RC ID # 2021-015 a

STATE OF CONNECTICUT
SUPREME COURT

CHAMBERS OF
RICHARD A. ROBINSON
CHIEF JUSTICE

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July 26, 2021

Honorable Andrew J. McDonald
Associate Justice Connecticut Supreme Court
Chair, Rules Committee of the Superior Court

Rules Committee of the Superior Court

Dear Justice McDonald and Judges:

As you are all aware, in *State* v. *Holmes*, 334 Conn. 202 (2019) we announced the creation of a Jury Selection Task Force to examine and to propose necessary solutions towards eradicating racial and ethnic bias from the jury selection process in Connecticut. That Task Force consisted of a diverse array of stakeholders which generated robust examination and discussion of the issues involved.

The Final Report of the Task Force contains recommendations for systemic jury reform in Connecticut. One such recommendation, which I submit to you today, is to adopt a general rule on jury selection intended to significantly improve the quality of justice in our state by eliminating the unfair exclusion of potential jurors through the use of peremptory challenges based on race or ethnicity.

In furtherance of this purpose, I submit to you the attached rule recommended by the Task Force and I implore you to consider and recommend the adoption of this rule on an expedited basis pursuant to the procedures set out in Practice Book Section 1-9 (c).

Your efforts in considering and recommending the expeditious adoption of this rule and your commitment to eradicate racial and ethnic bias from our jury system will serve to ensure the integrity of a particular trial and will advance the actual and perceived fairness of the judicial system as a whole.

Very truly yours,

Richard A. Robinson
Chief Justice

c: Hon. Patrick L. Carroll III
Hon. Elizabeth A. Bozzuto
Tais C. Ericson
Melissa A. Farley
Joseph J. Del Ciampo

New General Rule-Jury Selection

Objection to the Use of a Peremptory Challenge

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

(b) **Objection**. A party may object to the use of a peremptory challenge to raise a claim 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 prospective juror.

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

(d) **Determination.** The court shall then evaluate from the perspective of an objective observer, as defined in subsection (e) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated. If the court determines that the use of the challenge does not raise such an appearance, then the challenge shall be permitted and the prospective juror shall be excused. The court need not find purposeful discrimination to disallow the peremptory challenge. The court must explain its ruling on the record. A party whose peremptory challenge has been disallowed pursuant to this rule shall not be prohibited from attempting to challenge peremptorily the prospective juror for any other reason, or from conducting further *voir dire* of the prospective juror.

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

(f) **Circumstances considered.** In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case; (vi) whether issues concerning race or ethnicity play a part in the facts of the case to be tried; (vii) whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(g) **Reasons Presumptively Invalid**. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Connecticut or maybe influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge:

(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; (vii) not being a native English speaker; and (viii) having been a victim of a crime. The presumptive invalidity of any such reason may be overcome as to the use of a peremptory challenge on a prospective juror if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.

(h) **Reliance on Conduct**. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A party who intends to exercise a peremptory challenge for reasons relating to those listed above in subsection (g) shall, as soon as practicable, notify the court and the other party in order to determine whether such conduct was observed by the court or that party. If the alleged conduct is not corroborated by observations of the court or the objecting party, then a presumption of invalidity shall apply but may be overcome as set forth in subsection (g).

(j) **Review Process.** The chief justice shall appoint an individual or individuals to monitor issues relating to this rule.

STATE OF CONNECTICUT *v.* EVAN JARON HOLMES (SC 20048)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

Convicted, after a jury trial, of the crimes of felony murder, home invasion, conspiracy to commit home invasion and criminal possession of a firearm, the defendant appealed to the Appellate Court, claiming that the trial court had improperly overruled his objection to the prosecutor's use of a peremptory challenge to excuse a prospective, African-American juror, W. During voir dire, the prosecutor questioned W, who previously had disclosed that he was employed as a social worker and performed volunteer work directly with prison inmates, regarding his interactions with the police and his opinions of the criminal justice system. In response, W indicated that he sometimes feared being stopped by the police while driving, he had family members who had been convicted of crimes and incarcerated, and he believed that certain groups of individuals are disproportionately convicted of crimes and receive disproportionate sentences. W further expressed that his concerns were largely informed by his life experiences as an African-American. In objecting to the prosecutor's peremptory challenge, defense counsel argued that it was in violation of the United States Supreme Court's decision in *Batson* v. *Kentucky* (476 U.S. 79), which prohibits a party from challenging potential jurors solely on account of their race. The prosecutor explained that the basis for the peremptory challenge was W's stated distrust of law enforcement and his concern about the fairness of the criminal justice system, as borne out by his life experiences. The prosecutor also noted that the peremptory challenge was not based on W's race but, rather, related only to the particular viewpoints that W had expressed. After the trial court overruled the defendant's *Batson* challenge, it excused W from the venire. The Appellate Court affirmed the trial court's judgment and, relying on *State* v. *King* (249 Conn. 645), concluded that the prosecutor's explanation of W's distrust of the police

and concern regarding the fairness of the criminal justice system constituted a nondiscriminatory, race neutral reason for exercising the peremptory challenge. In so doing, the Appellate Court rejected the defendant's argument that the prosecutor's stated explanation was not race neutral because it had a disproportionate impact on African-Americans. The Appellate Court further concluded that there was no evidence that the prosecutor's explanation was a pretext for intentional discrimination. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court incorrectly concluded that the trial court had properly denied his *Batson* challenge and that this court should overrule *King* and its progeny and hold that distrust of the police and concern regarding the fairness of the criminal justice are not race neutral reasons for exercising a peremptory challenge in light of the disparate impact on prospective jurors of minority races. *Held*:

1. The Appellate Court properly upheld the trial court's rejection of the defendant's *Batson* challenge, and this court declined the defendant's request to overrule *King* and its progeny establishing that distrust of the police and concern regarding the fairness of the criminal justice are race neutral reasons for exercising a peremptory challenge: this court's holdings in *King* and its progeny remain consistent with federal constitutional law, which was the sole basis for the defendant's claim on appeal, and, pursuant to federal constitutional law, the distrust of law enforcement or the criminal justice system is a race neutral reason for exercising a peremptory challenge; in the present case, the prosecutor's proffered explanation for striking W from the jury was facially race neutral as a matter of law, even if it had a disparate impact on minority jurors, who are more likely to have negative interactions with the police or concerns regarding the fairness of the criminal justice system, because it was based not on W's race but, rather, on the viewpoints that he espoused, which may be shared by whites and minorities alike, and, because the defendant did not challenge on appeal the Appellate Court's conclusion that the trial court correctly determined that the prosecutor's proffered explanation for the peremptory strike was not a pretext for purposeful discrimination, the Appellate Court properly affirmed the judgment of conviction.
2. In light of systemic concerns identified by this court regarding the failure of *Batson* to address the effects of implicit bias and the disparate impact that certain race neutral explanations for peremptory challenges have on minority jurors, this court announced that it would convene a Jury Selection Task Force, appointed by the Chief Justice and composed of relevant stakeholders in the criminal justice and civil litigation communities, to study the issue of racial discrimination in the selection of juries, to consider measures intended to promote the selection of diverse jury panels, and to propose necessary changes, to be implemented by court rule or legislation, to the jury selection process in Connecticut.

(*Two justices concurring separately in one opinion*)

Argued January 18—officially released December 24, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of New London, where the first five counts were tried to the jury before *Jongbloed, J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm, felony murder, home invasion, conspiracy to commit home invasion, and burglary in the first degree; thereafter, the charge of criminal possession of a firearm was tried to the court; judgment of guilty; subsequently, the court vacated the verdict as to the lesser included offense of manslaughter in the first degree with a firearm and burglary in the first degree, and rendered judgment of guilty of felony murder, home invasion, conspiracy to commit home invasion, and criminal possession of a firearm, from which the defendant appealed to this court; thereafter, the appeal was transferred to the Appellate Court, *Prescott* and *Beach, Js.*, with *Lavine, J.*, concurring, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Alan Jay Black, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Paul J. Narducci*, senior assistant state's attorney, and, on the brief, *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. From its inception, the United States Supreme Court's landmark decision in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d

69 (1986), has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors.[1] Consistent with these long-standing criticisms of *Batson*, the defendant, Evan Jaron Holmes, asks us in this certified appeal[2] to overrule the line of cases in which this court held that a prospective juror's negative views about the police and the fairness of the criminal justice system constitute a race neutral reason for the use of a peremptory challenge to strike that juror. See, e.g., *State* v. *King*, 249 Conn. 645, 664–67, 735 A.2d 267 (1999). We conclude that the challenged line of cases, on which the Appellate Court relied in upholding the defendant's conviction of felony murder on the basis of its rejection of his *Batson* claim arising from the prosecutor's use of a peremptory challenge during jury selection; see *State* v. *Holmes*, 176 Conn. App. 156, 175–77, 169 A.3d 264 (2017); remains consistent with the federal constitutional case law that provides the sole basis for the *Batson* claim. Accordingly, we affirm

[1] See, e.g., *Batson* v. *Kentucky*, supra, 476 U.S. 106 (Marshall, J., concurring); *State* v. *Veal*, 930 N.W.2d 319, 359–61 (Iowa 2019) (Appel, J., concurring in part and dissenting in part); *State* v. *Saintcalle*, 178 Wn. 2d 34, 46–49, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wn. 2d 721, 398 P.3d 1124 [2017]), cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013); J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1077–78 (2011); N. Marder, "*Foster* v. *Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1182–83 (2017); A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 178–79 and n.102 (2005); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1887–89 (2015).

[2] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court err in determining that the trial court properly denied the defendant's challenge under *Batson* v. *Kentucky*, [supra, 476 U.S. 96–98]?" *State* v. *Holmes*, 327 Conn. 984, 175 A.3d 561 (2017).

the judgment of the Appellate Court in this case but refer the systemic concerns about *Batson*'s failure to address the effects of implicit bias and disparate impact to a Jury Selection Task Force, appointed by the Chief Justice, to consider measures intended to promote the selection of diverse jury panels in our state's courthouses.

The record and the Appellate Court's opinion reveal the following relevant facts and procedural history. In connection with a shooting at an apartment in New London,[3] the state charged the defendant with numerous offenses, including felony murder in violation of General Statutes § 53a-54c, and the defendant elected a jury trial.[4] "On the first day of jury selection, defense counsel noted that the entire venire panel appeared to be 'white Caucasian' and that every prospective juror who had completed a jury questionnaire had indicated that they were either white or Caucasian, or had not indicated a race or ethnicity.[5]

[3] For a detailed recitation of the underlying facts of this case, see *State* v. *Holmes*, supra, 176 Conn. App. 159–62.

[4] Specifically, the state charged the defendant with murder in violation of General Statutes § 53a-54a (a), felony murder in violation of § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (2), conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 (a) and 53a-100aa, burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217.

By agreement of the parties, the charge of criminal possession of a firearm was severed from the remaining counts and tried to the court. The parties stipulated that the defendant had a prior felony conviction, and the trial court subsequently found the defendant guilty of that offense.

[5] Defense counsel observed for the record that the defendant "is of mixed race" and that, on the basis of his observation of the questionnaires and the jury panel on the first day, "[there are] no Hispanic surnames, no African-Americans, no Asians, [there are] no Indians or [Middle] Easterners, [there are] no Pacific Islanders. It's 100 percent, from my view, [a] white Caucasian jury panel that was brought in." He indicated that he might put on the record that a prospective juror who had not answered the racial identification question on the questionnaire appeared to be white or Caucasian in the event that person was excused from service.

"On the second day of jury selection, only one prospective juror had indicated on the questionnaire that he or she was African-American. During the voir dire examination of one venireperson, W.T.,[6] he stated to defense counsel that he was African-American. W.T. indicated that he had obtained a master's degree in social work from the University of Connecticut and currently was employed by the state . . . as a supervisory social worker with the Department of Children and Families.

"He also disclosed that he performed volunteer work for the Department of Correction and had worked directly with inmates. When asked by defense counsel whether that work might affect him as a juror, W.T. responded: 'Because I work with, like I say, inmates, and also my work, I do—I mean, you see a lot of different things and you see a lot of sad situations. I'm sure as a professional and because I work with people who've been through a lot of stuff, you know, I'm sure I have an understanding of what they're doing. And also, just—just in the criminal justice system in general, I know how sometimes people are not, you know, given a fair trial or they [maybe] disproportionately have to go to jail and different things of that nature. So, part of my whole experience is as an African-American, as an American and also studying these situations, I know that there's a lot of issues [going] on in various systems. The criminal justice system, the educational system and various systems, but people are not fairly treated, so I know that much. But I don't use that, you know, I can—I could make a professional—and I think keep my composure and do my job just like—as a professional, as I work—even as I do volunteer work, but you have to know the reality in life as well, though.' In

[6] "In accordance with our usual practice, we identify jurors by initial in order to protect their privacy interests." *State* v. *Berrios*, 320 Conn. 265, 268 n.3, 129 A.3d 696 (2016).

response to a subsequent question by defense counsel regarding whether, in light of his life experiences, he could be fair to both sides in the case, W.T. stated that he could.

"During the state's voir dire examination of W.T., the following exchange occurred:

" '[The Prosecutor]: Now, you've obviously had a little more dealing with the court systems than most—most people that we see in through here. Have you formulated any opinions about the criminal justice system based on your experiences? Is it too lenient, too stringent, it works, it doesn't work; any feeling about that?

" '[W.T.]: And like I said, probably already share[d] too much stuff about—that talk about in terms of I have seen people, have had family members [who] went to prison before.

" '[The Prosecutor]: Right.

" '[W.T.]: And I just think—I think that's why I became a social worker, because I wanted to make a difference, and that's why I have been doing mentoring programs—

" '[The Prosecutor]: Yep.

" '[W.T.]: —try[ing] to help young people so they won't get into trouble. So, I meant the system, all various systems, there's a lot of discrimination [that] still goes out. Even today, ladies are still not getting equal pay. So, it's a lot. We've come a long way, but we have a long way to go.

" '[The Prosecutor]: Right.

" '[W.T.]: But I think I can make—I could keep the facts and be able to look at the facts of the case and judge by the facts.

" '[The Prosecutor]: . . . We need to know how you're feeling, so we can make the appropriate assess-

ment and you can make the appropriate assessment. . . . I think that it's not a perfect system, but it's improving every day, and [there are] not as many systems that I can think of that are, any—come anywhere close. One of the concerns that people may have is, jurors who are in the—using their time as a juror to try to fix the system. You indicated, and I think you said, that you would listen to the evidence and decide it on the evidence and you wouldn't let any concerns that you had filter in.

" '[W.T.]: That's correct.

" '[The Prosecutor]: Fair to say?

" '[W.T.]: That's correct.

" '[The Prosecutor]: Okay. And so . . . you would sit and listen to what all the evidence is and make a decision based on the evidence?

" '[W.T.]: That's correct. . . .

" '[The Prosecutor]: Okay. With respect to that, as much as you know about those situations, were you satisfied with the way the police reacted to your family . . . or friend being the victim of a crime?

" '[W.T.]: Sometimes and sometimes not.

" '[The Prosecutor]: Okay.

" '[W.T.]: So-so.

" '[The Prosecutor]: Fair to say that it's an individual situation and that the police have been—have acted in a way that was satisfactory toward your family members or friends, and in other situations they weren't satisfied with what the police did?

" '[W.T.]: That's correct.

" '[The Prosecutor]: Okay. Had you had any interactions with the police in any respect in which you devel-

oped an—either a strong, favorable impression or an unfavorable impression about the police and the way they treated you in any situation, speeding tickets, calling up to complain about [a] noisy neighbor, something with work?

" '[W.T.]: I'm, like—just growing up in this society, I fear, you know, I fear [for] my life. I got a new car, I feared that, you know, I might get stopped, you know, for being black, you know. So, you know, that's concerning and sometimes I get afraid—even me, you know, I—when I see the police in back of me, I wonder, you know, if I'm going to be stopped.

" '[The Prosecutor]: Okay. Now with—with respect to that, there will probably be police officers who will be testifying here, and the judge will tell you that [you] can't give a police officer more credibility merely because [he or she is] a police officer. Conversely, though, they don't get less credibility merely [because] they are police officers. They are to be treated like anybody else. Would you have any difficulty following the judge's instructions concerning that?

" '[W.T.]: No, I wouldn't.

" '[The Prosecutor]: Okay. And I can appreciate what you're saying. Obviously, I haven't been in that—in your shoes. I haven't been in your situation, nor do we ask the jury to put themselves in the shoes of either the police or a particular defendant. We can't ask you to do that. But having now life's experience, is that something that you think you can put aside and decide the evidence based on everything that's presented to you, or is there some concern that you might have that you might not be able to do that?

" '[W.T.]: No, I will be able to because another thing, too, is, I know good police officers who are—who are

good people, nice people, mentors who work in the community. So—so, yes, I'd be able to.

" '[The Prosecutor]: Okay. Okay. And have you had . . . positive experiences with the police as well?

" '[W.T.]: Yes.

" '[The Prosecutor]: Okay. So, I guess like anybody else, there are bad lawyers and there are good lawyers. There are bad social workers, there are good social workers. . . . But what I'm driving at is, we make an individual assessment based on what we hear and what we see and what we listen to. And that is what we're going to ask you to do if you're a juror.

" '[W.T.]: Yes.

" '[The Prosecutor]: We want to make sure you don't carry in any preconceived notions one way or the other.

" '[W.T.]: Yes.

" '[The Prosecutor]: No problems with that?

" '[W.T.]: No problem.

" '[The Prosecutor]: Okay. We can count on your word on that, then?

" '[W.T.]: That's right.

" '[The Prosecutor]: Okay. I asked about being the victim of a crime and your family member. The flip side to that, have you, any member of your family or any close personal friends ever been either accused or ever convicted of crimes?

" '[W.T.]: Yes. I have family members who've been in—who served time in jail.

" '[The Prosecutor]: Okay. This obviously is a crime of violence. Any—any family members who have been convicted of crimes of violence?

" '[W.T.]: No. . . .

" '[The Prosecutor]: You mentioned that your family members have—have served time. With respect to that, were—did you develop any feelings about the way the police had treated your family members in those situations?

" '[W.T.]: Well, I think the—like I told you earlier, my life experiences living in this world—

" '[The Prosecutor]: Right.

" '[W.T.]: —you see that things are not fair. And then you—I mean, you—you experience things, you know, and you see things happen. And some things are not fair, some things not—not all people are the same, all police are not bad or, like, you know, just like you said everybody, but when you see firsthand your own family members, then you experience something a little bit different.

" '[The Prosecutor]: Of course.

" '[W.T.]: Other people who, you know, so—

" '[The Prosecutor]: Of course. And I guess it's kind of tough, because I—you know, I could ask you questions all day long and I'm not going to get to know you as well [as] you know yourself. But there's a difference, I think, between I'm upset that my family member had to go through this versus I'm upset that the police treated my family member in such a way. Do you understand the distinction I'm trying to make, that you're not satisfied that your family member ended up in prison versus I'm not satisfied that they were treated properly by either the court system or by the police. There's a difference, and I'm not sure I'm explaining it very well.

" '[W.T.]: Are you saying more, like, for instance, like, someone may have gone to jail because they did something wrong—

" '[The Prosecutor]: Right.

" '[W.T.]: —and they had to pay the consequences.

" '[The Prosecutor]: Right. And you know, like that, but—

" '[W.T.]: So—exactly. You have to—even if it's your family member or not, you did something wrong, you need to pay the consequences.

" '[The Prosecutor]: Right.

" '[W.T.]: You need to pay the consequences for whatever you've done wrong, you know.

" '[The Prosecutor]: Right.'

"Following the voir dire examination, defense counsel stated that W.T. was acceptable to the defendant. The [prosecutor], however, exercised a peremptory challenge and asked that W.T. be excused." (Footnotes added.) *State* v. *Holmes*, supra, 176 Conn. App. 162–69.

"[Defense counsel] immediately raised a *Batson* objection to the [prosecutor's] use of a peremptory challenge, citing the fact that W.T. was the first African-American venireperson to be examined and that, in essence, W.T. had assured the court and the [prosecutor] that, regardless of his views about the criminal justice system or the police, he could be a fair and impartial juror." (Footnote omitted.) Id., 169. In his argument, defense counsel compared W.T.'s assurances that he could be fair with the voir dire of another member of the venire, a young white man from New London, who had "said that he couldn't be fair because of incidents with . . . police officers," observing that, "if he had been black or white, the kid had to go. You know, [there are] clearly some people [who] can't be jurors. I don't see why [W.T.] shouldn't be seated."

"The [prosecutor] then responded: 'I understand exactly where [defense counsel] is coming from, would agree with him for the most part with the exception of, I do believe that there are race neutral reasons for this.

It was somewhat of a struggle for me, but I looked at some of the answers. And even though he responded favorably after further questioning, the concerns that I did have [were] the—the comments that—about [a] disproportionate amount of people being sent to jail, disproportionate amount of jail time, the fact that he's had family members who have been convicted and have served time, the fact that he works to rehabilitate people. And none of this is per se bad, but I think in the context of this particular case, it's important, it's race neutral. If we had a Caucasian who was in the same situation, the exercising of a peremptory challenge would be the same, I think.

" 'Additionally, the fact that he did mention . . . his concern about and his life's experience about driving and seeing a police officer behind him and his concern about police officers. Yes, he said that there are other police officers who are good and people can be good, but there is that life's experience that I would submit would make it difficult for him to be fair and impartial in this particular—in this particular case.

" 'Again, I understand exactly what [defense counsel] is saying. I believe that they are race neutral reasons, and I was exercising the peremptory based on those race neutral reasons.'

"The court then asked for argument . . . and defense counsel gave the following response: 'With respect to being, as an African-American male, fearful when the police are behind you, I mean, that's just, you know, something that [the prosecutor] and I never have had to deal with . . . but if this gentleman sitting next [to] me is entitled to a jury of his peers, we've picked three white people already. We've accepted them. I mean, isn't he—and that's a common complaint by African-American people, that they feel that they get pulled over too often, and there are probably studies that say it's disproportionate. So, that particular reason does seem to me to be race based . . . . It was [W.T.'s] view

and, I mean, again, that's—he's entitled to a jury of his peers, and we get nobody who feels that way or has those thoughts is not really his peers because that's probably the experience or experiences [that] a lot of African-Americans go through.'

"The prosecutor, when asked if he wanted to argue further, stated: 'Only briefly, and maybe it's a matter of semantics. I think [*Batson*] is, oh, I see an African-American gentleman, I see an Asian-American, I see a Hispanic, I'm going to excuse them. If an African-American comes in with a distrust of the police and will not listen to a police officer and says he will not listen to a police officer, that isn't a challenge based on that person's race or ethnicity; it's a challenge based on that person's personal views.

" 'If a white—a Caucasian person came in and said, I don't like being followed by the cops because I [have seen] a number of cops punch friends of mine in the face, it's not because he is a Caucasian, it's because of life's experiences. And I think that's what I would be arguing, that the comments that were made were not because of his ethnicity or his race, but rather his—his expressed opinions. And I think it's a distinction, I think it's a legitimate distinction, but I defer to Your Honor with respect to this.' " Id., 169–71.

The trial court then denied the defendant's *Batson* challenge, comparing W.T. to the white juror who previously had been excused because of his negative comments about the police, and stating: "I do think that, in both situations, it's an issue with regard to negative contact with the police and that, I believe, has been found to be a legitimate race neutral reason for exercising [a] peremptory challenge. So, under all the circumstances, I am going to find that the [prosecutor] has given a race neutral reason for exercising a peremptory

challenge in this case, and I'm going to overrule the *Batson* challenge."[7]

"Throughout the remainder of the voir dire process, the [prosecutor] asked a uniform set of questions of all jurors. Furthermore, three African-American jurors were selected to serve in this case—two as regular jurors and one as an alternate juror." Id., 171.

After a ten day trial, the jury returned a verdict of guilty of, inter alia, felony murder. The trial court subsequently rendered a judgment of conviction and sentenced the defendant to a total effective sentence of seventy years imprisonment.[8]

The defendant appealed from the judgment of conviction to the Appellate Court, claiming that the trial court improperly overruled his *Batson* objection to the

[7] "Following the filing of this appeal, the defendant filed with [the Appellate Court] a motion for articulation, which was referred to the trial court pursuant to Practice Book § 66-5. The trial court granted the motion and in a memorandum concluded that all of the reasons set forth by the [prosecutor] in exercising [the] peremptory challenge were race neutral." *State* v. *Holmes*, supra, 176 Conn. App. 171. Specifically, the trial court cited, inter alia, this court's decisions in *State* v. *King*, supra, 249 Conn. 664–67, *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999), and *State* v. *Smith*, 222 Conn. 1, 13–15, 608 A.2d 63 (1992), for the proposition that "negative contact with the police" is a "legitimate, race neutral reason for exercising a [peremptory] challenge." The trial court then determined that the defendant had not met his burden of persuading the court by a preponderance of the evidence that the explanations were pretextual or insufficient. The trial court also observed in its articulation that "the other reasons given by the [prosecutor] for exercising the peremptory challenge were also race neutral. Those reasons included the expressed view that the criminal justice system was not fair, the venireperson had family members who had been convicted and served time, and that he worked to rehabilitate people."

[8] Specifically, the defendant was found guilty on all of the counts tried to the jury and the count tried to the court; see footnote 4 of this opinion; except for murder, as the jury instead found the defendant guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a). In rendering its judgment of conviction, the trial court vacated the convictions of manslaughter and burglary in the first degree pursuant to *State* v. *Polanco*, 308 Conn. 242, 255, 61 A.3d 1084 (2013).

prosecutor's use of a peremptory challenge on W.T.[9] The Appellate Court relied on this court's decisions in *State* v. *Edwards*, 314 Conn. 465, 102 A.3d 52 (2014), and *State* v. *King*, supra, 249 Conn. 645, among other cases, and concluded that "[d]istrust of the police or concerns regarding the fairness of the criminal justice system are viewpoints that may be shared by whites and nonwhites alike. In other words, the prosecutor's questions regarding potential jurors' attitudes about the police and the criminal justice system are likely to divide jurors into two potential categories: (1) those who have generally positive views about the police and our criminal justice system, and (2) those who have generally negative views of the police or concerns regarding the criminal justice system." *State* v. *Holmes*, supra, 176 Conn. App. 175–76. The Appellate Court further observed that "the prosecutor . . . also did not refer to race in his explanation except as necessary to respond to the *Batson* challenge" and that Connecticut case law, including this court's decisions in *State* v. *King*, supra, 644–64, *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999), and *State* v. *Hinton*, 227 Conn. 301, 327, 630 A.2d 593 (1993), supported the proposition that "such explanations are facially neutral." *State* v. *Holmes*, supra, 176; see id., 180 (emphasizing that, as intermediate appellate court, it was bound by *King*).

The Appellate Court rejected the defendant's "disproportionate impact" argument, namely, that "resentment

[9] The Appellate Court rejected the defendant's other claims on appeal, namely, that (1) the trial court improperly admitted a tape-recorded statement of a witness pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), and (2) the state violated his right to remain silent under *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), "when it cross-examined him at trial about his failure to disclose to the police at the time of his arrest certain exculpatory information that he later testified to at trial." *State* v. *Holmes*, supra, 176 Conn. App. 185. These claims are not before us in this certified appeal.

of police and distrust of the criminal justice system are not racially neutral justifications for exercising a peremptory challenge because there is a much higher prevalence of such beliefs among African-Americans," as not legally cognizable under the second step of the *Batson* rubric, which requires only a facially valid explanation. Id., 177. The Appellate Court further concluded that there was no evidence that the prosecutor had used W.T.'s distrust of the criminal justice system as a pretext for intentional discrimination under *Batson*'s third step.[10] Id., 179; see id., 182 (emphasizing that prosecutor was not required to accept at "face value" W.T.'s assurances that, "despite his expressed concerns and fears, he believed that he could follow the court's instructions and act as an impartial juror"). Accord-

[10] The Appellate Court observed that the six factors articulated in *State* v. *Edwards*, supra, 314 Conn. 485–86, for determining whether the prosecutor had acted with discriminatory intent in using a peremptory challenge on W.T. all "support the [trial] court's conclusion that the [prosecutor] properly exercised [his] right to use a peremptory challenge with regard to W.T.

"First, the [prosecutor's] reasons for excluding W.T. were his stated distrust of [the] police and the criminal justice system, which clearly related to the trial of this case because it is a criminal proceeding in which police [officers] would provide significant evidence. Second, the [prosecutor] did not exercise [his] peremptory challenge without questioning W.T. but, rather, engaged in a detailed discussion with W.T. about the views he had expressed in response to defense counsel's questions. Third, the defendant concedes, and our review of the record confirms, that the [prosecutor] asked a relatively uniform set of questions of all jurors. Accordingly, W.T. and the other African-American venirepersons were not asked questions that were not asked of other jurors or that sought to elicit a particular response. Fourth, we are unaware of any venireperson of a race different from W.T.'s, who expressed the same or similar views regarding [the] police and the criminal justice system as those of W.T. but nevertheless was permitted to serve on the defendant's jury. Fifth, the [prosecutor] did not advance any explanation that was based on an inapplicable group trait. Finally, and perhaps most significantly, the [prosecutor] did not use a disproportionate number of peremptory challenges to exclude African-Americans from the jury. In fact, as the defendant acknowledges, three African-Americans were selected to serve, two as regular jurors and one as an alternate. Although the racial composition of an empaneled jury certainly is not dispositive of the issue of impermissible motive for use of a peremptory strike as to a particular juror, it is among the various factors that a reviewing court can consider in evaluating whether the explanation for exercising a peremptory challenge is pretextual and, thus, constitutionally infirm." *State* v. *Holmes*, supra, 176 Conn. App. 178–79.

ingly, the Appellate Court "conclude[d] that the court [correctly] determined that the [prosecutor's] use of [a] peremptory challenge to exclude W.T. from the jury was not tainted by purposeful racial discrimination, and, therefore, it properly denied the defendant's *Batson* challenge."[11] Id., 182. The Appellate Court unanimously affirmed the judgment of conviction.[12] Id., 192.

[11] The Appellate Court was by no means insensitive to the concerns raised by the defendant. In a footnote, the Appellate Court cited "studies conducted by reputable research firms" and observed that "permitting the use of peremptory challenges with respect to potential jurors who express negative views toward the police or the justice system may well result in a disproportionate exclusion of minorities from our juries, a deeply troubling result." *State* v. *Holmes*, supra, 176 Conn. App. 180–81 n.5. The Appellate Court also expressed its concern about the effect of implicit bias in decisionmaking, observing that it was making "this point not to suggest that the prosecutor conducting voir dire in this case was motivated by racial bias, but to recognize the need to be particularly vigilant in assessing a prosecutor's use of peremptory challenges, especially if the proffered explanation may have a disproportionate impact on minority participation on juries." Id., 181 n.5. Ultimately, the Appellate Court observed that, as "an intermediate state appellate court, we are, of course, bound by extensive precedent that limits our ability to remedy the weaknesses inherent in the *Batson* standard. Our cases are clear that disparate impact alone is insufficient to demonstrate a *Batson* violation. Accordingly, as [this court] did in *State* v. *Hinton*, supra, 227 Conn. 330, we are confined to reminding trial courts to be particularly diligent in assessing the use of peremptory challenges in circumstances that, if left unscrutinized for pretext, may result in 'an unconstitutionally disparate impact on certain racial groups.' " *State* v. *Holmes*, supra, 181–82 n.5.

[12] Judge Lavine issued a scholarly and insightful concurring opinion, agreeing with the Appellate Court majority's conclusion that, "in the present case, the peremptory challenge was properly exercised under prevailing law and practices" but opining that "this case brings into sharp relief a serious flaw in the way *Batson* has been, and can be, applied. *Batson* is designed to prevent lawyers from peremptorily challenging prospective jurors for manifestly improper reasons based on race, national origin, and the like. It was *not* designed to permit prosecutors—and other lawyers—to challenge members of suspect classes solely because they hold widely shared beliefs within the prospective juror's community that are based on life experiences." (Emphasis in original.) *State* v. *Holmes*, supra, 176 Conn. App. 192. Judge Lavine argued that this "blatant flaw that significantly disadvantages black defendants—and people belonging to other suspect classes—has become part of the *Batson* process itself" and urged reform of Connecticut's "jury selection process to eliminate the perverse way in which *Batson* has come to be used." (Footnote omitted.) Id., 193.

Judge Lavine conducted a thorough review of case law and commentary cataloging *Batson*'s shortcomings, including that it requires the court to find that a prosecutor committed serious ethical violations; id., 196–97 and n.4; and that, "as it has evolved, [*Batson* has come to permit] the elimination

This certified appeal followed. See footnote 2 of this opinion.

I

WHETHER FEAR OR DISTRUST OF LAW ENFORCEMENT IS A RACE NEUTRAL REASON FOR A PEREMPTORY CHALLENGE UNDER *BATSON*

On appeal, the defendant urges us to modify or overrule *State* v. *King*, supra, 249 Conn. 645, and hold that fear or distrust of law enforcement is not a race neutral reason for the use of a peremptory challenge "[b]ecause

of certain categories of prospective jurors whose views are reasonable and widely shared in their communities. The potential for the kind of categorical exclusion that *Batson* permits is simply unacceptable in a system that strives to treat everyone equally. It sends a troubling message to members of minority communities who should be encouraged—not discouraged—to actively engage in, and trust, the criminal justice system.

"[Additionally], permitting a peremptory challenge to be used under these circumstances is an affront to the dignity of the individual prospective juror who is excluded for honestly voicing reasonable and widely held views. It minimizes or negates his or her life experience in an insulting and degrading way. It must be remembered that one of the rationales for *Batson* is that the inappropriate exclusion of prospective jurors deprives the *prospective juror* of his or her constitutional right to serve on a jury—a basic right of citizenship. . . . To prohibit a significant percentage of people belonging to a suspect class from serving on a jury because they express a reasonable, [fact based], and widely held view cannot be countenanced." (Citation omitted; emphasis in original.) Id., 198.

Acknowledging "that peremptory challenges play an important function in our system because they permit lawyers to use their intuition in the very human jury selection process"; id., 199–200; Judge Lavine urged further study of this problem and also proposed an alteration to the *Batson* framework "in Connecticut to ameliorate the negative effects of the present regime." Id., 201. Specifically, Judge Lavine proposed reallocating some of the discretion in the jury selection process from the lawyers to the trial judge and granting "judges . . . the discretion to disallow the use of peremptory challenges in cases in which (1) the prospective juror is part of a suspect class; (2) the prospective juror gives an unequivocal assurance, under oath, that he or she can be fair to both sides; (3) the prospective juror expresses reasonable and [fact based] views, which, in the opinion of the judge, following argument by the lawyers, are widely shared in the prospective juror's particular community; and (4) the judge concludes that the prospective juror can, in fact, be fair." Id.

it is most commonly minority races that possess such a fear . . . .'' The defendant emphasizes that W.T.'s ''general concerns for his safety and equality as an African-American,'' on which the prosecutor relied as a race neutral explanation, are neither ''unique to W.T. as an individual nor . . . a direct reflection of his personal experiences but, rather, a well understood reality to the majority of African-Americans. As a result, if the explanation provided by the [prosecutor] for [his] challenge of W.T. is to be considered by the courts as race neutral, it could be used as a reason for excluding a [large number] of potential African-American venirepersons. It would be difficult to maintain acceptance of this reason as race neutral . . . .'' The defendant relies on the authorities cited in Judge Lavine's concurring opinion in the Appellate Court; see footnote 12 of this opinion; and emphasizes the need for courts to be vigilant in guarding against racial discrimination in jury selection given the effects of implicit bias, disparate impact, and the relative ease by which a prosecutor can proffer a racially neutral explanation in defense of a *Batson* challenge. The defendant further argues that ''[a]ny implicit racial bias housed by the [prosecutor] in this case was certainly inflated by his knowledge of W.T.'s employment, which he could have perceived, when considered alongside knowledge of W.T.'s race, to be a sign of W.T.'s 'negative' opinions of law enforcement.''

In response, the state relies on *Hernandez* v. *New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), *State* v. *Gould*, 322 Conn. 519, 142 A.3d 253 (2016), and *State* v. *Edwards*, supra, 314 Conn. 465, to contend that the Appellate Court properly upheld the trial court's rejection of the *Batson* challenge because disparate impact and unconscious bias claims are not cognizable under the second step of the *Batson* analysis; instead, ''discriminatory intent or purpose . . . is

discerned under the third step of *Batson* based [on] 'an assessment of all the circumstances' and not simply on the basis of disparate impact alone." Relying on *State* v. *Hodge*, supra, 248 Conn. 231, and *State* v. *Smith*, 222 Conn. 1, 13–15, 608 A.2d 63 (1992), among other cases, the state also argues that fear or distrust of the police is a race neutral explanation as a matter of law because it is a viewpoint that may be shared by whites and minorities alike. The state further argues that this is not an appropriate case in which to overrule or modify *King* because the record demonstrates that the prosecutor's questioning of all members of the venire was uniform, and, of the at least four African-American members of the venire, W.T. was the only one who expressed a negative view of the police and the only one removed.[13] We agree with the state and conclude that the Appellate Court properly upheld the trial court's rejection of the defendant's *Batson* challenge.

The framework under which we consider *Batson* claims is comprehensively set forth in *State* v. *Edwards*, supra, 314 Conn. 465. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our constitutional and statutory law permit each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is

[13] The state also observes that the prosecutor had proffered other race neutral reasons—unchallenged by the defendant on appeal—for the peremptory challenge of W.T., including his concerns about racial disparities in sentencing, his work to rehabilitate prisoners, and the fact that he had close relatives who had been convicted and incarcerated.

in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. . . .

"Peremptory challenges are deeply rooted in our nation's jurisprudence and serve as one [state created] means to the constitutional end of an impartial jury and a fair trial. . . . [S]uch challenges generally may be based on subjective as well as objective criteria . . . . Nevertheless, [i]n *Batson* [v. *Kentucky*, supra, 476 U.S. 79] . . . the United States Supreme Court recognized that a claim of purposeful racial discrimination on the part of the prosecution in selecting a jury raises constitutional questions of the utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . The court concluded that [a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his [or her] view concerning the outcome of the case to be tried . . . the [e]qual [p]rotection [c]lause forbids [a party] to challenge potential jurors solely on account of their race . . . ."[14]

"Under Connecticut law, a *Batson* inquiry involves three steps.[15] First, a party must assert a *Batson* claim

[14] In addition to race, it is well established that *Batson* also precludes peremptory challenges that discriminate purposefully on the basis of gender, religious affiliation, and ancestry or national origin. See, e.g., *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (gender); *State* v. *Rigual*, 256 Conn. 1, 10, 771 A.2d 939 (2001) (ancestry/national origin); *State* v. *Hodge*, supra, 248 Conn. 240 (religious affiliation).

[15] "We note that a *Batson* inquiry under Connecticut law is different from most federal and state *Batson* inquiries. Under federal law, a three step procedure is followed when a *Batson* violation is claimed: (1) the party

. . . . [Second] the [opposing party] must advance a neutral explanation for the venireperson's removal. . . . In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the [e]qual [p]rotection [c]lause as a matter of law. . . . At this stage, the court does not evaluate the persuasiveness or plausibility of the proffered explanation but, rather, determines only its facial validity—that is, whether the reason on its face, is based on something other than the race of the juror. . . . Thus, even if the [s]tate produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three. . . .

"In the third step, the burden shifts to the party asserting the *Batson* objection to demonstrate that the [opposing party's] articulated reasons are insufficient or pretextual. . . . In evaluating pretext, the court must assess the persuasiveness of the proffered explanation and whether the party exercising the challenge was, in fact, motivated by race. . . . Thus, although an improbable explanation might pass muster under the second step, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination at the third stage of the inquiry. . . .

"We have identified several specific factors that may indicate that [a party's removal] of a venireperson

objecting to the exercise of the peremptory challenge must establish a prima facie case of discrimination; (2) the party exercising the challenge then must offer a neutral explanation for its use; and (3) the party opposing the peremptory challenge must prove that the challenge was the product of purposeful discrimination. . . . Pursuant to this court's supervisory authority over the administration of justice, we have eliminated the requirement, contained in the first step of this process, that the party objecting to the exercise of the peremptory challenge establish a prima facie case of discrimination." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 484 n.16; see *State* v. *Holloway*, 209 Conn. 636, 646 and n.4, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

through a peremptory challenge was . . . motivated [by race]. These include, but are not limited to: (1) [t]he reasons given for the challenge were not related to the trial of the case . . . (2) the [party exercising the peremptory strike] failed to question the challenged juror or only questioned him or her in a perfunctory manner . . . (3) prospective jurors of one race . . . were asked a question to elicit a particular response that was not asked of other jurors . . . (4) persons with the same or similar characteristics but not the same race . . . as the challenged juror were not struck . . . (5) the [party exercising the peremptory strike] advanced an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically . . . and (6) the [party exercising the peremptory strike] used a disproportionate number of peremptory challenges to exclude members of one race . . . .

"In deciding the ultimate issue of discriminatory intent, the [court] is entitled to assess each explanation in light of all the other evidence relevant to [a party's] intent. The [court] may think a dubious explanation undermines the bona fides of other explanations or may think that the sound explanations dispel the doubt raised by a questionable one. As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances. . . . Ultimately, the party asserting the *Batson* claim carries the . . . burden of persuading the trial court, by a preponderance of the evidence, that the jury selection process in his or her particular case was tainted by purposeful discrimination." (Citations omitted; footnote added; footnote altered; internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 483–86; see also Conn. Const., art. I, § 19, as amended by art. IV of the amendments to the constitution; General Statutes § 54-82f; Practice Book § 42-12.

With respect to appellate review of *Batson* claims, the "second step of the *Batson* inquiry involves a determination of whether the party's proffered explanation is facially race neutral and, thus, is a question of law. . . . Because this inquiry involves a matter of law, we exercise plenary review." (Citations omitted.) *State* v. *Edwards*, supra, 314 Conn. 487.

"The third *Batson* step, however, requires the court to determine if the prosecutor's proffered race neutral explanation is pretextual. . . . Deference [to the trial court's findings of credibility] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. . . . Whether pretext exists is a factual question, and, therefore, we shall not disturb the trial court's finding unless it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) Id., 489–90.

We understand the defendant's claims in this case, as clarified at oral argument before this court, to be limited to the second step of *Batson*, namely, to contend that fear or distrust of the police is not a race neutral reason for the exclusion of jurors as a matter of federal constitutional law[16] given its disparate effect on minority jurors. The defendant acknowledges that this argument requires us to overrule, or at the very least strictly limit, a line of Connecticut cases. See, e.g., *State* v. *King*, supra, 249 Conn. 666 (concluding that prosecutor's reasons for striking juror were "not motivated by discriminatory considerations" because "it was reason-

[16] Our analysis is limited to the federal constitution because, as the defendant acknowledged at oral argument before this court, he has not briefed an independent state constitutional claim pursuant to *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). See, e.g., *State* v. *Saturno*, 322 Conn. 80, 113 n.27, 139 A.3d 629 (2016); see also *State* v. *Hinton*, supra, 227 Conn. 329–31 (rejecting *Batson* claim under state constitution on basis of disparate impact on jurors who reside in vicinity of crime scene at issue).

able for the prosecutor to conclude that [the juror's] concerns about the fairness of the criminal justice system might make it difficult for him to view the state's case with complete objectivity" and that rejection of juror's "employment applications [by] two law enforcement agencies . . . gave rise to a legitimate concern that he might harbor some resentment toward the police and the prosecuting authorities"); *State* v. *Hodge*, supra, 248 Conn. 231 ("[The prospective juror] testified that her son, brother and cousin each had a prior arrest record and that her son had been prosecuted by the New Haven office of the state's attorney, the same office involved in prosecuting the present case. In addition, [she] characterized her cousin's treatment at the hands of the prosecutor who handled his case as unfair."); *State* v. *Smith*, supra, 222 Conn. 14 (concluding that exclusion of juror with arrest record was racially neutral because "[p]rosecutors commonly seek to exclude from juries all individuals, whatever their race, who have had negative encounters with the police because they fear that such people will be biased against the government"); *State* v. *Jackson*, 73 Conn. App. 338, 350–51, 808 A.2d 388 (rejecting *Batson* challenge to peremptory strike of African-American juror who "had some relatives that had some general contact with New Haven police officers and had been involved in narcotics, and [whose] relatives have been in court," because defendant's *Batson* argument "rested solely on the disproportionate impact that the race neutral explanations the state provided could have on inner-city black males," and "[p]roof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause" [internal quotation marks omitted]), cert. denied, 262 Conn. 929, 814 A.2d 381 (2002), and cert. denied, 262 Conn. 930, 814 A.2d 381 (2002); *State* v. *Morales*, 71 Conn. App. 790, 807, 804 A.2d 902 (concluding that prospective juror's "negative opinion concern-

ing police performance, especially with respect to drug related crime," was "a valid, nondiscriminatory reason" for excusing him given "the state's considerable dependency on police testimony . . . and the fact that the crime charged was drug related," and prosecutor was not bound to accept his statement that "he would not allow those considerations to affect his impartiality as a juror"), cert. denied, 262 Conn. 902, 810 A.2d 270 (2002); see also *State* v. *Hinton*, supra, 227 Conn. 327–28 (prospective juror's stated "sympathy to African-Americans whom she perceived were treated unfairly by the criminal justice system," as well as her exposure to pretrial media publicity and fact that she lived near crime scene, were legitimate race neutral reasons for her exclusion and not pretextual).

The defendant's disparate impact argument is foreclosed as a matter of federal constitutional law by the United States Supreme Court's decision in *Hernandez* v. *New York*, supra, 500 U.S. 352. In *Hernandez*, the United States Supreme Court concluded that a prosecutor had not violated *Batson* by using peremptory challenges to exclude Latino jurors by reason of their ethnicity when he offered as a race neutral explanation his concern that bilingual jurors might have difficulty accepting the court interpreter's official translation of multiple witnesses' testimony given in Spanish. Id., 357–58. In so concluding, the Supreme Court rejected the argument that the prosecutor's reasons, if assumed to be true, were not race neutral and thus violated the equal protection clause as a matter of law because of their disproportionate impact on Latino jurors. See id., 362–63. The court relied on "the fundamental principle that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause. . . . Discriminatory purpose

. . . implies more than intent as volition or intent as awareness of consequences. It implies that the [decision maker] . . . selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (Citations omitted; internal quotation marks omitted.) Id., 359–60, quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). The Supreme Court stated that a "neutral explanation in the context of [its] analysis . . . means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez* v. *New York*, supra, 360. Noting that the prosecutor also had relied on the prospective jurors' demeanor and his assessment of their willingness to accept the official translation relative to other bilingual jurors, the court observed that "[e]ach category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a per se violation of the [e]qual [p]rotection [c]lause." Id., 361.

The Supreme Court emphasized, however, that disparate impact is not completely irrelevant under *Batson*. Instead, "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, but it will not be conclusive in the preliminary [race neutrality] step of the *Batson* inquiry. An argument relating to the impact of a classification does not alone show its purpose. . . . Equal protection analysis turns on the intended consequences

of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality. Nothing in the prosecutor's explanation shows that he chose to exclude jurors who hesitated in answering questions about following the interpreter *because* he wanted to prevent bilingual Latinos from serving on the jury.'' (Citation omitted; emphasis in original.) Id., 362. After analyzing the record under the third step of *Batson*, the Supreme Court concluded that the reason was not a pretext for intentional discrimination, deferring to the state trial judge's factual finding that the prosecutor had not used that reason as a pretext for intentional discrimination. Id., 363–64.

We have relied on *Hernandez* on multiple occasions to reject claims that a prosecutor's explanation was not race neutral as a matter of law under the second step of *Batson* because of its claimed disparate impact on minority groups. Most recently, in *State* v. *Edwards*, supra, 314 Conn. 465, we rejected a defendant's claim that a prospective juror's racial self-identification on the juror questionnaire as "human," which the prosecutor offered as a race neutral explanation in response to the defendant's *Batson* challenge, is "a proxy for race, and, thus, the court should find discriminatory intent inherent in the prosecutor's explanation"; id., 490; because "a racial minority is more likely to identify himself or herself as an 'unusual' race, and, thus, the prosecutor's proffered reason is inherently discriminatory. This argument is, in essence, a disparate impact argument, which is not dispositive of the issue of race neutrality." Id., 492. Turning to the third step of *Batson*, we considered disparate impact as a possible indicator of pretext, but we ultimately determined that there was "insufficient evidence to find any sort of disparate impact from the prosecutor's proffered explanation,'' given that the social science studies proffered by the defendant proved "only that racial minorities are more likely to

self-identify in creative and unusual ways, not that these same individuals would write an unusual answer in an official document. Furthermore, the prosecutor's proffered explanation related to unusual answers in the questionnaire generally, not to the race line specifically." Id., 496–97; see id., 497 (noting that "a policy of excluding all individuals who provide an answer other than the usual answer to the question of race, i.e., 'Caucasian,' 'African-American,' or other [well known] races, 'without regard to the particular circumstances of the trial or the individual responses of the [potential] jurors, may be found by the trial [court] to be a pretext for racial discrimination' "). In *State* v. *Hinton*, supra, 227 Conn. 329–31, this court rejected a state constitutional challenge based on the disparate racial impact of prospective jurors' residency near the crime scene, but we expressed caution about the possible pretextual effect of this explanation should it be left "unscrutinized" by the trial court. Cf. *State* v. *Gould*, supra, 322 Conn. 533–34 (erroneous removal of juror for cause based on judge's misperception of his English language competency did not require automatic reversal under *Batson* because there was no claim of purposeful discrimination, and "the specter of implied or unconscious bias . . . finds no support in *Batson* or its progeny").

Given the breadth of the United States Supreme Court's decision in *Hernandez*, it is not surprising that the defendant has not cited any case law for the proposition that distrust of law enforcement or the criminal justice system is not a race neutral reason under *Batson* for exercising a peremptory challenge on a juror.[17] Indeed, the only post-*Hernandez* cases we have located

[17] Examples abound of courts accepting distrust of the criminal justice system or law enforcement officers as a race neutral explanation for peremptorily challenging a juror. See, e.g., *United States* v. *Alvarez-Ulloa*, 784 F.3d 558, 567 (9th Cir. 2015); *United States* v. *Moore*, 651 F.3d 30, 43 (D.C. Cir. 2011), aff'd sub nom. *Smith* v. *United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013); *People* v. *Hardy*, 5 Cal. 5th 56, 81, 418 P.3d 309, 233 Cal. Rptr. 3d 378 (2018), cert. denied, U.S. , 139 S. Ct. 917, 202 L.

on this direct point have expressly rejected this disparate impact argument. For example, the United States Court of Appeals for the Seventh Circuit recently rejected an argument that "the government's proffered justification for the strike—bias against law enforcement—is not [race neutral] because [African-Americans] are disproportionately affected by negative interactions with law enforcement. Even accepting the premise of this argument, it does not support a finding of pretext. *Batson* protects against intentional discrimination, not disparate impact. . . . Moreover, we have acknowledged that bias against law enforcement is a legitimate [race neutral] justification." (Citation omitted.) *United States* v. *Brown*, 809 F.3d 371, 375–76 (7th Cir.), cert. denied, U.S. , 136 S. Ct. 2034, 195 L. Ed. 2d 219 (2016); see *United States* v. *Arnold*, 835 F.3d 833, 842 (8th Cir. 2016) (rejecting argument that prosecutor's reliance on prospective jurors' "[exhibition of] strong agreement with the suggestion that police could be wrong" was "by itself . . . illegitimate and discriminatory because distrust of police officers is prevalent among [African-Americans]"). Similarly, in *State* v. *Rollins*, 321 S.W.3d 353 (Mo. App. 2010), transfer denied, Missouri Supreme Court, Docket No. SC91170 (October 26, 2010), cert. denied, 563 U.S. 946, 131 S. Ct. 2115, 179 L. Ed. 2d 910 (2011), the court rejected an argument under the second step of *Batson*, founded on an African-American prospective juror's negative perception of police officers, that "the court was required to take into account the disparate impact of such a supposedly facially [race neutral] reason when it means that members of a particular race or ethnicity are more likely to be affected than others" because "disparate impact does not conclusively govern in the

Ed. 2d 648 (2019); *State* v. *Mootz*, 808 N.W.2d 207, 219 (Iowa 2012); *Batiste* v. *State*, 121 So. 3d 808, 849 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178 (2014); *State* v. *Nave*, 284 Neb. 477, 487–88, 821 N.W.2d 723 (2012), cert. denied, 568 U.S. 1236, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013).

preliminary [race neutrality] step of the *Batson* inquiry." Id., 366; cf. *State* v. *Veal*, 930 N.W.2d 319, 334 (Iowa 2019) (declining to adopt "something like a cause requirement" with respect to use of strike of last African-American juror, despite "aware[ness] of the disproportionate impact when jurors can be removed based on prior interactions with law enforcement," because "this case involved a special set of circumstances—a prosecutor's use of a peremptory strike on a juror because the same prosecutor had sent her father to prison for the rest of his life"). Thus, with no adequate claim that the Appellate Court improperly upheld the trial court's finding that the prosecutor's reasons were not pretextual under the third step of *Batson*,[18] we conclude that the Appellate Court properly affirmed the judgment of conviction.

[18] The state observes that the "Appellate Court majority was unable to ascertain whether the defendant was challenging the trial court's resolution of both the second and third steps of *Batson*, or whether he was challenging only the court's ultimate factual finding that the prosecutor did not act with discriminatory intent in exercising the peremptory challenge against W.T." See *State* v. *Holmes*, supra, 176 Conn. App. 175. We read the defendant's brief to this court to limit his challenge to the second step of *Batson*, insofar as he does not engage in any significant analysis of the record to demonstrate that the trial court's finding of no pretext was clearly erroneous and instead emphasizes that the prosecutor's reasons with respect to " 'negative' " interactions with law enforcement were not racially neutral "per se" because they "have a strong air of implicit racial bias, particularly with the knowledge that potential juror W.T. is of African-American descent," and "minority races are generally afraid of [the] police, a statistical conclusion that is not shocking given the amount of violence against minorities inundating recent headlines." This reading was borne out at oral argument before this court, at which counsel for the defendant candidly acknowledged that the trial prosecutor had *not acted purposefully* to exclude African-Americans or other minorities from the jury but instead had elected to question prospective jurors about a topic that would have the effect of excluding minority jurors, rendering it not race neutral as a matter of law.

The defendant argues, however, that, "based on what is known about the human inability to recognize biases and the tendency to readily provide a race neutral reason for [one's] behavior, it is easy to assume that the [prosecutor] in this case acted in accordance with his implicit racial biases in exercising a peremptory challenge against W.T., and that the trial court did not exercise sufficient prudence in making a determination as to the propri-

II

BATSON REFORM IN CONNECTICUT

Although the relief that we can provide in this case is constrained by the defendant's decision to limit his *Batson* claims to the equal protection clause of the United States constitution; see footnote 16 of this opinion; the broader themes of disparate impact and implicit bias that the defendant advances raise, as the state candidly acknowledges, extremely serious concerns with respect to the public perception and fairness of the criminal justice system.[19] As the United States Supreme

ety of the challenge. Had the court . . . been more aware of the likelihood of implicit racial biases to be hidden by race neutral reasons offered by the party exercising a challenge against a potential juror, [the court] would have found pretext as it related to the [prosecutor's] proffered reasons for challenging potential juror W.T., *particularly in a situation where the* [*court itself*] *found W.T. to be impartial.*" (Emphasis added.) We disagree with this characterization of the record, insofar as the defendant has not identified, and our independent review has not revealed, a specific finding that W.T. was in fact impartial. In any event, this argument—founded on implicit bias—falls short of the purposeful discrimination contemplated by *Batson*. See, e.g., *State* v. *Gould*, supra, 322 Conn. 533–34.

Finally, to the extent that the defendant does argue pretext, he relies on the decision of the United States Court of Appeals for the Second Circuit in *Mullins* v. *Bennett*, 228 Fed. Appx. 55, 56 (2d Cir.), cert. denied sub nom. *Mullins* v. *Bradt*, 552 U.S. 911, 128 S. Ct. 259, 169 L. Ed. 2d 190 (2007), to contend that the prosecutor's challenge to W.T. based on his employment as a social worker was a pretext for racial discrimination because "the central issue being contested in this case does not at all relate to social work or troubled families . . . ." We disagree, insofar as the prosecutor relied on W.T.'s volunteer work with incarcerated persons, not his social work employment as a general matter.

[19] To its great credit, the state acknowledges the importance of "understanding and appreciating the existence and potentially corrupting influence of implicit or unconscious biases" and notes that "Connecticut prosecutors regularly receive training on this subject for the purpose of gaining insight regarding this phenomenon and eliminating its corrupting influences to the full[est] extent possible." See A. Burke, "Prosecutors and Peremptories," 97 Iowa L. Rev. 1467, 1483–85 and n.93 (2012) (urging prosecutors to consider their institutional ethical obligation and to undertake "voluntary reforms designed to bolster the prosecutor's role in protecting [race neutral] jury selection and to neutralize the biases that might lead to racialized peremptory challenges," including implicit bias training and " 'switching' exercises during voir dire to assess for disparate questioning or reasoning").

Court recently observed, "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers* v. *Mississippi*, U.S. , 139 S. Ct. 2228, 2238, 204 L. Ed. 2d 638 (2019). Moreover, there is great "constitutional value in having diverse juries," insofar as "equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury. If we allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict. And it is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less." *State* v. *Saintcalle*, 178 Wn. 2d 34, 49–50, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wn. 2d 721, 398 P.3d 1124 [2017]), cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013). "From a practical standpoint, studies suggest that compared to diverse juries, [all white] juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. . . . In contrast, diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused. . . . By every deliberation measure . . . heterogeneous groups outperformed homogeneous groups. . . . These studies confirm what seems obvious from reflection: more diverse juries result in fairer trials." (Citations omitted; internal quotation marks omitted.) Id., 50; see, e.g., J. Rand, "The Demeanor Gap: Race, Lie Detection, and the Jury," 33 Conn. L. Rev. 1, 60–61 (2000) (suggesting that jury diversity is necessary to address "[d]emeanor [g]ap," which undermines accuracy of cross-racial credibility determinations). Insofar as *Batson* has been roundly criticized for its doctrinal

and practical shortcomings in preventing both purposeful and unconscious racial discrimination, this appeal presents us with an occasion to consider whether further action on our part is necessary to promote public confidence in the perception of our state's judicial system with respect to fairness to both litigants and their fellow citizens.

A

Review of *Batson* Problems and Solutions

Reams of paper have been consumed by judicial opinions and law review articles identifying why *Batson* has been a toothless tiger when it comes to combating racially motivated jury selection, and numerous authorities and commentators have proposed various solutions to those specific problems. Much of *Batson*'s perceived ineffectiveness stems from its requirement of purposeful discrimination. To begin with, the pretext and purposeful discrimination aspects of *Batson*'s third step require the trial judge to make the highly unpalatable finding that the striking attorney has acted unethically by misleading the court and intentionally violating a juror's constitutional rights. See, e.g., *State* v. *Veal*, supra, 930 N.W.2d 360 (Appel, J., concurring in part and dissenting in part) ("requiring a district court judge to, in effect, charge the local prosecutor with lying and racial motivation from the bench in the course of voir dire is unrealistic"); *State* v. *Saintcalle*, supra, 178 Wn. 2d 53 ("[i]magine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism"); J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1113 (2011) ("so long as a personally and professionally damning finding of attorney misconduct remains a prerequisite to awarding relief under *Batson*, trial courts will be understand-

ably reluctant to find *Batson* violations"); M. 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. & Policy Rev. 149, 162–63 (2010) (noting dual difficulties that "[m]ost trial court judges will . . . find such deceit [only] in extreme situations," while other troubling cases indicated that "some prosecutors are explicitly trained to subvert *Batson*"); R. Charlow, "Tolerating Deception and Discrimination After *Batson*," 50 Stan. L. Rev. 9, 63–64 (1997) ("[S]hould courts apply *Batson* vigorously, it would be even less appropriate to sanction personally those implicated. Moreover, judges may be hesitant to find *Batson* violations, especially in close cases, if doing so means that attorneys they know and see regularly will be punished personally or professionally as a result."); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1897–98 (2015) ("[The *Batson* rule's focus on pretext] requires personally insulting prosecutors and defense lawyers in a way that judges do not take lightly, calling them liars and implying that they are racist. Technically, as some have argued, lying to the court constitutes an ethics violation that the judge should then report to the bar for disciplinary proceedings. Disconnecting the regulation of jury selection from the motives of lawyers will make judges far more likely to enforce the rule." [Footnotes omitted.]).

Second, the purposeful discrimination requirement does nothing to address the adverse effects of implicit or unconscious bias on jury selection. As the Washington Supreme Court has astutely observed: "In part, the problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our insti-

tutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus." (Footnote omitted.) *State* v. *Saintcalle*, supra, 178 Wn. 2d 46; see also T. Tetlow, supra, 56 Wm. & Mary L. Rev. 1946 ("The current *Batson* rule constitutes a placebo that purports to solve the problem of discrimination by juries but really focuses only on purported discrimination against jurors. Not only does it fail to address the real issues, it also actively distracts from them. The *Batson* rule represents the culmination of the [United States] Supreme Court's desire to solve the intractable and unconscionable problem of racism in our criminal justice system by ordering everyone in the courtroom to ignore it.").

In a leading article on implicit bias, Professor Antony Page makes the following observation with respect to a lawyer's own explanations for striking a juror peremptorily: "[W]hat if the lawyer is wrong? What if her awareness of her mental processes is imperfect? What if she does not know, or even cannot know, that, in fact, but for the juror's race or gender, she would not have exercised the challenge?" (Emphasis omitted.) A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 156 (2005). "The attorney is both honest and discriminating on the basis of race or gender. Such unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes." (Emphasis omitted.) Id., 180. Professor Page's landmark article "examines the findings from recent psychological research to conclude that the lawyer often will be wrong, will be unaware of her mental processes, and would not have exercised the challenge but for the juror's race or gender. As a result (and not because of lying lawyers), the *Batson* peremptory challenge framework is woefully ill-suited to address the problem of

race and gender discrimination in jury selection." (Emphasis omitted.) Id., 156.

The studies reviewed by Professor Page demonstrate that "few attorneys will always be able to correctly identify the factor that caused them to strike or not strike a particular potential juror. The prosecutor may have actually struck on the basis of race or gender, but she plausibly believes she was actually striking on the basis of a [race neutral] or [gender] neutral factor. Because a judge is unlikely to find pretext, the peremptory challenge will have ultimately denied potential jurors their equal protection rights." (Footnote omitted.) Id., 235. Although Professor Page argues that the social psychology research supports addressing implicit bias by eliminating peremptory challenges entirely; id., 261; in the alternative, he proposes (1) to eliminate the *Batson* procedure's requirement of subjective discriminatory intent, which also relieves judges of "mak[ing] the difficult finding that the lawyers before them are dishonest," (2) to instruct jurors about the concepts of unconscious bias and stereotyping, (3) to require educating attorneys about unconscious bias, with a requirement that they "actively and vocally affirm their commitment to egalitarian [nondiscriminatory] principles," and (4) to increase the use of race blind and gender blind questionnaires. Id., 260–61.

Similarly, Judge Mark W. Bennett, an experienced federal district judge, considers the "standards for ferreting out lawyers' potential explicit and implicit bias during jury selection . . . a shameful sham"; he, too, urges (1) the inclusion of jury instructions and presentations during jury selection on the topic of implicit bias, to adequately explore a juror's impartiality, and (2) the administration of implicit bias testing to prospective jurors. M. Bennett, supra, 4 Harv. L. & Policy Rev. 169–70. But see J. Abel, "*Batson*'s Appellate Appeal and Trial Tribulations," 118 Colum. L. Rev. 713, 762–66 (2018)

(discussing *Batson*'s greater value in direct and collateral postconviction review proceedings, particularly in habeas cases that afford access to evidence beyond trial record to prove discrimination).

The second step of *Batson*, which requires the state to proffer a race neutral explanation for the peremptory challenge, has been criticized as particularly ineffective in addressing issues of disparate impact and implicit bias such as those raised by the defendant in this appeal. Specifically, the United States Supreme Court's decision in *Purkett* v. *Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), took a very broad approach to the second step, allowing virtually any race neutral explanation, however "implausible or fantastic," to pass muster; the actual merit of the explanation is considered only during the pretext inquiry of the third step. See *State* v. *Edwards*, supra, 314 Conn. 484–85. *Purkett* has been criticized for its effect in "watering down" the *Batson* inquiry. See L. Cavise, "The *Batson* Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection," 1999 Wis. L. Rev. 501, 537. Some courts and commentators have urged reforms to ensure that the reason proffered by the prosecutor relates to the case being tried in an attempt to limit post hoc reasoning for the use of the strike. See *Ex parte Bruner*, 681 So. 2d 173, 173 (Ala. 1996) (rejecting disparate impact conclusion in *Hernandez* v. *New York*, supra, 500 U.S. 352, and *Purkett* as matter of Alabama law); *Spencer* v. *State*, 238 So. 3d 708, 712 (Fla.) (under Florida law, second prong of *Batson* requires prosecutor to identify "clear and reasonably specific" race neutral explanation that is related to trial at hand, which requires trial court to "determine both whether the reason was neutral and reasonable and whether the record supported the absence of pretext" [internal quotation marks omitted]), cert. denied, U.S. , 138 S. Ct. 2637, 201 L.

Ed. 2d 1039 (2018); see also *Tennyson* v. *State*, Docket No. PD-0304-18, 2018 WL 6332331, *7 (Tex. Crim. App. December 5, 2018) (Alcala, J., dissenting from refusal of discretionary review) ("[i]f any implausible or outlandish reason that was never even discussed with a prospective juror can be accepted as a genuine [race neutral] strike by a trial court . . . and if appellate courts simply defer to trial courts . . . then *Batson* is rendered meaningless, and it is time for courts to enact alternatives to the current *Batson* scheme to better effectuate its underlying purpose"). It also has been suggested that the second step of *Batson* be modified to circumscribe the number of permissible race neutral explanations or increase their quality, which would also alleviate the more difficult discrimination finding attendant to the third step. See L. Cavise, supra, 551–52 ("If the Supreme Court is serious when it holds that the venireperson's right to serve is of such importance that it merits equal protection coverage, then surely it is merely a logical extension to prohibit a person from being improperly removed for the [nonreason] of the neutral explanation. Is the exalted right to serve merely a facade to be torn away on the sheerest of explanations? Minorities, women, and persons of cognizable ethnicity should . . . be removed [only] for legitimate reasons—which does not include those that are purely subjective, irrational, or unverifiable, much less racist or sexist."); J. Wrona, Note, "*Hernandez* v. *New York*: Allowing Bias To Continue in the Jury Selection Process," 19 Ohio N.U. L. Rev. 151, 158 (1992) (criticizing *Hernandez* for giving "little value to the disparate impact of the prosecutor's challenges" and "emphasizing the prosecutor's subjective rationale and attaching minor significance to objective evidence," which affords "prosecutors ample means to discriminate in jury selection").

Other commentators have proposed solutions that more directly consider the demographics of the jury in

considering whether to allow the use of peremptory challenges in a particular case, akin to the approach suggested by Judge Lavine in his concurring opinion in the Appellate Court. See *State* v. *Holmes*, supra, 176 Conn. App. 201–202; see also footnote 12 of this opinion. One proposal is to engage in a qualitative analysis similar to that used to assess a challenge for cause, in which the trial judge would balance claims of potential juror bias against the systemic interest in diversity of the jury.[20] See L. Cavise, supra, 1999 Wis. L. Rev. 551 ("The cost of this approach would be that, in gender and race questioning, the peremptory would be transformed into a challenge for 'quasi-cause.' In other words, trial judges would be required to do with peremptories just as they have been doing with challenges for cause . . . but simply lower the standard for the challenge to allow some exercise of the intuitive. Any judge who can say 'I may not agree but I see how you can think that' has mastered this suggestion in peremptory challenges."); A. Cover, "Hybrid Jury Strikes," 52 Harv. C.R.-C.L. L. Rev. 357, 395 (2017) ("[The author suggests the] replacement of traditional peremptory strikes with hybrid jury strikes, which could . . . be exercised [only] if the proponent first articulated reasons coming close to, but not found to satisfy, the standard for cause challenges. This reform would have important salutary effects by mandating ex ante rationality, yet preserving in modified form the most important penumbral function of the peremptory strike."); T. Tetlow, supra, 56 Wm. & Mary L. Rev. 1895 (proposing test that would balance quality of claims of juror bias against impact on diversity of striking juror, rather than their sincerity); see also

[20] The state, while acknowledging that "*Batson* has been widely criticized as being ineffectual," criticizes such diversity conscious solutions as unconstitutional and discriminatory in their own right insofar as they would affirmatively treat white and minority venirepersons differently. Because neither of these solutions is directly before us for adjudication, we express no view regarding the merits of the state's concerns.

T. Tetlow, supra, 1900–1906 (arguing that that *Holland* v. *Illinois*, 493 U.S. 474, 482–83, 110 S. Ct. 803. 107 L. Ed. 2d 905 [1990], holding that sixth amendment requirement of fair cross section on venire does not apply to petit jury, was wrongly decided and arguing in favor of consideration of diversity during jury selection, rather than "equat[ing] race consciousness with racism").

Other commentators have suggested that some of the concerns about *Batson* can be addressed procedurally by delaying the final decision of whether to seat a juror or to accept a strike until the conclusion of voir dire, thus allowing a provisionally stricken juror to be reseated should a pattern emerge of apparently discriminatory challenges. See J. Bellin & J. Semitsu, supra, 96 Cornell L. Rev. 1127 (suggesting that if "a trial court can invalidate a peremptory challenge after finding an unrebutted appearance of discrimination, it could be contended that the proposal is insufficiently tethered to *Batson* and, thus, the constitutional right that *Batson* enforces,'' and making prophylactic ''analogy to *Miranda* warnings and the decades of practice that have shown that a robust enforcement of the *Batson* right must of necessity sweep more broadly than the constitutional right itself" [emphasis omitted]). Our existing *Batson* case law is compatible with this suggestion. See *State* v. *Robinson*, 237 Conn. 238, 252–53 and n.14, 676 A.2d 384 (1996) (holding that "a defendant may object to the state's peremptory challenge on *Batson* equal protection grounds at any time prior to the swearing of the jury" and noting that nothing on face of General Statutes § 51-238a precludes trial judge from recalling juror who was released from duty).

Moving beyond the courtroom itself, other commentators have suggested the reform of recordkeeping practices to allow for the evaluation of jury selection practices on a systemic level. See C. Grosso & B. O'Brien, "A Call to Criminal Courts: Record Rules for

Batson,'' 105 Ky. L.J. 651, 662 (2017) (''Our limited evidence suggests that the regular availability of statistical evidence might mitigate racial disparities in jury selection. If this is true, criminal courts need to recognize their obligation to preserve and provide access to jury selection data for all criminal trials.''); id., 667–68 (suggesting retention of records, including race of potential jurors, whether they served, and ''additional venire characteristics,'' with omission of juror names or other identifying information to protect jurors' privacy and safety); R. Wright et al., ''The Jury Sunshine Project: Jury Selection Data as a Political Issue,'' 2018 U. Ill. L. Rev. 1407, 1442 (advocating for aggregation and collection of jury selection data across court systems to promote public policy advocacy with respect to reduction of discrimination during jury selection process); see also A. Burke, ''Prosecutors and Peremptories,'' 97 Iowa L. Rev. 1467, 1485–86 (2012) (urging prosecutors to ''collect and publish both individual and office-wide data regarding the exercise of peremptory challenges'').

Finally, we cannot ignore the intersection of peremptory challenges with other areas of the law bearing on the composition of our juries, including the fair cross section requirement that we recently considered in *State* v. *Moore*, 334 Conn. 275, A.3d (2019), to ensure a diverse jury pool. ''When we approach a case with civil rights implications, it is important to think systemically. Important issues involving the [composition] of the venire pool, the scope of voir dire of potential jurors, the use of peremptory challenges, and the instructions given to the jury intersect and act together to promote, or resist, our efforts to provide all defendants with a fair trial.'' *State* v. *Veal*, supra, 930 N.W.2d 344 (Appel, J., concurring in part and dissenting in part); see id., 360 (Appel, J., concurring in part and dissenting in part) (''*Batson*'s relatively free reign on peremptory challenges cuts rough against the grain of the constitu-

tional value of achieving juries with fair cross sections of the community. By opening the valve on peremptory challenges, you close the [fair cross section] pipe and lose the benefits of diversity, which are substantial."); L. Cavise, supra, 1999 Wis. L. Rev. 549 (noting solutions to *Batson*'s shortcomings that "focus on the selection of the venire, such as supplementing the traditional method of voter registration lists with driver's license or other lists to [ensure] proportionality," sending "jury questionnaires . . . to selected areas with a higher percentage of minorities, and [having] the results of the questionnaires or the composition of the venire actually called to service be scanned by the chief judge to [ensure] diversity").

B

Implementation of *Batson* Reforms

Although *Batson* has serious shortcomings with respect to addressing the effects of disparate impact and unconscious bias, we decline to "throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it." *State* v. *Saintcalle*, supra, 178 Wn. 2d 49. We hesitate to assume, however, that this court is best situated in the first instance to issue an edict prescribing a solution to what ails *Batson* on a systemic level. But see *State* v. *Holloway*, 209 Conn. 636, 646 and n.4, 553 A.2d 166 (using supervisory authority to provide greater protection than required by *Batson* by eliminating requirement under first prong of establishing prima facie case of purposeful discrimination in any case in which venirepersons of same cognizable racial group as defendant are peremptorily struck from venire), cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

Instead, the scale and variety of the potential changes that appear necessary to address the flaws in *Batson*, as shown by the menu of possible solutions such as those discussed in part II A of this opinion, beg for a more deliberative and engaging approach than appellate adjudication, which is limited to the oral and written advocacy of the parties and stakeholders appearing as amici curiae in a single case. See, e.g., *Johnson* v. *California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (recognizing that states "have flexibility in formulating appropriate procedures to comply with *Batson*"); *State* v. *Saintcalle*, supra, 178 Wn. 2d 51 ("[t]he *Batson* framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection"); accord *State* v. *Gould*, supra, 322 Conn. 535–37 (declining to require provision of translator to "prevent the underrepresentation of minorities on juries due to the English proficiency requirement" because that argument "is one that is more appropriately addressed to the legislature rather than this court," but noting that "[o]ur Judicial Branch has been proactive in addressing the issue of limited English proficiency by establishing the Committee on Limited English Proficiency and charging it with 'eliminating barriers to facilities, processes and information that are faced by individuals with limited English proficiency' ").

To this end, we find it most prudent to follow the Washington Supreme Court's approach to this problem in *State* v. *Saintcalle*, supra, 178 Wn. 2d 34, which was to uphold under existing law the trial court's finding that the prosecutor had not acted with purposeful discrimination in exercising a peremptory challenge, but also to take the "opportunity to examine whether our *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries"; id., 35; by convening a work group of relevant stakeholders to study the problem and resolve it via the state's

rule-making process, which is superintended by that court.[21] Id., 55–56; see *State* v. *Jefferson*, 192 Wn. 2d 225, 243–47, 429 P.3d 467 (2018) (describing work group's process).

The rule-making process[22] that followed *Saintcalle* recently culminated in the Washington Supreme Court's adoption of a comprehensive court rule governing jury selection, Washington General Rule 37,[23] which applies

[21] In referring *Batson* reform to the rule-making process, "[a]s a first step," the Washington court proposed to "abandon and replace *Batson*'s 'purposeful discrimination' requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion. For example, it might make sense to require a *Batson* challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory challenge or [when] the judge finds it is more likely than not that, but for the defendant's race, the peremptory challenge would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a *Batson* challenge. This in turn would simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious." *State* v. *Saintcalle*, supra, 178 Wn. 2d 53–54.

[22] The Final Report of the Jury Selection Workgroup, explaining the proposal adopted by the Washington Supreme Court as General Rule 37, provides a comprehensive "legislative history" of that rule, which resulted from consideration of proposed rules submitted by the American Civil Liberties Union and the Washington Association of Prosecuting Attorneys, with considerable comment by the bench and bar. See Jury Selection Workgroup, Washington Supreme Court, Proposed New GR 37—Jury Selection Workgroup Final Report, p. 1, available at http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf (last visited December 16, 2019).

[23] Rule 37 of the Washington General Rules, adopted on April 24, 2018, provides: "(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 that 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

in all jury trials and is intended "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." Wn. Gen. R. 37 (a) and (b). With respect to the issues in the present case, one particularly notable feature of General Rule 37 is a declaration—targeted to the second prong of *Batson*—that certain ostensibly race neutral explanations are "presumptively invalid," including distrust of law enforcement officers, not being a native English speaker, and residing in a high crime neighborhood. Wn. Gen. R. 37 (h); see also Wn. Gen. R. 37 (i) (requiring corroboration and verification on record of certain conduct based challenges). General Rule 37 also responds to implicit bias concerns by requiring the trial judge to consider "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."[24] Wn. Gen. R. 37 (e); see also *State* v. *Jefferson*, supra, 192 Wn. 2d 229–30 (extending General Rule 37's modification of third prong of *Batson* with objective test to pending cases and reversing defendant's conviction because record indicated that "objective observer could view race or ethnicity as a factor in the use of the peremptory strike").

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."

[24] We note that General Rule 37 may well be subject to consideration in at least one other jurisdiction, as a defendant has sought review by the Arizona Supreme Court of an Arizona Court of Appeals decision that relied on its intermediate role in the hierarchal system to decline an invitation to "adopt the approach to peremptory challenges established in Washington, which carves out a list of reasons presumed invalid and expands the third step of the *Batson* analysis to include an 'objective observer' standard." *State* v. *Gentry*, Ariz. , 449 P.3d 707 (App. 2019), petition for review filed (Ariz. August 23, 2019) (CR-19-0273-PR).

Accordingly, we refer the systemic considerations identified in part II A of this opinion to a Jury Selection Task Force that will be appointed by the Chief Justice forthwith. We anticipate that the Jury Selection Task Force will consist of a diverse array of stakeholders from the criminal justice and civil litigation communities and will be better suited to engage in a robust debate to consider the "legislative facts"[25] and propose necessary solutions to the jury selection process in Connecticut, ranging from ensuring a fair cross section of the community on the venire at the outset to addressing aspects of the voir dire process that diminish the diversity of juries in Connecticut's state courts.[26]

[25] "[I]t is well established that an appellate court may take notice of legislative facts, including historical sources and scientific studies, which help determine the content of law and policy, as distinguished from the adjudicative facts, which concern the parties and events of a particular case." (Internal quotation marks omitted.) *State* v. *Santiago*, 318 Conn. 1, 53 n.44, 122 A.3d 1 (2015). "Legislative facts may be judicially noticed without affording the parties an opportunity to be heard, but adjudicative facts, at least if central to the case, may not." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 479. Particularly because many of the relevant issues have not yet been presented to us through the crucible of the adversarial process, we deem it advisable to stay our hand in favor of the rule-making process, which is better suited to consider the array of relevant studies and data in this area, along with the interests of the stakeholders, and to promote diversity on juries in Connecticut's state courts. See id., 481–82.

[26] We note that the Jury Selection Task Force may well recommend that the applicability of some *Batson* reforms be limited to criminal cases, given the fundamental difference between a criminal trial—which brings the resources of the government to bear against a private citizen—and one between private litigants. Cf. M. Howard, "Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges," 23 Geo. J. Legal Ethics 369, 373–74 (2010) (Discussing prosecutors' "ethical duty to 'seek justice' " and noting that peremptory challenges are "a prophylactic safeguard of a constitutional right to an impartial jury" that "are subject to cost-benefit scrutiny prompting an assessment of the extent to which the practice risks unconstitutional discrimination, damaging both the actual and perceived fairness of the prosecution process, as well as the extent to which the practice actually increases the likelihood of a just conviction. And in balancing the two, is the benefit of one outweighed by the detriment to the other?" [Footnote omitted.]); see also id., 375 ("I argue for an office policy directing prosecutors to waive peremptory challenges except in narrowly

See *State* v. *Saintcalle*, supra, 178 Wn. 2d 52–53 ("we seek to enlist the best ideas from trial judges, trial lawyers, academics, and others to find the best alternative to the *Batson* analysis"); see also *Seattle* v. *Erickson*, 188 Wn. 2d 721, 739, 398 P.3d 1124 (2017) (Stephens, J., concurring) ("The court has convened a work group to carefully examine the proposed court rule with the goal of developing a meaningful, workable approach to eliminating bias in jury selection. That process will be informed by the diverse experiences of its participants and will be able to consider far broader perspectives than can be heard in a single appeal. Unconstrained by the limitations of the *Batson* framework, the rule-making process will be able to consider important policy concerns as well as constitutional issues.").

Although we observed in *State* v. *Holloway*, supra, 209 Conn. 645, that "the issue of purposeful racial discrimination in the state's use of peremptory jury challenges is a matter of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole," we now have the advantage of more than three decades of research and experience since *Batson* to tell us that implicit bias may be equally as pernicious and destructive to the perception of the justice system. Accordingly, we anticipate that the Jury Selection Task Force will propose meaningful changes to be implemented via court rule or legislation, including, but not limited to (1) proposing any necessary changes to General Statutes § 51-232 (c),[27] which governs the confirmation form

defined circumstances, such as curing a failed challenge for cause by either party or excusing a juror who demonstrates an unwillingness to deliberate in good faith").

[27] General Statutes § 51-232 (c) provides: "The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required

and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate *Batson*'s requirement of purposeful discrimination. Cf. *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 686 n.7, 142 A.3d 1095 (2016) (expressing preference that Rules Committee of Superior Court consider and adopt prophylactic rules, rather than Supreme Court exercising its supervisory powers, because "the Rules Committee of the Superior Court . . . provides a more appropriate forum in which to fully and fairly consider any potential amendment to the procedural rules"). Accordingly, we "hope . . . that our decision sends the clear message that this court is unanimous in its commitment to eradicate racial bias from our jury system, and that we will work with all partners in the justice system to see this through."[28] *Seattle* v. *Erickson*, supra, 188 Wn. 2d 739 (Stephens, J., concurring).

solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record."

[28] We note that numerous commentators and jurists, including United States Supreme Court Justices Stephen Breyer and Thurgood Marshall, have suggested that nothing short of the complete abolition of peremptory challenges will suffice to address discrimination in jury selection. See, e.g., *Miller-El* v. *Dretke*, 545 U.S. 231, 273, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Breyer, J., concurring); *Batson* v. *Kentucky*, supra, 476 U.S. 107 (Marshall, J., concurring); *State* v. *Veal*, supra, 930 N.W.2d 340 (Cady, C. J.,

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD, KAHN and ECKER, Js., concurred.

MULLINS, J., with whom D'AURIA, J., joins, concurring. I agree with and join the majority's thoughtful and well reasoned opinion. In particular, I wholeheartedly endorse the majority's decision in part II B of its opinion to create a Jury Selection Task Force to identify and implement corrective measures for combatting the dis-

concurring); *People* v. *Brown*, 97 N.Y.2d 500, 509, 769 N.E.2d 1266, 743 N.Y.S.2d 374 (2002) (Kaye, C. J., concurring); *Davis* v. *Fisk Electric Co.*, 268 S.W.3d 508, 529 (Tex. 2008) (Brister, J., concurring); *Seattle* v. *Erickson*, supra, 188 Wn. 2d 739–40 (Yu, J., concurring); *State* v. *Saintcalle*, supra, 178 Wn. 2d 70–71 (Gonzalez, J., concurring); M. Bennett, supra, 4 Harv. L. & Policy Rev. 167; N. Marder, "*Foster* v. *Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1205 (2017). As the state aptly observes—and as Justice Mullins acknowledges in his concurring opinion, in which he advocates for "substantially reduc[ing] the number of peremptory challenges that the parties have available for their use"—this specific remedy raises serious state constitutional questions. See Conn. Const., art. 1, § 19, as amended by art. IV of the amendments to the constitution ("The right of trial by jury shall remain inviolate . . . . In all civil and criminal actions tried by a jury, *the parties shall have the right to challenge jurors peremptorily*, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate." [Emphasis added.]); *Rozbicki* v. *Huybrechts*, 218 Conn. 386, 392 n.2, 589 A.2d 363 (1991) ("[t]he provisions concerning peremptory challenges and the individual voir dire appear to be unique to Connecticut's constitution"); see also *Rivera* v. *Illinois*, 556 U.S. 148, 152, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) ("The right to exercise peremptory challenges in state court is determined by state law. This [c]ourt has long recognized that peremptory challenges are not of federal constitutional dimension. . . . States may withhold peremptory challenges altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." [Citation omitted; internal quotation marks omitted.]). As was emphasized at oral argument before this court, the defendant has not requested that we consider abolishing peremptory challenges as a matter of law, so we do not consider further this more drastic remedy, not yet embraced by any state. See *State* v. *Saintcalle*, supra, 117 (Gonzalez, J., concurring). Accordingly, we leave it to the rule-making process to address the systemic issues identified by the defendant in this appeal.

criminatory use of peremptory challenges beyond the framework set forth in *Batson* v. *Kentucky*, 476 U.S. 79, 96–98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). I write separately because, in my view, it is time not only to reconsider the framework of the *Batson* challenge in order to eliminate discrimination in jury selection but also to consider substantially restricting the use of peremptory challenges altogether.

Peremptory challenges by their very nature invite corruption of the judicial process by allowing—almost countenancing—discrimination. The credibility and integrity of our system of justice should not tolerate prospective jurors being prevented from serving on juries on the basis of discrimination due to their race, ethnicity, gender or religious affiliation. The straightest line to eliminating such discrimination would be to eliminate the peremptory challenge. In our state, in light of article first, § 19, of the Connecticut constitution, as amended by article IV of the amendments, outright elimination of the peremptory challenge would raise constitutional concerns. However, nothing in our constitution prevents the next best thing, which would be to substantially reduce the number of peremptory challenges that the parties have available for their use.

I

As the majority opinion cogently sets forth, the *Batson* framework has proven to be wholly inadequate to address the discriminatory use of peremptory challenges. There are, however, more fundamental problems with peremptory challenges that should lead us to question whether any reforms short of reducing the parties' access to peremptory challenges will meaningfully reduce the discriminatory effects that they have on the selection of jurors.

The problem of discrimination in peremptory challenges stems from the following systemic issues: (1)

the historical use of peremptory challenges as a means of excluding African-Americans from jury service; (2) peremptory challenges lead inescapably to parties striking prospective jurors on the basis of speculation and stereotypes; (3) peremptory challenges are often based on unconscious biases and justifications that are ostensibly race neutral but that have a disparate impact on minority jurors; and (4) peremptory challenges lead to violations of the constitutional rights not just of the parties but also of the prospective jurors.

A

First, peremptory challenges have a history of being used as a tool of racial discrimination. Until *Batson* was decided in 1986, the United States Supreme Court expressly countenanced the use of peremptory challenges to strike jurors on account of their race. See *Swain* v. *Alabama*, 380 U.S. 202, 220–21, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), overruled by *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Emphasizing the inherent conflict between peremptory challenges and equal protection principles, the United States Supreme Court concluded: "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. . . . To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the [e]qual [p]rotection [c]lause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination . . . . And a great many uses of the challenge would be banned."[1] *Swain* v. *Alabama*, supra, 380 U.S. 221–22.

[1] In *Swain*, the United States Supreme Court recognized that the use of peremptory challenges to exclude African-American jurors violated the equal protection clause only if there was evidence that the state did so in virtually every single case and that no African-Americans were ever selected to serve on juries. *Swain* v. *Alabama*, supra, 380 U.S. 223–24. This requirement later was recognized as "impos[ing] a crippling burden of proof that left

Although *Swain* was eventually overruled by *Batson*, this long held understanding, that it was acceptable to strike prospective jurors on the basis of their race, has left an indelible mark on the use of peremptory challenges.

I acknowledge that the problem extends beyond race and into discrimination on the basis of ethnicity, gender, and religious affiliation, which also are entitled to protection under the *Batson* framework. See *J. E. B.* v. *Alabama*, 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); *State* v. *Hodge*, 248 Conn. 207, 244–45, 726 A.2d 531 (1999). The *Batson* framework, however, is equally ineffective in addressing discrimination on these bases as well.

B

Second, peremptory challenges lead inescapably to parties striking prospective jurors purely on the basis of speculation and stereotypes. Unlike challenges for cause, where the prospective juror's partiality is articulable, "the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Swain* v. *Alabama*, supra, 380 U.S. 220. "With limited information and time, and a lack of any reliable way to determine the subtle biases of each prospective juror, attorneys tend to rely heavily on stereotypes and generalizations in deciding how to exercise peremptory challenges." *State* v. *Saintcalle*, 178 Wn. 2d 34, 81, 309 P.3d 326 (2013) (Gonzalez, J., concurring).

It is almost inevitable that this expedient resort to stereotypes will invoke improper racial and other discriminatory considerations. I submit that decisions to exclude a prospective juror on the basis of stereotypes,

prosecutors' use of peremptories largely immune from constitutional scrutiny." (Internal quotation marks omitted.) *Miller-El* v. *Dretke*, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).

whether based on racial or other discriminatory considerations that have nothing to do with the juror's ability to fairly assess the evidence and follow legal instructions given by the judge, have no place in our system of selecting jurors.

C

Third, as discussed in the majority opinion, there are two especially elusive problems with peremptory challenges: (1) unconscious or implicit bias; and (2) lines of voir dire questioning that are race neutral but that have a disparate impact on minority jurors. Although these forms of discrimination are not purposeful, their consequences are no less pernicious. Both result in minorities being disproportionately excluded from jury service. This brand of exclusion has the effect of reducing diversity in our juries and perpetuating a mistrust of our justice system, particularly among those in the communities disparately impacted by these challenges. See *State* v. *Holmes*, 176 Conn. App. 156, 197–99, 169 A.3d 264 (2017) (*Lavine*, *J.*, concurring); *State* v. *Saintcalle*, supra, 178 Wn. 2d 100 (Gonzalez, J., concurring).

Regarding unconscious or implicit bias, Justice Marshall explained in *Batson* that "[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." *Batson* v. *Kentucky*, supra, 476 U.S. 106 (Marshall, J., concurring).

A number of judges and commentators have argued that the only way to meaningfully combat the effects of implicit bias on peremptory challenges is to limit or eliminate them. See *Rice* v. *Collins*, 546 U.S. 333, 343,

126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (Breyer, J., concurring) (In suggesting that peremptory challenges should be abolished, Justice Breyer noted that, "sometimes, no one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype. . . . How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?" [Citations omitted.]); A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U.L. Rev. 155, 246 (2005) ("The psychological research . . . demonstrates the prevalence of unconscious, automatic stereotype use and the difficulty in eradicating it, even among those who are not of a mind to discriminate. This finding provides one more powerful reason to eliminate the peremptory challenge.").

The problem of lines of voir dire questioning that have a disparate impact on minorities is equally complex. Our case law, as the majority opinion notes, has held that ostensibly race neutral reasons for striking a juror—such as, in this case, the juror's negative views about law enforcement—pass muster under *Batson* even though they disproportionately affect minority jurors. See *State* v. *King*, 249 Conn. 645, 666–67, 735 A.2d 267 (1999); *State* v. *Hodge*, supra, 248 Conn. 230–31; *State* v. *Smith*, 222 Conn. 1, 13–14, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992); see also *Hernandez* v. *New York*, 500 U.S. 352, 359–60, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

Throughout history and continuing through the present day, relations between the police and many minorities and minority communities have been strained and highly contentious. Recently, police killings of African-American men and women have been highly publicized. Unfortunately, while the heightened publicity around

these cases is new, these stories are not new. We cannot turn a blind eye to that reality. To permit an honest venireperson who expresses that experience to be prevented from service on a jury is unacceptable.[2] I therefore echo the sentiments of the Appellate Court majority that "permitting the use of peremptory challenges with respect to potential jurors who express negative views toward the police or the justice system may well result in a disproportionate exclusion of minorities from our juries, a deeply troubling result." *State* v. *Holmes*, supra, 176 Conn. App. 181 n.5. Indeed, as Judge Lavine thoughtfully set forth in his concurring opinion in the Appellate Court, the effects of these types of challenges are immensely damaging to our juries and to the perception of our justice system. See id., 197–99 (*Lavine*, *J.*, concurring).

Adequate solutions to this problem are hard to come by, due in no small part to the innumerable permutations of disparate impact questions. In light of the complexity of these problems, I believe that outright elimination of, or at least a substantial reduction in access to, peremptory challenges is the most effective way to lessen the discrimination that arises from peremptory challenges.

D

Finally, it is important to remember that every time a discriminatory, peremptory strike goes unchallenged or such a strike passes muster in our courts, it violates the equal protection rights not only of the affected par-

[2] Judge Lavine, in his concurring opinion in the Appellate Court in this case, provides other examples of experiences that a venireperson of a particular suspect class may honestly reveal that may subject him or her to being stricken from the jury. See *State* v. *Holmes*, supra, 176 Conn. App. 197 (*Lavine*, *J.*, concurring). I agree with his examples and find it unacceptable for an individual to be excluded from service on a jury merely because he or she has experiences common to his or her race, ethnicity or gender that a party considers to be objectionable for service on a jury.

ties but also of the individual jurors who were improperly stricken. See *Powers* v. *Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (The equal protection clause prohibits prosecutors from "exclud[ing] otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."). "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." Id., 407. A procedure that permits qualified jurors to be excluded from jury service because of their race, ethnicity, gender or religious affiliation is irreconcilable with promoting the legitimacy and credibility of our justice system.

In my view, the importance of these rights should lead us to question whether they should be left to self-interested parties who, as previously explained, often are acting on the basis of stereotypical judgments. Citizens should not be deprived of the opportunity to serve on a jury in the absence of an acceptable and identifiable reason. Our system takes that into account with the challenge for cause. The peremptory challenge allows too much discrimination to seep into the decision to strike a prospective juror.

II

Having identified the systemic problems associated with peremptory challenges, I now consider the constitutional and policy considerations involved in addressing these problems. I acknowledge at the outset that, although there is no right to peremptory challenges under the federal constitution; see *Georgia* v. *McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33

(1992); total elimination of peremptory challenges may not be possible in this state. This is because article first, § 19, of the Connecticut constitution was amended in 1972 to include the following provision: "In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. . . ." Conn. Const., amend. IV.

I make two observations here. First, our constitution does not prescribe any minimum number of peremptory challenges that parties are entitled to; see Conn. Const., amend. IV; leaving that to be determined by the legislature. See General Statutes § 51-241 (providing each party with three peremptory challenges in civil cases, subject to limitations); General Statutes § 54-82g (providing state and defendant each with between three and twenty-five peremptory challenges in criminal cases, depending on severity of crime charged). Thus, there does not appear to be any constitutional impediment to reducing the number of peremptory challenges available to parties.

Second, and more fundamental, although the language of the constitution affords the state a right to a peremptory challenge, the historical basis for that right is unclear. Historically, peremptory challenges have been recognized, not as a right belonging to the government, but as a tool for criminal defendants to protect themselves *from* the government. Indeed, this court described peremptory challenges several years before they were constitutionalized as "one of the most important rights secured to *the accused* . . . ." (Emphasis added; internal quotation marks omitted.) *DeCarlo* v. *Frame*, 134 Conn. 530, 533, 58 A.2d 846 (1948). This court has recognized peremptory challenges as a means of securing a criminal defendant's right to trial by a fair and impartial jury. See *State* v. *Hodge*, supra, 248 Conn. 217. The United States

Supreme Court has explained that the right to a trial by a fair and impartial jury "is granted to criminal defendants in order to prevent oppression by the [g]overnment." *Duncan* v. *Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Notwithstanding the fact that article first, § 19, of the Connecticut constitution, as amended by article four of the amendments, provides that "the parties" in a criminal action have the right to peremptory challenges, granting that right to the state seems incongruous with the other rights associated with criminal trials. Virtually all of the other trial related rights in a criminal case have as their basis the protection of the individual against the state.[3] Nevertheless, I understand that the language

[3] The right to a jury trial has been deemed fundamental because it safeguards the accused's rights against abuse of state power. See *Duncan* v. *Louisiana*, supra, 391 U.S. 155–56. Likewise, "[t]he right to counsel under the sixth amendment of the federal constitution protects a criminal defendant at critical stages of the proceedings from adversarial government agents . . . ." *State* v. *Piorkowski*, 243 Conn. 205, 215, 700 A.2d 1146 (1997); see also *Gideon* v. *Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to counsel is necessary to protect criminal defendants from government, which spends "vast sums of money to establish machinery to try defendants accused of crime"). The same is true of the sixth amendment right to a speedy trial; see *State* v. *Baker*, 164 Conn. 295, 296, 320 A.2d 801 (1973) ("[o]n its face, [the right to a speedy trial] is activated only when a criminal prosecution has begun and extends only to those persons who have been accused in the course of that prosecution" [internal quotation marks omitted]); and the fifth amendment right against self-incrimination. See *In re Samantha C.*, 268 Conn. 614, 634, 847 A.2d 883 (2004) ("fifth amendment privilege against self-incrimination . . . protects the individual against being involuntarily called as a witness against himself" [internal quotation marks omitted]). Similarly, the fourteenth amendment, which forbids the purposeful discrimination in the exercise of peremptory challenges, was designed to protect citizens from state action. See *State* v. *Holliman*, 214 Conn. 38, 43, 570 A.2d 680 (1990) (fourteenth amendment "prohibits the states from denying federal constitutional rights" and "applies to acts of the states, not to acts of private persons or entities" [internal quotation marks omitted]).

Moreover, article first, §§ 8 and 20, of the Connecticut constitution, which contain our state counterparts to these federal rights, by their express terms extend only to individual citizens or criminal defendants. See Conn. Const., art. I, § 8 (listing rights secured to "the accused" and providing that "[n]o

of the constitutional provision provides the state with peremptory challenges. However, given that the legal basis for the state's constitutional right to peremptory challenges in a criminal case is certainly open to question, I suggest that it is appropriate to consider whether the state should be entitled to an equal number of peremptory challenges as the accused in a criminal case. Instead, it may be appropriate, in a criminal case, to limit the number of peremptory challenges available to the state in greater measure than the number of peremptory challenges available to the defendant.

Apart from the constitutional question of whether limiting the number of peremptory challenges available to the state to a greater degree than the number available to the defendant would be permissible under our state constitution, there remains the question of whether providing criminal defendants with greater access to peremptory challenges than the state is appropriate as a matter of policy. Justice Marshall, for instance, rejected such disparate treatment in his concurring opinion in *Batson*, reasoning that "[o]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' " *Batson* v. *Kentucky*, supra, 476 U.S. 107 (quoting *Hayes* v. *Missouri*, 120 U.S. 68, 70, 7 S. Ct. 350, 30 L. Ed. 578 [1887]).

Others, however, have argued that, because only criminal defendants possess the constitutional right to a fair trial and impartial jury, their use of peremptory challenges should be preserved while prosecutors' use

person shall be compelled to give evidence against himself"); Conn. Const., art. I, § 20 ("[n]o person shall be denied the equal protection of the law"). The foregoing demonstrates that both the language and the origins of these trial related rights establish that their purpose is to protect the accused from the awesome power of the state. Conversely, there is no historical basis for the proposition that the state possesses constitutional trial related rights.

should be eliminated or reduced. See *Georgia* v. *McCollum*, supra, 505 U.S. 68 (O'Connor, J., dissenting) (arguing that *Batson* prohibition on race based peremptory challenges should not apply to criminal defendants because "[t]he concept that the *government alone* must honor constitutional dictates . . . is a fundamental tenet of our legal order . . . [and] [t]his is particularly so in the context of criminal trials, where we have held the prosecution to uniquely high standards of conduct" [emphasis added]).

These difficult constitutional and policy questions are not presently before this court and I make no attempt to answer them here. Instead, I write separately to emphasize that the problem of racial and other forms of discrimination in the use of peremptory challenges is extremely complex and the solution to the problem must take into account that complexity. To be sure, solutions may need to extend beyond the framework of the *Batson* challenge to encompass a substantial reduction in the availability of peremptory challenges.

STATE OF CONNECTICUT *v.* JAMES RAYNOR
(SC 20042)

Robinson, C. J., and Palmer, McDonald, D'Auria, Kahn, Ecker and Vertefeuille, Js.

Syllabus

Convicted, after a jury trial, of the crimes of assault in the first degree as an accessory and conspiracy to commit assault in the first degree, the defendant, an African-American, appealed to the Appellate Court, claiming that the prosecutor engaged in racially disparate treatment during jury selection, in violation of *Batson* v. *Kentucky* (476 U.S. 79), by excusing a prospective juror, R, on the basis of his employment history, even though the prosecutor accepted two other venirepersons, I and G, whom the defendant claimed were nonminority venirepersons with work restrictions similar to those of R. The Appellate Court affirmed the judgment of the trial court and concluded that the record was inadequate to review the defendant's unpreserved *Batson* claim because, inter alia, the transcripts of the voir dire did not indicate the racial composition

Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson

December 31, 2020

STATE OF CONNECTICUT
JUDICIAL BRANCH

December 31, 2020

The Honorable Richard A. Robinson
Supreme Court
231 Capitol Avenue
Hartford, Connecticut 06106

Dear Chief Justice Robinson,

As Co-Chairs of the Jury Selection Task Force, we are pleased to present for your consideration the final report of the Jury Selection Task Force, which contains recommendations for systemic jury reform in Connecticut, and also notes, where applicable, opposing views expressed by members of the Task Force.

One year ago, in State v. Holmes, the Connecticut Supreme Court announced the creation of a Jury Selection Task Force to examine and to propose necessary solutions toward eradicating racial bias from the jury selection process in Connecticut. A diverse group of stakeholders was appointed to the Task Force (drawing from the criminal justice, civil litigation, and academia communities, along with judges and members of the Judicial Branch's Court Operations division), which provided an opportunity for robust examination and for discussion from many perspectives.

The Task Force was divided into four subcommittees, each with a specific charge and focus. Their recommendations and dissenting opinions were then presented to the entire Task Force for discussion, debate and approval. This final approved report presents both the recommendations and any dissents for your consideration.

We are proud of the work undertaken by the Task Force. We hope the report provides you with a solid foundation for implementing meaningful changes in furtherance of the Judicial Branch's goal to eliminate racial discrimination in the jury process.

Respectfully submitted,

Chase T. Rogers and Omar A. Williams

JURY SELECTION TASK FORCE SUBCOMMITTEES

I. **Data, Statutes & Rules:** Dean Timothy Fisher and Attorney Claire M. Howard, Co-Chairs, Hon. James W. Abrams, Hon. Robin L. Wilson, Attorney Tais C. Ericson, Attorney Charles DeLuca, Attorney Paul Williams, Ms. Taylor Withrow

***Charge**:* This subcommittee will undertake a review of relevant statutory authority, including, but not limited to 51-232(c), and Practice Book rules, if applicable, that govern the confirmation form and juror questionnaire provided to prospective jurors, to determine if revisions to the confirmation form and/or questionnaire should be made in support of the Task Force charge.

As part of the review of the CT General Statutes and Practice Book rules, the subcommittee shall consider the feasibility of collecting juror demographic information. Currently, no demographic information is collected on jurors, and there is no way to determine the race of individuals that are actually appearing for jury service. The type and nature of juror demographic information will need to be discussed, taking into consideration the very limited information collected pursuant to 51-232(c) on the juror questionnaire. The Task Force should also examine, whether revisions through the legislative process to the type and nature of the juror demographic information sought, should be proposed. The subcommittee shall undertake an exhaustive review of the data collection practices in other states.

II. **Juror Summoning Process:** Ms. Esther Harris and Attorney Harry Weller, Co-Chairs, State Representative Matthew Blumenthal, Attorney Erik T. Lohr, Attorney Anna Van Cleave, Attorney William M. Bloss, Attorney Michael J. Walsh, Attorney James J. Healy

Charge: This subcommittee will undertake a review of the current process by which we summon jurors in Connecticut in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity. This review shall include a study of relevant statutory authority including but not limited to qualifications of jurors as defined in 51-217(a), the summoning of jurors pursuant to 51-222a , and a review of the process used for gathering the source lists in preparation of the master file in accordance with 51-222a. Further, this review shall include a study of the available data. The subcommittee shall further study the source lists from which jurors are summoned in Connecticut and elsewhere, and also a review of the existing body of work on how other states summon jurors to ensure representative and diverse jury panels. Why are minorities so underrepresented on jury panels? What are the factors that prevent jurors from serving? Factors like economic hardships, such as employment, child care, transportation, and other more personal factors such as physical or mental disabilities and Limited English Proficiency (LEP) may adversely impact our jury pool in Connecticut.

III. **Implicit Bias in the Jury Selection Process and Batson Challenges:** Hon. David P. Gold and Hon. Douglas Lavine, Co-Chairs, Hon. Joette Katz, Attorney Richard J. Colangelo, Jr., Attorney

Christine Perra Rapillo, Attorney Daniel Krisch, Attorney Aigné Goldsby, Attorney Preston Tisdale, Professor Neal Feigenson, Mr. Tobechukwu Umeugo

***Charge*:** This subcommittee will study the extensive body of work relating to implicit bias and its impact on the jury selection process. Implicit bias is everywhere and it exists both inside and outside the jury box. How does implicit bias impact our jury selection process and ultimately the jurors who are empaneled?

The subcommittee will examine how the court can play a role in addressing implicit bias through the use of peremptory challenges and the creation of model jury instructions.

In the discussion of peremptory challenges, the subcommittee should consider how their use may contribute to imbedding implicit bias in the jury selection process. Should peremptory challenges be eliminated or at least severely limited? Should jurors instead be "conditionally stricken" and their status revisited at the conclusion of the voir dire process? Through the study of practices in other states, the subcommittee shall give consideration to the feasibility and impact of judges presiding over the civil jury selection process and what impact their presence may have on the use of peremptory challenges.

When it comes to Batson challenges, most judges are loathe to make a finding of purposeful discrimination in concluding that the attorney in question has acted unethically and has willfully violated a potential juror's constitutional rights. Further, the reputation, and integrity of the attorney may be called into question under the prongs of Batson, resulting in a referral to statewide bar counsel. This subcommittee will study all standards under Batson and whether the Batson rule should be divorced from the court's requirement to find purposeful discrimination in upholding a Batson challenge.

Further, this subcommittee should examine whether in practice, Batson serves to contribute to the implicit bias and discrimination it seeks to overcome. Does Batson in fact encourage the voir dire process to look the other way and ignore the very issues of race, stereotype and discrimination it is designed to guard against? Consider, "The current Batson rule constitutes a placebo that purports to solve the problem of discrimination by juries but really focuses only on purported discrimination against jurors. Not only does it fail to address the real issues, it also actively distracts from them. The Batson rule represents the culmination of the [United States] Supreme Court's desire to solve the intractable and unconscionable problem of racism in our criminal justice system by ordering everyone in the courtroom to ignore it." T. Tetlow, supra, 56 Wm. & Mary L. Rev. 1946. The subcommittee will examine in detail, the relationship between Batson and implicit bias and make recommendations for sweeping and systemic changes to the jury selection process through a variety of remedies, including the legislative process and statutory revisions.

In developing model jury instructions, the subcommittee shall conduct focus groups with stakeholders to be identified, to determine how the model jury instructions can be drafted to educate jurors about implicit bias and how to avoid it in their deliberations.

IV. **<u>Juror Outreach & Education:</u>** Hon. Joan K. Alexander and Attorney Charleen E. Merced Agosto, Co-Chairs, Attorney Molly Arabolos, Attorney Sheila Sinha Charmoy, Attorney Glenn B. Coffin, Mr. Scot X. Esdaile, Ms. Hannah Kogan

***Charge*:** This subcommittee will review the current Jury Outreach Program, study jury related public service campaigns from other states, look at the feasibility of partnering with community organizations from minority communities, and study whether there is a role that community colleges and universities can play in educating our citizens about jury service. In addition the subcommittee will identify resources needed for an outreach program that specifically targets minority communities.

Jury Outreach & Education continues to be an important component of the jury process. Misinformation and negative perceptions of the criminal justice system can impact whether or not an individual will show up for jury service, particularly individuals from minority populations and those with LEP. As it is written, the statute requires that an individual summoned for jury service must be able to speak and understand English to serve on a jury. This subcommittee should explore whether this statutory provision warrants revision and how the availability of court interpreters in the voir dire and trial process might impact the diversity of potential jurors who appear for jury service.

Table of Contents

Jury Task Force: Data, Statutes and Rules Subcommittee Recommendations

I. Introduction and Rationale

The Data, Statutes and Rules Subcommittee's primary charge was to examine juror demographic information that currently is and should be collected. Without a diverse representation on juries the legitimacy of the justice system and fair administration of justice is weakened. [1]

A crucial step to ensuring fair trials with diverse jury members is to begin collecting data on who is called for jury duty and selected to serve on a jury. Data is the foundation to any efforts to ensure diverse representation on juries – it is impossible to ascertain whether there is a problem with jury composition or the extent of the problem without robust data collection.

Emerging research on jury selection and composition has revealed a significant problem in the exclusion of minorities on juries. In research on jury selection and composition in North Carolina, researchers found that prosecutors excluded black jurors at more than twice the rate they excluded white jurors.[2] The same research also found that black men were removed from juries at a higher rate than any other jurors. [3]

To help facilitate data collection and research on juror selection in Connecticut, the subcommittee has developed the following recommendations, which are aimed at striking a balance between preserving individual juror privacy and gaining an understanding, through robust data collection, on juror composition in Connecticut.

II. Subcommittee Recommendations

The subcommittee's three primary recommendations are that General Statutes § 51-232 be amended to aid the Connecticut Judicial Branch in maintaining a detailed record keeping of disparities in jury service. [4] Specifically, we recommend that the Connecticut Judicial Branch

[1] In a review of a data analysis of jury composition in two counties in Florida, researchers found that "(i) juries formed from all-white jury pools convict black defendants significantly (15 percentage points) more often than white defendants, and (ii) this gap in conviction rates is nearly entirely eliminated when the jury pool includes at least one black member." Liz McCurry Johnson, Accessing Jury Selection Data in a Pre-Digital Environment, 41 Am. J. Trial Advoc. 45, 79 (2017).

[2] Ronald F. Wright, Kami Chavis & Gregory S. Parks, The Jury Sunshine Project: Jury Selection Data as a Political Issue, 2018 U. Ill. L. Rev. 1407, 1423 (2018).

[3] *Id*. at 27-28.

[4] The subcommittee considered whether any Practice Book revisions were needed to accomplish the goals we have set out, and concluded that there were none that we could identify.

- Collect data on the characteristics of prospective jurors, including race, ethnicity, and gender, and also such other attributes that the Judicial Branch believes could be the basis of disparate treatment in jury selection;
- Retain demographic non-personally identifiable data on jurors to be publicly available for research, examination and educational purposes; and
- Collect records on for cause and preemptory challenges that reflect the identity of the first chair trial counsel as the party asserting the challenge.

In accordance with our recommended revisions to General Statutes § 51-232, we recommend the new State of Connecticut Judicial Branch Jury Management System, currently being developed with a planned launch by the end of 2021, be designed to electronically collect demographic data on prospective jurors contacted as part of the venire process as well as jurors selected for duty. For persons without internet access, the same changes should be made to the paper juror questionnaire to incorporate this subcommittee's recommendations.

Specifically, we recommend that the Jury Management System collect data on the following mandatory demographic categories:

- Race - White American; Black or African American; Native American; Alaska Native; Asian American; Native Hawaiian; and Other Pacific Islander.
- Ethnicity - Hispanic or Latino; Not Hispanic or Latino.
- Age - by Date of Birth.
- Gender – Male; Female; or X.

Jurors should be able to select more than one racial/ethnic category. The subcommittee also recommends adding optional demographic subcategories for data collection including sexual orientation to the design of the new Jury Management System. [5]

The Subcommittee recommends the new Jury Management System be designed to make all reasonable efforts to protect juror data. We recommend that demographic data from jurors be retained in a manner that is not personally identifiable to any person, to the greatest possible extent. Any personally identifiable juror data retained in the new system should be considered confidential, not public information.

Demographic data of jurors retained in the new Jury Management System shall be de-identified, with each juror assigned an alphanumeric identifier that is not personally-identifiable to any person or juror. If this separation between a person's identity and demographic data is unachievable in data retention, it is recommended that this information be separated as much

[5] We leave it up to the discretion of the Judicial Branch as to whether and when data regarding sexual orientation and gender identification of prospective jurors will be collected.

as is practicable when that data is being utilized for research, examination and education. The subcommittee recommends that the publicly accessible information be maintained as part of an open access plan within the meaning of CGS Section 4-67p(h), which the Judicial Branch shall develop in a form prescribed by the Office of Policy and Management, and that the data be published in the online repository for open data required by Section 4-68p(i).

The subcommittee also recommends that the information collected regarding juror selection include every stage of the process so as to enable the Branch and others to ascertain the points at which prospective jurors exit the selection process, which thereby facilitates more focused determinations of the causes and cures of any disparate treatment of certain groups. Those stages should include data on each prospective juror who is:

a) released without being subject to voir dire because of "hardship";
b) released without being subject to voir dire because all trial jurors had been selected for voir dire to cease;
c) subjected to voir dire
d) challenged for cause;
e) dismissed for cause and the general type of reason for such dismissal;
f) dismissed by peremptory challenge;
g) selected for jury service, whether or not the case settles or proceeds; as well as
h) the sequential order in which each venireperson in the venire panel was subject to any of the above possible dispositions, in cases where jurors are released individually; and
i) the names and JURIS numbers of the attorney(s) – first chair trial counsel – raising the challenges in (d), (f), and (g) above.

We believe that the data collected will not only provide the Judicial Branch with comprehensive data to look at and address through the continued development of best practices but the data will meaningfully demonstrate *Batson* challenges by data-driven pattern rather than just anecdotally. It is also the subcommittee's consensus that the data will allow attorneys an opportunity to look at their own patterns and personally address their behaviors and attitudes and provide an opportunity for external research.

Final Report of Jury Summoning Sub-Committee to Jury Task Force

Members: Co-chairs, Jury Administrator, Esther Harris, Atty. Harry Weller. Members, Atty. Anna Van Cleave, Atty. Erik T. Lohr, Atty. Michael J. Walsh, Atty. William M. Bloss, State Representative Matt Blumenthal, Atty. James J. Healy, Ms. Karen Sandler, Judicial Branch Support,

Our sub-committee has plumbed the summoning process (process) by evaluating the following: juror eligibility, how summons lists are compiled, how summonses are sent, what the summons looks like, what causes underrepresentation of any group in the actual venires that appear for service and how the process might be able to address those causes, and enforcement when summoned people fail to appear for jury duty on date scheduled or within the grace period defined by statute. Many of the issues we identified are addressed in the sub-committee's proposed legislation as adopted by the task force earlier this month. Those provisions will be briefly addressed in this final report.

This report contains several subsections that roughly follow the process chronologically. Along the way it highlights the strengths of Connecticut's system, especially how this state already employs some of the best practices recommended nationwide. It includes suggestions that do not require statutory changes, but perhaps will be helpful in improving the yield of jurors who are underrepresented because they are lost to the system.

I. Considerations and Recommendation to Improve the Summoning Process

In *State v. Gibbs*, 254 Conn. 578 (2000), the Supreme Court rejected a claim that the process violated the sixth amendment for failing to summon jurors from a fair cross-section of the community because Hispanics were underrepresented in venires. In rejecting that claim and an equal protection claim, the *Gibbs* litigation established that there is no systemic discrimination in the present jury summoning process. It is random where it is required to be random, and it samples the various communities (e.g., cities and towns) in a manner that acceptably favors the larger cities within each Judicial District. Moreover, it is impossible for any person within the jury summoning process to engage in systematic discrimination because at each juncture a selection is made it is automated and random. (e.g., who is available to be summoned, who is eventually summoned and, once someone arrives for service, who is placed on a venire panel for voir dire).

Gibbs brought into relief, however, that much of the underrepresentation that exists is the result of private sector effects including socio/economic factors that have a greater impact on minorities to whom summonses are sent. For example, in *Gibbs*, there was little debate about the fact that Hispanics were underrepresented at the venire level based on their proportion of

the population, but the evidence showed that jurors were lost due to economic hardship and mobility that caused many summonses to be undeliverable in areas where Hispanics lived. It also showed that acceptable constitutional exclusions based on citizenship and language proficiency resulted in a disproportionate loss of Hispanics old enough to serve on a jury.

Data from the Jury Administrator revealed to the sub-committee that undeliverable summonses and simply failure to show up for jury duty continue to produce a disproportionate loss of prospective jurors who live in certain large metropolitan areas.

Recommendation

Our committee presented legislation to address the loss of jurors to undeliverable summonses. These proposals include sending a replacement summons to the same zip code from which a summons is determined to be undeliverable and ultimately calculating how many summonses will be sent to a town/city based by previous yields.

The sub-committee also eliminated two statutory, but nonetheless constitutionally permissible, exclusions that have a disproportionate effect on minorities. Under our proposal, non-citizens who are permanent residents can serve as can a convicted felon.

The sub-committee also increased compensation and reimbursement of expenses to reduce economic hardships prospective jurors might suffer when completing jury service.

II. Source Lists

Precedent establishes that a selection process is constitutional even if only one unbiased source list is used as a starting point for summoning prospective jurors, e.g., registered voters. Best practices recommend, however, the use of more source lists to improve the likelihood of including a fair cross-section of the community in the summoning process. When *Gibbs* was decided, Connecticut used two source lists, registered voters and licensed drivers. Thereafter, Gen. Statutes Sec. 51-222a was amended to require the use of four source lists, registered voters, licensed drivers and those with DMV identification cards, unemployment lists and lists from revenue services.

Recommendation:

There are no recommended changes to the number of source lists used.

III. Culling Duplicates

Employing multiple source lists to generate a master list from which jurors will be summoned creates the problem that some people may be on multiple lists. This is not surprising because Connecticut's combined source list contains almost eight-million prospects.

Best practices include a step in the process during which duplicate names are removed so the master list contains distinct individuals. Connecticut uses a computer algorithm to survey the files and remove duplicate names. The records must pass five stages of examination. Once those five passes are complete, any remaining matched groupings are further analyzed. Those records are manually compared by last name, first name, middle initial, date of birth, social security number, and address. If there is any doubt as to whether a record is a match, it is then separated from the group and treated as a single record.

When culling duplicates, a best practice is to use what is called the "best address." That is, the address that is most likely to be current. The "best address" is usually one with financial implications. For example, presently, if there is the tax record in the group, Connecticut's Jury Administrator uses that address because it is most likely to be the "best address". The administrator next defaults to the motor vehicle address, registrar of voters address, and then the labor address in that order.

Recommendation

The Jury Administrator will follow-up to ensure that she is using the "best address" throughout the process of culling duplicates.

IV. The Master List Is Reconstituted Annually

In Connecticut, a new master list is generated annually. By comparison, the federal court reconstitutes its qualified wheel every three years. A primary benefit of making a new master list annually is that it reduces, but does not eliminate, the prospect of stale addresses. Using stale addresses contributes somewhat to the number of undeliverable summonses.

The master list is compiled in January/February for the court year beginning on September 1. The last summons sent from any master list is in June of the following year. Thus, a name and address on the source list will be used for no longer than 18-months. Connecticut's annually generated master list temporally coincides with postal practices in a manner that helps reduce undeliverables.

When a person moves and leaves a forwarding address, the post office will forward the mail for one year. For the next six-months thereafter, the post office will return the mailing to the sender with the corrected address noted. When the Jury Administrator receives such a return, she will re-mail it to the addressee if they are still living in the judicial district. Thus, the 18-month life of a master list operates in conjunction with postal regulations that ensure delivery of mail after someone has moved. There is an important caveat, however. The postal service will forward mail and provide a corrected address only if the addressee files a change of

address card. Doing so places the addressee into the National Change of Address system (NCOA) discussed below. Otherwise, an undeliverable summons remains undeliverable.

Recommendation

The new summoning system the Judicial Branch will be using is an automated process that is coupled with the NCOA system to identify when an address is undeliverable before a summons is mailed. Under the legislative proposal, the undeliverable summons will be replaced with a deliverable address from the same zip-code until the new yield summoning process goes into effect.

Understanding that the process cannot control some of the private sector factors that contribute to underrepresentation, the sub-committee nevertheless recommended statutory changes that are designed to compensate for those undeliverables without compromising the process' constitutionality.

There are jurisdictions which renew their master lists more frequently. The sub-committee is not recommending such a change.

V. Form of the Summons and Reminder/Juror Questionnaire

Members of the sub-committee discussed the form of the mailing and explored whether the physical characteristics and design of the envelope and content could be improved. Toward this end, we looked at both the present summons package and the new proposal the Judicial Department has pending with Tyler Technologies, its soon-to-be vendor for mailing out the summons. We also researched material generated by those who make a living designing successful commercial mail campaigns. Notably, this multi-billion-dollar industry has its own "best practices," and we have incorporated those we think will be most useful into the suggested changes.

Our goal is twofold. First, to increase the chance that recipients will open the envelope rather than consider it "junk mail" or official mail that some might be reluctant to open. We also wanted to appeal to a juror's sense of community and equal justice under the law.

Second, once the envelope is opened, we also want to ensure that the contents are clear and comprehensible especially regarding subjects that summoned jurors may not be aware of. This includes emphasizing that a summons is a court order, and a juror is entitled to compensation and certain types of reimbursement. We concluded that emphasizing this information could allay concerns for those who might otherwise suffer a hardship, and thus make them more willing to participate.

Recommendations

a) Summons and Reminder envelopes

Appendix A provides several possible changes to the envelopes. They are not interdependent. Although we are fully aware that the Judicial Branch's new vendor, Tyler Industries, may not be capable of making any of the proposed changes, we wanted the Task Force to have the benefit of what we learned.

Professional mailers have determined that a personalized invitation is more likely to be opened than one that comes from a less well-known office such as the "Jury Administrator." Therefore, we propose that Chief Justice Robinson should be listed as the sender, with his name appearing as a signature rather than in print. Another possible way of making the envelope more personal would be to replace the Judicial Department's seal with a picture of the Chief Justice.

The present envelope states, **"Important court document inside - - immediate action required."** That declaration may discourage some potential jurors from opening the envelope. Another approach would be an appeal to a juror's sense of community and justice. Our example reads **"A summons for you to serve your community and ensure equal justice."** Similar language should be included in the on the reminder envelope. (Please see Appendix A for a sample.)

Another best practice is to make the postage appear as a canceled stamp rather than bulk mail product. Some companies can produce this image within their bulk mail protocol.

b) The interior of the mailing

One best practice includes using bold text to provide notice of important aspects of a mailing. We recommend the following to be in clear and prominent text: **that the juror can receive payment for their jury service and reimbursement for expenses like transportation and family care.** The form should also explain that the summons is not a request but an order. For example: "**This is a summons, not an invitation. This means you are required to appear in court on the day noted or contact the court for another appearance date. There are penalties imposed for those who do not comply."** This last point might be intimidating, but many folks may not understand exactly what a summons is, especially because it comes in the mail.

We suggest that this mailing or the reminder should have notice that the juror can tear off and give directly to their employer explaining the juror's obligation to appear, the employer's obligation to pay, and instructions to contact the court if the employer has any

questions about the juror's obligation to serve or the employer's obligation to accommodate jury service. This removes from the juror the burden of having to explain his/her need for time off, etc. to an employer.

Possible text:

Dear employer,

[Name] has been summoned to appear for jury service on [date]. Jurors selected to be on a jury are required to serve until the trial is completed or the court dismisses them. Employers are obligated to pay jurors their regular rate of pay for the first five days of jury service. If you have any questions about your employee's obligation to serve as a juror or an employer's obligation to accommodate, you may contact Jury Administration at [phone number] or by email at [email address].

c) Reminder Notice/Questionnaire

The form should again include in bold type, maybe larger typeface than the rest of the letter:

You can receive payment for your jury service if your employer is not compensating you for days of jury service. You can be reimbursed for reasonable expenses like transportation and family care.

If not included in the original mailing the reminder should include a notice that an individual can provide directly to their employer explaining the obligation to appear, the employer's obligation to pay, and instructions to contact the court if the employer has any questions about the juror's obligation to serve or the employer's obligation to accommodate jury service.

Follow-Up Notices

Best practices call for sending at least one follow-up reminder of upcoming jury service. The Jury Administrator accomplishes this with a second mailing that provides both a reminder and more detailed information about jury service. For people who respond online and provide email addresses, reminders are also transmitted.

d) Enforcement

The subcommittee also examined the question of enforcement for potential jurors who are “no-shows.” Separate from potential jurors whose summonses are known to be undeliverable because they are returned by the Postal Service, a substantial number are considered by the Judicial Branch to be “no shows” because either they fail to complete

eligibility forms, or they do not appear in court on the day summoned or during the one-year grace period allowed by law. In some cases, "no-shows" are sent a duplicate summons for a different date over the course of a year, which leads to some number of former "no shows" eventually appearing for service, but others do not respond at all.

Statistics compiled by the Judicial Branch report that the rates of what it classifies as "no shows" are substantially greater in urban areas. For example, in the five zip codes in Hartford with the largest number of summonses in 2019, calculated rates of no shows ranged from 10.6 to 20.3 percent. In New Haven that number ranged from 11.8 to 20.1 percent. In Bridgeport that number was 21.1 to 27.5 percent. In other words, of the 61,781 potential jurors summoned in Bridgeport whose summonses were not returned as undeliverable, 13,487 were classified as "no shows." For comparison, 4 percent of those summoned in Avon were considered "no shows," as were 6.6 percent in Guilford and 7.7 percent in Monroe. Thus, there is a disproportionate number of "no-shows" from communities with more concentrated minority populations.

The Judicial Branch reports "no shows" to the Attorney General for possible enforcement action under Conn. Gen. Stat. § 51-237. That statute provides in part that "[e]ach juror, duly chosen, drawn and summoned, who fails to appear shall be subject to a civil penalty, the amount of which shall be established by the judges of the Superior Court." That statute further provides that "[t]he provisions of this section shall be enforced by the Attorney General within available appropriations." Information available to the subcommittee indicates that no appropriations for enforcement have been made and the Attorney General does not take enforcement action.

The subcommittee considered whether enforcement might be a productive method to increase diversity on juries. The National Center for State Courts (NCSC) in its publication Best Practices for Jury Summons Enforcement recommends that states send out reminder and subsequent notices to those who at first do not respond. Connecticut already does that. Further, according to NCSC, over half of states do take some enforcement measures ranging from orders to show cause, contempt citations, or civil penalties. NCSC's best practices recommend that if a state increases enforcement of summonses, it should only be pursued following a robust public relations campaign about the importance of jury service and the fact that a jury notice is a court order commanding someone to appear, and not a request. (See, Section V, infra. suggested changes to form). NCSC states that enforcement actions could be taken against all "no shows," a randomly selected group, or what NCSC calls "the most recalcitrant" no shows.

There are trade-offs regarding these enforcement methods. The administrative burden of the first alternative is significant, as evinced by the fact that, under a prior version of the

statute, “no-shows” could be punished by criminal contempt charges pursued by the Division of Criminal Justice. When the state tried to pursue “no-shows” in bulk, however, the court system could not handle the influx of cases. By contrast, the second and third alternatives essentially permit some substantial number of willful “no shows” to avoid consequences while others get called on the carpet with the ultimate goal of making it known that scoffers are punished.

VI. Recommendation

There are several reasons why, at present, the subcommittee does not recommend a more robust enforcement regime. First, there may be a risk that enforcement could be considered unfair or heavy-handed. Second, it is not clear how many of those that the Judicial Branch classifies as “no shows” are willfully failing to respond to summonses – all we know is that they did not appear, but we do not know why. For example, some number are undoubtedly those who have moved without completing a change of address form. Some likely have economic or physical hardships that would excuse them from service. Some may not understand that a “summons” received in the mail is an order with legal implications for non-compliance. Fourth, there is little data one way or the other to indicate that increasing enforcement will produce more diverse venires, which is a primary Task Force goal. Rather than increased enforcement now, we are relying on the other proposals that we have advanced as more likely to increase diversity.

However, if the other recommendations that we have proposed are adopted and do not lead to the results that we expect, enforcement is one area that could be considered. A summons is a court order, and it seems inconsistent that a court will issue such an order but tolerate some number of people disobeying it. Still, greater enforcement would be both sensitive and carry substantial costs. It would require a strong public relations campaign and would require the General Assembly to appropriate funds to the Attorney General and the Judicial Branch to implement a practicable, let alone successful process. Accordingly, the subcommittee suggests deferring this issue to see if other proposals are more productive at lower cost.

- **Auditing**

  The summoning process is audited annually to ensure that it is performing according it statutory mandate.

  Recommendations: None.

VII. Conclusion

This report, in addition to the statutory recommendations made previously, is the result of a concerted six-month effort by everyone on this very hardworking and dedicated sub-committee.

Connecticut's jury summoning process is tasked with producing, from a fair cross-section of the community, enough qualified jurors for our judiciary to provide the constitutional right to a jury trial whenever that right is asserted. Although the system already does a constitutionally sufficient job, our research makes clear that obtaining truly diverse venires remains a significant challenge.

We determined early on that our mission was to find ways to improve the process in a manner that retained its constitutionality but nonetheless addressed some of the issues that cause otherwise qualified people to be lost to jury service. We also expanded those who could qualify to serve and made practical suggestions like treating the summons and reminder as postal advertising. Only time will tell if these recommendations are adopted and if they improve diversity on venire panels. Hopefully, the results will be as fruitful as those by which the Jury Summoning Sub-committee addressed its charge.

Respectfully submitted,

_____ _____

Esther Harris, Co-Chair Harry Weller, Co-Chair

Implicit Bias in the Jury Selection Process and Batson Challenges

December 2, 2020

Dear Co-chairs:

We are delighted to submit to you a proposed New General Rule on Jury Selection, as well as reports and individual statements produced by the three working groups of the Implicit Bias in the Jury Selection and Batson Challenges subcommittee. Members of these working groups—the Batson Working Group, the Peremptory Challenges Working Group, and the Implicit Bias Model Jury Instructions Working Group-- devoted an enormous amount of time and energy producing what we believe to be excellent recommendations.

We believe the proposed rule and the recommendations of the working groups, if adopted, will significantly improve the quality of justice in our state.

We are all proud to have been selected by Chief Justice Robinson to take part in this important and historic process. Of course, the members of our committee are all available to discuss our proposals.

Yours truly,

David Gold

Douglas Lavine

Judges David Gold and Douglas Lavine

Committee Co-chairmen

I. New General Rule. Jury Selection

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

(b) **Scope; Appellate Review**: The rule applies to all parties in all jury trials. The denial of an objection to a peremptory challenge made under this rule shall be reviewed by an appellate court de novo, except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard. The reviewing court shall not impute to the trial court any findings, including findings of the prospective juror's demeanor, which the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given and shall not speculate as to, or consider reasons, that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors, who are not members of the same protected group as the challenged juror. Should the reviewing court determine that the objection was erroneously denied, then the error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(c) **Objection**. A party may object to the use of a peremptory challenge to raise a claim 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 prospective juror.

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

(e) **Determination.** The court shall then evaluate from the perspective of an objective observer, as defined in section (f) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated. If the court determines that the use of the challenge does not raise such an appearance, then the challenge shall be permitted and the prospective juror shall be excused. The court need not find purposeful discrimination to disallow the peremptory challenge. The court must explain its ruling on the record. A party whose peremptory challenge has been disallowed pursuant to this rule shall not be prohibited from attempting to challenge peremptorily the prospective juror for any other reason, or from conducting further *voir dire* of the prospective juror.

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

(g) **Circumstances considered.** In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case; (vi) whether issues concerning race or ethnicity play a part in the facts of the case to be tried; (vii) whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(h) **Reasons Presumptively Invalid**. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Connecticut or maybe influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge: (1) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; (vii) not being a native English speaker; and (viii) having been a victim of a crime. The presumptive invalidity of any such reason may be overcome as to the use of a peremptory challenge on a prospective juror if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.

(i) **Reliance on Conduct**. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for a peremptory challenge, that party

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

(j) **Review Process.** The chief justice shall appoint an individual or individuals to monitor issues relating to this rule.

II. Report of the *Batson* Working Group

In *State* v. *Gonzalez*, 206 Conn. 391 (1988) the Connecticut Supreme Court, relying on the then recent United States Supreme Court decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), first recognized that racial discrimination in the exercise of peremptory challenges is unconstitutional. The *Batson* Court acknowledged that a claim of racial discrimination in the selection of jurors "raises constitutional questions of the utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole," and harms "the entire community" whose confidence in the fairness of our justice system depends. Moreover, it undermines the right of jurors of color to serve.

Batson set forth the following standard for establishing claims of racially motivated peremptory challenges. "[T]he defendant first must show that he is a member of a cognizable racial group ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, 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.' ... Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination." Id., 96.

Thereafter, in State v. Holloway 209 Conn. 636, 646 (1989), the Connecticut Supreme Court modified the three part Batson test for demonstrating purposeful discrimination, eliminating the first prong so that "once such a challenge has been made (1) "the burden shifts to the state to advance a neutral explanation for the venireperson's removal" and (2) "[t]he defendant is then afforded the opportunity to demonstrate that the state's articulated reasons are insufficient or pretextual." In other words, the Court eliminated the first prong of the three part

test of Batson—that is, the defendant need not prove "by a preponderance of evidence that the state's use of the peremptory challenge was tainted by purposeful discrimination."

For more than 30 years, our courts have applied the legal framework of Batson/Holloway, but as our Supreme Court acknowledged in State v. Holmes, 334 Conn. 202, 234 (2019), themes of disparate impact and implicit bias "raise extremely serious concerns with respect to the public perception and fairness of the criminal justice system." Discriminatory strikes, even those based on facially neutral reasons, can reflect unconscious racism of both lawyers and judges and have been difficult to address under Batson's purposeful discrimination framework. *Batson* has been criticized as failing to prevent racial discrimination in jury selection because courts are unlikely to encounter direct evidence of purposeful discrimination. Judges may be hesitant to question neutral reasons provided by a party, particularly when the case involves an attorney who often appears before the judge. Similarly, placing the focus on purposeful discrimination ignores the influence of implicit biases and thereby may serve to mask the biased selections of jurors; Antony Page, Batson*'s Blind Spot: Unconscious Stereotyping & the Peremptory Challenge*, 85 B.U. L. Rev. 155, 160 (2005) (explaining that "race- and gender-based stereotypes almost inevitably affect people's judgment and decision-making, even if people do not consciously allow these stereotypes to affect their judgment"). Finally, because trial courts normally receive strong deference on factual findings and issues of credibility, an appellate court rarely reverses a trial court's *Batson* decision.

In response to *Batson*'s failings, commentators and legal scholars have proposed a range of alternatives and solutions. One response is to eliminate peremptory challenges, as Justice Marshall advocated in his *Batson* concurrence. (See Peremptory Challenge Working Group Report). Another idea is to propose ways to dissuade attorneys from using discriminatory strikes, such as implicit bias trainings. Nevertheless, and despite numerous scholarly commentaries, pleadings, cases, and studies illustrating the failings of *Batson*, there has not been any significant improvement in identifying and addressing improper bias in jury selection.

Following years of Court opinions, studies, and Task Force reports, in April 2018, the Washington Supreme Court took an enormous step when it used its rulemaking authority to promulgate a court rule that expressly addresses implicit and institutional racism with the intent of "eliminat[ing] the unfair exclusion" of prospective jurors based on their race. Washington's Rule 37 expressly acknowledges that the strict purposeful discrimination requirement has thwarted *Batson*'s effectiveness and ignores unconscious racism. In short, the Rule expands protections beyond intentional discrimination.

Recognizing *Batson's* shortcomings in preventing both purposeful and unconscious racial discrimination, the *Holmes* Court took the occasion "to consider whether further action on our part is necessary to promote public confidence in the perception of our state's judicial system

with respect to fairness to both litigants and their fellow citizens." Id., 234. Following a comprehensive review of more than three decades of research and experience since *Batson* reaffirming "that implicit bias may be equally as pernicious and destructive to the perception of the justice system;" Id., 250; the Court referred the systemic considerations identified in the opinion to a Jury Selection Task Force to be appointed by the Chief Justice to propose meaningful changes to strengthen protections against discrimination in jury selection to be implemented via court rule or legislation.

Since August 2020, the Batson working group has studied, discussed and debated what approach to propose in response to the Chief Justice's charge that the issue be addressed. Recognizing that the extensive implicit bias research identified in the Holmes opinion should inform policymaking, we are pleased to recommend unanimously the adoption of a rule modeled in part on Washington's Rule 37, assuming a Practice Book approach is the route the Chief Justice wishes to take. This proposal is the result of significant debate and compromise by members of our working group and was informed by extensive legal research and discussions with members of the committee who were involved in drafting Washington's Rule 37. We believe our proposed rule retains the essential thrust of Rule 37 with some improvements informed by work done in California, taking into account the particulars of Connecticut's jury selection regime.

We invite Task Force members to assess independently the proposal being put forth. In the interest of aiding the Task Force, and other individuals or entities who may later address these issues, we thought it would be helpful to highlight four issues that we found most challenging.

First, the proposed new rule, if implemented, will replace Connecticut's modified version of the three-step Batson test with a wholly different methodology. It will do so, however, only with regard to some, but not all, objections to a party's exercise of a peremptory challenge. By its express terms, the proposal will apply only to those objections based on a juror's race or ethnicity, not those based on a juror's gender, religious affiliation or other protected-group status. The decision to limit our analysis only to race and ethnicity was based on a number of factors, principally the fact that the Chief Justice's charge in *Holmes* specifically related to matters of race, and concomitantly, ethnicity, in light of historical realities. This limitation in no way is intended to minimize the importance of addressing other issues of perceived or real discrimination relating to other groups or protected classes. Indeed, if the Chief Justice wants these other issues to be considered and addressed, they deserve separate and serious deliberation in the future, but the working group decided to stick to the charge given to it.

We understand that the approach being suggested will require stakeholders to accustom themselves to a new construct, in which different rules are applied to peremptory challenges directed at jurors based on race or ethnicity. Yet, it remained the unanimous view of the

working group that the proposal is essential to ensure increased confidence in our jury system. Moreover, two members of Washington's Rule 37 committee have informed us that while the adoption of Rule 37 was a controversial matter in their state, lawyers—including prosecutors—have adapted to it and accept it as part of a changed legal landscape. We have no reason to believe that lawyers won't similarly adjust in our state if our proposed rule is adopted.

A second concern raised about the proposal is the extent to which its creation of "presumptively invalid" reasons for the exercise of peremptory challenges will require the seating of jurors whose objectivity might be viewed by a party with a certain amount of skepticism, but not to the degree that the proposal would require for a peremptory challenge to be sustained over objection. Peremptory challenges have always been permitted for subjective as well as objective reasons. They make allowance for a lawyer's use of instinct and intuition in the selection process. It is also true that the law has never required parties to be bound by a venireperson's own personal assessment of his or her fairness and objectivity, but rather has afforded parties the right to rely on their own judgments. The presumptively invalid reasons identified in the proposal, however, have been associated historically with improper discrimination. The rule contains numerous safeguards to protect the right of lawyers to continue to rely on intuition and instinct in using peremptories—but *not* if that intuition and instinct are grounded in impermissible bias.

The proposal's creation of presumptively invalid reasons generated a separate area of concern as well --- that is, whether these reasons are presumed invalid as to the peremptory strike of *any* juror, regardless of the juror's race or ethnicity, or only as to jurors whose race or ethnicity made them historically subject to unfair exclusion for these reasons. Ultimately, the working group agreed that the presumptions, which are rebuttable, are an essential means by which to address the issue of historically unfair exclusion, and that the "reach" of the presumptions is most appropriately determined by judges to whom that question may be presented.

A final matter that produced spirited debate among working group members and the only area on which we could not reach a unanimous vote related to the appropriate standard of review that appellate courts should apply to the trial court's determinations made under this proposal. Not only were widely divergent opinions expressed on this issue, but some argued that the rule should make no mention of any standard of review at all, principally on the ground that the proper standard was a legal decision to be made by an appellate court. The committee voted to approve the language on the standard of review contained in section (b) "Scope, Appellate Review" but this issue was hotly debated and the decision was by no means unanimous.

These issues and areas of concern, as well as others, marked the working group's deliberations. We recognize that novel and unanticipated issues of law, and difficulties relating to interpretation of the rule, will arise. But we are confident that the lawyers and judges in our

state are more than up to the task of dealing with the changed approach we are proposing. We are unanimously of the opinion that the challenge is urgent and the imperative for change is great. We therefore cannot allow the perfect to be the enemy of the good. It is in that spirit, and with a deep desire to make our court system fairer and engender greater trust in it by all communities in our state, that we respectfully request the Task Force to consider favorably the proposal we are submitting. We sincerely hope that this proposal contributes to the ongoing effort to improve the quality of justice in our state.

Statement of Douglas Lavine in Opposition to Proposed Subsection (b), "Scope; Appellate Review," of New General Rule, Jury Selection

I think the proposed new rule is excellent in all respects, with the exception of the above-referenced section relating to the scope of appellate review. Here are my reasons for opposing the inclusion of this section.

First and foremost, I believe the proposed language clearly invades the prerogatives of the courts. By attempting to establish a standard of review, the rule ventures into an area reserved for the judicial branch. It is the courts, and the courts *alone*, who are tasked with deciding what the standard of review ought to be. This is a general principle of law which I have always thought to be beyond controversy. I have never seen a rule, in any legal context, which purports to do what this rule does. Moreover, I fail to see why any appellate court would be influenced by knowing the personal predilections, on a pure legal issue, of the people who favor a particular rule. I think the rule is a clear over reach and accomplishes nothing of real value except to create a target for people who might be looking for a reason to oppose the outstanding innovations in the rule itself.

Second—aside from the fact that I find the language of the rule somewhat confusing-- I disagree with the standard of review established by the rule. The rule states that: "The denial of an objection to a peremptory challenge made under this rule shall be reviewed by an appellate court de novo, except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard." As indicated, I oppose including *any* section on standard of review in the proposed rule, but if there is to be a standard of review, I would not use the bifurcated standard suggested, which I think is cumbersome, confusing, and difficult to apply. This standard may be appropriate in other legal contexts, but I do not believe it is suited for the proposed rule. If a standard of review is to be included, I would favor a standard of "clearly erroneous" because it is easily understood, simple to apply, and in my view, more suited to the difficult and sensitive issues sure to arise under the proposed rule, and as to which reasonable people could, in most instances, disagree.

Next, I think the proposed standard will create unnecessary difficulties for trial judges who, for the most part, try to be fair. Having been a trial judge for 12 years, I am aware of the blinding speed with which difficult, often vexing issues come at the bench. Evaluating and assessing one's own unconscious biases—as well as those of other stakeholders in the system—is inherently difficult. This rule will require trial judges to make particularly difficult decisions under a wide variety of unknowable circumstances. I think any standard of review should afford reasonable leeway to the trial judges applying it.

Finally, the rule states that the erroneous denial of an objection shall *automatically* result in reversal. While that should perhaps be the result in many—maybe even most—cases, I think such a rigid, mechanical rule is unwise and demonstrates again why putting any standard of review in the rule is inadvisable. I have never seen a rule which declares, in the text of the rule itself, that a violation is *per se* reversible. I would leave the reversal judgment to judges who have the benefit of the full record before them. I think decisions about automatic reversal are far better left to the courts, and do not belong in a rule such as this one.

I would like to add one final point. I believe the rule we are proposing is forward-looking and superb. In all likelihood, any new rule will have to be approved by a vote of the judges of the Superior Court, assuming it is adopted by the entire Task Force first. I would not assume that all of the judges will be enthusiastic about the rule. The standard of review section, as it presently stands, is certain in my opinion to provoke opposition which could undermine the support for the rule while adding nothing of value. The disputed section was barely adopted by a majority of the members of our own committee. I fear it could spark opposition among the judges. That would be most unfortunate given all the positive benefits the rule could bring.

For all of these reasons, I respectfully oppose the inclusion in the rule of the section relating to the scope of appellate review.

Chief State's Attorney Richard Colangelo and Judge David Gold join in this statement.

Individual Statement of Daniel Krisch Re: Report of the *Batson* Working Group and Proposed Practice Book Rule

I support the proposed new rule except for subsection (b) ("Appellate Review"), which opens the door to a *DeJesus* problem.[6] Under *DeJesus*, the judges of the Superior Court cannot adopt a rule that restricts the Supreme Court's "oversight and supervision" of the courts' "core judicial truth-seeking function".[7] Subsection (b) does that: It limits the substantive power of

[6] *See State v. DeJesus*, 288 Conn. 418 (2008).

[7] *See id.* at 461-62.

the Supreme and Appellate Courts by defining the standard of review, circumscribing the manner of review,[8] and declaring any error to be structural. Though "rules governing pleading, practice and procedure" are fair game,[9] the standard of review, manner of review, and whether an error can be harmless are part and parcel of appellate courts' core function. Even if subsection (b) is not unconstitutional, it invites litigation on that point – needlessly so, as settled precedent already requires a reviewing court to review most constitutional issues *de novo* and scrutinize the record carefully. No other rule in the Practice Book prescribes the standard of review, circumscribes the manner of review, or declares an error structural. The rest of the rule is laudatory; it should not have a possibly fatal flaw baked into it.

Our Support for the Inclusion of (b) Appellate Review

Five of the members of this subcommittee voted to propose (b) Appellate review provision, fully appreciating the ultimate authority of the Supreme Court to determine the appropriate appellate standard of review; we have merely articulated the standard routinely applied to questions of constitutional significance. For example, when determining whether a trial court's actions constituted an impermissible restriction on a defendant's speech, the Supreme Court has expressly recognized that the inquiry presents a question of law, over which appellate review is plenary. See *Lafferty* v. *Jones*, 2020 WL 4248476 (2020). (In first amendment contexts appellate courts are bound to apply a de novo standard of review; the inquiry into protected status of speech is one of law, not fact. Accordingly an appellate court is compelled to examine for itself the statements and circumstances at issue to determine whether they are protected; the appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion. This rule of independent review is in recognition that reviewing courts must review the evidence to insure that those principles have been constitutionally applied and appellate courts are obliged to conduct a fresh examination of crucial facts under the rule of independent review.) However, the heightened scrutiny that the Supreme Court applies in first amendment cases does not authorize it to make credibility determinations regarding disputed issues of fact. Rather the Court accepts all subsidiary credibility determinations and findings that are not clearly erroneous. *State* v. *Krijger*, 313 Conn. 434, 446-47 (2014). Therefore, we are not charting a new

[8] Subsection (b) imposes severe restrictions on the reviewing court – e.g., not imputing findings to the trial court, not considering the failure to challenge similarly situated jurors – that, as far as I know, exist in no other context. In addition to the *DeJesus* problem, this seems too one-size-fits-all. It may be that, in most cases, these restrictions make sense, but, perhaps not in every case. The subsection leaves no wiggle room for a reviewing court, if the facts warrant it, to achieve substantial justice.

[9] *See id.*

course, but rather are identifying the well-travelled path regarding matters of constitutional significance.

The next consideration to which objection has been voiced pertains to the requirement that a trial judge articulate expressly his reasons for his ruling as to the exercise of a peremptory challenge. The proposal refuses to indulge in the fiction that a reviewing court can presume facts not provided or evidence not identified in support of the ruling. Again, this is not unchartered territory. See *State* v. *Kinchen*, 243 Conn. 690, 706 (1998) ("In light of the sensitive balancing test required under § 54–56, we will not presume that the trial court considered factors to which absolutely no reference was made, either by the court or by the parties, prior to the court's dismissal of the charge."). Plainly stating that the reviewing court is bound by the specific reasons presented in the record forces the court to review what was proffered and not look for a race-neutral reason to uphold the challenge.

The final objection pertains to the presumption of error when a reviewing court concludes that the trial court acted improperly in ruling on a peremptory challenge. The proposal treats this as structural error. **"**Structural [error] cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected .... These cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.... Such errors infect the entire trial process ... and necessarily render a trial fundamentally unfair." (Citations omitted; internal quotation marks omitted.) *State* v. *Lopez*, 271 Conn. 724, 733-4 (2004). Quite simply, a decision that deprives a venireman of the ability to serve on a jury as a result of improper bias deserves this treatment.

We fully appreciate that we have a limited role as Committee members, and that if this Rule, even without (b), is adopted by the judges of the Superior court as a Practice Book provision, we will have accomplished a great deal. We also fully recognize that the ultimate decisions regarding scope of review, demand for articulation and the label afforded an error will in the end be left to the Supreme Court. Nevertheless, because of the significance of the issue at stake and the failure of less stringent requirements to ameliorate the injustices that have continued despite good faith efforts, we strongly urge consideration of this provision as a reflection of our aspiration that meaningful change will occur during this administration. Our judicial system's inability to seat racially balanced juries has undermined society's confidence in the fairness of the process. People of color do not see themselves well represented on Connecticut's juries. There are many reasons for this, some of which relate back to generations of systemic racism both inside and outside the justice system. Our mandate as a Task Force was to make meaningful recommendations that will move us towards a bias free jury selection process. The proposed rule is designed to make a fundamental change and move the system beyond the status quo. The inclusion of (b) provides added assurance of its success.

Our group has not proposed ending or limiting the number of peremptory challenges because we found no data to support that such a change would significantly improve the diversity of juries. We unanimously agree that the proposed rule is necessary and a majority agree that the rule should provide a scope of appellate review that will allow for a more meaningful evaluation of the use of peremptory challenges when racial bias is alleged. This approach makes it clear that ensuring a fairly chosen and diverse jury is of critical importance to due process.

There may well be opposition to (b) and litigation may ensue if it is adopted. Conflict may be necessary as we try to grapple with how to effectively protect both the right to a jury of one's peers and the use of peremptory challenges. Bold action is required if there is to be meaningful change in the way a reviewing court considers ***Batson*** challenges. We feel that this proposal moves our system towards that change.

Aigne Goldsby

Neal Feigenson

Joette Katz

Christine Rapillo

Preston Tisdale

III. Report of the Peremptory Challenges Working Group

The Peremptory Challenges Working Group[10] considered whether the use of peremptory challenges "contribute[s] to imbedding implicit bias in the jury selection process[,]" and, if so, whether (1) peremptory challenges should "be eliminated or at least severely limited[,] and (2) judges should "presid[e] over the civil jury selection process[.]"[11] Given the formidable legal and practical barriers that stand in the way of either idea, the PCWG unanimously recommends no changes to the current system of peremptory challenges or to the civil jury selection process.

[10] The members of the Peremptory Challenges Working Group are Professor Neal R. Feigenson, Attorney Daniel J. Krisch, Tobechukwu Umeugo, and Chief Public Defender Christine Rapillo.

[11] *See* Subcommittee Charge for Implicit Bias in the Jury Selection Process and Batson Challenges (available at https://www.jud.ct.gov/Committees/jury_taskforce/default.htm#Implicit).

A. Peremptory Challenges in Connecticut

Peremptory challenges have been a part of jury trials since the mid-14th century,[12] and "are deeply rooted in our nation's jurisprudence[.] [They] serve as one state-created means to the constitutional end of an impartial jury and a fair trial."[13] Such challenges "permit each party to reject certain prospective jurors whom they believe, but cannot demonstrate, harbor some latent predisposition against their position or for the opponent's position[.]"[14] The proper exercise of challenges by both sides helps produce an unbiased and impartial jury, though courts also must consider prospective jurors' "separate and independent interest in participating in the trial process."[15]

Connecticut, uniquely among the states,[16] has constitutionalized peremptory challenges. Article First, Sec. 19 of the Connecticut constitution provides: "In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law." The legislature adopted (and the voters approved) this provision in 1972 "to preserve … the fundamental character of jury trials … [by] guaranteeing that parties would continue to have certain rights, previously granted only by statute, regarding the selection of individual jurors."[17]

In a criminal case, the number of peremptory challenges depends on the seriousness of the charges and whether there are alternate jurors: The parties each get twenty-five challenges in

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[12] *See Swain v. Alabama*, 380 U.S. 202, 212-15 (1965) (discussing the "very old credentials" of peremptory challenges); see also *Holland v. Illinois*, 493 U.S. 474, 481-82 n. 1 (1990).

[13] *See State v. Edwards*, 314 Conn. 465, 483 (2014).

[14] *See Carrano v. Yale-New Haven Hosp.*, 279 Conn. 622, 638-39 (2006).

[15] *See State v. Gould*, 322 Conn. 519, 528 (2016). There is no individual right to sit on a particular jury, but the federal and state constitutions give "all persons … the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B. v. Alabama*, 511 U.S. 127, 141–42 (1994).

[16] *See Rozbicki v. Huybrechts*, 218 Conn. 386, 392 n. 2 (1991) ("[t]he provisions concerning peremptory challenges and the individual voir dire appear to be unique to Connecticut's constitution").

[17] *See id.* at 392.

capital cases, fifteen "for offenses punishable by life imprisonment," six for all other felonies, and three for any other offense.[18] If there are alternate jurors, then the parties each get thirty challenges in capital cases, eighteen "for offenses punishable by life imprisonment," eight for all other felonies, and four for any other offense.[19] In a civil case, each party gets three peremptory challenges.[20]

B. Whether Peremptory Challenges Contribute to Implicit Bias in Jury Selection

Scholarly research and logic suggest that peremptory challenges provide an opportunity for implicit bias to impact jury selection. Many studies have found that peremptory challenges are used to exclude Black venirepersons more frequently than white venirepersons.[21] One

[18] *See* Conn. Gen. Stat. § 54-82g. In a multi-count prosecution, the most serious charge determines the number of peremptory challenges. *See id.*

[19] *See* Conn. Gen. Stat. § 54-82h(a).

[20] *See* Conn. Gen. Stat. § 51-241. In a multi-party case, a "unity of interest" between the plaintiffs or the defendants permits the court to treat them as one party, but the court also may allot additional peremptory challenges to them. *See id.* However, the number of peremptory challenges for one side may not "exceed twice the number of peremptory challenges" for the other. *See id.*

[21] *See, e.g.*, David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffit, "The Use of Peremptory Challenges in Capital Murder Trials," 3 Journal of Constitutional Law 3 (2001) (study of 317 capital murder cases in PA from 1981-1997, finding that African-Americans 4.5 times more likely than whites to be stricken by prosecution's use of peremptory challenges); Whitney DeCamp & Elise DeCamp, "It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors," 57 Journal of Research in Crime and Delinquency 3 (2020) (study based on data from over 2,500 venire members in 89 trials in MS from 1992-2012, finding that African-Americans 4.5 times more likely than whites to be stricken by prosecution's use of peremptories, while whites 4.2 times more likely to be stricken by defense); Francis X. Flanagan, "Race, Gender, and Juries: Evidence from North Carolina," 61 Journal of Law and Economics 189 (2018) (study of 1,200 felony jury trials in NC in 2010-12, finding that prosecutors use peremptory strikes against African-American prospective jurors twice as often as against whites); Catherine M. Grosso & Barbara O'Brien, "A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials," 97 Iowa Law Review 1531 (2012); (study of 173 post-*Batson* capital trials in NC, finding that African-Americans twice as likely as whites to be stricken by prosecutors); Mary R. Rose, "The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County," 23 Law and Human Behavior 695 (1999) (study of 13 criminal trials post-*Batson* in NC, finding that prosecution used 60% of its peremptory challenges against African-Americans, who made up only 32% of prospective jurors questioned); Samuel R. Sommers & Michael I. Norton, "Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the *Batson* Challenge Procedure," 31 Law and Human Behavior 261 (2007) (experimental study finding that participants assigned role of prosecutor significantly more likely to use peremptory challenges against African-American than white prospective jurors); Ronald F. Wright, Kami Chavis, & Gregory S. Parks, "The Jury Sunshine Project: Jury Selection Data as a Political Issue," 2018 University of Illinois Law Review 1407 (2018) (study of database of 30,000 prospective jurors in 1,300 NC criminal trials in 2011, finding that prosecutors struck African-Americans about twice as often as whites); *but cf.* Shari Seidman Diamond, Destiny Peery, Francis J. Dolan, & Emily Dolan, "Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge," 6 Journal of Empirical Legal Studies 425 (2009) (peremptory challenges systematically related to race/ethnicity but opposing challenges cancel each other out, so no overall effect on makeup of jury).

consequence has been "the elimination of … prospective jurors whose views are reasonable and widely shared in their communities[,]" a "blatant flaw that significantly disadvantages black defendants – and people belonging to other suspect classes[.]"[22] Moreover, "[p]eremptory challenges by their very nature invite corruption of the judicial process by allowing – almost countenancing – discrimination … [and inviting] parties [to] strik[e] prospective jurors on the basis of speculation and stereotypes."[23] The exclusion of prospective jurors due to "real or imagined partiality that is less easily designated or demonstrable"[24] opens the door to the excluder's implicit biases. A 'gut' decision for which no reasons must be given is more likely the product of the unconscious biases that reside in everyone's guts.[25] While a requirement to articulate the reasons for a decision can be a check on implicit bias,[26] the principal cure for these problems – *Batson* challenges – has proven inadequate. A separate Working Group has recommended significant changes to the way in which our courts handle *Batson* challenges.[27]

There is little empirical evidence about the degree to which peremptory challenges alone introduce implicit bias into the jury selection process. Though the topic, by its very nature, defies data-driven analysis,[28] one article notes that "although peremptory challenges can radically warp the composition of any single jury … multiple studies suggest that, excepting capital cases, peremptories only negligibly affect whether, on average (i.e., across a set of

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[22] *See State v. Holmes*, 176 Conn. App. 156, 193 & 198 (2017) (Lavine, J., concurring), *aff'd*, 334 Conn. 202 (2019).

[23] *See State v. Holmes*, 334 Conn. 202, 254-55 (2019) (Mullins, J., concurring).

[24] *See Swain*, 380 U.S. at 220.

[25] *See Holmes*, 334 Conn. at 256 (Mullins, J., concurring) ("[w]ith limited information and time, and a lack of any reliable way to determine the subtle biases of each prospective juror, attorneys tend to rely heavily on stereotypes and generalizations in deciding how to exercise peremptory challenges") (quoting *State v. Saintcalle*, 309 P.3d 326, 353 (Wash. 2013) (Gonzalez, J., concurring)).

[26] *See* https://www.ncsc.org/__data/assets/pdf_file/0024/17637/implicit-bias-bench-card.pdf ("articulate the reasoning behind your decision before committing to a decision to allow yourself to critically review your decision-making process"); https://njdc.info/wp-content/uploads/2018/07/Addressing-Bias-Bench-Card-1.pdf ("slow down the process of making decisions, induce deliberation, and ensure that decisions are based in fact, rather than an aggregate of biases").

[27] *See* Report of the *Batson* Working Group.

[28] *See Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("[i]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal").

cases), juries tend to represent their communities."[29] Implicit bias impacts every step of jury selection – e.g., the composition of jury pools, the frequency of response to jury summonses – which hamstrings any attempt to isolate the pernicious effect of peremptory challenges.[30] In addition, the PCWG found no empirical studies on the relationship between the number of peremptory challenges allowed and racial disparity on juries.[31]

C. Whether to Eliminate or Limit Peremptory Challenges

I. Elimination of Peremptory Challenges

Four reasons militate against the elimination of peremptory challenges. First and foremost, to do so Connecticut would have to amend Art. First, § 19 of its constitution.[32] Whether to tilt at that windmill is beyond the PCWG's purview;[33] it suffices to note the laborious process that a constitutional amendment would require.[34]

Second, peremptory challenges fulfill important goals: They give parties and their lawyers a sense of control over the proceedings; they enhance the public's perception of procedural fairness; they are a hedge against unrestrained judicial power; they prevent some biased

[29] *See* Mary R. Rose, Raul S. Casarez, & Carmen M. Gutierrez, "Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts," 15 Journal of Empirical Legal Studies 378, 379 n. 1 (2018).

[30] *See* Paula Hannaford-Agor, "Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded," 59 Drake Law Review 761, 770-74, 773-74 (2011); Equal Justice Initiative, "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy" 35 (2010); Rose, *supra* n. 21 (study of federal jury pools including over 700 counties found an absolute disparity of 3.9% between Blacks' percentage of the jury pool and their percentage of the general population).

[31] PCWG member Neal Feigenson spoke to several leading scholars in the field – among them Professor Mary Rose, see *supra*, n. 21 – none of whom knew of any such studies.

[32] *See supra*, pp. 1-2.

[33] *See* Charge of Task Force (available at https://jud.ct.gov/Committees/jury_taskforce/#Purpose) ("[t]o propose meaningful changes to be implemented via court rule or legislation").

[34] *See* Conn. Const. Art. Twelve. Many influential voices have called for the elimination of peremptory challenges. *See Miller-El v. Dretke*, 545 U.S. 231, 273 (Breyer, J. concurring); *Batson*, 476 U.S. at 105 (Marshall, J., concurring); Jeffrey Bellin & Junichi P. Semitsu, Widening *Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 Cornell Law Review 1075 (2011); 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 Harvard Law and Policy Review 149 (2010); Morris B. Hoffman, Abolish Peremptory Challenges, 82 Judicature 202, 203 (1999). Connecticut's unique constitutional barrier aside, no jurisdiction yet has paid heed to these voices.

individuals from serving on juries; and they save time that otherwise would be spent on cause challenges.[35]

Third, such a proposal likely would face great resistance from the bar and the bench. Peremptory challenges are written into our legal DNA.[36] Though tradition alone cannot save an idea whose time has passed, stability is a cornerstone of the judicial system.[37] The PCWG anticipates that important stakeholders who are familiar with things as they are – prosecutors, defense attorneys, civil trial lawyers, and judges – instinctively (and vociferously) will oppose the elimination of peremptory challenges.[38] Their likely opposition could well make a constitutional amendment a non-starter.

Fourth, as noted, it is unclear how much the elimination of peremptory challenges would reduce implicit bias in jury selection. Doing so necessarily would have some ameliorative effect, as it is safe to assume that attorneys sometimes exercise peremptory challenges on the basis of

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[35] *See* Barbara Babcock, A Place in the Palladium: Women's Rights and Jury Service*,* 61 University of Cincinnati Law Review 1139, 1175 (1993); E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (1988); Tania Tetlow, Solving Batson, 56 William & Mary Law Review 1859, 1925-26 (2015); Kenneth J. Mellili, *Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges, 71 Notre Dame Law Review 447, 484 (1996).

[36] *See Holmes*, 334 Conn. at 223.

[37] *See State v. Evans*, 329 Conn. 770, 805 (2018), *cert. denied*, 139 S. Ct. 1304 (2019) (stability in the law "allows for predictability in the ordering of conduct … promotes the necessary perception that the law is relatively unchanging … saves resources and it promotes judicial efficiency … [and] is an obvious manifestation of the notion that … consistency itself has normative value").

[38] PCWG member Christine Rapillo informally surveyed attorneys in her office; their opinions varied: Some attorneys urged the elimination of peremptory challenges and increased efforts to promote jury pool inclusivity – among them greater compensation for jurors. Other attorneys thought that peremptory challenges are an important tool for defense lawyers – e.g., if they suspect that a potential juror was untruthful or harbored implicit biases that could not be uncovered through voir dire. They suggested revising statutes and the Practice Book to provide for a case-by-case expanded inquiry into a prosecutor's "race neutral" grounds and that objections to a juror's address, employment or level of education also be case-specific. See also *Holmes*, 334 Conn. at 242-43 n. 20 ("[t]he state, while acknowledging that Batson has been widely criticized as being ineffectual, criticizes such diversity conscious solutions as unconstitutional and discriminatory in their own right insofar as they would affirmatively treat white and minority venirepersons differently") (quotation marks omitted). Proposals to eliminate individual voir dire – the peremptory challenge's constitutional sibling – either have died on the vine, provoked a firestorm of controversy, or both. For example, in 1997, the House proposed an amendment to eliminate individual voir dire, which went nowhere after a public hearing. See https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-0710.htm (discussing 1997 House Joint Resolution 4). More recent discussions have tended towards hyperbole. *See* Richard A. Silver, "Individual Voir Dire = Justice," The SG&T Blog (March 30, 2016) (available at https://www.sgtlaw.com/2016/03/individual-voir-dire-justice/).

their implicit biases.[39] Though it offends justice if bias excludes even a single prospective juror,[40] it seems ill-advised to take a monumental step for a possibly marginal gain.

II. Limitations on Peremptory Challenges

In keeping with Justice Mullins' suggestions in *Holmes*, the PCWG considered two possible limitations on peremptory challenges short of eliminating them: (1) an across-the-board reduction in the number given to each party, and (2) giving the State fewer challenges than the defendant in criminal cases.[41] The first measure has some appeal to it: Reducing the number of peremptory challenges necessarily reduces the number of opportunities for an attorney to exercise those challenges in a discriminatory manner.[42] However, many of the reasons against the elimination of peremptory challenges likewise counsel against either limitation. First, there is no empirical or scholarly support for the notion that a reduction in the number of peremptory challenges would have a significant effect on implicit bias in jury selection.[43] Nor is there a workable evidence-based methodology by which to decide on the reduced number. Second, peremptory challenges serve a salutary function, see *supra*, p. 5, and are a deeply-rooted part of our judicial system.[44] Third, Connecticut already gives parties a relatively small number of peremptory challenges. In nearly all felony trials, for example, the parties get six challenges (eight if there are alternate jurors), which is low compared to other states. The same is true in civil cases. [45] Moreover, there does not

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[39] *See supra*, p. 3.

[40] *See Holmes*, 334 Conn. at 259-60 (Mullins, J., concurring) ("every time a discriminatory, peremptory strike goes unchallenged or such a strike passes muster in our courts, it violates the equal protection rights not only of the affected parties but also of the individual jurors who were improperly stricken").

[41] *See id.* at 260-64 (discussing possible solutions short of eliminating peremptory challenges)
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[42] *See id.* at 259 ("a substantial reduction in access to, peremptory challenges is the most effective way to lessen the discrimination that arises from peremptory challenges").

[43] *See supra*, p. 4 & n. 21.

[44] *See supra*, p. 5 & n. 29.

[45] *See* National Center for State Courts, "Trial Juries: Allocation of Peremptory Challenges" (available at http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM181). Hawaii, Kansas, and Louisiana allot the most challenges (twelve) in non-capital criminal cases, while Colorado allots the fewest (five). *See id.*, Table 4.4a. Connecticut does top the list for capital cases. *See id.* Connecticut is in the middle of the pack for civil cases. *See id.*, Table 4.4c. All of the data is as of 2016-2017. *See id.*, Table 4.4d.

appear to be a trend among the states to reduce the number of peremptory challenges, let alone one that bespeaks an intent to reduce implicit bias in jury selection.

Giving the State fewer peremptory challenges than the defendant is a closer call. A handful of other states do so, as do the federal courts in non-capital cases.[46] The justifications for this asymmetry include: (1) the most obvious problems in the use of peremptory challenges pertain to their use by prosecutors; (2) defendants have a greater need for peremptory challenges, given that their liberty is at stake, while the prosecution has far greater resources; (3) asymmetry is the more deeply-rooted historical practice, while symmetry is a relatively recent innovation; and (4) *Batson* sets up an inherently unlevel playing field.[47]

On the other hand, twice as many states gave the defendant more peremptory challenges pre-*Batson* than do so now.[48] This trend likely reflects a changed perception of the need for asymmetry.[49] Furthermore, asymmetry would face a unique constitutional hurdle in Connecticut: Art. First, § 19 guarantees "the parties" in a criminal trial the right to challenge jurors peremptorily; it does not distinguish between the State and the defendant. Though Art. First, § 19 empowers the legislature to set the number of peremptory challenges, it does not expressly permit it to distinguish between the parties when doing so.[50] It is uncertain, too, whether the legislature would look favorably on a proposal that the public might perceive as pro-defendant.

D. Whether Judges Should Preside Over Civil Jury Selection

Three factors militate against having judges preside over civil jury selection. First, there does not appear to be a link between a judge's mere presence and a reduction in bias during jury selection. The PCWG is aware of no empirical studies or scholarly articles that suggest

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[46] *See id.*, Table 4.4a; Fed. R. Crim. P. 24(b)(2); *see also* Anna Roberts, Asymmetry as Fairness: Reversing a Peremptory Trend, 92 Washington University Law Review 1503, 1536-38 (2015).

[47] *See* Roberts, *supra* n. 38; Daniel Hatoum, Injustice in Black and White: Eliminating Prosecutors' Peremptory Strikes in Interracial Death Penalty Cases, 84 Brooklyn Law Review 165 (2018).

[48] *See* Roberts, *supra* n. 38; C.J. Williams, On the Origins of Numbers: Where Did the Number of Peremptory Strikes Come From and Why Is Origin Important?, 39 American Journal of Trial Advocacy 481, 506-07 (2016).

[49] *See id.* (discussing history of Fed. R. Crim. P. 24).

[50] *Cf. Holmes*, 334 Conn. at 261-63 (Mullins, J., concurring) ("given that the legal basis for the state's constitutional right to peremptory challenges in a criminal case is certainly open to question … it is appropriate to consider whether the state should be entitled to an equal number of peremptory challenges as the accused in a criminal case").

otherwise. Second, Connecticut has required judges to preside over criminal jury selection for a quarter century,[51] yet bias in jury selection remains a problem in criminal cases. Indeed, given the hidden nature of implicit bias, it is unlikely that the presence of a judge would have any effect.

Finally, such a rule would be costly, inefficient, and likely would encounter resistance from judges. Voir dire often lasts for days; shackling a judge to the bench while the process grinds along would hinder the conduct of other important business.[52]

IV. Report of the Implicit Bias Model Jury Instruction Working Group

The Implicit Bias Model Jury Instruction Working Group[53] was tasked with "developing model jury instructions … to educate jurors about implicit bias and how to avoid it in their deliberations."[54] After reviewing the current instruction, Criminal Jury Instruction 2.10-3B,[55] implicit bias instructions from other jurisdictions, and the relevant empirical and scholarly literature, the Working Group recommends: (1) making modest revisions to the current instruction, detailed below; (2) giving the instruction in civil as well as criminal cases; and (3) giving a version of the instruction at the beginning as well as the end of trial. The Working

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[51] *See State v. Patterson*, 230 Conn. 385, 397 (1994) ("hold[ing], under our supervisory power over the courts, that henceforth the judge is required to remain on the bench throughout the voir dire of a criminal trial"); *see id.* at n. 12 (not deciding whether to apply rule to civil cases). The Supreme Court sanctioned this dichotomy – albeit in *dicta* – in *Kervick v. Silver Hill Hosp.*, 309 Conn. 688, 704-05 (2013).

[52] *See Kervick*, 309 Conn. at 705 ("long-standing practice, whereby the judge is absent and voir dire is conducted off of the record, allows for the efficient use of scarce judicial resources").

[53] The members of the working group are Attorney Daniel J. Krisch and Professor Neal Feigenson.

[54] *See* Subcommittee Charge for Implicit Bias in the Jury Selection Process and Batson Challenges (available at https://www.jud.ct.gov/Committees/jury_taskforce/default.htm#Implicit).

[55] "As I indicated earlier, your verdict must be based on the evidence, and you may not go outside the evidence to find facts; that is, you may not resort to guesswork, conjecture or suspicion.

"As human beings, we all have personal likes and dislikes, opinions, prejudices, and biases. Generally, we are aware of these things, but you also should consider the possibility that you have implicit biases, that is, biases of which you may not be consciously aware. Personal opinions, preferences or biases have no place in a courtroom, where our goal is to treat all parties equally and to arrive at a just and proper verdict. All people deserve fair treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender, sexual orientation, education, income level or any other personal characteristic.

"Although our personal biases can affect how we perceive, remember and evaluate information, being aware of them may help you avoid their influence throughout your decision-making process. Techniques to identify and check one's implicit biases include: slowing down and examining your thought processes thoroughly to identify where you may be relying on reflexive, gut reactions or making assumptions that have no basis in the evidence; asking yourself whether you would view the evidence differently if the players were reversed or other types of people were involved; and listening carefully to the opinions of your fellow jurors, each of whom brings a different, valid perspective to the table.

"In sum, your task is to render a verdict based on facts drawn from the evidence and not on personal prejudice or bias. Again, decisions based upon biases for or against particular groups of people or stereotypes regarding such groups are unfair and have no place in the courtroom."

Group also recommends showing jurors selected for jury service a short video that explains implicit bias.

A. Content of the instruction

No empirical research has found that implicit bias instructions help reduce the effect of racial or other biases on jurors' thinking or decision-making.[56] However, other psychological research suggests that a properly-drafted implicit bias instruction might be useful.[57] The research also points to the most important features of an effective implicit bias instruction: explaining implicit bias and its effects; motivating jurors to avoid it; offering specific techniques for debiasing; and being written in clear, plain English.

Connecticut adopted its pattern instruction in 2019. Eight other states and two federal courts[58] have some form of an implicit bias instruction; in many ways, Connecticut's instruction is one of the most thorough of the bunch. Despite that fact, and despite the recent vintage of Connecticut's instruction, the Working Group recommends a few modest changes.

Brief explanation of implicit bias and its effects. Bringing the fact of implicit bias to jurors' attention is the first step toward addressing it.[59] Beyond this, explaining the concept of implicit bias effectively can provide jurors with an understanding of what it is they are supposed to be addressing and help motivate them to do so.

Connecticut's instruction sets out the concept of implicit bias very briefly:

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[56] The leading study is Jennifer K. Elek & Paula Hannaford-Agor, "Implicit Bias and the American Juror," 51 Court Review 116 (2015). See also Hannah Bolotin, "Mitigating Implicit Racial Bias Among Criminal Court Jurors: Intervention Through Instruction," undergraduate thesis, Wesleyan University (2019), https://digitalcollections.wesleyan.edu/object/ir1422?solr_nav%5Bid%5D=75017250094dbf52a0f8&solr_nav%5Bpage%5D=0&solr_nav%5Boffset%5D=0 (last visited 8/7/20). The control group in each study (i.e., the group not given an implicit bias instruction) did not display any racial bias, so there was nothing for the experimental instruction to debias.

[57] An implicit bias instruction also signals to the public that the judiciary recognizes the gravity of the problem of racial bias in the legal system and is making efforts to address it.

[58] The states are Arkansas (Model Jury Instruc. – Civil 103), California (Jud. Council of Cal. Crim. Jury Instruc. 200), Illinois (Pattern Jury Instruc. – Civil 1.08), Michigan (Model Civ. Jury Instrucs. 3.02, 97.13, 97.33; Model Crim. Jury Instruc. 2.26), Missouri (Approved Jury Instruc. (Civ.) 2.00(C), 2.03(A)), Oregon (Uniform Crim. Jury Instrucs. 1001, 1004, 1005), Pennsylvania (Suggested Standard Crim. Jury Instruc. 2.02; Suggested Standard Civ. Jury Instruc. 1.140), and Washington (Pattern Jury Instrucs. Civ. 1.01, 155.01). The federal courts are the Ninth Circuit (Model Crim. Jury Instrucs. 1.1, 1.7) and the Western District of Washington (Crim. Jury Instruc. – Implicit Bias).

[59] E.g., Cynthia Lee, "Awareness as a First Step Toward Overcoming Implicit Bias," in *Enhancing Justice: Reducing Bias* 289 (Sarah Redfiled et al. eds., 2017), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2550&context=faculty_publications (last visited 8/7/20). More generally, awareness of unwanted influences on mental processing is the first step toward correcting any unwanted effects (Timothy D. Wilson & Nancy Brekke, "Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations," 116 Psychological Bulletin 117 (1994)).

> As human beings, we all have personal likes and dislikes, opinions, prejudices, and biases. Generally, we are aware of these things, but you also should consider the possibility that you have implicit biases, that is, biases of which you may not be consciously aware.[60]

This labels the concept of implicit bias without thoroughly explaining it. A fuller explanation is likely to help jurors understand the concept better. Compare this excerpt from the American Bar Association's "Achieving an Impartial Jury" (AIJ) proposed instruction:

> Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.[61]

These few sentences offer jurors a simple analogy to help them understand what implicit bias is and how it works: It's like a physical reflex. The description explicitly and directly explains the connection between jurors' reflexive responses and their judgments about the evidence and the case. The first sentence alludes to the scientific support for the concept of implicit bias, which may enhance its credibility. These sentences also attempt to relieve jurors of feeling somehow blameworthy for having unconscious biases and thus may avoid provoking them to react defensively to the instruction.

Motivating jurors to avoid the bias. Understanding that a bias exists and what its effects may be is not enough to enable jurors to avoid its influence. An instruction also must motivate jurors to try to correct for the effects of the bias.[62] One way to increase jurors' motivation to follow an instruction is to explain the reason(s) behind the instruction. Studies of limiting instructions, for instance, have found that explaining to jurors the goals they are intended to serve increases the likelihood that jurors will follow them.[63]

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[60] See *supra* note 3.

[61] American Bar Association, "Achieving an Impartial Jury (AIJ) Toolbox" 17-18 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf (last visited 8/7/20).

[62] Wilson & Brekke, *supra* note 7.

[63] E.g., Shari Seidman Diamond & Jonathan Casper, "Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury," 26 Law and Society Review 513 (1992); Joel Lieberman & Bruce Sales, "What Social Science Teaches Us About the Jury Instruction Process," 3 Psychology, Public Policy, and Law 589 (1997). See also Nancy Steblay, Harmon M. Hosch, Scott E. Culhane, & Adam McWethy, "The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis," 30 Law and Human Behavior 469, 486 (2006)

As the authors of a study of instructions to disregard inadmissible evidence explain: "Jurors may be influenced to comply [with an instruction to disregard] only to the extent to which they agree with the judge's explanation as to why certain evidence should be disregarded."[64] An implicit bias instruction, therefore, should set out the rationale for the instruction in language that jurors can understand.

Connecticut's current instruction states:

> Personal opinions, preferences or biases have no place in a courtroom, where our goal is to treat all parties equally and to arrive at a just and proper verdict. All people deserve fair treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender, sexual orientation, education, income level or any other personal characteristic.[65]

These aspirational statements alone may not be enough to obtain jurors' compliance, however. In fact, emphasizing these sorts of extrinsic motivations to avoid racial bias may even backfire and exacerbate the role of the proscribed bias. For one thing, merely instructing jurors about the unwanted influence calls more attention to it and thus may enhance its prominence in their memory and judgment.[66] In addition, the language used to convey the purpose of the rule may alienate jurors and provoke their *reactance*, that is, a desire to do the opposite of what they have been instructed to do because they feel that their freedom to choose how to act is being threatened.[67] First, although jurors are generally motivated to reach what they consider to be a just verdict,[68] they may bristle at being told to comply with standards they see as being imposed on them by an external authority. "[S]tudies ha[ve] shown that some types of individuals are angered and feel threatened by external pressure to comply with mandatory nondiscrimination standards. When away from the watchful eye of the authority figure setting the standards for compliance, these individuals are more likely to engage in biased decision making, presumably in attempts to 'reassert their personal freedom.'"[69]

(when an instruction to disregard inadmissible evidence provided a reason for inadmissibility, the effect of the inadmissible evidence on mock jurors' verdicts was reduced).

[64] Steblay et al., *supra* note 11, at 473.

[65] See *supra* note 3.

[66] See, e.g., Keri Edwards & Tamara S. Bryan, "Judgmental Biases Produced by Instructions to Disregard: The (Paradoxical) Case of Emotional Information," 23 Personality and Social Psychology Bulletin 849 (1997); see generally Daniel M. Wegner, *White Bears and Other Unwanted Thoughts* (1989).

[67] On jurors' reactance to limiting instructions generally, see Joel Lieberman & Jamie Arndt, "Understanding the Limits of Limiting Instructions," 6 Psychology, Public Policy, and Law 677 (2000).

[68] Saul M. Kassin & Samuel R. Sommers, "Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations, 23 Personality and Social Psychology Bulletin 1046–54 (1997).

[69] Jennifer K. Elek & Paula Hannaford-Agor, "First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making," 49 Court Review 190, 193 (2013). The authors continue: "Thus if an authority designs the

Second, the risk of reactance may be heightened when the instruction is couched in authoritarian terms, implying that the jurors, unlike the judge, have some flaw they need to correct. Research indicates that jurors are more likely to comply with an instruction when it includes them as part of an in-group which, together with the judge, is engaged in a joint activity.[70]

While the current Connecticut instruction begins, "As human beings, we all have personal likes and dislikes, opinions, prejudices, and biases. Generally, we are aware of these things,"[71] thus using the first-person plural to welcome the jurors into an ingroup,[72] it immediately shifts to a more authoritarian tone, using the second person. The current instruction's articulation of the nondiscrimination standard in itself is unproblematic.

Specific techniques for debiasing. An implicit bias instruction should offer jurors specific methods they can use to try to reduce the effect of their biases on their thinking and decision-making.[73] Connecticut's current instruction is quite good in this respect; in fact, no other jurisdiction currently provides better guidance:

> Techniques to identify and check one's implicit biases include: slowing down and examining your thought processes thoroughly to identify where you may be relying on reflexive, gut reactions or making assumptions that have no basis in the evidence; asking yourself whether you would view the evidence differently if the players were reversed or other types of people were involved; and listening carefully to the opinions of your fellow jurors, each of whom brings a different, valid perspective to the table.

Slow down and examine your own thinking. Several other actual or proposed implicit bias instructions include this advice, using varying language.[74] If followed, this instruction would yield the benefit not only of focusing jurors' attention on the problem of implicit bias but, by getting jurors to slow down, of reducing their cognitive load. This

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educational message to pressure individuals to comply with social or institutional standards for racial fairness, this *extrinsic* motivation to regulate prejudice can incite hostility and generate backlash that may increase expressions of racial prejudice."

[70] See ABA/AIJ, *supra* note 9, at 17 nn. 66-67 and sources cited therein.

[71] See *supra* note 3.

[72] See *supra* note 9 (ABA/AIJ explanation).

[73] See Anna Roberts, "Implicit Jury Bias: Are Informational Interventions Effective?," in Cynthia J. Najdowski & Margaret C. Stevenson (eds.), *Criminal Juries in the 21st Century* 85, 96 (2019).

[74] E.g., ABA/AIJ, *supra* note 9, at 18; Elek & Hannaford-Agor, "Implicit Bias and the American Juror," *supra* note 4, at 119; Michigan Model Civil Jury Instructions 97.13; Federal District Court for the Western District of Washington implicit bias video, https://www.wawd.uscourts.gov/jury/unconscious-bias (last visited 8/7/20).

would be beneficial because reduced cognitive load is associated with a reduced reliance on heuristic thinking,[75] including the resort to stereotypes.[76]

Imagine if you would view the evidence differently if the parties or witnesses belonged to different ethnic or other groups. This encouragement to take another person's perspective has also been strongly recommended as a debiasing technique.[77] An especially striking example is one professor's suggestion that jurors be invited to make a "race-switching assumption," which:

> involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you would imagine a Latino defendant and a White victim. If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.[78]

While Connecticut's instruction gets at the idea of perspective-taking, it is not as clearly and directly worded as it might be (see below).

Listen to other jurors' views. The advice to "consider the other side" is a longstanding principle in the law which, in the form of advising jurors to listen to one another's views, is incorporated into every set of instructions we reviewed. Social scientific evidence for its potential efficacy comes from a number of studies finding that "considering the opposite" instructions reduce biases in social judgments.[79] Encouraging jurors to listen to one another's views before deciding also aims to enhance the quality and experience of jury deliberations more generally. Connecticut's current instruction is excellent on this point.

<u>Clear, direct, plain language</u>. As decades of research and "plain English jury instructions" reforms show, framing instructions in simple, clear language helps jurors understand them better.[80] The current Connecticut instruction is, for the most part,

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[75] See Richard Petty & John Cacioppo, "The Elaboration Likelihood Model of Persuasion," in Leon Berkowitz (ed.), *Advances in Experimental Social Psychology* (vol. 19) 123-205 (1986).

[76] E.g., Ad Van Knippenberg, Ap Dijksterhuis, & Diane Vermeulen, "Judgement and Memory of a Criminal Act: The Effects of Stereotypes and Cognitive Load," 29 European Journal of Social Psychology 191 (1999).

[77] See ABA/AIJ, *supra* note 9, at 19 & n. 75; Elek & Hannaford-Agor, "Implicit Bias and the American Juror," *supra* note 4, at 119-20 & n. 9; Federal District Court for the Western District of Washington implicit bias video, *supra* note 20.

[78] See ABA/AIJ, *supra* note 9, at 21-22.

[79] E.g., Charles G. Lord, Mark R. Lepper, & Elizabeth Preston, "Considering the Opposite: A Corrective Strategy for Social Judgment," 47 Journal of Personality and Social Psychology 1231 (1984).

[80] E.g., American Bar Association, *Principles for Juries and Jury Trials* principles 6.C, 14 (2005); Lieberman & Sales, *supra* note 11; for a brief overview, see Dennis J. Devine, *Jury Decision Making: The State of the Science* 57 (2012).

clear and precise, but the second specific technique for reducing bias, perspective-taking – "[Ask] yourself whether you would view the evidence differently if the players were reversed or other types of people were involved" – is a bit oblique.

B. Proposed revision of Criminal Jury Instruction 2.10-3B[81]:

As I indicated earlier, your verdict must be based on the evidence, and you may not go outside the evidence to find facts; that is, you may not resort to guesswork, conjecture or suspicion.

~~As human beings, we all have personal likes and dislikes, opinions, prejudices, and biases. Generally, we are aware of these things, but you also should consider the possibility that you have implicit biases, that is, biases of which you may not be consciously aware. Personal opinions, preferences or biases have no place in a courtroom, where our goal is to treat all parties equally and to arrive at a just and proper verdict.~~

Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. All people deserve fair treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender, sexual orientation, education, income level or any other personal characteristic. Scientists studying the way our brains work, however, have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they can influence how we judge people and how we remember or evaluate the evidence. This kind of quick, unconscious response is what is known as an implicit bias.

Although our ~~personal~~ implicit biases can affect how we perceive, remember and evaluate information, being aware of them ~~may~~ can help you avoid their influence~~ throughout your decision-making process~~. Here are some ~~T~~techniques to identify and ~~check~~ counter~~-one's~~ implicit biases. ~~include:~~ ~~s~~Slow~~ing~~ down and examin~~ing~~e your thought processes thoroughly to identify where you may be relying on reflexive, gut reactions or making assumptions that have no basis in the evidence~~;~~. ~~a~~Ask~~ing~~ yourself whether you would view the evidence differently if ~~the players were reversed or other types of people were involved~~ the defendant or the victim were of a different race, gender, or ethnicity than they are – for instance, if the defendant is White and the victim is Black, whether you would view the evidence differently if the defendant were Black and the victim were White~~;~~ ~~and l~~Listen~~ing~~ carefully to the opinions of your fellow jurors, each of whom brings a different, valid perspective to the table.

[81] Additions are underlined; deletions are struck through.

~~In sum, your task is to render a verdict based on facts drawn from the evidence and not on personal prejudice or bias. Again, decisions based upon biases for or against particular groups of people or stereotypes regarding such groups are unfair and have no place in the courtroom.~~

C. Instructing in civil cases

Given the value of an implicit bias instruction, the Working Group sees no reason not to recommend that it be given in civil as well as criminal cases. Of the other jurisdictions that address implicit bias in jury instructions,[82] six include those instructions or some portion of them in civil cases and six in criminal cases (in two jurisdictions,[83] implicit bias instructions or at least some portion of them are given in both civil and criminal cases).

D. Instructing at beginning of trial

Psychological research has found that pre-instructing juries enables them to process and recall the evidence better.[84] As one Washington state court judge has written, "[i]ntroducing the topic of implicit bias during juror orientation is optimal. . . . Such timing is important because it is during orientation that jurors are introduced to the concepts of the right to fair trial, the role of the jury system, and the need to discard bias and prejudice to decide the case fairly. Awareness of unconscious stereotypes and biases is logically related."[85] The Working Group therefore recommends that any implicit bias instruction be given at the beginning of trial as well as immediately before deliberations, in a condensed form if desired for sake of efficiency.

E. Implicit bias video

To improve jurors' understanding of implicit bias, at least one court shows jurors a video that explains the concept.[86] After reviewing this video and some others available online, the Working Group recommends that a short and simple video explaining implicit bias be adopted or created and shown to jurors: in criminal cases, after the panel is brought into the courtroom and at a sufficiently early stage so that the topic can be addressed at voir dire; in civil cases, at a time to be determined by the task force. If this general recommendation is adopted, the task force can then determine the precise nature and contents of the video.

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[82] See note 6 *supra*.
[83] Michigan and Pennsylvania.
[84] See, e.g., Martin J. Bourgeois, Irwin A. Horowitz, Lynne ForsterLee, & Jon Grahe, "Nominal and Interactive Groups: Effects of Preinstruction and Deliberations on Decisions and Evidence Recall in Complex Trials," 80 Journal of Applied Psychology 58 (1995); Devine, *supra* note 28, at 66.
[85] Theresa J. Doyle, "U.S. District Court Produces Video, Drafts Jury Instructions on Implicit Bias," King County [WA] Bar Bulletin 2 (April 2017).
[86] Federal District Court for the Western District of Washington, https://www.wawd.uscourts.gov/jury/unconscious-bias (last visited 11/3/20).

Juror Outreach & Education Subcommittee:

Co-Chairs: Honorable Joan K. Alexander, CT Judicial Branch, Appellate Court
Attorney Charleen E. Merced Agosto, CT Hispanic Bar Association

Members: Attorney Molly Arabolos, CT Asian Pacific American Bar Association
Attorney Sheila Sinha Charmoy, South Asian Bar Association of CT
Attorney Glenn B. Coffin, CT Defense Lawyers Association (CDLA)
Scot X. Esdaile, President, CT NAACP
Hannah Kogan, UCONN Law School Student
Shari L. DeLuca, Jury Outreach Coordinator – Support Staff

I. Subcommittee Charge:

This subcommittee will review the current Jury Outreach Program, study jury related public service campaigns from other states, look at the feasibility of partnering with community organizations from minority communities, and study whether there is a role that community colleges and universities can play in educating our citizens about jury service. In addition, the subcommittee will identify resources needed for an outreach program that specifically targets minority communities.

Jury Outreach & Education continues to be an important component of the jury process. Misinformation and negative perceptions of the criminal justice system can impact whether or not an individual will who up for jury service, particularly individuals from minority populations and those with LEP. As it is written, the statute requires that an individual summoned for jury service must be able to speak and understand English to serve on a jury. This subcommittee should explore whether this statutory provision warrants revision and how the availability of court interpreters in the voir dire and trial process might impact diversity of potential jurors who appear for jury service.

This subcommittee reviewed the current Jury Outreach Program, studied jury related public service campaigns from other states, looked at the feasibility of partnering with community organizations from minority communities, and studied whether there is a role that community colleges and universities can play in educating our citizens about jury service. In conducting this review, the subcommittee identified important resources needed for an outreach program that specifically targets minority communities. The subcommittee discussed the modification of the

statutory provision requiring jurors to speak and understand English in order to serve on a jury. The subcommittee is not proposing any changes to the jury statute. The subcommittee believed that due to the limited number of accessible court interpreters and the potential for complicated legal implications involved in this type of statutory change, the more effective focus at this time is to expand jury outreach. The following recommendations are respectfully submitted for consideration:

II. Research of Other State Outreach Programs:

In reviewing other states jury outreach programs, it was determined that many states simply have websites that specify information for jurors including contacts, information for employers regarding jury service, and other useful information. However, there are states with more specific outreach information:

- **Massachusetts**: The Office of Jury Commissioner (OJC) conducts a Public Outreach Program designed to inform the public about the experience of serving on a jury. The goal of the program is to emphasize jury duty as a building block of good citizenship and a rewarding, positive experience. The program was developed to help reduce juror delinquency. The program works with groups to tailor messaging for each audience, ranging from students to adults in fraternal, religious, and social organizations. The goal of this program is to emphasize the very important contribution jurors make to preserving law and order and justice for all. The Public Outreach Program teaches groups about jury duty using audio visual methods, mock trials, audience participation, historical materials and case examples.

- **Arizona**: The state of Arizona's website offers numerous links to educational information including information on jury service, videos regarding orientation for jurors, information on court officers, key legal terms, courtroom personnel and a jurors' "Bill of Rights." Arizona jurors' rights are defined as follows:

  JUDGES, ATTORNEYS AND COURT STAFF SHALL MAKE EVERY EFFORT TO ASSURE THAT ARIZONA JURORS ARE:

  - Treated with courtesy and respect.
  - Afforded privacy and security safeguards.
  - Randomly selected for jury service without regard for race, ethnicity, gender, age, religion, physical disability, sexual orientation or economic status.
  - Provided with comfortable and convenient facilities, with accommodations to address the special needs of jurors with physical disabilities.

- Informed of trial schedules as often as possible.
- Informed of the trial process and of the applicable law in plain and clear language.
- Permitted to take notes during trial and to ask questions of witnesses or the judge, as permitted by law, and to have them answered where appropriate.
- When the law permits, told of the circumstances under which they may discuss the evidence during the trial among themselves in the jury room, while all are present, as long as they keep an open mind until a verdict is rendered.
- Given answers, as permitted by law, to questions and requests that arise during deliberations regarding the law as it relates to their specific case.
- Offered assistance if they experience serious anxiety, stress, or trauma as a result of jury service.
- Permitted to express concerns, complaints and recommendations to courthouse authorities.
- Compensated in a timely manner for jury service.

The information provided to jurors in Arizona is very comprehensive and accessible.

- **New York:** The state of New York has a webpage - https://www.nynd.uscourts.gov/juror-faq. Contained on that webpage is information regarding jury service and the different types of cases. It also makes available a "Juror Appreciation Kit."

  As previously indicated, many states simply have general information on a website. Arizona and Massachusetts seem very detailed in their outreach programs. While the above described outreach forums may not be entirely practicable for Connecticut, something similar – even a pre-recorded video segment informing jurors of what to expect - would be useful. In addition, Arizona's juror bill of rights is an interesting idea which demonstrates that the court recognizes the needs and concerns of jurors before they serve. The subcommittee also proposes that a week dedicated to juror outreach be held each year which would emphasize the importance of jury service throughout many different communities.

III. Community Outreach

In order to secure a more diverse jury pool, a starting point would be to draw on the many diverse affinity bars already in existence to do outreach and serve as spokespersons. Many of those affinity bars are represented on this task force which already shows their commitment to the necessary changes being considered. Having Black, Indigenous, and People of Color (BIPOC)

attorneys engaging and encouraging communities for greater jury participation would send a positive message that real change is coming. Those affinity bars should be called upon to reach out to a variety of different groups. Some of these groups could include social organizations, local community centers, libraries, and PTAs/PTOs. In a post-pandemic world, fairs, cultural events, and even voter registration drives should be considered as possible locations to have representation from the bar. The affinity bar and volunteers could present remotely, or eventually in- person, the importance of jury service. There should be certain common bullet points used by all but the mode and manner in which they decide to present could be modified based on the specific group they would be addressing.

The manner of presentation should include, both a written pamphlet or information sheet, as well as an in-person presentation. The information sheet could be a shorter and more engaging version of the one that is currently being sent to potential jurors. This could be accomplished by limiting or highlighting a few important things to know about jury service. All representatives would have these concise pamphlets for their presentations, allowing for uniformity in the message to jurors. In-person presentations could range from a panel comprised of lawyers, former jurors, and/or judges discussing their jury trial experiences and answering questions from the audience, a pre-recorded video with judges, lawyers, and former jurors, or booths set up at various events for walk-by participation. The importance of in-person interaction is to make the information more dynamic and interactive. In-person interaction also allows for "real people" to answer questions or concerns in "real time."

IV. New Citizens/Naturalization Ceremony Outreach

As the jury pool continues to expand, the subcommittee also considered how to reach out to new citizens. The following statistics from the American Immigration Council show the rapid growth of immigrant populations in our state as follows:

a) 15% of our population is comprised of immigrants; and

b) The fastest growing populations are from[87]:

- India (9% of immigrants);
- Jamaica (7%);
- Dominican Republic (5%);
- Poland (5%); and,
- Ecuador (5%).

[87] (source: https://www.americanimmigrationcouncil.org/research/immigrants - Connecticut)

Currently, the State of Connecticut Judicial Branch does not have resources directly targeting these fast-growing populations. Brochures should be translated, and the Branch should consider providing digital real time translation services to allow new citizens to begin to participate in the jury process.

The Connecticut Commission on Women, Children, Seniors, Equity and Opportunity has done extensive outreach into the immigrant population in our state. There are sub-commissions for African American, Latino and Asian populations. All three deal with specific immigrant populations. The Asian Sub-commission investigated translation services for non-English speaking immigrants for purposes of medical care and legal issues. The Branch should consider utilizing this valuable resource to conduct outreach into these communities. In addition, the fastest growing immigrant populations also have civic and social engagement organizations, specifically: Asian Pacific American Coalition (CT-APSC), West Indian Social Club (WISC) located in Hartford, Polish American Foundation of CT, and the Ecuadorian Civic Center of Danbury. The Branch should consider forming liaisons with these organizations in order to provide outreach to these diverse communities.

In order to accomplish these connections, the following ideas are recommended:

a) Provide brochures that are in the following languages:
   A) Hindi and Tamil;
   B) Hmong and Laotian;
   C) Spanish; and,
   D) Polish.

b) Utilize the resources above to directly target the brochures to these communities. These brochures should be widely disseminated among the organizations listed above, as well as at naturalization ceremonies.

c) The Judicial Branch has a built-in resource as many of the minority judges have been involved extensively with their corresponding civic and social organizations. The subcommittee recommends that minority judges from these populations attend community events. The outreach by judges to these communities would be a very valuable asset. For example, a judge informally attending a function such as India Day or West Indian Independence celebrations will make the judicial system more inviting and less intimidating to new citizens. Similarly, a representative of the Judicial Branch could attend naturalization ceremonies. It would again be helpful to use a panel to give talks about the judicial process and our judicial system to these

communities with volunteers from the minority Bar Associations: South Asian Bar Association of Connecticut (SABAC), Crawford Bar Association, and Connecticut Hispanic Bar Association (CHBA). The more the Branch makes its presence known in these informal environments, the more likely it is to engage these populations. Events at the Supreme and Appellate Court which are targeted to these populations is another way to make the judicial process more inviting.

The Judicial Branch should keep the countries of origin in mind when addressing outreach. Depending on the country of origin, the legal system may be fairly similar or very different from ours. India and the Dominican Republic do not have jury trials. India abolished jury trials pursuant to the 1973 Code of Criminal Procedure. In Poland, trials are heard by a judge or a panel of judges. Although there are no trials by jury per se, for lesser crimes trials are heard by a judge along with two Polish citizens. The citizens work in conjunction with the judge to determine guilt or innocence and to determine the sentence. For these populations the education, brochures, and outreach should include comprehensive explanations of our jury system, as well as clear expectations of the role of a juror. Our jury process is extensive and complicated, thus educational material should include an explanation of the voir dire process, the types of issues that may excuse a person from serving as a juror, the expected time off from work, the expectations during trial, and the deliberation process. Most significantly, the information should include the cultural and historical basis for why we have jury trials in the United States. The information should also include practical and useful information such as to what to wear, whether food or drink is accessible, where to park, and what to expect on the day of jury service.

V. High School/College Outreach

The following are recommendations to improve and build upon current outreach with students, both in high school and college, including increasing student participation in the Jury Outreach Program itself:

a) Currently, presentations to high school students, and previously to some college students, is largely made possible through connections with specific teachers willing to allot time out of their curriculum to allow the Jury Outreach Coordinator to use class time to give a presentation on jury service in Connecticut. The current presentation is singlehandedly done by the Jury Outreach Coordinator herself, Shari DeLuca. She has done a commendable job and uniquely tailors her presentation, along with an associated PowerPoint, to her audience. The subcommittee recommends, if possible, funding to hire additional staff to assist the current Jury Outreach Coordinator or cross-training other judicial employees to do these presentations. Having additional staff

would allow for an increased number of presentations across the state. In the past, four employees worked in Jury Outreach and conducted these program presentations. The subcommittee recommends preparing a special presentation that educates students but also fosters a lively debate that could be introduced in Connecticut schools' curriculum. This special presentation can be introduced in the history, civics, or government classes.

b) Another recommendation is the utilization of Judicial Branch souvenirs or mementos. At community events, this is a major draw rather than just having various brochures and pamphlets on the table. In the past, bags were available that included various items - rulers, pens, pencils, erasers, note pads, coloring books, crayons, stickers, and candy. The goal of having these Judicial Branch bags was to draw younger children to the table because with them were adults—the actual target audience. The subcommittee recommends providing these type of items at community events and at presentations to students in high school and college. Such memorable items will be taken home, will be used by both the student and parents alike, and can be designed to provide a link to the Judicial Branch's website on the item.

c) While at community events and schools, the Jury Outreach Program should encourage students to follow the Connecticut Judicial Branch on social media (Twitter, Instagram, Facebook, etc.). Social media is obviously extremely popular among young adults and is an easy way to engage. Apart from court closures or logistical updates, the Judicial Branch should increase efforts to reach out and seem "friendlier" through its social media posts. For instance, providing a weekly "fact" about some aspect of the Connecticut Judicial Branch or certain employees keeps the community engaged in the judicial process. Additional postings regarding open employment positions, including the Job Shadow Program, Court Aide Program, and any internship or experiential learning opportunities will help keep younger individuals and students involved. Further, students that receive or see social media posts and updates from the Connecticut Judicial Branch may share it with their parents—this again could lead to an increase in adults using the Connecticut Judicial Branch's website as a resource for other items apart from jury service questions.

d) The subcommittee would like to see more practicing attorneys and law students assist as volunteers in the Jury Outreach Program's school presentations on jury service. These individuals can provide another perspective to the importance of serving as a juror from a practice-based standpoint. Many students (both undergraduate and graduate/law students) do not know of the current Jury Outreach Program by the Connecticut Judicial Branch or that it welcomes interns. To increase student involvement as volunteers, the

subcommittee hopes to have all Connecticut college and university's websites regarding Community Outreach options add the Jury Outreach Coordinator's contact information. Students will then become aware of the Jury Outreach Program and may reach out to the Coordinator to participate and volunteer at outreach events, including presentations about jury selection at local schools. For UConn School of Law, in particular, this information can be added to the school's Pro Bono webpage as another volunteer opportunity.

e) Further, the subcommittee recommends the Jury Outreach Coordinator do an annual information and training session initially at UConn Law School, and eventually branching out to other Connecticut law schools. At UConn Law School, the subcommittee proposes to have this training paired up with the Pro Bono program as part of the Pro Bono Pledge. By partnering with UConn Law School and other Connecticut law schools in this training, it will provide law students with an understanding of how jury service and summoning works in Connecticut. Not only does this educate future lawyers, but it also provides them with the necessary information and tools to accompany and assist the Jury Outreach Coordinator on presentations to local high schools, colleges and other community organizations.

f) Finally, in addressing interactions with college students, it is recommended that the Judicial Branch partner with organizations already established at the school. For example, most colleges and universities have NAACP chapters and these organizations regularly meet and could provide an appropriate forum for direct communication about jury service.

As a general matter, the subcommittee recommends the updating of pamphlets regarding "Jury Duty in Connecticut: What Every Student Should Know." This includes adding webpage links to the CT Judicial Branch website and the FAQ page, as well as outlining the electronic process for students attending college out of state that want to send notice of their inability to serve as a juror. Currently, the pamphlet only provides for the option of writing a letter to the Jury Administrator and does not include the online process available through the Judicial Branch's website. Once the updates have been accomplished, the subcommittee recommends making these pamphlets available in school administrative offices, including career services, community outreach centers, and service-learning centers across college campuses and universities.

To summarize, the subcommittee recommendations are divided into two main categories:

a) **Materials and Communications:**

i. Creating a Juror's Bill of Rights, such as the one adopted in Arizona.

ii. Revising jury materials to make the information less intimidating and easier to understand.

iii. Expanding the use of social media for jury service communications.

iv. Creating public service announcements for broadcast media which include past jurors and highlights diversity in jury service.

v. Participating in local radio interviews about juries.

vi. Creating a Mock Trial video to be used in high schools and colleges.

vii. Publishing op-ed pieces about jury service and the importance of diversity in the jury panel.

viii. Participating in interviews on local television, radio and social media about the Juror Taskforce recommendations, resulting legislative changes and impact on Connecticut communities.

ix. Creating posters and visual media to make jury service more visible and attractive.

x. Establishing a Jury Service Week. Each year the Juror Outreach Coordinator will direct an educational campaign to diverse communities about jury service.

xi. Creating a Juror Appreciation Kit that could include a gavel key chain, bookmarks (such as those provided by the American Bar Association) with an imprinted juror appreciation message, and/or an "I've been a Juror" sticker.

b) **Community Engagement**

i. Hiring of additional, diverse personnel or cross-training current personnel for the Jury Outreach Program.

ii. Preparing a list of contacts that will participate in the Juror Service Week.

iii. Creating a permanent volunteer and/or pro bono program focused on juror education and outreach:

- The creation of a volunteer and/or externship program with local universities and law schools to assist the Jury Outreach Coordinator in furthering the education about jury service; and,

- The creation of a permanent collaboration with Connecticut high schools, both public and private, to educate teenagers about jury service. Inviting Judges, lawyers, and court administrators into school classrooms to serve as a direct resource to engage students in a compelling and interactive way.

iv. Creating a permanent partnership with the local bar associations (regional and diversity bars) to establish an educational campaign that could be carried out during Juror Service Week. The local bar associations would be responsible for partnership with organizations such as the local Chamber of Commerce or other community based groups for the purpose of educating and engaging the community.

v. Engaging the private sector to help with new and innovative designs for public messages and communications regarding jury service.

vi. Attending naturalization ceremonies.

Jury Outreach and Education is an important component of the jury process. As indicated in the Subcommittee Charge, misinformation and negative perceptions of the criminal justice system can impact whether or not an individual will show up for jury service, particularly individuals from minority populations and those with LEP. This subcommittee believes that by improving education, communications and community interactions through a coordinated juror outreach program, a more diverse jury panel will become available for future trials in Connecticut.

Appendix A.

Richard A. Robinson, Chief Justice

Barcode

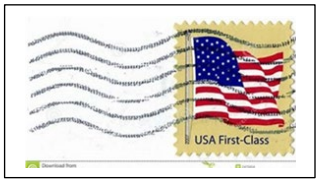
c/o State of Connecticut Judicial Branch
Jury Administration
P.O. Box 260448
Hartford. CT 06126-0448

A summons for you to serve your community and ensure equal justice

Return window

Appendix A-1

Richard A. Robinson, Chief Justice



Window

Barcode

c/o State of Connecticut Judicial Branch
Jury Administration
P.O. Box 260448

A reminder of your date to serve to serve your community and ensure equal justice

Return window

Appendix A-2