CURING *TERRY*'S COLORBLINDNESS

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Abstract

Scholars, policymakers, and advocates have long bemoaned the Supreme Court's colorblind Fourth Amendment jurisprudence. The Court has alternatively ignored or condoned racially discriminatory searches and seizures, allowing government agents to engage in widespread racial profiling. Proposed reforms have typically focused on doctrinal solutions that would limit police discretion or called for the reversal of Terry v. Ohio.

This Article provides a comprehensive doctrinal, regulatory, and legislative solution to racial discrimination in police investigations. It proposes a novel solution: adopting recent jury selection reforms aimed at preventing racism in jury selection to combat racial profiling in searches and seizures. Several states, including most prominently Washington and California, have adopted new procedures to combat the analogous problem of racial discrimination in jury selection. These states mandate the rejection of a peremptory strike where a reasonable observer, guided by lists of presumptively invalid justifications, could find that the strike was motivated by racial bias.

This Article proposes that criminal legal system actors, regulators, and legislators should incorporate these principles to combat racial discrimination in searches and seizures. Central to this Article is a doctrinal solution whereby trial courts, guided by lists of presumptively pretextual justifications, should suppress evidence if a reasonable observer could conclude that the search or seizure was the product of racial profiling. Although not a panacea, this proposal is a tangible, viable prophylactic to racism in stop and frisk.

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Introduction

Two cases inspired this Article.[1] Both cases involved *Terry*[2] stops infected with racial bias. The cases illustrate the American criminal legal system's well-documented failure to prevent racial discrimination from determining whom police stop and search. In the first case, a prosecutor filed a response to a suppression motion alleging that the officers' decision to detain an African American man was justified because he had been stopped in a predominantly Latinx neighborhood. In other words, the prosecutor believed that the arresting officer could base his decision to stop the defendant—at least in part—on whether the defendant looked like he matched the neighborhood's racial demographic.[3] In the second case, an officer testified that he stopped and arrested the defendant for "loitering" because the defendant matched the description of an alleged car burglar—a Black man wearing dark clothing—and was seen walking toward the front door of a home. When asked why he had performed a stop, despite having only a barebones description, the officer added, "you could tell [the defendant] just didn't belong there just the way he was." The officer, over nearly three transcript pages, failed to elaborate why the defendant "didn't belong" in the neighborhood.[4]

These two cases encapsulate the prevalence of racial bias in stop and frisk and the criminal legal system's failure to prevent this practice.[5] In the first

1. Both are cases that I encountered as a criminal defense practitioner.

2. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court legalized the police investigatory practice, colloquially known as "stop and frisk," in which police may conduct limited, warrantless searches and seizures of individuals based on reasonable, articulable suspicion of criminal conduct.

3. The prosecutor failed to include any demographic data to establish that the neighborhood was predominantly Latinx.

4. This case mirrors Professor Paul Butler's experience with police stopping him for "walking while Black" in his own neighborhood in Washington, D.C. *See* Paul Butler, *Walking While Black: Encounters with the Police on My Street*, LEGAL TIMES, Nov. 10, 1997, at 23 [hereinafter Butler, *Walking While Black*], https://www.law.com/nationallawjournal/almID/1202421509992/.

5. Although we typically think of stop and frisk in the context of investigative searches and seizures on foot, I use the term more generally to describe all seizures, and subsequent searches, based on reasonable suspicion of criminal behavior. I include traffic stops because police often use them as pretext to engage in more invasive interactions. *See* LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 31 n.15 (1967) ("[A] violation of the traffic code is often used as a subterfuge by officers who desire to interrogate a person about a more serious offense. Because of this, traffic regulations which normally are unenforced are asserted as justification for field interrogations."); *see also* Marla Broadfoot, *This Change Could Reduce Police Brutality Against Black Drivers like Tyre Nichols*, SCI. AM. (Feb. 8, 2023),

case, a prosecutor felt justified in arguing that an officer can stop someone for being a member of a racial minority. Similarly, the second defendant could not use the fact that he was a victim of racial profiling to challenge his detention and arrest.[6]

Neither defendant had any recourse for the racial discrimination underlying their seizures thanks to the United States Supreme Court's colorblind investigatory stop jurisprudence. In a string of cases beginning with *Terry v. Ohio*[7] and culminating with *Whren v. United States*,[8] the Court has refused to acknowledge the influence of racial bias on officers' decisions to stop and search individuals. The parallel development of the Intent Doctrine has effectively quashed equal protection challenges based on the discriminatory nature of investigatory stops.[9]

The problem of discrimination in investigatory stops has received a great deal of attention among scholars, practitioners, and the public writ large.[10] Some have advocated for bolstering equal protection.[11] Many propose

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https://www.scientificamerican.com/article/this-change-could-reduce-police-brutality-against-black-drivers-like-tyre-nichols/ (noting that traffic stops are the most common way that people come into contact with police).

6. Ultimately, both cases were dismissed because of other issues. However, both defendants spent significant amounts of time incarcerated prior to the dismissal of their cases.

7. *See* Terry v. Ohio, 392 U.S. 1 (1968).

8. *See* Whren v. United States, 517 U.S. 806 (1996).

9. *See* Brandon Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131, 150 (2012); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1453 (2016) [hereinafter Butler, *The System*] (quoting Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Respondents, Virginia v. Moore, 553 U.S. 164 (2008) (No. 06-1082), 2007 WL 4359018) (discussing the difficult burden of proof required to prove intentional racial discrimination); Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1277-78 (1998); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 253 (2010) [hereinafter Butler, *White Fourth Amendment*]; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 108-12 (2010); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 157-60 (2018).

10. *See, e.g.*, sources cited *supra* note 9; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Renée McDonald Hutchins, *Stop* Terry: *Reasonable Suspicion, Race, and a Proposal to Limit* Terry *Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883 (2013); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L. J. 659 (1994); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

11. *See* Starkey, *supra* note 9, at 214; Thompson, *supra* note 10, at 998-99.

limitations on police discretion such as reversing *Terry*[12] or other unspecified doctrinal remedies centered on the Fourth Amendment.[13]

This Article proposes a novel solution: adopting recent reforms to eliminate racial discrimination in jury selection to combat racial profiling in searches and seizures. This Article's proposal contemplates a specific doctrinal solution, as well as various regulatory and legislative proposals, modeled on jury selection reforms first enacted in Washington and California.

Discrimination in the exercise of peremptory challenges is analogous to racism in searches and seizures. In *Batson v. Kentucky*,[14] the Court attempted to combat racial discrimination in jury selection, but its requirement for litigants to demonstrate intentional racial bias failed to prevent strikes based on veiled intentional bias or those stemming from implicit bias.[15] Several states, notably, Washington, California, and Arizona, have created new jury selection procedures to better combat *Batson*'s flaws.[16] While Arizona abolished peremptory strikes entirely, Washington and California created new jury selection procedures that require judges to deny a peremptory strike where an objective observer could conclude that the strike is a product of racial bias regardless of intent.[17] To guide trial courts, the procedures define an objective observer as someone who is aware of systemic racial inequities that have prevented people of color from serving on juries, and promulgate lists of presumptively discriminatory strikes.[18] In addition, a growing number

12. *See*, *e.g.*, Harris, *supra* note 10, at 682.

13. *See* Thompson, *supra* note 10, at 1005-08.

14. 476 U.S. 79 (1986).

15. *Id.* at 102 (Marshall, J., concurring); *see* EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION (2021), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf [hereinafter EJI 2021 REPORT].

16. *See Batson Reform: State by State*, BERKELEY L. DEATH PENALTY CLINIC, 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/ (last visited Mar. 8, 2024) [hereinafter BERKELY LAW DEATH PENALTY CLINIC]; Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021) [hereinafter Arizona Order] (amending Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure to eliminate peremptory challenges); CAL. CIV. PROC. CODE § 231.7 (West 2024); WASH. R. GEN. APPLICATION 37 (enacting new rules for *Batson* challenges); *see also* State v. Andujar, 254 A.3d 606, 611 (N.J. 2021) (holding peremptory challenges based on "implicit or unconscious racial bias" unconstitutional).

17. *See* WASH. R. GEN. APPLICATION 37; CAL. CIV. PROC. CODE § 231.7.

18. WASH. R. GEN. APPLICATION 37; CAL. CIV. PROC. CODE § 231.7.

of state legislatures and supreme courts have proposed, or are considering, additional modifications to *Batson*.[19]

As illustrated by the earlier examples, *Batson*'s failures are reflected just as forcefully in the context of investigatory stops. Thus, the nascent solutions to *Batson*'s shortfalls should be extended to Fourth Amendment jurisprudence. In a recent decision, the Washington Supreme Court extended the principles of its reform to the Fourth Amendment seizure analysis, and the court appears to invite further expansion.[20]

This Article proposes an additional step forward. To combat racial profiling, policymakers, criminal legal system actors, and courts should develop statutes, jurisprudence, and rules of procedure that require the suppression of evidence whenever an objective observer could conclude such evidence is the fruit of racial profiling.[21] These actors should also promulgate lists of presumptively pretextual justifications for searches or seizures to guide trial courts.

In Part I, this Article recounts the Supreme Court's analogous failures to combat racial bias in investigatory stops and jury selection procedures. Part I starts with examining the Court's Fourth Amendment colorblindness from *Terry* to *Whren*. It then draws analogies to the Court's failure to prevent racial bias in jury selection.

In Part II, this Article discusses recent *Batson* reforms in Washington, California, Arizona, and several other states. It includes an examination of the political processes that led to their passage and an overview of their specific provisions.

In Part III, this Article discusses the applicability of *Batson* reforms in the Fourth Amendment context. It starts by outlining the unifying principles adopted from jury selection reforms. Part III then provides an overview of how this proposal would govern suppression hearings as well as more preventative procedures such as internal affairs investigations and other checks on policing. Finally, this Article responds to several potential criticisms of this proposal.

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19. *See* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 16.

20. *See* State v. Sum, 511 P.3d 92, 102-03 (Wash. 2022).

21. Stakeholders in Washington State, led in part by the Fred T. Korematsu Center at Seattle University, which helped spearhead the adoption of General Rule 37, have recently made this proposal. *See* TASK FORCE 2.0: RACE AND WASHINGTON'S CRIM. JUST. SYS., FRED T. KOREMATSU CTR. FOR L. & EQUITY, RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM: 2022 RECOMMENDATIONS TO CRIMINAL JUSTICE STAKEHOLDERS IN WASHINGTON 6 (2022), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1122&context=korematsu_center [hereinafter TASK FORCE 2.0 RECOMMENDATIONS].

I. The Supreme Court's Colorblind Fourth Amendment and Jury Selection Jurisprudence

A. The Colorblind Fourth Amendment

In *Terry v. Ohio*, the Supreme Court refused to acknowledge racism in stop and frisk and set the tone for how it would treat race in its Fourth Amendment jurisprudence.[22] The latter-day Warren Court's blindness to race facilitated the devolution of Fourth Amendment protections for people of color as the Court's composition became more conservative during the 1970s and 1980s.[23] Chief Justice Warren's majority opinion does not mention race in its statement of facts.[24] However, two of the three individuals stopped and frisked in *Terry* were African American, including the eponymous John Terry.[25] The opinion relegated its discussion of race to a single sentence and a single footnote.[26] The in-line text abdicates the Court's ability to use the Fourth Amendment to prevent racial profiling: "The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the

22. *See* Thompson, *supra* note 10, at 963-64; Butler, *White Fourth Amendment*, *supra* note 9, at 248-49; Maclin, *supra* note 9, at 1278. *But see* Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of* Terry v. Ohio, 34 HOW. L.J. 567, 574 (1991) (arguing that *Terry* unequivocally disapproved of racist police harassment).

23. *See* Butler, *White Fourth Amendment*, *supra* note 9, at 247-48. The Warren Court's tenure is widely recognized as the most progressive period in the Supreme Court's history, particularly for its decisions expanding the rights of African Americans, the criminally accused, and other marginalized groups. Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER REVOLUTION THAT WASN'T 62, 67 (Vincent Blasi ed., 1983).

24. Terry v. Ohio, 392 U.S. 1, 4-8 (1968); Thompson, *supra* note 10, at 963.

25. Thompson, *supra* note 10, at 964. Richard Chilton, the second man stopped, was African American while Carl Katz, the third individual arrested, and Detective McFadden, the arresting officer who observed the men were White. *Id.* "Cleveland police lore held that when a black man and a white man got together, they were likely to be planning a crime." Butler, *White Fourth Amendment*, *supra* note 9, at 248.

26. Maclin, *supra* note 9, at 1284. Professor Maclin argued that the Court accounted for race's impact by requiring a consideration of "the degree of community resentment aroused by particular practices." *Id.* (quoting *Terry*, 392 U.S. at 17 n.14). However, the Court subordinated this issue to a footnote with no other mention of race during the opinion or even during the justices' conferences to decide *Terry*. *Id.* at 1284-85 (citing John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749 (1998)). This ignorance, along with the Court's subsequent decisions and practices, discussed *infra*, suggests that the Court willfully ignored race.

exclusion of any evidence from any criminal trial."[27] In the accompanying footnote, the Court acknowledged a report from the President's Commission on Law Enforcement and Administration of Justice detailing the concerns of "minority groups."[28]

It defies explanation that the Warren Court—the same court that spearheaded the protection of the criminally accused and marginalized racial and ethnic communities—would so publicly undermine its power to combat racial discrimination in the criminal legal system.[29] The same Justices who

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27. *Terry*, 392 U.S. at 14-15.

28. *Id.* at 14 n.11. In response, Professor Maclin argues that "[t]he effectiveness of the exclusionary rule's deterrent function should not control the substantive content of the Fourth Amendment." Maclin, *supra* note 9, at 1313. The Court is correct that deciding *Terry* differently would not have completely prevented police abuses because the exclusionary rule is an insufficient deterrent, particularly where officers have no intent to sustain an arrest or prosecution. However, as one scholar has so aptly stated, "[u]nder this formula any concern for justice is excluded from the equation." Laurence A. Brenner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 136-37 (1989).

29. As Professor Thompson has noted:

> The Court's claim of powerlessness [in *Terry*] is in sharp contrast with the previous Warren Court decisions championing the rights of the individual in encounters between a civilian and a police officer. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 492 (1966) (holding that statements obtained from defendants who were not informed of their constitutional rights were inadmissible); Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (protecting defendant's Sixth Amendment right to counsel); Massiah v. United States, 377 U.S. 201, 205-06 (1964) (holding incriminating statements by defendant inadmissible because government agent had obtained statements in absence of defendant's retained counsel and without defendant's knowledge); Henry v. United States, 361 U.S. 98, 104 (1959) (holding that arrest is not justified by what subsequent search discloses).

Thompson, *supra* note 10, at 972 n.75; *see also* Starkey, *supra* note 9, at 134 (citing MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 3 (1998)) (highlighting the incongruity between the Warren Court's reputation for combatting racial discrimination and the result of the Court's lowered standard for the "stop" and "frisk" search). Multiple scholars have attributed the Court's decision to pressure from law-and-order rhetoric in the wake of unrest in major cities and campuses in the mid- and late-1960s. *See* Hutchins, *supra* note 10, at 886-93; Harris, *supra* note 10, at 663; Maclin, *supra* note 9, at 1277-78, 1287. In addition, the Court appears to have accepted its "powerless[ness] to deter invasions of constitutional rights" where police had no prosecutorial motive. *Id.* (quoting *Terry*, 392 U.S. at 14); *see also* Kamisar, *supra* note 23, at 67 (positing that there were two Warren Courts). The Court was particularly susceptible to backlash where, as in *Terry*, it faced the doubly unpopular prospect of increasing rights for criminal defendants and persecuted racial groups. Maclin, *supra* note 9, at 1318.

believed in the exclusionary rule's power to deter police misconduct[30] and who outlawed segregation[31] decided that the Court lacked the ability to combat racial discrimination in interactions between civilians and the police. In effect, the Court tipped the scales in favor of evidence gathering at the expense of preventing police harassment of communities of color.[32] The Court ignored race altogether, setting the tone for its Fourth Amendment jurisprudence.

The Court's Fourth Amendment decisions between *Terry* and *Whren* continued to ignore race.[33] In *Delaware v. Prouse*,[34] the Court failed to consider social science data establishing that police officers' nearly unbridled discretion led to racial profiling in traffic stops.[35] Although it ruled in Prouse's favor, the Court neither mentioned race nor discussed the social science data Prouse cited.[36]

The Court again failed to appreciate racial undercurrents in *Tennessee v. Garner*[37] and *Kolender v. Lawson*.[38] *Garner* held that the Fourth Amendment prohibited police from using deadly force on a "fleeing suspect" unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[39] Garner presented social science research that suggested racial disparities in police use of force against African Americans.[40] Once again, the Court's opinion was devoid of any

30. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence seized in violation of the Fourth Amendment is inadmissible at trial as a matter of constitutional law); Miranda v. Arizona, 384 U.S. 436, 471-72, 476 (1966) (holding that testimonial statements obtained by law enforcement in violation of the Fifth Amendment are inadmissible at trial).

31. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation of public schools violates the Equal Protection Clause of the Fourteenth Amendment).

32. Hutchins, *supra* note 10, at 894-95.

33. *See* Thompson, *supra* note 10, at 973-78; Butler, *White Fourth Amendment*, *supra* note 9, at 247-52 (arguing that the Court's Fourth Amendment jurisprudence is willfully colorblind).

34. 440 U.S. 648 (1979).

35. *Id.*; Thompson, *supra* note 10, at 973-74; *see* Brief for Respondents at 25, app. A, at 5a-10a, *Prouse*, 440 U.S. 648 (No. 77-1571), 1979 WL 199597.

36. *Prouse*, 440 U.S. 648; Thompson, *supra* note 10, at 974.

37. 471 U.S. 1 (1985); Thompson, *supra* note 10, at 974-75.

38. 461 U.S. 352 (1983).

39. *Garner*, 471 U.S. at 11.

40. *See* Brief for Appellee-Respondent at 13-14, *Garner*, 471 U.S. 1 (Nos. 83-1035, 83-1070), 1984 WL 566020 (relaying that Memphis police had shot 108 people suspected of non-violent property crimes between January 1969 and October 1974); James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 718-21 (1982) (relying on the same data used by Garner to describe disproportionate shootings of African

discussion of race despite its prominence in the parties' briefing and case framing.[41] In *Kolender*, the Court held that a California statute requiring that suspicious people provide police with "a 'credible and reliable' identification" was unconstitutionally vague.[42] However, the Court similarly failed to acknowledge that Mr. Lawson, "who had been arrested fifteen times, was a black male who wore his hair in dreadlocks, and had been arrested while walking in white neighborhoods."[43]

The Court only acknowledged the role of race in Fourth Amendment cases between *Terry* and *Whren* to permit racial profiling near the southern border.[44] In *United States v. Brignoni-Ponce*,[45] the Court held that the Border Patrol could not stop vehicles near the Mexican border solely because of the occupants' apparent "Mexican ancestry."[46] However, the Court endorsed the government's contention "that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."[47] Thus, the Court permitted the Border Patrol to consider "Mexican appearance"—whatever this means[48]—in the reasonable suspicion calculus.[49] The Court similarly ignored the Border Patrol's legacy of en masse arrests and deportations of "Mexican-

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Americans by Memphis Police); Brief for Appellee-Respondent, *supra*, at 98-99 (finding that "blacks were more than twice as likely to be shot at"); Thompson, *supra* note 10, at 974-75.

41. *See* Thompson, *supra* note 10, at 975 (arguing that the Court must have "consciously . . . avoided the issue of race").

42. *Kolender*, 461 U.S. at 353-54.

43. Johnson, *supra* note 10, at 230.

44. *See* Thompson, *supra* note 10, at 975-76.

45. 422 U.S. 873 (1975).

46. *Id.* at 885-86.

47. *Id.* at 885.

48. Contrary to the Court's and the Border Patrol's beliefs, not all Mexicans look alike. In fact, Mexicans exhibit rich genetic and ethnic diversity. *See* Andrés Moreno-Estrada et al., *The Genetics of Mexico Recapitulates Native American Substructure and Affects Biomedical Traits*, 344 SCIENCE 1280 *passim* (2014) (describing genetic diversity in people of Mexican descent); *Mexico: Ethnic Groups*, BRITANNICA, https://www.britannica.com/place/Mexico/Ethnic-groups (last visited Mar. 8, 2024) (describing Mexico's ethnic diversity). For example, I am a pale-skinned Jewish man—and first-generation American citizen—with dark hair and green eyes whose maternal ancestors immigrated to Mexico from Central and Eastern Europe. Perhaps the Border Patrol would be better served training their officers with some more accurate sources. *See, e.g.*, True Mexico, *What Do Mexicans LOOK LIKE? #Mythbusting Mexico*, YOUTUBE (Jan. 8, 2017), https://www.youtube.com/watch?v=J4aDvQI-Oak. Moreover, it is virtually impossible to "visually distinguish[] illegal Mexican immigrants from American-born Latinos." Butler, *White Fourth Amendment*, *supra* note 9, at 249-50 (citing INS v. Delgado, 466 U.S. 210, 233-34 (1984) (Brennan, J., dissenting)).

49. *Brignoni-Ponce*, 422 U.S. at 886-87.

looking" citizens—including people who had lawful immigration status—during "Operation Wetback," which stemmed from white supremacist replacement theory.[50] Thus, the Court lent its imprimatur to the consideration of race and its role in identifying individuals who "do not belong" within officers' decisions to perform investigatory stops.

The Court reinforced the legality of racial profiling in *United States v. Martinez-Fuerte*.[51] The Court permitted the Border Patrol to stop and refer motorists for random secondary inspections regardless of whether reasonable suspicion or probable cause existed.[52] The Court explicitly legalized racial profiling in this context, holding that "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."[53] However, the Court clarified that, consistent with its prior ruling in *Brignoni-Ponce*, the motorists' "apparent Mexican ancestry" could not be the *sole* reason for the secondary inspection.[54]

The Court's discussion of race and the Fourth Amendment between *Terry* and *Whren* revealed—at best—its ignorance of the conscious and unconscious biases of police officers. When the individual subjected to a search or seizure alleged racial animus, the Court refused to acknowledge the role of race. In contrast, when the government sought to legalize racial profiling in *Brignoni-Ponce* and *Martinez-Fuerte*, the Court acquiesced.[55]

In *Whren*, the Court formalized its refusal to prevent racial discrimination through the Fourth Amendment. Once again, the Court omitted any mention

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50. *See On This Day – Jul 15, 1954: U.S. Government Stages Mass Deportations in the American Southwest*, EQUAL JUST. INITIATIVE, https://calendar.eji.org/racial-injustice/jul/15 (last visited Mar. 8, 2024). The operation began in June 1954 after U.S. Attorney General Herbert Brownell "promoted the crackdown based on his assertion that 'the Mexican wetback problem was becoming increasingly serious because Mexican immigrants were 'displacing domestic workers, affecting work conditions, spreading disease, and contributing to crime rates.'" *Id.*

51. 428 U.S. 543, 563 (1976); Thompson, *supra* note 10, at 976-77.

52. *See Martinez-Fuerte*, 428 U.S. at 547, 563.

53. *Id.* at 563. The government had conceded that "apparent Mexican ancestry" was one of the factors agents relied on to determine whom to stop and refer for inspection. *Id.* at 563 n.16; *see* Thompson, *supra* note 10, at 977.

54. *Martinez-Fuerte*, 428 U.S. at 564 n.17 (citing *Brignoni-Ponce*, 422 U.S. at 886-87); *see* Thompson, *supra* note 10, at 977.

55. For a broader discussion of courts' treatment of race in the reasonable suspicion and probable cause analysis, see Johnson, *supra* note 10, at 225-37 (arguing, while citing numerous examples, that courts explicitly permit race as a dispositive factor in reasonable suspicion or probable cause analysis).

of race in its statement of facts.[56] However, race was a central, rather than collateral, issue in this case. Whren argued that the unfettered discretion given to police to enforce traffic laws provided "virtual carte blanche to stop people because of the color of their skin or for any other arbitrary reason."[57] In addition, he referenced examples of racially biased traffic stops.[58] Whren stopped short of arguing that racially disproportionate stops violated the Fourth Amendment. Instead, he used them to illustrate the impact of providing police virtually unlimited discretion to seize any motorist.[59]

In response, the Court held that "objectively justifiable behavior" sanitizes officers from allegations of pretext—stopping individuals for minor, rarely-enforced offenses such as jaywalking or nonmoving traffic violations to hopefully obtain evidence of a more serious crime—under the Fourth Amendment.[60] The Court's selective recognition of race is strategically employed to deny the existence of racialized policing.[61] In doing so, *Whren* formalized the Court's refusal, starting with *Terry*, to consider racism in the Fourth Amendment context.[62] In addition, the Court solidified its prioritization of evidence gathering at the expense of protecting the rights of Black and Brown people. The Court could have decided that race plays a role in Fourth Amendment balancing—as it had previously suggested in *Terry*[63]—and simply found that Whren had not established racial profiling on the facts.[64] Instead, the Court enacted an unnecessary barrier to any

56. Thompson, *supra* note 10, at 978-79; Whren v. United States, 517 U.S. 806, 808-09 (1996).

57. Brief for the Petitioners at 22, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75758 (citing 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4(e), at 121-22 (3d ed. 1996)).

58. *Id.* at 23-29 (citing United States v. Harvey, 16 F.3d 109, 114 (6th Cir. 1994); State v. Arroyo, 796 P.2d 684, 688 (Utah 1990); Wilson v. Tinicum Township, No. CIV. A. 92-6617, 1993 WL 280205 (E.D. Pa. July 20, 1993); United States v. Laymon, 730 F. Supp. 332 (D. Colo. 1990); Whitfield v. Bd. of Cnty. Comm'rs, 837 F. Supp. 338, 340, 343-44 (D. Colo. 1993); United States v. Roberson, 6 F.3d 1088, 1089 (5th Cir. 1993)).

59. *Id.*; Thompson, *supra* note 10, at 980.

60. *Whren*, 517 U.S. at 812; *see* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032-33 (2002).

61. *See* Carbado, *supra* note 60, at 1033.

62. Thompson, *supra* note 10, at 981; Carbado, *supra* note 60, at 1033. In addition, *Whren* effectively invalidates one of the only mentions of race in *Terry v. Ohio*: "[T]he degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." Terry v. Ohio, 392 U.S. 1, 17 n.14 (1968).

63. *Terry*, 392 U.S. at 17 n.14.

64. Carbado, *supra* note 60, at 1033-34.

consideration of race in Fourth Amendment analysis.[65] Because the Fourth Amendment requires objective reasonableness, the Court found no room for consideration of officers' "[s]ubjective intentions . . . in ordinary, probable-cause Fourth Amendment analysis."[66] Thus, "*Whren* essentially divided the world into two neat, straightforward categories: those in which there clearly is and those in which there clearly is not 'probable cause.'"[67]

Whren demonstrates the Court's misinterpretation of objectivity. *Terry* itself provides the perfect example of how courts often misinterpret signs of racial bias as objective indications of criminality by framing the facts through the lens of police expertise. The *Terry* Court's statement of facts began by noting how Detective McFadden "was unable to say precisely what first drew his eye to [Chilton and Terry]."[68] The Court then observed that Detective McFadden "had been a policeman for 39 years and a detective for 35 and he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years."[69] The Court concluded its opening paragraph by quoting McFadden's reasons for initially becoming suspicious: "Now, in this case when I looked over they didn't look right to me at the time."[70] However, during the suppression hearing prior to trial, McFadden admitted to having no experience "observing the activities of individuals in casing a place."[71] In addition, the Court overlooked "Cleveland police lore"

65. *Id.*
66. *Whren*, 517 U.S. at 813.
67. Thompson, *supra* note 10, at 982.
68. *Terry*, 392 U.S. at 5.
69. *Id.*
70. *Id.*
71. Maclin, *supra* note 9, at 1300 (quoting Defendants' Bill of Exceptions, State v. Terry and State v. Chilton (Nos. 79,491 & 79,432), *reprinted in Appendix B:* State of Ohio v. Richard D. Chilton *and* State of Ohio v. John W. Terry: *The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, 1420, 1477 (1998) [hereinafter Terry *Suppression Transcript*]). Detective McFadden later stated during the hearing that he became suspicious because "[he] didn't like them" and that Detective McFadden was first watching the men because "[*he*] *didn't like their actions* on Huron Road, and [he] suspected them of casing a job, a stick-up." Maclin, *supra* note 9, at 1300-01 (quoting Terry *Suppression Transcript*, *supra*, at 1456) (emphasis added). When Justice Marshall later asked about Detective McFadden's expertise at oral argument, Ohio's counsel responded, "I think that he would get his expertise by virtue of the fact that he had been a member of the police department for forty years, and by being a member of the police department for forty years I am quite sure that, even if by *osmosis*, some knowledge would have to come to him." Maclin, *supra* note 9, at 1301 (quoting *Terry v. Ohio*, OYEZ, https://www.oyez.org/cases/1967/67 (last visited Apr. 19, 2024) (link to oral argument transcript)).

that "held that when a black man and a white man got together, they were likely to be planning a crime."[72]

The Court wrongly deferred to Detective McFadden's expertise in identifying a casing job. The Court's own biases undermined its objectivity and led it to falsely characterize McFadden's observations as objective instead of subjective. In doing so, the Court endorsed what Professor Tracey Maclin has called an officer's "sixth sense."[73] However, this "sixth sense" could just as easily be interpreted as racial bias masquerading as objectivity.[74] In fact, these sorts of gut instincts are particularly susceptible to implicit racial bias.[75] This paradoxical thinking exposes *Whren*'s disingenuous reliance on objectivity in a world where officers are granted wide discretion to stop and frisk.[76] Inevitably, racial bias and stereotyping, whether conscious or unconscious, infect facially objective justifications for searches and seizures.[77] The trial and appellate courts evaluating these justifications

72. Butler, *White Fourth Amendment*, *supra* note 9, at 248.

73. Maclin, *supra* note 9, at 1303.

74. *See* Johnson, *supra* note 10, at 227-29 (discussing cases where courts endorsed stops founded on the defendant's racial nonconformance with the racial demographics of the neighborhood where they were stopped because of officers' expertise in discerning suspicious activity) (citing State v. Dean, 543 P.2d 425, 427 (Ariz. 1975); United States v. Magda, 547 F.2d 756 (2d Cir. 1976)).

75. *See* ELISABETH SEMEL ET AL., BERKLEY L. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS 31 (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf (citing Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314 (2002); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5 (1989); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004) [hereinafter Eberhardt et al., *Seeing Black*]; Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCH. 399 (2003); Anthony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181 (2001)).

76. *See* Thompson, *supra* note 10, at 991 ("Many of the perceptions and judgments an officer reports on a witness stand—for example, the commission of a 'furtive gesture,' an 'attempt to flee,' 'evasive' eye movements, 'excessive nervousness'—will not be accurate renditions of the suspect's actual behavior but rather a report that has been filtered through and distorted by the lens of stereotyping."); Harris, *supra* note 10, at 680 (citing Elizabeth A. Gaynes, Essay, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 624 (1993)).

77. *See* Hutchins, *supra* note 10, at 901 ("[T]he extraordinary discretion afforded by *Terry*'s reasonable suspicion standard is further complicated by matters of race and poverty.");

succumb to the same biases. Thus, the Court's conclusion in *Whren* that a reasonable objective basis negates any racist motivations for conducting a stop and frisk ultimately endorses officers' reliance on stereotypes and racial bias.

B. Preemptively Closing the Door to Equal Protection Challenges: McCleskey v. Kemp *and* Armstrong v. United States

Instead of broadening the Fourth Amendment's protections, *Whren* directed litigants to challenge discrimination through the Equal Protection Clause.[78] However, the Court's decisions in *McCleskey v. Kemp*[79] and *United States v. Armstrong*[80] effectively barred the courthouse doors to any selective enforcement claims under the Equal Protection Clause.

1. McCleskey v. Kemp*'s Discriminatory Purpose Requirement*

McCleskey held that statistical proof of racial disparities was insufficient to establish the discriminatory intent necessary for an equal protection challenge.[81] Warren McCleskey had been convicted of capital murder in Georgia and sentenced to death.[82] In his petition for a writ of habeas corpus in federal court, McCleskey presented a statistical study that revealed racial disparities in Georgia's imposition of death sentences.[83]

The so-called "Baldus study" consisted of "two sophisticated statistical studies that examine[d] over 2,000 murder cases that occurred in Georgia during the 1970's."[84] The study revealed statistically significant racial

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Thompson, *supra* note 10, at 991. Furthermore, James J. Fyfe, a former police officer, has observed that:

> [P]olice officers on American streets too often rely on ambiguous cues and stereotypes in trying to identify the enemies in their war. When officers act upon such signals and roust people who turn out to be guilty of no more than being in what officers view as the wrong place at the wrong time—young black men on inner-city streets late at night, for example—the police may create enemies where none previously existed.

JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 114 (1983).

78. Whren v. United States, 517 U.S. 806, 813 (1996). The Court engaged in some image rehabilitation as well, noting its agreement "with petitioners that the Constitution prohibits selective enforcement of the law based on consideration such as race." *Id.*

79. 481 U.S. 279 (1987).

80. 517 U.S. 456 (1996).

81. 481 U.S. at 292-97.

82. *Id.* at 284.

83. *Id.* at 286.

84. *Id.*

disparities both in prosecutors' decisions to seek the death penalty and in defendants sentenced to death.[85]

The Supreme Court denied relief despite assuming the study's validity.[86] Specifically, the Court held that the Baldus study did not establish discriminatory intent.[87] The Court first differentiated capital sentencing from other contexts where the Court had accepted statistical evidence as proof of racial discrimination such as jury venire selection and suits brought under Title VII of the Civil Rights Act of 1964.[88] The Court also found that stronger proof was necessary to require the State to rebut the Baldus study, citing the traditional rule that jurors "cannot be called . . . to testify to the motives and influences that led to their verdict."[89]

In addition, foreshadowing its deference to police discretion in *Whren*, the Court found that discretion insulated prosecutors from having to defend decisions to seek death sentences, particularly where the defendant had been convicted of an act punishable by death.[90] The Court emphasized: "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[91] According to the Court, such disparities are therefore an essential feature of a functioning system.[92] Thus, prosecutors under *McCleskey* and officers under *Whren* have carte blanche from the Court to engage in discriminatory practices if they act within their discretion.

The Court's treatment of racial discrimination in *McCleskey* evinced its intentional ignorance of racial discrimination in the criminal legal system.[93] The Court's decision enshrined racial bias as an inevitable—if undesirable—component of the system. The Court prioritized the continued function of a system infected with racial bias over the rights of those affected by the disparities essential to the system's continued operation.

By requiring challengers to demonstrate intentional racial discrimination in their cases, the Court created an impossible burden for litigants. Challengers consistently lost when relying on evidence of gross racial disparities following *McCleskey*.[94] For example, a subsequent challenge to

85. *Id.* at 286-87.
86. *Id.* at 291.
87. *Id.* at 292-97.
88. *Id.* at 293-96.
89. *Id.* at 296 (quoting Chicago, B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907)).
90. *Id.* at 296-97.
91. *Id.* at 297.
92. *Id.* at 319.
93. *See* ALEXANDER, *supra* note 9, at 111.
94. *Id.* at 113.

Georgia's "two strikes and you're out" sentencing scheme failed despite statistical evidence demonstrating that 98.4% of people sentenced to life sentences under the statute were Black.[95]

2. Armstrong *Sets the Stage for* Whren

Whren must be read within the context of the Court's decision just four months earlier in *United States v. Armstrong* to understand the Court's intentional colorblindness. *Armstrong* stemmed from allegations of selective enforcement of two federal statutes that outlawed conspiring to possess crack cocaine with intent to distribute.[96] Following indictment, the defendants filed a motion for discovery or dismissal of the indictment, alleging that they had been singled out for prosecution because they were Black.[97] In support of their contentions, the defendants, in the Court's words, "offered only an affidavit by a 'Paralegal Specialist,' employed by the Office of the Federal Public Defender representing one of the [alleged co-conspirators]."[98] The Court continued to express its disdain as it recounted the contents of the affidavit:

> The only allegation in the affidavit was that, in every one of the 24 § 841 or § 846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.[99]

After the district court granted the motion, the government filed a motion for reconsideration.[100] The Court's treatment of the government's motion is a striking contrast to its treatment of the defense's evidence. The Court noted that the government's motion relied on "affidavits and other evidence," including affidavits from the "federal and local agents" involved, to refute the group's claim of racial discrimination.[101] Despite its contention that "race played no role," "the Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that '[l]arge-scale, interstate trafficking networks controlled by Jamaicans,

95. *Id.* at 114.

96. United States v. Armstrong, 517 U.S. 456, 458 (1996). The statutes at issue were 21 U.S.C. §§ 841, 846.

97. *Armstrong*, 517 U.S. at 459.

98. *Id.*

99. *Id.*

100. *Id.* at 459-60.

101. *Id.* at 460.

Haitians and Black street gangs dominate the manufacture and distribution of crack.'"[102] Ultimately, the district court denied the government's motion for reconsideration and the Ninth Circuit Court of Appeals, sitting en banc, affirmed.[103]

The Supreme Court held that the defense was not entitled to the information it sought absent a showing that "similarly situated defendants of other races could have been prosecuted, but were not."[104] In other words, "the Court demanded that Armstrong produce in advance the very thing he sought in discovery: information regarding white defendants who should have been charged in federal court."[105] Thus, the Court crippled selective prosecution claims.[106]

The Court reasoned, in language almost identical to *Whren* and *McCleskey*, that courts should give extraordinary deference to prosecutorial discretion in charging decisions:

> In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[107]

In the Court's eyes, the Ninth Circuit erred by presuming "that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group."[108] Instead,

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102. *Id.* (citing JOHN W. FEATHERLY & EDDIE B. HILL, DRUG ENF'T ADMIN., U.S. DEP'T OF JUST., CRACK COCAINE OVERVIEW 1989 (1989), https://www.ojp.gov/pdffiles1/Digitization/117888NCJRS.pdf). The Court acknowledged that Armstrong and the other challengers responded with statements from an intake coordinator at a drug treatment facility, a criminal defense attorney, and a newspaper article that refuted the government's assertion. *Id.* (citing Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequity*, L.A. TIMES, Nov. 23, 1992, at 1).

103. United States v. Armstrong, 21 F.3d 1431 (9th Cir. 1994).

104. *Armstrong*, 517 U.S. at 469.

105. ALEXANDER, *supra* note 9, at 117.

106. *See id.*

107. *Armstrong*, 517 U.S. at 464 (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

108. *Id.* at 469. The Court then cited statistics from the United States Sentencing Commission showing that "90% of the persons sentenced in 1994 for crack cocaine trafficking were black," "93.4% of convicted LSD dealers were white," and "91% of those convicted for pornography or prostitution were white." *Id.* (citing U.S. SENTENCING COMM'N, 1994 ANNUAL REPORT 41 (Table 13), 107 (Table 45), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1994/1994%20Annual%20Report.pdf).

the Ninth Circuit should have prefaced its analysis with the assumption that the United States Attorney's Office exclusively prosecuted crack cocaine conspiracies against African Americans because African Americans were the only individuals committing these offenses.[109] The Court willfully ignored evidence presented by Armstrong that refuted this belief.[110] In doing so, the Court reinforced the debunked argument that African Americans exclusively perpetrated crack cocaine abuse and trafficking.[111]

C. The Result: No Remedy for Racial Discrimination in Police Stops and Frisks

Armstrong, *McCleskey*, and *Whren* ultimately created a system where the Court bars the courthouse doors to claims of racial discrimination during searches and seizures. In *Whren*, the Court prevented Fourth Amendment challenges while suggesting that litigants pursue equal protection claims instead. However, *McCleskey* and *Armstrong* effectively foreclosed equal protection challenges in the criminal context.

Proponents of the Court's approach may argue that there has been success challenging discriminatory searches and seizures. Most famously, in *Floyd*

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109. This circular reasoning ignores the fact that police arrest a disproportionate number of poor people and people of color because they specifically target these groups for enforcement based on racist and classist stereotypes. *See* Butler, *The System*, *supra* note 9, at 1428-30; Harris, *supra* note 10, at 679; Maclin, *supra* note 9, at 1281.

110. Armstrong relied on an affidavit at trial from a criminal defense attorney "alleging that in his experience many nonblacks are prosecuted in state court for crack offenses." *Armstrong*, 517 U.S. at 460.

111. Federal drug use surveys indicated that "most crack users were white or Hispanic." Andrew J. Goudsward, *Crack vs. Heroin: 5 Takeaways from Our Investigation into the Role of Race in Drug Battle*, ASBURY PARK PRESS (June 17, 2020, 4:28 AM), https://www.app.com/in-depth/news/investigations/2019/12/02/crack-heroin-five-takeaways-our-investigation-black-race-arrests-inequities-sentencing/4302777002/. Just eight days after the Court's decision in *Armstrong*, the *Los Angeles Times* published an article exposing this myth. Dan Weikel, *War on Crack Targets Minorities over Whites: Cocaine: Records Show Federal Officials Almost Solely Prosecute Nonwhites. U.S. Attorney Denies Race is a Factor*, L.A. TIMES (May 21, 1995, 12:00 A.M.), https://www.latimes.com/archives/la-xpm-1995-05-21-mn-4468-story.html. Moreover, at least one later "study found that, contrary to the prevailing 'common sense,' the high arrest rates of African Americans in drug-law enforcement could not be explained by rates of offending; nor could they be explained by other standard excuses, such as the ease and efficiency of policing open-air drug markets, citizen complaints, crime rates, or drug-related violence." ALEXANDER, *supra* note 9, at 126-27 (citing Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005); Katherine Beckett et al., *Race, Drugs and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105 (2006)).

v. City of New York,[112] Judge Shira A. Scheindlin found that the stop and frisk policy of the City of New York and the NYPD violated the Fourth and Fourteenth Amendments.[113] Judge Scheindlin found an equal protection violation because city officials had adopted a policy based on the "belie[f] that blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population."[114]

However, the *Floyd* litigation's success was fleeting. The Second Circuit Court of Appeals stayed Judge Scheindlin's rulings and remanded the case, ordering the Southern District of New York to appoint a new judge to oversee the stay pending appeal.[115] The City and NYPD eventually agreed to dismiss their appeals and enter a de facto consent decree to implement Judge Scheindlin's Remedial Orders and end their discriminatory practices.[116]

Yet, *Floyd* has failed to eliminate racist policing in New York City.[117] A recent report by the independent monitor overseeing the consent decree found that the NYPD's anticrime units continue targeting people of color with unlawful stops and frisks.[118] A total of 97% of those stopped by these teams were Black or Latinx, and 24% of the stops were unlawful.[119] This problem is not confined to proactive policing units either.[120] For example,

112. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

113. *Id.*

114. *Id.* at 560.

115. Ligon v. City of New York, 538 Fed. Appx. 101 (2d Cir. 2013). The Second Circuit questioned Judge Scheindlin's impartiality after she made comments inviting the lawsuit in Floyd and after public statements in response to criticism. *Id.* at 102-03 nn.1-2 (citing Joseph Goldstein, *A Court Rule Directs Cases over Friskings to One Judge*, N.Y. TIMES (May 5, 2013), https://www.nytimes.com/2013/05/06/nyregion/a-court-rule-directs-cases-over-friskings-to-one-judge.html; Mark Hamblett, *Stop–and–Frisk Judge Relishes Her Independence*, N.Y. L.J. (May 5, 2013), https://www.law.com/newyorklawjournal/almID/1202600625151/; Larry Neumeister, *N.Y. 'Frisk' Judge Calls Criticism 'Below the Belt'*," WASH. TIMES (May 19, 2013), https://www.washingtontimes.com/news/2013/may/19/ny-frisk-judge-calls-criticism-below-belt/; Jeffrey Toobin, *Rights and Wrongs: A Judge Takes on Stop–and–Frisk*, NEW YORKER, May 27, 2013, at 36).

116. *See* Floyd v. City of New York, 770 F.3d 1051, 1062-63 (2d Cir. 2014).

117. *See* Nick Pinto, *NYPD Reforms Are Failing, Say Plaintiffs Who Won Landmark Stop-and-Frisk Case*, THE INTERCEPT (July 30, 2021, 9:48 AM), https://theintercept.com/2021/07/30/nypd-stop-and-frisk-reforms-fail/.

118. Corey Kilgannon, *N.Y.P.D. Anti-Crime Units Still Stopping People Illegally, Report Shows*, N.Y. TIMES (June 5, 2023), https://www.nytimes.com/2023/06/05/nyregion/nypd-anti-crime-units-training-tactics.html.

119. *Id.*

120. *See* Christina Fan, *NYPD: More Than 670,000 Pulled Over in 2022, with Vast Majority Arrested and Searched People of Color*, CBS NEW YORK (Feb. 23, 2023, 6:44 PM), https://www.cbsnews.com/newyork/news/nypd-traffic-stops-racial-disparity/; CHRISTOPHER

citywide data showed that young Black and Latino men comprised 38% of stops despite making up only 5% of the city's population between 2014 and 2017.[121] These individuals were "innocent—that is, neither arrested nor received a summons—80 percent of the time" and over 93% of frisks recovered no weapon.[122]

Empirical analyses demonstrate the pervasiveness of racial discrimination in stop and frisk beyond New York City. A recent nationwide study found that African American drivers are stopped at disproportionate rates and that African American and Latinx "drivers were searched on the basis of less evidence than white drivers" after a traffic stop.[123] Although Latinx drivers were not stopped at disproportionate rates according to the study, a growing body of research suggests that police departments purposefully classify Latinx drivers as White to sidestep accusations of racial discrimination.[124] Regardless, separate studies of the Border Patrol's and the Texas Department of Public Safety's stop and frisk practices reveal significant evidence of racial

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DUNN & MICHELLE SHAMES, N.Y. C.L. UNION, STOP-AND-FRISK IN THE DE BLASIO ERA 17 (Mar. 2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf; Alice Speri, *The NYPD Is Still Stopping and Frisking Black People at Disproportionate Rates*, THE INTERCEPT (June 10, 2021, 7:00 AM), https://theintercept.com/2021/06/10/stop-and-frisk-new-york-police-racial-disparity/.

121. KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 212 (2021) (citing DUNN & SHAMES, *supra* note 120).

122. DUNN & SHAMES, *supra* note 120, at 2.

123. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736 (2020).

124. Jefferson Parish, Louisiana exemplifies this practice. Richard A. Webster, *"If Everybody's White, There Can't Be Any Racial Bias": The Disappearance of Hispanic Drivers from Traffic Records*, PRO PUBLICA (Nov. 22, 2021, 7:00 AM), https://www.propublica.org/article/if-everybodys-white-there-cant-be-any-racial-bias-the-disappearance-of-hispanic-drivers-from-traffic-records. Over a six-year period, sheriff's deputies issued 167 tickets to drivers with the last name Lopez and "not one of the motorists was labeled as Hispanic." *Id.* "The same was true of 252 tickets issued to people with the last name of Rodriguez, 234 named Martinez, 223 with the last name Hernandez and 189 with the surname Garcia." *Id.* "Five of the top 10 most common last names of people cited as 'white' on tickets were Rodriguez, Martinez, Hernandez, Garcia and Lopez. That's basically impossible: the U.S. Census Bureau says more than 90% of people with those five last names were Hispanic." *Id.* In fact, despite Latinx individuals comprising 18% of the parish population, "of the almost 80,000 tickets that the Louisiana State Police handed out in Jefferson Parish over nearly six years, not a single one was issued to a person labeled as Hispanic" and "[o]f the more than 73,000 traffic tickets the [Sheriff's] [O]ffice issued between 2015 and September, 2020, deputies identified only six of the cited people as Hispanic." *Id.* In response to similar allegations, the Department of Justice has opened investigations of law enforcement agencies in North Carolina, Connecticut, Arizona, Louisiana, and New York. *Id.*

profiling of Latinx drivers.[125] In Washington, D.C., African Americans comprise 74.6% of individuals stopped by the Metropolitan Police Department despite making up only 47% of the population.[126] African Americans made up even larger proportions of the individuals stopped or searched without receiving a warning, ticket, or arrest[127] and experienced disproportionate search rates.[128] In California, "Black people are far more likely to be stopped by police than white people."[129] Latinx people "were also detained at disproportionate rates in many areas."[130] In Los Angeles and San Francisco, African Americans were almost six times more likely to be detained than White people.[131] These disparities persisted despite White

125. *See* Reece Jones, *The Biden Administration Must Ban Racial Profiling*, TEX. OBSERVER (Aug. 4, 2022, 8:48 A.M.), https://www.texasobserver.org/the-biden-administration-must-ban-racial-profiling/; ALEX DEL CARMEN ET AL., INST. FOR PREDICTIVE ANALYTICS IN CRIM. JUST., ADDITIONAL ANALYSIS OF STATE OF TEXAS 2021 RACIAL PROFILING DATA: HISPANIC DATA ANALYSIS REPORT 17 (2022), https://www.tarleton.edu/ipac2/wp-content/uploads/sites/350/2022/12/IPAC2021AnnualReportHispanicFindings.pdf.

126. ACLU ANALYTICS & ACLU OF D.C., RACIAL DISPARITIES IN STOPS BY THE METROPOLITAN POLICE DEPARTMENT: 2020 DATA UPDATE 1 (2021), https://www.acludc.org/sites/default/files/field_documents/2021_03_10_near_act_update_vf.pdf. In six of the seven police districts, African Americans were disproportionately likely to be stopped. *Id.* at 4. Most egregiously, despite comprising only 27.3% and 7.53% of the population in the First and Second Districts, 75.6% and 43.5% of people stopped were African American. *Id.* The Second District was the only area of D.C. where less than half of people stopped were African American. *Id.*

127. African Americans constituted 86.5% of such stops and 90.7% of such searches. *Id.* at 2.

128. A total of 90.5% of those searched were African Americans. *Id.* at 4. "Black people who were stopped were 5.06 times as likely to undergo a pat-down or search of their person and 3.67 times as likely to undergo a pat-down or search of their property" than White people. *Id.* at 4-5. Officers recovered weapons from only 6.7% of White people and 8.5% of Black people who were searched. *Id.* at 5.

129. *See* Dustin Gardiner & Susie Neilson, *'Are the Police Capable of Changing?': Data on Racial Profiling in California Shows the Problem Is Only Getting Worse*, S.F. CHRON. (July 14, 2022, 4:00 AM), https://www.sfchronicle.com/projects/2022/california-racial-profiling-police-stops/. African Americans were disproportionately searched at even higher rates. *Id.*

130. *Id.*

131. *Id.* In Los Angeles, another recent study found that 28% of people stopped are Black despite comprising only 9% of the city's population. Darwin BondGraham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves*, GUARDIAN (Jan. 3, 2020, 1:00 PM), https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force. According to the same study, in San Francisco African Americans make up 5% of the population, but 26% of individuals who are stopped. *Id.*

people being more likely to have contraband.[132] A recent report in Chicago similarly found that "Black people were overwhelmingly disproportionately stopped by [the Chicago Police Department]."[133] The list goes on and on.[134]

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132. Gardiner & Neilson, *supra* note 129. For example, in San Diego, "60% of white people searched . . . had contraband, compared with 46% of Black people." *Id.* In Fresno, 61% of White people searched had contraband versus 46% of African Americans. *Id.* A total of 42% of White people in Los Angeles County were found to possess contraband in contrast to 31% of Black people. *Id.*; *see also* ALI WINSTON & DARWIN BONDGRAHAM, THE RIDERS COME OUT AT NIGHT: BRUTALITY, CORRUPTION, AND COVER-UP IN OAKLAND 358-59 (2023) (describing how African Americans are stopped at rates disproportionate to their population in Oakland despite possessing contraband less often than White people).

133. WILLIAM MARBACK & NATHANIEL WACKMAN, CHICAGO OFF. OF INSPECTOR GEN., REPORT ON RACE- AND ETHNICITY-BASED DISPARITIES IN THE CHICAGO POLICE DEPARTMENT'S USE OF FORCE 31 (2022), https://igchicago.org/wp-content/uploads/2022/02/Use-of-Force-Disparities-Report.pdf.

134. In Jacksonville, Florida, Black pedestrians received tickets for pedestrian violations three times as often as white residents and received 55% of all pedestrian tickets despite making up only 29% of the population. Melba V. Pearson, *For People of Color in Jacksonville, Florida, Walking Can Be a Crime*, ACLU (Nov. 29, 2017), https://www.aclu.org/blog/criminal-law-reform/reforming-police/people-color-jacksonville-florida-walking-can-be-crime. In Oakland, California, Black people are stopped 5.3 times as often as White people and, in Sacramento, 3.7 times as often. Gardiner & Neilson, *supra* note 129. Following the shooting of Michael Brown in Ferguson, Missouri in 2014, a Department of Justice investigation found that, among other disparities, African Americans comprised over 90% of arrests and citations despite making up only 67% of the population. NATAPOFF, *supra* note 9, at 151-52 (citing CIV. RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf). Police in Baltimore prefilled the race and gender spaces in arrest reports for trespass arrestees with "BLACK MALE." *Id.* at 152 (citing CIV. RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 37-38, 55-56 (2016), https://www.justice.gov/d9/bpd_findings_8-10-16.pdf). In addition, police were twice as likely to search Black people than White people during traffic stops despite discovering contraband less often. *Id.* According to police files in St. Petersburg, Florida, African American "residents [were] three times as likely as whites to be stopped and questioned . . . . One officer explained that he stopped a black man because the shopping cart he was pushing was 'partially filled with aluminum cans.'" Maclin, *supra* note 9, at 1271 n.2 (quoting Tim Roche & Constance Humburg, *Stops Far Too Routine for Many Blacks*, ST. PETERSBURG TIMES, Oct. 19, 1997, at 1A). According to a retired Detroit police officer's experience, "if you stop and search 50 Negroes and get one good arrest out of it that's a good percentage; it's a good day's work. So, in my opinion, there are 49 Negroes whose rights have been misused and that goes on every day." *Id.* at 1272 (quoting *Hearings Before the U.S. Commission on Civil Rights* 375 (1961)); *see also* Hutchins, *supra* note 10, at 905-06 (discussing purposeful racial discrimination in stops and frisks in Avon, Connecticut, Philadelphia, and Miami); Johnson, *supra* note 10, at 236-37 ("There is substantial evidence that many police officers believe minority race indicates a general propensity to commit crime."); Ryan J. Reilly, *Louisville Police Use Excessive Force, Invalid Warrants and*

The Court's deference to police and governmental entities is a theme connecting *Armstrong* and *McCleskey* to the Court's colorblind, Fourth Amendment jurisprudence.[135] The Court has consistently directed lower courts to accede to officers' "sixth sense"[136] to differentiate crime from otherwise innocent conduct.[137] The Court has blindly deferred to police training and expertise as well as prosecutorial discretion and judgment to justify racially disparate outcomes. Rather than question Detective McFadden's gut that John Terry and Richard Chilton "didn't look right,"[138] the Court credited Detective McFadden's expertise. Instead of recognizing signals of implicit bias or disguised intentional racism, the Court assumed that Detective McFadden's training and experience led him to correctly interpret innocent activity as incipient criminal behavior.[139] Similarly, in *Brignoni-Ponce* and *Martinez-Fuerte*, the Court credited the government's contention that Border Patrol agents could recognize people of "apparent Mexican ancestry" and thereby stop individuals based on their appearance.[140]

Discriminatory Stops, DOJ Review Finds, NBC NEWS (Mar. 8, 2023, 1:22 PM), https://www.nbcnews.com/politics/justice-department/louisville-police-use-excessive-force-invalid-warrants-discriminatory-rcna73979.

135. In *Terry*, the Court assumed Detective McFadden's experience despite "no objective evidence affirming the accuracy, or ability, of Officer McFadden individually or patrol officers generally, to spot or 'sense' persons about to commit violent crimes." Maclin, *supra* note 9, at 1306. The shortsighted worldview that police training and experience automatically legitimizes governmental Fourth Amendment narratives has become commonplace in American criminal courts. *See* Harris, *supra* note 10, at 665.

136. *See* Maclin, *supra* note 9, at 1303.

137. *See* Harris, *supra* note 10, at 665-66; United States v. Cortez, 449 U.S. 411, 418-19 (1981). The Court explicitly directs trial courts to determine the legality of a stop through the perspective of "those versed in the field of law enforcement." *Id.* at 418.

138. Terry v. Ohio, 392 U.S. 1, 5 (1968).

139. The American Bar Foundation published a study, which the Court cited three times in *Terry*, warning about this type of misconception: "Because such expertise as may exist is left to the individual officer, it is not subject to effective review or control. And it may be suspected that individual prejudices, racial and others, influence these assumptions about behavior as strongly as does objective experience." Maclin, *supra* note 9, at 1307 (quoting TIFFANY ET AL., *supra* note 5, at 89-90).

140. These precedents have not aged well. *See* Jones, *supra* note 125; DEL CARMEN ET AL., *supra* note 125. For instance, in the 1970s, Mexican Americans in Chicago secured an injunction against the Immigration and Nationalization Service for excessive stops and detentions. Johnson, *supra* note 10, at 233 (citing Ill. Migrants Council v. Pilliod, 540 F.2d 1062, 1070 (7th Cir. 1976)). Similarly, the Southern District of New York dismissed a lawsuit brought by Ecuadorian citizens who were legal United States residents. *Id.* (citing Marquez v. Kiley, 436 F. Supp. 100 (S.D.N.Y. 1977)). The men were stopped, and one was arrested, based on their ethnicity, their presence in a community with allegedly large numbers of

By deferring to police expertise, the Court credited implicit racial biases in *Terry* and "justifiable" racial profiling in *Brignoni-Ponce* and *Martinez-Fuerte*.

The high burden for challenging searches and seizures based on racial bias has enabled the continued criminalization of people of color. The Court could have prevented discriminatory stop and frisk. Instead, by insisting on proof of intentional racial animus, the Court turned a blind eye to all but the clearest instances of racial discrimination.[141] The Court's failure to recognize instances of police bias masquerading as "expertise" compounds the problem.

Luckily, the Court does not have the final say on preventing racial bias in stop and frisk. State and local judicial, legislative, and executive bodies can apply the lessons learned from the Court's similar misadventures in the jury selection context. The following Section recounts the Court's failure to remedy implicit racial bias in jury selection and its parallels to the Court's flawed Fourth Amendment jurisprudence.

D. Batson*'s Failure to Prevent Racial Discrimination in Jury Selection*

In *Batson v. Kentucky*, the Court attempted to eliminate racially discriminatory peremptory challenges.[142] The Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black

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undocumented people, the fact that one of the men had a lunch bag, and because the men spoke in Spanish. *Id.* (citing *Marquez*, 436 F. Supp. at 103-07). These issues continue today. Pennsylvania recently paid $865,000 to settle a civil rights suit alleging discriminatory stops and seizures of Latinx drivers by the Pennsylvania State Police. Dale Russakoff & Deborah Sontag, *Changes in Police Policy, Payouts to Latino Victims of Traffic Stops and Arrests Following Investigations*, PRO PUBLICA (Apr. 8, 2022, 2:00 PM), https://www.propublica.org/article/changes-in-police-policy-payouts-to-latino-victims-of-traffic-stops-and-arrests-following-investigations. Similarly, the U.S. Border Agency settled a lawsuit brought by the ACLU of Montana in 2020 after agents infamously detained two women because the women were speaking Spanish. Allyson Waller, *U.S. Border Agency Settles with 2 Americans Detained for Speaking Spanish*, N.Y. TIMES (Nov. 26, 2020), https://www.nytimes.com/2020/11/26/us/montana-spanish-border-patrol.html.

141. *See* ALEXANDER, *supra*, note 9, at 125-27 (arguing that contemporary racial discrimination in the criminal system stems from implicit rather than "old-fashioned racism"); NATAPOFF, *supra* note 9, at 158-59.

142. 476 U.S. 79 (1986). Unlike challenges for cause, which apply where a juror is unable or unfit to serve on a jury, advocates may exercise a set number of peremptory challenges in most jurisdictions to excuse jurors for no set reason. *Id.* at 89.

defendant."[143] The Court created a three-step process for defense attorneys to object to a prosecutor's exercise of a peremptory challenge. First, the defendant must establish that they are a member of a protected racial group and make a prima facie showing that the prosecutor exercised racially discriminatory peremptory strikes.[144] The defendant may establish a prima facie case of intentional discrimination based on the prosecutor's exercise of peremptory strikes in the instant case.[145] Once the defense establishes a prima facie case, the burden shifts to the prosecutor to provide a race-neutral justification.[146] The neutral reason need not satisfy the more exacting standard for a cause challenge, but must be "related to the particular case to be tried."[147] The trial court then determines whether the prosecution has engaged in purposeful discrimination.[148]

In a concurring opinion, Justice Marshall commended the majority but warned that *Batson* would "not end the racial discrimination that peremptories inject into the jury-selection process."[149] Instead, Marshall advocated for the elimination of peremptory challenges.[150] He identified several fatal limitations that have proved prophetic and are analogous to the Court's Fourth Amendment jurisprudence. Marshall noted that the Court's framework allowed for at least some "acceptable" racial discrimination by imposing a prima facie burden on the defense.[151] A sly prosecutor could exercise discriminatory peremptory strikes "provided that they hold that discrimination to an 'acceptable' level."[152] In addition, even if the defense established prima facie evidence, trial courts "face the difficult burden of assessing prosecutors' motives."[153] Furthermore, Justice Marshall argued

143. *Id.*

144. *Id.* at 96. Batson originally only allowed challenges based on peremptory strikes against venire members who were the same race as the defendant. *Id.* The Court later expanded its ruling to prohibit discriminatory strikes against jurors who are not the same race as the defendant. Powers v. Ohio, 499 U.S. 400, 402 (1991). In addition, the Court has since expanded Batson's protections to gender discrimination. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 131 (1994).

145. *Batson*, 476 U.S. at 95.

146. *Id.* at 97.

147. *Id.* at 98.

148. *Id.*

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

150. *Id.* In contrast to his silence in *Terry* and other Fourth Amendment cases, Justice Marshall cited extensive statistics and anecdotal evidence demonstrating rampant racial discrimination in the exercise of peremptory challenges. *Id.* at 103-04.

151. *Id.* at 105.

152. *Id.*

153. *Id.*

that prosecutors could easily concoct and cite pretextual facially neutral justifications for their strikes.[154] Marshall also identified *Batson*'s failure to account for implicit racial bias.[155] Prosecutors' innate biases could "lead [them] easily to the conclusion that a prospective black juror is 'sullen,' or 'distant'" while acting identically to a prospective white juror.[156]

Although well-intentioned, *Batson* failed to eliminate racial discrimination in jury selection.[157] The intentional discrimination requirement renders *Batson* toothless, resulting in the same rampant discrimination vitiating stop and frisk.

Prosecutors' offices nationwide have promulgated training materials that provide methods to evade *Batson* objections.[158] For example, training materials instruct prosecutors to engage in "tokenism," that is, keeping a single member of a race they wish to strike on the panel to combat accusations of intentional discrimination.[159] In addition, manuals and other training materials have provided laundry lists of vague "race-neutral" justifications for peremptory strikes and have instructed prosecutors to articulate multiple reasons to survive *Batson* objections.[160] In perhaps the

154. *Id.* at 106.

155. *Id.*

156. *Id.*

157. *See* EJI 2021 REPORT, *supra* note 15.

158. *See id.* at 43-45.

159. *See* SEMEL ET AL., supra note 75, at 49; EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 11 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [hereinafter EJI 2010 REPORT]; *see, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 250 (2005) (prosecutor accepted an African American panel member to attempt to neutralize an earlier strike of a comparable venire member); Lark v. Beard, 495 F. Supp. 2d 488, 494 (E.D. Pa. 2007) (finding that the Philadelphia District Attorney's Office trained attorneys to avoid "routinely striking all African-American veniremen").

160. *See* Beth Schwartzapfel, *A Growing Number of State Courts Are Confronting Unconscious Racism in Jury Selection*, MARSHALL PROJECT (May 11, 2020, 6:00 AM), https://www.themarshallproject.org/2020/05/11/a-growing-number-of-state-courts-are-confronting-unconscious-racism-in-jury-selection; SEMEL ET AL., *supra* note75, at 49; EJI 2021 REPORT, *supra* note 15, at 43-44; EJI 2010 REPORT, *supra* note 159, at 16-18. In addition, manuals produced by the Los Angeles County District Attorney's Office and the California District Attorneys Association instruct prosecutors to avoid putting justifications that hint at racism on the record to avoid the appearance of discrimination. SEMEL ET AL., *supra* note 75, at 49; *see also Miller-El*, 545 U.S. at 270-71 (Breyer, J., concurring) (noting the increased systematization and organization of racial and gender profiling in jury selection, including a "jury-selection guide counsel[ing] attorneys to perform a 'demographic analysis' that assigns numerical points to characteristics" including race and gender and "a bar journal article counsel[ing] lawyers to 'rate' potential jurors 'demographically (age, gender, marital status,

best manifestation of Justice Marshall's fears, Jack MacMahon, an assistant district attorney in Philadelphia, held a training just after *Batson* was decided on how to question prospective African American jurors to obtain neutral justifications for strikes.[161] Just as officers may avoid accusations of racial discrimination so long as they can articulate a pretextual objective basis for reasonable suspicion, prosecutors can hide behind the veil of boilerplate race-neutral justifications to justify racist peremptory strikes.

Furthermore, *Batson* fails to account for attorneys' and judges' implicit biases. Prosecutors who articulate nebulous race-neutral justifications—and judges who accept these justifications—mirror the Supreme Court when it defers to officer expertise and other markers of implicit bias. Prosecutors' offices further enhance the impact of implicit biases by training prosecutors to rely on gut instincts to strike jurors.[162] However, implicit biases heavily influence gut feelings.[163] Studies have shown that unintentional biases "are unconscious and therefore impossible to elicit."[164] Thus, *Batson*, like the Supreme Court's colorblind Fourth Amendment approach, fails to account for the more subtle or unintentional manifestations of modern racism.[165]

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etc.) and mark who would be under stereotypical circumstances [their] natural *enemies* and *allies*'") (citing Leonard Post, *A Loaded Box of Stereotypes: Despite "Batson," Race, Gender Play Big Roles in Jury Selection*, NAT'L L.J., Apr. 25, 2005, at 1, 18; V. HALE STARR & MARK MCCORMICK, JURY SELECTION 193-200 (3d ed. 2001)).

161. SEMEL ET AL., *supra* note 75, at 36; *Lark*, 495 F. Supp. 2d at 493-94.

162. *See* SEMEL ET AL., *supra* note 75, at 46.

163. *See id.* at 31 (citing Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314 (2002); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5 (1989); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004) [hereinafter Eberhardt et al., *Seeing Black*]; Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCH. 399 (2003); Anthony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181 (2001)).

164. *Id.* (citing Samuel R. Sommers & Michael J. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCH. 527, 533 (2008)).

165. Studies have exposed implicit biases infecting all aspects of the criminal legal system. *Id.* at 33 (citing Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 784 (2018) (finding that criminal defendants' Afrocentric features affect the length of their sentences if convicted); Jennifer L. Eberhardt et al., *Looking Deathworthy, Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17

Consequently, examples of prosecutors justifying strikes with suspect race-neutral reasons abound.[166] For instance, a study of California courts concluded that prosecutors relied on racial stereotypes about demeanor as justifications for peremptory strikes in over 40% of cases.[167] In South Carolina, a prosecutor struck a prospective juror because the juror "shucked and jived" while walking.[168] A Georgia prosecutor struck an African American venire member because the prosecutor had failed to "establish a rapport" with the juror.[169] Another Georgia prosecutor struck one potential juror because they were "too close in age to the defendant (she was 34 and he was 19)" and another prospective juror because they "had a son who had been convicted of 'basically the same thing that this defendant is charged with' (the son stole hubcaps; the defendant was accused of murder)."[170] In Arkansas, a prosecutor successfully excluded a Black prospective juror based on their "hunch" that the juror would be unfavorable.[171]

Empirical studies expose the prevalence of discrimination in peremptory strikes. According to a study of strikes in Mississippi between 1992 and 2017, African American prospective jurors were four times more likely to be struck than White prospective jurors.[172] Another found that prosecutors in California struck African American jurors in 72% of cases while striking

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PSYCH. SCI. 383, 384 (2006) (finding that Black defendants in capital cases involving white victims are more likely to receive a death sentence if they are perceived to be more stereotypically Black); Eberhardt et al., *Seeing Black*, *supra* note 163, at 889 (finding a pattern of attitudinal bias among police officers that links African Americans to crime); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285, 285, 300-12 (2001) (finding that federal judges imposed harsher and longer sentences on African American defendants than White defendants); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1196, 1221 (2009) (finding that judges exhibit the same implicit biases present in the general public); Sommers & Norton, *supra* note 164, at 533 (finding that implicit biases cause significantly more challenges to African American prospective jurors than white prospective jurors)).

166. *See* EJI 2021 REPORT, *supra* note 15, at 44-45.

167. SEMEL ET AL., *supra* note 75, at 15.

168. EJI 2010 REPORT, *supra* note 159, at 18 (citing State v. Tomlin, 384 S.E.2d 707, 708-09 (S.C. 1989)).

169. *Id.* at 18 (citing George v. State, 588 S.E.2d 312, 316 (Ga. Ct. App. 2003)).

170. Schwartzapfel, *supra* note 160.

171. EJI 2010 REPORT, *supra* note 159, at 18 (citing Thornton v. State, No. CACR 93-452, 1994 WL 114350, at *3-4 (Ark. Ct. App. Mar. 30, 1994)).

172. EJI 2021 REPORT, *supra* note 15, at 42 (citing WILL CRAFT, APM REPORTS, PEREMPTORY STRIKES IN MISSISSIPPI'S FIFTH CIRCUIT COURT DISTRICT 2 (2018), https://features.apmreports.org/files/peremptory_strike_methodology.pdf).

White jurors in only 1%.[173] In Louisiana, prosecutors challenged "Black jurors at 175% the expected rate based on their proportion of the jury pool."[174] The litany of evidence led Justice Breyer to author a concurrence calling for the elimination of peremptory challenges.[175]

Curtis Flowers is perhaps the most famous victim of *Batson*'s failure. Over the course of six trials, the same Mississippi prosecutor exercised peremptory challenges against "41 of the 42 black prospective jurors that [he] could have struck."[176] The Mississippi Supreme Court reversed convictions in Flowers's first three trials because the prosecutor had engaged in misconduct including discrimination against African American prospective jurors.[177] On the sixth attempt, the Supreme Court reversed Flowers's conviction.[178]

Despite ultimately prevailing, Flowers spent almost twenty-three years in prison during the pendency of his case.[179] Meanwhile, Doug Evans, the prosecutor, won reelection to an eighth term in 2019.[180] Despite the Mississippi Supreme Court's three prior reversals for prosecutorial misconduct, the trial court and the Mississippi Supreme Court found no merit in Flowers's *Batson* objections.[181] The Mississippi Supreme Court maintained its position even after the U.S. Supreme Court granted, vacated, and remanded the case for the Mississippi Supreme Court to reconsider[182] in the wake of *Foster v. Chatman*.[183] Despite finding that "[t]he State appeared

173. SEMEL ET AL., *supra* note 75, at vi.

174. EJI 2021 REPORT, *supra* note 15, at 42 (citing Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1621, 1626-27 (2018)).

175. Miller-El v. Dretke, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring); *see also id.* at 266-67, 273.

176. Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).

177. *Id.* In the third reversal, the Mississippi Supreme Court remarked that "[t]he instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Id.* (quoting Flowers v. State, 947 So.2d 910, 935 (Miss. 2007)).

178. *Id.*

179. Jesus Jiménez, *Curtis Flowers Sues Prosecutor Who Tried Him Six Times*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2021/09/04/us/curtis-flowers-doug-evans.html. The State of Mississippi was ordered to pay Mr. Flowers $500,000, the maximum allowed under State law, for "wrongfully imprisoning him" for over two decades. *Id.*

180. EJI 2021 REPORT, *supra* note 15, at 45 (citing Parker Yesko, *Judge Dismisses Lawsuit Against DA Doug Evans*, AM. PUBLIC MEDIA REPS. (Sept. 11, 2020), https://www.apmreports.org/story/2020/09/11/judge-dismisses-lawsuit-against-doug-evans).

181. Flowers v. State, 158 So.3d 1009, 1057-58 (Miss. 2014).

182. Flowers v. Mississippi, 579 U.S. 913 (2016).

183. 578 U.S. 488 (2016); Flowers v. State, 240 So.3d 1082, 1134-35 (Miss. 2017). The Mississippi Supreme Court "remain[ed] unpersuaded that the trial court erred in finding that the State did not violate *Batson*" even after accounting for the prosecutor's past *Batson*

to proceed as if *Batson* had never been decided" in its "relentless, determined effort to rid the jury of black individuals,"[184] the Court did nothing to extend *Batson* to prevent similar egregious violations in the future.[185] Instead, the Court continually emphasized the "extraordinary"[186] and "unique"[187] circumstances of Flowers's case.

The Court's inaction regarding *Batson*'s continued failure has prompted local actors to reform or eliminate peremptory challenges. This Article next examines these efforts and their applicability to eradicating racial discrimination in the Fourth Amendment context.

II. Batson *Reforms*

At least fifteen states have taken significant steps toward eliminating peremptory challenges.[188] Three states—Arizona, California, and Washington—have enacted reforms through a combination of judicial rulemaking and legislative action.[189] Several other states have since enacted similar reforms.[190] Washington, in particular, has emerged as a pioneer. The Washington Supreme Court promulgated the first reform, General Rule 37. In addition, the Washington Supreme Court is the first criminal legal system institution to apply a *Batson* reform to search and seizure jurisprudence.[191] This Article next examines each of these states' attempts to combat racial discrimination in the exercise of peremptory challenges. It first discusses the background for each reform before highlighting their specific provisions. It also analyzes the Washington Supreme Court's decision in *State v. Sum* as a stepping stone toward wholesale application of jury selection reforms to Fourth Amendment jurisprudence.

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violations. *Flowers*, 240 So.3d at 1135. In a scathing dissent, Justice King wrote that the Mississippi Supreme Court and the trial court had "completely disregard[ed] the constitutional right of prospective jurors to be free from a racially discriminatory selection process." *Id.* at 1171 (King, J., dissenting).

184. *Flowers*, 139 S. Ct. at 2232.

185. *Id.*

186. *Id.* at 2235.

187. *See id.* at 2252 (Alito, J., concurring). Justice Alito, who had previously dissented from the Court's GVR, emphasized that "[w]ere it not for the unique combinations of circumstances present here, I would have no trouble affirming the decision of the Supreme Court of Mississippi." *Id.*

188. *See* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 16.

189. *See id.*

190. *See id.*

191. *See* State v. Sum, 511 P.3d 92, 102 (Wash. 2022).

A. The Washington Supreme Court as a Model

1. General Rule 37

Washington became the first state to adopt a *Batson* reform when the Washington Supreme Court enacted General Rule 37 on April 5, 2018.[192] The Washington Supreme Court first confronted *Batson*'s flaws five years earlier in *State v. Saintcalle*.[193] Despite affirming Saintcalle's conviction, the Washington Supreme Court reviewed many studies and reports to conclude that "[a] growing body of evidence shows that *Batson* has done very little to make juries more diverse or prevent prosecutors from exercising race-based challenges."[194] The Washington Supreme Court called for the "strengthen[ing]" of "*Batson* protections"[195] and the "formulat[ion of] a new, functional method to prevent racial bias in jury selection."[196]

In the years following *Saintcalle*, numerous statewide actors collaborated to reform *Batson*, ultimately settling on General Rule 37. The American Civil Liberties Union (ACLU) submitted a proposed rule in 2015.[197] The Washington Supreme Court then published the rule for public comment, drawing opposition primarily from prosecutors.[198] The Washington Association of Prosecuting Attorneys ("WAPA") objected that the rule would force prosecutors to seat jurors who would be unfair to government witnesses and submitted an alternative rule that would have "essentially codified *Batson* and its progeny."[199]

Following the public comment period, the court convened a workgroup of organizations that included the ACLU, the Washington Association of Criminal Defense Lawyers, the Loren Miller Bar Association, civil lawyers'

192. Press Release, ACLU, New Rule Addresses Failings of U.S. Supreme Court Decision (Apr. 9, 2018, 3:45 PM) [hereinafter Press Release, ACLU], https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury.

193. 309 P.3d 326 (Wash. 2013).

194. *Id.* at 334.

195. *Id.* at 337.

196. *Id.* at 338.

197. Press Release, ACLU, *supra* note 192.

198. Annie Sloan, Note, *"What To Do About Batson?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 248 (2020).

199. *Id.* (citing WASH. CT. JURY SELECTION WORKGROUP, PROPOSED NEW GR 37—JURY SELECTION WORKGROUP FINAL REPORT 1 (2018) [hereinafter WORKGROUP FINAL REPORT], https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf; Wash. Ass'n Prosecuting Attorneys, *Statement*, *in* WORKGROUP FINAL REPORT, *supra*, at 35)). WAPA convinced the ACLU and the Washington Supreme Court to incorporate gender discrimination into the rule's final version. *Id.* at 249-50 (citing Wash. Ass'n Prosecuting Attorneys, *supra*, at 1-2).

organizations, minority bar associations, trial court judges' associations, Legal Voice, and the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law.[200] The Washington Supreme Court intended for the workgroup to reach consensus among three proposed rules submitted during the public comment period or "to provide a clearer description of the positions and concerns which would assist the court in taking action on the rule proposals."[201] Although the workgroup agreed that the prima facie case threshold was too high and that the court should adopt a rule that, unlike *Batson*, addressed implicit bias, its members differed on specific provisions.[202] The workgroup ultimately submitted a proposed rule "presented in a red-lined format in order to demonstrate as many points of agreement and disagreement as possible."[203] The Washington Supreme Court subsequently adopted "the most protective version of the rule, which the ACLU coalition supported."[204]

General Rule 37 was enacted with the purpose of "eliminat[ing] the unfair exclusion of potential jurors based on race or ethnicity,"[205] and it introduced several significant changes to *Batson*'s framework. First, a trial court can object to a peremptory challenge sua sponte.[206] Most significantly, General Rule 37 directs the trial court to deny a challenge "[i]f the court determines that an objective observer *could* view race or ethnicity as a factor in the use of the peremptory challenge."[207] Furthermore, "The court need not find purposeful discrimination to deny the peremptory challenge."[208] General Rule 37 clarifies that "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."[209] Trial courts should consider circumstances such as "the number and types of [q]uestions posed to the prospective juror" and whether the exercising party asked questions regarding its alleged concern;[210]

200. Sloan, *supra* note 198, at 249-50 (citing WORKGROUP FINAL REPORT, *supra* note 199, at 16); Press Release, ACLU, *supra* note 192.

201. WORKGROUP FINAL REPORT, *supra* note 199, at 1.

202. *Id.* at 3-6.

203. *Id.* at 7.

204. Sloan, *supra* note 198, at 253; Wash. Sup. Ct. Order No. 25700-A-1221 (Apr. 5, 2018); WASH. R. GEN. APPLICATION 37.

205. WASH. R. GEN. APPLICATION 37(a).

206. *Id.* 37(c).

207. *Id.* 37(e) (emphasis added).

208. *Id.*

209. *Id.* 37(f).

210. *Id.* 37(g)(i).

whether the exercising party asked the prospective juror a disproportionate number of questions or different questions than other jurors;[211] whether the striking party did not strike other jurors who gave similar answers;[212] whether the "reason might be disproportionately associated with a race or ethnicity";[213] and whether the striking party has disproportionately used peremptory challenges against a particular race or ethnicity in the past or the instant case.[214] Finally, the Washington Supreme Court provided a list of reasons that are deemed presumptively invalid because they have historically been used as pretexts for discriminatory strikes:

> (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.[215]

In addition, General Rule 37 lists demeanor or conduct justifications that have a historical link to discrimination including "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."[216] To justify a peremptory strike based on a prospective juror's demeanor or conduct, the "party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner."[217] The trial court must deny the peremptory challenge if no corroboration exists.[218] General Rule 37 was subsequently constitutionalized in *State v. Jefferson*.[219] In doing so, the

211. *Id.* 37(g)(ii).
212. *Id.* 37(g)(iii).
213. *Id.* 37(g)(iv).
214. *Id.* 37(g)(v).
215. *Id.* 37(h).
216. *Id.* 37(i).
217. *Id.*
218. *Id.*
219. 429 P.3d 467 (Wash. 2018).

Washington Supreme Court incorporated General Rule 37's requirement that the trial court deny a peremptory strike where "an objective observer could view race or ethnicity as a factor in the use of the peremptory strike" into *Batson*'s third step.[220]

2. Washington's Expansion of General Rule 37: State v. Sum

The Washington Supreme Court has begun to apply the principles of General Rule 37 to other areas including search and seizure jurisprudence.[221] In *Sum*, the Washington Supreme Court held that for the purposes of the seizure analysis under article I, section 7 of the Washington Constitution,[222] "an allegedly seized person's race and ethnicity are relevant."[223] In addition, the court extended General Rule 37's definition of an objective observer to the seizure analysis.[224] In doing so, the Washington Supreme Court acknowledged its legacy of ignoring "the impact of race and ethnicity on police encounters"[225] and that "many of [its] opinions concerning the civil rights and lived experiences of BIPOC have been deplorable."[226]

The court suggested possibly expanding General Rule 37 when it stated that "[i]t would be nonsensical to hold that a person's race and ethnicity . . . are irrelevant to the question of how the person was brought into the criminal justice system in the first place."[227] Additionally, the Washington Supreme Court acknowledged that other courts have recognized the relevance of the defendant's race to the Fourth Amendment's seizure analysis.[228] Moreover,

220. *Id.* at 470.

221. *See* State v. Berhe, 444 P.3d 1172, 1181-82 (Wash. 2019) (using General Rule 37's definition of an objective observer to determine whether "implicit racial bias was a factor in the jury's verdict"); State v. Zamora, 512 P.3d 512, 523 (Wash. 2022) (applying General Rule 37's objective observer test to determine whether prosecutors improperly appeal to jurors' racial biases).

222. This is the Washington State Constitution's search and seizure provision: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 7. Article I, section 7 is more protective than the Fourth Amendment. State v. Sum, 511 P.3d 92, 99 n.2 (Wash. 2022).

223. *Sum*, 511 P.3d at 101.

224. *Id.* at 103 (quoting WASH. R. GEN. APPLICATION 37(f)).

225. *Id.* at 100.

226. *Id.* at 101. The court similarly recognized the "disproportionate police contacts experienced by BIPOC." *Id.* at 103 (citing WASH. R. GEN. APPLICATION 37(h)).

227. *Id.* at 102.

228. *Id.* (citing United States v. Smith, 794 F.3d 681, 688 (7th Cir. 2015); Dozier v. United States, 220 A.3d 933, 942-45 (D.C. 2019); United States v. Washington, 490 F.3d 765, 773 (9th Cir. 2007)). Momentum to consider race in search and seizure analysis continues to grow nationwide. *See infra* notes 321-329 and accompanying text.

the court seems to invite future litigation to apply General Rule 37's principles to other areas of law:

> Based on the constitutional text, recent developments in this court's historical treatment of the rights of BIPOC, and the current implications of our decision, we hold as a matter of independent state law that race and ethnicity are relevant to the question of whether a person was seized by law enforcement. We express no opinion as to whether race and ethnicity might be relevant in determining whether a particular warrantless seizure was justified by reasonable suspicion or some other exception to the warrant requirement, as that issue is not before us.[229]

The Washington Supreme Court drew further parallels between the discrepancies General Rule 37 addresses and gaps in stop and frisk jurisprudence. The court acknowledged the historical failure of imposing "'crippling' legal burdens to recognizing the constitutional rights of BIPOC" in the *Batson* context and refused to extend the same burdens to defendants challenging their seizures.[230] In addition, the Washington Supreme Court noted the role of concealed and implicit biases.[231] The court then acknowledged the connections between *Batson* and its seizure jurisprudence: "[W]e take guidance from GR 37. GR 37 was adopted to bring increased clarity, consistency, and justice to jury selection . . . . Many of the same concerns arise in the context of warrantless seizures."[232] In addition, the "presumptively invalid reasons for exercising peremptory challenges reflect that unless carefully drawn, facially neutral standards can have a disproportionate impact in jury selection. The same is true in the seizure context."[233] Finally, the court suggested that trial courts may take account of General Rule 37's enumerated factors in their seizure analysis.[234]

The Washington Supreme Court has thus created a blueprint for advocates to brief and challenge the legality of searches and seizures using General Rule 37's framework. Advocates have already proposed that the court adopt a search and seizure rule based on General Rule 37.[235] A procedural or

229. *Sum*, 511 P.3d. at 103.

230. *Id.* at 104.

231. *Id.* at 105 (citing State v. Berhe, 444 P.3d 1172, 1178 (Wash. 2019); State v. Saintcalle, 309 P.3d 326, 335-36 (Wash. 2013)).

232. *Id.* at 106.

233. *Id.* at 107.

234. *Id.* at 108.

235. *See* TASK FORCE 2.0 RECOMMENDATIONS, *supra* note 21, at 6.

doctrinal rule extending General Rule 37 to searches and seizures could be the next step in the Washington Supreme Court's racial justice revolution.

B. California Code of Civil Procedure Section 231.7 Follows Washington's Model

California became the second state to reform *Batson* when the state legislature passed Assembly Bill 3070 in August 2020.[236] Although California reformed through legislation rather than judicial rulemaking, Assembly Bill 3070's inspiration—like General Rule 37's—was a judicial opinion.[237]

In his concurrence in *People v. Bryant*, Judge P.J. Humes lamented *Batson*'s "plain[] fail[ure] to protect against—and [its] likely facilitat[ion of]—implicit bias."[238] Judge Humes suggested eliminating peremptory challenges or, alternatively, adopting a procedure akin to General Rule 37.[239]

Just two months after Judge Humes's concurrence in *Bryant*, California Supreme Court Justice Goodwin Liu joined the voices seeking to reform *Batson*. Justice Liu argued for the elimination of *Batson*'s first step to "requir[e] a party to state its actual reasons for striking a minority prospective juror" and prohibit trial court judges from offering their own race-neutral justifications.[240] Justice Liu noted that the California Supreme Court had failed to find a *Batson* error in over thirty years in a case involving a Black

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236. Emmanuel Felton, *Many Juries in America Remain Mostly White, Prompting States to Take Action to Eliminate Racial Discrimination in Their Selection*, WASH. POST (Dec. 23, 2021, 3:00 PM), https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html; Taryn Luna, *California Lawmakers Approve Bills to Address Racism in Criminal Charges and Jury Selection*, L.A. TIMES (Aug. 31, 2020, 11:57 PM), https://www.latimes.com/california/story/2020-08-31/california-lawmakers-approve-bills-to-limit-racism-in-criminal-charges-and-jury-selection.

237. People v. Bryant, 253 Cal. Rptr. 3d 289, 306-10 (Cal. Ct. App. 2019) (Humes, J., concurring); *see also* Schwartzapfel, *supra* note 160; Nate Gartrell, *A California Prosecutor Dismissed Every Black Person from a Jury Pool. Appeals Court Says That Was Legal*, SAN JOSE MERCURY NEWS (Oct. 3, 2019, 4:58 AM), https://www.mercurynews.com/2019/10/02/a-california-prosecutor-dismissed-every-black-person-from-a-jury-pool-appeals-court-says-that-was-legal/.

238. *Bryant*, 253 Cal. Rptr. 3d at 308. The prosecutor had struck all six of the African American prospective jurors at trial, but Judge Humes felt compelled to concur under existing precedent because there was no showing of intentional discrimination. *Id.* at 307, 309.

239. *Id.* at 309-10 (Humes, J., concurring).

240. People v. Rhoades, 453 P.3d 89, 148 (Cal. 2019) (Liu, J., dissenting) (quoting People v. Harris, 306 P.3d 1195, 1256 (Cal. 2013) (Liu, J., concurring)).

defendant, and that *Bryant* and an accompanying case, *People v. Johnson*,[241] were "the latest steps on what has been a one-way road."[242] Thus, Justice Liu concluded that "[o]ne way or another, it is time for a course correction in our *Batson* jurisprudence."[243]

Shortly thereafter, the California Supreme Court convened a jury selection workgroup "to study whether modifications or additional measures [were] needed to guard against impermissible discrimination in jury selection."[244] However, before the court could appoint members, much less prepare or release a report, the legislature passed Assembly Bill 3070.[245]

The California legislature modeled Assembly Bill 3070 on General Rule 37.[246] Now codified as Section 231.7 of California's code of civil procedure, the law prohibits peremptory challenges based on a prospective juror's membership or perceived identity as a member of a variety of groups including race and ethnicity.[247] Like General Rule 37, a trial court may object to a party's peremptory challenge sua sponte.[248] Section 231.7 also eliminates *Batson*'s first step pursuant to Justice Liu's dissent in *Bryant*.[249] Instead of requiring the objecting party to establish a prima facie case of intentional discrimination, the burden immediately shifts to the exercising party to state its justifications for the peremptory challenge.[250] The trial court then evaluates the striking party's reasons under the totality of the circumstances.[251] The trial court may "not speculate on, or assume the existence of, other possible justifications."[252] In addition, trial courts do not need to find *intentional* discrimination to sustain a *Batson* challenge.[253] California adopted a slightly different standard from General Rule 37 to evaluate whether the strike is discriminatory: "If the court determines there is a *substantial likelihood* that an objectively reasonable person *would* view

241. 453 P.3d 38 (Cal. 2019).
242. *Rhoades*, 453 P.3d. at 139 (Liu, J., dissenting).
243. *Id.* at 148.
244. Press Release, Merrill Balassone, Cal. Cts. Newsroom, Supreme Court Announces Jury Selection Work Group (Jan. 29, 2020), https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group.
245. SEMEL ET AL., *supra* note 15975, at 70-71.
246. *Id.* at 71.
247. CAL. CIV. PROC. CODE § 231.7(a) (West 2024).
248. *Id.* § 231.7(b).
249. *Id.* § 231.7(c).
250. *Id.*
251. *Id.* § 231.7(d)(1).
252. *Id.*
253. *Id.*

race, ethnicity . . . or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained."[254] Furthermore, Section 231.7 requires courts to presume that the objective person is aware of how unconscious bias has led to the exclusion of prospective jurors.[255]

Section 231.7 provides a somewhat more robust list of circumstances evidencing bias:

> (A) Whether any of the following circumstances exist:
>
> (i) The objecting party is a member of the same perceived cognizable group as the challenged juror.
>
> (ii) The alleged victim is not a member of [the same] perceived cognizable group [as the challenged juror].
>
> (iii) Witnesses or the parties are not members of that perceived cognizable group.
>
> (B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.
>
> (C) The number and types of questions posed to the prospective juror, including, but not limited to, any of the following:
>
> (i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).
>
> (ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.
>
> (iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

254. *Id.* (emphasis added).
255. *Id.* § 231.7(e).

> (D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.
>
> (E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.
>
> (F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.
>
> (G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson* . . . *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.[256]

Section 231.7 similarly includes a list of presumptively invalid justifications.[257] The striking party can only override the presumption if it establishes by clear and convincing evidence that an objectively reasonable person would not believe the reason was related to the potential juror's actual or perceived identity.[258] The striking party must show by clear and convincing evidence that its justifications "bear on the prospective juror's ability to be fair and impartial in the case."[259] Section 231.7 then lists thirteen presumptively invalid reasons:

> (1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

256. *Id.* § 231.7(d)(3).
257. *Id.* § 231.7(e).
258. *Id.*
259. *Id.*

> (2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
>
> (3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.
>
> (4) A prospective juror's neighborhood.
>
> (5) Having a child outside of marriage.
>
> (6) Receiving state benefits.
>
> (7) Not being a native English speaker.
>
> (8) The ability to speak another language.
>
> (9) Dress, attire, or personal appearance.
>
> (10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).
>
> (11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.
>
> (12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).
>
> (13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.[260]

Section 231.7 also lists three more presumptively invalid reasons citing prospective jurors' demeanor that have a historical association with discrimination:

> (A) The prospective juror was inattentive, or staring or failing to make eye contact.

260. *Id.*

> (B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
>
> (C) The prospective juror provided unintelligent or confused answers.[261]

Mirroring General Rule 37, the striking party cannot rebut the presumption of invalidity based on demeanor or behavior justifications unless either the trial court or the objecting party confirms the alleged activity.[262] California, however, also requires that the striking party explain the nexus between the behavior or demeanor and the case before the court to sustain a strike.[263]

Unlike General Rule 37, Section 231.7 enumerates specific remedies. If the trial court finds a violation, it must provide at least one of five forms of relief.[264] If the objecting party requests it, the court must quash the venire and restart jury selection.[265] The court may also, upon the accused's request, declare a mistrial and impanel a new jury if the court grants a motion after selecting the jury.[266] In addition, the court may deny the strike and seat the juror[267] or provide additional peremptory challenges to the objecting party.[268] Finally, Section 231.7 includes a catch-all allowing the trial court to provide any other appropriate remedy.[269]

C. Arizona Rules of Criminal Procedure 18.4 and 18.5 and Rule of Civil Procedure 47(e) Eliminate Peremptory Challenges

Arizona is the first state to eliminate peremptory challenges.[270] Arizona's reform, like Washington's but unlike California's, stemmed from a state supreme court order.[271] The Arizona Order followed a petition from the *Batson* Working Group, a committee of the Arizona Bar Association.[272] The

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261. *Id.* § 231.7(g)(1).
262. *Id.* § 231.7(g)(2).
263. *Id.*
264. *Id.* § 231.7(h).
265. *Id.* § 231.7(h)(1).
266. *Id.* § 231.7(h)(2).
267. *Id.* § 231.7(h)(3).
268. *Id.* § 231.7(h)(4).
269. *Id.* § 231.7(h)(5).
270. Arizona Order, *supra* note 16; Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021, 2:52 PM), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/.
271. Kanu, *supra* note 270.
272. Recent Order, *Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021)*, 135 HARV. L. REV. 2243, 2244 (2022).

Working Group's proposal was to adopt a version of Washington General Rule 37.[273] However, two Arizona Court of Appeals judges instead petitioned to eliminate peremptory strikes.[274] The Arizona Supreme Court opened both petitions for public comment on January 21, 2021.[275] Trial court judges generally supported the elimination of peremptory strikes while practitioners almost unanimously opposed.[276] Many opponents, including the Arizona State Bar, proposed adopting the Working Group's rule instead, arguing that eliminating peremptory strikes was "too extreme."[277]

On August 30, 2021, the Arizona Supreme Court adopted the latter petition without providing any specific rationale.[278] The order removed all provisions from Arizona's rules of civil and criminal procedure related to peremptory strikes.[279] In addition to eliminating peremptory strikes, the court created new rules allowing parties to stipulate to a prospective juror's removal and to continue exercising challenges for cause.[280] Perhaps attempting to assuage the fears of practitioners and other opponents, the Arizona Supreme Court's Task Force on Jury Data Collection, Practices, and Procedures recommended changes to for-cause removal rules shortly after the Arizona Order's issuance, including the use of written, case-specific questionnaires, extended oral voir dire, and disapproval of trial judges'

273. *Id.*

274. Recent Order, *supra* note 272, at 2244-45 (citing Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure at 2, No. R-21-0020 (Ariz. Jan. 11, 2021)).

275. *Id.* at 2245 (citing Order Opening Rules for Public Comment, Nos. R-20-0040 et seq. (Ariz. 2021)).

276. *Id.* (citing Comment of the Committee on Superior Court at 5, No. R-21-0020 (Ariz. Apr. 12, 2021); Comment of the State Bar of Arizona at 3, No. R-21-0020 (Ariz. Apr. 30, 2021); Comment of the Central Arizona National Lawyers Guild Opposing the Abolition of Peremptory Strikes at 6-7, No. R-21-0020 (Ariz. Apr. 30, 2021); Dru Stevenson, *Jury Selection and the Coase Theorem*, 97 IOWA L. REV. 1645, 1648 (2012)).

277. Recent Order, *supra* note 272, at 2246 (citing Comment of the State Bar of Arizona, *supra* note 276, at 15-16). Some Washington lawyers also voiced their support for adopting the Working Group's rule, citing General Rule 37's success in curtailing suspect peremptory strikes. *Id.* (citing Letter from Robert S. Chang, Exec. Dir. Korematsu Ctr. for L. & Equal. & Taki V. Flevaris, Fac. Affiliate, Korematsu Ctr. for L. & Equal., to the Hon. Justices of the Arizona Sup. Ct. (Apr. 29, 2021) (on file with the Harvard Law School Library)).

278. *Id.* (citing Arizona Order, *supra* note 16, at 1).

279. *Id.* (citing Arizona Order, *supra* note 16, at 3-6).

280. *Id.* (citing Arizona Order, *supra* note 16, at 4).

rehabilitation of prospective jurors by asking leading or conclusory questions.[281]

D. Other States' Jury Selection Reforms

Other states continue efforts to better account for implicit bias in jury selection.[282] So far, Connecticut and New Jersey have joined Washington, California, and Arizona in reforming *Batson*.[283] In November 2021, the New Jersey Supreme Court enacted Rule of Court 1.8-3A, which eliminates the purposeful discrimination requirement but does not include a list of presumptively invalid justifications.[284] Nor does Rule 1.8-3A redefine an objective observer as one who is aware of the legacy of racial discrimination in jury selection. In July 2022, the Connecticut Supreme Court adopted Superior Court Rule section 5-12.[285] Section 5-12 adopts the racially conscious objective observer definition from Washington and California.[286] Additionally, the rule eliminates the purposeful discrimination requirement[287] and includes examples of suspect and presumptively invalid justifications that mirror California's lists.[288]

Momentum to combat racial discrimination in jury selection continues to build alongside the movement to eliminate systemic racism from the criminal legal system. Racial bias in search and seizure decisions is analogous to racial discrimination in jury selection.[289] In the next Part, this Article proposes a framework for adopting principles from jury selection reforms to prevent systematic racial profiling in stop and frisk.

III. Applying Batson *Reforms to Stop and Frisk*

There are several options for adopting *Batson* reforms to combat racial discrimination in stop and frisk. This Part starts by discussing the central principles from General Rule 37 and Section 231.7 and how they can identify

281. *Id.* at 2246-47 (citing Order Adopting on an Emergency Basis Amends. to Rules 16.3, 18.3, 18.4, and 18.5, Rules of Crim. Proc.; Rules 16 and 47, Rules of Civ. Proc.; Rule 134, Just. Ct. Rules of Civ. Proc.; and Rule 12, Rules of Proc. for Eviction Actions, No. R-21-0045, at 1, 8-9, 13 (Ariz. 2021)).

282. *See* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 16.

283. *Id.*

284. *See id.* (citing N.J. S. CT. R. 1.8-3A).

285. BERKELEY L. DEATH PENALTY CLINIC, *supra* note 16; CONN. SUPER. CT. R. § 5-12.

286. CONN. SUPER. CT. R. § 5-12(e).

287. *Id.* § 5-12(d).

288. *Id.* § 5-12(f)-(h).

289. *See* State v. Sum, 511 P.3d 92, 106 (Wash. 2022) (discussing the similarities between jury proceedings and stop and frisk).

and remedy racial discrimination in the Fourth Amendment context. Next, this Part identifies a range of applications of these principles to suppression hearings and more preventative measures such as police discipline and internal antidiscrimination policies. Finally, this Part concludes by identifying how this proposal is workable, viable, and effective in reducing racial discrimination without harming public safety.

A. Unifying Principles

The various actors within the criminal legal system can implement reforms based on Washington General Rule 37 and California Section 231.7. A judiciary or legislature could promulgate new procedural rules or statutes empowering judges to suppress evidence that is the product of a discriminatory search or seizure. Legislative and executive bodies could similarly enact or expand regulations prohibiting police from racial profiling. Furthermore, prosecutors' offices and police agencies can establish internal policies modeled on these reforms. This Section describes the basic principles underlying these potential reforms adopted from General Rule 37 and Section 231.7.

A new race-conscious standard is central to this proposal. Evidence should be suppressed where a reasonable observer, aware of the history of racial discrimination in stop and frisk, could find that the search or seizure was the product of racial prejudice—whether conscious or unconscious. The prejudice requirement permits police to rely on race in appropriate circumstances, such as where a lookout message describes a suspect's race.[290] Moreover, the adoption of General Rule 37's standard instead of Section 231.7's provides factfinders with greater discretion to find racial discrimination and give people greater protection from discriminatory policing.

The burden on the government is necessarily heavy after decades of unchecked racial discrimination.[291] Any lower standard risks legalizing some amount of discriminatory behavior. The standard would have to be higher than a mere possibility of racial prejudice but lower than a preponderance of the evidence.[292] Allowing suppression based on a mere possibility that race—as opposed to racial discrimination—played a role would invalidate virtually any stop or frisk and would pose problems where race is a permissible factor. Unlike peremptory strikes, there are some contexts where consideration of a suspect's race could be permissible such as the aforementioned lookout

290. *See* Thompson, *supra* note 10, at 1002.
291. *See Sum*, 511 P.3d at 104.
292. *See* CAL. CIV. PROC. CODE § 231.7(d)(2)(B).

message example.[293] Thus, proscribing any reliance on race is unrealistic and unworkable.[294]

A list of presumptively invalid justifications is another central foundation for these proposed reforms. Borrowing further from General Rule 37 and Section 231.7, the lists would consist of two categories: (1) stops and searches that signal racial stereotyping or unconscious bias ("Category A") and (2) objective, but commonly pretextual justifications for stopping and searching people of color ("Category B"). Category A justifications are either nebulous, thinly veiled attempts at providing objective reasons for a stop or search, or signals of implicit bias masquerading as objectivity through the lens of an officer's "sixth sense." Category B justifications are facially objective justifications that are disproportionately or exclusively enforced to justify searches and seizures of people of color. These lists should be specific to jurisdictions based on input from community members—especially people who have been subjected to over-policing—as well as defense attorneys, police, prosecutors, and other criminal legal system actors.[295] An officer's reliance on Category A justifications would create a rebuttable presumption of prejudice requiring clear and convincing evidence to rebut. Category B would create a presumption of prejudice that the officer or government could rebut by introducing objective nontestimonial evidence such as photographs or videos.

A sample list of Category A justifications could include: (1) a suspect wearing "suspicious" clothing; (2) a suspect's presence in a high crime area;[296] (3) a suspect "loitering"; (4) a suspect engaging in unspecified "suspicious" activity; (5) a suspect "fleeing" from the police upon arrival;[297]

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293. *See* Thompson, *supra* note 10, at 1005-06.

294. Such an approach "would send the same message as *Whren* to law enforcement officials: Officers must offer race-neutral reasons for their conduct to survive constitutional scrutiny." *Id.* at 1002; *see also Sum*, 511 P.3d at 102 ("[R]ecognizing the relevance of race and ethnicity is not an outlier position, and it does not undermine the objective nature of the seizure inquiry.").

295. The justifications I include below stem from my experience as an indigent defense attorney as well as suggestions from current and former defense attorneys and prosecutors across the country. This area is ripe for future scholarship and research.

296. As David Harris notes, "Caution in in this area would be especially appropriate, because, . . . when courts blindly accept police expertise in pronouncing a place an area of high crime or drug activity, they risk becoming party to police prejudice and stereotypes." Harris, *supra* note 10, at 673 n.136 (citing Johnson, *supra* note 10, at 255); *see also id.* at 672, 681 n.171; Johnson, *supra* note 10, at 222 n.42.

297. *See* Harris, *supra* note 10, at 673-74; *see also* Illinois v. Wardlow, 528 U.S. 119, 132-35 (2000) (Stevens, J., concurring in part and dissenting in part) (arguing that "minorities and

(6) a suspect's failure to make eye contact; (7) a suspect's apparent "nervousness"; (8) a suspect's unspecified "furtive movements";[298] or (9) a suspect appearing as though they do not belong in the area.[299] Category B justifications could include: (1) traffic stops for equipment violations such as nonfunctioning tail lights, license plate covers, tinted windows, and rear view mirror obstructions;[300] (2) the presence of an odor of marijuana or other illicit substance; (3) a suspect jaywalking or committing another pedestrian violation; (4) contraband in "plain view"; (5) abandoned or discarded contraband; (6) a bulge resembling a firearm, weapon, or other contraband; and (7) bicycle violations such as riding on the wrong side of the street or riding without a light.

Lists of presumptively suspicious justifications should be individualized to each enacting jurisdiction and necessarily not exhaustive. Policymakers or litigants wishing to rely on these lists should conduct quantitative and qualitative studies to determine the most common suspect justifications police use to stop and search people of color. Researchers should interview system actors including attorneys, judges, and police supervisors. More importantly, researchers must seek out information and input from affected communities. The voices of over-policed communities are far too often lost in the discourse surrounding police reform. Additionally, system actors only witness the fruits of stops or searches that yield an arrest. This oversight results in a potential sample bias that could lead policymakers and reformers to overlook potential additions to these lists, undermining actors' ability to enact measures intended to comprehensively prevent discriminatory police behavior.

The lists must not be exhaustive and must continuously be evaluated and updated to prevent malicious government actors from using these lists as guides to avoid claims of racial discrimination akin to prosecutors' *Batson* justification lists. Police departments have a history of adopting tactics to avoid scrutiny for Fourth Amendment violations. For example, within a year of the Supreme Court's decision in *Mapp v. Ohio*, there was over a 70%

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those residing in high crime areas" are more likely to innocently flee from police because of violence, excessive stop and frisk, and other racially discriminatory practices).

298. *See* NATAPOFF, *supra* note 9, at 57; Johnson, *supra* note 10, at 238-39 n.171 (arguing that subcultural differences in nonverbal cues may lead to incorrect perceptions of furtive gestures).

299. *See* Butler, *Walking While Black*, *supra* note 4; Maclin, *supra* note 9, at 1281; Johnson, *supra* note 10, at 226-30, 240-41; NATAPOFF, *supra* note 9, at 57.

300. As discussed *infra*, a better approach to prohibiting racial discrimination in traffic stops would be to simply remove police from low-level traffic enforcement. *See generally* Jordan Blair Woods, *Traffic Without Police*, 73 STAN. L. REV. 1471 (2021).

increase in "dropsy" cases, in which police alleged that suspects dropped bags of contraband on the ground as police approached.[301] Officers had previously testified that they had merely approached suspects on the street and searched them because they suspected they may be dealing drugs.[302] After *Mapp* invalidated this practice, officers made the "great discovery" that they could justify these searches by alleging drops.[303] Catch-all provisions would allow evaluators, including judges and police supervisors, to identify other presumptively suspicious justifications. Continuous data collection and evaluation similarly allows policymakers to update the lists and ensure their accuracy over time.

This Article next examines how different criminal legal system actors and policymakers can harness these unifying principles in different contexts.

B. Applications of Batson *Reforms to Searches and Seizures*

1. Suppression Hearings

There is a range of options for harnessing *Batson* reforms during pretrial evidence suppression hearings. Legislative and judicial bodies could establish statutes, procedural rules, or caselaw that govern how trial and appellate courts evaluate officers' testimony at suppression hearings. These provisions would direct courts to suppress evidence where a reasonable observer could find that the search or seizure was the product of racial prejudice. This Part provides an overview of the different options available to policymakers and criminal legal system actors. It presents progressively stronger ways to incorporate *Batson* reforms and discusses their implementation.

a) Applications That Comply with Whren

Criminal legal system actors and policymakers need not reverse *Whren* to incorporate *Batson* reforms into Fourth Amendment suppression hearings. This approach would dictate that judges should suppress evidence where they find that an officer was motivated by racial bias rather than objective reasonable suspicion for Category A justifications or that judges should suppress evidence because of a lack of officer credibility for uncorroborated

301. People v. McMurty, 314 N.Y.S. 2d 194, 197 (N.Y. Crim. Ct. 1970) (citing Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 556-57 (1968)).

302. Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html.

303. *Id.* (citing *McMurty*, 314 N.Y.S. 2d at 197).

Category B justifications. This approach dictates stricter adherence to the principles enunciated in *Whren*. For Category A justifications, courts must reassess whether officers' justifications are objective indicia of reliability rather than indicators of subjective stereotyping masquerading as officers' sixth sense to detect crime.[304] *Whren* does not foreclose all consideration of racial motivation in search and seizure analysis. Rather, *Whren* makes clear that if the underlying subjective motivation of an otherwise legal stop appears to have been racial bias, then the stop is still legal. As for Category B justifications, *Whren* does not impose any limitation on judges taking systematic racial bias into account when determining officer credibility. Judges are given discretion and deference to evaluate the credibility of testifying witnesses. They may conclude that officers have systematically relied upon untruthful facially objective justifications that are either impossible or exceedingly difficult for defendants to disprove.[305] Judges would not outright reject these justifications. Instead, they would require some corroboration to find the justification credible.

Some common historical examples of Category B justifications include contraband in "plain view" and "dropsy" cases.[306] Unsurprisingly, these justifications have historically targeted people of color.[307] New York state courts already conduct a similar analysis. In *People v. Berrios*[308] the New York Court of Appeals established a rule that "[w]here the Judge at a suppression hearing determines that the testimony of the police officer is unworthy of belief, he should conclude that the [prosecution] ha[s] not met [its] burden of coming forward with sufficient evidence and grant the motion to suppress."[309] Intermediate New York appellate courts have applied *Berrios* to situations where officers have tailored their testimony to avoid

304. *See* Maclin, *supra* note 9, at 1303. The Washington Supreme Court has clarified that General Rule 37 is a purely objective test that does not concern an actor's subjective motivations. *See* State v. Bagby, 522 P.3d 982, 991 (Wash. 2023) ("The question of whether a prosecutor flagrantly or apparently appealed to jurors' racial bias is analyzed using an objective lens.") (citing State v. Zamora, 512 P.3d 512, 522-23 (Wash. 2022)).

305. Police officer perjury is so pervasive that officers themselves coined the term "testilying" to describe it. Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES (Apr. 22, 1994), https://www.nytimes.com/1994/04/22/us/new-york-police-often-lie-under-oath-report-says.html?pagewanted=all; *see also* Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?*, SLATE (Aug. 4, 2020, 11:51 A.M.), https://slate.com/news-and-politics/2020/08/police-testilying.html.

306. Goldstein, *supra* note 302.

307. *Id.*

308. 270 N.E.2d. 709 (N.Y. 1971).

309. *Id.* at 713-14.

constitutional objections.[310] Most relevantly, New York courts have examined officers' "demeanor" and "mode of telling [their] stor[ies]" when evaluating their credibility.[311] Thus, this proposal creates a more holistic and balanced evaluation of the totality of the circumstances underlying a search or seizure.

Although this method of implementation is limited by *Whren*, any criminal legal system actor can adopt it immediately. Defense attorneys—who deserve their own criticism for failing to adequately raise issues of race in the Fourth Amendment context[312]—should immediately begin to compile data and raise these arguments in pleadings and during suppression hearings. In addition, judges should create precedent or judicial rules, following the Washington Supreme Court's example in crafting General Rule 37, that establishes this application of *Batson* reforms as part of the totality of the circumstances test. Finally, local actors including prosecutors, police supervisors, and local governments could create rules or ordinances establishing this procedure.

In practice, the defendant would first raise the issue of racial bias, either in a suppression motion prior to the hearing, or during the hearing itself.[313] In addition, judges could raise the issue sua sponte during the suppression hearing. The presence of any suspect justification would automatically satisfy this standard. The government must rebut the presumption for Category A justifications by clear and convincing evidence that the justification for the search or seizure was unrelated to the suspect's race or ethnicity and that it bore a nexus to a suspected offense.[314] The government

310. *See, e.g.*, People v. Garafolo, 353 N.Y.S.2d 500 (N.Y. App. Div. 1974) (discrediting an officer who testified that he saw a gun and contraband inside a paper bag in plain view); *In re* Bernice J., 670 N.Y.S.2d 207 (N.Y. App. Div. 1998) (discrediting "patently tailored" officer testimony); People v. Addison, 496 N.Y.S.2d 742, 743-44 (N.Y. App. Div. 1986) (finding police testimony that the defendant reached for a gun in his waistband while surrounded by officers incredible); People v. Harris, 138 N.Y.S.3d 593, 604 (N.Y. App. Div. 2020) (quoting People v. Aguirre, 632 N.Y.S.2d 154, 155 (N.Y. App. Div. 1995)) (discrediting "implausible and contrived" government witness testimony).

311. People v. Perry, 488 N.Y.S.2d 977, 979 (Sup. Ct. 1985).

312. *See* Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 926 (2023).

313. In an ideal world, the defense would have to raise the issue in a written motion prior to the hearing, but this requirement would unduly disadvantage the defense for two reasons. First, it would give bad actors an opportunity to find independent grounds justifying a discriminatory search or seizure. *See* Goldstein, *supra* note 302. In addition, the defense may not learn of the existence of evidence suggesting discrimination until the hearing itself, particularly in jurisdictions with more restrictive discovery practices.

314. *See* CAL. CIV. PROC. CODE § 231.7(e) (West 2024).

could rebut the presumption for Category B justifications by introducing independent corroborating evidence of the justification such as photographs or videos.[315] The defense could elicit a broad range of evidence, other than presumptively invalid justifications, to give rise to the inference including, but not limited to, statistics, police departmental policies, officers' history of searching or seizing individuals in suspect circumstances, community testimony regarding common false justifications for searches and seizures, and officers' behavior during the interaction with the defendant. The burden would then shift to the government to prove, by clear and convincing evidence, that the search or seizure was not the product of prejudice. The trial court would then determine, under the totality of the circumstances, whether the government had met its burden.

Actors should begin implementing *Batson* reforms in this way despite its limitations. Adoption without reversing *Whren* would allow police to justify searches or seizures if there was a credible, objective justification regardless of the existence of racial bias. Selective enforcement would especially pose a problem since officers could continue discriminatorily engaging in pretextual stops as long as they had corroboration. Nevertheless, this proposal would require a higher burden of proof for these commonly abused justifications. Although this higher burden of proof will not prevent selective enforcement entirely, it can have a positive impact in decreasing racial disparities. For example, search rates decreased after Colorado and Washington legalized marijuana, thereby removing a common pretextual justification for searches and seizures (odor of marijuana).[316] Although racial disparities persist in these states, the disproportionality of searches decreased after legalization as well.[317] Thus, in jurisdictions facing political or constitutional barriers[318] to enacting stronger protections than *Whren*, this is the best option to begin combatting racial discrimination in searches and seizures.

b) Applications That Do Not Comply with Whren

Legislators and state supreme courts could adopt *Batson* reforms to provide defendants with greater protection against racial discrimination than that afforded by *Whren*. Although *Whren* forecloses reliance on the Fourth

315. *See id.* § 231.7(g)(2).

316. Pierson et al., *supra* note 123, at 740.

317. *Id.*

318. Florida's state constitution, for example, prohibits its state courts from affording greater protections than the United States' Supreme Court's interpretation of the Fourth Amendment. FLA. CONST. art. I, § 12.

Amendment to remedy racial discrimination, state courts could rely on search and seizure provisions in their own constitutions to establish greater protections.[319] State supreme courts in Washington and New Mexico have already found that pretextual stops and searches violate their state constitutions.[320] Litigators in these states should use the greater protection afforded by their state constitutions to adopt *Batson* reform principles. State courts should use the *Batson* reforms as models for doctrinal tests of racial profiling. Because they are not limited by *Whren*, these courts can also provide a remedy for selective enforcement issues.

There is growing momentum to incorporate race in search and seizure jurisprudence. In addition to *Sum*, several other courts have found that race was relevant to whether an individual was seized.[321] The District of Columbia Court of Appeals[322] and Supreme Judicial Court of Massachusetts[323] have similarly found that the suspect's race is relevant to whether flight in a high-crime area amounts to reasonable suspicion. The Ninth Circuit has also considered race as a relevant factor in determining whether an individual consented to a search.[324] The state of Washington may pioneer this idea once again. General Rule 37's architects have proposed that the Washington Supreme Court adopt General Rule 37's procedures to determine the legality of vehicle stops.[325] The Washington Supreme Court has also continued to

319. As discussed, states such as Florida prevent courts from creating a doctrinal solution. *See* discussion *supra* note 318.

320. *See* State v. Gonzales, 257 P.3d 894, 896 (N.M. 2011); State v. Ochoa, 206 P.3d 143, 155 (N.M. Ct. App. 2008); State v. Ladson, 979 P.2d 833, 838 (Wash. 1999); *see also* Snyder v. State, No. 1127, 2023 WL 1497289, at *4 (Md. App. Ct. Feb. 3, 2023) (Friedman, J., concurring) (arguing that Maryland should depart from *Whren* and find that pretextual stops are unconstitutional under the state constitution).

321. *See* State v. Jones, 235 A.3d 119, 126 (N.H. 2020) (holding that race is relevant to whether an individual is seized under the New Hampshire Constitution); United States v. Smith, 794 F.3d 681, 688 (7th Cir. 2015) (finding that race is "not irrelevant" to Fourth Amendment seizure analysis) (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)); *see also* Dozier v. United States, 220 A.3d 933, 942-43 (D.C. 2019) ("We note other factors . . . that we think are relevant in evaluating the coercive character of the overall settling of the encounter: that it took place in a 'high crime area' and involved an African-American man.").

322. Miles v. United States, 181 A.3d 633, 642 (D.C. 2018).

323. Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016).

324. United States v. Washington, 490 F.3d 765, 775 (9th Cir. 2007) ("We also find significant the context in which Washington made his decision whether to consent to the search of his car . . . in the unique situation in Portland between the African-American community and the Portland police . . . .").

325. *See* WASH. R. GEN. APPLICATION 37.

expand General Rule 37 to combat racial discrimination in civil and criminal court.[326]

There is additional doctrinal momentum to lessen equal protection restrictions to better account for racism in the criminal legal system. For example, the Supreme Judicial Court of Massachusetts has lessened the burden for defendants alleging selective prosecution under the Equal Protection Clause, while specifically analogizing to *Batson*'s criticism of the disproportionate burden that litigants faced when challenging peremptory strikes.[327] Although the Massachusetts Supreme Judicial Court found that equal protection was a more appropriate constitutional underpinning, courts could just as easily decide to use search and seizure law to combat selective enforcement.[328] Search and seizure law may be a more appropriate avenue because of its preexisting exclusionary rule. Using equal protection would require the creation of an exclusionary rule as a remedy. Regardless of the constitutional underpinning, courts should adopt *Batson* reform principles in their attempts to remedy systematic racial prejudice in searches and seizures.[329]

Legislators could independently enact statutes that direct trial courts to suppress evidence where the racially conscious objective observer could find that the evidence is the fruit of racial profiling. These statutes could include the lists of presumptively suspect justifications. State legislatures are better situated to conduct the fact-finding and research required to create these types of lists than courts. In addition, legislation would provide a democratic imprimatur to this solution. Various federal and state statutes provide greater protection to individuals than that afforded under the United States Constitution.[330] Moreover, there is momentum to adopt legislative solutions

326. *See* State v. Zamora, 512 P.3d 512, 524 (Wash. 2022) (holding that a prosecutor had committed misconduct because an objective observer, as defined by General Rule 37, could view that the prosecutor had appealed to jurors' racial bias); State v. Bagby, 522 P.3d 982, 997-98 (Wash. 2023) (same).

327. Commonwealth v. Long, 152 N.E.3d 725, 738-41 (Mass. 2020) (creating a new selective enforcement test for vehicle stops); *see also* Commonwealth v. Robinson-Van Rader, 208 N.E.3d 693, 696 (Mass. 2023) (extending the *Long* holding to pedestrian stops as well as vehicle stops).

328. *See Long*, 152 N.E.3d at 750-51 (Budd, J., concurring) (arguing that defendants should be able to challenge racially biased stops under the Massachusetts State Constitution's search and seizure provision in addition to equal protection).

329. *See id.* at 738.

330. The Voting Rights Act of 1965 and Civil Rights Act of 1964 are two famous examples. 52 U.S.C. § 10301; 42 U.S.C. § 1981; *see also* Marsha Mercer, *Police 'Pretext' Traffic Stops Need to End, Some Lawmakers Say*, STATELINE (Sept. 3, 2020, 12:00 A.M.),

to systematic racism in the criminal legal system. For example, several states have enacted laws, in response to *McCleskey*, that empower people convicted or sentenced because of racial discrimination to seek postconviction relief.[331] California's Racial Justice Act already permits people accused of crimes to file motions pretrial to challenge their prosecutions on the basis that a "judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin."[332] Thus, people accused of crimes in California can already argue that evidence should be suppressed in their cases because of a racist search or seizure.

In practice, these reforms would work similarly to those limited by *Whren*. The defense or trial court would raise the issue of racial discrimination during argument on the suppression motion, and the government would bear the burden of rebutting a claim that the search or seizure was the product of racial profiling. However, the burdens and presumptions should be adjusted to afford defendants greater protection from racial discrimination than *Whren*. The court would still have to find a *prima facie* case that racial bias played a role in the decision to stop or search the defendant. Both Category A and Category B justifications would give rise to a presumption of racial profiling. However, because judges would not be limited by *Whren* in considering claims of selective enforcement, the government would then bear the burden of proving by clear and convincing evidence that the officers did not engage in racial profiling for both Category A and B justifications. The government would still have to corroborate reliance on any Category B justification as well. This added layer of protection would severely curtail officers' discretion and their ability to conduct pretextual searches and seizures.

c) The Exclusionary Rule's Limitations

While the exclusionary rule alone will not prevent discriminatory searches and seizures,[333] these reforms have the potential to substantially reduce

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https://stateline.org/2020/09/03/police-pretext-traffic-stops-need-to-end-some-lawmakers-say/ (describing legislative efforts to make pretextual traffic stops illegal).

331. *See* KY. REV. STAT. ANN. § 532.300 (West 2024); CAL. PENAL CODE § 745 (West 2024). North Carolina used to have a racial justice act that was repealed because of fears that it had effectively invalidated the death penalty in the state. *See* Matt Smith, *'Racial Justice Act' Repealed in North Carolina*, CNN (Jun. 21, 2013, 3:48 AM), https://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/index.html.

332. CAL. PENAL CODE § 745(a)(1) (West 2024). However, the Racial Justice Act places the burden on a defendant to establish racial prejudice by a preponderance of the evidence. *Id.* § 745(a).

333. *See* Terry v. Ohio, 392 U.S. 1, 14-15, 17 n.14 (1968); Hutchins, *supra* note 10, at 907.

prosecutions stemming from racial bias. Officers are not required to arrest everyone that they subject to an intrusive search or seizure and may not face any consequences for conducting discriminatory stops. However, the heightened scrutiny officers will face will deter them from performing as many stops and searches and could lead them to better evaluate whether their own unconscious biases have unduly influenced them. The decreased number of police contacts should also lead to a decrease in police violence against people of color. Slowing officer decision-making and forcing this kind of internal reckoning reduces the number of interactions police have with individuals and helps combat implicit bias.[334] However, other measures are necessary to better prevent racial discrimination in searches and seizures. In the next Section, this Article discusses some preventative measures that police and local governments can adopt from *Batson* reforms.

2. Preventative Measures

We must hold officers accountable for racial profiling in searches and seizures even where they do not result in an arrest or prosecution. There are efforts nationwide to reduce racial bias in policing. For example, consent decrees entered between police departments and the Department of Justice have reduced disparities in stop and frisk. The Oakland Police Department made progress in identifying and combatting racial profiling because of its decades-long consent decree.[335] In addition, the *Floyd* litigation, along with municipal reforms and the election of Bill de Blasio, forced the NYPD to reduce its stop and frisk practices.[336] Nevertheless, both Oakland and New York City continue to grapple with persistent racial disparities in stop and frisk.[337]

Policymakers could harness *Batson* reforms more preventatively to regulate police behavior. Several departments, including the Los Angeles Police Department, have adopted policies that prohibit pretextual vehicle

334. *See* Broadfoot, *supra* note 5 (discussing how slowing down officer decision-making by adding a checkbox to paperwork and "encourage[ing] officers to stop and count to 10 before engaging suspects after a foot pursuit" has reduced stops of Black drivers and the use of force after foot chases).

335. *See* WINSTON & BONDGRAHAM, *supra* note 132, at 380-81.

336. *See* Alan Feuer, *Black New Yorkers Are Twice as Likely To Be Stopped by Police, Data Shows*, N.Y. TIMES (Oct. 10, 2021), https://www.nytimes.com/2020/09/23/nyregion/nypd-arrests-race.html?smid=url-share.

337. *See supra* notes 117-122, 132-134 and accompanying text; Feuer, *supra* note 336. *See generally* WINSTON & BONDGRAHAM, *supra* note 132, at 381 (arguing that "consent decrees are not a panacea").

stops and searches.[338] Unlike temporary procedural measures such as pattern and practice investigations and consent decrees, these measures are a combination of procedural and substantive change that could be more effective.[339] These types of policies are more feasible and politically viable—at least in the short-term—than abolishing police.[340] Legislatures could incorporate the principles from the *Batson* reforms into laws that prohibit police from engaging in racial profiling. As an enforcement mechanism, legislatures could require discipline of officers who engage in racial profiling, including remedial measures, suspension, or dismissal.

Executive actors could also prohibit racial profiling and investigate officers for civil rights violations using the same model this Article proposes for suppression hearings. DOJ Civil Rights Division consent decrees could use the *Batson* principles to help evaluate and guide efforts to reduce racial profiling. Administratively, police departments could implement policies mandating that supervisors thoroughly review patrol officers' decisions to stop or search people. When an officer is suspected of profiling, including reliance on a presumptively invalid justification for a stop or frisk, a supervisor should require the officer to establish that the stop or frisk was not racially motivated, and the supervisor should independently review evidence including the officer's body worn camera or dash camera footage and reports. Departments should also better track officers' justifications to discipline officers who exhibit a pattern of relying on suspect reasons when stopping and frisking.

Progressive prosecutors could also help eliminate racial profiling in stop and frisk.[341] For example, prosecutors could reject cases where an officer has relied on a presumptively prejudicial justification. Prosecutors could also collect lists of officers who frequently cite pretextual reasons for stops and frisks and refuse to prosecute cases where those officers' testimony is necessary. Finally, prosecutors should continue efforts to combat biases within their offices. Prosecutors could then more effectively identify when officers' proffered reasons for stopping or searching people are the product

338. Kevin Rector, *New Limits on 'Pretextual Stops' by LAPD Officers Approved, Riling Police Union*, L.A. TIMES (Mar. 1, 2022, 7:32 P.M.), https://www.latimes.com/california/story/2022-03-01/new-limits-on-pretextual-stops-by-lapd-to-take-effect-this-summer-after-training.

339. *See* Butler, *The System*, *supra* note 9, at 125.

340. *See generally* Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245 (2023).

341. Reformist prosecutors face their own criticisms but can play a meaningful role in changing the system. *See* Paul Butler, *Progressive Prosecutors Are Not Trying To Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1989 (2022).

of bias rather than objective, reasonable suspicion. These measures, if adopted and implemented properly, could combat implicit and explicit racism's role in dictating whom police stop and search.[342]

The institution of policing must be reconceptualized to eradicate racial profiling. Research has shown that institutional actors can eliminate implicit biases.[343] However, policing as an institution has been designed to target poor people of color and requires a complete overhaul to achieve this goal.[344] Moreover, attempts to reduce racial discrimination in police departments through implicit bias trainings have had mixed results at best.[345] Finally, the current political climate forecloses any kind of wholesale reshaping of policing in the United States.[346] In the next Section, this Article demonstrates how this proposal constitutes an effective, politically viable, step on the path toward reconceptualizing policing.

C. Possible Criticisms

This Section discusses potential criticisms to the adoption of *Batson* reforms to address racial discrimination in searches and seizures. Each of these concerns has some legitimacy, but ultimately, this Section concludes that adopting *Batson*-reform principles to combat racially discriminatory searches and seizures will yield a more equitable and safe criminal justice system.

1. Doctrinal

Batson differs doctrinally from Fourth Amendment jurisprudence. The Supreme Court conceived *Batson* as a prophylactic for racial discrimination under the Fourteenth Amendment's Equal Protection Clause. Thus, *Batson* is intended to address issues of racial discrimination in the criminal legal system. In contrast, the Fourth Amendment was not adopted to address racial injustice directly. Thus, some would argue that there is no doctrinal link

342. *See* HENNING, *supra* note 121, at 323-24 (arguing that "permanent organizational reform" is impossible without incorporating implicit bias trainings into evaluation, policy decisions, and protocols).

343. *Id.*

344. *See* Butler, *The System*, *supra* note 9.

345. Calvin K. Lai & Jaclyn A. Lisnek, *The Impact of Implicit-Bias-Oriented Diversity Training on Police Officers' Beliefs, Motivations, and Actions*, 34 PSYCH. SCI. 424, 424 (2023) (finding that implicit bias training tends to increase officers' knowledge and concerns about bias as well as intent to combat bias in the short term, but "unlikely to change police behavior" in the long run).

346. *See* Barkow, *supra* note 340, at 253-54.

between *Batson* and Fourth Amendment jurisprudence to justify the adoption of *Batson* reforms in the Fourth Amendment context.

Ultimately, this critique views the Fourth Amendment's intent too narrowly. The Framers could not have drafted the Fourth Amendment with the specific intent to redress racial discrimination. The Fourth Amendment, however, was drafted to protect minority and disfavored groups from the majority's abuse of searches and seizures.[347] James Madison drafted the Fourth Amendment in response to concerns from Antifederalists that they would face undue persecution by the Federalist majority.[348] Furthermore, the Amendment was drafted in the wake of the "Quaker incident" in which government agents searched the homes of over forty Quakers before deporting them without any due process.[349] This was just one of a plethora of indiscriminate government investigations of minority groups in each of the burgeoning republic's states.[350]

Thus, even before the adoption of the Fourteenth Amendment—the basis of *Batson*—the Fourth Amendment was intended to protect disfavored groups from government targeting. Some scholars have even considered the Fourth Amendment as a "harbinger of the Equal Protection Clause."[351] Moreover, the passage of the Civil War Amendments reframes the constitution—including its preexisting amendments—as a vehicle for preventing racial discrimination. The Fourteenth Amendment's adoption should amplify the Fourth Amendment's protections for people of color rather than limit its protections.[352]

Several courts have recognized the links between equal protection and protection against government searches and seizures. *Terry* itself suggests that the Fourth Amendment could offer protection against racial discrimination. Although the Court concludes that the exclusionary rule is insufficiently powerful to deter police abuses of communities of color, the Court acknowledges the importance of marginalized groups' perspectives.[353] The Court states that its decision must take into account "the degree of community resentment aroused" by police investigative practices that may

347. Thompson, *supra* note 10, at 991-98.

348. *Id.* at 995-96.

349. *Id.* at 996.

350. *Id.*

351. *Id.* at 997-98 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 97 (1980)).

352. *See id.* at 998 (concluding that *Whren* wrongly decided that redressing racial discrimination in police investigations is exclusively the province of equal protection rather than the Fourth Amendment).

353. Terry v. Ohio, 392 U.S. 1, 14-15 (1968).

target particular minority groups.[354] Additionally, as noted in Section III.B.1.b., *supra*, several state supreme courts have linked equal protection and government investigations that clash with the Fourth Amendment's protections. Supreme courts in New Mexico and Washington rejected *Whren* after concluding that their state constitutional search and seizure provisions offered protection against racial discrimination.[355]

There is also growing momentum in a variety of jurisdictions nationwide to incorporate race into search and seizure jurisprudence.[356] The successes of Washington, California, and Arizona in reforming *Batson* offer hope for the passage of similar laws to combat racial discrimination in the Fourth Amendment context. The Washington Supreme Court's adoption of General Rule 37 and its subsequent expansion in *Sum* and other cases suggest the possibility for further extension of General Rule 37. The Washington State Working Group seemingly formed a similar consensus of acknowledging the failure to curtail racial profiling in searches and seizures.[357]

There is a sufficient doctrinal basis to draw an analogy between *Batson* and Fourth Amendment jurisprudence. The doctrinal link is further borne out by analogous failures to redress racial discrimination. Just as targeting of potential jurors of color warrants greater protection than *Batson*, police targeting of communities of color for discriminatory searches and seizures is precisely the government abuse the Fourth Amendment was intended to prevent.[358]

2. Feasibility

Others may voice concerns that courts will have difficulty analyzing search and seizure decisions using Washington's objective observer standard. Concerns might arise about the perceived overbreadth of this standard, which could place a substantial burden on the government in justifying searches and seizures. Critics could also argue that the test unnecessarily complicates the already complex totality of the circumstances test.

The test proposed is necessarily broad to remedy the rampant discrimination in stop and frisk. Failing to erect such a high standard risks

354. *Id.* at 17 n.14; *see also id.* at 14-15, 14 n.11.

355. *See supra* note 320 and accompanying text; New Mexico v. Gonzales, 257 P.3d 894, 899 (2011); New Mexico v. Ochoa, 206 P.3d 143, 150-51 (2008); Washington v. Ladson, 979 P.2d 833, 842 (1999).

356. *See supra* notes 321-29 and accompanying text.

357. *See* WASH. R. GEN. APPLICATION 37.

358. *See* Thompson, *supra* note 10, at 998.

creating a *Batson* analog for search and seizure jurisprudence.[359] *Batson*'s fatally weak protections, while well-intentioned, fail to account for implicit bias and allow malicious actors to circumvent claims of bias.[360] As Professor Anthony Thompson argues, "[g]iven that officers will not likely admit, or will not be aware, that race prompted their actions, judges would be expected to detect when race is the predominant motivation in officers' behavior. At best, this seems difficult."[361] Thus, it is necessary to adopt an exacting standard that accounts for implicit bias and that alerts trial courts to common markers of discrimination. Appellate courts should be similarly empowered to hold trial courts accountable for rulings that ignore or minimize racial discrimination. The factual findings required under the proposed standard will help ensure more complete trial court records that appellate judges can scrutinize. Otherwise, trial court judges could continually rubber stamp discriminatory searches and seizures.

Moreover, the burden on the government to justify a search or seizure is necessarily substantial. The Fourth Amendment is intended to protect everyone in the United States from government overreach. The data clearly establishes that people of color have not enjoyed the same level of protection as they should be afforded. Thus, there must be additional safeguards to ensure that they enjoy the same freedoms and protections that the Constitution should provide.

That said, policymakers and litigants should monitor and study the data that will begin to emerge from Washington, California, and other states adopting jury selection reforms to measure the efficacy of different standards. These reforms are all novel and require further evaluation. While preliminary anecdotal evidence from Washington seems to suggest success in curbing peremptory strikes of prospective jurors of color,[362] empirical data is necessary for a proper evaluation. This data collection and study must also continue to adjust to government actors' own adjustments. Otherwise, government actors could create specialized manuals to evade claims of racial discrimination akin to prosecutors' *Batson* manuals.[363]

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359. *See id.* at 1000-02.

360. *See supra* Section I.D.

361. Thompson, *supra* note 10, at 1002.

362. *See* Sloan, *supra* note 198, at 257-58; *Discussions With DPIC: Professor Elisabeth Semel on the Implications of Batson v. Kentucky and California's Capital Punishment System*, DEATH PENALTY INFO. CTR., at 30:02 (Apr. 30, 2024), https://deathpenaltyinfo.org/resources/podcasts/discussions-with-dpic/professor-elisabeth-semel-on-the-implications-of-batson-v-kentucky-and-californias-capital-punishment-system.

363. *See supra* note 160 and accompanying text.

The second workability criticism is unconvincing. Courts already engage in complex analyses in several contexts, including warrantless searches and seizures. The Fourth Amendment's totality of the circumstances test is a necessarily broad standard that does not lend itself to bright-line rules.[364] As such, trial courts must constantly engage in complex, holistic analyses when determining the legality of stops and searches. Additionally, courts are already familiar with similar burden-shifting analyses in determining the existence of discriminatory conduct. For example, the Massachusetts Supreme Judicial Court adopted this approach to determine whether police stops or searches violate the equal protection clause in *Long* and *Robinson-Van Rader*. Courts across the country engage in this type of burden-shifting analysis to determine the presence of discrimination in jury selection under *Batson* and the *Batson* reforms discussed in this Article, as well as a variety of other scenarios.[365] Thus, this procedure would be workable and familiar to trial courts.

3. Abolitionists

Abolitionists may voice concerns over the adoption of *Batson* reforms to address racial discrimination in stop and frisk, viewing it as a reformist approach that, rather than rectifying issues, legitimizes an inherently racist criminal legal system. Instead, they would argue for eliminating police as an institution. Others may argue that the best doctrinal reform would be the reversal of *Terry*, thereby reverting to a system where police must have probable cause to stop and frisk suspects.[366]

Although this approach involves reimagining the system instead of dismantling it, it demands that system actors critically assess police behavior with a race-conscious perspective. This approach is more impactful than a simple reformist approach such as adoption of body worn cameras. For one, it will not lead to greater investment in law enforcement. In addition, by requiring race-consciousness, this proposal forces the criminal legal system to confront its historically ingrained racism. Though this may not be abolitionist under the strictest definition, it is certainly not a reformist change that will lend greater legitimacy to law enforcement.

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364. Florida v. Harris, 568 U.S. 237, 244 (2013).

365. *See, e.g.*, McDonell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (establishing a burden-shifting test for discrimination under Title VII of the Civil Rights Act of 1964).

366. *See, e.g.*, Harris, *supra* note 10, at 682; ALEXANDER, *supra* note 9, at 103, 111 (arguing that nearly unfettered discretion afforded police catalyzes conscious and unconscious racial biases).

Regardless, eliminating police entirely is not politically viable.[367] Even in the wake of unprecedented political saliency and momentum after the murder of George Floyd in 2020, the movement to defund police may have ultimately harmed criminal justice reform efforts.[368] We should not adhere strictly to abolitionist principles at the expense of adopting an effective, but perhaps imperfect, prophylactic that will improve things for countless individuals and communities who face discrimination and over policing today.[369]

Similarly, many scholars who have proposed reversing *Terry* correctly acknowledge that this idea is a pipe dream.[370] Furthermore, it is not clear that reversing *Terry* would lead to better results. The *Terry* Court itself recognized the exclusionary rule's limitations,[371] but in the eloquent words of Professor Tracey Maclin, "The effectiveness of the exclusionary rule's deterrent function should not control the substantive content of the Fourth Amendment."[372] These limitations necessitate more preventative efforts to combat racially discriminatory policing as contemplated by this Article.[373] General Rule 37 has succeeded thus far despite the ability to levy similar criticisms. Early anecdotal evidence suggests that General Rule 37 has had a chilling effect on prosecutors' strikes of minority jurors.[374] In addition, the Los Angeles Police Department stopped substantially fewer African Americans after prohibiting officers from engaging in pretextual stops.[375] A

367. *See* Steve Friess, *'Defund the Police' Is Dead but Other Reform Efforts Thrive in U.S. Cities*, NEWSWEEK (May 24, 2022, 5:30 A.M.), https://www.newsweek.com/2022/06/24/defund-police-dead-other-reform-efforts-thrive-us-cities-1709393.html; Jerry Ianelli, *Democrats Would Rather Become Republicans Than Make the Case for Justice Reform*, THE APPEAL (June 22, 2022), https://theappeal.org/democrats-run-from-police-reform/.

368. *See* Barkow, *supra* note 340, at 288-89.

369. *See id.*

370. *See* Thompson, *supra* note 10, at 1003 (citing Harris, *supra* note 10, at 683); Maclin, *supra* note 9, at 1316 ("A ruling prohibiting stop and frisk would have been a first step in returning Fourth Amendment protection to individuals subjected to street investigations and other aggressive patrol tactics.").

371. *See* Terry v. Ohio, 392 U.S. 1, 14-15, 17 n.14 (1968); Hutchins, *supra* note 10, at 907 (arguing that the vast majority of stops do not result in arrests that reach the courtroom where the exclusionary rule theoretically deters police misconduct).

372. Maclin, *supra* note 9, at 1313.

373. *See supra* Section III.B.

374. *See* Sloan, *supra* note 198, at 257-58; Discussions With DPIC, *supra* note 362, at 30:02.

375. Libor Jany & Ben Poston, *Minor Police Encounters Plummet After LAPD Put Limits on Stopping Drivers and Pedestrians*, L.A. TIMES (Nov. 14, 2022, 5:00 A.M.), https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change.

similar chilling effect on discriminatory stops and frisks would be a vast improvement.

Even if reversing *Terry* was politically viable, various additional barriers would undercut its efficacy in eliminating racial discrimination. Requiring probable cause rather than reasonable suspicion would not effectively reduce police discretion. "Contempt-of-cop" offenses such as resisting arrest, obstruction, or disorderly conduct allow officers to essentially generate probable cause as needed to make an arrest.[376] Probable cause is an already low standard that is easily satisfied, particularly where court decisions have eroded the line between probable cause and reasonable suspicion.[377] Overcriminalization through minor offenses that give police broad authority to arrest for benign conduct such as jaywalking, loitering, or panhandling exacerbates this problem.[378] Malicious officers would continue fabricating justifications for searches and seizures, adjusting to meet the higher probable cause standard. Officers' ability to tailor testimony to establish probable cause rather than reasonable suspicion, combined with the deference afforded them, would render *Terry*'s reversal a ceremonial reform.

The logistical, political, and practical flaws associated with reversing *Terry* suggest that reformers should explore different approaches to eliminating racial discrimination in stop and frisk. Some of those changes could be more strictly abolitionist. For example, many jurisdictions, in the wake of police violence such as Memphis police officers' brutal killing of Tyre Nichols, have removed police from low-level traffic enforcement.[379] This is likely a better, politically feasible approach to preventing racial discrimination in traffic stops.[380] Ultimately, *Batson* reforms are some of a

376. NATAPOFF, *supra* note 9, at 60.

377. *See* Cynthia Lee, *Probable Cause with Teeth*, 88 GEO. WASH. L. REV. 269, 277, 315-26 (2020); Maclin, *supra* note 9, at 1308; NATAPOFF, *supra* note 9, at 158 ("Since misdemeanor and traffic codes are so broad, there is almost always probable cause for some violation.").

378. *See* Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 550-51 (2017).

379. Sammy Caoila, *Philly Changed Traffic Stop Laws to Try to Protect Black Drivers. Memphis Is Following Suit*, PBS: WHYY (Apr. 14, 2023), https://whyy.org/articles/driving-equality-act-traffic-stop-laws-black-drivers-memphis/; Angela Davis & Maja Beckstrom, *Can New Rules for Minneapolis Police Improve Interactions with Community?*, MPR NEWS (Apr. 20, 2023, 11:40 A.M.), https://www.mprnews.org/episode/2023/04/19/can-new-rules-for-minneapolis-police-officers-improve-interactions-with-the-public; *Investing in Evidence-Based Alternatives to Policing: Non-Police Responses to Traffic Safety*, VERA INST. FOR JUST. 2 (Aug. 2021), https://www.vera.org/downloads/publications/alternatives-to-policing-traffic-enforcement-fact-sheet.pdf.

380. *See* Woods, *supra* note 300, at 1479.

variety of changes courts and policymakers should implement to combat racial discrimination in the Fourth Amendment context.[381]

4. Public Safety

Reforming stop and frisk poses a greater political challenge than jury selection given the perceived public safety risks. Any proposal that seems to limit police or decrease their power tends to elicit fearmongering about crime. However, adopting *Batson* reforms to prevent racially discriminatory searches and seizures does not outlaw stop and frisk entirely. Rather, it limits the circumstances where a search or seizure is lawful. That said, limiting stop and frisk practices will result in overall benefits to public safety.

Ample evidence suggests that curtailing or limiting the number of stops and frisks does not increase crime and may have the opposite effect. A recent empirical study concluded that disproportionate stops and frisks of people of color in New York and Nashville failed to increase public safety.[382] After the NYPD agreed to curtail stop and frisk in the wake of the *Floyd* litigation, New York City did not experience a crime surge. Instead, between 2011 and 2018 crime significantly decreased, culminating in 2018 when the city experienced the fewest homicides in almost seventy years.[383] Moreover, stop and frisk rarely achieves its primary goal, the recovery of a weapon.[384] NYPD officers recovered weapons in just over 1% of stops in 2011, and they recovered firearms in about one out of every 900 stops.[385] Between 2014 and 2017, "80 percent of young Black and Latino males stopped . . . were innocent of any crime" and "[m]ore than 93 percent of those who were

381. I propose reforms "within the framework of *Terry*." Hutchins, *supra* note 10, at 907. In doing so, I agree with Dean Hutchins's warning that "such intra-doctrine attacks . . . cannot be the only implement in the toolbox." *Id.* My proposal is meant as an achievable improvement rather than an unachievable utopian solution.

382. Alex Cholas-Wood et al., *Identifying and Measuring Excessive and Discriminatory Policing*, 89 U. CHI. L. REV. 441, 451 (2022).

383. HENNING, *supra* note 121, at 230 (citing N.Y. C.L. Union, NYCLU Briefing: Stop-and-Frisk 2011, at 4 (May 9, 2012)); DUNN & SHAMES, *supra* note 120).

384. Cholas-Wood et al., *supra* note 382, at 456.

385. *Id.* The definition of a "weapon" is exceedingly broad as well. Law enforcement are instructed that pocketknives, flashlights, and even pens can be considered weapons depending on the situation. *See* Steven L. Argirou, Terry *Frisk Update: The Law, Field Examples and Analysis*, FED. L. ENF'T TRAINING CTRS., https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/4th-amendment/terryfriskupdate.pdf (last visited May 27, 2024). Further research into low hit rates could help scholars and practitioners identify justifications for stops and searches that statistically cannot give rise to reasonable suspicion or probable cause.

frisked for weapons during the stop didn't have a weapon."[386] Additionally, even though Black and Latinx individuals are more likely to undergo frisks than White individuals, they are often found to have weapons or contraband less frequently among those subjected to frisks.[387]

A substantial body of evidence illustrates the harm inflicted upon individuals and communities from rampant stop and frisk policies. "Police encounters that increase psychological distress among adolescents cause anger, resentment, and coping strategies that lead to more delinquent behavior."[388] Additionally, the psychological toll from constant police harassment and surveillance can cause individuals to exhibit conscious and unconscious physiological and behavioral characteristics that appear suspicious such as sweating, nervousness, or attempting to evade police.[389] This feedback loop ultimately creates a tautological fallacy where police perform increasingly disproportionate numbers of stops and frisks in poor Black and Brown communities.[390]

These high rates of discriminatory stops and searches undermine public safety. Overly intrusive policing leads communities of color to lose trust in law enforcement and dissuades members of the community from seeking help from police.[391] In New York City; Durham, North Carolina; and Baltimore, Maryland, police efforts to target high crime areas with increased stops and oversight led to widespread accusations of racial profiling,

386. HENNING, *supra* note 121, at 212 (citing DUNN & SHAMES, *supra* note 120); *see also* Starkey, *supra* note 9, at 135 (citing Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, Jul. 12, 2010, at A1) (arguing that stop and frisk in New York was not effective at its stated purpose of public safety as a sample of nearly 52,000 stops over four years yielded arrests in only 1% of stops and twenty-five firearms).

387. HENNING, *supra* note 121, at 212 (citing DUNN & SHAMES, *supra* note 120); Cholas-Wood et al., *supra* note 382, at 463 (arguing that there is a "racial 'surplus' of police frisks that cannot be explained by potentially 'legitimate' differences in risk between stopped individuals of different race groups"); *see also id.* at 451 (noting that African American and Latinx individuals were "frisked more often than comparably risky white individuals" in Chicago and New York).

388. HENNING, *supra* note 121, at 233. *But see* James J. Fyfe, Terry*: A[n Ex-] Cop's View*, 72 ST. JOHN'S L. REV. 1231, 1238 (1998) (arguing that the social impact of fruitless searches is minimal because instead of representing examples of innocence, these people were "*not caught this time*" with contraband).

389. *See* Harris, *supra* note 10, at 681. There is also research that suggests that "nonverbal cues, including eye contact, posture, and body movement, vary among subcultures." Johnson, *supra* note 10, at 238.

390. *See* Maclin, *supra* note 9, at 1281; Butler, *White Fourth Amendment*, *supra* note 9, at 254.

391. Cholas-Wood et al., *supra* note 382, at 442-43.

ultimately "eliciting fear and distrust that were inconducive to public safety."[392] The resulting lack of cooperation between community members and law enforcement undermines police efforts to solve serious offenses and increases violence. Police face much more difficulty identifying and arresting perpetrators of these offenses without community help. Departmental resource allocation compounds this problem. Limited department resources are wasted on rarely successful fishing expeditions for contraband instead of being used to solve violent crimes.[393] The criminal legal system's deterrent effect is felt most when individuals face a high likelihood of apprehension.[394] Therefore, reallocating resources to prevent and solve violent crimes instead could reverse these feedback loops and promote greater public safety and community trust in law enforcement. Local governments could redirect funding toward social services and evidence-based violence-prevention programs, which more effectively reduce violence.[395] Numerous studies

392. Ted Alcorn, *Do Anti-Gun Police Teams Work?*, VITAL CITY (Apr. 7, 2022), https://www.vitalcitynyc.org/articles/ted-alcorn-neighborhood-safety-teams. The City of Baltimore's experiences with proactive plainclothes units, particularly the infamous Gun Trace Task Force, has led to a complete breakdown of trust between the community and the Baltimore Police Department. WE OWN THIS CITY (HBO 2022); *see also* Justin Fenton, *Despite Corrupt Unit, Baltimore Commissioner Says Plainclothes Units Are Needed to Fight Crime. Some Disagree.*, BALTIMORE SUN (June 30, 2019, 10:56 A.M.), https://www.baltimoresun.com/news/crime/bs-md-gttf-cops-and-robbers-what-now-20190612-story.html; Harris, *supra* note 10, at 679 (discussing the costs of stops and frisks, particularly "one that remains largely invisible: *Large numbers of people are searched and seized, and treated like criminals, when they do not deserve to be*"); NATAPOFF, *supra* note 9, at 151, 161-65 (discussing the toll of constant state surveillance on people of color).

393. In Chicago, for example, arrests for gun possession have skyrocketed while arrest rates for shootings and homicides have dwindled. Police have made arrests in less than 20% of the over 3,200 shootings the city experienced in just over a year. Lakeidra Chavis & Geoff Hing, *The War on Gun Violence Has Failed. And Black Men Are Paying the Price.*, MARSHALL PROJECT (Mar. 23, 2023, 6:00 AM), https://www.themarshallproject.org/2023/03/23/gun-violence-possession-police-chicago.

394. *See generally* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199 (2013). This is particularly important as serious crimes such as burglaries, robberies, and homicides go unsolved at prodigious rates. *See* Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Accountability*, 72 ALA. L. REV. 47, 96-97 (2020) (observing that 3% of burglaries, 7% of robberies, and 60% of homicides are solved).

395. For example, a recent study found that GVI, a violence intervention program in Philadelphia, reduced shootings by as much as 50.3% as opposed to a 42.8% reduction from traditional enforcement methods such as arrests, police surveillance, pretrial incarceration, and longer terms of probation. Mensah M. Dean, *Shootings Remain High in Philly, but City-Funded Violence Interruption Shows Promise*, THE TRACE (Mar. 14, 2023), https://www.thetrace.org/2023/03/philadelphia-violence-interruption-shootings-study/.

reinforce this theory.[396] Thus, by reducing or eliminating stop and frisk, police could increase public safety.[397]

Conclusion

This Article poses a novel solution to the notorious problem of racial profiling in searches and seizures. The Supreme Court has blinded itself, and by extension, courts nationwide, to this pervasive issue by either ignoring the role and impact of racial bias or endorsing officers' reliance on stereotypes to justify searches and seizures. This Article's novel solution fills the gap in previous scholarly discourse. It is one of many options policymakers should adopt to help eliminate racial discrimination in stop and frisk.

This Article proposes adopting principles from *Batson* reforms that will encourage actors in the criminal legal system to acknowledge and remove bias from the Fourth Amendment calculus. Although these reforms will not eliminate all racial discrimination in stops and frisks, they can be a meaningful step forward.

As an illustration of these reforms in practice, let us return to the two examples from the Introduction. Before deciding to send the second defendant's case to the prosecutor's office, the police department could have determined that the officer's interpretation of the defendant's otherwise lawful actions was the result of bias. The prosecutor could have declined prosecution based on this conclusion or an independent assessment of the evidence including reports, body worn camera footage, and interviews with the arresting officer. If all else failed, a judge could have granted a suppression motion based on the discriminatory stop. The first defendant would similarly have been able to highlight the prosecutor's endorsement of racial profiling during a suppression hearing. Instead of blinding ourselves, like the Supreme Court, to the thinly veiled racism affecting these cases, we could have honestly and openly confronted it.

396. *See* Jamila Hodge & Seleeke Flingai, *What Happened When Boston Stopped Prosecuting Nonviolent Crimes*, VERA INST. OF JUST. (Apr. 2, 2021), https://www.vera.org/news/what-happened-when-boston-stopped-prosecuting-nonviolent-crimes (citing Amanda Y. Agan et al., *Misdemeanor Prosecution* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2021), https://www.nber.org/system/files/working_papers/w28600/w28600.pdf).

397. *See* Harris, *supra* note 10, at 681; NATAPOFF, *supra* note 9, at 165-67. *See generally* JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA (2015).