons of that race for the jury." *Holloway v. Horn*, 355 F.3d 707, 729 (3d Cir. 2004). Section III.A.3 discusses Justice Jon Streeter's recent concurring opinion in *People v. Smith*, observing that courts have placed "too much significance" on the "prosecutor's willingness to pass the panel with one or two" jurors of the same race as the defendant. 32 Cal. App. 5th 860, 881 (2019), *as modified on denial of reh'g* (Mar. 1, 2019), *review denied* (May 15, 2019) (Streeter, J., concurring). Justice Streeter concluded that this undue emphasis "provide[s] an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." *Id*. (internal citation and quotation marks omitted).

604 *See, e.g.*, *People v. Lomax*, 49 Cal.4th 530, 576 (2010) ("Acceptance of a panel containing African-American jurors 'strongly suggests that race was not a motive' in the challenges of an African-American panelist.") (quoting *People v. Lenix*, 44 Cal. 4th at 629).

605 Marin County, at 27. Although this is an Alameda County training document, the Marin County District Attorney's Office included the material in response to the ACLU-NC CPRA request.

606 Marin County, at 44.

607 Orange County, at 7.

608 Ventura County, at 147.

609 *See* Bellin & Semitsu, *supra* note 2, at 1104 ("Unfortunately, any attorney smart enough to pass a bar exam can easily circumvent the comparative-analysis pitfall by 'packaging' additional characteristics in a way that makes it statistically impossible that another individual will have an identical response").

610 San Francisco County, at 34.

611 *See* Bellin & Semitsu, *supra* note 2, at 1104-06.

612 *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (using this phrase to describe the prosecutor's 11 reasons for striking a Black juror).

613 *People v. Smith*, 4 Cal. 5th 1134, 1157-58 (2018).

614 *See People v. Armstrong*, 6 Cal. 5th 735 (2019) (Liu, J., with Cuéller and Perluss, J.J., dissenting) (citing *Smith* and criticizing the majority's failure to examine each of the prosecutor's eight reasons for striking one of the jurors); *People v. Hardy*, 5 Cal. 5th 56, 110-11 (2018) (Liu, J., dissenting) (quoting *Foster* and criticizing the majority's failure to examine the prosecutor's "'laundry list'" of six reasons).

615 San Francisco County, at 57.

616 *Id.*

617 *Id.* at 58 (listing "Soft-spoken"; "Long hair"; "Unkempt/poorly groomed"; "Frowning"; "Tentative/low-keyed"; "Inappropriate laughter"; "Hostile"; "Hesitant"; "Cavalier"; "Looked away from prosecutor"; "Smiled at defendant"; "Fidgety"; "Nervous"; "Upset"; "Defensive"; "Tired"; "Overweight"; and "Weird" as acceptable attributes for demeanor-based challenges).

618 *Id.* at 58-59. With regard to the latter approach, five years ago, a California appellate court held that preference for another juror is no different than an assertion of good faith or denial of a discriminatory motive; this justification "is, in effect, no reason at all." *People v. Cisneros*, 234 Cal. App. 4th 111, 121 (2015) (citing *Batson*, 476 U.S. at 97-98). *Id.* (explaining that "in each instance . . . the prosecutor elected to strike a prospective male juror rather than one of the many prospective female jurors then seated in the jury box").

619 San Francisco County, at 45.

620 *See People v. Wheeler*, 22 Cal. 3d 258 (1978); *Batson v. Kentucky*, 476 U.S. 79 (1986).

621 *People v. Silva*, 25 Cal. 4th 345, 385-86 (2001); *People v. Fuentes*, 54 Cal. 3d 707 (1991).

622 *Fuentes*, 54 Cal. 3d at 712; *id.* at 722 (Mosk, J., concurring).

623 *Silva*, 25 Cal. 4th at 354.

624 *Harris*, 57 Cal. 4th at 885 (Liu, J., concurring) (quoting *Silva*, 25 Cal. 4th. at 375).

625 *People v. Gutierrez*, 28 Cal. 4th 1083, 1175 (2002) (Liu, J., concurring).

626 *Id*. at 1156.

627 *Id*. at 1157.

628 *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring).

629 *Gutierrez*, 2 Cal. 5th at 1171-72 (majority opinion).

630 *Id*. at 1168, 1171.

631 *Id*. at 1172. Nothing in the majority opinion suggests that the court has abandoned its "reflexive deference" approach. *See id*. at 1172 (stating, "[W]e . . . typically afford deference to a trial court's *Batson/Wheeler* rulings . . . ."). On the contrary, in *People v. Armstrong*, the court deferred to the trial judge's credibility determination, finding that he had "engaged in a reasoned examination of Armstrong's showing in light of the record . . . ." 6 Cal. 5th 735, 768, 777-78 (2019). The dissent disagreed as to struck Juror E.W. *Id*. at 802-05 (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

632 *Johnson v. California*, 545 U.S. 162, 168 (2005).

633 *People v. Turner*, 42 Cal. 3d 711, 719-20 (1986) (holding that the defendant established a prima facie showing where, over his objection, the prosecutor had peremptorily challenged the only two Black prospective jurors in the box, and later struck the only other African American called to the box).

634 For opinions by the Ninth Circuit, *see e.g., Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000) ("California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*."); *Fernandez v. Roe,* 286 F.3d 1073, 1077 (9th Cir. 2002) (citing *Wade*, and declining to defer to the California appellate court because it applied the wrong test at step one); *Paulino v. Castro*, 371 F.3d 1083, 1090 (2004) (citing *Wade* and *Fernandez*, and declining to defer to the California appellate court because it applied the wrong test at step one).

635 *People v. Howard*, 1 Cal. 4th 1132, 1154, 1202 (1992) (in bank) (Kennard, J., concurring and dissenting).

636 *Id.* at 1207 (Kennard, J., concurring and dissenting) (citing *Turner*, 42 Cal. 3d at 719); *see Batson*, 476 U.S. at 105 (Marshall, J., concurring); *see also City of Seattle v. Erickson*, 398 P.3d 1124, 1126 (Wash. 2017) (en banc) (holding that when the prosecutor exercises a peremptory challenge against the sole African American in the venire, the trial court must find a prima facie showing of discrimination).

637 *Howard*, 1 Cal. 4th at 1207 (Kennard, J., concurring and dissenting).

638 *People v. Carasi*, 44 Cal. 4th 1263 (2008).

639 *People v. Scott*, 61 Cal. 4th 363, 384 (2015).

640 *Carasi*, 44 Cal. 4th at 1292-93. *See People v. Rhoades*, 8 Cal. 5th 393, 428-29 (2019) (explaining that, in deciding cases tried before *Johnson*, the court will "'review the record independently to determine whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis'" (quoting *People v. Kelly*, 42 Cal. 4th 763, 779 (2007)) (citing other cases endorsing this approach)).

641 *Carasi*, 44 Cal. 4th at 1291, 1294-95.

642 *Id.* at 1319, 1321 (Kennard, J., concurring and dissenting).

643 *Id*. at 1318.

644 *Id*. at 1321. *Carasi* also exemplifies the layers of judicial wrangling that characterize the court's step-one opinions. None of the complexities are warranted given the extremely low threshold set by *Batson* and affirmed in *Johnson*. Here, the majority's dissection of the pattern of strikes against women required Justice Kennard to respond by explaining how the prosecutor temporarily (and strategically) accepted panels of jurors with women in them. *Id*. at 1320-21. Justice Kennard then resorted to a flawed legal technique to reach the same conclusion: she reviewed the struck jurors' answers on their questionnaires and during voir dire "to see whether those answers suggest a reason for the prosecutor's peremptory challenges." *Id*. at 1321. As we discuss immediately below, Justice Kennard's reliance on speculation at step one, an approach the court employed before *Johnson* and continues to utilize, cannot be reconciled with *Johnson*'s holding.

645 *Johnson*, 545 U.S. at 170.

646 *Rhoades*, 8 Cal. 5th at 458 (2019) (Liu, J., dissenting) (quoting *People v. Harris*, 57 Cal. 4th 804, 864 (2013) (Liu, J., concurring)).

647 *Id*. at 456.

648 *Id.* at 460-61.

649 *Id*. at 457, 460-61 (quoting *Johnson*, 545 U.S. at 165, 173).

650 *Id.* at 459-60. Justice Liu also found that the majority exacerbated its error at step one by disregarding *Johnson*'s prohibition against speculation—positing reasons the prosecution might have removed jurors, rather than confining its analysis to the explanations actually given. *Id.* at 461-66. He also criticized the majority's rewriting of its historical unwillingness to engage in comparative juror analysis at step one, rather than forthrightly overruling its precedent. *Id*. at 468-69.

651 *Id*. at 458.

652 *Id*.

653 *Id*.

654 *Id.* at 470.

655 *Johnson*, 545 U.S. at 172.

656 *Id*.

657 *Id.* (quoting *Paulino*, 371 F.3d at 1090).

658 *Id.* at 171.

659 *See Chism*, 58 Cal. 4th 1266, 1352 (2014) (Liu, J., concurring and dissenting); *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring).

660 *Harris*, 57 Cal. 4th at 863 (Liu, J., concurring).

661 *Id.* at 834 (majority opinion).

662 *Id*.

663 *Id*.

664 *Id.* at 835-38.

665 *Id.* at 864 (Liu, J., concurring).

666 *Id.* at 880-82 (quoting *Johnson*, 545 U.S. at 172) (citing *People v. Clark*, 52 Cal. 4th 856, 907 (2011) (holding that there was no prima facie showing because "the record of voir

dire suggests race-neutral reasons for excusing each of the four jurors in question")); *People v. Hartsch*, 49 Cal. 4th 472, 487-89 (2010) (providing race-neutral reasons to justify four of the first five strikes against Black jurors); *People v. Hoyos*, 41 Cal. 4th 872, 900 (2007), *abrogated on other grounds by People v. McKinnon*, 52 Cal. 4th 610 (2011) (internal citations and quotation marks omitted) (concluding that affirmance is warranted where "the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question").

667 *Id.* at 872.

668 *Id.* at 873 (quoting *Johnson*, 545 U.S. at 172).

669 *Id.* at 880.

670 *People v. Reed*, 4 Cal. 5th 989, 998 (2018); *id*. at 1020 (Liu, J., dissenting).

671 *Id*. at 998 (majority opinion).

672 *Id*. at 1000-03.

673 *Id*. at 1020-28 (Liu, J., dissenting).

674 *Id.* at 1021 (Liu, J., dissenting). Justice Kruger dissented separately "for the reasons expressed in Justice Liu's dissenting opinion." *Id*. at 1031 (Kruger, J., dissenting). As to the court's inconsistent application of its precedent, Justice Liu first pointed out that the court's consideration of the factors in the jury selection that occurred after the *Batson* motion "is at odds" with its holding that "'the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire *as of the time the motion was made. . . .*'" *Id*. at 1021 (quoting *Scott*, 61 Cal. 4th at 384) (citing *Lenix*, 44 Cal. 4th at 624).

675 *Id*. at 1023.

676 *Id*. at 1025-28.

677 *Id*. at 1001 (majority opinion).

678 *Id*. (quoting *Harris*, 57 Cal. 4th at 836).

679 *Id*. at 1026 (Liu, J., dissenting). Justice Liu also criticized the inconsistency in the majority's reliance on a comparative juror analysis at the first *Batson* step for purposes of bolstering its decision given the court's "prior statements that comparative juror analysis in evaluating hypothesized reasons at stage one 'is inappropriate' (citation omitted) or 'has little or no use' (citation omitted)." *Id*. at 1025-26.

680 *Id*. at 1027-28 (quoting *Johnson*, 545 U.S. at 173). Justice Liu further explained that the relevant comparison is not the one the majority selected, i.e., total number of African Americans in the venire compared to the total number the prosecution struck. *Id*. at 1022-23. Rather, it is the total number of African Americans the prosecutor could have peremptorily challenged because they were seated in the box compared to the total number he excused. *Id.* Of this group, the prosecutor excused seven out of 10 African Americans, which supports, rather than diminishes, the inference of discrimination. *Id*. at 1023.

681 *People v.* (*Joe Edward*) *Johnson*, 8 Cal. 5th 475, 507-09 (2019).

682 *Id*. at 481, 510; *id*. at 528-29 (Liu, J., dissenting); *id*. at 536 (Cuéller, J. with Liu, J., dissenting).

683 *Id*. at 482-83 (majority opinion); *id*. at 529 (Liu, J., dissenting).

684 *Id*. at 503 (majority opinion).

685 *Id*.

686 *Id*. at 503-04.

687 *Id*. at 529 (Liu, J., dissenting). The prosecutor used 60% of those strikes against Black jurors and 34% against non-Black jurors in the box. *Id*.; *see also id*. 504-06 (majority opinion) (describing the sequence of peremptory challenges).

688 *Id*. at 504-06 (majority opinion).

689 *Id*. at 505.

690 *Id*.

691 *Id*. 506.

692 *Id*. at 508-509.

693 *Id*.

694 *Id.* at 546 (Cuéller, J., with Liu, J., dissenting).

695 *Id*. at 536.

696 *Id*. at 536-37.

697 *Id*. at 546.

698 *Id.*

699 *Id*. at 528 (Liu, J., dissenting).

700 *Id*. at 528-29.

701 *Id*. at 536 (quoting *Harris*, 57 Cal. 4th at 866).

702 *Id*. at 535-36 (citing *Batson*, 476 U.S. at 85, 87) (also citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238-39 (2019); *Powers v. Ohio*, 499 U.S. 400, 409 (1991)).

703 *Id*. at 535 (quoting *Harris*, 57 Cal. 4th at 865).

704 *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion) (deciding that where the trial court does not rule on the prima facie showing, but the proponent offers reasons for the strike—whether solicited or volunteered—and the court then rules on the ultimate question, the step-one ruling is moot); *Scott*, 61 Cal. 4th at 414-15 (Liu, J., with Kruger, J., concurring) (citing cases); *People v. Howard*, 42 Cal. 4th 1000, 1034 (2008) (Kennard, J., with Moreno, J., concurring and dissenting) (opining that the majority had failed to follow the weight of authority on the proper constitutional test at step one); *People v. Boyette*, 29 Cal. 4th 381, 469-70 (2002) (Kennard, J., dissenting) (citing cases and opining that the majority had failed to follow the weight of authority on the proper constitutional test at step one); *see* Semel, *supra* note 227, at 311-12 (citing cases and discussing the California Supreme Court's minority position in the split of authority).

705 *See Scott*, 61 Cal. at 386-87 (comparing opinions).

706 *Boyette*, 29 Cal. 4th at 469-70 (Kennard, J., dissenting); *see also Howard*, 42 Cal. 4th at 1034 (Kennard, J., with Moreno, J., concurring and dissenting) (citing cases).

707 *Scott*, 61 Cal. 4th at 386-87 (comparing opinions).

708 *Id.* at 391.

709 *Id*. at 409 (Liu, J., with Kruger, J., concurring) (citing *People v. Banks*, 59 Cal. 4th 1113, 1146 (2014); *People v. McKinzie*, 54 Cal. 4th 1302, 1320 (2012)).

710 *Id*. at 414.

711 *Id.* at 411, 413-14 (citing *Hernandez*, 500 U.S. at 372).

712 *Id.* at 409 (quoting *Johnson*, 545 U.S. at 172).

713 *Id.*

714 *See Batson*, 476 U.S. at 98 n.21; *see also Hernandez*, 500 U.S. at 364; *Lenix*, 44 Cal. 4th at 614.

715 *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (explaining that deference is "especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike," but unwarranted where the record does not show that determination).

716 *See People v. Hall*, 35 Cal. 3d 161, 167-68 (1983) (in bank); *Turner*, 42 Cal. 3d at 721 (in bank) (citing *Hall*); *People v. Snow*, 44 Cal. 3d 216, 222 (1987) (quoting *Hall*). In *People v. Mai*, Justice Liu mapped the downward trajectory of the court's jurisprudence on this issue. 57 Cal. 4th 986, 1067-73 (2013), *as modified on denial of reh'g* (Oct. 2, 2013) (Liu, J., concurring).

717 *Mai*, 57 Cal. 4th at 1067-71 (Liu, J., concurring) (citing *Silva*, 25 Cal. 4th at 385 (finding reversible error where the trial judge failed to examine and address the discrepancies between the record and the prosecutor's proffered explanations); *Fuentes*, 54 Cal. 3d at 721 (finding reversible error where the trial court did not analyze the prosecutor's explanations for his strikes); *Snow*, 44 Cal. 3d at 216 (finding reversible error where the trial court accepted without question the prosecutor's denial of group bias); *Turner*, 42 Cal. 3d at 727-28 (reversing the capital conviction because the trial court summarily denied the *Batson* motion)).

718 *People v.* (*James Willis*) *Johnson*, 47 Cal. 3d 1194, 1218 (1989) (in bank) (distinguishing *Hall*); *id*. at 1283, 1289-90 (Mosk, J., with Broussard, J., dissenting) (citing *Hall* and criticizing the majority for deferring to the trial judge's ruling which was "a rambling statement" that, at most, found that the prosecutor's reasons were race-neutral, but not that they were credible).

719 *Mai,* 57 Cal. 4th at 1068-70 (Liu, J., concurring) (citing *People v. Jackson*, 13 Cal. 4th 1164 (1996); *People v. Cummings*, 4 Cal. 4th 1233 (1993); (*James Willis*) *Johnson*, 47 Cal. 3d 1194).

720 *Silva*, 25 Cal. 4th at 386.

721 *Mai,* 57 Cal. 4th at 1070 (Liu, J., concurring); *see also Chism*, 58 Cal. 4th at 1349 (Liu, J., concurring and dissenting) (criticizing the majority for deferring to the trial court where the trial judge had failed to make "'a sincere and reasoned effort to evaluate'" all relevant circumstances bearing on a *Batson* claim, especially where "the prosecutor did not rely on [the struck juror's] demeanor or other intangible qualities apparent only to the trial court") (quoting *Lenix*, 44 Cal. 4th at 614)).

722 *Mai,* 57 Cal. 4th at 1070 (Liu, J., concurring) (citing *People v. Reynoso*, 31 Cal. 4th 903 (2003)).

723 *See Reynoso*, 31 Cal. 4th at 929; *id*. at 929-35 (Kennard, J., with Werdegar and Moreno, J.J., dissenting); *id*. at 935-45 (Moreno, J., with Kennard and Werdegar, J.J., dissenting).

724 *Id.* at 930 (Kennard, J., with Werdegar and Moreno, J.J., dissenting) (concluding that the majority opinion "undermines the right of Hispanics to sit on juries in California state courts and the right of criminal defendants to jury-selection procedures free of purposeful discrimination against Hispanic prospective jurors"); *id.* at 935 (Moreno, J., with Kennard and Werdegar, J.J., dissenting) ("Because today's majority opinion shelters a prosecutor's pretextual peremptory challenge of a Hispanic juror from further inquiry by the trial court, I dissent.").

725 *Id.* at 945 (Moreno, J., with Kennard and Werdegar, J.J., dissenting).

726 *Id.* at 930 (Kennard, J., with Werdegar and Moreno, J.J., dissenting).

727 *Mai,* 57 Cal. 4th at 1075 (Liu, J., concurring) (emphasis added).

728 *Id.* There is a split of authority on the requirements for appellate deference. *See People v. Williams*, 56 Cal. 4th 630, 701, 709-14 (2013) (Liu, J., dissenting) (assessing the split of authority among the state and federal appellate courts, and explaining that the California Supreme Court has "aligned itself with one side of this split, but not the side that reflects the United States Supreme Court's teachings on the careful scrutiny that trial courts and reviewing courts must apply to ferret out unlawful discrimination in jury selection"); *see also* Semel, *supra* note 227, at 336-40 (reviewing the split of authority).

729 *Mai,* 57 Cal. 4th at 1058 (Liu, J., concurring); *id.* at 1059 (pointing to "the thorough and careful inquiry at *Batson*'s third step" required by the high court's decisions in *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005), and *Snyder v. Louisiana,* 552 U.S. 472 (2008)); *see Snyder*, 552 U.S. at 479 (refusing to defer to, or even consider, the trial court's ruling where the prosecutor objected based on the struck juror's demeanor, and the trial court "simply allowed the challenge without explanation").

730 *See also Mai*, 57 Cal. 4th at 1062 (holding that appellate deference is required "so long as the prosecutor's stated reason for striking a minority juror is (1) inherently plausible and (2) supported by the record"); *id.* at 1059 (Liu, J., concurring) (concluding that the trial court's ruling did not warrant deference where the trial judge stated only that discriminatory intent was not "'inherent in the explanations'" and that "'the reasons appear to be race-neutral'").

731 *Williams*, 56 Cal. 4th at 649.

732 *Id.* at 650.

733 *Id.*

734 *Id.* at 651.

735 *Id.*

736 *Id.*

737 *Id.* at 652.

738 *Id.*

739 *Id.*

740 *Id.* at 650.

741 *Id.* at 700 (Liu, J., dissenting). *See also Chism,* 58 Cal. 4th at 1349 (Liu, J., concurring) (writing that where the trial judge made no effort to compare the struck juror to seated jurors, to "examine discrepancies" between the struck juror's statements and the prosecutor's characterization, or to ask the struck juror about one of the prosecutor's reasons—an issue about which the juror was never questioned—"it is unclear what exactly this court is deferring to here").

742 *Id.* at 700.

743 *Id.*

744 *Id.* at 698 (Werdergar, J., dissenting).

745 *Id.* at 699.

746 *People v. Hardy*, 5 Cal. 5th 56, 63 (2018); *id.* at 107 (Liu, J. dissenting).

747 *Id.* at 75.

748 *Id.*

749 *Id.*

750 *Id.*

751 *Id.* at 76 (quoting *Williams*, 56 Cal. 4th at 653) (internal citation in *Williams* omitted by the court).

752 *Id.* at 80.

753 *Id.* at 111, 113 (Liu, J., dissenting).

754 *Id.* at 111 (quoting *id.* at 82-83 (majority opinion)).

755 *Id.* at 113.

756 *People v. Manibusan*, 58 Cal. 4th 40, 107-08 (2013) (Liu, J., concurring and dissenting) (citing generally *Snyder*, 552 U.S. 472; *Miller-El II*, 545 U.S. 231). In *Manibusan*, the defendant made a *Batson* objection to the prosecution's strikes against three African-American women, one Asian-American woman, and two Latinx jurors. Denying the motion as to Juror No. 22, a Black woman, the trial court said only, "'It's a proper use of a peremptory challenge.'" *Id*. at 76. A majority of the California Supreme Court held that the ruling was sufficient for deference on appeal. *Id*. at 76-77. Justice Liu disagreed, writing that an unexplained ruling does not warrant deference because "'if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer.'" *Id*. at 107 (Liu, J., dissenting and concurring) (quoting *United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011)).

757 *Mai*, 57 Cal. 4th at 1062 (Liu, J. concurring).

758 *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring). *See also Mai*, 57 Cal. 4th at 1066-67 (Liu, J., concurring) (observing that these "habits of unwarranted deference, speculative inference, and overreliance on gap-filling presumptions have been entrenched in our *Batson* jurisprudence for some time now").

759 In *Wheeler*, the court pointed out that the prosecution might defeat an objection by showing that it peremptorily challenged "similarly situated members of the majority group on identical or comparable grounds." 22 Cal. 3d at 282. However, where the record showed the opposite, the prosecutor would not prevail. For example, in *People v. Trevino*, the prosecution, over objection, struck six Latinx jurors. 39 Cal. 3d 667, 688 (1985), *disapproved by* (*James Willis*) *Johnson,* 47 Cal. 3d at 1219-21. The court compared the struck Latinx jurors to several of the seated White jurors and found that the prosecutor's reasons for his strikes applied equally to the latter. *Id*. at 691-92. *E.g., id*. at 691 (where the prosecutor explained that he struck one Latinx juror because the juror's child was "close in age to at least one defendant," finding that he left three Whites on the jury whose sons were similar in age).

760 (*James Willis*) *Johnson*, 47 Cal. 3d at 1219-21.

761 *Id*. at 1220.

762 *Id*. at 1254 (Mosk, J., dissenting).

763 *Id*. at 1280-83 (discussing cases).

764 *Id*. at 1292.

765 *Id*. at 1292-95 (discussing the California Supreme Court's reliance on comparative juror analysis as well as its use by the state courts of appeal, the New Jersey Supreme Court, and the federal circuit courts).

766 These are, respectively, 537 U.S. 322 (2003) and 545 U.S. 231 (2005). *Miller-El I*, 543 U.S. at 326, concerned the proper standard for the issuance of a certificate of appealability under the AEDPA. Therefore, the Supreme Court's inquiry was limited to whether the Fifth Circuit had made the proper "threshold inquiry" into the merits of Miller-El's *Batson* claim, rather than whether he was entitled to relief on the claim under the AEDPA. *Id*. at 327. In answering the question, the Supreme Court analyzed some of the evidence supporting the claim, comparing, for example, the difference, "on the apparent basis of race," in how prosecutors asked prospective jurors their views about the sentence for murder under Texas law. *Id*. at 332.

767 These are, respectively, 552 U.S. 472 (2008); 136 S. Ct. 1737 (2016); and 139 S. Ct. 2228 (2019).

768 *Lenix*, 44 Cal. 4th at 622.

769 *Id*. at 622-24.

770 *Id*. at 622-24.

771 *See, e.g.*, *People v. Armstrong*, 6 Cal. 5th 735, 780-81 (2019) (quoting *Lenix*, 44 Cal. 4th at 622, 624); *Williams*, 56 Cal. 4th at 662 (quoting *Lenix*, 44 Cal. 4th at 622-23); *Chism*, 58 Cal. 4th at 1318 (relying on *Lenix*, 44 Cal. 4th at 622, to restrict comparative analysis to the jurors seated at the time the trial court ruled on the *Batson* motion unless the defendant later renews the objection).

772 *Miller-El II*, 545 U.S. at 241, 247 n.6.

773 *Id*. at 247 n.6.

774 *Id.*; *see also Flowers*, 139 S. Ct. at 2249 (citing *Miller-El II*).

775 *Miller-El II*, 545 U.S. at 241.

776 *Id*. at 255-60.

777 *Snyder*, 552 U.S. at 484.

778 *Foster,* 136 S. Ct. at 1754.

779 *Flowers*, 139 S. Ct. at 2246-47.

780 *Id*. at 2247.

781 *Miller-El II*, 545 U.S. at 252.

782 *Id.*

783 *People v. Jones*, 51 Cal. 4th 346 (2011).

784 *Id.* at 356-57.

785 *Id.* at 358.

786 *Id.*

787 *Id.* at 359.

788 *Id.* at 364.

789 *Id.* at 365.

790 *Id.*; *see id.* at 358-59 (listing the prosecutor's reasons for striking Juror G.G.).

791 *Id.* at 364-66 (reasoning that the limitations of conducting a comparative juror analysis for the first time on appeal allow the court to examine the record in this manner). *But see Miller-El II*, 545 U.S. at 252 (holding that trial and reviewing courts are precluded from hypothesizing a reason for the strike "if the stated reason does not hold up").

792 *People v. O'Malley*, 62 Cal. 4th 944, 979 (2016) (emphasis added) (quoting *Miller-El II*, 545 U.S. at 247); *id.* at 976-77 (citing *Jones*, and comparing the death penalty views of the struck jurors who were at issue with those of some of the seated jurors, even though the prosecutor did not rely on those views as a reason for his peremptory challenges).

793 *Miller-El II*, 545 U.S. at 252. In *People v. Winbush*, the majority suggested that it may be appropriate to permit a trial judge to rely on his or her own experiences as a lawyer and judge as well as "'common practices'" of the prosecutor and the prosecutor's office in exercising peremptory challenges. 2 Cal. 5th 402, 434 (2017) (quoting *Wheeler*, 22 Cal. 3d at 281). Justice Liu objected that "there is good reason not to do so." *Id.* at 491 (Liu, J., concurring). He pointed to two federal circuits that had rejected this approach because it allows the trial court to rely on information the defendant has "no opportunity to rebut" and to "'base such decisions on personal relationships outside of the courtroom.'" *Id.* at 491-92 (quoting *Coulter v. McCann*, 484 F.3d 459, 465 (7th Cir. 2007)) (citing *Adkins v. Warden*, 710 F.3d 1241, 1254 (11th Cir. 2013)).

794 *Winbush*, 2 Cal. 5th at 443 (quoting *People v. DeHoyos*, 57 Cal. 4th 79, 107 (2013)) (italics in *Winbush*).

795 *Id.* at 491 (Liu, J., concurring).

796 *Id.*

797 *Foster*, 136 S. Ct. at 1748. Section III.D introduces this topic in the context of jury selection training for California prosecutors.

798 *See* Sections II.B.1-4, II.C.1-2, III.D.

799 *Id.*

800 *Id.* at 1749-51.

801 *Id.* at 1751-54

802 *Id.* For instance, among the prosecutor's reasons for striking Mr. Hood was the fact that the prospective juror's son was close in age to the defendant. *Id.* at 1752. The court compared Mr. Hood to seated White jurors Graves and Duncan, both of whom had sons close in age to the defendant. *Id.* The prosecutor also struck Mr. Hood because he "'appeared to be confused and slow in responding to questions concerning his views on the death penalty.'" *Id.* at 1754 (internal citation omitted). Here, the court compared Mr. Hood to a different seated White juror, Huffman, who "showed similar confusion." *Id.*

803 *Id.* at 1755. The State used its peremptory challenges to remove all four African Americans who remained in the panel after cause challenges. *Id.* at 1743. Only the strikes of Jurors Garrett and Hood were at issue in the case before the Supreme Court. *Id.* at 1748. There were other egregious examples of discrimination in *Foster*, such as race-coded jury lists and additional notes in the State's file showing its "concerted effort to keep black prospective jurors off the jury." *Id.* at 1748-50, 1753, 1755.

804 *Hardy*, 5 Cal. 5th at 78.

805 *Id.* at 83-84; *id.* at 107 (Liu, J., dissenting) (explaining that the prosecutor "struck the only black prospective juror from the main panel, Frank G.").

806 Justice Liu emphasized other aspects of the *Batson* analysis in ways the majority did not, e.g., (1) the prosecutor's removal of "every African-American prospective juror she could have excused," *id.* at 108; (2) the "definite racial overtones" of the case discussed above, *id.*; (3) evidence that Frank G. "'should have been an ideal juror in the eyes of a prosecutor seeking a death sentence,'" *id.* at 109 (quoting *Miller-El II*, 545 U.S. at 231); and (4) the prosecutor's use of the "'laundry list'" approach, *id.* at 110 (quoting *Foster*, 136 S. Ct. at 1748).

807 *Id*. at 111-18 (Liu, J., dissenting). One of the six reasons—the prosecutor's assertion that Frank G. expressed in his questionnaire a belief that "'police are not always truthful and tend to exaggerate'"—was simply wrong. *Id*. at 111-12 (quoting the prosecutor). Frank G.'s questionnaire response concerned prosecutors (not police), and he wrote that he had the same view of defense lawyers. *Id*. The majority agreed that the prosecutor was mistaken about Frank G.'s statement, but, as mentioned above, rather than fault her or the trial court for the error, the majority criticized defense counsel for failing to notice the error and call it to the judge's attention. *Id*. at 79-80 (majority opinion).

808 *Id*. at 81 (majority opinion).

809 *Id*.

810 *Id*. at 114 (Liu, J., dissenting).

811 *Id*. at 82.

812 *Id*. at 117.

813 *Id*. at 117-18. (Liu, J., dissenting).

814 *Id*. at 119 (quoting *Miller-El II*, 545 U.S. at 247 n.6).

815 *People v. Smith*, 4 Cal. 5th 1134, 1157-58 (2018) (citing *Foster*, 136 S. Ct. at 1748; U*nited States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989)).

816 *Id*. at 1157.

817 *People v. Armstrong*, 6 Cal. 5th 735, 802-03 (2019) (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

818 *Id*. at 782 (majority opinion).

819 *Id*. at 801 (Liu, J., with Cuéllar and Perluss, J.J., dissenting) (quoting *Hardy*, 5 Cal. 5th at 78).

820 *Id*. at 800-01. The majority began the *Batson* discussion by stating the race of the victim and the defendants. *Id*. at 765 (majority opinion).

821 *Id*. at 801. As noted above, Justice Liu also dissented in *Hardy*.

822 *Id*. The majority acknowledged that no African-American men were on the seated jury and that, in California, Black men, a group "lying at the intersection of race *and* gender, are cognizable under *Wheeler*." *Id*. at 765, 768-69 (majority opinion).

823 The requirement flows directly from *Batson*, 476 U.S. at 96-97, in which the Court stated, "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *See also Miller-El II*, 545 U.S. at 240 (quoting *Batson*, 476 U.S. at 96-97); *Snyder*, 552 U.S. at 478 (citing *Miller-El II*, 545 U.S. at 239). The Supreme Court used this language to describe the third-step determination in the two successful post-*Snyder* cases, *Foster v. Chatman* and *Flowers v. Mississippi*. *Foster*, 136 S. Ct. at 1748 (quoting *Snyder*, 552 U.S. at 478); *Flowers*, 139 S. Ct. at 2251 (describing "all of the relevant facts and circumstances taken together" that supported a finding of *Batson* error).

824 *Armstrong*, 6 Cal. 5th at 805-15 (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

825 *Id*. at 804-05.

826 *Id*. at 815.

827 *Id*. at 816 (quoting *Johnson*, 545 U.S. at 170).

828 *Chism*, 58 Cal. 4th at 1319 (majority opinion). The court raised the prospect of forfeiture in *Lenix*, 44 Cal. 4th at 624. However, because *Lenix* did not involve a comparison with later-seated jurors, the statement was dictum. *Id*. at 1351 (Liu, J., concurring).

829 *Chism*, 58 Cal. 4th at 1351 (Liu, J., concurring) (quoting *Snyder*, 552 U.S. at 478) (italics in *Chism*); *see supra*, note 826 (tracing the requirement to *Batson*).

830 *Chism*, 58 Cal. 4th at 1350.

831 *Manibusan*, 58 Cal. 4th at 107 (Liu, J., concurring and dissenting).

832 *Id*. at 107-08.

833 *Chism*, 58 Cal. 4th at 1338 (Liu, J., concurring and dissenting) (citing *Williams*, 56 Cal. 4th at 698).

834 *Id.* at 1352.

835 *People v. Rhoades*, 8 Cal. 5th 393, 458 (2019) (Liu, J., dissenting).

836 GR 37(h).

837 In addition to these California state court judges, United States Supreme Court justices and other members of the bench have criticized *Batson* and its progeny. As discussed in Sections I.C.3 and III, Justice Marshall predicted that *Batson* would fail to achieve its objective: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished

only by eliminating peremptory challenges entirely." *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring); *id*. at 107 (citing Van Dyke, *supra* note 58, at 167-68 (proposing "tak[ing] away all peremptory challenges from the prosecution" whose duty it is to "see that the accused is tried by a fair, impartial and representative jury" instead of limiting the jury to those "approved . . . by the government's representative in court;" and noting that "good reasons exist for giving the defense peremptories.")). Justice Breyer embraced Justice Marshall's concerns in his concurring opinions in *Miller-El v. Dretke* and *Johnson v. California*, both decided in the same year. *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) ("I believe it necessary to reconsider *Batson's* test and the peremptory challenge system as a whole."); *id*. at 272 (discussing proposals to eliminate peremptory strikes); *Johnson v. California*, 545 U.S. 162, 173 (2005) (Breyer, J., concurring) (reiterating his position in *Miller-El v. Dretke*). In 2019, Iowa Supreme Court Justices Mark S. Cady and David Wiggins, writing separately, joined Justice Marshall's call to abolish peremptory challenges. *See State v. Veal*, 930 N.W.2d 319, 340 (2019) (Cady, J., concurring specially) ("[T]he solution in the future is to do away with the use of peremptory challenges."); *id.* (Wiggins, J., concurring in part and dissenting in part) ("I think it is time to abolish peremptory challenges in Iowa."). *See Flowers v. State*, 947 So. 2d 910, 937, 939 (Miss. 2007) (finding that "racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down," warranting reassessment of the *Batson* inquiry and peremptory challenges, and warning prosecutors that if they continue to violate *Batson*, changes are likely); *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124 (2017) (finding that "[t]wenty-six years later it is evident that *Batson*, like *Swain* before it, is failing" to eliminate racial discrimination in jury selection). *See also supra*, notes 88-89 (discussing the options the California Supreme Court considered in *Wheeler*).

838 *Rhoades,* 8 Cal. 5th at 459 (Liu, J., dissenting).

839 *Id*. at 456.

840 *Id*. at 469 (citing several state supreme court opinions and Washington Supreme Court General Rule 37).

841 *Id.* (citing *State v. Parker*, 836 S.W.2d 930, 939 (Mo. 1992)).

842 *Id*. at 469-70 (citing *Harris*, 57 Cal. 4th 804, 884 (2013) (Liu, J., concurring)).

843 *Id*. at 470.

844 *People v. Bryant*, 40 Cal. App. 5th 525, 548-49 (2019) (Humes, J., with Banke, J., concurring).

845 *See id*. at 548.

846 *Id*. at 544.

847 *Id*. at 545.

848 *Id*. at. 544.

849 *Id*. at 546 (internal citations and quotation marks omitted).

850 *Id*.

851 *Id*. at 545.

852 Page, *supra* note 303, at 246-51 (2005).

853 *Id*. at 247.

854 *See* Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. Marshall L. Rev. 1, 5, 45 (1994) (proposing the use of a half-and-half jury in "racially charged trials requiring a change of venue"); Derrick A. Bell, Jr., Race, Racism and American Law 273-74 (1980) (discussing race conscious selection and minimum number guarantees).

855 *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1698-99 (1985) (advocating for three same-race jurors in cases involving non-white defendants based on social psychological research indicating that this is the minimum number required to influence the remaining jurors).

856 *See generally Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1.*, 551 U.S. 701 (2007); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

857 Sommers & Norton, *supra* note 305, at 536.

858 Page, *supra* note 303, at 249 (citing Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 Stan. L. Rev. 781, 806-08 (1986) (providing a detailed description of the procedure of an affirmative selection system)); *see* Donna J. Meyer, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 Case W. Res. L. Rev. 251, 280-87 (1994) (describing a system called "peremptory inclusion" that allows defendants to use a challenge to secure a person's spot on the jury); Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. Chi. Legal F. 161, 171-74 (1998) (advocating for a system that gives each "litigant a fixed number of affirmative peremptory choices").

859 *See generally Parents Involved in Cmty. Sch.*, 551 U.S. 701; *Bakke*, 438 U.S. 265.

860 *See generally* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.-Kent L. Rev. 1179 (2003).

861 Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139, 1177 (1993) ("[T]ailored questionnaires can help the parties base their arguments for cause challenges and their exercise of peremptories on actual suspicion of race prejudice rather than simply on the color of the potential juror's skin."); Jean Montoya, *The Future of the Post-*Batson *Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. Mich. J. L. Reform 981, 1015-17 (1996) (describing a survey, which showed trial lawyers believe that voir dire by questionnaire is the best way to ensure fair and impartial juries); Sommers & Norton, *supra* note 305, at 535.

862 Sommers & Norton, *supra* note 305, at 536.

863 *Id*.

864 Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 Rev. Litig. 209, 308-09 (2003) (arguing that there should be a uniform rule providing that *Batson* violations are professional misconduct).

865 *Koo v. McBride*, 124 F.3d 869, 873 (7th Cir. 1997) (stating that granting the defendant additional peremptory challenges might be a remedy for a *Batson* violation); David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 Va. L. Rev. 811, 837 (1988).

866 Charles J. Ogletree, *Just Say No! A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1122 (1994).

867 In *Batson*, the Supreme Court expressed no "view on whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." 476 U.S. at 99 n.24. *See People v. Overby*, 124 Cal. App. 4th 1237, 1244-46 (2004) (concluding that defense counsel's request that a struck juror remain in the courtroom and statement of "submit" in response to reseating the struck juror waived any objection on appeal to the trial judge's use of an alternative remedy); *People v. Muhammad*, 108 Cal. App. 4th 313, 324-325 (2003) (overturning the trial court's monetary sanction against a prosecutor for improperly discriminating in the exercise of peremptory strikes only because of the trial court's failure to comply with the statutory provisions for imposing monetary sanctions under California Code of Civil Procedure section 177.5); *People v. Willis*, 27 Cal. 4th 811, 824 (2002) (modifying the decision in *Wheeler* to allow trial courts, with the express consent of the strike opponent, to adopt alternative measures short of

dismissal of the venire, such as reseating the struck jurors if they are available and imposing sanctions against the proponent of the strikes).

868 Page, *supra* note 303, at 253 (citing Ogletree, *supra* note 869, at 1117).

869 Professor Abbe Smith has called for an end to prosecutor peremptories in light of "the well-documented and longstanding abuse by prosecutors of peremptory challenges, the procedural asymmetry in our system of criminal justice, the different ethical roles of prosecutors and defenders, and the importance of 'buy-in' for criminal defendants." Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 Geo. J. Legal Ethics 1163, 1184 (2014). While the authors agree that Professor Smith's position is well-reasoned from both a legal history and constitutional rights perspective, they do not believe the proposal is likely to be adopted by a legislature or by the bench.

870 GR 37(h).

871 GR 37 Workgroup Final Report, *supra* note 154 at 1; *see also* Annie Sloan, *"What to do about* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Calif. L. Rev. 233, 244-53 (2020) (describing the process that led to the adoption of GR 37). Sloan notes that a plurality of the Washington Supreme Court called for meaningful *Batson* reform in a 2013 decision, *Saint v. Saintcalle*, 309 P.3d 326, 332-34 (Wash. 2013): "multiple members of the nine-justice Supreme Court expressed deep concerns that the overall *Batson* framework was not 'robust enough' to effectively combat race discrimination in jury selection." *Id.* at 245. In response to this "call to action" the ACLU drafted a new court rule, relying on "numerous studies and research identifying *Batson*'s flaws." *Id.* at 246-47. The rule eliminated *Batson*'s intentional discrimination requirement and listed presumptively invalid reasons for a peremptory strike. *Id.* at 247-48. Following a period of public comment on the proposed rule, the Washington Supreme Court convened a "workgroup" on the issue, "which included a broader array of perspectives, like those of prosecutors and additional judges." *Id.* at 250. The workgroup promulgated what is now GR 37 in April 2018 with the support of the original ACLU coalition. *Id.* at 253.

872 Dave Altimari, *State Supreme Court Calls for Commission to Study Whether Jury Selection System Is Unfair to Minorities,* Hartford Courant (Dec. 28, 2019), https://www.courant.com/news/connecticut/hc-news-supreme-court-jury-review-20191228-kg7iiay7uj-fudifyeaw407inem-story.html.

873 GR 37(c)-(d).

874 *Id.* 37(f).

875 *Id.* 37(e).

876 *Id.* 37(h), (i).

877 *See* A. 3070, 2019-2020 Reg. Sess. (Cal. as amended, May 4, 2020), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3070 (Juries: Peremptory Challenges).

878 The Honorable Tani Cantil-Sakauye, Chief Justice, Cal. Supreme Court, State of the Judiciary, Address to a Joint Session of the California Legislature (Mar. 8, 2016), https://www.courts.ca.gov/34477.htm (transcript and video available on the California Courts website).

879 *Id.*

880 A. 242 (Cal. 2019) (codified at Cal. Bus. & Prof. Code § 6070.5; Cal. Gov't Code § 68088), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB242.

881 *Id.* § 1(a)(3).

882 *See* Bennett, *supra* note 294, at 150 (stating that "[j]udge-dominated voir dire and the *Batson* challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish"); Terry Carter, *Implicit Bias Is a Challenge Even for Judges*, A.B.A. J. (Aug. 5, 2016), https://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges (reporting on a program by the ABA's Judicial Division at the American Bar Association's 2016 annual meeting that addressed implicit bias among members of the judiciary); *Fighting Implicit Bias*, A.B.A., https://www.americanbar.org/groups/judicial/committees/fighting_implicit_bias/ (last visited May 4, 2020) (describing the American Bar Association's Joint Committee on Fighting Implicit Bias in the Justice System, which is chaired by the Hon. Bernice B. Donald and is publishing a book "on fighting implicit bias in the justice system"); Rachlinski et al., *supra* note 334, at 1221 (in a study co-authored by a California federal magistrate judge, finding that judges harbor implicit racial bias that can influence their judgment).

883 News Release, Supreme Court of Cal., Supreme Court Announces Jury Selection Work Group (Jan. 29, 2020), https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group.

884 *Id.*

885 *Judicial Council*, Cal. Ct., https://www.courts.ca.gov/policyadmin-jc.htm (last visited May 14, 2020).

886 *Advisory Bodies*, Cal. Ct., https://www.courts.ca.gov/advisorybodies.htm (last visited May 14, 2020).

887 *Rhoades*, 8 Cal. 5th at 470 (Liu, J., dissenting).

888 *See supra* note 885; *see generally* Research Working Grp. & Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623 (2012), http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_ 030111.pdf.

889 Pursuant to section 1239 of the California Penal Code, defendants sentenced to death in capital cases automatically appeal their conviction and death sentence to the California Supreme Court. We discuss the California Supreme Court's record in *Batson* cases in Section II.C.1. California has five appellate projects that oversee felony appeals. Each is a nonprofit office under contract with the appellate courts. *See Appellate Projects*, Cal. Ct., https://www.courts.ca.gov/13714.htm (last visited May 14, 2020). According to the directors of each appellate project, there is no central repository of trial court records or briefing in these cases. Information on file with the Berkeley Law Death Penalty Clinic.

890 *Depublication of California Court of Appeal Decisions: Rules for Publishing and Citing to Appellate Cases*, UCLA, Sch. of L. Hugh & Hazel Darling L. Libr., https://libguides.law.ucla.edu/depublication (last visited Apr. 27, 2020) ("In California, the rules regarding publication of appellate opinions is quite complex."). Ultimate authority to publish or depublish a court of appeal opinion is vested in the California Supreme Court. *See* Cal. R. Ct. 8.512 (2020), https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_512; 8.516, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_516; 8.1105(g), https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1105); 8.1110, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1110; 8.11120, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1120; 8.1125, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1125. Rule 8.1115 governs the citation of unpublished opinions, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1115. There is an extensive scholarly literature examining California's publication rules, including articles arguing that the rules permit the California Supreme Court to "set California law without actually hearing individual cases" by "chang[ing] what the law is by ordering an opinion published or depublished." Shawn J. Bayern, *Case Interpretation*, 36 Fla. St. U. L. Rev. 125, 154 (2009). *See* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loy. L.A. L. Rev. 1033 (1993) (criticizing the California Supreme Court's depublication authority as permitting it to "mak[e] judicial decisions disappear"); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process, 473, 486 & n.107 (2003) (detailing how "California . . . issues ninety-three percent of its court of appeals opinions 'unpublished' and refuses to allow their citation" and suggesting that the rule "may reflect habits of undue leisure on the part of the state's court of appeal justices."); Robert A. Mead, *Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed by Health Care Providers*, 37 Wm. Mitchell L. Rev. 206, 210, 265 (2010) (discussing how "California's appellate publication practices and the related prohibition on the citation of, or reliance upon, unpublished opinions interfere[s]" with the law's development in elder and depen-

dent adult abuse practice and proposes a general solution of permitting "lawyers, justices, and judges to openly read and cite unpublished decisions as persuasive authority but not controlling precedent"); Rafi Moghadam, *Judge Nullification: A Perception of Unpublished Opinions*, 62 Hastings L.J. 1397, 1397 (2011) (criticizing the California Supreme Court's approach as "a mechanism for questionable discrimination against unpublished decisions" that "exhibit[s] vibrant legal discourse"). While this scholarship pre-dates the California Supreme Court's recent amendments to the publication rules in 2016, the Court's minor changes do not address these scholars' broader critiques.

891 Because the data set consisted of courts of appeal opinions, a limitation of this study is the inability to count every peremptory challenge to which a *Batson* objection was made at trial. Appeals to the appellate courts from trial occur only following a conviction.

892 We use "cases" instead of "opinions" throughout the report, except where "opinions" was appropriate. The two are synonymous for purposes of the report.

893 Not every *Batson* objection made and adjudicated by the trial court is raised on appeal. The observations were limited to peremptory challenges that were made to which there was a *Batson* objection at trial, a ruling by the trial court, and a merits determination by the court of appeal.

894 In two cases, the appellate court identified the race of the struck jurors and the party (defense or prosecution) that made the objection, but did not provide the number of struck jurors.

895 The Westlaw search query was: "advanced: ("Batson/Wheeler" OR "Wheeler/Batson")."

896 Most appellate opinions are not published. *See* Cal. R. Ct. 8.1105; *see also supra* note 890. The study included published and unpublished opinions.

897 A single *Batson* objection is not necessarily equivalent to one peremptory challenge. Often, a single *Batson* objection is made in response to multiple strikes.

898 *See, e.g.*, Taeku Lee, *Between Social Theory and Social Science Practice*, *in* Measuring Identity: A Guide for Social Scientists 113, 140-44 (Rawi Ahdelal et al. eds., 2009) (noting both the acknowledgment of the social construction of race—"a social construct marked by fluidity, multiplicity, and contingency"—and the difference between how social theorists and social scientists measure race and ethnicity, and observing that "[t]his tension is further exacerbated by the gap between race or ethnicity as social theorists describe it (as a fluid and contingent social construction) and race or ethnicity as social scientists measure it (as a fixed and categorical observable reality)"); Pew Research Ctr., Multiracial in America: Proud, Diverse and Growing in Numbers (2015), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2015/06/2015-06-11_multiracial-in-america_final-updated.pdf ("Multiracial Americans are at the cutting edge of social and demographic change in the U.S. . . . and growing at a rate three times as fast as the population as a whole.").

899 The U.S. Census considers "Hispanic origin" as an "ethnicity" only. U.S. Census Bureau, Race & Ethnicity (2017), https://www.census.gov/mso/www/training/pdf/race-ethnicity-onepager.pdf. The California Supreme Court has long held that jurors who have a Spanish surname are "Latino" or "Hispanic" for purposes of determining whether they were excused by an impermissible peremptory challenge. *See, e.g.*, *People v. Davis*, 46 Cal. 4th 439, 584 (2009).

900 This group is broader than the U.S. Census's racial groups, which categorize individuals who are from or descendants of individuals from the Far East, Southeast Asia, or India as "Asian," and those who are from or descendants of individuals from Hawaii, Guam, Samoa, and the Pacific Islands as "Native Hawaiian or Other Pacific Islander." U.S. Census Bureau, *supra* note 899.

901 *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1243-44 (1991) ("[T]he experiences of women of color are frequently the product of intersecting patterns of racism and sexism. . . . Because of their intersectional identity as both women *and* of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both.").

902 GR 37(h), (i).

903 *Id.* 37(h).

904 *Id.* 37(i).

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