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## Antidiscrimination Law Through a Sociolegal Lens

Anna Offit

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# ANTIDISCRIMINATION LAW THROUGH A SOCIOLEGAL LENS

*Anna Offit*

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# ANTIDISCRIMINATION LAW THROUGH A SOCIOLEGAL LENS

*Anna Offit\**

## INTRODUCTION

This Symposium invites reflection on whether the Anthropology of Law has “any space left for the content of rules” at a time when the concerns of legal anthropologists have largely shifted to processes, materials, and practices that are “adjacent to law.”<sup>1</sup> Taking the jury system as an illustrative case, this Essay advocates for the relevance and value of the anthropological study of rules, their content, and their effects. Looking in particular at antidiscrimination rules derived from *Batson v. Kentucky*,<sup>2</sup> decided in 1986, it argues that a sociolegal, ethnographic approach to how lawyers perpetuate discrimination in jury selection offers insight into everyday legal practice that is critical to enacting impactful jury reform—that is, to making better rules.

Part I of this Essay provides background on the *Batson* doctrine with attention to its misguided aspiration to race neutrality and emphasis on racial animus as the cause of disparate empanelment. Part II shows how ethnography leads to a more sophisticated, empirically grounded understanding of these issues, casting new light on racial and other forms of exclusion, including exclusion based on socioeconomic status and previous contact with the legal system. Part III makes the case that sociolegal approaches to jury selection are invaluable for illuminating the effects of, and reformative pathways for, antidiscrimination law.

## I. ANTIDISCRIMINATION LAW AND THE JURY

Judges and attorneys who wish to excuse otherwise eligible citizens from serving on juries have two options. The court can dismiss prospective jurors “for cause” based on their (perceived) partiality to one side of a case, or lawyers can exercise an allotted number of “peremptory strikes,” which can draw on a

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\* Assistant Professor of Law, SMU Dedman School of Law. This Essay is indebted to thoughtful comments and recurrent conversations with Deepa Das Acevedo, Anya Bernstein, Matthew Canfield, Riaz Tejani, Matthew Erie, Gwen Gordon, Jeff Kahn, Meghan Morris, and other participants in the Legal Anthropology roundtables and panels convened at the Law & Society Association and American Anthropological Association annual meetings. Thank you, also, to Kelly McKowen for invaluable feedback and support and to the staff of the *Alabama Law Review* for bringing this interdisciplinary discussion to a broader audience.

1. Deepa Das Acevedo, *Sweet Old-Fashioned Notions*, 73 ALA. L. REV. 719, 725 (2022).
2. 476 U.S. 79 (1986).

broader range of concerns about a juror's character or perceived fairness.<sup>3</sup> Certain bases of juror dismissal using a peremptory strike, however, are flatly prohibited. The antidiscrimination law that prohibits the use of peremptory strikes based on race,<sup>4</sup> sex,<sup>5</sup> and other protected characteristics is rooted in the U.S. Supreme Court's *Batson v. Kentucky* opinion.

An enduring contribution of the opinion is the so-called *Batson* doctrine—a three-step process by which a party can contest an adversary's removal of a juror.<sup>6</sup> First, the party opposing the peremptory removal of a juror is required to make a *prima facie* case of discrimination.<sup>7</sup> Second, once the judge has established the first requirement has been met, the challenged party can present “neutral” explanations for the strike decision in question.<sup>8</sup> Third, and finally, the party that has initiated the challenge is asked to demonstrate that the stated “neutral” rationales of the challenged party are in fact pretexts for race, sex, or another protected characteristic.<sup>9</sup>

The *Batson* doctrine has been roundly criticized for its ineffectiveness in deterring and correcting the racial disparities of contemporary juries.<sup>10</sup> Its issues have helped expose significant flaws in how courts approach antidiscrimination efforts more broadly. As Justice Thomas emphasized in his *Flowers v. Mississippi* dissent, the *Batson* doctrine pursues a “neutral” or colorblind orientation toward jury composition.<sup>11</sup> The intent of the law is to prevent lawyers from taking characteristics like race into account in the first place, as this may lead to the prejudicial dismissal of particular jurors on illegitimate grounds.<sup>12</sup> As anthropologists and others have pointed out, however, centering race as an explicit category of reflection, even if for the sake of fighting racism, can lead to the reification of racial categories—amplifying their perceived significance in the minds of lawyers, if only to make sure that one is not giving the appearance of selecting a jury based on race.<sup>13</sup> In trying to exorcise race through emphasis

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3. See Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1587–88 (2012).

4. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

5. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994).

6. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995).

7. *Id.* at 767.

8. *Id.* at 767–68.

9. *Id.* at 768.

10. See Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 72–75 (2009); see also Marder, *supra* note 3.

11. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2271 (2019) (Thomas, J., dissenting) (“[T]he racial composition of a jury could affect the outcome of a criminal case. . . . Thus, . . . allowing the defendant an opportunity to ‘secur[e] representation of the defendant’s race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.’” (citing *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring))).

12. See *id.* at 2240–41.

13. See, e.g., Barbra Koenig, *Which Differences Make a Difference? Race, Health, and DNA*, in *DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* 160 (Hazel Rose Markus & Paula M.L. Moya eds., 2010) (discussing the extent to which explicit discussion of race can emphasize perceptions that racial distinctions are biologically rooted rather than socially constructed).

on neutrality, the *Batson* doctrine magnifies its significance. An ethnographic perspective can help us understand the implications of this race-centered approach.

Another feature of the *Batson* doctrine is its emphasis on racial animus as the basis of discriminatory empanelment. It takes for granted that behind pretextual arguments lies antipathy for some jurors based on race. In fact, as the doctrine is formulated and applied in most jurisdictions, the successful adjudication of a *Batson* challenge presumes that the accused party has acted *deliberately*.<sup>14</sup>

A sociolegal perspective shows this emphasis on conscious racial animus is shortsighted. In America's courts, race-based jury exclusion is often not a goal but an outcome of discrimination based on socioeconomic status (i.e., perceived "financial hardship") and negative contact with law enforcement officers—both things that disproportionately affect people of color.<sup>15</sup> In short, while *Batson* may prevent lawyers from picking jurors based on race, it continues to permit the excusal of jurors based on experiences and characteristics that are entwined with race in the contemporary United States. When judges and juries impute bias or insurmountable hardship to people who are poor or people who do not trust the police, they are increasing the likelihood that the jury will not reflect the diversity of the community from which it is drawn.

A sociolegal view, rooted in ethnographic data, can also help demystify the actual process by which prosecutors assess and empanel prospective jurors. Throughout jury selection, prosecutors discuss their impressions of prospective jurors. These private, off-the-record conversations reveal the forms and sources of information that prosecutors deem relevant to their evaluations. These discussions also illuminate the various interpretive resources lawyers draw on to make sense of prospective jurors, including their contact with colleagues, contact with prospective jurors in other cases, and impressions of juries from their own or their colleagues' cases.

A sociolegal approach to jury selection shows juror exclusion under *Batson* to be an exclusive product of neither deliberate racial discrimination nor reliance on stereotypes beyond one's conscious awareness. In practice, prosecutors contribute to jury selection in ways that reflect diverse and sometimes contradictory interests and commitments. A sociolegal perspective helps to illuminate these interests and commitments as aspects of everyday practice and interaction, supplying insights that can be used to improve antidiscrimination law in the service of producing representative juries.

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14. See WASH. SUP. CT., NEW GENERAL RULE 37: JURY SELECTION (2018), which modified the *Batson* doctrine by acknowledging the possibility a lawyer might be motivated by institutional or unconscious bias.

15. See Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 42 n.121 (2019).

## II. BEYOND RACIAL ANIMUS

The mechanics of the three-step *Batson* test have remained largely unchanged since 1986.<sup>16</sup> Unfortunately, the empirical reality of jury exclusion has remained intact as well, with researchers continuing to find that judges, prosecutors, and defense attorneys excuse prospective jurors from venires along racial lines.<sup>17</sup> For the reasons discussed in the last section, ethnographic attention to the jury selection process can help us better understand the failure of formal antidiscrimination rules to prevent the racial disparities that continue to characterize jury participation.

*A. Race-Conscious Approaches to Voir Dire*

In my own ethnographic research among federal prosecutors, I noted an acute self-consciousness about the possibility of being subject to a *Batson* challenge. Prosecutors were concerned that being the object of a challenge would signal to others that they had deliberately and illegally excluded prospective jurors. Some prosecutors I observed in my research were so anxious about being suspected of racial animus under *Batson* that they made a concerted effort to identify and keep track of the racial identities of those in the venire.<sup>18</sup> They did this in different ways, including annotating written questionnaires with information about the demographics of the venire and revisiting personal notes about jurors as they deliberated about who to strike or question further.<sup>19</sup>

Nevertheless, this shared anxiety regarding *Batson* challenges did not translate to a uniform approach to jury selection. In some cases, prosecutors avoided excusing even a single Black prospective juror from the venire or refrained from exercising peremptory strikes altogether.<sup>20</sup> In other cases, prosecutors carefully revisited rationales for dismissing jurors to ensure that they could not be accused of showing anti-Black bias.<sup>21</sup> And still, in other cases, prosecutors made an effort to scrutinize and strike prospective jurors not subject to *Batson*'s protections, such as White male jurors, following the logic that such dismissals would be uncontroversial.<sup>22</sup>

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16. See e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019) (“In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.”).

17. See Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1411–12.

18. See generally Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 202 (2021).

19. See *id.* at 212.

20. *Id.* at 227–33.

21. *Id.* at 232.

22. *Id.* at 233–34.

The common thread in my ethnographic observations—corroborated by another qualitative jury study<sup>23</sup>—is *Batson's* reinforcement of the salience of race in the jury selection process. In general, my interlocutors wished to avoid the embarrassment or reputational harm that could accompany a *Batson* challenge. This prompted intense and sustained concern regarding race and whether their actions during voir dire could be construed as racially motivated. This concern, which I discovered again and again in the field, indicated to me that *Batson's* promise of race-neutral jury selection was, on balance, false. And in guarding against some bases of discrimination, it perhaps allowed others—often entwined with race and gender—to shape juries. This empirical reality suggests the need to move beyond a race-neutral—or colorblind—approach to antidiscrimination law in the context of the jury selection process. The social fact of race cannot be ignored in the project of building more inclusive juries.<sup>24</sup>

### B. *Financial Hardship and Law Enforcement Skepticism*

Peremptory strikes are not the only reason that people of color are disproportionately excluded from juries. Challenges “for cause,” exercised at the discretion of judges, also play a role. As it turns out, some of the common reasons for dismissing jurors for cause, including financial hardship and negative personal experiences with law enforcement, are more likely to register among jurors of color.<sup>25</sup> Though I observed prosecutors advocate for the removal of jurors on these grounds—not once did I witness any expression of concern with respect to the racial disparities such dismissals might introduce.<sup>26</sup> Race, in the context of cause challenges, appeared far from their minds. I suspect this is a result of antidiscrimination law’s focus on the perils of peremptory strikes and thus the practices of exclusion that lie within lawyers’, and not judges’, control.

In fact, prosecutors who urge judges to excuse prospective jurors for cause sometimes share that doing so is an act of benevolence—a way to exempt someone from a time-consuming and potentially costly civic duty.<sup>27</sup> In numerous cases I have witnessed judges defer to prosecutors and defense attorneys when it comes to assessing whether the financial burden of serving is too much for a prospective juror.<sup>28</sup> The potential jurors who the prosecutors

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23. See Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak about Voir Dire*, 51 WAYNE L. REV. 163, 363 (2005).

24. See also Thomas Ward Frampton, *What Justice Thomas Gets Right About Batson*, 72 STAN. L. REV. ONLINE 1, 8–9 (2019) for a pertinent discussion of the *Batson* doctrine’s inability to acknowledge the role that race plays in the courtroom.

25. See Wright et al., *supra* note 17, at 1411; see also Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL’Y REV. 387, 406 (2016).

26. Offit, *supra* note 18, at 210–18.

27. See generally Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613, 634–41 (2021).

28. *Id.* at 642–44.

identify as being likely to lose jobs or wages if empaneled often work in retail, food service, or the gig economy.<sup>29</sup> Even when prospective jurors do not express anxiety about these losses in the event of their participation, prosecutors often identify them as warranting dismissal.

Prosecutors also advocate for the dismissal of prospective jurors who share accounts in court of negative encounters with police officers and other members of law enforcement.<sup>30</sup> Based on these stories, prosecutors sometimes conclude that a prospective juror would likely view FBI agents or police officers with skepticism.<sup>31</sup> As one prosecutor put it with respect to people who live in heavily policed neighborhoods, such prospective jurors simply “hate cops.”<sup>32</sup> In contrast, prospective jurors who share that they work as, or alongside, law enforcement officers are sometimes appraised as desirable government jurors.<sup>33</sup> In this context, too, prosecutors’ concerns focus on likely juror bias and not on potential exclusion along racial lines.

### C. *Interpreting Jurors*

My ethnographic research among federal prosecutors shows that there is no single interpretive approach when it comes to picking a jury. In practice, prosecutors elicit information that they think will help make sense of the strangers they meet in court.<sup>34</sup> They scrutinize hobbies, preferred news sources, family members, job responsibilities, and past jury service experiences—as well as facial expressions, gestures, tone of voice, and clothing.<sup>35</sup> Throughout voir dire, prosecutors thus not only scrutinize the signs prospective jurors *wish* to share but also information gleaned from unintended verbal and nonverbal behavior in the course of hours (or sometimes days) of questioning.<sup>36</sup>

Having elicited these signs, federal prosecutors deploy a variety of interpretative approaches to unpack their meaning. The first of these approaches entails reading these signs as distinguishing characteristics of different “juror-types.” Many juror-types are conceptualized in order to identify people who, in general, should be challenged or viewed with skepticism: full-

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29. *Id.* at 643.

30. Anna Offit, *Thinking Inside the Box: How Prosecutors Invent Jurors to Pursue Justice* (forthcoming 2022).

31. *Id.*

32. *Id.*

33. *Id.*

34. For analogous formulations of social discrimination, drawing on ethnographic research in the United States and elsewhere see DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 58–60, 112 (1968); JOHN L. COMAROFF & SIMON ROBERTS, *RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT* 21–29 (1981); MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA*, at xxxi, 140, 157 (2d ed. 1967).

35. See Sally Jacoby & Elinor Ochs, *Co-Construction: An Introduction*, 28 *RSCH. ON LANGUAGE & SOC. INTERACTION* 171, 186 (1995).

36. For a related discussion, see *id.* at 176.

time students, teachers, social workers, accountants, and engineers.<sup>37</sup> Other common juror-types include small business owners (of relevance in civil cases) or jurors who had been arrested or searched by police (of relevance in criminal cases, as discussed in the last section).<sup>38</sup>

A second interpretive approach involves reading signs to identify “outliers”—that is, people with extreme or unusual views.<sup>39</sup> Some prosecutors who take this approach appear to see juror evaluation as akin to a job interview, with the goal of figuring out if a person is reliable. A third approach centers on prosecutors’ “intuitions” or “gut feelings,” drawing on a language of “common sense” and simple comparisons between prospective jurors and prosecutors’ impressions of their own family members, friends, and colleagues—all “proxy” jurors.<sup>40</sup> Here, it seems the prosecutors are looking for jurors who are, in some sense, familiar.

Some prosecutors are partial to one approach. Others shift between them freely, trying to make sense of prospective jurors in different ways. In either case, the goal is to use the dearth of information provided about a collection of strangers to determine who will make for a favorable juror. In some cases, prosecutors bring particular juror-types with them to court. In others, they develop them after seeing court-issued juror lists that include self-reported occupations.<sup>41</sup> Some say they form impressions of jurors as soon as the jurors speak while others linger on and revisit details from their responses to questions.<sup>42</sup> And nearly every prosecutor, at one point or another, negotiates or reformulates their assessments—either after interacting with a juror at sidebar or with co-counsel and other colleagues during breaks in proceedings.<sup>43</sup> The swiftness of these judgments, coupled with their confinement to a single trial, leaves open the possibility that they might reach similar conclusions about similar types of jurors in subsequent cases.

Each interpretive approach involves distinct ways of conceptualizing people. When prosecutors classify jurors based on juror-types, for example, their categorizations are negotiable and subject to collaborative revision; though a trial team might agree to impute opinions to jurors during a break in jury selection proceedings, their conclusions might be dispensed with entirely at the point they prepare to exercise peremptory strikes. Moments of consensus are

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37. *Id.* at 186.

38. Anna Offit, *Peer Review: Navigating Uncertainty in the United States Jury System*, 6 U.C. IRVINE L. REV. 169, 204–06 (2016).

39. See *id.* at 176–85 for a general discussion of the probabilistic and more evaluative analogies that federal prosecutors drew on to render prospective jurors intelligible.

40. *Id.* at 196–197.

41. Offit, *supra* note 27, at 642 (explaining that before jury selection begins, court deputies routinely distribute this photocopied Judge’s List to counsel).

42. *Id.* at 644.

43. *Id.*

therefore unpredictable, and prosecutors may remain uncertain or second-guess earlier judgments even after jurors are sworn in.

With the heterogeneity of legal actors' approaches to juror assessment in mind, it becomes possible to develop a more empirically grounded picture of how voir dire draws—and diverges—from practices of social discrimination in other domains. In turn, it becomes possible to perform a deeper audit of the antidiscrimination law currently in place, as well as reforms currently being proposed.

### III. ANTIDISCRIMINATION LAW THROUGH A SOCIOLEGAL LENS

Legal anthropologists conceptualize discrimination in various ways. In some accounts, it revolves around stereotypes.<sup>44</sup> In others, discrimination is viewed as a practice rooted in publicly intelligible, interpretive “frame[s] of reality.”<sup>45</sup> Other approaches locate discrimination in collective narratives that inform understandings of people,<sup>46</sup> events, objects, and places.<sup>47</sup> Anthropological research has also engaged with the findings and insights of other social science fields that examine the place of “generics” in rendering strangers intelligible.<sup>48</sup>

Across all these tendencies, anthropologists share a commitment to working within a sociolegal framework that takes seriously everyday practices of interpretation. Anthropologist John Comaroff and lawyer Simon Roberts, for example, have examined how Tswana norms (known as “mekgwa le melao”) are deployed in different combinations to legitimate distinct interpretations of people and social situations.<sup>49</sup> In Morocco, Lawrence Rosen shows that in certain legal processes there is no single feature of a person or her nature that can stand for the whole, and that meanings associated with particular characteristics are subject to change as strategic aims—or norms—shift.<sup>50</sup>

In the American jury selection process, as described above, discrimination also unfolds as part of the quotidian project of interpreting signs to build

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44. See generally LAWRENCE ROSEN, *BARGAINING FOR REALITY: THE CONSTRUCTION OF SOCIAL RELATIONS IN A MUSLIM COMMUNITY* 27 (1984); see VINCENT CRAPANZANO, *THE HARKIS: THE WOUND THAT NEVER HEALS* 177 (2011).

45. SUSAN BIBLER COUTIN, *LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY* 71 (2000); see also Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 L. & SOC'Y REV. 737, 739 (1988) (discussing “conflicting” views of the social world).

46. CAROLYN MOXLEY ROUSE, *UNCERTAIN SUFFERING: RACIAL HEALTH CARE DISPARITIES AND SICKLE CELL DISEASE* 6, 26, 40 (2009).

47. IRA BASHKOW, *THE MEANING OF WHITEMEN: RACE & MODERNITY IN THE OROKAIVA CULTURAL WORLD* 12 (2006).

48. See, e.g., Susan T Fiske et al., *Category-Based and Attribute-Based Reactions to Others: Some Informational Conditions of Stereotyping and Individuating Processes*, 23 J. EXPERIMENTAL SOC. PSYCH. 399, 422–25 (1987).

49. COMAROFF & ROBERTS, *supra* note 34, at 74.

50. See ROSEN, *supra* note 44, at 19, 27.

consensus about the reliability of strangers. Interpretive registers shift, as do the interpretations themselves, fostering dynamic assessments.<sup>51</sup> This process is one of “formation and transformation”—or what Peirce, as elaborated by Kevelson and Richland, refers to as *iteration*.<sup>52</sup> Here, lawyers continuously discriminate among different *schemes* of discrimination, as lawyers first discern relevant interpretive frames before imputing meaning to particular signs.

This dynamic approach to evaluating strangers is not unique to jury selection. Research on interactions between case agents and welfare recipients, physicians and patients, and researchers and their subjects—among other examples—illustrate the iterative process by which those engaged in social assessment formulate and revise their judgments of others. In a study of meetings between case agents and welfare recipients in the southern United States, for instance, sociologists found that bureaucrats relied on a repertoire of social knowledge, past experience, and “types” when “sizing up” or sanctioning (i.e., penalizing) their clients.<sup>53</sup> In this setting, case managers described feeling a sense of connection with their clients that developed through repeated interactions.<sup>54</sup>

In a similar vein, the eighteen-year relationship anthropologist Carolyn Rouse describes between her physician and patient research subjects offers a similarly vivid illustration of the reciprocal and dialogic nature of discrimination.<sup>55</sup> As in other ethnographies of the physician–patient relationship,<sup>56</sup> Rouse’s account shows that professional practices and evaluations evolve over the course of treatment.<sup>57</sup> Ruth Frankenberg’s work on “whiteness” similarly highlights the multiplicity of interpretive approaches that shape peoples’ understanding of their own—and others’—identities. Frankenberg’s interlocutors, for example, draw on multiple, coexisting repertoires to make sense of race—including “colorblind” or “assimilationist” discourses and “race-cognizant” ideas associated with decolonization and liberation movements in the United States and elsewhere.<sup>58</sup>

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51. *Id.* at 79 (discussing legal norms as “meaningfully determined only in terms of the situation in which they are invoked”).

52. *Id.* at 27; JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 174 (2008) (citing ROBERTA KEVELSON, CHARLES S. PEIRCE’S METHOD OF METHODS 33 (1987)).

53. *See* JOE SOSS ET AL., DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE 249 (2011).

54. *Id.*

55. ROUSE, *supra* note 46, at 24–44.

56. *See, e.g.*, GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES 177 (1999). Geoffrey Bowker and Susan Leigh were attentive, in this study, to patients’ roles in modifying others’ assessments of them. Recognizing the variability of doctors’ assessments of their tuberculosis infections, which were classified variously, patients assessed *each other* to discern patterns in doctors’ assessments of them.

57. ROUSE, *supra* note 46, at 24–44.

58. *See* RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS 239 (1993).

All of the pieces referenced above find professionals, patients, and ordinary people engaged in modes of both real-time and retrospective assessments of strangers. Written from the sociolegal perspective, they capture many of the features that also characterize the interpretive work of prosecutors who operate within the constraints of antidiscrimination law to influence the composition of juries.

#### IV. TOWARD EMPIRICALLY-GROUNDED JURY REFORM

Like the practices of social assessment examined in the sociolegal studies noted above, prosecutors' evaluations of jurors are guided by varying interpretations of social characteristics and experiences. And though prosecutors are attuned to the consequences of a *Batson* challenge for their reputations, they often appear unaware or uninterested in the connection between excusals for cause—which they regularly encourage—and the racial disparities of empaneled juries.

This is where the insights of ethnographic research can productively align with some of the most recent calls for the *Batson* doctrine's reform. These calls increasingly acknowledge the reality that those facing the most persistent abuse at the hands of law enforcement agents are disproportionately people of color. Reformers also critique the notion that jury exclusion is a product of racial animus. Examples of this latter orientation toward jury discrimination, which locates racial bias in processes and institutions, include some state courts' novel modifications of the *Batson* doctrine. In 2018, for example, the highest court in Washington State adopted General Rule 37 (GR37), which aimed to combat institutional (as well as more conscious) bias during voir dire.<sup>59</sup> Among the contributions of GR37 is its substitution of a judge's subjective assessment of purposeful discrimination in the adjudication of a *Batson* challenge for consideration of how an "objective observer could view race or ethnicity as a factor in the use of the peremptory strike."<sup>60</sup> The rule also specifically contemplates that this "objective viewer" will be a person trained to recognize "implicit, institutional, and unconscious" bias in order to interrogate challenged attorneys' purportedly neutral peremptory strike rationales.<sup>61</sup>

Another innovation of GR37 is its enumeration of reasons that prosecutors may *not* reference as bases for peremptory strikes without demonstrating that such characteristics are unrelated to a prospective juror's race (among other protected

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59. *Washington Supreme Court Is First In Nation To Adopt Rule To Reduce Implicit Racial Bias In Jury Selection*, ACLU (Apr. 9, 2018), <https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury/>.

60. *Id.*

61. WASH. SUP. CT., *supra* note 14, at (f) ("For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.").

characteristics).<sup>62</sup> These include indicia of a prospective juror's socioeconomic status—such as the receipt of “state benefits.”<sup>63</sup> It also includes evidence of a prospective juror's “distrust of law enforcement” or “prior contact with law enforcement officers.”<sup>64</sup> Other states have—or may soon—follow suit. California, for example, plans to adopt an expanded set of *Batson* reforms beyond those described above.<sup>65</sup> Among the states contemplating similar reforms, Connecticut convened a Jury Selection Task Force to investigate implicit bias in the jury system—culminating in a report that recommended the adoption of GR37.<sup>66</sup> Oregon also convened a Racial Task Force which compiled a report recommending the state adopt either the Washington state or California state rule.<sup>67</sup> In states that have not yet adopted the rule, some legal experts are advocating for the adoption of Washington jury selection GR37—including New York.<sup>68</sup> The Supreme Court of Arizona, meanwhile, has moved to eliminate peremptory strikes altogether, effective January 2022.<sup>69</sup>

Though there is some evidence that GR37 has prompted the more conscientious exercise of peremptory strikes,<sup>70</sup> ethnographic research highlights the need for a broader understanding of the factors that produce nonrepresentative juries. In particular, research on jury selection underscores the necessity of focusing on the cause-challenge phase of voir dire, as well as the financial burden that jury service imposes on people. In some respects, § 231.7 of California's revised (and more expansive) Trial Jury Selection and Management Act may bring *Batson* into closer alignment with sociolegal concerns about jury representativeness. In assessing challenged lawyers'

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62. See *id.* at (h).

63. See *id.*

64. See *id.*

65. See CAL. CIV. PROC. CODE § 231.7 (West 2021); Jim Frederick & Kate M. Wittlake, *New Jury Selection Procedure in California: Is This the End of Peremptory Challenges? Is This the End of Batson?*, THE NAT'L L. REV. (Dec. 2, 2020), <https://www.natlawreview.com/article/new-jury-selection-procedure-california-end-peremptory-challenges-end-batson>.

66. Jury Selection Task Force, *Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson* (2020), [https://jud.ct.gov/Committees/jury\\_taskforce/ReportJurySelectionTaskForce.pdf](https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf).

67. Sarah Bello, *Willamette Law Launches Racial Justice Task Force*, WILLAMETTE UNIV. (Feb. 16, 2021), <https://willamette.edu/news/library/2021/02/racial-justice-taskforce.html>; Brian R. Gallini et al., *Remediating Batson's Failure to Address Unconscious Juror Bias in Oregon*, 57 WILLAMETTE L. REV. 85, 85 (2021).

68. Barbara Zolot, *How New York State Can Fix Broken Promises of Batson*, LAW.COM (Apr. 1, 2021), <https://www.law.com/newyorklawjournal/2021/04/01/how-new-york-state-can-fix-broken-promises-of-batson/>.

69. SUP. CT. OF ARIZ., ORDER AMENDING RULES 18.4 AND 18.5 OF THE RULES OF CRIMINAL PROCEDURE, AND RULE 47(E) OF THE RULES OF CIVIL PROCEDURE (2021), <https://aboutblaw.com/ZpS>.

70. See Petition to Adopt New Arizona Rule of Supreme Court 24 on Jury Selection 2 (Apr. 29, 2021) (on file with the Arizona Supreme Court) (“In our numerous discussions with lawyers and judges in our state about the new rule since its adoption, reactions have been largely neutral or positive. Practitioners have reported that the rule is triggered in cases only from time to time; that the rule has been followed without fanfare or disruption; and that the rule appears to be accomplishing its purpose, in large part because peremptories are being attempted far less often in circumstances that would raise concerns about potential racial bias. Judges have also reported applying the rule to preclude suspect peremptories, which in itself is a departure from prior practice, and a very promising one.”).

rationales for exercising peremptory strikes, for example, the statute requires that the judge consider the quality and quantity of questioning that takes place during voir dire. This includes scrutinizing whether prospective jurors face inquiries into the basis of their peremptory removal, whether lawyers engage in superficial or “cursory” questioning, and whether attorneys engage in the selective striking of jurors.<sup>71</sup>

This new law rightfully acknowledges that jury disparities do not suddenly materialize when an attorney exercises a peremptory strike. A prosecutor motivated to dismiss a prospective juror who has been previously charged with a misdemeanor, for example, is likely to have engaged in earlier questioning or follow-up questioning of that juror. Further, the law does not assume that a lawyer facing scrutiny under *Batson* will have been found to have engaged in deliberate exclusion.<sup>72</sup> Insofar as judges and lawyers may be reluctant to either raise *Batson* challenges or find that the doctrine’s threshold for illegal exclusion has been met, the depersonalized framing of Washington and California’s laws may reduce the stigma and increase their use.<sup>73</sup> Encouragingly, these modifications of *Batson* could prevent prosecutors from striking prospective jurors who affirm that they can be fair, even if they hold a dim view of police based on previous experiences.

Beyond the protections in place to prevent the illegal removal of laypeople from juries, there is little in place to affirmatively *support* their broad participation. For many prospective jurors, serving is almost unthinkable given lost income, unstable employment, or the need to provide care for family members. Achieving true socioeconomic and racial diversity requires providing meaningful material support for prospective jurors—regardless of employment status, income, or wealth. Among the measures that state courts could take to encourage such diversity are increasing juror pay, providing in-court childcare support, and building sustainable funding sources to not only replace jurors’ lost wages for the duration of service but also to help offset other expenses associated with their participation.<sup>74</sup> Indeed, juror compensation should go further. Unemployed and underemployed jurors could be paid a stipend worthy of the intellectual labor they invest and civic experience they gain. The elimination of financial hardship as an accepted basis of a juror’s excusal would go a long way toward enhancing participation and thus the democratic character of juries.

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71. See CAL. CIV. PROC. CODE § 231.7(d)(3)(C)(i)–(iii) (West 2021).

72. See *id.* at § 231.7(d)(1) (“The court need not find purposeful discrimination to sustain the objection.”).

73. See *State v. Saintcalle*, 309 P.3d 326, 338 (Wash. 2013), *abrogated by* *City of Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017) (“Imagine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism. And if the judge chooses not to do so despite misgivings about possible race bias, the problem is compounded by the fact that we defer heavily to the judge’s findings on appeal.”).

74. See generally Offit, *supra* note 27.

## CONCLUSION

Improving antidiscrimination law necessitates a sociolegal perspective attuned to everyday, real-time experience and practice in the courtroom. The ethnographic study of voir dire provides such a perspective, illuminating the actual processes by which legal actors both knowingly and tacitly contribute to the disproportionate exclusion of certain groups from juries. We learn, for instance, that peremptory strikes are only part of the story. Cause challenges too—and the flawed inferences of judges—must be closely examined and targeted for reform. We find also that *Batson* amplifies the presence of race in the minds of legal actors as it seeks to nullify its effects. In the process, we may overlook other problematic but permitted bases of exclusion.

In short, a sociolegal view refuses to see the legal process as bounded and separate from society and its inequities. Disparate jury empanelment emerges at the intersection of an unequal society and an adversarial legal system that encourages each side to seek advantages where it can. Those who are poor, associate with social movements, have been harassed by police, or are skeptical of the government are all part of the country's diverse communities, yet to many prosecutors, they are merely "bad jurors." They are also, in general, more likely to be people of color. Above all, a sociolegal perspective shows that jury reform efforts that would enhance the inclusivity of American juries must take seriously the entwinement of race, sex, and class in analyses of jury exclusion—or fail.