

Arizona’s Elimination of Peremptory Challenges: A First Look

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INTRODUCTION

Historically, trial attorneys have used peremptory challenges to remove jurors discriminatorily based on race and ethnicity.¹ In 1986, the United States Supreme Court held that intentional, race-based peremptory challenges violated the Fourteenth Amendment's Equal Protection Clause, and the Court created a framework to cure the unconstitutional practice.² Still, the discriminatory use of peremptory challenges persisted.³

To effectuate the Sixth Amendment right to a jury trial, a jury must represent the community.⁴ Like many other states, Arizona recognized that the Court's framework failed to cure racial bias in jury selection, and Arizona juror demographics did not reflect those in the local communities.⁵ Arizona considered following other states' initiatives to reform the peremptory challenge systems.⁶ Ultimately, Arizona became the first state to eliminate peremptory challenges.⁷ This Article reports the effect of the Arizona change.

The Article proceeds in four parts. Part I overviews the history of peremptory challenges in the United States, highlights the importance of diverse juries, and acknowledges Arizona's lack of jury diversity. Part II identifies other states' approaches to reforming the peremptory challenge system, presents Arizona's contrary approach, and reviews the criticism behind each approach. Part III analyzes the results of Arizona's new rule in Maricopa County. Part IV concludes that preliminary data shows overall improvements in juror representation and that the concerns with eliminating peremptory strikes have not materialized.

1. See *infra* notes 27–33 and accompanying text.

2. *Batson v. Kentucky*, 476 U.S. 79, 85, 89, 96 (1986).

3. See *infra* notes 60–64 and accompanying text.

4. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

5. See, e.g., 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, No. R-21-0020 (Ariz. Jan. 11, 2021) [hereinafter Swann & McMurdie Petition], <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/5DW5-SMFX>]; Petition to Amend the Rules of the Supreme Court of Arizona to Adopt Proposed Rule 24—Jury Selection, No. R-21-0008, at 3 (Ariz. Jan. 8, 2021) [hereinafter Batson Working Group Petition], <https://www.azcourts.gov/Rules-Forum/aft/1196> [<https://perma.cc/3ZUH-9JHB>].

6. Batson Working Group Petition, *supra* note 5, at 2.

7. See 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. Aug. 30, 2021), <https://www.azcourts.gov/Portals/20/2021%20Rules/R-21-0020%20Final%20Rules%20Order.pdf> [<https://perma.cc/JTE6-8X3N>]; see also Hassan Kanu, Commentary, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2022, 2:52 PM), <https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01> [<https://perma.cc/XYN3-KERN>].

I. BACKGROUND

A. *The History of Peremptory Challenges*

Peremptory challenges permit parties to remove prospective jurors for nearly any reason or no reason.⁸ American common law recognized the peremptory challenge system to make juries more impartial.⁹ When Congress first codified the common law right to peremptory challenges in the federal system,¹⁰ it only entitled defendants in criminal trials to the challenges.¹¹ The prosecution's authority to exercise peremptories fully emerged after the Civil War, when Black Americans were emancipated and could hypothetically serve on juries.¹²

Using the new trial power, unscrupulous prosecutors turned to the peremptory challenge to prevent Black individuals from serving on juries.¹³ When other exclusionary mechanisms failed to prohibit Black citizens from becoming prospective jurors,¹⁴ attorneys used the peremptory challenge as the “final racial filter.”¹⁵ In 1963, the Alabama Supreme Court commented that “Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury.”¹⁶ Likewise, attorneys targeted not only Black individuals but also used peremptory challenges to exclude women

8. C.J. Williams, *On the Origins of Numbers: Where Did the Number of Peremptory Strikes Come from and Why Is Origin Important?*, 39 AM. J. TRIAL ADVOC. 481, 481–82 (2016).

9. *Id.* at 494.

10. Peremptory challenges predate our Constitution but are not constitutionally required. *Id.*; *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (“We have long recognized that peremptory challenges are not of constitutional dimension.”).

11. Williams, *supra* note 8, at 495. Over time, states codified peremptories and provided them to both sides in criminal and civil cases. *Id.*

12. See Jack B. Harrison, *Is a Green Tie Enough?—Truth and Lies in the Courtroom*, 75 OKLA. L. REV. 687, 711 (2023) (“By the end of the Civil War, every state had passed a law granting its prosecutors a limited number of [peremptory] challenges.”).

13. Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 829 (1997).

14. EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION 11–15 (2021), <https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf> [<https://perma.cc/9A3Z-5SNJ>] (“In most of the South . . . the failure to enforce anti-discrimination laws meant that Black people continued to be denied the basic rights of citizenship, including jury service Throughout the early 20th century, state and local officials continued to use discriminatory tactics to keep Black people out of the jury box. Such tactics were often obvious—many local officials simply removed the names of Black people from jury rolls. Others were less blatant but no less exclusionary. The ‘key-man’ system, for example, called for prominent white citizens to submit lists of suitable jurors to jury commissioners.” (citations omitted)).

15. Hoffman, *supra* note 13, at 829.

16. *Swain v. State*, 156 So. 2d 368, 375 (Ala. 1963), *aff'd*, 380 U.S. 202 (1965).

from jury service.¹⁷ An overlapping history of peremptory challenge discrimination exists for gender and race exclusion.¹⁸

The peremptory challenge system in the United States was originally intended to address primordial concerns, like the balance of power between the government and the individual.¹⁹ Racial and gender equality were not a priority. Although peremptory challenges were developed to ensure impartiality, litigators have since used them to achieve *less* impartiality in the final jury.²⁰ Lawyers justify such aims by pointing to both sides' opportunities to distort the jury pool.²¹ And to an advocate who believes in his or her cause, it might seem only natural that the jury be predisposed to that cause as well.

But the Sixth Amendment requires that juries be selected from “a representative cross section of the community,” and the United States Supreme Court has emphasized that such representation is “an essential component of the Sixth Amendment right to a jury trial.”²² Although peremptories might be useful for trial attorneys, discriminatorily striking jurors who pass a for-cause challenge does not seem to promote the constitutional imperative that the jury be chosen from a “representative cross section.”²³ If the constitutional rule is to have integrity, it cannot mean that the initial panel must be representative, but the parties can strive for a favorable imbalance on the final jury by striking minorities and women.²⁴ But such attempts at a favorable imbalance on the final jury remain possible through peremptory challenges.²⁵

B. Problems with Peremptory Challenges

Peremptory challenges have created persistent problems of unlawful discrimination. Study after study shows that litigants exercise peremptories

17. Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U. L. REV. 299, 340–41 (2017) (finding gender was a factor in the parties' decisions of whom to strike).

18. Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1163 (1993) (“Not only may gender be used as a cover for race prejudice, but in the case of minority women, allowing gender strikes subjects them to the most virulent double discrimination: that based on a synergistic combination of race and sex.”).

19. See Harrison, *supra* note 12, at 709.

20. C.J. Williams, *Proposing a Peremptory Methodology for Exercising Peremptory Strikes*, 54 AM. CRIM. L. REV. 277, 283–84 (2017).

21. See Williams, *supra* note 8, at 504.

22. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

23. *Id.*

24. See Swann & McMurdie Petition, *supra* note 6, at 8.

25. Williams, *supra* note 20, at 283–84.

in a discriminatory fashion throughout the United States.²⁶ And these examples are only a select, documented showing of when peremptory challenges have been used to discriminate.

A 2001 study of 1980s and 1990s Philadelphia cases found that race was the predominant factor in prosecutorial use of peremptory challenges and that gender also played a considerable role.²⁷ A 2011 study on the exercise of peremptory challenges during jury selection in capital trials in North Carolina made a parallel finding.²⁸ The prosecution struck 52.6% of eligible Black venire members and 25.7% of all other eligible venire members.²⁹ That is, “[p]rosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members.”³⁰ A more recent study reviewed cases resulting in death sentences in South Carolina between 1997 and 2012.³¹ The scholars noted that the “crux of [the] numbers is that the prosecution struck blacks at a rate higher than they were represented and removed one-third of eligible black jurors.”³² As a final example, a study of data from Mississippi criminal trials between 1992 and 2012 showed that “black venire members are 4.51 times [more] likely to be excluded from a jury due to peremptory challenges from the prosecution in comparison to white venire members.”³³ Thus, race has been a key motivator in exercising peremptory challenges.

But the discriminatory use of peremptory challenges is not always deliberate.³⁴ Social psychologists have recently come to understand implicit biases and their role in using peremptory challenges.³⁵ Even where parties do not purposefully weaponize peremptory challenges to manipulate the jury discriminatorily, their implicit biases can still have such consequences.³⁶ That

26. See *infra* notes 27–33 and accompanying text.

27. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10, 60 (2001).

28. Catherine M. Grosso & Barbara O’Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1542–43 (2012).

29. *Id.* at 1548.

30. *Id.*

31. Eisenberg, *supra* note 17, at 326.

32. *Id.* at 343–44.

33. Witney DeCamp & Elise DeCamp, *It’s Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. RSCH. CRIME & DELINQ. 3, 3 (2020).

34. Anthony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 208 (2005).

35. See *id.* at 180–81.

36. See *id.* at 208.

is, “stereotypes can lead to a peremptory challenge by altering the way an attorney unconsciously sees and uses information.”³⁷

Partly in response to discrimination issues, other countries have abolished peremptory challenges. For example, the United Kingdom abolished peremptory challenges in 1988.³⁸ More recently, in 2019, Canada abolished peremptory challenges.³⁹ The Canadian Bill’s legislative background explained that “[a]bolishing peremptory challenges addresses the concern that this aspect of the jury selection process may be used to discriminate unfairly against potential jurors and will strengthen public confidence in the jury selection process.”⁴⁰

Meanwhile, the United States approached the peremptory discrimination problem differently. In “efforts to eradicate racial discrimination in the procedures used to select the venire[.]” the Supreme Court recognized that “peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’”⁴¹ *Batson v. Kentucky* held that litigants cannot use peremptory challenges to intentionally strike prospective jurors based on race.⁴² The *Batson* Court then created a framework to discern race-based peremptory challenges.⁴³ First, a defendant must make a prima facie showing that a prosecutor’s peremptory challenge was intentionally based on race.⁴⁴ Second, the burden shifts to the prosecutor to offer a race-neutral reason for the challenge.⁴⁵ Then, if the prosecutor meets the burden of production, the trial court judge determines whether the peremptory challenge constituted purposeful discrimination.⁴⁶ A major limitation of the original framework was that the defendant had to “show he [was] a member of a cognizable racial group . . . and that the prosecutor [had] exercised peremptory challenges to remove from the venire members of the defendant’s race.”⁴⁷

37. *Id.*

38. Criminal Justice Act 1988, c. 33, § 118(1) (Eng. & Wales); see Amy Wilson, Note, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT’L & COMP. L. REV. 363, 364–65 (2009).

39. Bill C-75, S.C. 2019, c 25 (Can.).

40. DEP’T OF JUST. CAN., LEGISLATIVE BACKGROUND: *AN ACT TO AMEND THE CRIMINAL CODE, THE YOUTH CRIMINAL JUSTICE ACT AND OTHER ACTS AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS*, AS ENACTED (BILL C-75 IN THE 42ND PARLIAMENT) 38 (2022), <https://www.justice.gc.ca/eng/rp-pr/csjs-sjc/jsp-sjp/c75/c75.pdf> [<https://perma.cc/7VGC-H6B9>].

41. *Batson v. Kentucky*, 476 U.S. 79, 85, 96 (1986).

42. *Id.* at 89.

43. *Id.* at 93–98.

44. *Id.* at 95–97.

45. *Id.* at 97.

46. *Id.* at 98.

47. *Id.* at 96.

The Supreme Court later extended *Batson*'s framework through cases like *J.E.B. v. Alabama ex rel. T.B.*,⁴⁸ *Powers v. Ohio*,⁴⁹ and *Georgia v. McCollum*.⁵⁰ In *J.E.B.*, the Court extended *Batson*'s reach beyond race to gender-based peremptory challenges.⁵¹ *Powers* altered *Batson*'s framework by holding that "race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges."⁵² And a *Batson* challenge no longer required that the defendant and the stricken juror be of the same race.⁵³ *McCollum* provided that any party, not just a criminal defendant, can make a *Batson* challenge.⁵⁴ For brevity, this Article calls the expanded framework "*Batson*," and the analysis focuses on race-based peremptory challenges. Still, cases like *J.E.B.*, *Powers*, and *McCollum* are noteworthy attempts to rectify some of *Batson*'s shortcomings.

Since the Court decided *Batson*, people have been skeptical it would solve peremptory challenge discrimination.⁵⁵ Even Justice Marshall's concurrence warned, "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."⁵⁶ And Justice Marshall was correct—*Batson* proved ineffective.⁵⁷

The central weakness of the *Batson* framework is that the non-moving party can easily provide neutral-sounding rationales for its challenge.⁵⁸ "Trial and appellate courts have been willing to accept virtually any explanation offered by the prosecutor to rebut the defendant's inference of purposeful discrimination."⁵⁹ And so, by 2010, nearly twenty-five years after *Batson*, more than 100 criminal defendants in Tennessee had raised *Batson* claims

48. 511 U.S. 127 (1994).

49. 499 U.S. 400 (1991).

50. 505 U.S. 42 (1992).

51. *J.E.B.*, 511 U.S. at 129 ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

52. *Powers*, 499 U.S. at 416.

53. *Id.*

54. *McCollum*, 505 U.S. at 59.

55. See generally Daniel Edwards, *The Evolving Debate over Batson's Procedures for Peremptory Challenges*, NAT'L ASS'N ATT'YS GEN. n.69 (Apr. 14, 2020), <https://www.naag.org/attorney-general-journal/the-evolving-debate-over-batson-procedures-for-peremptory-challenges> [<https://perma.cc/4849-5N8Q>] (collecting such skepticism).

56. *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

57. See Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 713 (2018) ("*Batson v. Kentucky* is widely regarded as a failure.").

58. See Hiroshi Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process*, 23 INT'L J. COMPAR. & APPLIED CRIM. JUST. 55, 80 (1999).

59. *Id.*

during jury selection and on appeal, but no convictions were reversed on that basis.⁶⁰ Louisiana had twelve criminal verdicts reversed because prosecutors violated *Batson*, Mississippi and Arkansas had only ten *Batson* reversals, and Georgia only had eight.⁶¹ In Arizona, only seven *Batson* challenges have been successful at the appellate stage, a mere 4.4%.⁶²

In a 2005 Supreme Court case about prosecutors' use of peremptory challenges against ten of the eleven qualified Black venire members, Justice Breyer concurred, "I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem."⁶³ The reality is that the lack of successful *Batson* challenges has allowed prosecutors to excuse Black jurors disproportionately and defense attorneys to excuse white jurors disproportionately.⁶⁴ Disparities in jury demographics have many possible causes,⁶⁵ but one device in particular allows for intentional imbalances: the peremptory challenge.⁶⁶

C. *The Importance of Jury Service and Diverse Juries*

A lack of minority representation on juries is problematic for reasons apart from the appearance of impropriety. People have a constitutional right not to be excluded from jury service based on race.⁶⁷ The Supreme Court has highlighted that "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."⁶⁸ When people are excluded from jury service because of group stereotyping, it "brands the excluded group members as inferior, insults individuals by reducing their worth as jurors . . . , makes unrepresented groups less accepting of the court system and its results, and injures society as a

60. EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 22 (2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/UM27-KPBU>].

61. *Id.* at 19.

62. *Batson* Working Group Petition, *supra* note 5, at 3.

63. *Miller-El v. Dretke*, 545 U.S. 231, 268 (2005).

64. Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201, 238 (2021).

65. *See infra* notes 191–95 and accompanying text.

66. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 12 (1990) (arguing that the peremptory challenge "must be viewed as the most recent incarnation of the anti-democratic impulse to keep juries all-white").

67. *Powers v. Ohio*, 499 U.S. 400, 409 (1991).

68. *Flowers v. Mississippi*, 588 U.S. 284, 293 (2019).

whole by frustrating the ideal of equal citizen participation in the jury process.”⁶⁹

Diverse juries lead to better trial outcomes.⁷⁰ A study comparing racially mixed mock juries and all-white mock juries “found that racially mixed juries tended to deliberate longer and discuss more information, made fewer factual errors, and were less resistant to discussions of race than all-white juries.”⁷¹ The study determined that, as a result, “defendants tried by all-white juries are more likely to be found guilty than those tried before more diverse juries.”⁷²

Finally, a stable justice system should show respect for citizens called to serve. Public confidence in the judiciary diminishes when people do not feel respected by the system.⁷³ Yet today, most rules require courts to summon additional jurors merely to serve as disposable chattel for peremptory challenges,⁷⁴ which is inefficient and offensive to those who volunteer their time only to be peremptorily stricken.

D. Arizona’s Jury Diversity Problem

Arizona experienced the discussed patterns that suggest *Batson* failed to eliminate jury selection bias. For starters, Arizona juror demographics did not reflect community demographics.⁷⁵ We use the demographic information for Maricopa County, where over 60% of the state’s population resides,⁷⁶ because the comparative data used to contrast jury makeup comes from that county before and after eliminating peremptories. The 2020 census reported that, of the 86.4% of individuals in Maricopa County who identified as one

69. Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 501 (1996) (footnotes omitted).

70. See Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 40–41 (2014).

71. *Id.* at 40.

72. *Id.*

73. See Felice Banker, *Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges from Jury Selection*, 3 J.L. & POL’Y 605, 627 (1995).

74. See, e.g., UTAH R. CRIM. P. 18(a)(2).

75. See, e.g., Swann & McMurdie Petition, *supra* note 5, at 12 (“Data recently compiled by the Administrative Office of the Courts reveals an empirical imbalance between the demographics of the overall population and jurors seated under our current system.”).

76. See *QuickFacts, Arizona; Maricopa County, Arizona*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/AZ,maricopacountyarizona/PST045223> [https://perma.cc/5PNV-DS4E] (noting that, as of July 1, 2022, Maricopa County’s population was estimated at 4,551,524, and Arizona’s total population was estimated at 7,365,684). As of July 1, 2023, Maricopa County’s population was estimated at 4,585,871, and Arizona’s population was estimated at 7,431,344. *Id.*

race, 59.8% identified as white, 5.9% identified as Black or African American, 2.3% identified as American Indian or Alaska Native, 4.6% identified as Asian, 0.2% identified as Native Hawaiian or Other Pacific Islander, and 13.5% identified as some other race.⁷⁷ Thirty-two percent of the population identified as Hispanic or Latino.⁷⁸ During the 2019 calendar year in Maricopa County, 76.6% of individuals on criminal jury venires and 79.1% on civil venires identified as white.⁷⁹ But after peremptories and releases for cause or hardship, 80% of people empaneled on criminal juries, and 81.6% of those on civil juries, were white.⁸⁰ And even though over 30% of Maricopa County's population identified as Hispanic in the 2020 census,⁸¹ less than 20% of empaneled jurors in 2019 were Hispanic.⁸² Furthermore, data from the Maricopa County Superior Court revealed "that in 2019, prosecutors in Maricopa County jury trials struck Black individuals at a rate 40% greater than their presence in the venire, and American Indian individuals at a rate 50% greater than their presence in the venire."⁸³ On the other hand, defense attorneys disproportionately struck white individuals, striking all others at a rate lower than their presence in the venire (e.g., Black individuals were struck at a rate more than 57% below their representation in the venire).⁸⁴

77. *Profile of General Population and Housing Characteristics, Maricopa County*, U.S. CENSUS BUREAU (2020), https://data.census.gov/table?g=040XX00US04_050XX00US04013&d=DEC%20Demographic%20Profile [https://perma.cc/L64G-SZWU]. In Maricopa County, 13.6% of individuals identified as two or more races; 72.7% identified as white alone or combined with one or more races; 7.6% identified as Black alone or combined with one or more races; 4% identified as American Indian and Alaska Native alone or combined with one or more races; 6.1% identified as Asian alone or combined with one or more races; 0.5% identified as Native Hawaiian and other Pacific Islander alone or combined with one or more races; and 23.4% identified as some other race alone or combined with one or more other races. *Id.*

78. *Id.*

79. *Racial and Ethnic Representation Through the Jury Selection Process*, MARICOPA CNTY. JUD. BRANCH (July 2021), <https://www.azcourts.gov/Portals/74/Jury%20TF/Meetings/072321/Maricopa%20Jury%20Representation%20ReportR%20072021.pdf> [https://perma.cc/RUT8-X676].

80. *Id.* Notably, unlike the U.S. Census, the Maricopa County Superior Court race questionnaire did not provide respondents the opportunity to identify as members of multiple races. Because of this difference in methodology, it is not clear by *how much* juries in Maricopa are overrepresented by white individuals, though we can still conclude that white individuals are overrepresented.

81. U.S. CENSUS BUREAU, *supra* note 77.

82. RACIAL AND ETHNIC REPRESENTATION THROUGH THE JURY SELECTION PROCESS, *supra* note 79, at 2.

83. ARIZ. TASK FORCE ON JURY DATA COLLECTION, POLICIES, & PROCS., REPORT AND RECOMMENDATIONS 36–37 (2021), <https://www.azcourts.gov/Portals/74/Jury%20TF/Resources/Final%20Report%20Posting%20JTF%20100421.pdf> [https://perma.cc/95HD-L2J8] (analyzing data from MARICOPA CNTY. JUD. BRANCH, *supra* note 79).

84. MARICOPA CNTY. JUD. BRANCH, *supra* note 79.

While this does not account for the final misrepresentation in the empaneled jury, it does show the problem more generally: that peremptory challenges give attorneys the power to make race-based jury elimination decisions for no reason or under a pretext.

The effect of Arizona's jury selection system before the elimination of peremptory challenges was that white jurors in criminal cases were overrepresented by 3% of their representation in the population, while "Black jurors were underrepresented by 16%, Native American jurors were underrepresented by 51%, and Hispanic jurors were underrepresented by 21%."⁸⁵ The disparity in jury representation by race and ethnicity was not relegated to criminal cases. In civil cases, white jurors were identical to their representation in the population.⁸⁶ But "Black jurors were underrepresented by 24%, Native American jurors were underrepresented by 76%, and Hispanic jurors were underrepresented by 16%."⁸⁷

And *Batson* did not provide a meaningful remedy.⁸⁸ A review of all Arizona appellate decisions addressing the merits of *Batson* challenges revealed that appellate courts found *Batson* error in only 4.4% of cases.⁸⁹ Another 2.5% of cases were remanded to the superior court for further *Batson* findings.⁹⁰ Thus, in 93.1% of cases, appellate courts found some record evidence supporting a neutral, nondiscriminatory explanation for each peremptory challenge.⁹¹

The Arizona Supreme Court acknowledged the problem and "the need to ensure that [juries] fairly represent a cross-section of the local community in which they assemble" and established the Task Force on Jury Data Collection, Practices, and Procedures.⁹² Among other directives, the court instructed the task force to consider whether peremptory challenges systematically reduce minority representation in Arizona.⁹³

85. Swann & McMurdie Petition, *supra* note 5, at 12.

86. *Id.*

87. *Id.*

88. *See id.* at 11.

89. *Batson* Working Group Petition, *supra* note 5, at 3.

90. *Id.*

91. *Id.* at 4.

92. Order *in re* Establishment of the Task Force on Jury Data Collection, Pracs., & Procs., No. 2021-35, at 1 (Ariz. Mar. 10, 2021), <https://www.azcourts.gov/Portals/22/admorder/Orders21/2021-35.pdf> [<https://perma.cc/JM8X-JD58>].

93. *Id.* at 2.

Arizona was not the first state to recognize juror representation problems.⁹⁴ Arizona had options: it could implement *Batson* reform like other states, or it could be the first to eliminate peremptory challenges.

II. *BATSON* ALTERNATIVES

A. *Other States*

States, including Washington and California, tried to fix *Batson*'s shortcomings. In April 2018, the Washington Supreme Court adopted General Rule 37 ("GR 37").⁹⁵ GR 37 eliminates *Batson*'s requirement that a party opposing the peremptory challenge show purposeful discrimination, requires the court to deny a challenge if an objective observer could view race or ethnicity as a factor in its use, and includes presumptively invalid reasons for challenging jurors.⁹⁶ Unlike *Batson*, which considers only purposeful discrimination, GR 37 contemplates implicit, unconscious, and systemic biases.⁹⁷

In a Washington jury trial, a party or the court may object to a peremptory challenge by citing the rule.⁹⁸ After the party exercising the challenge explains its reasoning, the court evaluates the challenge under a totality of the circumstances.⁹⁹ The rule lists circumstances the court should consider, including "whether a reason might be disproportionately associated with a race or ethnicity"¹⁰⁰ and "whether the party has used peremptory challenges disproportionately against a given race or ethnicity."¹⁰¹ The rule also lists peremptory challenge reasons that are presumptively invalid, including

94. See *Batson Reform: State by State*, BERKELEY L., <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> [<https://perma.cc/RL3B-P2A9>].

95. Order *in re* the Proposed New Rule Gen. Rule 37—Jury Selection, No. 25700-A-1221 (Wash. Apr. 5, 2018), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221.pdf> [<https://perma.cc/8GUS-DBKE>].

96. *Id.*; see also *GR 37—Jury Selection*, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=537 [<https://perma.cc/QB8S-2ZJW>]. The rule was originally proposed by the American Civil Liberties Union as GR 36 but was later renumbered as GR 37. See *id.*; see also *City of Seattle v. Erickson*, 398 P.3d 1124, 1133 n.4 (Wash. 2017) (Stephens, J., concurring). For clarity, we refer to the rule as "GR 37."

97. See *GR 37—Jury Selection*, *supra* note 96.

98. WASH. CT. GEN. R. 37(b), (c).

99. *Id.* R. 37(d)–(e).

100. *Id.* R. 37(g)(iv).

101. *Id.* R. 37(g)(v).

exercising a challenge because a juror had “prior contact with law enforcement” or because a juror “express[es] a distrust of law enforcement.”¹⁰² And if a party wants to remove a juror for conduct such as “failing to make eye contact” or “exhibit[ing] a problematic attitude, body language, or demeanor,” the party must notify the court and the other parties, and the behavior must be corroborated.¹⁰³ The court must deny the peremptory challenge if it “determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.”¹⁰⁴

When the Washington American Civil Liberties Union proposed the rule,¹⁰⁵ many supported it, but there were also concerns.¹⁰⁶ People speculated that GR 37 would not create meaningful change from *Batson*.¹⁰⁷ And some asserted the standard of whether an “objective observer could view race or ethnicity as a factor” was overbroad or ambiguous.¹⁰⁸ A jury selection workgroup member in Washington contended that asking whether someone “*could* view race or ethnicity as a factor” is the same as asking whether it is *possible* to conceive race or ethnicity as a factor—and “anything is possible.”¹⁰⁹ Thus, there was concern that some judges would deny all peremptory challenges, regardless of a juror’s partiality, because race or ethnicity could always conceivably be a conscious or unconscious motivation

102. *Id.* R. 37(h)(i)–(ii).

103. *Id.* R. 37(i).

104. *Id.* R. 37(e).

105. See GR 37—*Jury Selection*, *supra* note 96.

106. See generally *Comments for GR 37—Jury Selection*, WASH. CTs., https://www.courts.wa.gov/court_rules/?fa=court_rules.commentDisplay&ruleId=537 [<https://perma.cc/T3MJ-6MR2>] (reflecting mixed public responses to the proposed rule).

107. Annie Sloan, “*What to Do About Batson?*”: *Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233, 259 (2020).

108. Position Paper from Jennifer Campbell, President of Wash. Defense Trial Laws., to Hon. JJ. of the Wash. State Sup. Ct., at 5–6 (Apr. 28, 2017), https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Jennifer%20Campbell,%20WDTL.pdf [<https://perma.cc/KWG4-UV9L>]; see also Letter from Mark McClain, Pac. Cnty. Prosecuting Att’y, to Hon. Susan L. Carlson, Wash. Sup. Ct. Clerk (Jan. 10, 2017), https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Mark%20McClain.pdf [<https://perma.cc/QE4Q-XTRC>]; Letter from Michele Hyer, Deputy Prosecuting Att’y, to Hon. Susan L. Carlson, Wash. Sup. Ct. Clerk, at 1 (Mar. 24, 2017), https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Michelle%20Hyer.pdf [<https://perma.cc/4LFL-226Z>].

109. Letter from Judge Blaine Gibson to Wash. Sup. Ct. J. Mary Fairhurst (Feb. 13, 2018), in WASH. CT. JURY SELECTION WORKGROUP, PROPOSED NEW GR 37—JURY SELECTION WORKGROUP FINAL REPORT app. 2, at 2 (2018) [hereinafter GR 37 FINAL REPORT] (emphasis added), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf> [<https://perma.cc/8GUS-DBKE>].

for a challenge.¹¹⁰ If the “could view” standard would lead to denying every peremptory challenge, some preferred eliminating peremptory challenges.¹¹¹ Some legal community members had concerns about a lack of uniformity in applying GR 37, particularly that judges would apply the rule more harshly against prosecutors.¹¹²

People also criticized GR 37 for failing to address discrimination based on other classes, such as gender or sexual orientation.¹¹³ GR 37 created a two-tiered system for reviewing peremptory challenges: one test for racial or ethnic bias allegations and a *Batson* review for bias against other groups.¹¹⁴ People were reluctant to require judges to apply multiple standards.¹¹⁵

Anecdotal evidence suggests that Washington’s experience with GR 37 has been neutral or positive.¹¹⁶ Washington Supreme Court Chief Justice Steven C. González communicated in 2021 that “the rule appears to be working to deter and mitigate racial discrimination.”¹¹⁷ Some attorneys reported being more hesitant to attempt peremptory challenges at the trial level.¹¹⁸ Other attorneys experienced multiple GR 37 objections within the first six months of enactment.¹¹⁹ “[A]ccording to public defenders and prosecutors in different counties, the rule has already been used against the defense, including by judges sua sponte.”¹²⁰ And appellate courts have

110. *Id.*; see also Franklin L. Dacca, Individual Statement (Feb. 16, 2018), in GR 37 FINAL REPORT, *supra* note 109, app. 2.

111. *See id.*

112. Sloan, *supra* note 107, at 255–56.

113. *See* Letter from John J. Juhl, Prosecuting Att’y, to Hon. Susan L. Carlson, Wash. Sup. Ct. Clerk, at 1 (Jan. 31, 2017), https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/John%20J.%20Juhl.pdf [<https://perma.cc/D4F8-P52Q>]; Letter from Rich Weyrich, President of Wash. Ass’n of Prosecuting Att’ys, to Hon. Susan L. Carlson, Wash. Sup. Ct. Clerk, at 4 (Jan. 4, 2017), https://www.courts.wa.gov/court_Rules/proposed/2016Nov/GR36/Pam%20Loginsky.pdf [<https://perma.cc/NP5N-ZWGR>]; Statement on the Workgroup Final Report from the Wash. Ass’n of Prosecuting Att’ys, in GR 37 FINAL REPORT, *supra* note 109, app. 2, at 2–4.

114. *See* Statement on the Workgroup Final Report from the Wash. Ass’n of Prosecuting Att’ys, *supra* note 113, app. 2, at 3.

115. *Id.*

116. *See, e.g.*, Steven C. González, Comment by the Chief Justice of the State of Washington’s Supreme Court, *In re Batson Working Group Petition*, No. R-21-0008 (Ariz. Apr. 30, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1196> [<https://perma.cc/G6X7-RZ9D>].

117. *Id.* at 1.

118. *See* Loren Miller Bar Ass’n, Comment in Support of the Petition to Adopt New Rule 24 on Jury Selection at 4, *In re Batson Working Group Petition*, No. R-21-0008 (Ariz. May 4, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1196/afpg/2> [<https://perma.cc/96PW-AK62>]; see also Sloan, *supra* note 107, at 257–58.

119. Sloan, *supra* note 107, at 258.

120. *Id.* at 256.

reversed convictions when applying GR 37 on appeal.¹²¹ But as courts continue to apply GR 37 in practice, the rule has been criticized as requiring judges and lawyers to speculate about jurors' racial and ethnic identities based on names and appearances.¹²²

Other states have implemented similar *Batson* reforms. In 2020, California passed legislation replacing the *Batson* framework with one resembling GR 37,¹²³ though California lists more presumptively invalid reasons for challenges than Washington.¹²⁴ Also, California's legislation expands protections to other groups, prohibiting peremptory challenges because of "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or . . . perceived membership . . . in any of those groups."¹²⁵ The court must sustain the peremptory challenge objection if it determines there is a "substantial likelihood that an objectively reasonable person would view [a listed protected status] as a factor in the use of the peremptory challenge."¹²⁶ The court has options when sustaining an objection to a peremptory challenge—apart from seating the juror, it could restart jury selection, declare a mistrial, or provide the objecting party additional challenges.¹²⁷

Connecticut recently amended its superior court rules to implement a peremptory challenge model like GR 37.¹²⁸ Also, the New Jersey Supreme

121. See, e.g., *State v. Tesfasilasye*, 518 P.3d 193 (Wash. 2022); *State v. Pierce*, 455 P.3d 647 (Wash. 2020); *State v. Lahman*, 488 P.3d 881 (Wash. App. 2021).

122. Finley Riordon, *The Objective Observer Strikes Out: A Comparative Analysis of Batson Reform in Washington State*, 13 WAKE FOREST J.L. & POL'Y 103, 125–26 (2023). The objective observer test assesses the "perceptions and visual observations of the parties and the court" rather than a juror's self-identification. *Id.* at 120.

123. Assemb. B. 3070, 2020 State Assemb., Reg. Sess. (Cal. 2020) (codified at CAL. CIV. PROC. CODE § 231.7). Assembly Bill No. 3070 is effective for criminal trials beginning January 1, 2022, and will apply to civil trials beginning January 1, 2026. *Id.*

124. Compare CAL. CIV. PROC. CODE § 231.7(e), with WASH. CT. GEN. R. 37(h).

125. CAL. CIV. PROC. CODE § 231.7(a).

126. *Id.* § 231.7(d)(1). California has a "would view" standard rather than Washington's "could view" standard. Compare CAL. CIV. PROC. CODE § 231.7(d)(1), with WASH. CT. GEN. R. 37(e). The Washington Supreme Court considered but denied the "would view" standard. See GR 37 FINAL REPORT, *supra* note 109, at 2, 6–7; see also WASH. CT. GEN. R. 37(e). In *State v. Tesfasilasye*, 518 P.3d 193 (Wash. 2022), the court explained why: "Under the 'could view' standard, a judge is required to deny a peremptory challenge when the effect is discriminatory regardless of whether there was discriminatory purpose. . . . The 'could view' standard is also more likely to prevent peremptory dismissals of jurors based on the unconscious or implicit biases of lawyers." *Id.* at 199.

127. See CAL. CIV. PROC. CODE § 231.7(h).

128. CONN. SUP. CT. R. § 5-12; see also WASH. CT. GEN. R. 37. After objection, a Connecticut court must deny a peremptory challenge if the court finds that the challenge "legitimately raises

Court recently adopted a court rule inspired by GR 37, but New Jersey's rule prohibits peremptory challenges based on any "actual or perceived membership in a group protected" under the U.S. and New Jersey Constitutions and New Jersey antidiscrimination laws.¹²⁹

In Arizona, a workgroup proposed adopting a new supreme court rule modeled after GR 37.¹³⁰ Like California's legislation¹³¹ and New Jersey's rule,¹³² the new rule would have extended to groups outside of race and ethnicity, including "sex, gender, religion, national origin, disability, age, and sexual orientation."¹³³ Under the proposed rule, the court must sustain a peremptory challenge objection if it finds "that any reasonable person could view" a protected status as motivating the challenge or waiver of a challenge.¹³⁴ The court must sustain the objection "even if other valid reasons [were] offered."¹³⁵ Like GR 37, the proposed rule listed presumptively invalid reasons for challenges, but the proposed rule added a mechanism for rebutting the presumption.¹³⁶

Many Arizonans supported the rule proposal.¹³⁷ But some believed the rule was too broad and "so significantly undermine[d] peremptory jury strikes that it render[ed] them illusory."¹³⁸ Some commenters found the proposal impracticable because almost all prospective jurors would fall into one of the protected groups, meaning litigants could object to every peremptory

the appearance that the prospective juror's race or ethnicity was a factor in the challenge." CONN. SUP. CT. R. § 5-12(d).

129. N.J. CT. R. 1:8-3A(a). After objection, the court must "impose an appropriate remedy" if it finds "a reasonable, fully informed person would believe that a party removed a prospective juror based on the juror's actual or perceived membership in a group protected" under the rule. *Id.* R. 1:8-3A(e), (f).

130. Batson Working Group Petition, *supra* note 5, at 2.

131. CAL. CIV. PROC. CODE § 231.7(a).

132. N.J. CT. R. 1:8-3A(a).

133. Batson Working Group Petition, *supra* note 5, at 8.

134. *Id.* at 15.

135. *Id.*

136. *Id.* at 16.

137. See generally *Court Rules Forum, R-21-0008 Petition to Amend the Arizona Rules of Supreme Court to Adopt New Rule 24 on Jury Selection*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/Rules-Forum/aft/1196> [<https://perma.cc/DQ9G-KACN>] (groups including the State Conference NAACP, Arizona Black Bar, Arizona Asian American Bar Association, Los Abogados Hispanic Bar Association, and the AZ-LGBT Bar Association submitted comments in support of the rule proposal).

138. Barry Halpern, Comment of the Arizona Medical Ass'n, Arizona Osteopathic Medical Ass'n, & Arizona Chamber of Commerce & Industry Opposing the Adoption of Proposed Rule 24—Jury Selection at 2, *In re Batson Working Group Petition*, No. R-21-0008 (Ariz. May 3, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1196/afpg/2> [<https://perma.cc/8QKK-UMP3>].

challenge successfully.¹³⁹ They questioned the workability of the rebuttable presumption, noting it was unclear what a party could present to overcome the presumption that certain peremptory challenge reasons were invalid.¹⁴⁰ They also found the “reasonable person” standard unworkable because it would require judges to ignore nondiscriminatory reasons for peremptory challenges.¹⁴¹ Ultimately, Arizona did not adopt the proposal.¹⁴²

All these approaches aim to make the *Batson* test more objective. On paper, the rules and legislation adopted to reform *Batson* preserve peremptory challenges while creating presumptions that protect people called to serve. It is too soon to tell whether the reform efforts effectively dispose of peremptories in practice or if they meaningfully depart from *Batson*. Some believe that as long as peremptory challenges are available, attorneys will use them discriminatorily, and with *Batson* reform, they “will simply become even more savvy when doing so.”¹⁴³ Just as attorneys previously learned to avoid offering discriminatory reasons for peremptory challenges, they might “simply shift” from the presumptively invalid reasons listed in rules and statutes “to an endless number of reasons that will still be available to them.”¹⁴⁴ Despite efforts to make *Batson* more effective, it could still be “too easy to evade.”¹⁴⁵

To be sure, GR 37 is changing jury selection and appellate review of peremptory challenges in Washington.¹⁴⁶ And it is likely that the rules and legislation modeled after GR 37 will also reveal changes in the courtroom. But even the Chief Justice of the Washington Supreme Court concluded that

139. Kip Anderson, Comment of the Mohave County Superior Court Judges at 1, *In re Batson Working Group Petition*, No. R-21-0008 (Ariz. Apr. 16, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1196> [<https://perma.cc/55AA-XNRG>].

140. Kenneth N. Vick, Chief Deputy, Maricopa County Attorney’s Comment in Opposition at 8, *In re Batson Working Group Petition*, No. R-21-0008 (Ariz. May 3, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1196/afpg/2> [<https://perma.cc/F5NS-N6BD>].

141. *See id.* at 7; Anderson, *supra* note 139, at 1.

142. *See* 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, 2244–45 (2022).

143. Mikel Steinfeld, Comment in Support of R-21-0020 at 11, *In re Swann & McMurdie Petition*, No. R-21-0020 (Ariz. May 3, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/PZ86-C9U2>].

144. *See* Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 CHI.-KENT L. REV. 65, 90–91 (2023).

145. *See id.* at 91.

146. *See* Sloan, *supra* note 107, at 255–59, 263 n.200; *see also* Riordon, *supra* note 122, at 111–12 (noting that Washington appellate courts reversed only one peremptory challenge between 1995 and 2017, but since GR 37, appellate courts have reversed at least eight peremptory challenges).

GR 37 did not go far enough.¹⁴⁷ He observed that although reforming *Batson* is an important step toward reducing bias in jury selection, the only way to overcome the problem fully is to eliminate peremptory challenges.¹⁴⁸

B. Arizona's Solution

Rather than trying to fix *Batson*, Arizona Supreme Court Petition R-21-0020 proposed eliminating peremptory challenges altogether.¹⁴⁹ The petition explained that *Batson* reform would not “be effective enough at eliminating the role race plays in jury selection.”¹⁵⁰ And if people were correct that the *Batson* reform rendered peremptory challenges meaningless, removing peremptories altogether would be more efficient and less burdensome for prospective jurors. The proposal preserved for-cause challenges and added that parties could stipulate to remove a juror.¹⁵¹

Several superior court judges supported the proposal, asserting that eliminating peremptory challenges is “a significant step toward making juries more representative.”¹⁵² They believed that the importance of representative juries outweighed concerns about increased litigation over for-cause challenges.¹⁵³ And they reasoned that eliminating peremptory challenges “dispenses with the guesswork required” in *Batson* reform to determine the litigants’ conscious or unconscious motivations.¹⁵⁴ Eliminating peremptories shifts the focus from the litigants’ motivations to the juror’s conscious and unconscious biases.¹⁵⁵ Other advocates believed the elimination would increase public trust.¹⁵⁶ After all, a system that prevents discrimination is more trustworthy than a system that “reduces discrimination by some measure.”¹⁵⁷

147. González, *supra* note 116, at 1; see *City of Seattle v. Erickson*, 398 P.3d 1124, 1134 (Wash. 2017) (Yu, J., concurring) (“I now join Justice González in calling for the complete abolishment of peremptory challenges.”).

148. González, *supra* note 116, at 1.

149. Swann & McMurdie Petition, *supra* note 5, app. A.

150. *Id.* at 14.

151. *Id.* app. A.

152. Charles W. Gurtler, Jr., Presiding Judge, Mohave Cnty. Superior Ct., Comment of the Committee on Superior Court at 2 (Apr. 12, 2021), *In re Swann & McMurdie Petition*, No. R-21-0020 (Ariz. May 3, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/G6KA-P8P9>].

153. *Id.* at 3–4.

154. See *id.* at 3.

155. See *id.*

156. See *id.* at 2.

157. Steinfeld, *supra* note 143, at 21–22.

But some Arizona legal community members believed that eliminating peremptory challenges would allow unfair or biased jurors to serve.¹⁵⁸ There was concern that for-cause challenges would be ineffective against biased jurors, typically removed by peremptory challenges, because the jurors could simply assure the court that they were fair and impartial despite their conscious or unconscious biases.¹⁵⁹ People also asserted that a litigant, rather than a judge, is better positioned to determine whether a juror's bias could affect a case and that the change placed too much power in the judiciary.¹⁶⁰ Highlighting that judges have their own biases, commenters thought this dynamic shift would undermine public confidence.¹⁶¹ Others were concerned that attorneys would not have enough time during voir dire to elicit facts supporting their for-cause challenges.¹⁶² People also thought the change would prolong jury selection and increase appellate litigation.¹⁶³

To alleviate many of the concerns, Arizona's Task Force on Jury Data Collection, Policies, and Procedures recommended that courts use jury questionnaires to streamline jury selection, allow more time for juror questioning, and train judicial officers on implicit bias and using for-cause strikes.¹⁶⁴ The task force also recommended increasing juror compensation to

158. See, e.g., William H. Sandweg III, Comment in Opposition, *In re Swann & McMurdie* Petition, No. R-21-0020 (Ariz. Apr. 13, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/7G6A-WKMM>]; Kent Hammond, Phx. Chapter of Am. Bd. of Trial Advoc., Objection to Proposed Amendments at 1, *In re Swann & McMurdie* Petition, No. R-21-0020 (Ariz. May 3, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/WQ4K-7RP3>]; Lisa M. Panahi, Gen. Counsel, State Bar of Ariz., Comment of the State Bar of Arizona at 1–6, *In re Swann & McMurdie* Petition, No. R-21-0020 (Ariz. Apr. 30, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/B5SX-AWXY>].

159. See, e.g., Hammond, *supra* note 158, at 1; James Schoppmann, Chief Deputy Mohave Cnty. Att'y, Comment in Opposition, *In re Swann & McMurdie* Petition, No. R-21-0020 (Ariz. Feb. 23, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/7G6A-WKMM>]; Vick, *supra* note 140, at 2–4.

160. Halpern, *supra* note 138, at 6–7; Victor Aronow, Comment of the Central Arizona National Lawyers Guild Opposing the Abolition of Peremptory Strikes at 3–4, 6–9, *In re Swann & McMurdie* Petition, No. R-21-0020 (Ariz. Apr. 23, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/MG8Z-9FED>].

161. See *id.*

162. See Tim Casey, Comment in Opposition, *In re Swann & McMurdie* Petition, No. R-21-0020 (Ariz. Feb. 4, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/7G6A-WKMM>]; Schoppman, *supra* note 159; Sandweg, *supra* note 158.

163. Halpern, *supra* note 138, at 5–6; Panahi, *supra* note 158, at 6–8.

164. ARIZ. TASK FORCE ON JURY DATA COLLECTION, POLICIES, & PROCS., *supra* note 83, at 5, 7–8. The Arizona Supreme Court issued its order eliminating peremptory strikes before the task force issued these recommendations. *Id.* at 2. Thus, the task force submitted a supplemental report to “evaluate whether additional rule revisions may be necessary or appropriate.” *Id.*; see also STATEWIDE JURY SELECTION WORKGROUP, REPORT AND RECOMMENDATIONS (2021),

expand service opportunities for individuals unable to serve due to hardship.¹⁶⁵

Effective January 1, 2022, the Arizona Supreme Court eliminated peremptory challenges.¹⁶⁶ Though other states had considered eliminating peremptories,¹⁶⁷ Arizona was the first to act.¹⁶⁸ As a result, during jury selection in Arizona, the party challenging a juror must show “by a preponderance of the evidence that the juror cannot render a fair and impartial verdict.”¹⁶⁹ When determining whether to excuse a juror for cause, “the court must consider the totality of a prospective juror’s conduct and answers given during voir dire.”¹⁷⁰ The court must excuse the juror if there are reasonable grounds to believe the juror cannot be fair and impartial.¹⁷¹ Or, “[t]he court may excuse a prospective juror upon stipulation of the parties.”¹⁷²

The Arizona Supreme Court adopted the task force recommendations and addressed community concerns about effective voir dire and the seating of biased jurors. On request, a court must allow the parties sufficient time to conduct oral voir dire.¹⁷³ The rule comments advise courts to “permit liberal and comprehensive examination” and “refrain from imposing inflexible time limits.”¹⁷⁴ The rules also encourage courts to ensure that jurors complete case-specific questionnaires about their qualifications to serve, hardships that would prevent jury service, and their fairness and impartiality.¹⁷⁵ To avoid

https://www.azcourts.gov/Portals/74/Jury%20TF/SJS%20Workgroup/SJSW_Final%20Report%20and%20Recommendations_11_01_21.pdf [<https://perma.cc/GW6N-46R8>].

165. ARIZ. TASK FORCE ON JURY DATA COLLECTION, POLICIES, & PROCS., *supra* note 83, at 5–7.

166. 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. Aug. 30, 2021).

167. *See, e.g.*, GR 37 FINAL REPORT, *supra* note 109, at 3; CONN. JURY SELECTION TASKFORCE, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 30–32 (2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf [<https://perma.cc/K9VF-P27T>]; JURY SELECTION WORK GRP., FINAL REPORT TO THE SUPREME COURT OF CALIFORNIA 26–28 (2022), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-09/Jury%20Selection%20Work%20Group%20Final%20Report.pdf> [<https://perma.cc/4SRG-E7FP>].

168. *See Kanu, supra* note 7.

169. ARIZ. R. CRIM. P. 18.5(h); ARIZ. R. CIV. P. 47(d)(3); ARIZ. R. P. EVICTION ACTIONS 12(a); ARIZ. JUST. CT. R. CIV. P. 134(a)(1).

170. ARIZ. R. CRIM. P. 18.5(h); ARIZ. R. CIV. P. 47(d)(3).

171. ARIZ. R. CRIM. P. 18.4(b); ARIZ. R. CIV. P. 47(d)(3).

172. ARIZ. R. CRIM. P. 18.5(i); ARIZ. R. CIV. P. 47(d)(4).

173. ARIZ. R. CRIM. P. 18.5(f); ARIZ. R. CIV. P. 47(c)(5).

174. ARIZ. R. CRIM. P. 18.5(f) note to 2022 amendment; ARIZ. R. CIV. P. 47(c)(5) note to 2022 amendment.

175. ARIZ. R. CRIM. P. 18.5(c); ARIZ. R. CRIM. P. 18.5(c) note to 2022 amendment; ARIZ. R. CIV. P. 47(c)(3); ARIZ. R. CIV. P. 47(c)(3) note to 2022 amendment.

court rehabilitation of prospective jurors, the comments advise courts to refrain from encouraging jurors “to affirm that they can set aside their opinions and neutrally apply the law.”¹⁷⁶

The legislature also increased juror compensation.¹⁷⁷ It eliminated requiring jury service to last more than five days to be eligible for Arizona’s Trial and Digital Evidence Fund.¹⁷⁸ Now, in addition to the daily \$12 payment and mileage reimbursement,¹⁷⁹ all petit jurors who receive less than full compensation from their employment can request supplemental income from the Fund.¹⁸⁰ The statutory amendment is a significant step toward removing socioeconomic barriers to jury service that could impact the demographic composition of jury pools.¹⁸¹

III. ARIZONA ANALYSIS

With only two years having passed since Arizona eliminated peremptory challenges,¹⁸² available data is limited. But several state and national organizations are collecting information on how the change is impacting jury populations in Arizona,¹⁸³ including the Arizona Supreme Court’s appointed

176. ARIZ. R. CIV. P. 47(c)(5) note to 2022 amendment; ARIZ. R. CRIM. P. 18.5(f) note to 2022 amendment. Historically, Arizona had a low standard for accepting rehabilitation, and courts seated jurors “based on ambiguous responses to rehabilitating questions.” Christopher A. Cospers, Note, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1489–90 (2003). And it is difficult for jurors to tell the judge they cannot be fair or impartial, and thus the jurors will often respond favorably to the judge’s rehabilitation questions. See, e.g., Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 LAW & HUM. BEHAV. 212, 213 (2010) (“Interviews with former jurors suggest that they were torn between their reluctance to admit to a judge that they would be unwilling to follow the law and their desire to follow their values and conscience, leading jurors to give dishonest answers during voir dire.” (citation omitted)).

177. 2022 Ariz. Sess. Laws 1722, 1724 (codified at ARIZ. REV. STAT. ANN. § 21-222(C)(1) (2024)).

178. ARIZ. REV. STAT. ANN. § 21-222(C)(1) (2024).

179. *Id.* § 21-221(A).

180. § 21-222(C)(1). Jurors who request payment from the fund will receive between \$40 and \$300, depending on the juror’s regular earnings, jury fees, and how much the jury’s employer will pay. § 21-222(D).

181. ARIZ. TASK FORCE ON JURY DATA COLLECTION, POLICIES, & PROCS., *supra* note 83, at 27–28.

182. See 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. Aug. 30, 2021).

183. For instance, in August 2022, Arizona State University and others received \$2.7 million from the Office of Justice Programs’ National Institute of Justice to assess how Arizona’s recent elimination of peremptory challenges is affecting jury selection and racial diversity on the jury.

Task Force on Jury Data Collection, Practices, and Procedures.¹⁸⁴ The Arizona Judicial Council (“AJC”)¹⁸⁵ has also compared data collected from the Maricopa County Superior Court calendar years 2019 and 2022.¹⁸⁶ Given that they are some of the first released data on the subject, this Article will mainly explore the AJC’s findings when analyzing the net impact of eliminating peremptory challenges.

We note that this Article does not compare the efficacy of Arizona’s system to GR 37 or any other state’s alternative. It is too soon to know the effect of each approach, and we leave such a comparison to a future author. Instead, we restrict our view to whether the new Arizona policy is an improvement over the previous system. To that end, we will consider whether Arizona has seen an increase in juror diversity and whether the court system has experienced negative consequences since the change.

A. Maricopa County 2022 Data Shows an Increase from 2019 in Underrepresented Minorities Serving on the Petit Jury

Our analysis is most interested in whether after eliminating peremptory challenges, members of underrepresented populations are disproportionately reduced between the venire’s creation and the final jury empanelment. One relevant metric is the “loss rate” between those two points: the percentage of

Press Release, Off. of Just. Programs, U.S. Dep’t of Just., National Institute of Justice Funds Research to Address Racial and Ethnic Disparities in Justice System (Aug. 24, 2022), <https://www.ojp.gov/files/archives/pressreleases/2022/nij-funds-research-address-racial-and-ethnic-disparities-justice-system> [<https://perma.cc/5WT3-JN6J>]. As of this Article’s publication, Arizona State University has not yet released its report.

184. ARIZ. TASK FORCE ON JURY DATA COLLECTION, POLICIES, & PROCS., *supra* note 83, at 20 (“exploring and making recommendations on ‘data collection, including demographic data that are important to determine jury composition.’”).

185. See generally *Arizona Judicial Council*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/ajc> [<https://perma.cc/L7TR-8XFP>] (“The [AJC] is a policy-making body that oversees the judicial system in Arizona. AJC was created in 1990 and, in accordance with Arizona Code of Judicial Administration § 1-104, assists the Supreme Court and the Chief Justice in the development and implementation of policies and procedures for the administration of all courts, uniformity in court operations, and coordination of court services that will improve the administration of justice in the state of Arizona.”).

186. 2019 was the last full year before the peremptory process was modified by administrative order for the COVID-19 pandemic, *Arizona’s Groundbreaking Venture . . . Eliminating Peremptory Challenges*, NAT’L ASS’N FOR PRESIDING JUDGES & CT. EXEC. OFFICERS slide 13 (Jan. 27, 2022), https://napco4courtleaders.org/wp-content/uploads/2022/01/NAPCO_Webinar-220127-AZ_Eliminates_Peremptories-SLIDES.pdf [<https://perma.cc/3B2V-6T72>], and 2022 is the first full year after the elimination of peremptory challenges.

minorities in the venire minus the percentage ultimately serving on the petit jury.

Figure 1. Loss Rate Comparison for Criminal Juries¹⁸⁷

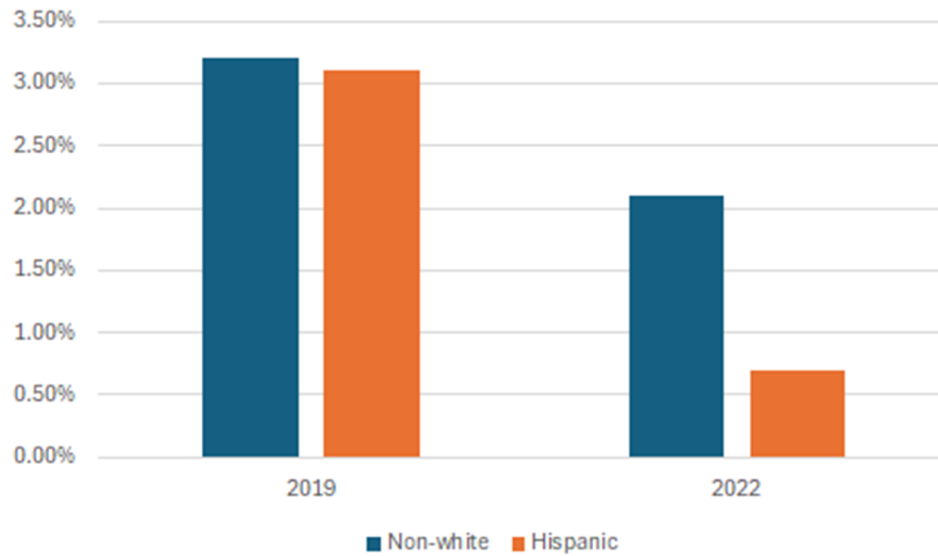
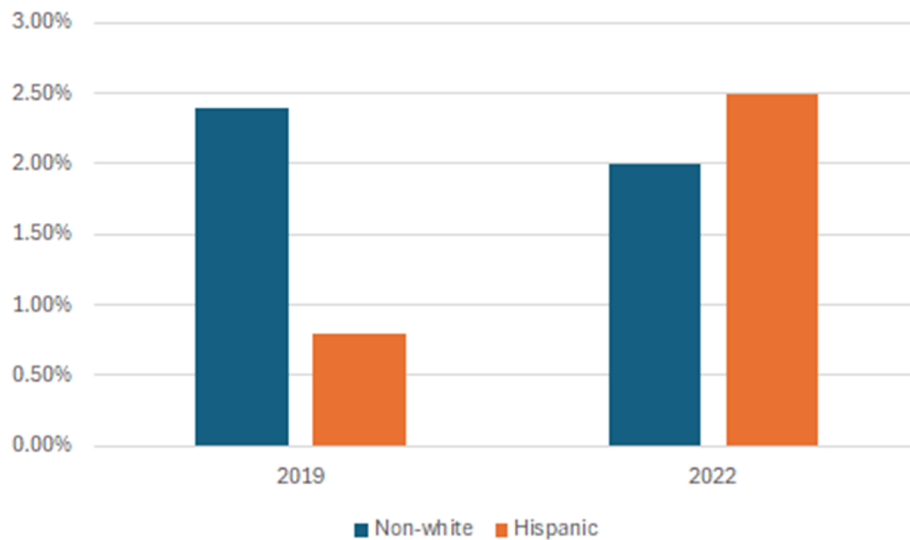


Figure 2. Loss Rate Comparison for Civil Juries¹⁸⁸



187. See Presentation, Ariz. Jud. Council, slide 8 (June 27, 2023) [<https://perma.cc/7B2N-7H2N>].

188. *Id.* slide 9.

As shown by Figures 1 and 2, among the four measured categories, loss rates for racial and ethnic minorities have generally decreased. After removing peremptory challenges, the non-white loss rate fell by about one-third in criminal cases and one-sixth in civil cases. The change in Hispanic loss rate is more mixed, having greatly decreased in criminal cases while increasing in civil cases.

The AJC's report also examined overall changes in the racial and ethnic makeup of empaneled juries between 2019 and 2022. For criminal trials, the data shows a 6% increase in empaneled jurors who identified as a person of color and a 15% increase in those who identified as Hispanic.¹⁸⁹ Civil trials showed a 15% increase in self-identified people of color but a 4% decrease in those identified as Hispanic.¹⁹⁰ These changes harmonize with the loss rate statistics, showing increased jury diversity and representation after removing peremptory challenges.

We acknowledge that many factors explain the difference between the number of racial and ethnic minorities in Arizona's general population and the number that arrive at the court for jury service.¹⁹¹ The difference may be attributed partly to underrepresentation on the jury master list from which names are called.¹⁹² Moreover, jury service may cause financial hardship for hourly workers who would not be paid, contract workers who may lose employment opportunities, and those whose employers would not react favorably to an absence for jury service.¹⁹³ Racial and ethnic minorities may comprise a disproportionate share of those who cannot serve because of financial hardship,¹⁹⁴ and so this may be a reason many fail to respond to jury summons. Arizona's adoption of increased juror compensation may improve

189. *Id.* slides 13, 15.

190. *Id.* slides 17, 19.

191. For a deeper investigation of the factors influencing who responds to jury summons, see Timothy H. Sparling et al., *Jury Pools: Drowning in Unfairness*, ARIZ. ATT'Y, Jan. 2022, at 14.

192. Arizona maintains a list of individuals who either are registered to vote or who have an Arizona driver's license. ARIZ. REV. STAT. ANN. § 21-301 (2024). Perhaps some racial or ethnic minorities are disproportionately not registered to vote or licensed to drive and are thus not even considered for jury service. *Cf.* ARIZ. TASK FORCE ON JURY DATA COLLECTION, POLICIES, & PROCS., *supra* note 83, at 19 (recommending an assessment of the inclusiveness of jury master lists). The task force tried to evaluate the adequacy of current source lists, but "there was inconsistent availability of detailed data from courts related to summoning, response rates, and juror use from which to consider adequacy of the source lists." *Id.* at 22.

193. For an analysis of income and wealth-based juror exclusion, see generally Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613 (2021).

194. See *Earnings Disparities by Race and Ethnicity*, U.S. DEP'T LABOR, <https://www.dol.gov/agencies/ofccp/about/data/earnings/race-and-ethnicity> [<https://perma.cc/8Z2M-WWCX>] (explaining that relative to white workers, Black workers in Arizona earn \$0.72 on the dollar and Hispanic/Latino workers earn \$0.68 on the dollar).

the response rate among those who would otherwise not respond for financial reasons.¹⁹⁵ The task force has also recommended the implementation of statewide information campaigns “to generate a culture of ownership of our justice system, promote the importance of participation in jury service, increase the public’s willingness to participate in jury service, and attempt to confront and overcome negative attitudes about jury service.”¹⁹⁶

Still, even if underrepresentation originates in the steps before jurors arrive at the courthouse, Maricopa County’s data suggests that, under Arizona’s new system, racial and ethnic minorities who show up to serve are less likely to be disproportionately removed before empanelment.

B. The Data Does Not Show the Anticipated Consequences of the Policy’s Adoption

The AJC’s data addressed concerns raised by the new system’s critics. Some critics argued that there are biased potential jurors—but who will insist that they are unbiased and thus cannot be removed for cause—and that peremptories are necessary for attorneys to remove these jurors.¹⁹⁷ Ostensibly, the failure to eliminate these jurors through peremptory challenges might lead to increased rates of hung juries, mistrials, and other impediments to the administration of justice.¹⁹⁸

But the data proves otherwise. In 2019, less than 7% of criminal jury trials led to a hung jury; the 2022 data reflects the same rate.¹⁹⁹ And, in fact, the

195. *First Time in over 50 Years Arizona Courts Increase Juror Pay*, ARIZ. DAILY INDEP. NEWS NETWORK (Sept. 27, 2022), <https://arizonadailyindependent.com/2022/09/27/first-time-in-over-50-years-arizona-courts-increase-juror-pay> [<https://perma.cc/2DU7-2E85>]; see also ARIZ. REV. STAT. ANN. § 21-222 (2024).

196. ARIZ. TASK FORCE ON JURY DATA COLLECTION, POLICIES, & PROCS., *supra* note 83, at 3–4.

197. See Paul McGoldrick, State Comm. Chair, Ariz. Chapter of Am. Coll. of Trial Laws., Objection to the Proposed Amendments on Behalf of the Arizona Chapter of the American College of Trial Lawyers at 1, *In re Swann & McMurdie Petition*, No. R-21-0020 (Ariz. Apr. 20, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/A5PM-SRC8>]; Michael E. Bradford, Comment in Opposition at 1, *In re Swann & McMurdie Petition*, No. R-21-0020 (Ariz. May 3, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/HA4A-QC3Z>]; Elizabeth Burton Ortiz, Exec. Dir., Comment of the Arizona Prosecuting Attorneys’ Advisory Council at 1, *In re Swann & McMurdie Petition*, No. R-21-0020 (Ariz. Apr. 30, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/8DH3-Y28B>]; Hammond, *supra* note 158; Vick, *supra* note 140.

198. See sources cited *supra* note 197.

199. In 2019, 27 out of 409 juries were hung, while 13 of 195 were in 2022. Presentation, Ariz. Jud. Council, *supra* note 187, slide 24.

rate of mistrials in criminal cases decreased in 2022.²⁰⁰ On the civil side, there were no hung juries and just two mistrials in 2019, and there was one hung jury and four mistrials in 2022 (out of a similar number of total cases).²⁰¹ There is a small increase in hung juries and mistrials in the civil docket.²⁰² Still, overall, both numbers are minuscule (and likely within the bounds of expected variance) given that hundreds of cases were successfully tried each year.²⁰³ In sum, there is no substantial evidence that removing peremptory challenges adversely impacted the jury's ability to reach verdicts.

Others challenged the conviction rate under a system without peremptories.²⁰⁴ We reviewed Maricopa County criminal cases from 2019 and 2022,²⁰⁵ compiling a list of all charges that reached a jury verdict.²⁰⁶ From that list of over 1800 charges across the two years, we found the following conviction rates:

200. In 2019, there were 23 mistrials out of 451 trials (about 5%), while there were just 3 mistrials out of 195 trials in 2022 (less than 2%). Presentation, Ariz. Jud. Council, *supra* note 187, slide 24.

201. *Id.*

202. *Id.*

203. *See id.*

204. *See* Panahi, *supra* note 158 (“Without recourse to exclusion of questionable jurors through peremptories, capital defendants may face ‘conviction prone’ jurors.”); Kip Anderson, Comment of the Mohave County Superior Court Judges, *In re Swann & McMurdie* Petition, No. R-21-0020 (Ariz. Apr. 15, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/7G6A-WKMM>] (“We are concerned that without peremptory challenges, criminal defendants would be required to acquiesce to jurors who have expressed views who disfavor them [D]efendants should be permitted to use peremptory strikes to remove these jurors because of the likelihood that implicit bias or prejudice would influence their decisions.”); Aronow, *supra* note 160 (“[A]bolition of peremptory strikes for criminal defendants exacerbates the unequal power held by the state.”); For a further discussion on this topic, see Gurtler, *supra* note 152 (noting that the dissenting votes in the Committee on Superior Court contend the change “would take from all defendants . . . the only tool they have to protect themselves from [jury] panel members who have hidden biases”).

205. Our 2022 conviction rate data spanned from January 2022 until April 2023. We have no reason to believe that the extra months in 2023 affected the overall results, and for simplicity, we refer to this conviction rate data as “2022 data.”

206. Compiled Data Spreadsheet of Maricopa County Superior Court Criminal Cases (on file with author). For the source data in its raw form, see JUDICIAL BRANCH OF ARIZ. IN MARICOPA CNTY., INTEGRATED COURT INFORMATION SERVICES (last visited Apr. 11, 2024) (filtering for 2019 and 2022 cases marked as “guilty by jury” or “not guilty by jury”). For information on how to access and navigate the Integrated Court Information System (“ICIS”), see *Electronic Court Records*, CLERK MARICOPA CNTY. SUPERIOR CT., <https://www.clerkofcourt.maricopa.gov/records/electronic-court-records-ecr> [<https://perma.cc/4VJX-XCX4>].

Figure 3. Conviction Rates (Separately Considering Guilt of Lesser Included Offenses)²⁰⁷

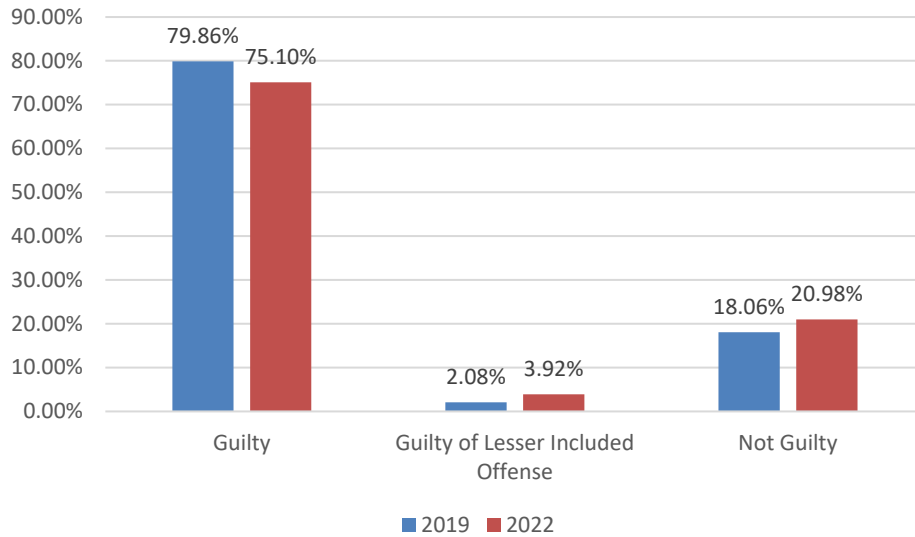
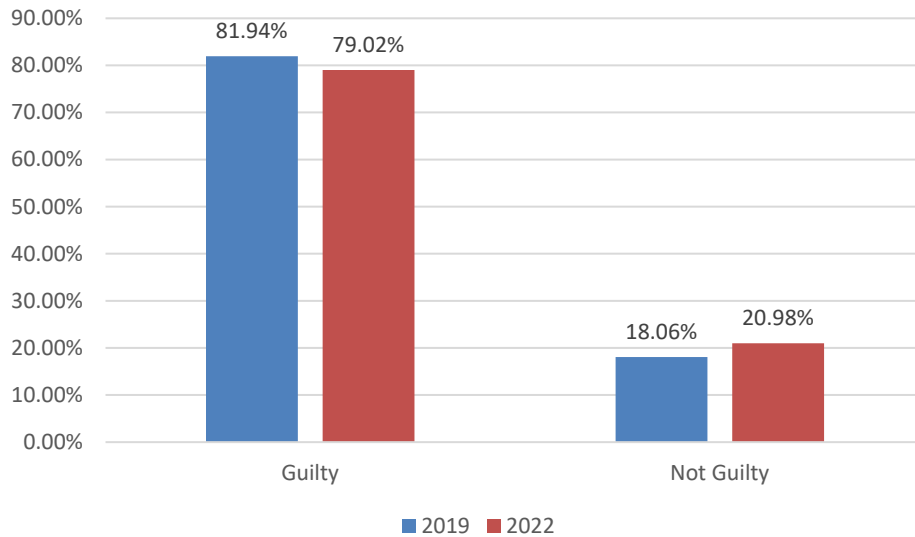


Figure 4. Conviction Rates (Merging Lesser Included Offenses with Other Guilty Verdicts)²⁰⁸



The data in Figures 3 and 4 shows no significant deviation (roughly 2%) in the conviction rate since the rule change. And contrary to anticipated concerns, the conviction rate decreased between the two years.²⁰⁹

Additionally, Arizona’s rule changes offset the potential for harm by would-be “difficult” jurors by expanding the ability of litigants to strike jurors for cause if necessary.²¹⁰ The new rules direct that, if requested, courts “must” allow sufficient time for the parties to conduct the examination.²¹¹ Courts may also provide for the use of written questionnaires.²¹²

That said, what constitutes “sufficient time”, and “reasonable limitations” is open to trial courts’ interpretation.²¹³ And the written questionnaires are not required; they “may” be used.²¹⁴ So the rules’ effectiveness somewhat depends on buy-in by superior court judges.

In this regard, the data suggests that judges support the change. By April 2022, 85% of Maricopa County superior court judges reported using case-specific questionnaires for jury selection, and over half reported that they “always” use them.²¹⁵ Questionnaire use increased throughout 2022.²¹⁶ And 100% of the judges who used digital questionnaires reported that they assisted in jury selection.²¹⁷

Still, this leads to another concern that critics raised: that removing peremptory challenges, adding questionnaires, and expanding oral examination would decrease efficiency in the jury selection process. Some worried that, without peremptory challenges, the voir dire process would require more time to assess potential jurors than judges would allot.²¹⁸ Others opposed the change out of concern that the number of for-cause challenges would increase, extending voir dire and making the jury selection process more time-consuming.²¹⁹

207. Compiled Data Spreadsheet of Maricopa County Superior Court Criminal Cases (on file with author).

208. *Id.*

209. *See id.*; *see also* sources cited *supra* note 205.

210. *See* ARIZ. R. CIV. P. § 47(c)(5) note to 2022 amendment; ARIZ. R. CRIM. P. § 18.5(f) note to 2022 amendment (“[T]he court should permit liberal and comprehensive examination by the parties . . . [and] refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions.”).

211. ARIZ. R. CIV. P. § 47(c)(5).

212. *Id.*

213. *Id.*

214. *Id.*

215. Presentation, Ariz. Jud. Council, *supra* note 187, slide 21.

216. *Id.* slide 20.

217. *Id.* slide 21.

218. *See* Casey, *supra* note 162; Schoppmann, *supra* note 159; Sandweg, *supra* note 158; Aronow, *supra* note 160.

219. *See* Corey E. Tyszka, Mut. Ins. Co. of Ariz. & HonorHealth, Comment to Proposed Amendment of Rule 47(e) of the Arizona Rules of Civil Procedure at 1, *In re* Swann & McMurdie Petition, No. R-21-0020 (Ariz. May 3, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208> [<https://perma.cc/RF74-9GC6>]; Halpern, *supra* note 160; Anderson, *supra* note 204.

But the data shows that neither concern was justified. Maricopa County had over 614 civil and criminal trials from 2018 to 2019, and jury selection took an average of 0.72 days.²²⁰ The 2022 data presented an average of just 0.78 days.²²¹ The data shows a reduction in the time spent on jury selection as the year progressed: the first few months immediately following the change required more time conducting voir dire, but the latter half of the year tracks pre-change timeframes very closely.²²² This data is unsurprising, as any procedural change will likely result in temporarily reduced efficiency as judges adjust their methodology.²²³ The total time of the trial process has also not expanded because of the change. Before the peremptory change, the average criminal trial lasted 7.0 days; in 2022, the average increased to just 7.2 days.²²⁴

Of course, the trial's duration is just one factor contributing to the cost of running the courts. The number of summoned jurors also plays a part: the more jurors summoned, the greater the cost to the taxpayers.²²⁵ And, cursorily, eliminating peremptory challenges means that a greater proportion of those summoned ultimately serve on the trial—reducing the overall demand for prospective jurors.²²⁶

The data from before and after removing peremptory challenges shows that efficiency in juror summons significantly improved. This was quantified with an efficiency factor, calculated as the number of required prospective jurors divided by the number of ultimately empaneled jurors. A low quotient signals higher efficiency: for instance, if *no* prospective jurors are removed, the efficiency factor would be 1.0; if 50% are struck, the factor would be 2.0.

The average efficiency factor in 614 trials from 2018 and 2019 was 4.3, with a median of 3.8.²²⁷ In 2022, the average factor was 3.1, with a median of 2.6.²²⁸ These reduced numbers mean fewer jurors were summoned—and paid—to be removed from the panel. While cost savings may not be the

220. Presentation, Ariz. Jud. Council, *supra* note 187, slide 22.

221. *Id.*

222. *Id.*

223. See ARIZ. R. CIV. P. 47(c)(5) note to 2022 amendment; ARIZ. R. CRIM. P. 18.5(f) note to 2022 amendment (“[T]he court should . . . refrain from imposing inflexible time limits.”).

224. Presentation, Ariz. Jud. Council, *supra* note 187, slide 27. We note that the data used here averaged both 2018 and 2019 data in reaching its pre-change trial duration.

225. See *Jury Service Is a Key Civic Duty—Peremptory Challenges Prevent Black People from Serving*, DC JUST. LAB (Nov. 1, 2023), <https://dcjusticelab.org/library/prosecution/jury-selection> [<https://perma.cc/9U5B-XKLN>].

226. See *id.*

227. See Presentation, Ariz. Jud. Council, *supra* note 187, slide 28.

228. *Id.*

ultimate goal, it is a valuable side benefit of eliminating peremptory challenges.

But what do the trial judges implementing the new system believe? According to a statewide survey of trial judges in June 2022, 72% responded they had no concerns about the jury selection process following the rule change.²²⁹ In Maricopa County, 91% of judges reported they have reduced or eliminated attempts to rehabilitate jurors, and 97% of judges reported using open-ended questions during the voir dire.²³⁰

C. Next Steps

After eliminating peremptory challenges, preliminary data shows court improvements and no evidence of downsides. We acknowledge that more data is needed, and we should review data from non-Maricopa counties. We await the researchers' reports on these issues, recognizing our understanding will only improve with time, more data, and further analysis.

Second, we reiterate that other systemic changes are necessary to increase jury representation. Imperfect jury master lists,²³¹ race-correlated economic inequality,²³² and various other factors likely generate an unrepresentative venire—before the removal of potential jurors is even at play. But removing opportunities to discriminate during jury selection moves the justice system in the correct direction.

Third, we highlight that the data collected mainly focuses on race and ethnicity. While this helps determine whether the elimination of peremptory challenges has impacted racial and ethnic diversity, a more thorough investigation might also analyze whether the change has had any effect on other historically marginalized groups.²³³

And lastly, we recognize that other recent changes between 2019 and 2022 may have influenced the results. As mentioned above, the Arizona legislature passed a statutory amendment increasing juror compensation beginning in

229. *Id.* slide 23.

230. *Id.*

231. *See* ARIZ. REV. STAT. ANN. § 21-301 (2024); *see also supra* note 192 and accompanying text.

232. *See generally* *Wealth Gaps Within Racial and Ethnic Groups*, PEW RSCH. CTR. (Dec. 4, 2023), <https://www.pewresearch.org/race-ethnicity/2023/12/04/wealth-gaps-within-racial-and-ethnic-groups> [<https://perma.cc/2UCQ-YTHN>] (“The disparity in wealth between richer and more solvent households is most pronounced among Black Americans and Hispanics.”).

233. *See, e.g., supra* note 17 and accompanying text.

September 2022, which could have decreased removals for hardship.²³⁴ There have also been changes to voir dire with pre-screen questionnaires to survey for hardship or case-specific bias.²³⁵ Finally, we cannot rule out the effect of the COVID-19 pandemic—and shifting public attitudes toward health, safety, and best practices—as a possible source of changes in representation on a jury.²³⁶

We encourage other jurisdictions to survey their post-*Batson* systems and assess the results. We are under no illusion that Arizona’s recent rule change is a silver bullet, but the American laboratory of democracy²³⁷ should serve as a fine medium to develop an ever-improving response to the challenges posed by racial inequities within our justice system.²³⁸

IV. CONCLUSION

Much remains to be done before Arizona juries reflect their local communities’ diversity. But eliminating peremptory challenges was one step Arizona has taken toward attaining this goal. Data taken from just one year under the new rules has shown an increase in racial and ethnic minority representation without a surge in trial length, the number of mistrials, or convictions.²³⁹ And trial judges and litigants have generally expressed positive views of the new rule when polled.²⁴⁰ With these successes in mind, we look forward to the continued use of the new system and encourage other jurisdictions to consider the same.

234. See *supra* notes 177–81 and accompanying text; see also ARIZ. REV. STAT. ANN. § 21-222(C)(1) (2024).

235. See Presentation, Ariz. Jud. Council, *supra* note 187, slides 20, 21; see also ARIZ. R. CRIM. P. § 18.5(c) and note to 2022 amendment; ARIZ. R. CIV. P. § 47(c)(3) and note to 2022 amendment.

236. Cf. *Trends in Racial and Ethnic Disparities in COVID-19 Hospitalizations, by Region—United States, March–December 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 16, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7015e2.htm> [<https://perma.cc/F799-4PN5>].

237. See generally *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . . without risk to the rest of the country.”).

238. See generally Marder, *supra* note 144 (noting ongoing reform efforts in other states).

239. See *supra* Sections III.A–B.

240. See *supra* Section I.B.