

11-7-2023

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Recommended Citation

Ellen Boland Monroe, Comment, *Washington's General Rule 37 and Montana's Call for Jury Selection Reform*, 84 Mont. L. Rev. 2 (2023).

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WASHINGTON'S GENERAL RULE 37 AND MONTANA'S CALL FOR JURY SELECTION REFORM

Ellen Boland Monroe*

A society with decent institutions will not remain stable if citizens simply *rely* on institutions to function in a certain sort of way: for reliance is compatible, once again, with great cynicism toward both institutions and officials. For example, in a very corrupt society citizens often *rely* on the corruption of officials, the rottenness of the justice system, and so forth. . . . If a decent society is to remain stable not just as a grudging *modus vivendi*, but, as John Rawls puts it, stable “for the right reasons,” it needs to generate attachments to its principles, and attachment brings vulnerability. This vulnerability would be unendurable without trust. Producing trust must therefore be a continual concern of decent societies.¹

I. INTRODUCTION

In April 2018, the Washington Supreme Court became the first in the nation to adopt a court rule to combat implicit bias in the jury selection process.² General Rule 37 (“GR 37”) eliminates the need to raise an inference of purposeful discrimination, lists presumptively invalid reasons for exercising a peremptory strike that are historically associated with racial stereotyping, and uses an objective standard to determine if race or ethnicity could be viewed as a factor in the strike.³ These changes address growing concerns that the current framework for evaluating biased peremptory strikes has failed to combat discrimination while recognizing that eliminating peremptory strikes altogether may harm the rights of defendants and produce unintended harms. Montana can implement a similar process to prevent biased and discriminatory jury selection.

This paper first discusses the history of discrimination in jury selection and the recognized need for reform in Washington and Montana. Next, it outlines the rulemaking process leading to the creation of GR 37 and how the rule addresses unconscious bias. Finally, it presents the available evi-

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1. MARTHA C. NUSSBAUM, *ANGER AND FORGIVENESS* 173 (2019).

2. Rachel Simon, *Effectuating an Impartial Jury of One's Peers: Why Washington Has More Work to Do to Achieve Peremptory Challenge Reform*, 19 SEATTLE J. SOC. JUST. 201, 205 (2020).

3. WASH. GEN. R. 37(e) (no need for purposeful discrimination); *id.* 37(h) (reasons presumptively invalid); *id.* 37(f) (nature of observer). *See also id.* 37(c) (“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.”).

dence supporting GR 37's effect and makes recommendations for implementing this process in Montana.

II. THE CALL TO ACTION: COURTS IN WASHINGTON AND MONTANA LOOK FOR A SOLUTION TO UNCONSCIOUS BIAS IN THE JURY SELECTION PROCESS

A. *Background: Discriminatory Peremptory Challenges and the Trouble with Batson*

Discrimination in myriad variations has undermined the American jury selection process since its inception.⁴ The courts have a pressing duty throughout the jury selection process to take definitive steps to protect the impartial jury right under the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment.⁵ These constitutional rights serve as critical underpinnings of a fair criminal justice system, not only for criminal defendants but for the community at large.⁶ The United States Supreme Court has described serving on a jury as, apart from voting, “the most substantial opportunity that most citizens have to participate in the democratic process.”⁷

In addition to preserving jurors' dignity and equal protection rights, jury diversity is key to ensuring fair trial outcomes.⁸ Social science research shows that juries with fair representation of minorities yield more accurate results by considering a wider range of evidence and facts, better evaluating witness credibility, and narrowing racial sentencing disparities.⁹ Enforcing these rights protects citizens against the “arbitrary exercise of power” by the government and supports confidence in the “fairness of our system of justice.”¹⁰ The impartial jury right provides a unique backstop against govern-

4. *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, EQUAL JUST. INITIATIVE 6–33 (2021), <https://perma.cc/RQJ6-WYZW> [hereinafter EJI] (discussing various forms of historical racial, gender, and economic discrimination in juries).

5. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”); *id.* amend. XIV (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

6. *Batson v. Kentucky*, 476 U.S. 79, 86–88 (1986) (“The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.”).

7. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019).

8. EJI, *supra* note 4, at 56 (“Representative juries are indispensable to reliable, fair, and accurate trials, especially in serious criminal cases. The absence of racial diversity on juries leads to outcomes that are less reliable, inflicts injury on people of color who are excluded, and undermines the integrity of the entire criminal legal system.”).

9. *Id.* at 58.

10. *Batson*, 476 U.S. at 86–87.

ment overreach and creates fairer verdicts. Therefore, it must actively protect against discriminatory practices to accomplish its goals.

To address the systematic elimination of Black jurors in criminal trials, the U.S. Supreme Court's 1986 decision in *Batson v. Kentucky* set out the framework for evaluating intentional discrimination in peremptory challenges.¹¹ To prove a claim of purposeful discrimination, the challenging party must first raise an inference of discriminatory intent.¹² Next, the burden shifts to the striking party who must offer a non-discriminatory reason.¹³ Finally, the trial court evaluates whether the offered reason is a pretext and whether the circumstances as a whole point to purposeful discrimination.¹⁴ Although the Court hoped to “enforce[] the mandate of equal protection and further[] the ends of justice,”¹⁵ *Batson* has largely failed to curb intentional discrimination, much less to address the more insidious disparities arising from implicit bias.¹⁶

Proponents of jury selection reform attribute *Batson*'s failure to two main deficiencies: the ease of articulating a “neutral” reason for the strike and the *Batson* framework's inability to account for implicit bias.¹⁷ First, judges and attorneys hesitate to question a neutral reason offered by the striking party because they must determine openly that the attorney is both lying and intentionally engaging in racist, sexist, or otherwise discriminatory behavior.¹⁸ Second, the Court does not require the striking party's justification even to be plausible: “any reason, so long as it is not admittedly because the juror is a minority, will suffice.”¹⁹ This extraordinary deference to lawyers' justifications leads to successful *Batson* challenges only in the most absurd circumstances.²⁰

11. *Id.* at 96–98.

12. *Id.* at 93–94 (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)).

13. *Id.* at 94 (citing *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

14. *Id.* at 98.

15. *Id.* at 99.

16. EJI, *supra* note 4, at 42; see also Annie Sloan, “What to Do About *Batson*?”: *Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233, 235 (2020).

17. Sloan, *supra* note 16, at 235.

18. Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 253–54 (2005); La Rond Baker et al., *Fixing Batson*, LITIG., Summer 2022, at 3–4, available at <https://perma.cc/AWG3-HRX6>.

19. Lauren McLane, *Our Lower Courts Must Get in “Good Trouble, Necessary Trouble,” and Desert Two Pillars of Racial Injustice—Whren v. United States and Batson v. Kentucky*, 20 CONN. PUB. INT. L.J. 181, 185 (2021) (citing *Purkett v. Elem*, 514 U.S. 765, 768 (1995)).

20. See *Foster v. Chatman*, 578 U.S. 488, 495 (2016). *Foster* illustrates the extreme results necessary to justify a *Batson* challenge. On post-conviction review, the defendant was able to acquire the prosecutor's notes and two lists identifying all Black prospective jurors as “definite NO's,” marking out Black jurors by number, and the letter “N” next to each name of all five Black jurors. On each juror questionnaire, the juror's race had been circled. Additionally, the prosecutor's handwritten notes specified, “No Black Church,” next to the name of a local congregation. *Id.*

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For example, the recent U.S. Supreme Court decision in *Foster v. Chatman* illustrates the extraordinary evidence necessary to justify a *Batson* challenge. *Foster* gives unique insight into the process of circumventing *Batson* by offering race-neutral explanations because the defendant was later able to acquire the prosecutor's notes marking all Black prospective jurors as "definite NO's."²¹ The prosecutor's notes identified "three Black prospective jurors as 'B#1,' 'B#2,' and 'B#3,'"²² but the prosecutor nonetheless successfully argued race-neutral reasons for strikes during the trial.²³ In the absence of the prosecutor's notes, the explanations seemed "reasonable enough"²⁴ and likely would have continued to survive review.

Even when attorneys do not consciously intend to exercise discriminatory peremptory strikes, demeanor-based justifications such as inattentiveness or lack of eye contact mask implicit biases and correlate with racial stereotyping.²⁵ Because *Batson* targets only *purposeful* discrimination within the bounds of the Fourteenth Amendment,²⁶ the "heart of the *Batson* problem" lies in the unconscious discrimination resulting from internalized and unintentional stereotypes.²⁷ Justice Marshall's concurrence in *Batson* predicted the exact difficulty that befalls courts today. First, defendants can only establish a prima facie case of discrimination in cases with "flagrant" abuse of challenges.²⁸ Secondly, prosecutors intending to exercise peremptory strikes in a discriminatory fashion can "easily assert facially neutral reasons" that are all but immune to argument.²⁹ Most critically, unconscious biases permeate trials conducted under "the best of conscious intentions"³⁰ and hide implicit racial prejudices from the protection of the Fourteenth Amendment.

Unfair exclusion from juries harms prospective jurors by denying them access to democratic participation and subjecting them to humiliating and harassing courtroom discussion, including disparate voir dire questioning and stereotyping.³¹ In Montana's *State v. Wellknown*,³² the prosecutor exer-

21. Nancy S. Marder, *Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1140–41 (2017).

22. *Foster*, 578 U.S. at 494.

23. *Id.* at 502.

24. *Id.*

25. Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, BERKELEY LAW DEATH PENALTY CLINIC 16 (June 2020), <https://perma.cc/U4ET-R2YR>.

26. *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986).

27. Page, *supra* note 18, at 161.

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

29. *Id.* at 106.

30. *Id.*

31. EJI, *supra* note 4, at 61.

32. 510 P.3d 84 (Mont. 2022).

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cised a peremptory strike against Mr. Shan Birdinground, the only Native American and, in fact, the only member of any racial minority group on the venire.³³ Though the prosecutor asked other potential jurors about their connections to the county attorney's office and whether that connection may affect their impartiality, the State never asked Mr. Birdinground these questions.³⁴ Later, the State exercised a peremptory strike against Mr. Birdinground, and when asked to explain the strike, the prosecutor told the district court that Mr. Birdinground had not helped with an investigation against his partner for stabbing him, called him "hostile," and accused him of undermining their case against her.³⁵ Though other members of the venire had the opportunity to reveal their own experiences with the county attorney's office and answer to their ability to be impartial, Mr. Birdinground did not. Further, the State later claimed that it struck Mr. Birdinground because he said he would need to be "100 percent before he would ever convict."³⁶ The defense pointed out that other jurors had made the same statement and had not been struck by the prosecution.³⁷

This case highlights a recent example of Montana's struggle with discriminatory peremptory strikes, but the struggle for equality in jury selection is universal. In Washington's 2013 decision, *State v. Saintcalle*,³⁸ the Washington Supreme Court also called for *Batson* reform.³⁹ There, the prosecutor's "neutral" reason for attempting to strike the sole Mexican American juror, a real estate broker taking college courses, was: "I just think that she appeared not to be very intelligent. No disrespect."⁴⁰ The State also successfully struck the only Black juror after a disproportionately long colloquy, which included questions about her experiences as a minority working in an "inner city school."⁴¹ Though the Washington Supreme Court noted that this peremptory challenge arose from suspect disparate questioning, it affirmed the trial court's ruling that the prosecutor's reasons—inattentiveness during voir dire and the possibility of "losing" her due to the recent shooting death of an acquaintance—were race-neutral.⁴²

Despite the recognized need for reform, several obstacles impede efforts to change jury selection processes. First, the legal profession generally

33. Appellant's Opening Brief at *1–2, *State v. Wellknown*, 510 P.3d 84 (Mont. Nov. 8, 2021) (No. DA 20-0379).

34. *Id.* at *2.

35. *Id.* at *5.

36. *Id.* at *6.

37. *Id.*

38. 309 P.3d 326 (Wash. 2013).

39. *Id.* at 339.

40. Supplemental Brief of Petitioner at *7, *State v. Saintcalle*, 309 P.3d 326 (Wash. Jan. 27, 2012) (No. 86257-5).

41. *Saintcalle*, 309 P.3d at 330–32.

42. *Id.* at 340.

tends to resist change and cling to institutional norms.⁴³ In particular, judicial resistance to change is so well-documented that its effect, known as “judicial defiance,” can measurably undercut or even entirely negate a new legal rule.⁴⁴ The time, effort, and cognitive decision-making strain saved by “routinely applied doctrines” can lead judges to apply outdated principles “long after the doctrines have been expressly overturned by a higher court.”⁴⁵ Researchers have examined this phenomenon within the context of various new rules designed to improve jury processes. Even under binding statutes or court rules, noncompliance with a new rule—including rules saving time and effort—was so widespread as to constitute “judicial nullification.”⁴⁶

Secondly, the long history of peremptory challenges has made the practice difficult to dislodge from the American trial system.⁴⁷ Prosecutors and defense attorneys alike, alongside the American Bar Association and other committees generally advocating for jury reform, wish to retain peremptory challenges.⁴⁸ Proponents view them as a method of eliminating the extreme ends of jurors’ belief systems on both sides for the sake of impartiality.⁴⁹ Statistically, however, lawyers are bad at eliminating jury bias through peremptory challenges,⁵⁰ and a jury’s impartiality can be achieved as effectively with for-cause challenges.⁵¹

Using peremptory challenges to control for impartiality has no constitutional origin, but preserving equal protection rights in the jury selection process certainly does.⁵² Academic legal researchers and the judiciary widely consider eliminating peremptory challenges to be the only effective remedy for discriminatory selection.⁵³ Though many lawyers resist losing control over jury impartiality, this fear does not “fully justify lawyers’ widely shared sense that something valuable would be lost if we eliminated peremptories.”⁵⁴ Peremptory challenges retain value as a tool of “demo-

43. Elizabeth D. Gee & James R. Elkins, *Resistance to Legal Ethics*, 12 J. LEGAL PROF. 29, 35 (1987) (In reference to implementing reforms in legal ethics education: “Existing norms of legal education and of the legal profession create the strongest resistance to change.”).

44. Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 903–04 (2015).

45. *Id.* at 903.

46. *Id.* at 935–36.

47. Baker, *supra* note 18, at 6.

48. Ela A. Leshem, *Jury Selection as Election: A New Framework for Peremptory Strikes*, 128 YALE L.J. 2356, 2366–67 (2019).

49. *Id.* at 2368–69.

50. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517 (1978).

51. Leshem, *supra* note 48, at 2371.

52. *Batson v. Kentucky*, 476 U.S. 79, 98–99 (1986).

53. Leshem, *supra* note 48, at 2366.

54. *Id.* at 2370.

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cratic legitimation,” which allows defendants subjected to the full power of the state to retain an element of choice and agency in an otherwise disempowering process.⁵⁵ Peremptory strikes resemble the concept of election in our representative democracy: the practice gives parties “a say in choosing the individuals who will wield [the state’s coercive] power.”⁵⁶ When viewed as a method of preserving human dignity and democratic choice in an otherwise dehumanizing criminal process, peremptory challenges deserve at least an attempt at reform before complete elimination.

B. *Washington and Montana Courts Ask for Batson Reform*

Washington’s GR 37, the first of its kind to address implicit bias and substantially change the *Batson* steps, aims to strike a balance between the desire to reform peremptory challenges and to preserve their value as a key element of choice in trial.⁵⁷ GR 37 arose from the Washington Supreme Court’s direct request for change in *State v. Saintcalle*.⁵⁸ The court affirmed the defendant’s first-degree felony murder conviction even though the State exercised a peremptory strike against the only Black potential juror.⁵⁹ Because *Batson* requires the strike to be purposefully discriminatory, the court could not overturn the conviction under the clearly erroneous standard of review.⁶⁰ However, the court noted that if the parties had raised the issue of creating a new procedure, it would have reexamined Washington’s existing *Batson* procedures to recognize institutional and unconscious biases.⁶¹

Though it was unable to overturn the conviction in this case, the court concluded that “peremptory challenges have become a cloak for race discrimination.”⁶² It noted particularly that “Washington appellate courts have *never* reversed a conviction based on a trial court’s erroneous denial of a *Batson* challenge.”⁶³ In reference to *Batson*’s second step requiring the prosecution to offer a neutral reason for the strike, the court discussed studies demonstrating that “people will act on unconscious bias far more often if reasons exist giving plausible deniability.”⁶⁴ Implicit bias and social conditioning contribute to the “intractable problem”⁶⁵ of jury selection discrim-

55. *Id.* at 2385–87.

56. *Id.* at 2387.

57. Simon, *supra* note 2, at 205.

58. *State v. Saintcalle*, 309 P.3d 326, 336 (Wash. 2013) (“[W]e should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it.”).

59. *Id.* at 329.

60. *Id.*

61. *Id.*

62. *Id.* at 334.

63. *Id.* at 335.

64. *Saintcalle*, 309 P.3d at 336.

65. *Id.*

ination, but the court suggested “strengthen[ing] our *Batson* protections, relying both on the Fourteenth Amendment and our state jury trial right.”⁶⁶ Under the first avenue of authority, the court discussed the flexibility state courts enjoy in implementing equal protection rules⁶⁷ and the “wide discretion” under federal law to create state procedures above the base-level federal Fourteenth Amendment protection.⁶⁸ Under the second avenue, the Washington State Constitution affords higher protection for defendants and allows the court to extend *Batson* protection beyond the federal minimum.⁶⁹

Although the court found it could not alter the *Batson* framework by decision because the issue had not been argued, it suggested that the court rule-making process would better “reduce discrimination and combat minority underrepresentation.”⁷⁰ The court included a directive that the rule should account for unconscious bias and therefore must address the “purposeful discrimination” requirement under *Batson*.⁷¹ Whatever the outcome of the GR 37 creation process, the Washington Supreme Court was unwilling to continue condoning unconscious or conscious bias in jury selection. In 2018, the court reviewed a case in which the defendant’s *Batson* challenge was denied shortly before GR 37 took effect.⁷² Since the triggering event (*voir dire*) occurred before the rule was adopted, the court could not apply the new analysis retroactively.⁷³ Rather than allow another *Batson* challenge to go unvindicated, the Court used its authority described in *Saintcalle* to modify step three from the purposeful discrimination requirement in *Batson* to the exact language of GR 37: “whether ‘an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.’”⁷⁴ This decision lent weight to the new court rule by giving its main alteration a constitutional pedigree under both state and federal law.⁷⁵

66. *Id.* at 337; *see* WASH. CONST. art. I, § 21 (“The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.”).

67. *Saintcalle*, 309 P.3d at 337 (citing *Batson*, 476 U.S. at 99–100 n.24; *Johnson v. California*, 545 U.S. 162, 168 (2005); *State v. Hicks*, 181 P.3d 831, 837 (Wash. 2008)).

68. *Id.* (citing *Smith v. Robbins*, 528 U.S. 259, 273 (2000); *Dickerson v. United States*, 530 U.S. 428, 438 (2000)).

69. *Id.* (citing *Hicks*, 181 P.3d at 838–39) (noting the use of the word “inviolate” to describe the state jury right elevates the Washington jury right above the federal constitutional floor).

70. *Id.* at 339.

71. *Id.* at 338–39.

72. *State v. Jefferson*, 429 P.3d 467, 477 (Wash. 2018).

73. *Id.* at 479.

74. *Id.* at 479–80 (quoting WASH. GEN. R. 37(e)).

75. *Id.* at 480 (citing the court’s constitutional authority as described in *Saintcalle*, 309 P.3d at 337); *see also* *Saintcalle*, 309 P.3d at 337 (“We conclude from this that we should strengthen our *Batson* protections, relying both on the Fourteenth Amendment and our state jury trial right. . . . Likewise, we

In 2022, Justice Baker of the Montana Supreme Court expressed similar frustration with the *Batson* framework in her concurring opinion in *State v. Wellknown*.⁷⁶ There, however, Justice Baker noted that the legal basis for jury selection reform can be found in the Montana Constitution's Equal Protection and Dignity Clauses, which provide greater protection than the Fourteenth Amendment.⁷⁷ Couching the basis for jury reform in *both* clauses gives the court ample support for "the adoption of strong anti-discrimination provisions enforceable by [minority populations] affected."⁷⁸ Montana's Dignity Clause should apply with special force to issues affecting Native Americans, who have suffered "distinctive forms of degrading, discriminatory treatment"⁷⁹ and experience a disproportionate rate of incarceration.⁸⁰ Although Washington's rulemaking research and efforts focused on the state's discriminatory treatment of Black jurors, Montana can rely on the same framework to vindicate the rights of Native American jurors and defendants. Justice Baker cited Washington's GR 37 both as an example of state flexibility in creating new *Batson* procedures and as a model for "reconsider[ing] [Montana's] approach to peremptory challenges in light of our state constitution and the studies regarding *Batson*'s limitations."⁸¹

III. ANSWERING THE CALL: HOW WASHINGTON'S WORKGROUP CREATED GR 37

Even before the Washington Supreme Court issued its call to action in *State v. Saintcalle*, various organizations had been studying discrimination in Washington's criminal justice system.⁸² These groups began to focus on "facially neutral policies that have racially disparate effects" as a result of implicit bias.⁸³ A report issued in 2011 by the Task Force on Race and the Criminal Justice System concluded that policy decisions should account for

have authority under federal law to pioneer new procedures within existing Fourteenth Amendment frameworks.").

76. *State v. Wellknown*, 510 P.3d 84, 97 (Mont. 2022) (Baker, J., concurring) ("In my view, we should revisit Montana's approach to equal protection in the jury selection context, consistent with the Montana Constitution and with society's improved understanding of implicit bias.").

77. *Id.* (citing MONT. CONST. art. II, § 26 ("The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."); *Wilson v. State*, 249 P.3d 28, 33 (Mont. 2010); *Walker v. State*, 68 P.3d 872, 882 (Mont. 2003)).

78. *Id.* at 98 (quoting MONT. CONST. CONVENTION COMM'N, MONTANA CONSTITUTIONAL CONVENTION STUDIES, No. 10: BILL OF RIGHTS 312, available at <https://perma.cc/U986-ZELB>).

79. *Id.* at 97 (quoting Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301, 320 (2000)).

80. *Id.* at 99.

81. *Id.* at 99–100.

82. Sloan, *supra* note 16, at 242–44.

83. *Id.* at 244.

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the effects of implicit biases on decision-making.⁸⁴ The research produced by these interest groups provided the foundation for Washington's court to argue for reform.⁸⁵

The *Saintcalle* decision prompted a group of lawyers, judges, and academic researchers to tackle the rulemaking process.⁸⁶ The ACLU of Washington decided to host a legal education program to discuss how to respond.⁸⁷ The group ruled out eliminating peremptory challenges early in the process due to widespread opposition.⁸⁸ But, the specter of “losing peremptory strikes entirely” produced some “unlikely allies” in their effort to reform peremptories.⁸⁹ After significant research, including discussions with community stakeholders, the ACLU submitted a rule proposal eliminating the purposeful discrimination standard to account for unconscious bias and creating a list of “presumptively invalid reasons.”⁹⁰ The group included reasons with a history of “perpetuat[ing] the exclusion of jurors of color” and intended the list to guard against judicial reluctance.⁹¹

After the Washington Supreme Court published the ACLU's proposal during the period of public comment, the Washington Association of Prosecuting Attorneys (WAPA) submitted its own, which it described as a “practical guide for implementing current standards on peremptory challenges.”⁹² WAPA believed the ACLU rule would skew juries against the State, and further criticized the ACLU's failure to correct for gender bias, though gender was not included in WAPA's own rule proposal.⁹³ In response to continued criticism regarding the omission of gender bias, particularly in the context of domestic violence cases, the ACLU revised its proposed rule to include gender.⁹⁴

With three proposals before the court, it closed the comment period and submitted the drafts to a workgroup made up again of trial judges, defense and prosecuting attorneys, and court administrators.⁹⁵ After the work-

84. *Id.*

85. *Id.* at 245.

86. *Id.* at 246–47.

87. *Id.*

88. Baker, *supra* note 18, at 4.

89. *Id.* at 7.

90. Sloan, *supra* note 16, at 247–48.

91. *Id.*

92. *Id.* at 248 (quoting Letter from Rich Weyrich, President, Wash. Ass'n of Prosecuting Att'ys, to Susan L. Carlson, Clerk, Washington Supreme Court, at 1 (Jan. 4, 2017), available at <https://perma.cc/PT8H-TBD4>).

93. *Id.* at 248–49 (“[U]nlike the proposed ACLU rule, the proposed WAPA rule did not fundamentally change existing law.”); see also Letter from Rich Weyrich, *supra* note 92, at 3–4.

94. Sloan, *supra* note 16, at 249–50.

95. Baker, *supra* note 18, at 6–7; *Proposed New GR 37—Jury Selection Workgroup Final Report*, WASH. CT. JURY SELECTION WORKGROUP 2 (2018), <https://perma.cc/M4V3-D6QW> [hereinafter JURY SELECTION WORKGROUP].

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group utilized the drafts to create two main proposals, it intended to integrate them and if that should fail, to clarify the group's stance and concerns to help the court determine the best course of action.⁹⁶ The group reached a number of areas of consensus, including mentioning the historical exclusion of racial and ethnic minorities in the rule's language and addressing implicit bias.⁹⁷ Two important points of contention arose regarding whether gender and sexual orientation should be included in the rule proposal and whether to keep the list of presumptively invalid reasons.⁹⁸ The workgroup submitted a rule proposal with alternative options for the main areas of disagreement.⁹⁹

The group urged further work to expand the rule to gender and sexual orientation, create training opportunities for judges, and publish a new "best practices" list for jury selection.¹⁰⁰ Ultimately, the workgroup was unable to add explicit provisions protecting gender and sexual orientation due to time constraints, but recommended that the courts continue working toward that goal.¹⁰¹ Overall, the main strength of the group's report was the effort taken to include viewpoints from the many stakeholders in the drafting process. This painstaking information-gathering paid off when the court adopted the rule unanimously in April of 2018, five years after *Saintcalle*.¹⁰²

IV. WASHINGTON'S NEW *Batson* Analysis under GR 37

A. Key Features of GR 37

The Washington Supreme Court ultimately chose to adopt the ACLU proposal, which offered the highest degree of protection against discrimination.¹⁰³ GR 37 seeks to combat purposeful discrimination and implicit bias in the jury selection process through three main changes to the *Batson* analysis. First, it removes step one, which required the defendant to raise an inference of purposeful discrimination.¹⁰⁴ Next, it provides a list of presumptively invalid reasons for exercising peremptory strikes that have historically arisen as a pretext for targeting racial minorities.¹⁰⁵ Finally, it removes the purposeful discrimination requirement and instead asks

96. JURY SELECTION WORKGROUP, *supra* note 95, at 1.

97. *Id.* at 3.

98. *Id.* at 5–6.

99. *Id.* at 2.

100. *Id.* at 7–8.

101. *Id.* at 8.

102. Sloan, *supra* note 16, at 253.

103. Baker, *supra* note 18, at 7.

104. WASH. GEN. R. 37(c); *cf.* *Batson v. Kentucky*, 476 U.S. 79, 93–94 (1986) (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)).

105. WASH. GEN. R. 37(h), (i); Simon, *supra* note 2, at 231–32.

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whether an objective observer “could view race or ethnicity as a factor in the use of the peremptory challenge.”¹⁰⁶ These alterations lower the barriers necessary for proving a *Batson* challenge and extend constitutional equal protection to the effects of unconscious bias.

Step one of the *Batson* analysis, originally intended to be a low bar for a prima facie case of discrimination,¹⁰⁷ can be a difficult hurdle to overcome.¹⁰⁸ Raising an inference of discrimination is particularly difficult in states like Montana where the venire may only have one member who belongs to a racial minority, as in *Wellknown*.¹⁰⁹ In these cases, defendants cannot show a pattern of strikes against particular racial or ethnic groups. The Washington Supreme Court had already attempted to remedy this by ruling that striking a venire member who is the only member of a cognizable protected class satisfies step one.¹¹⁰

However, this decision did not overcome step one’s other shortcomings, which arise from implicit bias when the venire contains more than one minority member. If the prosecutor is not aware that her biases have affected her decision, sufficient evidence to raise an inference of discrimination may not exist at this stage.¹¹¹ Skipping the first step offers an additional practical benefit: if the trial court denies the *Batson* challenge at step one, the record will not show the challenge’s complete context, and the appellate court may have to remand for further proceedings.¹¹² Eliminating step one of the *Batson* analysis combats implicit bias and reflects the policy behind the rule: race as a factor in jury selection is an irrefutably common practice.¹¹³

If the trial judge or the opposing party raises an objection to the use of a peremptory strike, the striking party must explain why they exercised the

106. WASH. GEN. R. 37(e).

107. *Batson*, 476 U.S. at 96–97 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (“The defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’”)); cf. *State v. Rhone*, 229 P.3d 752, 756 (Wash. 2010) (“Cases from other states support this holding, attesting to the imperative to require ‘something more’ than a peremptory challenge against a member of a racially cognizable group.”).

108. See, e.g., *Rhone*, 229 P.3d at 757 (describing examples of circumstances showing “something more” than membership in a cognizable group, most of which require more than one minority venireman to prove).

109. *State v. Wellknown*, 510 P.3d 84, 92 (Mont. 2022); *State v. Hicks*, 181 P.3d 831, 839 (Wash. 2008) (holding that striking the only member of a racial minority in the venire is sufficient to establish a prima facie case of discrimination).

110. *City of Seattle v. Erickson*, 398 P.3d 1124, 1131–32 (Wash. 2017).

111. Page, *supra* note 18, at 231.

112. Timothy J. Conklin, *The End of Purposeful Discrimination: The Shift to an Objective Batson Standard*, 63 B.C. L. REV. 1037, 1059–60 (2022).

113. Matt Haven, *Reaching Batson’s Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard*, 11 U. MD. L.J. RACE RELIGION GENDER & CLASS 97, 114–15 (2011).

challenge, which cannot include one of the presumptively invalid reasons.¹¹⁴ These reasons account for their historic association with discriminatory strikes and include contact with the justice system or mistrust of law enforcement, living in high-crime neighborhoods, or speaking English as a second language.¹¹⁵ The demeanor-based justification section discusses the history of using snap judgments of jurors' behavior or appearance as a tool of improper discrimination.¹¹⁶ The use of these justifications requires corroboration by the judge or opposing counsel in order to avoid the presumption of invalidity.¹¹⁷ Presumptively invalid reasons address the unconscious stereotyping motivating the strike even when the attorney genuinely believes their own explanation.¹¹⁸ The list may also force the prosecutor to examine her own internal motivations for striking a member of the venire before actually doing so.

Finally, the rule removes the purposeful discrimination requirement and requires sustaining the objection when “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.”¹¹⁹ The rule further defines an objective observer as someone “aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”¹²⁰ Shifting to an objective standard informed by an understanding of implicit bias and historical patterns of exclusion addresses the trouble that *Batson* failed to remedy. Framing the concept of bias in this way also decreases the awkwardness of accusing a colleague of intentional discrimination. If litigators no longer need to reproach their colleagues for lying or acting out a racist agenda, attorneys might bring *Batson* challenges more frequently, and judges might be more inclined to hear them.¹²¹

B. Measuring Success: Limited but Encouraging Indications of Improvement

As a relatively new addition to the Washington court rules, GR 37 has little data to support its success or failure at combating discrimination. However, anecdotal evidence shows positive changes in jury selection, and

114. WASH. GEN. R. 37(d), (h).

115. *Id.* 37(h); Simon, *supra* note 2, at 231–32.

116. WASH. GEN. R. 37(h).

117. *Id.* 37(i).

118. Page, *supra* note 18, at 235.

119. WASH. GEN. R. 37(e).

120. *Id.* 37(f).

121. *State v. Saintcalle*, 309 P.3d 326, 338–39 (Wash. 2013) (“A requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a *Batson* challenge. . . . A strict ‘purposeful discrimination’ requirement thus blunts *Batson*’s effectiveness and blinds its analysis to unconscious racism.”).

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several court cases recognized the validity of objections to peremptory challenges under the rule.

GR 37 has inspired other states to take action to address implicit bias. Since the rule's implementation in 2018, supreme courts in seven states have discussed *Batson's* failure to address unconscious forms of discrimination.¹²² Additionally, California, Connecticut, and New Jersey have formed their own workgroups to examine “the role of implicit bias in jury selection and to recommend solutions to their states’ *Batson* framework.”¹²³ Arizona has gone so far as to eliminate peremptory challenges altogether, again by court rule.¹²⁴ GR 37 has undoubtedly inspired other states to take action in response to the harm implicit bias inflicts on the rights of defendants, jurors, and the community.

Anecdotal evidence from interviews indicates attorneys in Washington are adapting to the new rule¹²⁵ and exercising peremptory challenges less frequently.¹²⁶ However, others report that attorneys know about GR 37 but do not utilize it often.¹²⁷ Overall, the available experiential evidence suggests that juries are more diverse and that attorneys “appear to be more aware of their implicit biases and more careful in exercising their peremptory challenges.”¹²⁸

Recent cases involving GR 37 provide at least some conclusive evidence: Washington courts have been ruling against discriminatory peremptory challenges. In *State v. Lahman*,¹²⁹ a Washington appellate court held that the State’s proffered explanation for the strike (a lack of life experience) was “insufficient to dispel the concern that ‘an objective observer *could* view race or ethnicity as *a* factor’” in the juror’s exclusion.¹³⁰ The appellate court noted the rule “teaches that peremptory strikes exercised against prospective jurors who appear to be members of racial or ethnic minority groups must be treated with skepticism and considerable caution.”¹³¹

However, the rule has its limitations. In *State v. Brown*,¹³² a Washington appellate court held that the defendant’s trial counsel was not ineffective for failing to argue that GR 37 and the *State v. Jefferson* decision—

122. Conklin, *supra* note 112, at 1057.

123. *Id.* at 1058.

124. Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021), <https://perma.cc/XQS8-87MD>.

125. Conklin, *supra* note 112, at 1080.

126. *Id.* at 1084.

127. Simon, *supra* note 2, at 244.

128. Baker, *supra* note 18, at 7.

129. 488 P.3d 881 (Wash. Ct. App. 2021).

130. *Id.* at 886 (quoting WASH. GEN. R. 37(e) (emphasis added)).

131. *Id.*

132. 506 P.3d 1258 (Wash. Ct. App. 2022), *rev. denied*, 514 P.3d 641 (Wash. 2022).

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implementing the new *Batson* challenge steps under the court’s constitutional authority—applied to gender-based discriminatory strikes.¹³³ Including gender bias under these standards was a novel legal argument because the court rule and *Jefferson* holding arose specifically from a history of racial and ethnic discrimination.¹³⁴ If the rule had intended to include gender, the court argued, “gender would likely have been included in GR 37’s inaugural version.”¹³⁵ The court ruled that GR 37 and *Jefferson* did not apply to objections based on gender bias because those authorities “are based on a demonstrated history of *Batson*’s inability to move the needle on racial and ethnic bias in jury selection.”¹³⁶ Instead, the court applied the *Batson* purposeful discrimination standard, and the State’s demeanor-based explanations succeeded in eliminating six women from the venire, leaving only one remaining peremptory unused.¹³⁷

Another recent Washington case, *State v. Listoe*,¹³⁸ demonstrates that even with the list of presumptively invalid reasons, trial judges may still fail to apply the new standard without education about its implications.¹³⁹ The trial court allowed the prosecutor to strike the only Black venire member even after recognizing that “race is one of the issues that needs to be addressed by the Court.”¹⁴⁰ Instead of following the new GR 37 standard, the trial court engaged in a *Batson*-style analysis, weighing the credibility of the prosecutor’s race-neutral explanation:

But his comments concerning his inability to follow the law in the example of the hypothetical that was given by [the State] does not — could lead an objective observer to view that that would be the reason why the use of the peremptory was, rather than race or ethnicity, so I’m going to allow for the peremptory challenge.¹⁴¹

Because the prospective juror expressed mistrust of the justice system and was the only member of a cognizable group, the appellate court determined that race could be viewed as a factor, and therefore, the State improperly excluded the juror.¹⁴²

Although time and data analysis will tell, the early days of GR 37 reveal positive evidence that the rule combats racial discrimination in jury selection. With further examination of the rule’s limitations as well as educational opportunities to expand the rule’s application, Washington will ad-

133. *Brown*, 506 P.3d at 1267.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1267–68.

138. 475 P.3d 534 (Wash. Ct. App. 2020).

139. *Id.* at 539–40.

140. *Id.* at 539.

141. *Id.*

142. *Id.* at 542.

vance the aims of equal protection and continue to combat unfairness in the criminal justice system.

V. CONCLUSIONS: APPLYING WASHINGTON'S PROCESS IN MONTANA

Montana can learn from Washington's experiences, should the state implement its own court rule. Providing educational and training opportunities for judges and lawyers would help the rule take effect quickly and achieve early consistency among trial court decisions. Increasing the varieties of bias covered by the rule and tailoring the presumptively invalid reasons to Montana's own history of discriminatory practices will help the rule accomplish its policy aims.

Educating judges and attorneys, a step strongly recommended by Washington's workgroup, would enable wider and more effective usage of the rule.¹⁴³ Furthermore, this step is key to combating judicial defiance and the justice system's resistance to change. *Listoe* proves the value of the presumptively invalid reasons. The presence of a presumptively invalid reason not only requires the attorney to offer a different one but provides *positive evidence* that the strike relied on implicit bias in the court's review of step three.¹⁴⁴ The presumptively invalid reasons drive the court's analysis of the peremptory challenge's potential bias. Accordingly, Montana should include all the reasons listed in GR 37 and consider enumerating additional reasons specifically designed to address bias against Native Americans and any other groups especially at risk of discrimination. Here, the workgroup becomes especially important in determining the state's unique needs and balancing them against the realities that face rural courts with limited jury venires. Without community input, the rule may fail to account for a critical local need.

Unlike Washington, where the jury trial right provides state constitutional support for *Batson* reform,¹⁴⁵ Montana can act under the greater protection provided by its constitution's Equal Protection and Dignity Clauses.¹⁴⁶ Increasing the rule's reach to include gender, sexual orientation, disabilities, low socioeconomic status, and other groups will not only help combat discriminatory practices to a greater degree but also help the rule

143. Simon, *supra* note 2, at 244; JURY SELECTION WORKGROUP, *supra* note 95, at 8.

144. *Listoe*, 475 P.3d at 541–42.

145. WASH. CONST. art. I, § 21; State v. Saintcalle, 309 P.3d 326, 337 (Wash. 2013).

146. State v. Wellknown, 510 P.3d 84, 97–98 (Mont. 2022) (Baker, J., concurring) (“Montana’s Equal Protection and Dignity Clauses provide bases for strengthening Montana’s *Batson* framework”; and “[g]iven our recognition of the greater protections Montanans have under the state constitution’s Dignity and Equal Protection Clauses, I would suggest that the Montana Constitution affords greater protection against discriminatory peremptory challenges than what the traditional *Batson* analysis offers.”).

avoid serious equal protection concerns. Though Washington’s rule aimed to remediate a well-documented history of racial discrimination in jury selection, it creates an entirely different constitutional analysis for only one protected class. The outcome in *Brown*, where gender-based discrimination was specifically excluded from the protection of GR 37, illustrates the need for inclusiveness from the beginning of the rule implementation process.

Montana recognizes that when anyone is excluded from a jury for a discriminatory reason, “the promise of equality under the law and the integrity of our judicial system are compromised.”¹⁴⁷ Washington’s GR 37 began the difficult process of combatting implicit biases that undermine citizens’ access to justice and equal rights. Montana can capitalize on Washington’s successes, learn from its missteps, and draw on our own community initiatives to create a new court rule. We must answer the call and “revisit Montana’s approach to equal protection in the jury selection context, consistent with the Montana Constitution and with society’s improved understanding of implicit bias.”¹⁴⁸

147. *State v. Miller*, 510 P.3d 17, 52 (Mont. 2022) (McKinnon, J., concurring).

148. *Wellknown*, 510 P.3d at 97.