

Trouble in River City?
Do Iowa Juries Reflect a Fair Cross-Section of the Community?
What Can Be Done to Improve Representation of Minorities in the Jury Pool?
What Procedural Changes Can Be Made to Protect Against Implicit Bias in the
Exercise of Peremptory Strikes of Jurors by the Prosecutor or Defense Counsel?
[Work in Progress]

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I. Overview

The occasion of the 800th anniversary of the signing of the Magna Carta makes especially timely the NAACP evaluation of Iowa's Jury System. "The right to a trial by jury, one of the most time-honored inheritances from Magna Carta in United States law, refers to the guarantee that courts will depend on a body of citizens to render judgments in most civil and criminal cases. The origins of the jury trial precede the creation of Magna Carta. However, Chapter 39 of King John's Magna Carta includes the guarantee that no free man may suffer punishment without "the lawful judgment of his peers." Magna Carta: Muse and Mentor. <http://www.loc.gov/exhibits/magna-carta-muse-and-mentor/trial-by-jury.html>.

Let me add that I am a big believer in the American jury trial. To quote former American Bar Association President Robert Grey: The American jury is one of the most important democratic institutions ever conceived and is still the bedrock of the justice system." It has proven itself time and again to be a wise and true decision maker, attentive to both the evidence and the law, in cases both contentious and complex. Drake Law School is the only law school in America that adjourns an entire week of the 1L year to observe an actual jury trial in our on campus court room and has done so since 1998. The students' observation of "law in action" supplemented by small group discussions with lawyers and judges observing the same case has proven to be an exceptional learning experience. <http://www.law.drake.edu/admissions/?pageID=trialPracticum>.

The NAACP has serious concerns that there are problems at both stages of the Iowa jury selection process—inadequate development of a jury pool that truly reflects a fair cross section of the community and inadequate procedural mechanisms to protect against the insidious infiltration of implicit bias into the exercise of peremptory strikes in securing the 12-person jury that will hear the case. Thus, my title adapts Meredith Wilson's famous song from the Music

Man musical that emphasized that “Trouble” starts with a “T”; this paper argues that Trouble starts with a “P”—as in Jury “Pool” and as in “Peremptory” Strikes.

But first the NAACP would like to applaud Chief Justice Mark Cady, in his State of the Judiciary Speech this past January, for his recognition of the serious racial disparities in Iowa’s criminal justice system and the need to find solutions to eliminate these racial disparities. In particular, we support the Chief Justice’s efforts to address implicit bias, including education and training on implicit biases:

“[T]he criminal justice system in Iowa and across the nation is marked by racial disparities. There is an overrepresentation of African Americans and other minorities in the criminal justice system—from arrest to incarceration. For example, Iowa incarcerates 9.4% of its adult African American males, which is the third highest percentage in the nation. *This is a difficult problem, but its complexity must not deter us from finding a solution. * * * We are gathering information and searching for ways to bring the promise of equal justice to everyone. The training the judicial branch provides to all staff, including new judges and magistrates, will now include education on recognizing implicit biases that may often contribute to the disparities.* [Specifically citing the data and information provided by NAACP representatives at the annual Judges Training Conference] We . . . will continue to work with others to do what we can to eliminate racial disparities in the criminal justice system. [Encouraging steps have been taken by the Judicial Branch that show] Iowa can also lead the nation in finding solutions to end racial disparities.”

Hon. Mark S. Cady, Chief Justice of the Iowa Supreme Court, 2015 State of the Judiciary Address, Jan. 14, 2015, pp. 4-5. (emphasis added). In addition to implicit bias training for Iowa judges, we note the Court has proposed a Rule that would enable lawyers to earn CLE credit for attending implicit bias training.

We applaud Governor Terry Branstad for serving as a keynote speaker at the 2015 Justice & Disparities Summit and for creating this Criminal Justice Working Group with a defined mission of studying critical Iowa criminal justice issues and reporting its recommendations in early November. This time frame will facilitate submission of reform bills to the Iowa Legislature.

We also wish to applaud Assistant State Public Defender Chuck Kenville of Ft. Dodge for digging into and exposing the jury pool problems in Webster County, despite Iowa Supreme Court precedent that suggested the futility of jury pool challenges. Chuck’s tenacity in developing this issue served as a catalyst for re-examination of this issue, as the evidence he developed suggested the problems may well prove to be systemic and state-wide.

We also wish to applaud the Honorable Colleen Weiland, the Fort Dodge District Court Judge, who on May 12 dismissed a 112-member jury pool in State v.

Washington, a murder trial. Judge Weiland determined that the jury pool's composition didn't reflect a fair cross section of the Webster County community that, according to 2013 census data, is 4 to 5% African American. All but one of the potential jurors was white. The lone non-white in the jury pool drawn for the State v. Washington trial was Native American. The defendant, Tyrone Washington, is African American, and there were no African Americans on Jury Pools 1 (150 persons) and Jury Pool 3 (75 persons) from which his case's Jury Pool List was drawn—zero African Americans out of 225. Judge Weiland's ruling requires Webster County officials to search for ways to achieve a fair cross-section of the community on the next jury pool. I will have more on that later.

There are two principal ways in which discrimination or implicit bias can occur in jury selection. The first is at the front end of the process—in the gathering of the names of citizens to be included in the jury source pool. While systemic litigation can challenge this stage of the process as unconstitutionally under-representative, *Castenada v. Partida*, such cases only establish the minimum floor. Given our historic commitment to equality Iowa Courts should seek to be much more inclusive and democratic. There are important affirmative steps Courts can take to make our jury pools more representative of the community. This of course implements important constitutional values of fairness, and the community's perception of the fairness of the judicial system is crucial to its confidence and trust in the judicial system.

The second way in which discrimination or implicit bias occurs in jury selection is in the winnowing down of the jurors who are in the particular jury pool assigned to a case by the exercise of peremptory or discretionary strikes by the attorneys for the parties, prosecutor and defense lawyers. Concerns that the procedure prescribed by the United States Supreme Court in *Batson v. Kentucky* to protect against discriminatory challenges is ineffective are so widespread that, given the extreme racial disparities in Iowa's criminal justice system, it is time for the Iowa Courts to actively search for more robust protections against implicit and intentional bias in jury selection. *State v. Saintcalle*, 309 P.3d 326 (Wash. 2013); Mark Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol. Rev. 149 (2010); Iowa Law Review Symposium; Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (August 2010) at <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf>. See also the Project Implicit web site, a longstanding study managed by Harvard University and the University of Washington since 1998. <https://implicit.harvard.edu/implicit/aboutus.html>.

The NAACP is not inclined to disagree with Defense Attorney Kenville's statement that Webster County's jury problems do not reflect intentional, purposeful racial discrimination, but we do believe existing systems appear to result in disparate impact on persons of color and inadequately check implicit bias. We note that the administrative sloppiness and possible indifference to

underrepresentation of the jury pool in Webster County calls to mind the negligence theory of jury system management proposed by Paula Hannaford-Agor, Director of the Center for Jury Studies of the National Center for State Courts, in a lead article in the Drake Law Review. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761 (2011) [hereinafter “Hannaford-Agor”]. Hannaford-Agor “argues that if a court’s failure to manage its jury system in a reasonably effective manner contributes to legally insufficient minority representation in the jury pool, the court’s negligent jury management is itself systematic exclusion.” Id. at 764. Systematic exclusion of course is necessary to establish a prima facie violation of the fair cross section requirement. *Duren v. Missouri*, 439 US. 357, 364 (1979)

The NAACP is a volunteer organization. We do not have the resources or staff to do an exhaustive study of each stage of the Iowa criminal justice system, but, given the exceptional over-representation of African Americans in Iowa’s prisons, we have every reason to think that national and regional studies that identify critical areas needing rethinking and reform have full application to Iowa. The NAACP believes that even if Iowa’s Jury System should be found to satisfy the minimum constitutional requirements, Iowa can and should do more—as a matter of sound policy and as a matter of State constitutional law.

The NAACP often hears the mantra: “If you do the crime, you do the time.” This mantra tends to view the problem with all-white juries as de minimis. The NAACP begs to disagree. All-white juries in 21st century America severely undercut the confidence of the community in the fairness and integrity of the judicial system. All-white juries can result in systemic discrimination—even in cases in which the accused is factually guilty of some crime. Just as racial discrimination occurs when police departments enforce drug laws more vigorously in minority neighborhoods than in white neighborhoods, discriminatory results can occur when juries do not reflect the community. Social science research has found that juror deliberations are more thoughtful when the jury is diverse, and that can sometimes affect the determination of guilt or innocence but more often can affect the jury’s determination of the degree of severity of the criminal offense (and therefore the sentence) when a verdict of guilty is rendered. Attorney Kenville was quoted as saying: “Kenville said minority conviction rates go down by 10 percent if a minority is a member of the jury panel.” The social science research that was examined in the Iowa Law Review Symposium found that racially mixed juries were generally more deliberative—they engaged in a more thorough examination of the evidence.

But jury trials occur in only a small number of criminal cases—95% to 98% of criminal cases are resolved through plea bargains. The prospect of facing an all-white jury can adversely impact the African American defendant’s decision to go to trial and the negotiation of a guilty plea. Defense counsel suggest this reality significantly weakens the bargaining position of African American defendants. Whether their apprehension has a factual basis or not, the NAACP has reports

that Black defendants have taken harsh plea deals out of fear that an all-white jury might convict them of an even more severe crime if they did go to trial.

Tradition and precedent should not stand in the way of fairness and equality when the structure is as fundamental to the justice system as is the jury system. We note that in 1988, 700 years after it created the peremptory strike, England eliminated it in jury trials. And Scotland, Wales, and Northern Ireland followed suit in 2007.

II. Achieving Jury Pools That Truly Reflect the Community: Underrepresentation of Minorities in the Jury Pool

Professor Michelle Alexander contends:

“Achieving an all-white jury, or nearly all-white jury, is easy in most jurisdiction, because relatively few racial minorities are included in the jury pool. Potential jurors are typically called for service based on the list of registered voters or Department of Motor Vehicle lists—sources that contain disproportionately fewer people of color, because people of color are significantly less likely to own cars or register to vote. Making matters worse, thirty-one states and the federal government subscribe to the practice of lifetime felon exclusion from juries. *As a result, about 30 percent of black men are automatically banned from jury service for life.*

The New Jim Crow at 121 (emphasis in original). We believe Iowa jury pools suffer from precisely the shortcomings identified by Professor Alexander.

Let’s return to the Webster County case. As reported in the *Globe Gazette*, May 12, 2015, Defense Attorney Charles Kenville suggested that

“We are not saying it’s done intentionally, but the system is broken in Webster County and this court needs to fix it for Mr. Washington’s rights to be upheld,” Kenville said about the lack of diversity in the jury pool.

He said the computerized system by which citizens are called for jury service using Iowa Department of Motor Vehicles records and voter registration records needs to be changed. The current statewide system has been used since 1997.

Kenville suggested adding local utility company billing records, lists of persons receiving unemployment benefits or disability payments to provide a more racially diverse jury.

Counties can request that other types of lists be used to prepare the master list of potential jurors. But an official with the state testified Monday that no county has ever asked to expand the lists.

* * *

Webster County selects potential jurors from three pools. Pool 1 and 2 have 150 members each and Pool 3 has 75 persons. Washington's potential jurors were drawn from pools 1 and 3 with no African-Americans and only one minority of any race. Pool 2 had two African Americans. That pool was used to pick a jury for a civil trial.

A. Judge Weiland's Order to Strike Webster County Jury Pool

District Judge Weiland made the following findings regarding the significant underrepresentation of African Americans in the Webster County Jury Pool:

"Of the 117 questionnaires submitted and the 95 panel members checked in, there was no person of African-American, black, mixed racial, or other non-white origin. From a population that is approximately 4% African American and 10% non-white, that result could arise from standard deviation. But the sample pools previously presented by the defendant show that underrepresentation is consistent. Using typical means of analysis, the defendant fails to show an absolute disparity, but the court recognizes that no distinctive group will be able to meet that burden in Iowa. Comparative disparity varies amongst the various sample pools, but all of them show some comparative disparity. And the comparative disparity of this jury panel is 100%."

Judge Weiland also found a "material departure" from statutory requirements. "Primarily, the system of jury impaneling has drifted from the provisions of Chapter 607A because reliance on centralized electronic control of source lists and production of master lists has led to a corresponding deterioration of local and particularize oversight over time."

The Iowa Code requires a Jury Manager be appointed for each County, who has the responsibility of ensuring the goals of the Iowa Code regarding Jury representation are met. No one knew who was the Jury Manager in Webster County. There was a standing order entered back in 1997 that a Court Clerk was the Jury Manager, but the person who held that position in 2015 was unaware she had this responsibility. State Court Administration apparently took over this responsibility in 1997, but it is unclear to what degree State Court Administration monitors the construction of the Jury Pool as it has contracted with an outside vendor ACS, now Xerox, to update the jury lists annually, using "the Iowa Department of Motor Vehicle Registration file and the Secretary of State's Voter Registration file." When State Court Administration staff was asked if any other lists were used to develop the Master Jury List, he replied no County has ever asked that this be done.

Judge Weiland concluded the existing practice in Webster County did not comply with Iowa Code's requirements that envision certification of the Jury Pool lists by a County Jury Manager. There are no County Master Jury Pool lists—only a State of

Iowa Master Jury Pool List. Those on the State list are coded by County, so when a County asks for its List each month a random list of jurors residing can be generated. But there is no way for a local Jury Manager to review a Master List for her County and monitor whether there might be underrepresentation.

Although Judge Weiland did not fully explain her reasoning, she recognized the futility of any minority group in Iowa seeking to establish a prima facie case by utilizing the absolute disparity computation due to the reality that no minority group in Iowa exceeds 10% of the population (10% showing found insufficient in *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965); 7.2% showing found insufficient in *United States v. Clifford*, 640 F2d 150, 155 (8th Cir. 1981)). It seems apparent Judge Weiland recognized the Iowa Supreme Court decision, in *State v. Jones*, 490 N.W.2d 787, 793 (1992), is obsolete in light of the U.S. Supreme Court's subsequent decision in *Berghuis v. Smith*, 559 U.S. 314 (2010).

B. Methods to Determine Underrepresentation in the Jury Pool

In *State v. Jones* the Iowa Supreme Court discussed the absolute and comparative methods of determining underrepresentation. The Court did not mention or consider the binomial distribution statistical method.

"Absolute disparity is determined by taking the percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel." The Iowa Court first "reject[ed] the argument that all minority groups should be compared with the total population. We compare only the distinctive group involved when determining if a prima facie case has been established." *Id.* at 793. Then, explaining only that "[t]he absolute disparity computation has been used by the Supreme Court," the Court "reject[ed] reliance upon a comparative disparity statistical comparison" and held "[t]he absolute disparity computation . . . is the appropriate method to be used" to demonstrate underrepresentation. *Id.*

Based on this reasoning, the Jones Court then concluded that the absolute disparity of 3.6% for all racial minorities combined in Scott County (8.7% - 5.1% (on jury panel) = 3.6%) was not the correct comparison. The Court calculated the absolute disparity for African Americans only, the Defendant's own racial group, as only 1.5% (4.1% - 2.6% = 1.5). The Court then held that an absolute disparity of 1.5% was insufficient to make out a prima facie case, citing cases that had held absolute disparities as high as 7% - 10% were insufficient.

The Court then gave short shrift to the Defendant's argument and evidence showing comparative disparity because it determined only the absolute disparity method "was appropriate" to show underrepresentation. It did explain "[c]omparative disparity is determined by taking the absolute disparity percentage and dividing that number by the percentage of the group in the total population." The Court noted the comparative disparity based on all racial minorities in Scott County was

41% ($3.6\%/8.7\% = .413$), but it did not calculate the comparative disparity for African Americans as a group (presumably because it rejected the comparative disparity method). The comparative disparity for African Americans in Scott County was 36.6% ($1.5/4.1 = .366$).

The Jones case seemed to establish a bright line rule, one that required a showing of underrepresentation that was impossible to meet given the reality that almost no community in Iowa has a single racial minority group that exceeds 10% of its population. (Black Hawk County has an African American population of 8.9% based on the 2013 U.S. Census data.)

In *Berghuis* the United States Supreme Court observed:

“[N]either *Duren* [v. Missouri, 439 U.S. 357 (1979)] nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools. The courts below and the parties noted three methods employed or identified in lower federal court decisions: absolute disparity, comparative disparity, and standard deviation. . . .

Each test is imperfect. Absolute disparity and comparative disparity measurements, courts have recognized, can be misleading when, as here, ‘member of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service.’ . . . And to our knowledge, ‘[n]o court . . . has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems.’”

Id. at 1393.

Berghuis v. Smith, 559 U.S. 314 (2010), a 2010 decision of the United States Supreme Court, is the basis for Public Defender Chuck Kenville’s statement that the Iowa Supreme Court case law on calculation underrepresentation of minorities in jury pools is “obsolete.” The Court held that “neither *Duren* [v. Missouri, 439 U.S. 357 (1979)] nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools. “ *Id.* at 330. The Court recognized three methods had been employed by courts to do so: absolute disparity, comparative disparity, and standard deviation. The *Berghuis* Court observed, at 330:

Each test is imperfect. Absolute disparity and comparative disparity measurement, courts have recognized, can be misleading when, as here, ‘members of the distinctive group comp[ose] a small percentage of those eligible for jury service.’ * * * And to our knowledge, ‘[n]o court has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selections systems.’”

In *Berghuis*, the State had asked the Court to “adopt the absolute disparity standard for measuring fair and reasonable representation’ and to ‘requir[e] proof that the absolute disparity exceeds 10%’ to make out a prima facie fair cross-section violation. . . . Under the rule the State proposes, ‘the Sixth Amendment offers no remedy for complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold.’” *Id.* at 1394 n.4. The Court responded: “We need not reach that issue.” *Id.* The *Berghuis* Court concluded it “would have no cause to take sides today on the method or methods by which underrepresentation is appropriately measured”, *id.* at 1393, as the Defendant’s evidence failed to establish a policy or practice of systematic exclusion in the jury system, the third step of the *Duren v. Missouri* constitutional analysis.

Thus, in contrast to the holding of the Iowa Supreme Court in *State v. Jones*, *Berghuis* expressly declined to hold that the absolute disparity method was the sole method for determining underrepresentation and that a 10% absolute disparity was a prerequisite to make out a prima facie case. It also indicated that both the absolute and comparative measurements can be misleading when—as in Iowa—members of the racial minority group in question compose only a small percentage of those eligible for jury service. The Court’s misgivings about the absolute and comparative methods suggest a closer look at the standard deviation or binomial distribution statistical method is warranted.

The NAACP recommends that the Iowa Supreme Court should exercise its inherent authority over judicial procedure to engage in rule-making necessary to clarify the relationship and responsibilities of the State Judicial Branch, the District Court, and District Court administration for development of the Master Jury Pool and monitoring compliance with the fair cross section requirement. There is confusion and uncertainty as to these relationships and responsibilities and rule-making would result in much needed clarification and would identify if there is a need for corrective legislation.

There is also confusion and uncertainty as to the proper method for Courts to measure underrepresentation in the fair cross section analysis and here also rule-making would result in clarification. The Iowa Supreme Court’s 1992 holding of *State v. Jones* that only the absolute disparity method can be used to determine underrepresentation has been superseded by the U.S. Supreme Court’s recognition in *Berghuis v. Smith* (2010) that three methods—absolute disparity, comparative disparity, and standard deviation—have been used and the *Berghuis* Court’s express refusal to embrace the absolute disparity method alone. *Berghuis* cast further doubt on the appropriateness of use of the absolute disparity method in Iowa as it instructed that the absolute and comparative disparity methods can produce “misleading results” in judicial districts where racial minorities comprise only a small percentage of those eligible for jury service, as is the case in every judicial district in Iowa.

This issue is critical and one that can arise in every case involving a minority defendant, which is not an insignificant percentage of the Iowa Courts' dockets. Waiting until a case reaches the Court through the traditional appellate case process could delay resolution for several years. Given the fundamental nature of the jury trial right, a delayed appellate decision might require reversal of numerous cases that in the interim applied a method of measurement ultimately determined to be erroneous. Rule-making is an appropriate procedural method to address this issue as it allows full input from the many stakeholders, more complete consideration than may result from an appeal of an individual case, and more rapid resolution.

The NAACP recommends that the Iowa Supreme Court or the Iowa Legislature should give serious consideration to adoption of the standard deviation/binomial distribution as the preferred method of measuring underrepresentation. Of the three methods courts have used, the binomial is the only method that has statistical validity. It is a reliable measure for Iowa judicial districts because its calculation takes into account when a racial minority group may comprise only a small percentage of the juror eligible population. Technology advances have occurred that have simplified the binomial calculation. As we will demonstrate in the next section, the binomial calculation can be easily made on the Excel Spreadsheet found on every lap top computer, without the necessity of expert witness testimony from a statistician. In the event the Court is unable to identify one preferred method of measuring underrepresentation, a rule can, at a minimum, confirm that the absolute disparity method is not the only method and that the comparative disparity and standard deviation methods may also be used.

C. Advances in Technology Make Binomial Distribution/Standard Deviation Method the Best Method for Measuring Underrepresentation

The Berghuis Court defined the standard deviation method: "Standard deviation analysis seeks to determine the probability that the disparity between a group's jury-eligible population and the group's percentage in the qualified jury pool is attributable to random chance." *Id.* at 1390 n. 1. I submit that the principal rationale for both the absolute and comparative disparity tests—the simplicity of their arithmetic calculations—has been superseded by advances in technology since 1979. Both computations require only simple arithmetic and permit judges to make an intuitive assessment—but this is a seat of the pants assessment that lacks statistical verification and one that is particularly flawed in jurisdictions, such as those in Iowa, where the population percentage of each racial minority group is so small. Considerations such as these led the Supreme Court to embrace the standard deviation method in the context of pattern and practice employment discrimination cases, a proven statistical convention that takes into account sample size. *Hazelwood School District v. United States*, 433 U.S. 299 (1977); see also *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977).

The NAACP fully appreciate that lawyers and judges are generally not grounded in statistics and that has caused them tend to prefer simple math. However, technology has continued to advance in the nearly forty years since Hazelwood and Castaneda were decided, and those advances strongly suggest the standard deviation or binomial distribution method should be the preferred method for determining jury pool underrepresentation. The advent of the lap top computer and soft ware programs such as Excel now enable the binomial distribution calculation to be done reliably and easily, indeed, at the press of a button, without the involvement of a main frame computer or a statistician as was the case in 1977.

Castenada v. Partida, 430 U.S. 482 (1977), is the leading case on systemic challenges to selection of the venire or jury pool that discusses the standard deviation method. Castenada indicated that a defendant can make out a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time in numbers that approximate their percentage of eligible population.

Castenada made clear that an Equal Protection violation does not require total exclusion of a minority group, but can occur when that group is significantly underrepresented in the jury pool. It approved the binomial distribution statistical formula as a reliable measure of whether the difference between the observed number of minority group members in the pool and the expected number is statistically significant. The Court noted there is a general statistical convention that the assumption the selection process was nondiscriminatory should be rejected when there is less than a 5% chance the observed result could have occurred in a nondiscriminatory process. “As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.” Id.

Castenada teaches that while representation of African Americans in the jury pool need not mirror the population, over time it is expected that the percentage of African Americans in the pool would roughly approximate their percentage of the population, and large discrepancies from that expectation can provide the basis for a prima facie case of jury discrimination. Utilizing the binomial distribution formula to apply these principles to the Webster County data provides compelling statistical confirmation for our intuition that the “system is broken” to use Attorney Kenville’s words.

Application of Standard Deviation/Binomial Distribution Analysis to Webster County.

African Americans. Based on the data reported in the Globe Gazette article, the NAACP finds the underrepresentation of African Americans in the Webster County jury pool is dramatic. When the three jury pools are combined, there are only 2 African Americans out of 375 persons (Jury pool 1 (150) + Jury Pool 2 (150) + Jury Pool 3 (75) = 375). African Americans comprised only .005 of those

called for jury service—approximately 1/2 of 1% in a County in which Judge Weiland found African Americans comprise 4% of the juror eligible population.¹

In lay person's terms, standard deviation analysis would expect that random selection of a jury pool of 375 persons in Webster County would result in the inclusion of approximately 15 African Americans ($375 \times 0.04 = 15$). Instead, there were only 2. The binomial distribution formula finds this result (2) is 3.43 standard deviations less than the expected result (15), a showing greater than the prima facie case required in Castenada (2 or 3 standard deviations).

The binomial calculation function on the Excel spread sheet makes the calculation much simpler today and not only calculates the standard deviation but also converts it into probability as well. (You no longer have to take the standard deviation calculation and go to a probability table to get this result.) Using the 4% African American figure, Excel calculates the likelihood of this result in a nondiscriminatory process is 2.20783E-05, or .00000220783

Kenville prepared a 6-month cumulative Jury Pools Chart (May – October 2014). See Appendix. There were 16 African American jurors out of 868 jurors, or .018. In lay person's terms, based on 4% African Americans in the community, one would have expected approximately 36 African Americans in the Jury Pool. The binomial distribution formula finds this result (16) is 3.33 standard deviations less than the expected result (35.5), a showing greater than the Castenada prima facie case. Excel calculates the likelihood of this result in a nondiscriminatory process is .000153.

Absent a convincing explanation by Webster County officials, these statistical showings would constitute a prima facie case of racial discrimination against African Americans in violation of the 14th Amendment.

Hispanics or Latinos. Although African Americans were the minority group in question in *State v. Washington*, Kenville's 6-month Jury Pools Chart also included data on other minority groups as well. A quick glance at the Hispanic data is startling. According to the 2013 U.S. Census data, Hispanics or Latinos comprise 4.2% of the population in Webster County—roughly the same percentage that African Americans comprise of the population. Yet there were only 7 Hispanic jurors in the pool of 868, or .008.

¹ It should be noted that the Census had a category "Two or More Races" and this group comprised 1.7% of the Webster County population. There is no indication whether or how Judge Weiland took this group into account. Certainly, it is appropriate to allocate some portion of this bi-racial group to the African American and Hispanic group percentage; a 50-50 proportional allocation would seem appropriate as the "Black or African American Alone" and "Hispanic or Latino" alone group were essentially identical at 4.1% and 4.2% respectively.

Again, random selection of the jury pool would have expected approximately 36.5 Hispanic jurors ($868 \times .042 = 36.5$). The binomial distribution formula finds the actual number of Hispanic jurors in the Pool (7) is 4.99 standard deviations less than the expected result (36.5), a showing greater than the Castenada prima facie case. Excel calculates the likelihood of this result in a nondiscriminatory process is an incredible $1.8243E-09$, or .000000000 18243.

Absent a convincing explanation by Webster County officials, these statistical showings would constitute a prima facie case of racial discrimination against Hispanics in violation of the 14th Amendment.

Perhaps Webster County jury process is an outlier, but the testimony of the State Judicial Branch official that no county had ever asked to expand the Jury Pool source list beyond drivers' license holders and registered voters cries out for a serious reexamination of jury pool processes statewide. Anecdotal evidence also suggests that Iowa has a Jury Pool problem. Personal observation of the jury panels over 18 years of trials in the Drake Trial Practicum, with jurors drawn from Iowa's most populous country and likely its second most diverse, has seldom seen a person of color on panels. In the most recent 2015 trial, with a panel of 45 jurors, Professor Jerry Foxhoven reports there was not a single minority on the panel. Unfortunately, we believe this was not an aberration. Professor Robert Riggs, Director of the Drake Criminal Defense Clinic, advised Professor Lovell he and his student-lawyers had observed the absence of minority jurors in Polk County cases over the twenty-year experience of the Clinic. When Professor Lovell inquired whether the Batson protections were effective, Professor Rigg commented that he really didn't know because almost no minority jurors are ever in the jury pool.

D. Practical Steps Iowa Courts Can Take to Improve Minority Representation on Iowa Juries

Regardless of whether Webster County is an outlier, Iowa has always been a leader on equality and should not be satisfied to meet the constitutional minimum. Inclusiveness only makes our democracy stronger. Our neighboring state of Nebraska has served as nationwide model. The Nebraska Minority Justice Commission identified an easily implemented solution—adding persons with State DMV Identification cards to the pool.

The Nebraska Minority Justice Commission (MJC) studied the racial composition of jury pools in Nebraska and found that people of color were significantly underrepresented when the pool was drawn only from voter registration and drivers license lists. Prior to 2008 Nebraska also compiled its jury pool from “the lists of registered voters and registered drivers in the state of Nebraska.” The Nebraska MJC Study found that minorities were substantially underrepresented in Nebraska's jury pools. The MJC examined solutions that “explored the possibility of adding the following lists: state identification cards,

tax rolls, unemployment lists, and lists of those receiving state aid through the Department Health and Human Services.” Id. at 5-6.

The Nebraska DMV provided a breakdown by race and ethnicity of the more than 77,000 individuals who held State I.D. cards and it showed “that non-whites (Asians, Blacks, Hispanics, and American Indians) comprise a much greater percentage of state identification cards holders than registered drivers.” Id. at 6. For example, Blacks hold 3.71% of Nebraska drivers licenses but 17.73% of Nebraska ID cards. Ultimately, the MJC recommended that the source lists be expanded to include individuals with state identification cards. The Nebraska Legislature implemented the MJC recommendation, changing Nebraska law to require inclusion of state ID holders. This change added 77,111 more individuals to Jury Pools across Nebraska and, in doing so, corrected much of the underrepresentation of minorities. The Nebraska MJC reports: “Blacks are no longer significantly underrepresented in the initial pool’ of jurors.”

Let’s examine Iowa’s Jury Pool system which, like Nebraska, also relies on voter registration and drivers license lists for its Jury Pools. According to the Iowa Supreme Court’s web site, the “jury pool source list . . . is composed of names of citizens who are licensed to drive and registered to vote in Iowa.” http://www.iowacourts.gov/For_the_Public/Jury_Service/Frequently_Asked_Questions/. The Iowa Code requires the jury commission to use both lists to compile the master jury pool “and may use any other current comprehensive list of persons residing in the county, including but not limited to the lists of public utility customers”

“607A.22 USE OF SOURCE LISTS -- INFORMATION

PROVIDED. The appointive jury commission or the jury manager shall use both of the following source lists in preparing grand and petit jury lists: 1. The current voter registration list. 2. The current motor vehicle operators list. **The appointive jury commission or the jury manager may use any other current comprehensive list of persons residing in the county, including but not limited to the lists of public utility customers, which the appointive jury commission or jury manager determines are useable for the purpose of a juror source list.** The applicable state and local government officials shall furnish, upon request, the appointive jury commission or jury manager with copies of lists necessary for the formulation of source lists at no cost to the commission, manager, or county.

The jury manager or jury commission may request a consolidated source list. A consolidated source list contains all the names and addresses found in either the voter registration list or the motor vehicle operators list, but does not duplicate an individual's name within the consolidated list. State officials shall cooperate with one another to prepare consolidated lists. The jury manager or jury commission may further request that only a randomly chosen portion of the consolidated list be prepared which may

consist of either a certain number of names or a certain percentage of all the names in the consolidated list, as specified by the jury manager or jury commission.”

The NAACP brought the Nebraska Jury Pool study and reform to the attention of Chief Justice Mark Cady in April 2015. Neither the Chief Justice nor his staff were aware as to whether state ID card holders were included and he instructed his staff to study the Nebraska reform and its applicability to Iowa. When the NAACP met with the Chief Justice in late July, his staff stated that the DOT reported it provides the Court “with everything it has,” both drivers license holders and state ID card holders. The DOT provided no additional information.

The NAACP was pleasantly surprised to learn the DOT is already taking this step, but the DOT assurance does not abate our concerns in light of the District Court findings and evidence of substantial underrepresentation in the Ft. Dodge case. In light of the testimony that no judicial district has ever requested that names from other source lists, such as public utility or unemployment compensation lists, be added to the Master Jury Pool, the NAACP continues to have concerns that the statistically significant underrepresentation of African Americans (and Latinos) that was apparent in 2014-2015 jury data from Webster County is being replicated state-wide. The NAACP hopes it was aberrational, but we fear that it is instead the tip of the iceberg.

Of equal alarm was the testimony that no court officials, either at the local or state level, have been monitoring the Master Jury Pools so as to ensure each reflects a fair cross section of the community. Chuck Kenville, counsel for Defendant Washington, confirmed that the State Judicial Branch representative testified that it was his understanding DOT provides an outside vendor with a combined list of drivers licensees and State I.D. card holders. But Kenville expressed concern that DOT submits the data directly to a company in Kentucky and no one in State Court Administration or at the District Court level is actually checking the data submitted. The NAACP has learned over the years to be skeptical of verbal assurances so we intend to ask the Judicial Branch to respond to Kenville’s concerns about the lack of judicial oversight of the data submitted for the compilation of the Master Jury Pool list for Iowa. The NAACP knows from experience that Administrative procedures that are in place are not always followed. Given the importance of this issue to penultimate stage of the Iowa justice system, a careful study of this process by the State Judicial Branch is warranted. A verbal assurance by the DOT is not reassuring to the NAACP, as the NAACP recalls there was evidence in the *Pippen v. State of Iowa* case that suggested the DOT was one of the two worst state agencies in terms of underrepresentation of African Americans in its own work force.

In sum, the NAACP plans to ask that the Judicial Branch provide the public with data, broken down by racial group, from which it can be determined whether Iowa’s Judicial Districts’ Jury Pools reflect a fair cross section of the community. If such data has not been maintained, the NAACP intends to ask the Judicial

Branch to begin monitoring the racial composition of the Master Jury Pools in those Judicial Districts wherein lie Iowa's largest cities and in smaller cities, such as Perry, which have seen a sizable influx of Latino workers in recent years.

As part of this review, the NAACP will also ask that the Judicial Branch follow up with the DOT, and ask DOT to provide the Judicial Branch with further information about what DOT provides the Court in the way of names and data, including the number of ID card holders, race and/or color of each individual provided the outside vendor. The NAACP is also be interested to learn whether DOT or some other department or agency takes steps to encourage those without cars to obtain State ID cards, and if so, what steps are taken and by what department or agency.

The 2011 Drake Law Review article by Paula Hannaford-Agor, the Director for Jury Studies at the National Center for State Courts, provides a number of practical steps Courts can take to address underrepresentation. Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded, 59 Drake Law Review 761 (2011). In addition to broadening the source lists used to compile the Master Jury List, Hannaford-Agor recommended:

- (1) increasing the renewal frequency of the Master List to improve accuracy, which seems likely to become a problem in Iowa now that drivers licenses need be renewed only every eight years;
- (2) improving jury summons response through effective judicial enforcement; and
- (3) altering length of service and increasing compensation of jurors to minimize excusal rates and increase the ability to serve (which suggests the Fifth Judicial District's "1-week, 1-case" juror commitment should be replicated state-wide, if that has not already been done).

The NAACP supports each of the above three recommendations. Each is incorporated in the NAACP Recommendations to the Governor's Criminal Justice Working Group, with a detailed explanation as to the research and judicial experience supporting the recommendation and also how each would change existing Iowa law.

Finally, a very important step to achieving a fair cross section on juries would be to end felon disenfranchisement in Iowa. Iowa is one of only a handful of mostly Southern states that continue this regressive practice. The NAACP advocates that Governor Branstad restore the policy of his two predecessors, Governors Vilsack and Culver, that ex-felons who have served their sentences have their civil rights, including their right to vote, automatically restored. This is an important step in these individuals' reintegration into the community. Continued exclusion of ex-felons from restoration of their civil rights has a disproportionate racial impact on African American men and women in Iowa and undoubtedly explains a portion of the underrepresentation of Blacks on Iowa's juries. The

NAACP supports Presidential Candidate Hillary Clinton's proposed Voting Rights Act that would automatically restore voting rights for ex-felons who have served their sentences.

III. Implicit Bias Is Inherent in the Exercise of Peremptory Strikes

In *Batson v Kentucky*, 476 U.S. 79 (1986), Justice Powell, writing for a 7-2 Majority, held the Equal Protection Clause prohibits a prosecutor from using a peremptory challenge to exclude "potential jurors solely on account of their race or the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." The Court recognized that discriminatory strikes impacted not only the defendant but also jurors and the community. *Batson* held that proof of a pattern of discrimination was not necessary and that a prima facie case of purposeful discrimination can be made out solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.

Batson embraced the *McDonnell Douglas v. Green* 3-Step Proof Model. First, the party objecting to the peremptory challenge must show facts and other relevant circumstances that raise an inference the juror was excluded "on account of their race." Second, if the defendant establishes this prima facie case, the burden shifts to the prosecutor to provide "a neutral explanation." It is not sufficient for the prosecutor to assert her good faith or deny discriminatory intent. The Court stated the prosecution cannot strike jurors of the defendant's race based on an assumption they would be partial to the defendant because of his shared race. The prosecutor must provide legitimate reasons "related to the particular case to be tried." *Id.* at 98 and n.20. (Note, this potentially important limitation has been watered down or ignored in subsequent cases.) Third, if the prosecutor meets this burden, the trial judge must determine if the defendant has carried its burden of proving "purposeful discrimination." The most common method of proof has been to demonstrate that the race neutral reason articulated was pretextual.

Remedy. If discrimination is found, the court can "discharge the venire and select a new jury from a panel not previously associated with the case" or "disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." *Id.* at 99 n.24. Justice Thurgood Marshall, in his concurrence, contended that the only effective remedy is to eliminate peremptory challenges completely.

Formally, *Batson v. Kentucky* has barred racial discriminatory peremptory challenges for more than 25 years. The proof is in the pudding, and the reality has proved *Batson* to be a fig leaf. There are scores of law review articles critical

of the U.S. Supreme Court's jurisprudence implementing Batson, decrying the ineffectiveness of the evidentiary burden placed on those who challenge a peremptory challenge as discriminatory. There is a growing body of literature that criticizes the Batson focus on purposeful, intentional racial discrimination as obsolete, wholly failing to address the contemporary phenomenon of implicit bias. Leading the way is an Iowa Law Review Symposium, Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (August 2010) at <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf>, and a Harvard Law & Policy article by Federal District Court Judge Mark Bennett in 2010 that focused on implicit bias and, following Thurgood Marshall's lead, advocated the abolition of peremptory challenges altogether.

The 200-page series of articles in the Iowa Law Review exhaustively documents the serious flaws in the U.S. Supreme Court's implementation of Batson, and was cited in several of the opinions in *State v Saintcalle*. Although the Washington Supreme Court affirmed the conviction because the Batson issues were not properly preserved, there was a broad consensus on the Court that "more robust" protections needed to be developed by State Courts if Batson was to have any meaning. In sum, the 3-step *McDonnell Douglas v. Green* Analysis that implements Batson's well-intentioned prohibition on racial discrimination in juror selection has placed an evidentiary burden so high on the party opposing a peremptory challenge that it has failed to protect against intentional discrimination, and, worse, the post-Batson Court's willingness to accept intuition, stereotypes, even silliness as justification has effectively licensed implicit racial bias in the selection of jurors.

A. Thurgood Marshall, concurring in Batson, and so often ahead of his time, argued strenuously the Court's McDonnell Douglas approach to implementing Batson's Equal Protection guarantee would prove ineffective.

First, defendants cannot attack the discretionary use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. * * * Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level."

Batson v. Kentucky, 476 U.S. 79, 105 (1986) (case citations omitted). Justice Marshall further contended that the Court's bottom line requirement that "purposeful discrimination" need be proven to resist a peremptory challenge effectively undercut the Equal Protection guarantee it purported to enforce.

"Second, when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. Any

prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed 'uncommunicative,' or 'never cracked a smile' and, there 'did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case.' If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory."

"Nor is outright prevarication by prosecutors the only danger here. '[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.' A prosecutors' own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors' peremptory strikes are based on their 'seat-of-the-pants instincts' as to how particular jurors will vote. Yet 'seat-of-the-pants instincts' may often be just another term for racial prejudice."

Batson v Kentucky, at 105-106 (case citations omitted).

The 3-step McDonnell Douglas proof model was developed in an employment discrimination case. Proving discriminatory intent in an individual disparate treatment employment discrimination case is a challenging task even when the plaintiff has had the benefit of an Iowa Civil Rights Commission or EEOC investigation report and has had, typically, two or more years to investigate the case and do discovery, including depositions. Smoking gun evidence is rare today, and it takes a good deal of time, considerable effort, and resources to obtain evidence of difference in treatment or discriminatory impact. In contrast, the party opposing a peremptory challenge may have only two to five minutes to articulate the grounds for the challenge and the proof that will support it.

B. Washington Supreme Court's lead opinion by Justice Charles Wiggins in *State v. Saintcalle*, 309 P.3d 326, 338 (Wash. 2013), observed at 336, 338, 339:

"[D]iscrimination in this day and age is frequently unconscious and less often consciously purposeful. That does not make it any less pernicious. Problematically, people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it. . . . Since Batson's third step hinges on credibility, this makes it very difficult to sustain a Batson challenge even in situations where race has in fact affected decision-making."

“More troubling for Batson is research showing that people will act on unconscious bias far more often if reasons exist giving plausible deniability (e.g., an opportunity to present a race-neutral reasons). * * * The main problem is that Batson’s third step requires a finding of ‘purposeful discrimination,’ which trial courts may often interpret to require conscious discrimination. This is problematic because discrimination is often unconscious. A requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a Batson challenge.”

“* * * As a first step, we should abandon and replace Batson’s ‘purposeful discrimination’ requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion. For example, it might make sense to require a Batson challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory or where the judge finds it is more likely than not that, but for the defendant’s race, the peremptory would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a Batson challenge.”

While the myriad of opinions in Saintcalle confirm there was a consensus that “more robust” procedures were necessary to implement the Batson Equal Protection principles, the Washington Court ultimately held that arguments based on the Washington State Constitution had not been made below or briefed on appeal, and, therefore, this was not an appropriate case to make a decision on Batson reforms. The Court also observed that the issue may well be one better suited for rule-making by the Court, where it could obtain the views of the many constituencies that are interested in the issues involving peremptory challenge.

The Saintcalle opinions are the most extensive judicial treatment of the issues involving the shortcomings of the Batson jurisprudence in light of the Social Science research involving implicit bias. The Saintcalle opinions, particularly Justice Gonzalez, extensively cite to the excellent 2012 Iowa Law Review Symposium put together by Professor James Tomkovicz, *Symposium: Batson at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy*, 97 Iowa L. Rev. 1393 -1744 (2012) <http://ilr.law.uiowa.edu/past-issues#975>.

C. Early Post-Batson Cases that Expanded Its Scope

A. *Powers v. Ohio* (1991) held that a white criminal defendant may challenge racially discriminatory peremptory challenges directed at African American jurors; thus, upholding reverse-Batson challenges.

B. *Edmonson v. Leesville Concrete Co.* (1991) held that Batson applied to peremptory strikes made by private parties in a civil case and that the opponent of the strike could raise the excluded juror's rights.

C. In *Georgia v. McCollum* (1992) white defendants were charged with assault against black victims. The Court held that Batson applied to criminal defendants and therefore they could not exercise their peremptory challenges in a racially discriminatory manner.

D. *J.E.B. v. Alabama ex rel. T.B.* (1994) held that Batson applied to gender-based strikes, and it was impermissible for the State to strike male jurors in a paternity case.

D. Post-Batson SCOTUS Cases that Watered Down the Burden of Justification by the Party Making Peremptory Challenge

A. *Hernandez v. New York*, 500 U.S. 352 (1991). In case involving a Hispanic defendant the prosecutor struck Hispanic jurors. When challenged the prosecutor stated he struck these jurors because they were bilingual and might not be able to accept the translator's version of testimony and they might have "undue impact upon the jury." The Supreme Court held that these explanations were race neutral and satisfied the "facial validity" requirement of step 2. At step 3, the pretext stage, the trial court can consider the disproportionate impact that the peremptory will have upon a racial group, but the ultimate issue is intent, and where the trial court has taken into account the lawyer's demeanor in determining his intent, that finding must be given "great deference on appeal."

B. *Purkett v. Elem*, 514 U.S. 765 (1995)(Per curiam). The state court upheld the prosecutor's strike of two black jurors, based on his explanation that he struck them because of their hair length and facial hair, which caused them to look suspicious to him. In a habeas corpus review the Eighth Circuit held these explanations should have been rejected by the trial court because they did not plausibly relate to a juror's ability to serve as a juror. The Eighth Circuit concluded these reasons were pretextual and found clear error in the trial court's determination there was no discrimination. The Supreme Court reversed, finding the Eighth Circuit erred in requiring an explanation that was persuasive or plausible at step 2. Indeed, the Court held that a trial judge can believe any "silly or superstitious" reason offered by a prosecutor for striking the prospective black jurors.

IV. Iowa Supreme Court Should Invoke Its Independent Constitutional Analysis Under the Iowa Constitution and Its Rule-making Power to Construct More Robust Procedures to Protect Against Both Conscious and Unconscious Racism in the Exercise of Peremptory Strikes

A. *State v. Mootz*, 808 N.W.2d 207 (Iowa 2012).

This is a reverse-Batson case in which the defendant used peremptory challenges to exclude two Hispanic jurors. The defendant was charged with

assault on a police officer (who was Hispanic). The trial court advised the lawyers that he observed 3 minorities on the jury panel, 2 of whom were Hispanic, and advised that only one of the minorities was strikable, because of his relationship to law enforcement. When Defendant Mootz also struck the other Hispanic juror (Garcia), District Judge Douglas McDonald sua sponte held a hearing in chambers and asked if the State objected to this strike; the State did. Mootz's lawyer replied that he didn't have to give a reason, but, if he did, he struck "Garcia because he was a former bartender who claimed he knew about intoxication and because Garcia stated he had been previously arrested and thought he deserved it." *Id.* at 213. The trial judge concluded these reasons were insufficient, and stated: "[W]e have a police officer who is Hispanic and we make it a point to make sure that minorities are treated fairly like everyone else on our jury panel and I think that's important and that applies to both the Defendant and the State." *Id.* The juror in question was seated, and Mootz was convicted.

The Iowa Supreme Court unanimously reversed. The Court upheld the trial court's authority to raise a Batson Equal Protection claim sua sponte and inquire into a defense attorney's motives for a peremptory strike, but the trial judge first must observe an "abundantly clear" prima facie case. *Id.* at 271. It also stressed the trial judge must make an adequate record following the 3-step Batson procedure. The Court followed the U.S. Supreme Court case law implementing Batson; there was no claim that the Court should examine whether the Iowa Constitution would provide a basis upon which the Court might fashion a more protective standard under the Iowa Constitution's Equality and/or Jury Trial provisions.

The Court noted, citing "State v. Griffin, 564 N.W.2d 370, 376 (Iowa 1997) (finding a prima facie case was established where the only two African-American panel members were struck)," that a pattern of strikes against jurors of a particular race make out a prima facie, but then faulted the trial judge for not finding on the record it found a prima facie case before proceeding to step 2. (This conclusion is puzzling, or incredibly technical, as the trial judge appeared to be seeking to protect the litigants from violating the Griffin holding that striking two minorities from the panel made out a prima facie case.) Nonetheless, the Court went on to Batson steps 2 and 3 as defense counsel gave a race neutral reason in response to the objection. Applying the Purkett standard that a step 2 reason can be "silly or superstitious," the Court concluded that Mootz's reasons for striking Garcia were race neutral, and the trial judge erred in not proceeding to step 3 of the Batson analysis.

Step 3 involves a determination of whether the reasons given for the strike are pretextual. "The district court did not evaluate Mootz's credibility regarding the reasons provided for the peremptory strike. Instead, the court stated the reasons were insufficient, illegitimate, and invalid reasons for the strike." *Id.* at 220. This was error, as the Court found "Mootz's explanations were not only valid, racially neutral reasons for striking Garcia, they were reasonable." It noted the

case “involved an altercation with a law enforcement officer that occurred following a bar fight where Mootz may have been intoxicated.” *Id.*

B. Mootz Does Not Foreclose an Iowa State Constitutional Claim to Strengthen the De minimis Batson Procedures

The Iowa Supreme Court was not asked to develop a procedure or analysis that would be more protective of Equal Protection than the de minimis Batson 3-step procedure. The Mootz Court followed without question or reservation the Batson procedure developed by SCOTUS. The race neutral reasons given by Mootz for striking Garcia, while not compelling, easily met the de minimis “silly or superstitious” standard of Purkett. Although the Iowa Supreme Court held that a trial judge could sua sponte raise a Batson objection on her own, the Court was very cautious in doing so, stating a judge should do so only when she has observed “an abundantly clear” prima facie case of discrimination. When a clear prima facie case has been observed, “it would be *appropriate to ask* for a race-neutral reason for the defendant’s strikes.” *Id.* at 217.

The Iowa Supreme Court appears to have been concerned that “the neutral role of the trial judge” be maintained. The NAACP believes this concern is misplaced, and the better view is that of the Washington Court in *State v. Evans*, 998 P.2d 373, 378-79 (2000): “[T]he trial judge, as the presiding officer of the court, should take the necessary steps to ensure that discrimination will not mar the proceedings in his courtroom.” The Iowa Supreme Court’s perspective is too narrow and the role it envisions for the trial judge is too passive given that the case law recognizes discrimination in peremptory challenges implicates Equal Protection rights not only of the parties but also of the excluded juror and the community generally. While the Batson Court expressed hope that the State would protect the community interest, we believe experience suggests this has proven spotty at best and that the trial judge should have a shared responsibility to protect this community interest and to ensure that discrimination does not infect the jury. After all, the buck stops with the trial judge. The NAACP believes it was unfortunate there was not even a hint of praise from the Supreme Court in *Mootz* for the trial judge’s efforts to protect against discriminatory exercise of peremptory strikes or to secure a racially diverse jury. Indeed, the unanimous 6-0 reversal without so much as faint praise for the District Court’s good intentions to achieve a jury that represent a fair cross section of the community sends exactly the opposite signal to trial judges—there is almost no chance of reversal if you sustain the peremptory strike (a statutory right), but real risk of reversal if you don’t dot your “I’s” and cross your “T’s” if you deny a Batson objection to a peremptory strike even though the objection is based on constitutional grounds.

The Court emphasized that “[w]hen the [trial] court raised the Batson issue on its own, [] we will require the district court to ‘make an adequate record, consisting of all relevant facts, factual findings, and articulate legal bases for both its finding of a prima facie case and for its ultimate determination at the third stage of the Batson procedure.’” *Id.* at 217 (quoting *People v. Rivera*, 852 N.E.2d (Ill.) at 785). Despite striking two of the three Hispanic jurors, the Court concluded this was insufficient for the trial judge to believe there was “a clear indication of a prima facie case of purposeful racial discrimination.” *Id.* at 218. The Court held “[t]he district court did not evaluate Mootz’s credibility regarding the reasons provided for the peremptory strike. Instead, the court stated the reasons were insufficient, illegitimate, and invalid reasons for the strike.” *Id.* at 220.

It may be that the trial judge could and should have made a better record as to his reasons for sustaining the Batson objection, but the extreme deference that appellate courts typically give to Batson fact-finding by trial judges when they deny Batson objections does not appear to have been employed by the Iowa Supreme Court in its evaluation of the trial judge’s ruling when he sustained the Batson challenge. The NAACP believes it is wrong for the Court to impose a greater burden on the trial judge to justify a ruling in favor of Equal Protection than it requires when the trial judge rejects a Batson objection and rules in favor of the peremptory challenge—to do so subordinates the Constitutional Equal Protection right to the Statutory right.

The reason Mootz gave for striking Garcia was he “was a former bartender who claimed he knew about intoxication and because Garcia stated he had been previously arrested and thought he deserved it.” *Id.* at 213. This ruling appears consistent with the U.S. Supreme Court’s ruling in *Purkett v. Elem* that a “silly or superstitious” reason satisfies the step 2 burden of production. On the question of pretext, the Court concluded that, in the context of this case, these reasons were “valid,” “reasonable,” and “legitimate concerns,” and “were not so implausible that they can be viewed as a mere pretext for discrimination.” *Id.* at 220. However, the Iowa Supreme Court fails to appreciate the reality that it is human nature for the trial judge to shy away from making a finding the attorney lied or engaged in purposeful discrimination; this is a professional she knows and may work with regularly and such a finding carries considerable stigma. It is instructive to recall the observation of Justice Wiggins in *Saintcalle*: “A requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a Batson challenge.” I suspect Judge McDonald may well have stopped short of entering such a devastating finding, in the hope his finding that the lawyer’s explanation was insufficient, illegitimate, and invalid would suffice.

The Batson requirement that the judge find the lawyer guilty of purposeful race discrimination sets the bar so high that Batson’s protections have proven meaningless. A similar high bar rendered the original Iowa Civil Rights Act ineffective. Discrimination was originally made a crime that required indictment by the grand jury and, of course, proof beyond a reasonable doubt for conviction.

These requirements imposed such high hurdles that only a handful of convictions were obtained between 1884 and 1965, when the law was amended to provide civil remedies (and abandoned criminal penalties). The success of the ICRA in fighting discrimination over the past 50 years demonstrates the wisdom of this remedial change, and suggests that the wisdom of the Court invoking the Iowa Constitution's Equality and Jury Trial Clauses to shift the Batson focus from purposeful discrimination to implicit bias.

We do not know whether the Court would have upheld the trial judge's ruling in Mootz had it made an explicit finding of pretext in defendant's strike of Garcia. We do not know what weight, if any, the Court gave to the struck Hispanic juror and community's interest in Equal Protection, but those considerations appear to have been slighted as they were not even mentioned by the Court. Would this case come out differently were the Iowa Court to reform Batson by requiring the proponent of the strike (here, the defendant) to carry the burden of persuasion that his strike was nondiscriminatory? The Dissent in Purkett noted, with seeming approval: "The Court of Appeals agreed with the State that excluding juror 24 was not error because the prosecutor's concern about that juror's status as a former victim of a robbery was related to the case at hand [in which defendant Elam was charged with robbery]." In Mootz, the connection between Garcia, the struck juror, and the particular case was less direct than that of juror 24 in Purkett. While the answer is uncertain without more specific findings by the trial judge in Mootz, shifting the burden of persuasion to the party making the challenged strike would likely have resulted in sustaining the Batson objection and seating the Hispanic juror.

The Iowa Supreme Court has exercised its independent authority to provide individuals with greater protection under the Iowa Constitution's Equality and criminal procedure clauses. However, it has not been asked to do so with regard to jury selection. Indeed, as recently as 2012 the Iowa Supreme Court's consideration of Batson issues in *State v Mootz* resulted in it following lockstep with the U.S. Supreme Court's jurisprudence. Batson recognized the applicability of the Equal Protection Clause protections not only on behalf of the defendant and the prosecution, but also the community as potential jurors. The NAACP is critical of the Mootz decision, which it believes gives inadequate regard to the Community's Equal Protection interests and undercuts the trial judge's key role in protecting that interest. In seeking to protect the defendant's statutory right to peremptory challenges, we believe the Court failed to carefully consider the Community right and as a result wrongly subordinated the Constitutional right of Equal Protection.

It is time for the Iowa Supreme Court to reform Batson, perhaps through its rulemaking authority rather than its appellate jurisdiction. The American Justice System's goal of "Equal Justice Under Law" is boldly proclaimed over the entrance to the United States Supreme Court building, a telling statement of the Equal Protection right's critical foundation to the rule of law. We believe Mootz will discourage trial judges from taking an active role in monitoring and

enforcing the Batson protections. We believe this aspect of the Mootz Court’s reasoning is clearly wrong, as trial judges should not stand by passively while implicit bias infects decision making. If they do so, they will be complicit. The Iowa Supreme Court should take the lead in establishing an active role for trial judges in the enforcement of Batson and should provide the necessary training so judges can address race issues in jury selection—a skill that many lawyers lack due to inexperience or lack of expertise. In order that the trial judge can effectuate a remedy, the judge should keep all jurors present until all strikes have been made. This will enable the Judge to see if a pattern of striking all jurors of color developed, and also enables the judge to restore any juror wrongfully struck to the jury panel.

C. Possible Batson Reforms

There seems little likelihood a majority of the current U.S. Supreme Court will engage in reforming the Batson defects. We are aware the Court will have an opportunity to revisit Batson next Term as it has granted certiorari in a case involving Batson issues, *Foster v. Chatman*, No. 14-8349. See New York Times, Aug. 16, 2015, “Exclusion of Blacks From Juries Raises Renewed Scrutiny.” <http://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html?smid=nytcore-iphone-share&smprod=nytcore-iphone>. But the Iowa Supreme Court need not wait for the U.S. Supreme Court; rather, it should exercise its independent authority under the Iowa Constitution or its inherent authority over court procedure. It should broaden the overall scope of protection, using independent constitutional analysis under State Constitution’s Equality and Jury Trial provisions, so as to prohibit not only purposeful discrimination but also implicit bias.

A. Total Elimination of Peremptory Challenges. Precedent: After more than 700 years, peremptory challenges were totally eliminated in England in 1988 [Criminal Justice Act, 1988, c. 33, §118(1) (Eng.)] and by Scotland, Wales, and Northern Ireland in 2007 [Justice and Security Act (Northern Ireland), 2007, ch. 6, §13]. Canada still allows peremptory challenges but, unlike U.S. state courts, does not provide for extended voir dire. Principal rationale for abolition was that the exercise of peremptory challenges derogates the randomness of jury selection that is the essence of the jury system. Post-abolition commentary suggests this change has reduced cost and the length of trials and has done so without causing jurors to suffer embarrassment due to challenges for cause, without an increase in challenges for cause (as had been anticipated), and without robbing defendants of a sense of justice.

Abolition has also been advocated by SCOTUS Justices Thurgood Marshall and Stephen Breyer, Washington Supreme Court Justice Gonzalez, numerous commentators, and U.S. District Judge Mark Bennett (with additional procedures). Justice Gonzalez wrote extensively on his reasoning for abolishing peremptory challenges, supporting his constitutional analysis with numerous policy grounds, only two of which will be summarized here. He pointed out that

peremptory challenges exacerbate unfairness as they favor affluent parties who have the resources to hire jury consultants. Justice Gonzalez argued that extended voir dire is an inefficient use of judicial resources and juror time.

B. Elimination of Peremptory Challenges Coupled with Expanded Lawyer Participation in Voir Dire, lawyer training regarding implicit bias, and Jury Instructions addressing implicit bias. Advocated by U.S. District Judge Mark Bennett. Judge Bennett contends that “the selectors’ ability to act on their own biases will be inhibited by the necessity of demonstrating cause for any strikes of prospective jurors. Similarly, . . . increased lawyer participation in voir dire will increase the information about juror biases on which strikes for cause can be based.” Mark Bennett, 4 Harv. L. & Pol. Rev. 149, 168 (2010). I submit that training trial judges on implicit bias and a mandate that they actively monitor and enforce Batson sua sponte by the trial judge should be built into the procedural scheme.

C. Changing the Batson 3-Step Analysis.

Clarify/Ease Proof Required for Prima Facie Case. In *State v. Rhone*, 229 P.3d 752 (Wash. 2010), a 5-member majority agreed that a defendant “can establish the prima facie case when the record shows that the prosecution exercised a peremptory challenge against the only remaining member of the venire who is in the same constitutionally cognizable racial group as the defendant.” The Iowa Supreme Court’s holding in *State v. Griffin*, appears to hold similarly, but the Mootz dicta regarding the prima facie case seems inconsistent with *Griffin*.

Expand Batson’s Protection to Bar Implicit Bias, Impose Burden of Persuasion on Party Making Peremptory Challenge to Demonstrate Its Strike Was in Fact Made Without Implicit/Unconscious Bias. The existing case law has done a damn poor job of implementing Equal Protection principles, and it has totally failed to address the widespread problem of implicit bias. By expanding Batson through interpretation of the Iowa Constitution’s Equality clauses to prohibit implicit bias, the Court will pump vitality into Batson again. McDonnell Douglas imposes only a burden of production on the party exercising the peremptory challenge; Purkett and the case law make clear the current “burden” is meaningless. Judge Bennett observed “the Batson challenge process would be more effective if trial courts required stronger showings of legitimate grounds for strikes and if appellate courts gave less deference to trial courts’ Batson determinations.” *Id.* at 169.

Changing the burden of production to a burden of persuasion would be consistent with the burden-shifting in Title VII employment discrimination cases. There, once the plaintiff has established a prima facie case of disparate impact from the employer’s race neutral procedure or criteria, the employer is required to show the procedure or criteria is job related and a business necessity.

Justice Wiggins in *Saintcalle* suggested another approach that would “require a Batson challenge to be sustained if there is a reasonable probability that race was

a factor in the exercise of the peremptory or where the judge finds it is more likely than not that, but for the defendant's race, the peremptory would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a Batson challenge.”

In sum, Iowa is rightfully proud of its historical record of leadership on equality issues, but the current crisis in its criminal justice system threatens to destroy its historical legacy—but, more importantly, the current racial disparities in our criminal justice system reflect serious and disproportionate havoc and injury on the lives of countless African Americans and their families far beyond that required by thoughtful and balanced penal policy.

V. Iowa Courts Need a Minority Justice Standing Committee

NAACP urges the Iowa Supreme Court to create a Minority Justice standing committee, supported by full-time professional staff, modeled on Nebraska's. Eradicating systemic discrimination and reconstructing a justice system that is fair, nondiscriminatory, and equal is both hard work and ongoing work. The change that must occur will not happen without a systemic response that is committed and ongoing. Without such a commitment history demonstrates any gains achieved will be piecemeal and too frequently lost due to backsliding.

Resources:

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

Mark Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol. Rev. 149 (2010)

Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761 (2011)

Jerry Kang, Mark Bennett et al, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012)

Project Implicit, <http://projectimplicit.net/index.html>.

Symposium: *Batson at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy*, 97 Iowa L. Rev. 1393 -1744 (2012) <http://ilr.law.uiowa.edu/past-issues#975>. UI Law Professor James Tomkovicz was the point person for the Symposium and wrote the lead article.

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color-Blindness* 119-123 (2012)

State v Mootz, 808 N.W.2d 207 (Iowa 2012)

State v. Saintcalle, 309 P.3d 326 (Wash. 2013)

Appendix:

State of Iowa v. Tyrone Washington, Iowa District Court Order Granting Motion to Strike Jury Panel

Kenville Exhibit, Webster County Cumulative Jury Pool Data, May – October
2014, State of Iowa v. Washington⁵
State Court Administration’s Explanation of Jury Pool Construction, State of
Iowa v. Washington
2013 U.S. Census Data for Webster County, Iowa