



New York State Justice Task Force

**Recommendations Regarding Reforms to Jury
Selection in New York**

August 2022

I. Introduction

In May 2009, Chief Judge Jonathan Lippman formed the New York State Justice Task Force (the “Task Force”) to identify practices that may contribute to wrongful convictions in the state and consider what measures should be taken to reduce—and, ideally, to eliminate—the incidence of such convictions. In 2016, the new Chief Judge of the State of New York, and an original Co-Chair to the Task Force, Janet DiFiore elected to continue, without interruption, the Task Force’s work. That work has now continued for 13 years. Chief Judge DiFiore also expanded the Task Force’s mission to promote fairness, effectiveness, and efficiency in the criminal justice system; to eradicate harms caused by wrongful convictions; to further public safety; and to recommend judicial and legislative reforms to advance these causes throughout the state.

The Task Force is chaired by Hon. Carmen Beauchamp Ciparick (Ret.), former Senior Associate Judge of the New York Court of Appeals, and Hon. Deborah A. Kaplan, Deputy Chief Administrative Judge for New York City. The Task Force’s members represent a broad cross-section of the criminal justice community in New York State, consisting of judges, prosecutors, defense attorneys, law enforcement officials, victim advocates, and others who are committed to investigating and building consensus around some of the most important and difficult issues in our criminal justice system.

Since its inception, the Task Force has studied and provided recommendations on a number of issues, including: expanding New York State’s DNA databank; granting post-conviction access to DNA testing; utilizing electronic recordings of custodial interrogations; implementing best practices in identification procedures; granting greater access to forensic case file materials; reforming criminal discovery; using root-cause analysis to prevent wrongful convictions; addressing attorney misconduct; reforming the initial charging decisions commencing a criminal action; and providing meaningful bail reform.

II. Executive Summary

Chief Judge DiFiore most recently directed the Task Force to examine racial disparities in the criminal justice system at all key stages of the process—from arrest through sentencing—with a goal of proposing broader reforms to effectively address these disparities, and ensure a more just system for all New Yorkers.

In recognition of the complexity and breadth of the issues, as well as the need to make timely progress, the Task Force’s recommendations for mitigating these disparities will be issued on a rolling basis. In connection with this important work, since June 2019, the Task Force has recommended reforms relating to a number of topics, including with regard to the issuance of criminal summonses in New York City, the collection of more uniform statewide data on dismissal dispositions, and initial charging decisions made by police and prosecutors’ offices across New York. The recommendations that

are the subject of this report relate to the composition of, and procedures governing, the selection of juries in New York.

This report pertains to procedures for summoning prospective jurors to serve and ensuring that a fair representation of the population is impaneled for jury service. First, this report explains the Task Force’s considerations with respect to procedures to summon New Yorkers to jury service, including a survey of the state’s commissioners of jurors. Next, this report explains the historical background of the Supreme Court’s decision in *Batson v. Kentucky*, which created the constitutional framework for challenging peremptory strikes, and discusses certain reforms that have occurred in other states to further protect against bias in the jury selection process. Finally, this report concludes with a discussion of the recommendations of the Task Force. As detailed more fully below, the Task Force recommends expanding the constitutional framework applicable to *Batson* by allowing a challenge to a peremptory strike (i.e., a challenge to a juror without the need for any reason or explanation) based on a broader set of protected classes and requiring the court to evaluate the use of the strike under a “reasonable person” standard in New York. The Task Force also makes additional recommendations concerning the conducting of voir dire, additional training that should be instituted, and other important issues related to the composition of a jury.

III. Background

The Task Force’s recommendations grew out of the deliberations of a Task Force working group, chaired by Hon. Mark Dwyer (Ret.) and Hon. Barry Kamins (Ret.), which focused specifically on studying issues of racial disparity relating to jury selection (the “Jury Working Group” or the “Working Group”). The Jury Working Group was originally created by the late-Judge Paul Feinman during his tenure chairing the Task Force. The Jury Working Group’s focus has been twofold: ensuring that a fair representation of the population of the court’s jurisdiction is summoned to appear for jury service such that they enter the courthouse, and then ensuring that the prospective jurors in the pool are impaneled without bias or discrimination. In total, the Jury Working Group met 18 times to consider these issues and develop potential recommendations.

A. Reaching a Diverse Population of Potential Jurors

New York has a robust system currently in place to summon citizens to jury service. To begin, New York randomly pulls names of prospective jurors from a number of source lists, including tax records, DMV records, voting rolls, unemployment records, and social welfare records.¹ The process for the qualifications and summoning of jurors is also statutorily proscribed and centralized via the Jury Management System (“JMS”). The JMS technology platform, implemented in 2017, is managed by the Office of Court Administration’s (“OCA’s”) Jury Support Office (“JSO”), which coordinates the creation of the aggregate potential juror master list and the mailing of all questionnaires,

¹ See Judiciary Law § 506.

summons, and noncompliance letters statewide.² JSO also regularly reviews the master list for duplicates or incorrect addresses, or both, to maximize the number of potential jurors who receive and respond to questionnaires and summonses.³ As a result, the process is essentially completely computerized and standardized statewide for each of this state's 62 counties.

Over an initial period of six months, the Jury Working Group focused on the first goal of ensuring a fair representation of the population is summoned and afforded the opportunity to serve as jurors. The Task Force also analyzed publicly available data collected by OCA on the demographics of those who appear for jury service. The disparity between the demographic representation on juries and the population of the county vary by county. However, as a general matter, the demographics of those who appear for jury service, particularly in the downstate most populous counties, do not mirror the racial makeup of the county populations.⁴ For example, although 46% of the population of New York County identify as white,⁵ 60% of those who appear for jury service identify as white.⁶ In Westchester County, for example, 63% of the population

² Summoning jurors is a multistep process. Potential jurors are randomly selected from the annual master list to be mailed qualification questionnaires. Those who complete the questionnaire and who are eligible may be selected for summoning. *See* Uniform Rules for the Jury System §§ 128.5, 128.6; Judiciary Law §§ 513; 516. Prospective jurors are mailed a summons and those who fail to appear are automatically summoned a second time. A noncompliance document is then mailed to those jurors who fail to appear on two summonses, and the notice requires the juror to respond to the Commissioner of Jurors within 20 days. The individual Commissioner of Jurors has the discretion to decide how to proceed following the 20-day notice. *See* Uniform Rules for the Jury System § 128.12; Judiciary Law § 502 (d).

³ Despite the efforts of the JSO and Commissioners of Jurors, the rate of undeliverable questionnaires in many New York counties is above the national average. *See* JURY SUPPORT OFFICE, THE JURY COLLEGE: EXPANDED REPORT ON JUROR INCLUSIVITY AND COMMUNITY OUTREACH (2021) at 8; *see also* BEST PRACTICES FOR JURY SYSTEM OPERATIONS (April 2009), at 16, <http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/JuryBestPractices.pdf>. The JSO regularly processes the master list against the United States Postal Service address database to attempt to reduce undeliverable mail.

⁴ *See* REPORT PURSUANT TO SECTION 528 OF THE JUDICIARY LAW (2019), at 6-7 (showing racial breakdown of juries across New York counties). By way of comparison, note that these same disparities do not occur in other less populous and less diverse counties, such as Dutchess, Onondaga, and Ontario, for example. In these counties, the racial makeup of the county largely mirrors the makeup of juries.

⁵ *See* *New York County Population Statistics*, U.S. CENSUS BUREAU, Population Division (2021), <https://www.census.gov/quickfacts/fact/table/newyorkcountynewyork,NY/RHI125221>.

⁶ REPORT PURSUANT TO SECTION 528 OF THE JUDICIARY LAW (2019), at 6, <http://ww2.nycourts.gov/sites/default/files/document/files/2020-09/2019%20Section%20528%20Annual%20Report.pdf>.

that appears for jury duty identifies as white—a full 10% more than the county’s population of white persons.⁷

Given these disparities, the Jury Working Group analyzed whether there were any factors that were driving these differences and whether there were potential reforms that might allow the courts to better reach communities of color so that the jury population may more appropriately reflect the populations of the counties in which they serve. During its evaluation and investigation of current policies, the Jury Working Group met on a biweekly basis and heard presentations from experts in the field.⁸

1. Evaluation of Procedures for Summoning Jurors to Service

The Jury Working Group examined whether any discrete variations exist in how each of the state’s 62 counties summon jurors. The Working Group drafted an informal survey, which was distributed to each county’s Commissioner of Jurors in 2021. This survey focused on whether counties ever diverge from the five standard source lists, and requested information related to the rate of failure to respond to juror questionnaires in the county, as well as what actions are taken with respect to called jurors that do not appear for service.

In total, 48 commissioners responded to the Jury Working Group’s survey, representing a diverse collection of both urban and suburban counties from all geographical locations in New York. Every responding county confirmed that the five standard sources are used to draw a jury pool. As explained, New York pulls from more source lists than most states, as jurors are identified by not only voter registration and DMV records, but also public assistance, unemployment, and tax records. On average, according to the Working Group’s survey, 18.8% of recipients who receive a jury questionnaire based on one of the five source lists do not respond. Approximately 67% of reporting counties stated that the county’s Commissioner of Jurors took steps in some form to encourage public willingness to serve on juries. There was a surprising amount of public outreach by commissioners, for example, targeting various civic groups to engage in discourse regarding the value of jury service.

In summary, the Jury Working Group concluded that any disparity with respect to jury pools is likely not the result of racial bias impacting who, of those eligible,⁹ is

⁷ *Id.* at 7; Westchester County Population Statistics, U.S. Census Bureau, Population Division (2019).

⁸ The Task Force heard from Judge Milton Tingling, Commissioner of Jurors for New York County, and Stephen Fiala, Commissioner of Jurors for Richmond County.

⁹ In order to qualify as a juror, a person must be a citizen of the United States and a resident of the county, 18 years old or older, not have been convicted of a felony, and “be able to understand and communicate in the English language.” *See* Judiciary Law § 510. There have been legislative attempts to amend the statute to allow felons who have completed their sentences to serve on juries, but the statute has yet to be successfully amended.

summoned to jury duty in this state. Because New York draws from more source lists as compared to other states and utilizes a standardized system regulated by statute, it reaches a greater population, which in turn ensures that a fair representation of the population is summoned for jury duty.¹⁰ Given the strength of New York State’s current system, the Task Force’s focus turned to other aspects of the jury process—including barriers to service that cause racial disparities in who appears for jury duty and how civic engagement may decrease such disparities.

B. Ensuring a Diverse Pool Appears for Service

Despite the variety of source lists utilized, the racial disparity between prospective jurors summoned and those who appear and are eventually impaneled, remains lacking in some jurisdictions. One factor that the Working Group discussed that may exacerbate the lack of diversity of the jury pool is the difficulty for economically disadvantaged prospective jurors to obtain transportation to the courthouse. For example, public transportation is not always a viable option for many prospective jurors. Thirteen counties indicated that their counties lacked public transportation in all or parts of their counties, or that the public transportation schedules were too limited to meet jurors’ needs. The Working Group discussed the possibility of increasing funding for transportation, as well as the possibility of allowing potential jurors to determine if they needed to serve using an online portal to reduce the need for transportation in the first instance.

The Working Group discussed other economic impediments to jury service, such as the cost of childcare while serving as a juror, and considered express economic impediments to jury service shared by certain counties.¹¹ One reform that the Working Group discussed—and that the Task Force ultimately recommends—is that the legislature

¹⁰ Indeed, New York’s process for the selection and summoning of prospective jurors is not only consistent with, but also more exacting than, the general principles set forth by the American Bar Association for selecting a representative and inclusive pool of prospective jurors. See AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY, Standard 15-2.1 (1996), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/discovery_trial_byjury.pdf (setting forth, among other things, the principle that the names of prospective jurors “should be selected at random from sources which will furnish a representative cross-section of the community”); American Bar Association, *Principles for Juries and Jury Trials*, Principle 10(A), (B) (2006), https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf.

¹¹ For example, Monroe County responded that the county and city could not afford to provide free parking at the courthouse or free rides on the local transit system. Similarly, Schenectady County responded that it did not take steps to resolve transportation issues of prospective jurors due to financial limitations.

give due consideration to increasing juror pay to mitigate some of the economic disincentives.¹²

Aside from the economic hardship that often attends jury service for some prospective jurors, the Working Group and the Task Force also discussed the benefits of employing community outreach to underscore the importance of jury service to help increase the representation of communities of color on juries. During a presentation to the Working Group in September 2020, Judge Milton Tingling, the Commissioner of Jurors in New York County, spoke about the history of perceived bias in the jury system and the ways in which civic engagement can encourage jurors of color to serve. Judge Tingling explained that the jury system was rooted in a history of overt bias and racism, going back to the Civil War, and that communities of color may have a grounded negative perception of jury service due, in part, to how they are treated when they enter the courthouse. He has called for communities of color to respond to jury summonses, noting that because the demographics of counties vary greatly, there may not be a “one-size fits all” solution to eliminating disparities in the racial makeup of juries. Such civic outreach and engagement would emphasize, in particular, the importance of the participation of every citizen on juries in achieving fair and just outcomes.

Among other things, Judge Tingling emphasized the importance of direct contact between citizens and court staff, including the local Commissioners of Jurors. This would help to promote a relationship of trust with the court, which may encourage people of color to be more likely to want to serve. As part of this civil outreach by the courts to communities, court personnel could encourage eligible jurors to also volunteer for jury service (even if they do not receive a summons) through filling out a short questionnaire online.¹³

C. Impaneling a Racially Diverse Jury

The Jury Working Group then shifted its deliberations to ensuring that racial bias plays no part in the selection of the prospective jurors appearing for jury service.¹⁴ The discussion focused on the time allotted for voir dire, ways in which implicit bias can be addressed in voir dire, and the use of peremptory challenges—strikes to potential jurors specifically defined as a challenge “for which no reason need be assigned.” *See* CPL 270.25 (1).

¹² The Working Group heard from Jessica Simard, Statewide Jury Coordinator, NYS Unified Court System, about existing juror pay structures.

¹³ New York State UCS, *Volunteer Questionnaire*, <https://portal.nycourts.gov/jqq/>.

¹⁴ It is important to note that data regarding the use of peremptory challenges is not ordinarily maintained. The tracking and maintenance of such data would be valuable in further evaluating the use of peremptory challenges across the state.

1. *Batson* Background

Generations of legal scholars and practitioners have grappled with the myriad pitfalls of peremptory challenges, recognizing the heightened risk of bias—particularly racial bias—in the selection of the jury. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the preeminent case on peremptory challenges, the U.S. Supreme Court held that the Fourteenth Amendment of the Constitution prohibits the purposeful discrimination by the government on the grounds of race in the exercise of peremptory challenges of prospective jurors. *Batson* now applies to both the prosecutor’s and criminal defendant’s peremptory challenges, to gender discrimination, and to civil trials. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *JEB v. Alabama ex rel TB*, 511 U.S. 127, 129 (1994); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

Batson created a three-step process for the trial court to determine whether a peremptory challenge violates the Constitution. First, the party opposing any challenge must establish a *prima facie* case of racial or gender discrimination in the exercise of the peremptory challenge, by establishing an inference of discrimination. *Batson*, 476 U.S. at 96. Considering “all relevant circumstances,” the trial court evaluates whether the party established the inference. *Id.* at 96-97. If the trial court finds that the party opposing the challenge made a *prima facie* showing, the second step provides that “the burden shifts to the [party exercising the challenge] to come forward with a [race-]neutral explanation” for the peremptory challenge. *Id.* at 97. The race-neutral explanation proffered “need not rise to the level justifying exercise of a challenge for cause.” *Id.* Finally, at the third step, the trial court must consider if the stated neutral reasons were the actual reasons or were a pretext for purposeful discrimination. *Id.* at 98; see also *Flowers v. Mississippi*, 139 S. Ct. 2228, 2248-49 (2019).

In his concurring opinion in *Batson*, Justice Marshall, although recognizing that the majority had taken a “historic step” in creating a framework to end purposeful racial discrimination in the selection of juries, nevertheless warned of the effects of implicit bias. Of course, now it is widely accepted that implicit biases affect our criminal justice system generally, and the composition of our juries in particular.¹⁵ Justice Marshall asserted that more needed to be done, suggesting that peremptory challenges should be eliminated “entirely” in criminal cases. *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring).

2. New York and *Batson* Reform

Since *Batson* was decided, New York State courts have played an important role in leading conversations around reform. For example, in *People v. Bolling*, 79 N.Y.2d

¹⁵ JUDICIAL FRIENDS ASSOCIATION, INC., REPORT TO THE NEW YORK STATE COURT’S COMMISSION ON EQUAL JUSTICE IN THE COURTS (Aug. 31, 2020), at 33-34, [Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.pdf](https://www.judicialfriends.org/reports-on-systemic-racism-in-the-ny-courts.pdf) ([judicialfriends.org](https://www.judicialfriends.org)); Elisabeth Semel et al., *Whitewashing the Jury Box*, BERKELEY LAW (June 2020), at 7-8, <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>.

317 (1992), three judges, in a concurring opinion, asserted that there is an inexorable need for a broader remedy to address discriminatory peremptory strikes, explaining that the *Batson* remedy has proven ineffective and unworkable in eradicating implicit bias in the jury selection process.

Various New York judiciary committees have advocated reform of our system of peremptory challenges since at least the 1970s. And, in the mid-1990s, former Chief Judge Judith S. Kaye—in her first major initiative—undertook a significant effort to overhaul New York’s jury system, assembling a task force of judges, attorneys, and jury commissioners, among others, to evaluate the intricacies of the State’s jury system (the “Jury Project”). The Jury Project advocated for the reduction of the number of peremptory challenges available in criminal trials in order to reduce opportunities for *Batson* violations and increase voir dire efficiency, noting that New York law permitted more peremptory challenges than the ABA Standard, the federal system, and virtually every other state at the time. The Unified Court System proposed the same amendments. The proposal faced strong opposition from both criminal defense attorneys and prosecutors. Although Chief Judge Kaye ultimately proposed that the legislature amend the Criminal Procedure Law to reduce the number of peremptory challenges, it never adopted her proposal.

Most recently, Chief Judge DiFiore took steps to raise the consciousness of prospective jurors as to the existence of implicit bias. In September 2021, at the direction of the Chief Judge, OCA, with the aid of Hon. Edwina Mendelson, Deputy Chief Administrative Judge for Justice Initiatives, and Professor Rachel Godsil, Co-Founder and Co-Director of the Perception Institute, prepared a video for potential jurors on the importance of being aware of one’s implicit biases. Titled “Jury Service and Fairness,” the video describes what implicit bias is, explains how biases occur, and discusses strategies that jurors can employ to help ensure they are making decisions without relying on underlying biases or stereotypes. This video is currently shown as part of the jury selection process across New York courts. In conjunction with the production of this video, the Chief Judge appointed Jeh Johnson, former U.S. Secretary of Homeland Security, as Special Adviser on Equal Justice in the Courts. In October 2020, Secretary Johnson issued an extensive report on his independent review of New York’s court system, recommending a series of reforms to combat racial bias.¹⁶ New York’s courts have also mandated bias training for judicial and nonjudicial employees, adopted a “zero tolerance” policy on racial bias and discrimination, and commissioned a complete review of the judicial system.¹⁷

¹⁶ See REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS (Oct. 1, 2020), <https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

¹⁷ See Marco Poggio, *NY Courts Made Strides In Improving Fairness And Equity*, LAW360 (Nov. 18, 2021), <https://www.law360.com/articles/1441490/ny-courts-made-strides-in-improving-fairness-and-equity>.

Although there have been efforts to raise social consciousness to avoid implicit bias, the Jury Working Group also considered more fundamental changes to the approach to peremptory challenges in New York to minimize the possibility of implicit bias and ensure a more diverse jury. The Working Group started by examining recent reforms adopted in other states, including Washington, California, and Arizona.

3. The Washington Rule

In 2018, Washington became the first state to adopt a court rule addressing *Batson* after the Washington Supreme Court’s plurality opinion in *State v. Saintcalle*, 309 P.3d 326 (Wash. 2013), expressed concern over the *Batson* framework and proposed modification through the state court’s power for rulemaking.¹⁸ In the wake of this decision, the Washington Supreme Court formed a working group that recommended a formal court rule, which was officially adopted in 2018, and is now known as the General Rule “GR” 37.¹⁹ Under the Washington rule, a peremptory challenge will be denied if an “objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.”²⁰ Thus, a judge need not find purposeful discrimination in the use of a peremptory challenge. Instead, a judge need only determine whether an objective observer *could* view race or ethnicity as a factor in the use of the peremptory challenge, and if so, the judge must deny the challenge. The rule also contains a list of reasons, such as receiving public benefits or expressing a distrust of law enforcement, that judges should assume are substitutes for racial bias even though they were previously seen as race-neutral. Moreover, the Washington Supreme Court went a step further in another case, *State v. Jefferson*, by modifying *Batson*’s third prong. 429 P.3d 467, 478 (Wash. 2018). The *Jefferson* court replaced *Batson*’s purposeful discrimination test with an objective inquiry that is similar to the one in GR 37.²¹ *Id.* at 480. In summary, the Court held as follows:

[T]he question at the third step of the *Batson* framework is *not* whether the proponent of the peremptory strike is acting out of purposeful discrimination. Instead, the relevant question is whether ‘an objective observer could view race or ethnicity as a factor in the use of the

¹⁸ After this decision, the ACLU formed a working group to develop a new rule. That working group proposed a rule, which was published for public comment, after which the Washington Supreme Court created a formal working group to consider the proposed rule and the alternatives received as a result of the public comment period. The working group ultimately submitted a report to the Washington Supreme Court and provided a final draft rule with alternative language options.

¹⁹ Wash. Sup. Ct. Order No. 25700-A-1221 (Apr. 5, 2018) (adopting Wash. Ct. Gen. R. 37).

²⁰ Wash. Ct. Gen. R. 37 (e).

²¹ Because GR 37 had been adopted *after* the events at issue in *Jefferson*, the Court held that it could not be retroactively applied. Nevertheless, the Court determined that *Batson* must be modified in order to “meet the goals of *Batson*.” *Jefferson*, 429 P.3d at 478, 480.

peremptory challenge.’ If so, then the peremptory strike shall be denied.
Id.

4. The California Rule

In October 2020, the California State Legislature enacted legislation modeled on Washington’s GR 37.²² Under California’s rule:

If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained.²³

Though similar to the Washington rule in many ways, California’s law uses a stricter objective observer test, asking if the observer *would* view any of the protected characteristics as a factor in the use of the peremptory challenge, as opposed to whether they *could*. Notably, the California rule also applies to a broader set of protected classes. Overall, the California law aims to curtail the use of peremptory challenges premised on race-neutral reasons highly correlated with racial stereotypes. It also prohibits prosecutors from basing their peremptory challenges on certain race-neutral explanations that are implicitly associated with the potential juror’s race. The law took effect for criminal cases in January 2022 and will apply to civil cases in 2026.

5. The Arizona Rule

Finally, in August 2021, Arizona became the first state to eliminate peremptory challenges altogether through the Arizona Supreme Court’s rulemaking power, which effectively amended Arizona’s codes of civil and criminal procedure.²⁴ The new rule became effective in January 2022 and adopted a proposal by two judges of Arizona’s intermediate appellate court, who wrote that the elimination of peremptory challenges provides “a clear opportunity to end definitively one of the most obvious sources of racial injustice in the courts.”²⁵

²² Assembly Bill No. 3070, Chapter 318, (Ca. 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3070.

²³ *Id.*

²⁴ No. R-21-0045, Arizona Supreme Court, (Dec. 8, 2021), <https://www.azcourts.gov/LinkClick.aspx?fileticket=upS1NfhAA0%3d&portalid=20>.

²⁵ See R-21-0020 Petition to Amend Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure (Jan. 11, 2021), <https://www.azcourts.gov/Rules-Forum/af/1208>.

6. Deliberations by Other States

Other states are grappling with these same issues and considering whether there should be a modification to their peremptory challenge systems.²⁶ For example, in a December 2019 opinion, the Connecticut Supreme Court called for a Jury Selection Task Force to study how bias might affect jury selection, stating that current *Batson* protections against removing potential jurors due to race do not go far enough. *See State v. Holmes*, 221 A.3d 407, 436-38 (Conn. 2019). That task force issued its report to Chief Justice Richard A. Robinson in December 2020. That report recommended culling juror source lists for “best addresses” to prevent duplication, creating a juror video to address implicit bias, and promoting community outreach to encourage jury service.²⁷ Additionally, in February 2021, New Jersey’s Supreme Court called for a Judicial Conference on Jury Selection to examine the state’s jury selection procedures and propose reforms. *See State v. Andujar*, 254 A.3d 606, 611-12 (N.J. 2021). That conference took place in November 2021 and public comments on the proposed 25 recommendations that came out of the conference were solicited beginning in April 2022.²⁸ The recommendations include items such as expanding source lists for juror summonses, increasing civic engagement to promote jury service, mandating training for judges and attorneys on implicit bias, encouraging the development of a model for attorney-conducted voir dire on bias issues, and increasing juror compensation.

7. The Jury Working Group’s Deliberations on *Batson*

With these recent reforms in mind, during the spring of 2021, the Jury Working Group invited two speakers from Washington State to discuss Washington’s new rule and observations regarding its impact. Specifically, the Working Group heard from Brandy Gevers, Senior Deputy Prosecuting Attorney, King County Prosecuting Attorney’s Office, and Lila Silverstein of the Washington Appellate Project.

Ms. Gevers’s presentation focused on the impact of Washington’s new rule, GR 37. She offered commentary that the rule is very stringent and imposes a high burden on the challenged party to provide a reason for using a peremptory challenge. Ms. Gevers

²⁶ A complete state-by-state survey of these reforms, including pending legislation, judicial decisions, and committee recommendations, is available through Berkeley Law’s Death Penalty Clinic. *See* BATSON REFORM: STATE BY STATE, <https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/>.

²⁷ *See* REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (Dec. 31, 2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf.

²⁸ *See Notice to the Bar & Public: Jury Reform – Recommendations of the Committee of the Judicial Conference on Jury Selection – Publication for Comment* (April 2022), <https://www.njcourts.gov/notices/2022/n220428a.pdf>.

also discussed certain challenges created by the new rule, particularly those relating to time, practical challenges in application, concerns about negative perception, and limitations on being able to track the impact of the rule.

Ms. Silverstein—who was among the members of the working group that crafted GR 37—focused on GR 37 as it more specifically compares to *Batson*. Ms. Silverstein spoke to the Working Group about how the system has improved with GR 37 by leading lawyers to be more thoughtful and careful about their use of peremptory challenges.²⁹

Following these presentations, the Working Group discussed how *Batson* works in practice and how a statute similar to GR 37 would function in New York. The Working Group went through the stages of the *Batson* process and considered potential recommendations and reforms with respect to the various stages.

D. Deliberations of the Full Task Force

In the fall of 2021, the Jury Working Group presented its work and analysis to the full Task Force, which then undertook further deliberations, informed by presentations from different speakers and experts regarding these issues, over the course of several months.

1. Presentations and Materials Considered

The Task Force heard from a variety of speakers on topics related to this work, including the science behind implicit bias, reforms implemented in other states, and New York stakeholders' experience with implicit bias in New York courts.

In October 2021, Professor Rachel Godsil, Co-Founder and Co-Director of the Perception Institute, as well as Professor of Law and Chancellor's Scholar at Rutgers Law School, presented her research relating to implicit bias. Professor Godsil's presentation focused partly on a topic referred to as the "fairness paradox," the idea that although people creating institutional policies may not be racist, the results of such policies can be. She further discussed how the unconscious part of the brain grips onto experiences in the courtroom or media, for example, to create bias resulting in default positives and negatives for specific groups. She shared with the Task Force detailed studies relating to this hypothesis and discussed how resolving it would require setting up guardrails to deflate bias.

In November 2021, Ms. Silverstein was invited back to present to the full Task Force on the considerations and deliberations resulting in GR 37 in Washington. She spoke to the full Task Force about the topics and issues she raised with the Working Group.

²⁹ For early impressions of GR 37's impact, see Annie Sloan, "What to Do About *Batson*?": Using A Court Rule to Address Implicit Bias in Jury Selection, 108 CAL. L. REV. 233 (2020).

The following month, the Task Force also heard presentations from some of its own members who practice in New York courts, including Jed Painter, then serving as General Counsel to the Nassau County District Attorney's Office, and Jamal Johnson of the Legal Aid Society. Mr. Painter and Mr. Johnson presented on issues relating to jury selection, including ideas for expanding potential jury pools and addressing implicit bias, exploring ways to foster more consistency and transparency across New York State when it comes to how implicit bias is addressed during voir dire, and the reasons why peremptory challenges are made.

Lastly, as discussed more fully in the recommendations section below, in light of the various presentations given, the Task Force discussed a number of additional methods for encouraging jury service, including:

1. The Unified Court System could endeavor to create a public service announcement featuring a nongovernment public figure (e.g., celebrity, athlete) about the importance of jury service as a civic duty, targeting underrepresented populations in the jury pool.
2. The New York State Education Department could add a mandatory curriculum for high school students regarding the importance of their civic duty to engage in jury service.
3. Individual Commissioners of Jurors and JSO could collect data on the effectiveness of civic outreach events and campaigns. JSO could then maintain this data in a centralized database to facilitate the exchange of information and ideas about civic outreach among Commissioners of Jurors across the state.
4. JSO, in conjunction with the New York State Commissioner of Jurors Association and other stakeholders, could draft a strategic plan (updated annually) for statewide outreach in an effort to increase the number of jurors who actually appear when summoned.
5. JSO could create and provide templates for materials to be used by individual Commissioners at community outreach events—e.g., video, PowerPoint, printed materials, posters, scripts—which could be altered by Commissioners to fit the unique needs of their particular audiences.

Following these presentations, the Task Force began considering potential recommendations for reform, extensively discussing not only the potential benefits of each proposal, but also the practical implications. The diverse backgrounds of Task Force members provided valuable perspectives. The 24 voting members attempted to reach broad consensus wherever possible, and achieved consensus on the vast majority of the recommendations below.

IV. Recommendations

The Task Force intends the following recommendations to be read holistically as a complete package of reforms that will best address the need for reform in this area, which it believes is both critically important and long overdue.

A. Recommendation to Expand the Constitutional Framework in *Batson*

The Task Force recommends that New York’s peremptory challenge framework and process be modified to minimize implicit bias and afford greater protections than those provided by the constitutional rule in *Batson v. Kentucky*, 476 U.S. 79 (1986). This vote was unanimous.

B. Recommendation to Adopt an Expanded Standard for the Court’s Inquiry into the Use of a Peremptory Challenge

1. Standard to be adopted to reform the *Batson* framework

The majority of the Task Force’s deliberations concerned how best to improve upon the protections afforded by the *Batson* framework. The Task Force considered potential adoption of the California or Washington standards discussed above. Those standards differ primarily in their applications of the objective observer test: in California, whether an objective observer *would* view race as a factor in the use of the peremptory challenge, and in Washington whether an objective observer *could* view race as a factor in the use of the peremptory challenge. Several members advocated in support of one of these two standards.

The Task Force then considered a modification of the California and Washington rules that would be more consistent with New York’s history of embracing the “reasonable person” standard. Indeed, New York has long recognized the importance of a “reasonable person” standard. “Statutes or rules of law requiring a person to act ‘reasonably’ or to have a ‘reasonable belief’ uniformly prescribe conduct meeting an objective standard measured with reference to how ‘a reasonable person’ could have acted.” *See People v. Goetz*, 68 N.Y.2d 96, 112-13 (1986). The standard has been applied in various forms in New York’s criminal law, such as the justification defense (*id.*); custody (*see People v. Yukl*, 25 N.Y.2d 585, 589 (1969)); automobile stops (*see People v. Robinson*, 97 N.Y.2d 341, 349-50 (2001)); submission of a lesser included offense (*see People v. Glover*, 57 N.Y.2d 61, 64 (1982)); and the conduct of attorneys (*see Matter of Holtzman*, 78 N.Y.2d 184, 192-93 (1991)). It is clear, therefore, that this standard is widely understood by both New York courts and practitioners, thus providing clear guidance for its application in this specific context. In the view of the Task Force, the standard should also be applied in the context of evaluating the appropriateness of a *Batson* challenge.³⁰

³⁰ Interestingly, this standard has even been suggested in the *Batson* context. In a concurring opinion in *People v. Wells*, 7 N.Y.3d 51 (2006), Judge George Bundy Smith advocated for “[a]

As such, after deliberation and consideration of other frameworks, a majority of Task Force members voted to recommend that the following “reasonable person standard” be adopted when a court evaluates the facially neutral reasons given in the second step of the process to justify the use of a peremptory challenge after an objection is raised by one party or *sua sponte*:

Whether, in the view of a reasonable person, the race of a juror was a factor in the exercise of the peremptory challenge. If the court determines that the answer is yes, then the peremptory challenge shall be denied.

To fully implement this recommendation, legislative action is required to amend the Criminal Procedure Law. The Task Force recommends that the legislature consider this reform for the reasons outlined above.

2. Applicability of the chosen standard to protected classes

The Task Force next considered the applicability of the reformed *Batson* standard to different protected classes, as it currently only applies federally to race and gender. Notably, New York has applied *Batson* under the State’s Constitution to prohibit discrimination “on the basis of race, gender or any other status that implicates equal protection concerns.” *See People v. Luciano*, 10 N.Y.3d 499, 502-03 (2008).³¹ The Task Force considered different variations of protected classes to be specifically included. New York’s Constitution provides equal protection of laws and protects against discrimination based on “race, color, creed or religion.” *See* N.Y. Const. Art. 1, § 11. In addition, New York’s Civil Rights Law protects a citizen’s right to serve on a jury by ensuring that no citizen is disqualified based on “race, creed, color, national origin or sex.” *See* N.Y. Civ. Rts. § 13. The most expansive language, however, appears in the New York Unified Court System’s directives on voir dire questions regarding bias, emphasizing that a fair juror does not base a decision on a person’s “race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation.”³² In the Task Force’s view, the applicability of the reformed *Batson* standard should mirror this language to provide the greatest protections to all New Yorkers.

The Task Force recommends that the adopted standard for inquiry to evaluate whether the use of a peremptory challenge is permissible should be applied to objections based on an expanded set of classes, including a juror’s race, color, national origin,

‘reasonable explanation’ requirement” within the *Batson* framework, which “would merely ensure that the explanations make sense under the circumstances.” *Id.* at 61, n.2 (G.B. Smith, J., concurring).

³¹ Skin color has been held to be a “status that implicates equal protection concerns.” *See People v. Bridgforth*, 28 N.Y.3d 567, 572-73, 576 (2016).

³² *See* Criminal Jury Instructions & Model Colloquies, Suggested Voir Dire Questions on Bias, <https://nycourts.gov/judges/cji/5-SampleCharges/SampleCharges.shtml>.

ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation.

C. Recommendations Regarding the Manner and Means of Conducting Voir Dire

1. The court should conduct the initial questioning on implicit bias, with counsel permitted to conduct voir dire on implicit bias afterwards

The Task Force recognizes that counsel directly questioning prospective jurors regarding their implicit bias can be a sensitive exercise. In attempting to determine whether prospective jurors may be implicitly biased, prosecutors and defense counsel in their voir dire risk inadvertently offending a potential juror or being misconstrued as biased toward protective classes. This can lead to the potential for a different type of prejudice in the proceedings. To guard against this, the Task Force believes that the court—as the overseer of the trial—is in the best position to initially probe issues of implicit bias.

Therefore, the Task Force recommends that the court conduct the initial questioning during voir dire that relates to bias. The attorneys may thereafter question potential jurors regarding bias.

2. The manner used to conduct voir dire

The Task Force recommends that the conduct of the portion of voir dire relating to bias should incorporate use of the uniform questionnaire prepared by the Office of Court Administration’s Committee on Criminal Justice Instructions and Model Colloquies, which will ensure that the probing for potential implicit biases is uniform across New York State.³³ The model questionnaire includes suggested questions for voir dire, including specific questions relating to bias and implicit bias. For example, the questionnaire outlines that the court should give the jury panel specific instructions on bias, including language from the CJI2d Model Instructions, and includes three specific questions to ask potential jurors. On the latter, these questions are meant to address whether a potential juror can promise to be fair and impartial, and not base their decision upon bias or prejudice; whether a potential juror can guard against stereotypes or attitudes influencing their decision; and whether there is any reason that bias could interfere with their ability to be fair in reaching a verdict. The point of incorporating a uniform questionnaire, with specific questions on bias and implicit bias, is to ensure that

³³ See “Voir Dire” suggested questions at <https://www.nycourts.gov/judges/cji/8-Colloquies/1MCTOC.shtml>.

lawyers on both sides are asking jurors the same questions in the voir dire process, and ensuring that bias and implicit bias are directly addressed in the process.

3. Sufficient time allotted for counsel to conduct voir dire

The Task Force discussed that certain time limits in conducting voir dire can inhibit the ability of attorneys to probe implicit bias issues of the potential jurors. While the court is often in the best position to begin probing issues of implicit biases, counsel also play an important role and should be given sufficient time to make additional inquiries of potential jurors. Of course, reasonable minds may differ regarding how much time may be considered “sufficient” and the Task Force recommends that courts be liberal in allotting time for counsel to explore these issues.

Accordingly, the Task Force recommends that the courts allow sufficient time for attorneys conducting voir dire to probe the potential implied biases of prospective jurors.

D. Recommendation to Maintain the Current Number of Peremptory Challenges Permitted for Each Side

The Task Force intensely debated potential reforms regarding the number of peremptory challenges permitted by each side. As an initial matter, no key stakeholder groups—from the prosecution, defense, or courts—believed that the elimination of peremptory challenges would be a fair or beneficial solution.

The Task Force considered whether to recommend that the number of peremptory challenges be increased or decreased. New York State currently allows for more challenges per side than the majority of other jurisdictions. Currently in New York State, for Class A Felonies, both the State and the Defendant(s) are permitted twenty (20) peremptory challenges, plus two (2) for each alternate juror. For Class B or Class C felonies, both the State and the Defendant(s) are permitted fifteen (15) peremptory challenges, plus two for each alternate juror. For all other criminal matters, both the State and the Defendant(s) are permitted ten (10) peremptory challenges, plus two (2) for each alternate juror. In the civil context, each party is permitted three (3) peremptory challenges, plus one (1) for every two alternate jurors. In local court, three peremptory challenges are permitted under CPL 360.30.

The Task Force considered reducing the number of challenges permitted for felony trials to ten (10) to comport with the federal standard. Additionally, the Task Force debated reducing the number of challenges by five (5) for each class of felonies (i.e., reducing the number of challenges allowable for Class A felonies from twenty (20) to fifteen (15)). During this discussion, it was noted that the authorized sentence for most Class A felonies defined in Penal Law article 220 (controlled substances) had been reduced, and suggested that peremptory challenges for that subset of Class A felonies should also be reduced. Specifically, it was discussed that some Class A felonies no longer carry a lifetime sentence, and so should receive the same peremptory challenges allowed for Class B and Class C felonies. Some members—from both the prosecution

and defense sides—strongly supported maintaining the current peremptory challenge numbers. The vote in this regard was reflective of that debate, but members narrowly favored maintaining the current number.

Accordingly, the Task Force recommends that New York should maintain the current schedule regarding the number of peremptory challenges, with the understanding that the additional reforms recommended in this report regarding the standard to be applied endeavor to remedy the potential for bias resulting from the use of peremptory challenges.

E. Recommendation for the Legislature to Amend the Lifetime Ban on Jury Service Following a Felony Conviction

Currently, citizens convicted of a felony are ineligible to serve on a jury in New York under any circumstances. Recent reforms in New York have broadened the rights of persons previously convicted of a felony. For example, a prior felony conviction barred a person from exercising the right to vote. In 2021, the legislature passed, and the governor signed, amendments to Election Law § 5-106 to allow a person convicted of a felony to vote in New York, so long as they are no longer incarcerated, thus providing greater freedoms to individuals who may be finishing sentences of parole or probation.

The Task Force recommends that the same rubric should be applied to New York’s juries. The Judiciary Law currently bars felons from sitting on juries, but persons convicted of a felony nevertheless may still appear on the source lists used by commissioners for the issuance of a jury summons—including voter registration rolls—meaning they can be issued juror questionnaires only to later be disqualified due to their felon status.³⁴

F. Recommendation to Encourage District Attorneys’ Offices and Institutional Defense Providers to Review Their Use of Peremptory Challenges

The Task Force also considered reforms to ensure continuing efforts to evaluate the use of peremptory challenges. The Task Force believes that attorneys at all levels must be responsible for ensuring that implicit bias is eliminated from the criminal justice system. The largest institutions, however, are in the best position to self-educate themselves on their own practices. The Task Force also recognized during the course of its investigation into issues of racial disparity—specifically with regard to charging decisions—that sufficient data often does not exist to analyze issues effectively.

The Task Force recommends that both District Attorneys’ offices and institutional defense providers across the state examine the use of peremptory challenges within their offices. During its deliberations, the Task Force articulated that such examination would likely take place through the creation of records to be used by the individual offices

³⁴ CPL 270.20 addresses any prior relationship with the prosecuting party that is likely to preclude the rendering of an impartial verdict.

themselves on peremptory challenges across cases, including tracking the stated reasons, if any, given for a challenge, and the judge's ruling on the challenge.

G. Recommendation to Encourage Mandatory Training on Implicit Bias

The Task Force recognizes that the challenge of eliminating implicit bias is naturally a persistent one, which will require continual training and awareness. Educating the legal profession at all levels, especially those engaging in the process more directly in the courtroom, is paramount to ensuring continued vigilance with regard to implicit bias. As discussed, judicial and nonjudicial court staff already undergo implicit bias training. That training should continue and should also be replicated throughout the legal profession.

The Task Force recommends that judges, court officers, and court staff receive, or continue to receive, mandatory annual training on implicit bias and its effects. The Task Force also recommends that any attorney practicing in the criminal courts receive mandatory, annual training on implicit bias and its effects, including through increasing the requirement for CLE credits.

H. Recommendation for the Legislature to Evaluate Juror Pay

The Task Force discussed the economic impact of jury service. As explained in this report, the cost of jury service often disproportionately affects different populations across our state. New York's current juror pay of \$40/day is below the federal standard of \$50/day. Although the Task Force discussed potential recommendations regarding specific dollar-amount increases to juror pay, the Task Force determined that such considerations are best left to the legislature as it considers wider issues related to New York State's budget.

The Task Force recommends that the legislature evaluate whether there should be an increase in juror compensation.