

“A FAIR AND IMPARTIAL TRIAL FREE FROM RACIAL  
DISCRIMINATION WILL REQUIRE AN ACROSS-THE-  
BOARD APPROACH”: SYSTEMIC REFORMS STILL  
NEEDED IN LIGHT OF THE “OTHER” RACIAL JUSTICE  
JURY TRIAL RULINGS IN STATE V. VEAL & STATE V.  
WILLIAMS

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I. INTRODUCTION

Because of the complexities of the Iowa Supreme Court’s fair cross-section jurisprudence, including the analysis of standard deviation statistical facts and proof,

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census data fine-tuned to juror eligibility, and differing jury management practices and the potential systemic impact of each on every stage of the jury selection process, there was so much to unpack that it was necessary to limit the focus of our recently published Article<sup>1</sup> to the fair cross-section holdings of the *Lilly* trilogy: *State v. Lilly*,<sup>2</sup> *State v. Veal*,<sup>3</sup> and *State v. Williams*.<sup>4</sup> The Authors identified but were unable to examine several other issues these cases presented which are also crucial to providing a defendant with “a fair and impartial trial free from racial discrimination.”<sup>5</sup> This Article will examine and critique the *Veal* and *Williams* rulings on the “other” racial justice jury issues that were resolved against the appellants and will suggest they still leave open avenues for reform.

The Authors agree with the justices who disagreed with those rulings. In particular, the Authors agree with the systemic vision championed by Justice Brent Appel in all three cases that was most eloquently expressed in his dissent in *State v. Williams*. Justice Appel wrote, “[T]o emphasize, again, that in order to ensure criminal defendants receive a fair and impartial trial with a cross section of members of the community, a systemic approach is required.”<sup>6</sup> Justice Appel explained what a systemic approach would encompass:

The progress that has been made today on the question of fair cross section in jury pools is important. But in my view, the promise of providing defendants with a *fair and impartial trial free from racial discrimination will require an across-the-board approach*. Any effective effort to address the potential of racial bias must include approval of individual inquiry of racial bias in voir dire, revision or abandonment of the approach to peremptory challenges of *Batson v. Kentucky*, the availability of an implicit-bias instruction at the request of the defendant as suggested by the American Bar Association, and development of the principles outlined in *Peña-Rodriguez v. Colorado*, which permit a defendant to penetrate the jury box when there is evidence that the verdict was tainted by racial discrimination.<sup>7</sup>

This Article is a sequel to our earlier article. In it we will demonstrate why we

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1. Russell E. Lovell II & David S. Walker, *Achieving Fair Cross-Sections on Iowa Juries in the Post-Plain World: The Lilly-Veal-Williams Trilogy*, 68 Drake L. Rev. 499 (2020) [hereinafter Article].

2. *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019).

3. *State v. Veal*, 930 N.W.2d 319 (Iowa 2019).

4. *State v. Williams*, 929 N.W.2d 621 (Iowa 2019).

5. *Id.* at 642 (Appel, J., concurring in part and dissenting in part).

6. *Id.* at 642.

7. *Id.* (emphasis added) (citing *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017)).

agree with Justice Appel’s view that “a systemic approach” will be required if the fair cross-section cases are to accomplish *State v. Plain*’s<sup>8</sup> objectives.<sup>9</sup> The Authors have three goals. One is to examine the divisions within the court in the *Veal* and *Williams* holdings on “the other racial justice jury trial rulings” and to suggest common ground can be found for the “systemic reform” advocated by Justice Appel. A second is to identify selected areas of common ground for reform through the Iowa Supreme Court’s current rulemaking process. For the first time in 42 years, the Iowa Supreme Court has under consideration proposed amendments to the Iowa Rules of Criminal Procedure.<sup>10</sup> Among the proposed amendments are several that relate to jury trial issues relevant to racial justice and racial diversity in jury pools and on trial juries, including the implicit bias and individualized voir dire issues resolved in *Williams* and a mandate for reporting on voir dire enabling appellate review of *Batson* claims, like that arising in *Veal*.<sup>11</sup> Finding common ground for reform is urgent. The tragic events of 2020 significantly heightened concerns about racial justice in a myriad of contexts, and, in response, the National Conference of Chief Justices, together with the Conference of State Court Administrators, issued a resolution committing them to address racial injustices in the criminal justice system.<sup>12</sup> Our third and final goal is to alert the reader to and examine the

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8. *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). We also promised in our Article separately to illustrate determination of whether there is underrepresentation of a distinctive group under *Duren/Plain* prong 2 and would provide a step-by-step guide to such proof: the necessary jury data, the appropriate comparative Census data, and demonstration of the binomial distribution calculation on Microsoft Excel. That illustration and discussion will appear in a forthcoming article.

9. See Article, *supra* note 1, at 586–88.

10. *Request for Public Comment on Proposed Amendments to Chapter 2, Iowa Rules of Criminal Procedure*, IOWA CTS. (Mar. 30, 2020), <https://www.iowacourts.gov/collections/483/files/1073/embedDocument/>.

11. See *id.*; *State v. Williams*, 929 N.W.2d 621, 633 (Iowa 2019); *State v. Veal*, 930 N.W.2d 319, 334 (Iowa 2019).

12. During the month of June 2020, in the wake of the tragic killing of George Floyd and other African Americans, 25 Chief Justices of Supreme Courts from across the country, including our neighboring States of Illinois and Nebraska, issued public “statements on racial justice” expressing their Courts’ renewed commitment to racial justice and equality. *State Court Statements on Racial Justice*, NAT’L CTR. STATE CTS., <https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice> [https://perma.cc/N5MN-UJLK]. Many expressed an openness to taking a fresh or new look at institutional or systemic racism. See *id.* The National Center for State Courts did not merely publish a news report of the Chief Justices’ Racial Justice Statements, but prominently printed each one on the NCSC website. See *id.* In late July the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (CSCA) jointly passed the above-mentioned Resolution 1:

implications of recent developments sure to impact achievement of a fair cross-section of the community and representation of African Americans, indeed all persons of color, in jury pools and jury panels. These were (a) the restoration of voting or citizenship rights by Iowa Governor Kim Reynolds of persons previously convicted of a felony, (b) the Supreme Court's amendment of Rule of Criminal Procedure 2.18(5)(a) to eliminate previous conviction of a felony as a basis for dismissing or excluding persons from jury service if their voting rights have been restored, and (c) a recent position statement of the Office of State Court Administration on jury data collection, monitoring, and reporting, which will be of major assistance to counsel, judges, and jury managers in determining whether there is underrepresentation of a distinctive group in jury pools and panels and in developing timely correction when underrepresentation is found

## II. *STATE V. VEAL*: UPHOLDING THE PROSECUTORIAL STRIKE OF THE FINAL AFRICAN AMERICAN JUROR AGAINST DEFENDANT VEAL'S *BATSON* CHALLENGE

Writing for a 5–2 majority that included Justices Thomas Waterman, Susan Christiansen, and Christopher McDonald and Chief Justice Mark Cady, Justice Edward Mansfield upheld the prosecutor's peremptory strike of the final African American juror on defendant Veal's trial jury over his *Batson v. Kentucky* challenge.<sup>13</sup> In doing so, the court relied upon the traditional *Batson* case law that is very deferential to the trial court's finding that the prosecutor's reason was *not* pretextual.<sup>14</sup> The facts did not provide a favorable backdrop for seeking reform of the ineffective *Batson* procedures.<sup>15</sup> S.H., the African American juror who was struck by the prosecutor, was the daughter of a man he had prosecuted and convicted of murder only a few years earlier; and the prosecutor expressed understandable concern she might have a latent bias toward him.<sup>16</sup>

During voir dire, juror S.H. stated “she believed her father was treated fairly,” and she “conceded he was ‘involved’ in the crimes but said she did not ‘know for

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“[A]gree[ing] to continue and to intensify efforts to combat racial prejudice within the justice system, both explicit and implicit, and to recommit to examine what systemic change is needed to make equality under the law an enduring reality for all, so that justice is not only fair to all but also is recognized by all to be fair.” *Resolution 1: In Support of Racial Equality and Justice for All*, CONF. CHIEF JUSTS. (July 30, 2020), [https://ccj.ncsc.org/\\_data/assets/pdf\\_file/0029/42869/07302020-Racial-Equality-and-Justice-for-All.pdf](https://ccj.ncsc.org/_data/assets/pdf_file/0029/42869/07302020-Racial-Equality-and-Justice-for-All.pdf) [<https://perma.cc/XK37-4M6A>].

13. See *Veal*, 930 N.W.2d at 334.

14. See *id.*

15. See *id.* at 324–27.

16. *Id.* at 327.

sure if he was the only person.”<sup>17</sup> There was further discussion of the juror’s answers and the prosecutor’s explanation for his strike, but examining either in more detail is a dead end and will not provide better understanding of the court’s ruling, which did not turn on a parsing of words.<sup>18</sup>

However, the defendant made a number of arguments against the peremptory strike that Justice Mansfield’s opinion did not discuss but should nonetheless be examined.<sup>19</sup> They were set out in Justice Appel’s dissent: (1) that the juror’s answers “negated any legitimate concern that the prosecutor might have had about latent hostility toward him, and, as a result, [defendant] showed pretext under *Batson*;<sup>20</sup> (2) that because this strike was used against “the last potential African-American juror” in the pool, “the court should hold the State to a ‘very high standard’ in these circumstances;<sup>21</sup> and (3) that “the prosecutor’s ‘reasoning seems to fit into that category of facially non-discriminatory reasoning that disproportionately implicates African-American potential jurors’<sup>22</sup> and therefore “will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of discriminatory purpose.”<sup>23</sup>

The NAACP argued in its Amicus Brief<sup>24</sup> that *Foster v. Chatman*<sup>25</sup> and *Pena-Rodriguez v. Colorado*<sup>26</sup> required trial judges “to engage in a searching inquiry of the prosecutor’s demeanor and stated justifications for striking jurors of color, including a comparative juror analysis to determine whether the stated race-neutral reasons for striking black jurors were in fact even-handedly applied to white jurors.”<sup>27</sup> The NAACP cited *City of Seattle v. Erickson*,<sup>28</sup> as having “fashioned a bright line ‘that the trial court must recognize a prima facie case of discriminatory

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17. *Id.* at 332.

18. *See id.* at 327.

19. *See id.* at 347 (Appel, J., concurring in part and dissenting in part).

20. *Id.*

21. *Id.*

22. *Id.* (quoting *State v. Miller*, No. 16-0331, 2017 WL 1088104, at \*3 (Iowa Ct. App. Mar. 22, 2017)).

23. *Id.* at 348 (quoting *Hernandez v. New York*, 500 U.S. 352, 376 (1991) (Stevens, J., dissenting)).

24. Amicus Curiae Brief in Support of Defendant-Appellant Peter Leroy Veal, filed on behalf of the National Association for the Advancement of Colored People at 38–40, *State v. Veal*, 930 N.W.2d 319 (Iowa 2019) (No. 17-1453).

25. *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

26. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

27. Amicus Curiae Brief in Support of Defendant-Appellant, *supra* note 24, at 38.

28. *City of Seattle v. Erickson*, 398 P.3d 1124, 1132 (Wash. 2017).

purpose when the sole member of a racially cognizable group has been struck from the jury.”<sup>29</sup> The NAACP also maintained *Foster v. Chatman* and *People v. Gutierrez*<sup>30</sup> require trial judges to write a “sincere and reasoned” opinion when ruling on *Batson* challenges, and the trial judge in *Veal* erroneously assumed “articulation of a race-neutral reason by the prosecutor concluded the *Batson* analysis.”<sup>31</sup>

The court acknowledged it was “aware of the disproportionate impact when jurors can be removed based on prior interactions with law enforcement.”<sup>32</sup> Despite that acknowledgement, however, the court seemed to reject its implications for jury selection and *Batson* challenges; for Justice Mansfield then quoted from a prior opinion stating, “Our cases have repeatedly noted that a juror’s interactions with law enforcement and the legal system are a valid, race-neutral reason for a peremptory challenge.”<sup>33</sup> But the most important sentence in Justice Mansfield’s opinion on this issue is the next sentence: “But this case involved a *special set of circumstances*—a prosecutor’s use of a peremptory strike on a juror because the same prosecutor had sent her father to prison for the rest of his life.”<sup>34</sup>

The Authors submit the court in *Veal*, without any citation to the California Supreme Court’s decision in *People v. Smith*,<sup>35</sup> effectively applied *Smith*’s reasoning: “Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication.”<sup>36</sup> Perhaps in the future, *Veal* can be strictly confined to its facts, namely, the striking of a child of a person the same prosecutor had successfully prosecuted for murder, and Justice Mansfield and the court will view with stricter scrutiny a peremptory challenge justified merely because a family member or friend had had a negative interaction with law enforcement, which African Americans are more likely to have.<sup>37</sup> More could have been said and would have been helpful. Although Justice Mansfield acknowledged in his analysis of the fair cross-section issues in Part IV of his

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29. Amicus Curiae Brief in Support of Defendant-Appellant, *supra* note 24, at 40.

30. *People v. Gutierrez*, 395 P.3d 186 (Cal. 2017).

31. Amicus Curiae Brief in Support of Defendant-Appellant, *supra* note 24, at 40–41.

32. *Veal*, 930 N.W.2d at 334.

33. *Id.* (quoting *State v. Mootz*, 808 N.W.2d 207, 219 (Iowa 2012)).

34. *Id.* (emphasis added).

35. *People v. Smith*, 417 P.3d 662 (Cal. 2018).

36. *Id.* at 684 (quoting *People v. Gutierrez*, 395 P.3d 186 (Cal. 2017)).

37. See, e.g., Chris Barnum, Robert Perfetti & Matt Lint, *Iowa City Police Department Traffic Study: 2005, 2006, 2007, 2010, 2011 & 2012*, IOWA CITY (May 31, 2014), <https://www.iowa-city.org/weblink/0/doc/1481387/Electronic.aspx>; *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings/>.

opinion in *Veal* that “Veal did mention the Iowa Constitution when asserting his *Batson* challenge,”<sup>38</sup> Justice Mansfield never mentioned the Iowa constitution in his analysis of the *Batson* issues in Part VI of his opinion.<sup>39</sup> Moreover, the court majority on this issue never probed the disproportionate impact on trial jury selection of African Americans’ and their families’ disproportionately greater interactions with law enforcement,<sup>40</sup> nor did it address Veal’s and the NAACP’s arguments that the court should hold the prosecution to a very high standard when, as in Veal’s case, the prosecutor uses a peremptory strike to eliminate the last African American from the jury pool.<sup>41</sup>

Chief Justice Cady concurred specially, agreeing “that the district court in this case properly applied the *Batson* test to reject the challenge to the removal of the last African-American juror from the panel. In other words, the district court properly applied our *current* law.”<sup>42</sup> But the chief justice made very clear that his concurrence was based solely on precedent, and that “the problems inherent in the exercise of peremptory challenges . . . [require] the solution in the future [] to do away with the use of peremptory challenges.”<sup>43</sup> We read the *Veal* holding as limited to an application of current *Batson* principles, as applied in Iowa. In our judgment, the court’s decision not to address the arguments of defense counsel and the NAACP’s encouragement for the court to go beyond *Batson* and fashion more protective procedures under the Iowa constitution or its supervisory power over trial courts is in no way a precedent rejecting those arguments. Rather, we submit that on this issue *Veal* should be viewed as recognition that the facts or record in the case did not provide an appropriate backdrop for consideration of the arguments in favor of systemic *Batson* reform.

With regard to the latter, Chief Justice Cady and Justices Wiggins and Appel

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38. *Veal*, 930 N.W.2d at 328 n.5.

39. *See id.* at 319.

40. *See, e.g.*, State v. Miller, No. 16-0331, 2017 WL 1088104 (Iowa Ct. App. Mar. 22, 2017). Recognizing this fact, the Washington Supreme Court in April of 2018 promulgated new General Rule 37, governing Jury Selection, for the expressed purpose “to eliminate the unfair exclusion of potential jurors based on race or ethnicity.” WASH. GEN. R. 37(a). Subparagraph (h) of Rule 37 states “reasons presumptively invalid” for making a peremptory challenge and includes “(i) having prior contact with law enforcement officers; (ii) expressing distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; [and] (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; . . .” WASH. GEN. R. 37(h).

41. *See Veal*, 930 N.W.2d at 332–39.

42. *Id.* at 340 (Cady, C.J., concurring) (emphasis added) (citation omitted).

43. *Id.*

voiced their views that broad-based reform of the *Batson* procedures is badly needed.<sup>44</sup> The late Chief Justice Cady's separate concurrence does not appear to rule out reform pursuant to article I, section 10 of the Iowa constitution, but he refers only to "our governing rules," and he seems clearly to have had in mind use of the court's supervisory power over trial court procedures:

Nevertheless, I acknowledge problems inherent in the exercise of peremptory challenges and agree with the separate opinion by Justice Wiggins that the solution in the future is to do away with the use of peremptory challenges. Thus, I am not in favor of trying to modify our governing rules to better detect bias in discretionary decision-making so much as I am in eliminating discretionary practices altogether that allow implicit bias to exist undetected. For that reason, I also concur in the overall theme of the thoughtful analysis and criticism of peremptory challenges discussed in the separate opinion by Justice Appel.<sup>45</sup>

In addition to the chief justice's special concurrence, Justices Wiggins and Appel each wrote a separate concurring and dissenting opinion. Both agreed with the NAACP's arguments that the *Batson* protections against racially discriminatory peremptory strikes have been so ineffective that major reform is required, and, at a minimum, very close scrutiny is required when a strike removes the final prospective juror of the defendant's race.<sup>46</sup>

For Justice Wiggins, who also joined Justice Appel's opinion,<sup>47</sup> the failure of *Batson* procedures to address implicit bias made its protections so ineffective that peremptory strikes should be abolished in criminal cases.<sup>48</sup> "Peremptory challenges are a creature of our rules and are not constitutionally required," he observed.<sup>49</sup> Peremptory challenges are not guaranteed to litigants under either the United States or the Iowa Constitution; they can be restricted, limited, or eliminated by court rule. "What is required under our Constitutions is that a defendant receives a trial by an impartial jury."<sup>50</sup> In terms of solutions, Justice Wiggins observed:

Washington General Rule 37 [limiting the grounds upon which a *Batson*

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44. *See generally id.*

45. *Id.* (Cady, C.J., concurring).

46. *See id.* at 340–63 (Wiggins, J., concurring in part and dissenting in part) (Appel, J., concurring in part and dissenting in part).

47. *Id.* at 340 (Wiggins, J., concurring in part and dissenting in part).

48. *Id.* at 340 ("I think it is time to abolish peremptory challenges in Iowa.").

49. *Id.* at 341.

50. *Id.*

challenge to a peremptory strike may be overruled] . . . helps but does not solve the problem. The only way to stop the misuse of peremptory challenges is to abolish them in Iowa and require judges to rigorously enforce challenges for cause. If our judges would enforce our rules on challenges for cause, the district court can be confident that it sat an impartial jury.<sup>51</sup>

For Justice Appel, reforms that would strengthen *Batson*'s protections could be considered, but he also indicated his own openness to abolition of peremptory strikes entirely.<sup>52</sup> He urged the court to “recognize the profound and persistent problem of racial discrimination in our society,” to view the *Lilly* trilogy of cases “in their larger context within our legal system,” and to acknowledge “the role of state courts in working to develop a system of justice where fair and impartial juries and freedom from discrimination are the norm and not the exception.”<sup>53</sup> Justice Appel emphasized the national consensus that the *Batson* procedures have been totally ineffective at effectuating the *Batson* ban on racially discriminatory strikes, and he pointed out that the problem is aggravated in Iowa due to the reality that “black people comprise a small percentage of Iowa’s population.”<sup>54</sup> He instructed that it is virtually impossible to prove purposeful discrimination under *Batson* without proof of a pattern and practice of strikes of jurors of color, and, given that the percentage of jury-eligible African Americans number only in single digits in each of Iowa’s 99 counties, that kind of proof will never be possible for African American defendants.<sup>55</sup> The problem is exacerbated by the reality that judges are only human and are “hesitant to question the integrity or self-awareness of counsel” with whom they work regularly—that “requiring a district court judge to, in effect, charge the local prosecutor with lying and racial motivation from the bench in the course of voir dire is unrealistic.”<sup>56</sup>

Embracing the test fashioned by the Washington Supreme Court in *State v. Jefferson*,<sup>57</sup> Justice Appel would apply “greater scrutiny than other *Batson* challenges ordinarily require,”—“*Batson* with teeth”—when a peremptory strike is

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51. *Id.* at 340.

52. *See id.* at 359 (Appel, J., concurring in part and dissenting in part).

53. *Id.* at 341.

54. *Id.* at 344.

55. *Id.* at 352.

56. *Id.* at 357, 360. It is not only the judge who may be drawn into conflict. One of the Authors personally attended a trial in which defense counsel made a *Batson* challenge to a peremptory strike of a prospective African American juror by the prosecutor, himself an African American, and the prosecutor plainly took personal offense at the challenge.

57. *State v. Jefferson*, 429 P.3d 467 (Wash. 2018).

of “the last African-American member[s] of the jury.”<sup>58</sup> He would require “that the prosecutor provide a specific challenge related to the facts of the case” at *Batson* step two,<sup>59</sup> and would make larger changes to step three of the *Batson* analysis:

[T]he district court should objectively determine whether the asserted reason was in fact race neutral or whether race may have played a role in the strike. If the district court objectively determines that the reason asserted for the strike is race neutral, the district court should then objectively weigh the prosecution’s racially neutral interest in eliminating the juror against the defendant’s interest in a jury composed of a fair cross section of the community.<sup>60</sup>

The NAACP advocated<sup>61</sup> that the best lens through which to view and to analyze the *Batson* racial justice issue presented is to recognize there was a pattern of strikes in the *Veal* case by the prosecution—he struck all 3 African American jurors on the voir dire jury panel of 34: 2 for cause, because each had a past felony conviction, and 1 as a peremptory strike. District court judges regard Rule 2.18(5)(a) as requiring them to dismiss for cause a prospective juror previously

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58. *Veal*, 930 N.W.2d at 361 (Appel, J., concurring in part and dissenting in part).

59. *Id.*

60. *Id.* at 361–62.

61. Amicus Curiae Brief in Support of Defendant-Appellant states as follows:

Although the District Court recognized that Rule 2.18(5)’s authorization to strike an ex-felon for cause is not mandatory, Tr. Vol. III, p. 18, Line 13, the Court erred in considering each of the prosecutor’s strikes for cause and the discretionary strike of S.H. in isolation and not in the context of the apparent pattern of strikes of African American jurors. Two African Americans were struck for cause, D.F. and E.L. The fact that one Caucasian juror was also struck does not foreclose a *Batson* claim because discrimination can still exist if the prosecution exercised its cause strikes predominantly against African Americans. *See Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

The NAACP is particularly concerned about the prosecution’s strike of E.L. for cause. E.L. had a burglary-larceny conviction many years ago and also had a DUI-3d conviction in 2008. There was no consideration as to whether the Vilsack-Culver Executive Orders that restored the rights of all ex-offenders who had served their time applied to E.L.’s convictions. Surely if these Orders restored one’s right to run for public office, as they do, it can be inferred they restored the right to serve on a jury. Although there was no indication of any legal problems since 2008, there was no inquiry about E.L.’s rehabilitation and citizenship since he was discharged or whether the crimes had any real relationship to the person’s veracity and impartiality at the time of jury selection.

Amicus Curiae Brief in Support of Defendant-Appellant, *supra* note 24, at 42–43.

convicted of a felony,<sup>62</sup> but nothing in the rule requires a prosecutor to make that motion. Indeed, the Authors were informed by one District Court Judge that he in fact seated such a person as a member of a jury when neither the prosecution nor defense counsel made a challenge for cause. Thus, the prosecution effectively had three discretionary strikes that could be exercised against African American jurors, and he struck all three.

In reality, the Iowa judicial practice of felon-exclusion effectively transforms Rule 2.18(5)(a) challenges for cause into peremptory strikes because no inquiry is made into the impartiality of the prospective juror—whose conviction may have been years in the past and who may long have been successfully reintegrated into society. Prior conviction of a felony is seen as a race-neutral, self-evident justification for striking the juror, and no scrutiny is given to its invocation. Accordingly, regardless of Rule 2.18’s characterization as a challenge for cause, it should be viewed as a discretionary strike for purposes of *Batson* and considered part of a pattern of striking African American jurors when the trial court is confronted—as it was in *Veal*—with a peremptory challenge to the last prospective African American juror. Because Rule 2.18(5)(a) as applied disguises the discretionary nature of the prosecutor’s strike, neither the parties nor the district court considered the challenge-for-cause strikes of the felons in the light of *Batson*’s required analysis.<sup>63</sup> Defendant’s *Batson* challenge focused only on juror S.H. and did not include the two Rule 2.18(5)(a) strikes, but the Authors submit that fairness requires this issue to be reconsidered on appeal.<sup>64</sup>

The Authors do not deny that it is difficult to dispute the district court upholding the peremptory strike of the last juror, S.H., under existing law, given the district court’s finding that the prosecutor’s concern of latent bias against him because of his prosecution of her father was not pretextual.<sup>65</sup> We submit that it is the

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62. Iowa Rule of Criminal Procedure 2.18(5)(a) is cast in permissive terms: “A challenge for cause *may* be made by the state . . . and *may* be made for any of the following causes: (a) A previous conviction of the juror of a felony.” (emphasis added). While the prosecution has discretion whether to make a cause challenge, on remand the District Court held that “Iowa courts are *required* to grant such a challenge.” *State v. Veal*, Order Following Supreme Court Remand, at 13 (Jan. 209, 2021, No. FECR02575)(emphasis in original). This is the position advocated by the State: “Iowa courts are required to grant such a challenge for cause, under Rule 2.18(5) in criminal trials and under Rule 1.915(6) in civil trials. \* \* \* [T]rial courts do not have the discretion to overrule a challenge for cause if it is apparent and undisputed that criteria specified in Rule 2.18(5) are met.” State’s Proposed Order, at 22-23 (FECR025750).

63. *See generally Veal*, 930 N.W.2d 319.

64. *Id.* at 332–34.

65. *Id.* at 333–34. *See* text accompanying notes 35-36, *supra*.

seeming “reasonableness” of the prosecutor’s concern that is the unarticulated “special circumstances” upon which Justice Mansfield based his decision.<sup>66</sup> But against the genuineness of the prosecutor’s concern should be balanced the credible impartiality of the last African American member of the jury pool, as Justice Appel wrote, and Veal’s interest in a jury actually representing a fair cross-section.<sup>67</sup> Further, we submit that when the prosecution has struck all the African American jurors on the panel, close scrutiny should be given not only to the last juror struck but to all the African American jurors who were struck.

The findings of two major jury studies, one in North Carolina and one in Florida, provide sound empirical basis for the fair cross-section jurisprudence fashioned in *Plain* and the *Lilly* Trilogy. Juries formed from all-white jury pools or all-white voir dire jury panels convict black defendants significantly more often—8-16%—than white defendants; this gap is largely eliminated when the jury pool or voir dire jury panel includes at least one black member.<sup>68</sup> Flanagan’s findings

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66. *Id.* at 334.

67. *Id.* at 362 (Appel, J., dissenting).

68. Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J.L. & ECON. 189, 191–92 (2018); Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1027–28, 1032 (2012) (*cited in State v. Plain*, 898 N.W.2d 801, 826 (Iowa 2017)). The Anwar Study found that “all-white [voir dire jury panels] convict black defendants significantly (16 percentage points) more often than white defendants, and this gap in conviction rates is entirely eliminated when the [voir dire jury panel] includes at least one black member.” Anwar, *supra* note 68, at 1017. Flanagan found that “when black men make up more than 11 percent of the pool, which is roughly the fourth quartile of this statistic, the conviction rate for both black and white defendants is 68 percent, but when the proportion of black men in the pool is below 3.3 percent, which is the first quartile, the conviction rate for white defendants increases to 76 percent, and for black defendants it increases to 80 percent.” Flanagan, at 205. Conversely, higher proportions of white men are more likely to convict black male defendants (82% conviction rate) relative to white male defendants (71% conviction rate). *Id.*

The terminology used in the Anwar study has been the source of confusion. The stage of the jury selection process studied by Anwar et al, which the Study called the “jury pool,” is not the jury pool stage of the Iowa jury selection process. Rather, the focus of the Anwar study was the equivalent of the voir dire jury panel stage that determines who will serve on the seated trial jury. This is evident from the following explanation: “Our data set consists of all felony trials for which jury selection began in Sarasota and Lake Counties, Florida, during 5.5- and 10-year periods, respectively, in the 2000s. The data are unusually rich in providing information on the age, race, and gender not only for each of the 6–7 members of the seated jury but also for the approximately 27 members of *the jury pool* for the trial *from which the seated jury is selected.*” Anwar, *supra* note, at 1019 (emphasis added).

confirmed the need for the more exacting scrutiny of peremptory challenges urged by Justice Appel, which can otherwise skew the fair cross-section. Flanagan found that while “attorneys on both sides of a trial use race and gender to decide which potential jurors to strike,” these opposing strategies do not result in a “jury that is representative of the population from which it is drawn but with biased jurors removed.”<sup>69</sup> Rather than cancelling out, Flanagan found the effect has been to “shift the gender distribution within the population of black jurors. The effect is that black male defendants are less likely to have a jury containing multiple black male jurors. Thus, black male defendants are less likely to be tried by a jury of their peers.”<sup>70</sup>

To illustrate, when the trial court in *Veal* decided to overrule the *Batson* challenge to the prosecutor’s peremptory strike of juror S.H., we submit that the court should have revisited—or initially held in abeyance—the prosecutor’s motion to strike juror E.L. for *cause* based on a burglary conviction 30 years earlier in E.L.’s youth and a DUI conviction 9 years prior to *Veal*’s trial date. When the peremptory strike and challenges for *cause* are properly viewed together as pattern, and the mitigating circumstances of E.L.’s prior convictions weighed, the prosecutor’s justifications should have received exacting scrutiny by the trial judge for three reasons: first, because the purported race-neutral reason, the felon-exclusion, has such a significant racial impact on African Americans in Iowa;<sup>71</sup> second, because the impact of racial composition on the conviction rate of African

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69. Flanagan, *supra* note 68, at 191.

70. *Id.* at 191–92. The Anwar study concluded that “even when black potential jurors are struck by peremptory challenges, they are essentially replaced on the jury by white jurors with similar attitudes toward the case.” Anwar, *supra* note 68, at 1041 (footnote omitted). Flanagan was skeptical of this Anwar conclusion, as are we, noting the “mixed evidence of the effect of peremptory challenges on juries’ composition and trial outcomes” and that the Anwar study used data spanning 5 to 10 years from only two Florida counties. Flanagan, *supra* note 68, at 190. Flanagan pointed out that the Anwar 2-county sample size “with small populations of black potential jurors” was not representative of most of the nation’s experience. *Id.* at 202. The Authors note that the Anwar Study did not take into consideration whether there was a gender disparity within the population of black jurors, as Flanagan found in North Carolina. *Id.* at 191.

71. See Addendum to Iowa-Nebraska NAACP Public Comments Regarding Chapter 2 Amendments, Iowa Jud. Branch 16: Lovell-Walker Draft Article, Part V, *Does Exclusion from Jury Service of Persons with a Felony Conviction Constitute Systematic Exclusion?*, B. Proving the Sweeping Racial Impact of Iowa’s Felon Exclusion Rule, text accompanying notes 23-30; see also *Plain*, 898 N.W.2d at 826 (citing Kyle Munson, *Black-White Disparities Persist in Iowa*, DES MOINES REG. (July 12, 2015), <https://www.desmoinesregister.com/story/news/local/kyle-munson/2015/07/12/black-iowa-statistics-economics-incarceration/30059517/> [<https://perma.cc/L9WE-T4EC>]).

American defendants is well documented and well known;<sup>72</sup> and third, because there had been no attempt to ascertain whether E.L. was in any way biased against law enforcement and could not be impartial.

The Authors hear the dissenters, and Chief Justice Cady, contending that there is something very wrong when *statutory* peremptory strikes of jurors of color can subordinate two fundamental *constitutional* rights—the Sixth Amendment right to a jury drawn from a jury pool and panel representing a fair cross-section of the community and the Fourteenth Amendment right to equal protection of the laws.<sup>73</sup> The latter, as we know, requires proof of intent whereas the former does not, and *Batson* requires the defendant objecting to a peremptory challenge to prove intentional discrimination.<sup>74</sup> Our growing awareness of the existence, prevalence, and pervasiveness of *implicit* bias,<sup>75</sup> however, undermines recognition alone of intentional discrimination as a basis to overcome a peremptory strike of a prospective juror of color. Indeed, for the Authors, as well as for Justices Cady and Wiggins, it calls into question the judicial system’s continued sanction of peremptory strikes. The peremptory strike, although a longstanding tradition of our adversarial system, is not required by either the U.S. or Iowa constitutions, and the dramatic racial disparities in Iowa’s prison populations strongly suggest its use may have significantly contributed to undermining our justice system’s racial equality goals.

It is time that the words emblazoned over the entrance to the U.S. Supreme Court Building—“Equal Justice Under Law”—take primacy over continued use of a tool, even one of longstanding use, that has in practice presented a major roadblock to achieving racial diversity on Iowa’s juries. An important step towards this end, but only a first step, would be the collection of data. The NAACP has been calling for the Iowa Supreme Court and the Office of State Court Administration to collect and publicize data on the use in criminal cases of peremptory strikes, including the race and ethnicity of those against whom peremptory strikes are made, and others

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72. See *supra* note 68.

73. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *State v. Lilly*, 930 N.W.2d 293, 299 (Iowa 2019); *Plain*, 898 N.W.2d at 821.

74. See *Plain*, 898 N.W.2d at 824.

75. *Id.* at 816–17 (majority opinion) and 830–36.

Special Concurrence of Justice Appel, in which Chief Justice Cady and Justice Wiggins joined). In *Veal* Justice Appel noted the existence and impact of implicit bias and the need, *inter alia*, to reexamine *Batson* and the use of peremptory challenges. See *State v. Veal*, 930 N.W.2d 319, 343–44 (Iowa 2019) (Appel, J., dissenting). See generally Mark W. 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’y Rev. 149 (2010).

have agreed.<sup>76</sup> But the Authors submit there are additional affirmative steps that the Court should take now, which can be fine-tuned if the data collection suggests that is appropriate.

Both the late Chief Justice Cady and Justice Wiggins advocated for abolition of peremptory strikes, essentially embracing Tania Tetlow's assessment that "*Batson's* problems cannot be solved by tinkering with it."<sup>77</sup> Although peremptory strikes came to U.S. law from England, England abolished peremptory strikes in 1988.<sup>78</sup> The subsequent extension of the abolition to the entire United Kingdom in 2007 speaks volumes as to the reform now needed in Iowa—a volume that rises to a crescendo when the racial disparities in the Iowa criminal justice system are weighed. The Iowa Supreme Court's Committee on Jury Selection (Committee) noted, "Although initially there was trepidation in England when peremptory strikes were abolished, those fears have vanished."<sup>79</sup> The Arizona Supreme Court, "to reduce the number of citizens summoned to jury duty" during the COVID pandemic, reduced the number of peremptory strikes per side from six to two "in all civil and felony cases" [except for capital murder cases] and to one "in all misdemeanor cases."<sup>80</sup> More recently, the Court created a Task Force on Jury Data Collection, Practices, and Procedures, whose mission includes exploring and making recommendations on "[w]hether the reduction in the number of peremptory challenges should be continued for a period of up to three years to reduce the number of prospective jurors required for the impending jury trial backlog during post-pandemic recovery" and "[w]hether peremptory challenges of jurors systemically reduce the representation of minorities and whether changes to the

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76. *Recommendations of the Committee on Jury Selection*, IOWA CTS. 22 (March 2018), <https://www.iowacourts.gov/collections/41/files/499/embedDocument/> [<https://perma.cc/9M2Y-A272>] ("The Supreme Court Should Ensure that as Much Comprehensive Jury Data as Possible—From Pools to Panels to Tracking Strikes in Voir Dire—is Maintained and Available to the Public . . .").

77. Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1735 (2012).

78. Criminal Justice Act 1988, c. 33 § 118 (Eng.).

79. *Recommendations of the Committee on Jury Selection*, *supra* note 73, at 22.

80. *Authorizing Limitation of Court Operations During a Public Health Emergency and Transition to Resumption of Certain Operations: Administrative Order No. 2020 – 197*, ARIZ. JUD. BRANCH 8 (Dec. 3, 2020), <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-197.pdf?ver=2020-12-03-144859-950>. The court estimated this would result in a 46% reduction in the number of qualified jurors necessary to select a jury. *COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup Best Practice Recommendations*, N.C. JUD. BRANCH 14 (May 1, 2020), [https://www.nccourts.gov/assets/inline-files/Arizona-Plan-B-Best-Practices-and-Recommendations-FINAL-5-1-2020.pdf?Ki3g3weoamBINzzqf39r0Bs.iUI\\_x9Cy](https://www.nccourts.gov/assets/inline-files/Arizona-Plan-B-Best-Practices-and-Recommendations-FINAL-5-1-2020.pdf?Ki3g3weoamBINzzqf39r0Bs.iUI_x9Cy).

peremptory challenge rules should be made.”<sup>81</sup>

Despite the call for *Batson* reform from three Iowa Supreme Court justices, including the late chief justice, the Committee’s finding that there is a national consensus that the procedures to implement *Batson*’s protections have been woefully ineffective, and the Committee’s recommendation to reduce the number of peremptory challenges,<sup>82</sup> the proposed amendments to the Criminal Rules of Procedure are largely silent on *Batson* reform. The only *Batson*-related change would be to require the reporting of voir dire in all cases except misdemeanors<sup>83</sup>—a modest procedural reform, long overdue, that would improve appellate review of appeals raising *Batson* challenges, but in no way change the grudging case law that so disfavors *Batson* claims. The NAACP Public Comments strenuously urged the court, albeit short of abolition, to be bolder and to recognize that nowhere else in the justice system is implicit bias given such free reign.<sup>84</sup> The NAACP urged the court to extend *Batson*’s protections to recognize and bar implicit bias, in addition to racial animus and pretext, in the making of a peremptory challenge and to embrace a proactive prophylactic response similar to what the Washington Supreme Court accomplished in its path-breaking Rule 37.<sup>85</sup> On April 19, 2021, the NAACP

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81. *Establishment of the Task Force on Jury Data Collection, Practices, and Procedures: Administrative Order No. 2021 – 35*, ARIZ. JUD. BRANCH 1–2 (Mar. 10, 2021), <https://www.azcourts.gov/Portals/22/admorder/Orders21/2021-35.pdf?ver=2021-03-10-130444-153>.

82. *Id.* at Recommendation VII.

83. *Iowa-Nebraska NAACP Public Comments Regarding Chapter 2 Amendments*, IOWA JUD. BRANCH 16, <https://www.iowacourts.gov/collections/483/files/1148/embedDocument/> (filed July 1, 2020). The NAACP disapproved the exception for misdemeanors.

84. *Id.*

85. *See id.*, pt. V, at 16–19. *See also* Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, BERKELEY L. & DEATH PENALTY CLINIC, June 2020 (recommending elimination of *Batson*, allocation of the burden of proving justification for a peremptory challenge to the party making the challenge, for example, the prosecutor, and emphasizing the importance of awareness of implicit bias). In August 2020 the California Legislature enacted major *Batson* procedural reforms, declining to wait for the California Court’s rulemaking process. Cal. Assembly Bill No. 3070. Cal. C.C.P. § 231.7. Its purpose was to expand *Batson*’s protections: “[T]his act [should] be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.” §1(c) Section 2(d)(1) expressly stated that: “The court need not find purposeful discrimination to sustain the objection.” Section 2(c) requires “the party exercising the peremptory challenge . . . [to] state the reasons the peremptory challenge has been exercised.” At the point when the trial court is directed to evaluate the reasons given, the court must determine whether “there is substantial likelihood that an objectively reasonable person would view race [or other asserted basis of

updated the Criminal Rules Revision Committee as to the California Legislature's enactment of enactment of AB 3070, which significantly expanded *Batson's* protections; and it proposed that the Court follow the Arizona Supreme Court's lead and utilize, as a pilot project, a reduction in peremptory strikes from 6 to 2 over the next twelve to twenty-four months.<sup>86</sup> Due to the expanded need for jurors to resolve the post-pandemic backlog of cases, and necessary health/safety precautions as the pandemic is winding down, the NAACP suggested that steps should continue to be taken, over at least the next year or two, to lessen the burden of jury service for citizens. The Authors find merit in the actions taken in Arizona: why not take this step not only for health reasons but also consider it as a pilot project for racial justice?

III. *STATE V. WILLIAMS*: UPHOLDING THE DISTRICT COURT'S DENIALS OF DEFENDANT'S REQUEST FOR (1) INDIVIDUALIZED VOIR DIRE, AND (2) AN IMPLICIT-BIAS JURY INSTRUCTION

Defendant Williams was African American, as was homicide victim Fleming.<sup>87</sup> Defendant requested that his counsel be allowed to voir dire prospective jurors "on race issues" in an individual, sequestered setting as opposed to the full jury panel setting in the courtroom.<sup>88</sup> Defendant also requested a comprehensive instruction explicitly addressing implicit bias.<sup>89</sup> The district court judge denied both requests.<sup>90</sup>

Justice Mansfield wrote for a 4–3 majority upholding the district court's rulings denying individualized voir dire and the requested implicit-bias instruction, and he was joined by Justices Waterman, Christensen, and McDonald.<sup>91</sup> The court employed a very deferential standard of appellate review, finding the trial judge did "not abuse his discretion" in denying defendant Williams's requests on both issues.<sup>92</sup> In its analysis of both the individualized voir dire and the implicit-bias instruction issues, the supreme court emphasized "defendant and the decedent were of the same

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discrimination] as a factor in the use of the peremptory challenge." *Id.* 2(d)(1) If so, "the objection shall be sustained." *Id.* The law became effective Jan. 1, 2021 in criminal trials, and Jan. 1, 2026 in civil as well as criminal trials.

86. Iowa-Nebraska NAACP Proposal re *Batson* Procedural Reform, April 19, 2021 (copy on file with the Drake Law Review).

87. *State v. Williams*, 929 N.W.2d 621, 623 (Iowa 2019).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* at 631–33.

race.”<sup>93</sup> The court stated it was “noteworthy that both Williams and Fleming were of the same race, unlike in *Plain* where the defendant was African-American and the complaining witness was white.”<sup>94</sup> Justice Mansfield also emphasized “there is no suggestion that race played a role in the alleged crime or its investigation.”<sup>95</sup>

#### A. Upholding Denial of Individualized Voir Dire

In deciding whether to grant the request for individualized voir dire, the trial judge expressed concern that it would be more time-consuming and would result in extending voir dire beyond one day.<sup>96</sup> As a consequence, allowing individualized voir dire would make it “more difficult to limit the exposure of a large group of potential jurors overnight to improper influence than to limit the exposure of a small group of actual jurors.”<sup>97</sup>

The supreme court observed that a request for individualized voir dire has generally been considered within the discretion of the trial judge “when the case does not have particular racial overtones.”<sup>98</sup> The court then sought guidance from its 1982 decision in *State v. Windsor*.<sup>99</sup> After noting that *Windsor* was an interracial “case involving an African-American defendant and a white alleged victim,” Justice Mansfield quoted the holding of *Windsor*: “[T]rial courts in Iowa should make or permit counsel to make specific inquiry into racial prejudice upon proper request in similar circumstances<sup>100</sup> and in any case in which a reasonable possibility exists that the verdict might be affected by racial prejudice.”<sup>101</sup> The court in *Windsor*, Justice Mansfield noted, was of the opinion that generally the inquiry into racial bias can be done as part of the group voir dire: “Yet we also held [in *Windsor*] that[,] ‘absent

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93. *Id.* at 631.

94. *Id.* at 633.

95. *Id.* at 631.

96. *See id.* at 631–32.

97. *Id.* at 632.

98. *Id.* at 631.

99. *See id.* (citing *State v. Windsor*, 316 N.W.2d 684 (Iowa 1982)).

100. *Windsor*, 316 N.W.2d at 687. It was evident the “similar circumstances” to which *Windsor* referred were the differing races of the accused and the alleged victim. While the supreme court, like the district court, points out the defendant and the decedent were of the same race, the court does not expressly state that this fact distinguished the instant case from *Windsor*. Instead, the court put more weight on *Windsor*’s holding that the trial judge has discretion as to the setting and scope of the inquiry into racial bias.

101. *Williams*, 929 N.W.2d at 631 (quoting *Windsor*, 316 N.W.2d at 686–87). *Windsor* pointed out the U.S. Supreme Court had fashioned a “supervisory rule on federal trial courts requiring specific inquiry into racial prejudice on voir dire when requested by a defendant accused of violent crime against a person of a different race.” *Windsor*, 316 N.W.2d at 687.

special circumstances of the nature delineated in *Ham [v. South Carolina]*, the inquiry may be limited to a question of the panel sufficient to call the jurors' attention to the subject and require response from any juror harboring racial bias."<sup>102</sup> Clearly, *Windsor* placed the burden to show such special circumstances on the party moving for individualized voir dire, and the *Williams* majority saw no "special circumstances" on the facts presented. Moreover, Justice Mansfield noted defense counsel for *Williams* had been allowed to question the panel "on the subject of race" and that counsel's questions were "thoughtful and insightful."<sup>103</sup>

"[I]n effect," Justice Mansfield suggested, defendant *Williams* was asking the court "to overrule *Windsor*."<sup>104</sup> The court deflected that question, noting that in the decades since *Windsor* scholarship on implicit bias has emerged, but that defendant had cited no scholarship directed to "the effectiveness of questioning prospective jurors on race in an individual, sequestered setting as opposed to a group setting."<sup>105</sup> Instead, the court explained there were two factors that led it to conclude the district court's ruling was not an abuse of discretion.<sup>106</sup> First, Justice Mansfield reiterated, "The defendant and the decedent were of the same race and there is no suggestion that race played a role in the alleged crime or its investigation."<sup>107</sup> Second, the court found "there is logic to the court's reasoning" for denying individual voir dire: the district court balanced *Williams*'s request against the court's concern that "if it granted individualized voir dire, it would no longer be possible to finish jury selection that day . . . [and] it would be more difficult to limit the exposure of a large group of potential jurors overnight to improper influence than to limit the exposure of a small group of actual jurors."<sup>108</sup>

The court held the trial judge's decision denying individual voir dire was not "an abuse of discretion."<sup>109</sup> It is interesting, however, that it apparently would *not* have been an abuse of discretion had the district court *allowed* individualized voir

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102. *Williams*, 929 N.W.2d at 631. In footnote 3, Justice Mansfield explained the "special circumstances . . . delineated in *Ham*" were that defendant *Ham* "was a civil rights activist who alleged that local authorities had framed him on a drug charge because of his civil rights work. Thus, racial prejudice was a material issue affecting the merits of the case." *Id.* at 631 n.3 (quoting *Windsor*, 316 N.W.2d at 686).

103. *Id.* at 632.

104. *Id.* at 631.

105. *Id.*

106. *Id.* at 631–32.

107. *Id.* at 632.

108. *Id.* at 631–32.

109. *Id.* at 631.

dire.<sup>110</sup> Supporting that conclusion is the fact that the court added this caution: “[T]his was a murder trial where the defendant faced a very severe sentence . . . [and] [d]efense counsel should be given considerable leeway in utilizing voir dire to eliminate potential racial bias from the jury.”<sup>111</sup> The Authors agree with that cautionary observation and urge not only defense counsel but also prosecutors and trial judges to heed its wisdom and force. No doubt, as in *Williams*, the trial judge will feel the time pressures attributable to a crowded docket, speedy trial concerns, and the risk that jurors might experience “exposure to . . . improper influence;”<sup>112</sup> and defense counsel may be reluctant to ask for individualized voir dire and to make a record on the request because counsel hears the court’s concerns and has other cases counsel will likely try before the judge.

The court in *Windsor* assumed that if a question from counsel called the subject of racial bias to the jury panel’s attention, it would “require” and secure a “response from any juror harboring racial bias.”<sup>113</sup> The Authors are highly skeptical and regard that as unlikely. Accordingly, the Authors emphasize the court’s admonition that “defense counsel should be given”—and counsel should take—“considerable leeway in utilizing voir dire to eliminate potential racial bias from the jury,” certainly more than one question. And especially in cases where the penalty is severe and, in any case, where something is said or done or the circumstances are such as reasonably to give rise to concern about racial bias, the interest of justice makes a request for individualized voir dire compelling and should be ordered *sua sponte*.<sup>114</sup>

### B. Upholding Denial of Implicit-Bias Instruction

The district court judge gave Jury Instruction 5 on the first day of trial, which stated in relevant part:

As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices or emotions. Because you are making very important decisions

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110. *Cf. Id.* at 633 (“This does not mean, of course, that it would have been an abuse of discretion to use *Williams*’s requested [implicit-bias] instruction.”). In holding that the district court’s refusal to allow individualized voir dire was not an abuse of discretion, the court did not expressly state that granting individualized voir dire would have been within the court’s discretion, but the Authors believe that is a fair reading of the Supreme Court’s opinion. *See id.* at 631–32.

111. *Id.* at 632.

112. *See id.* at 631–32.

113. *State v. Windsor*, 316 N.W.2d 684, 687 (Iowa 1982).

114. *See id.* at 632.

in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions. As jurors, your sole duty is to find the truth and do justice.<sup>115</sup>

Defense counsel had no objection to Instruction 5, but also requested an additional instruction developed by the Impartial Jury Project of the American Bar Association that seeks to define and explain in lay language the concept of implicit bias, although it never uses the term “implicit bias.” In pertinent part, the American Bar Association (ABA) instruction states:

Scientists studying the way our brains work have shown that for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.<sup>116</sup>

The ABA instruction also suggests techniques a juror can use to reduce the risk of one’s own implicit bias influencing one’s role as a juror. It reads, in part, “Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case,” and it suggests approaches that would mitigate against “unconscious responses.”<sup>117</sup> The trial judge “did not conclude it lacked authority to give an implicit-bias instruction. Rather, it found that Instruction 5 adequately addressed the concern.”<sup>118</sup>

Justice Mansfield noted Jury Instruction 5—that warned about “prejudices, sympathies, stereotypes, biases” and so forth—had recently been updated and the updated version had been given by the district judge. As noted earlier, the court again stressed “both Williams and [the victim] Fleming were of the same race, unlike in *Plain* where the defendant was African-American and the complaining witness was white.”<sup>119</sup> That said, in holding that the trial judge had not abused his discretion in declining to give the requested ABA instruction, the Iowa Supreme Court observed, “This does not mean, of course, that it would have been an abuse of

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115. *Id.*

116. *Id.* (quoting AM. BAR ASS’N, *ACHIEVING AN IMPARTIAL JURY (AIJ) TOOLBOX* 17–18 (2017)).

117. *Id.*

118. *Id.* at 633.

119. *Id.*

discretion to use Williams's requested instruction."<sup>120</sup>

The fighting issue was the proper appellate standard of review, which the majority held was the abuse of discretion standard.<sup>121</sup> Justice Wiggins dissented on this issue. Relying on *Alcala v. Marriott International, Inc.*,<sup>122</sup> he argued the governing standard was not "abuse-of-discretion" but rather "error-at-law,"<sup>123</sup> and it was an error at law not to give the requested instruction when it correctly states the applicable law and is not embodied in another instruction.<sup>124</sup> Speaking for the majority on this issue, Justice Mansfield ruled otherwise.<sup>125</sup> In the majority's view, *State v. Plain* held "an abuse-of-discretion standard of review applied to whether an implicit-bias instruction should have been given . . . [and] specifically distinguished . . . *Alcala* which we said did not apply to 'cautionary' instructions such as an implicit-bias instruction."<sup>126</sup>

Justice Mansfield accurately summarized the *Plain* holding on the standard of review regarding denial of a request for an implicit-bias instruction in 2015, when *Plain* was tried. However, *Plain*'s principal holding on implicit bias was to encourage trial judges *prospectively* to be "proactive about addressing implicit bias" in their courtrooms given the widespread recognition of the existence, prevalence, and impact of implicit bias.<sup>127</sup> It is one thing to hold that a trial court did not abuse its discretion in denying a request for an implicit-bias instruction *before* the supreme court has spoken to the issue; it is another thing to hold that the trial court did not do so *after* the supreme court had spoken to the issue and recognized that dealing with

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120. *Id.*

121. *Id.* at 638.

122. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 722 (Iowa 2016) (Wiggins, J., concurring in part and dissenting in part).

123. *Williams*, 929 N.W.2d at 641. Justices Wiggins and Cady contended that under *Alcala v. Marriott Int'l, Inc.* the correct standard of review of the district court's refusal to give the requested implicit-bias instruction was for "errors at law," rather than the "abuse-of-discretion" standard the majority utilized. They summarized the *Alcala* holding: "[R]eview of 'refusals to give a requested jury instruction [is] for correction of errors at law' when Iowa law requires the instruction be given." *Id.* at 640–41 (quoting *Alcala*, 880 N.W.2d at 707). Justice Wiggins quoted *Alcala* as reaffirming that "Iowa law requires a court to give a requested instruction if it correctly states the applicable law and is not embodied in other instructions." *Id.* at 641 (quoting *Alcala*, 880 N.W.2d at 707). See also Justice Wiggins' concurring and dissenting opinion in *State v. Plain*, 898 N.W.2d 801, 830 (Iowa 2017), in which Chief Justice Cady and Justice Appel joined.

124. *Id.*

125. *Id.* at 638.

126. *Id.* at 633 n.6 (citations omitted).

127. *State v. Plain*, 898 N.W.2d 801, 817 (2017) ("We strongly encourage district courts to be proactive about addressing implicit bias.").

implicit bias was a rapidly evolving and important area of social science and law. The instruction which the trial judge accepted as sufficient to address implicit bias was, in the Authors' view, wide of the mark. It addressed "the personal sympathy, bias, prejudices or emotions" of which one is aware and conscious, not what is unconsciously held and reflexive. Moreover, one can readily read *Plain* to preview that it was merely a matter of time before giving such an instruction would be mandatory.<sup>128</sup> As we explain below, it appears the justices who dissented on this issue thought the evolution had reached that point when *Plain* was decided by the Iowa Supreme Court in late June 2017 and that it would govern future cases, such as *Williams*, tried three months after *Plain* in October of 2017.<sup>129</sup>

Three justices dissented and would have found reversible error on both the trial judge's denial of the implicit-bias instruction and denial of the request for individual voir dire: Justice Wiggins, in an opinion joined by Chief Justice Cady, and Justice Appel in his separate opinion, concurring in part and dissenting in part.<sup>130</sup> The dissenting views of Justices Cady, Wiggins, and Appel are examined in subsections (C) and (D) that follow.

### *C. Should the Giving of an Implicit-Bias Instruction Be Mandatory upon Timely Request?*

The Wiggins-Cady dissent concluded that Jury Instruction 5 was *not* an implicit-bias instruction, and that implicit bias was *not* embedded in Instruction 5.<sup>131</sup> Justice Wiggins gave a succinct explanation of implicit bias and why it is so insidious:

[Instruction 5] was not an instruction aimed at addressing implicit bias. Rather it was an instruction dealing with personal sympathy, conscious biases or prejudices, or emotions. Implicit biases are held deep in the subconscious, and as humans, we are often unaware of them or their influence on our cogitations and actions. In addition, research portends that implicit bias will influence jurors unless the court expressly brings the subject to the jurors' attention. Thus, a jury instruction addressing implicit bias must clearly present itself as one on implicit bias and must target the hidden and subconscious nature of that type of bias. The bias instruction given in this case did not do so.<sup>132</sup>

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128. See *State v. Plain*, 898 N.W.2d 801 (Iowa 2017).

129. See *id.*

130. *Williams*, 929 N.W.2d at 641 (Wiggins, J., concurring in part and dissenting in part).

131. *Id.* at 642.

132. *Id.* at 639 (citations omitted).

In Justice Wiggins’s and Chief Justice Cady’s opinion, the *Alcala* principle required that an implicit-bias instruction be given:

Racial bias goes to the heart of a fair trial. A fair trial is a tenet of due process in this country. The instruction given concerned personal bias, not implicit bias. Moreover, the requested instruction is a correct statement of law. Therefore, I would find an error at law for not giving the requested instruction.<sup>133</sup>

Justice Wiggins did not directly respond to the majority’s argument that *Plain* characterized an implicit-bias instruction as a “cautionary instruction,” not “outcome determinative,” and thus reviewed for “abuse of discretion.”<sup>134</sup> Instead, he emphasized that *Plain* “strongly encourage[d] district courts to be proactive about addressing implicit bias.”<sup>135</sup> Expressing their belief that the “racially disparate treatment of blacks by our criminal justice system is due to implicit racial bias,”<sup>136</sup> Justice Wiggins—with Chief Justice Cady—would have held it is not discretionary but is instead “incumbent on every judge in every county courthouse to do whatever is necessary to make sure black men and women receive a trial with a fair and impartial jury free of racial bias.”<sup>137</sup>

The Authors submit that Justice Wiggins and Chief Justice Cady, in pointing to the racial disparities in Iowa’s criminal justice system, necessarily recognized that, while an implicit-bias instruction conceptually may be “cautionary,” there is reason for concern that implicit bias has all too often been “outcome determinative”—that is, implicit bias, by definition unconscious, can affect the outcome of criminal trials when the defendant is a person of color. In the Authors’ judgment the disparate treatment and outcomes in our criminal justice system so adversely affect the appearance of fairness and justice, and confidence in the courts, that an implicit bias instruction should be mandatory. No harm is done by giving it, and the good the instruction can accomplish is great. That is the lens through which its denial should be viewed, not the unexamined conclusion that the instruction is only “cautionary”, ergo, not mandatory. Justice Wiggins, joined by the Chief Justice, rightly viewed *Plain* as expressing great urgency to address implicit bias and commanding trial judges to be proactive in doing so. Again, the court in *Plain* might understandably have been unwilling to hold that, in 2015, the trial court

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133. *Id.*

134. *Id.* at 633 (majority opinion) (discussing *State v. Plain*, 898 N.W.2d 801, 816 (Iowa 2017)).

135. *Id.* at 638. (Wiggins, J., concurring in part and dissenting in part).

136. *Id.*

137. *Id.*

committed an error of law in failing to give an implicit-bias instruction, but two years later—and more than three months after the supreme court’s command for judges to be proactive—a jury instruction explicitly addressing implicit bias should have been held mandatory upon defense counsel’s request.

In this sense the Authors’ views coincide with those of Justice Appel. Justice Appel noted that the district court in *Williams* had concluded that other instructions, like the one on burden of proof, together with Instruction 5, “were the equivalent of an implicit-bias instruction.”<sup>138</sup> But for Justice Appel it was nothing of the sort: “There is nothing wrong, of course, with Instruction 5. But it does not cover the question of implicit bias. Implicit bias is bias that is subconscious or unintentional. . . . It was error for the district court to conclude that Instruction 5 covered the same subject matter as an implicit-bias instruction.”<sup>139</sup> Justice Appel acknowledged the “abuse of discretion” standard had been applied in *Plain*, and *Plain* was “indistinguishable” on this jury instruction issue;<sup>140</sup> however, he would hold the time has “long since passed” that addressing implicit bias in the courtroom can be left to the discretion of the trial judge:

The concept of implicit bias is old, but the notion of an implicit-bias instruction is somewhat new. Change comes hard. In my view, however, the time has come, and has in fact long since passed, to adjust our approach to implicit bias in our courtrooms. Giving an appropriate implicit-bias instruction at the request of the defense is not a panacea, but it moves us in the right direction in seeking to ensure that racial bias plays no part in our justice system.

There is some good news in all of this. Researchers have found that instructions that emphasize fairness and the importance of recognizing racial bias can have impact. The impact is probably greatest if the instruction is given at the beginning of trial as well as after the evidence is received.<sup>141</sup>

The court undoubtedly was aware the *Williams* trial took place on October 10, 2017, slightly more than three months after the *Plain* decision. At that time, many in the Iowa legal community, including judges, were just beginning to grasp the social science distinction between implicit and explicit bias. We read the court majority’s conclusory analysis as thinking the trial judge was acting in good faith and he could reasonably have believed Instruction 5, by mentioning “stereotypes and biases,”

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138. *Id.* at 642 (Appel, J., concurring in part and dissenting in part).

139. *Id.* at 642–43.

140. *Id.* at 642.

141. *Id.* at 643 (citations omitted).

covered implicit bias.<sup>142</sup> In the Authors' opinion, district judges would be ill-advised not to give an implicit-bias instruction upon defense counsel's request, both at the beginning and at the close of trial in the year 2021 and beyond. A correct and timely requested instruction should be mandatory. This position does not require overruling *Plain* in this regard. It only recognizes that circumstances change and that where once a choice was seen within the trial court's discretion, after years of experience and growing awareness, it is no longer. Insofar as the content of such an instruction is concerned, there are choices. The ABA instruction considered in *Williams* has been adopted by the Illinois courts<sup>143</sup> and likely others. For us, however, the implicit bias jury instruction drafted by former U.S. District Court Judge Mark Bennett, a renowned expert on implicit bias, is preferable. The instruction expressly refers to "implicit bias," clearly describes "implicit" in lay language, and succinctly explains its insidious quality, effectively requiring members of the jury, and all of us, to be mindful of its potential impact on our individual decision-making.<sup>144</sup>

D. *Should Prevention of Racial Bias, Both Implicit and Explicit, Require that Defendants of Color Be Allowed to Conduct Individualized Voir Dire?*

Dissenting from the majority's ruling on this issue, Justice Wiggins concluded it was in fact an abuse of discretion not to grant defense counsel's request for individualized voir dire.<sup>145</sup> As the supreme court majority itself had cautioned, *Williams* was being tried for murder, carrying a severe sentence if convicted, and he was an African American who quite likely—given the demographics of Floyd County—was going to be tried by an all-white jury, which he eventually was.<sup>146</sup> Justice Wiggins could see "no other reason" for the trial judge to deny the defense counsel's request other "than to shorten the trial."<sup>147</sup> In contrast, defense counsel had good reason to make the request according to Justice Wiggins. "Studies show jurors do not always disclose everything in voir dire," he pointed out. "Thus, it is necessary to do a thorough voir dire to root out implicit bias. That takes time.

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142. See *id.* at 638. (Wiggins, J., concurring in part and dissenting in part)

143. Ill. Sup. Ct. Comm. On Jury Instrs. in Civ. Cases, *Implicit Bias*, ILL. CTS., <https://courts.illinois.gov/Circuitcourt/civilJuryInstructions/1.08.pdf> [<https://perma.cc/2H5L-ZSH9>].

144. Mark W. Bennett, *Implicit Bias Jury Instruction*, WISPD, <https://www.wispd.org/attachments/article/101/ImplicitBiasJuryInstruction.pdf> [<https://perma.cc/9B5H-SM8Y>]. See also Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

145. *Williams*, 929 N.W.2d at 641 (Wiggins, J., dissenting).

146. See *id.* at 642.

147. *Id.* at 641.

Scheduling concerns should not be the basis for refusing to conduct individual voir dire.”<sup>148</sup>

Justice Appel agreed. “[T]he environment matters,” he argued, noting, “Collective questioning on sensitive issues may not elicit a response from some jurors who would respond in private.”<sup>149</sup> Justice Appel marshalled social psychology literature to make a telling point—one that we all know to be true: “[I]f a lawyer is to engage in effective voir dire, the advocate cannot skate over the surface with collective questions to jurors about explicit racial bias, which all will deny in any event. A more individualized approach is required if implicit bias is to be explored.”<sup>150</sup> Simply put, the “ability of the defense to engage in individualized voir dire,” Justice Appel elaborated, “increases the likelihood of identifying jurors who may not be fair and impartial.”<sup>151</sup>

The majority in *Williams* viewed as controlling its holding in *Windsor* that individualized voir dire will only be available in a case “in which a reasonable possibility exists that the verdict might be affected by racial prejudice.”<sup>152</sup> Defendant had urged the court in applying *Windsor* to consider “new scholarship on implicit bias,” but the majority rejected that argument.<sup>153</sup> According to the majority, *Williams* had failed to point to any “scholarship directed to the specific issue here—namely, the effectiveness of questioning prospective jurors on race in an individual, sequestered setting as opposed to a group setting.”<sup>154</sup>

That was not the view of Justice Appel, who joined Justice Wiggins on this issue and wrote “separately to emphasize the limitations of conventional group voir

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148. *Id.*

149. *Id.* at 643–44 (Appel, J., concurring in part and dissenting in part) (quoting *Commonwealth v. Shelley*, 409 N.E.2d 732, 740 n.12 (Mass. 1980)). Professor Nancy Marder, Director of the Chicago-Kent Law School’s Jury Center explains: “The voir dire is conducted in the public setting of the courtroom and jurors are usually questioned as a group. It is undoubtedly difficult to be reflective in such a setting and to ask oneself if one can truly be impartial. It is also exceedingly difficult for a juror to admit in that public setting that he or she cannot be impartial. The socially acceptable, or what psychologists describe as ‘socially desirable,’ answer is that one can be impartial. It is far easier to remain silent and to blend in with the group than to respond in a manner that is contrary to social expectations.” Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1595 (2012) (footnotes omitted).

150. *Id.* at 644.

151. *Id.*

152. *Id.* at 631 (majority opinion) (quoting *State v. Windsor*, 316 N.W.2d 684, 686–87 (Iowa 1982)).

153. *Id.*

154. *Id.*

dire in rooting out racial bias and the modest potential of individual voir dire, properly handled, in addressing the potential of racial bias.”<sup>155</sup> Justice Appel cited a half-dozen law review and social science journals that advocate for individualized voir dire in order to obtain “jury candor” regarding a person’s biases, and he also cited the ABA Principles on Juries and Jury Trials.<sup>156</sup> ABA Jury Principle 11B(2) provides: “Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.”<sup>157</sup> Specifically, he pointed out research indicating that “a series of open-end questions educating jurors about implicit bias may be helpful” and that “focused examination in a more private setting can yield invaluable information” that can root out juror racism.<sup>158</sup> Even if it “does not lead to the exercise of a strike, it can serve to mitigate the potential effects of implicit bias.”<sup>159</sup> Justice Appel recognized that concerns about time lead to curtailment of voir dire—and away from individualized voir dire; but speaking bluntly, he made clear that in his opinion, “expedition is clearly subsidiary to the duty to impanel an impartial jury.”<sup>160</sup>

#### *E. Proposed Amendments to the Iowa Rules of Criminal Procedure*

In the spring of 2020, the Iowa Supreme Court published for public comment proposed amendments to the Rules of Criminal Procedure.<sup>161</sup> The proposed amendment to Rule 2.18(6) involves the availability of individualized voir dire and necessarily recognizes how this procedural protection is intertwined with ferreting out both intentional and implicit bias so that an “impartial jury” can be obtained through challenges for cause or peremptory strikes.<sup>162</sup> Our NAACP Public

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155. *Id.* at 643 (Appel, J., concurring in part and dissenting in part).

156. *Id.* at 643–44.

157. *Trial by Jury: ABA Principles for Juries & Jury Trials, Principle 11.B(2)*, A.B.A., [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_juryaddendum/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_juryaddendum/) [<https://perma.cc/LRA7-JHUW>].

158. *Williams*, 929 N.W.2d at 644 (Appel, J., concurring in part and dissenting in part).

159. *Id.*

160. *Id.* at 645 (quoting *United States v. Dellinger*, 472 F.2d 340, 370 n.42 (7th Cir. 1972)).

161. *Request for Public Comments on Proposed Amendments to Chapter 2 Rules of Criminal Procedure*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/collections/483/files/1062/embedDocument/>.

162. The proposed amendment to Rule of Criminal Procedure 2.18(6) provides for the trial judge to order an individualized voir dire “on sensitive subjects” of a potential juror “separate from each other and in a location other than the courtroom.” It is not clear that the rule’s “sensitive subjects” trigger authorizes individualized voir dire in all cases in which a defendant of color is prosecuted. When “a potential juror expresses actual bias . . . , including but not limited to

Comments extensively address these issues in Parts II and III, and we direct the reader to our NAACP Public Comments rather than repeat those comments here.<sup>163</sup>

In addition, Part II of our NAACP Public Comments made two related recommendations.<sup>164</sup> The NAACP proposed, as a needed clarification, that racial and similar biases be expressly listed as bases for challenges for cause.<sup>165</sup> A second NAACP recommendation supported the proposed amendment of the change of venue rule to grant discretion to trial judges to transfer cases involving defendants of color when the case originates in a county in which there are few residents of color. At present, Rule 2.11(10) requires the trial court to find “the evidence in support of the motion [demonstrates] that such degree of prejudice exists in the county in which the trial is to be held that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury from that county.” The NAACP believes the current rule imposes “an unrealistic, time-consuming, and expensive burden to discharge when the challenge to the appearance of fairness was obvious for all to see.” The proposed amendment deletes the requirement that prejudice must be found to exist in the county and authorizes change of venue if “the court finds there is a substantial likelihood a fair and impartial trial cannot be preserved in the county where the trial is to be held . . . .” While the proposed amendment is a positive step forward, the NAACP contended it is still too restrictive. Accordingly, the NAACP recommended that the trial judge’s discretion under the rule be further enhanced by

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bias based on . . . race, creed, [or] color,” the rule provides that “the court may clarify the juror’s position but shall not attempt to rehabilitate the juror by its own questioning.” This proposal is intended to end—and should end—the practice of “easy rehabilitation” by judges of jurors who have expressed or implied racial or other biases. A juror who has directly or indirectly expressed bias should not be retained simply because the juror answers “yes” to a question asked by the judge whether he or she could and would follow the Court’s instructions to be fair and impartial. The Authors strongly support that aspect of the proposed rule.

However, subject to reasonable time limits, we believe individualized voir dire should be generally available in all cases in which the defendant is a person of color, and certainly in ones in which a conviction would carry a severe or mandatory minimum sentence. The risk of implicit bias is much greater in these circumstances, and *a fortiori* where the jury seems likely to be all-white, defense counsel should not be required to elicit statements reflecting racial bias in a group setting before individualized voir dire is allowed. Imposing such a limitation will necessarily cause implicit bias to be overlooked, as it is likely that the group setting will allow implicit bias to remain hidden. Of course, and to repeat for the sake of clarity, individualized voir dire would be subject to reasonable time limits.

163. See generally *Iowa-Nebraska NAACP Public Comments Regarding Chapter 2 Amendments*, *supra* note 78.

164. *Id.* at 8–13.

165. *Id.* at 8–10.

adding “in the interests of justice” as a basis for change of venue and authorizing the trial judge to do so *sua sponte*.<sup>166</sup> That new-found authority might be particularly useful and appropriate to exercise when an African American is accused of a crime carrying a lengthy mandatory sentence and will face trial in a county likely to produce an all-white jury.

Part III of our NAACP Public Comments notes that the proposed amendments are disappointingly silent about the trial judge’s role in proactively addressing implicit bias and taking prophylactic steps to minimize the risk of juror bias infecting juror deliberations. That is a significant concern and one of heightened importance because of the U.S. Supreme Court’s ruling in *Peña-Rodriguez*<sup>167</sup> that racial bias of even one juror can require overturning a verdict.<sup>168</sup> As expressed earlier, the Authors recommend that, if requested by the defendant, an implicit-bias instruction must be given. We also recommend that the court map out procedures, as the Washington Supreme Court has done, to guide trial judges when faced with a juror’s charge that bias or prejudice was expressed during jury deliberations and may have affected the verdict, as was alleged in *Pena-Rodriguez*.<sup>169</sup>

The proposed amendments addressing challenges for cause and individualized voir dire demonstrate the advantages of the comprehensive view that rulemaking can provide, with all stakeholders at the table, in contrast to the ad hoc appellate adjudication process.<sup>170</sup> The Authors are confident the Washington Supreme Court would point to the Rule 37 reform of *Batson* procedure that resulted from its rulemaking proceeding as a case in point—at least when reforming court procedures.<sup>171</sup> Appellate adjudication, of course, is often essential, as our court’s landmark rulings in *Plain* and *Lilly* illustrate. *Plain* and *Lilly* have reset, nay, have reinvigorated the court’s commitment to achieving juries that truly reflect the communities they serve. *Plain* and *Lilly* stand tall, painting in broad brush strokes.

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166. *Id.* at 11–13. The criterion of “the interests of justice” was drawn from 28 U.S.C. § 1404 (2018).

167. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017).

168. *Iowa-Nebraska NAACP Public Comments Regarding Chapter 2 Amendments*, *supra* note 78, at 13–16.

169. *Id.* Just such a case was addressed and decided recently by the Iowa Court of Appeals. In *State v. Spates*, No. 19-0749, 2020 WL 6156739 (Iowa Ct. App. Oct. 21, 2020), Judge David May discussed and outlined such a procedure for the trial court to follow. The court conditionally affirmed but remanded to the district court for further proceedings. The court was unaware of the Washington Supreme Court case, *State v. Berhe*, 444 P.3d 1172 (Wash. 2019).

170. *Iowa-Nebraska NAACP Public Comments Regarding Chapter 2 Amendments*, *supra* note 78, at 13–16.

171. *See id.*

They leave important details to rulemaking informed by public participation and comment, and to administrative reforms, such as the development and implementation of a comprehensive and effective Jury Management Policy by the Judicial Branch's Office of State Court Administration in December 2018.<sup>172</sup> Notably, the Iowa fair cross-section court reforms have progressed in a fashion similar to the Washington court's *Batson* reforms, which sprang from its *State v. Saintcalle* decision.<sup>173</sup> The Authors are hopeful that Iowa *Batson* reforms will follow as well.

IV. THE COURT'S SUPERVISORY POWER CAN PROVIDE THE COMPREHENSIVE,  
ACROSS-THE-BOARD APPROACH NECESSARY TO ENSURING DEFENDANTS OF  
COLOR WITH A FAIR AND IMPARTIAL TRIAL FREE FROM RACIAL OR ETHNIC  
DISCRIMINATION

Related to but separate from the Iowa Supreme Court's authority to ensure a fair and impartial trial free from racial or ethnic discrimination through interpretation of specific provisions of the Iowa constitution, is the court's supervisory authority under article V to ensure the administration of justice.<sup>174</sup> The court does so, of course, both through judicial interpretation and through rules of procedure it publishes. The court's opinion in *State v. Jonas*<sup>175</sup> is a good example of the former, while the proposed amendments to the rules of criminal procedure currently under consideration provide a solid example of the latter.<sup>176</sup>

The rejection of defendant Veal's challenge to current *Batson* procedures, and the denial of individualized voir dire and the implicit-bias jury instruction in *Williams*, need not be the final chapter on these issues. The Authors view *Veal*'s rejection of the *Batson* challenge as limited to the very "special factual

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172. Article, *supra* note 1, at 592–97.

173. *State v. Saintcalle*, 309 P.3d 326 (Wash. 2013) (en banc), *abrogated in part*, *City of Seattle v. Erickson*, 398 P.3d 1124, 1131 (Wash. 2017) (“In the past, this court has provided great discretion to the trial court when it comes to the finding of a prima facie case pursuant to a *Batson* challenge. To ensure a robust equal protection guaranty, we now limit that discretion and adopt the bright-line [State v.] Rhone [229 P.3d 752 (Wash. 2010)] rule. We hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury. The trial court must then require an explanation from the striking party and analyze, based on the explanation and the totality of the circumstances, whether the strike was racially motivated.”)

174. IOWA CONST., art. V, § 4 provides: “The supreme court shall . . . exercise a supervisory control over all inferior judicial tribunals throughout the state.”

175. *State v. Plain*, 898 N.W.2d 801 (Iowa 2017).

176. *See id.*

circumstances” of the case and see it as reflecting, as Chief Justice Cady expressed, application “of current law.”

We view implicit bias and individualized voir dire as inextricably linked. Both are areas in which social science research is evolving and maturing rapidly, and the court may be open to procedural changes informed by those developments when change will further the goal of a fair trial for all, including persons of color. Writing for the majority in *Williams*, Justice Mansfield faulted the defendant for failing to cite any “scholarship directed to the specific issue here—namely, the effectiveness of questioning prospective jurors on race in an individual, sequestered setting as opposed to a group setting.”<sup>177</sup> That is disputable, as Justice Appel’s separate opinion reveals,<sup>178</sup> but as further such scholarship emerges, the court should be open to review of *Windsor* and *Williams*. That seems plainly to be implied by the court majority’s statement; for it strongly suggests that if the defendant had brought forth social science research that documented the greater effectiveness of individualized voir dire in protecting against implicit bias, a different result distinguishing—perhaps overruling—*Windsor* would have been reached.<sup>179</sup> Justice Appel gave defense counsel in future cases a head start on preparing for this issue by citing a half-dozen articles that advocate for individualized voir dire.<sup>180</sup>

Even if a majority of the Iowa Supreme Court, on the factual records that were before them in *Veal* and *Williams*, was not, or in the future is not, prepared to make these reforms *through constitutional adjudication*, each of these issues lies squarely within the court’s supervisory authority over trial courts. The NAACP and others advocating reform should continue to pursue those reforms through the court’s rulemaking process.

With respect to peremptory strikes of prospective jurors who would offer a racial or ethnic mix in the jury panel, the supreme court’s opinion in *State v. Mootz*,<sup>181</sup> the court’s most recent pre-*Veal* decision involving the *Batson* precedent, is a case with which those seeking reform must reckon. It was a reverse-*Batson* case, where it was not the prosecutor but defense counsel that struck Hispanic jurors.<sup>182</sup> The Iowa Supreme Court came down hard on the district court judge who sua sponte had raised a *Batson* objection (while the prosecutor stood mute) and then, after

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177. *State v. Williams*, 929 N.W.2d 621, 631 (Iowa 2019).

178. *See id.* at 643 (Appel, J., concurring in part and dissenting in part).

179. *See id.* at 631 (majority opinion).

180. *See id.* at 643–45 (Appel, J., concurring in part and dissenting in part).

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

182. *See id.* at 212.

questioning, ruled on its own objection.<sup>183</sup> The Iowa Supreme Court essentially held that while a trial judge had the authority to act *sua sponte*, the court had to be certain that there was discrimination and the court had to document it thoroughly to enable review.<sup>184</sup> *Mootz* implied that such a proactive role by the trial court is to be the exception. The Authors believe *Mootz* sent the wrong signal: the trial court will almost never be reversed if it rules in favor of the side making the statutory peremptory strike, but it runs a serious risk of reversal if it affirmatively investigates bias in making the strike and rules in favor of the side making the constitutionally-based *Batson* anti-discrimination claim. Worse, heedless of widespread criticism of *Batson* standards and procedure, *Mootz* tended to cement the requirement of a documented showing of intentional discrimination in the exercise of a peremptory strike rather than focus on the crucial importance not only to defendant but also the criminal justice system of an “impartial jury” both in fact and appearance. At least in the most typical factual context, in which the prosecution is making the peremptory strike of jurors of color, the Authors believe trial judges must be proactive to ensure that a fair cross-section in the jury pool or panel is not lost at this final stage of the process—namely, selection of the trial jury. That means *Mootz* should be seen as a pre-*Plain* decision that should go by the wayside as *Batson* protections are strengthened. We do not view *Veal* as foreclosing an extension or revision of *Batson*’s substantive and procedural protections as a matter of Iowa constitutional law or through the court’s supervisory authority over the trial courts.

As noted above, the Washington Supreme Court totally transformed its *Batson* procedures through rulemaking in April 2018.<sup>185</sup> Justice Mansfield, in Part IV of his opinion, found defendant *Veal* had not raised article I, section 10 in support of his fair cross-section claim, but noted, “*Veal* did mention the Iowa Constitution when asserting his *Batson* challenge and when moving for change of venue.”<sup>186</sup> However, there is no mention of the Iowa constitution’s equality or impartial jury clauses in Justice Mansfield’s discussion of the *Batson* challenge in Part VI of his opinion.<sup>187</sup> The court’s analysis is solely based on current *Batson* law and procedure, including its decision in *Mootz*, and therefore should not foreclose a future argument that greater protection should be afforded under the Iowa constitution.

Even were the court to disagree with the Authors on this point, *Veal* does not

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183. *See id.* at 213.

184. *See id.* at 217–18.

185. *See State v. Veal*, 930 N.W.2d 319, 358 (Iowa 2019) (including Washington Supreme Court General Rule 37 in the addendum to his dissent).

186. *Id.* at 327 n.5 (majority opinion).

187. *See id.* at 328–30.

foreclose extending greater protection under the court's article V supervisory power over the trial courts.<sup>188</sup> A future court would almost certainly recognize that the underlying facts and rationale that the prosecutor in *Veal* gave in justification of his strike, which was fully credited by the trial judge based on the prosecutor's demeanor, made it almost impossible to overturn the strike—short of total abolition of peremptory challenges. Therefore, criminal defense attorneys should not read the *Veal* decision as foreclosing future challenges to the ineffectiveness of the *Batson* procedures, but it will be important to raise the issue in timely fashion in an appeal that presents much more favorable facts.

#### V. RECENT DEVELOPMENTS IMPACTING THE ACHIEVEMENT OF FAIR CROSS-SECTIONS OF THE COMMUNITY IN IOWA JURY POOLS AND PANELS

To Justice Appel's list<sup>189</sup> of reforms necessary to secure "a fair and impartial trial free from racial discrimination," the Authors would have added the necessity of eliminating the felon exclusion rule,<sup>190</sup> an issue that was not raised or addressed in the *Lilly* trilogy, though it does figure into *Veal*.<sup>191</sup> The felon exclusion rule rendered ineligible and eliminated from consideration for jury service persons previously convicted of a felony even after they had completed their sentences and without any inquiry into their impartiality and fitness to serve. It did so without regard to the period of time passed since the crime was committed, without regard to the nature of the crime, without regard to evidence of rehabilitation and good citizenship, and even without regard to restoration of citizenship and voting rights by the Governor. In doing so, Rule 2.18(5)(a) undoubtedly thwarted much of the promise and hope of *State v. Plain* that an "impartial jury" representing and drawn from a fair cross-section of the community will be secured in every case.<sup>192</sup> The reason for that lies in the dramatic racial disparities in Iowa's criminal justice system: although African Americans have accounted for 3 to 4 percent of the state's population, they

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188. See *State v. Lilly*, 930 N.W.2d 293, 307-08 (Iowa 2017); *Jonas v. State*, 904 N.W.2d 566, 580-81 (Iowa 2017). In early 2020 the California Supreme Court had under consideration the commencement of a rulemaking proceeding directed at reform of its *Batson* procedures; however, the California Legislature moved more quickly, enacting Assembly Bill No. 3070, which Governor Gavin Newsome signed into law in September 2020. The comprehensive reform is codified in §231.7 of the California Code of Civil Procedure and provides a guide for the Iowa Supreme Court to consider when exercising its supervisory power. See generally, *supra* note 86.

189. See text accompanying note 6, *supra*.

190. IOWA R. CRIM. P. 2.18(5)(a).

191. See Article, *supra* note 1, at 571-75 and text accompanying footnotes 405-32.

192. See *State v. Plain*, 898 N.W.2d 801, 821-29 (Iowa 2017) (*passim*).

constitute 25 percent of the state's prison population and likely an even greater percentage of those under criminal supervision.<sup>193</sup>

There have been two major legal developments involving Iowa Rule of Criminal Procedure 2.18(5)(a). First, on August 5, 2020, Governor Kim Reynolds issued Executive Order Number 7, which restored the right to vote in all elections for persons previously convicted of a felony who had completed their term of confinement, including parole and probation, except in certain cases requiring the Governor's individual attention; and it did so on a rolling basis such that it applied to persons who completed their terms of confinement each day into the future.<sup>194</sup> Governors Vilsack and Culver had done so by Executive Order during their tenures as Governor, but Governor Branstad had repealed their Executive Orders as soon as he returned to the Governor's Office after the 2010 election. In consequence, anyone previously convicted of a felony who discharged his or her sentence thereafter was ineligible to vote unless the Governor granted his or her individual application for restoration of rights. Notably, however, even during the period governed by Governor Vilsack's and Governor Culver's Executive Orders, the court system attached no relevance to the restoration of citizenship and right to vote, and they remained forever ineligible to serve on a jury and subject to automatic dismissal for cause.

Second, the Iowa Supreme Court on February 19, 2021 issued an immediately effective Supervisory Order amending Rule 2.18(5)(a) to eliminate previous conviction of a felony as a ground for dismissal for cause if the prospective juror's voting rights had been restored by the Governor; and it thus made immediately eligible for jury service all persons previously convicted of a felony whose voting

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193. *African-Americans in Iowa: 2020*, IOWA DATA CTR. 1 (Feb. 2020), <https://www.iowadatacenter.org/Publications/aaprofile2020.pdf>; *Quarterly Quick Facts*, IOWA DEP'T CORR. (Mar. 31, 2021), <https://doc.iowa.gov/data/quick-facts>.

194. The "carve outs" were limited to homicides and certain specified sex crimes. See *Gov. Reynolds Signs Executive Order to Restore Voting Rights of Felons Who Have Completed Their Sentence*, OFF. GOVERNOR IOWA (Aug. 5, 2020), <https://governor.iowa.gov/press-release/gov-reynolds-signs-executive-order-to-restore-voting-rights-of-felons-who-have> [<https://perma.cc/U9Y3-YRX7>]; see also Rachel Droze & Hollie Schlesselman, *Iowa No Longer Lone State With Lifetime Ban Barring Felons From Voting*, WOI-TV, <https://www.weareiowa.com/article/news/local/local-politics/iowa-governor-kim-reynolds-felon-voting-rights-executive-order-politics-state-capitol/524-5874d3da-ce6c-4a89-859d-a61fc4858b59> [<https://perma.cc/X8G8-MX9G>]; Erin Murphy, *Gov. Kim Reynolds Promises Felon Voting Rights Before Election*, THE GAZETTE (June 19, 2020), <https://www.thegazette.com/subject/news/government/kim-reynolds-promise-felon-voting-rights-executive-order-20200619> [<https://perma.cc/FU7X-R4FZ>].

rights had been restored by the Executive Orders of Governors Reynolds, Vilsack, and Culver or whose rights would be restored by Governor Reynold pursuant to her continuing exercise of authority under Executive Order Number 7.<sup>195</sup> The NAACP has long advocated that rule change, and the Iowa Supreme Court had proposed amendment of Rule 2.18(5)(a) making that change in March of 2020, along with numerous other Rules of Criminal Procedure. The Court had invited public comments on the proposed rule changes but had not reached final decision on any of them. The Authors' views were originally Part V of our Article, but they removed that part pending issuance of the Governor's promised Executive Order and the Court's final publication of amended Rule 2.18(5)(a).<sup>196</sup> In its public comments on the proposed amendment the NAACP noted the significant effect such a rule change could have on the achievement in Iowa of juries that represent a fair cross-section of the community, and in particular, improved representation of African Americans and people of color: ". . . Because Iowa Judges have not viewed the restoration of rights granted by the Executive Orders of Governors Vilsack and Culver, or even those based on individual applications, as including the right to serve on a jury, only a minute fraction of former felons in Iowa are considered eligible for jury service."<sup>197</sup>

"The racial impact is huge. Nationwide, the most reliable estimates are that a third of adult African American men—one out of every three!--are excluded from jury service by virtue of felon-exclusion rules. . . . The facts in *State v. Veal* are demonstrative. The initial voir dire panel was comprised of thirty-four potential jurors and included three African Americans. Three panel members had felony convictions, including two of the three African Americans. While all three with past felony convictions were disqualified for cause, the racial impact of felon exclusion was stark—whereas two-thirds of the African American jurors were eliminated, only 3% of the white jurors were eliminated. The most recent conviction of one of the African American jurors who was struck was a DUI-3d conviction nine years old; his prior burglary/larceny conviction was many years earlier in his youth."<sup>198</sup>

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195. *In the Matter of Adopting Felony Conviction Challenge for Cause Amendments to Chapter 1 Rules of Civil Procedure and Chapter 2 Rules of Criminal Procedure*, IOWA CTS. (Feb. 19, 2021), <https://www.iowacourts.gov/iowa-courts/supreme-court/orders/> [<https://perma.cc/WV4Y-2CKB>] [<https://perma.cc/MYZ7-SSCC>]. See IOWA R. CRIM. P. 2.18(5)(a). The Court's Supervisory Order applies as well to civil trials.

196. See NAACP Public Comments to Iowa Supreme Court Proposed Amendments to Iowa Rules of Criminal Procedure, filed June 30, 2020, at pp. 1-5.

197. *Id.*

198. See *id.* at 2.

The third recent development that will impact achievement of a fair cross-section of the community in jury pools and panels, and positively so, involves jury data collection and reporting. As a corollary to its holding that fair cross-section claims arise under the Impartial Jury Clause of the Sixth Amendment, not the Fourteenth Amendment's Equal Protection Clause, the Iowa Supreme Court in *State v. Plain*<sup>199</sup> held that "the constitutional fair cross-section purpose alone is sufficient to require access to the information necessary to prove a prima facie case."<sup>200</sup> The Assistant Public Defender representing Plain had been denied such access. But without access to the composition of jury pools in the county over the preceding six to twelve months, it is impossible for defense counsel to review the aggregated jury data and determine whether there was statistically significant underrepresentation of a distinctive group, as *State v. Lilly*<sup>201</sup> would later require. The Judicial Branch, State Court Administration, and Jury Managers were not gathering such data in a consistent or complete manner, nor was it readily or regularly available, nor even, when obtained, did it prove comprehensible without inquiry into definition of terms. Complicating matters further, the lack of coordination was evident as the Jury Managers in each of Iowa's 99 counties were not uniformly gathering the same information, using the same terminology, or making it available in a timely manner.<sup>202</sup> Moreover, how was the relevant racial or ethnic composition of the jury-eligible<sup>203</sup> population in the county served by the trial court to be determined? The U.S. Census Bureau gathers such data every ten years, and through its annually conducted American Community Survey of a sample of each county's population, the jury-eligible population of each county can be determined. But it is an understatement to say that, with a possible exception for social scientists and statisticians, the Census Bureau tables are something of a labyrinth and by no means easily negotiated, by attorneys, by jury managers, even by judges.

Addressing the first issue, ascertaining the jury-eligible population, the NAACP approached the Director of the State's Data Center, Gary Krob, with the question whether he might be able, using Census Bureau data gathered in the

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199. 898 N.W.2d 801(Iowa 2017).

200. *Id.* at 828; *See* Article, *supra* note 1, at 513-14.

201. 930 N.W.2d 293, 301-305 (Iowa 2019).

202. *See Governor's Working Group on Criminal Justice Policy Reform Submits Final Strategy Recommendations*, OFFICE OF CIO (Nov. 6, 2015), <https://comment.iowa.gov/Notice/Details/JusticePolicyReform> [<https://perma.cc/LS68-CJMH>].

203. *State v. Lilly* held that the distinctive group's percentage in the aggregate jury data was to be compared to the group's jury-eligible portion of the population, not to its percentage of the general population, thus eliminating those under age 18, those not U.S. citizens, and those who were incarcerated.

American Community Survey, to ascertain and publish for each Iowa county the jury-eligible population broken down by race, ethnicity, and gender for those 18 years of age and older.<sup>204</sup> Krob undertook the task and indeed did determine and publish a user-friendly online web page so that anyone can access the requested information for each Iowa county without charge; and he readily agreed to update it for every year as soon as the U.S. Census Bureau published its latest annual survey results.<sup>205</sup>

Addressing the second issue entailed a lengthy and involved process but has nonetheless proven productive. It began in the fall of 2015 when NAACP advocacy secured recommendations from the Branstad Committee (1) that “[t]he Judicial Branch should begin collecting and maintaining statistics regarding the racial composition of jury pools [and] (2) that [o]versight and accountability should be restored to the jury selection process. . . [with] ongoing monitoring and coordination at both the State and District Court levels.”<sup>206</sup> Representing the NAACP, the Co-Authors along with State NAACP President Betty Andrews met with the then-newly appointed State Court Administrator Todd Nuccio in the fall of 2017, exchanged emails with Deputy State Court Administrator John Goerdt regarding data collection by jury managers and clarification of terminology, began to assist the Public Defender representing Kelvin Plain on the remand of his case, and embarked on series of emails and meetings over the next three years, some attended by then Chief Justice Mark Cady, to secure improvements in data collection and publication of data, by county, to enable defense counsel to explore and assert fair-cross section claims. The Judicial Branch retained Paula Hannaford Agor, Director of the Jury Studies Center at the National Center for State Courts, as a consultant, and State Court Administrator Nuccio arranged for her to hold a daylong meeting providing in-depth training for jury managers in March 2018. The Office of State Court Administration developed a comprehensive Jury Management Policy in mid-2018, published in December and taking effect January 1, 2019. Work continued within OSCA and in exchanges with the Co-Authors to make data-collection uniform, comprehensive, and transparent on a statewide basis, and to publicize and endorse for use the State Data Center’s annual report by county of the jury-eligible population.

Data collection, public access to the data, monitoring and reporting of the data, continued to be on the agenda at meetings between the NAACP and OSCA

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204. Co-Author Walker is quick to say that it was his Co-Author and longtime colleague Russ Lovell who had the inspiration and took the initiative to do this.

205. See Lovel II, *supra* note 1, at 561–65.

206. *Id.* at 520-23.

Administrator Nuccio and his leadership team in January and March 2021. Advancing these efforts and discussions to a significantly higher level, on April 5, 2021, State Court Administrator Nuccio sent the Co-Authors a Memorandum titled “Jury Data Collection and Reporting.”<sup>207</sup> He referenced previous meetings with and emails from the Authors regarding use of Census Bureau data “as a measure of the racial and ethnic composition of the presumptive jury-eligible population of Iowa counties.” Moreover, he continued, “After considerable discussion about your suggestions, including but not limited to consultation with Paula Hannaford Agor, Iowa State Court Administration has developed a plan that we believe is responsive to the issues and concerns that have been the subject of our numerous productive discussions.”

The plan that the State Court Administrator described in his Memorandum of April 5, 2021, represents a major development that will facilitate discovery, presentation, and adjudication of fair cross-section claims. The plan, Nuccio said, is “preliminary” and details remain to be provided “after further progress is made in refining and operationalizing” it; but there can be no doubt that it will have major impact on the administration of the criminal justice system in Iowa and on the appearance of fairness in criminal jury trials.

First, OSCA will provide jury managers in Iowa with current Census Bureau American Community Survey data, but “[g]iven the rather involved process of accessing these tables directly from the US Census Bureau, we intend to share links to the much more easily accessible and user-friendly presentation of the data available from Iowa’s State Data Center.” That is the position the NAACP has recommended. The State Data Center provides for the court, the jury manager, and counsel the jury-eligible population in each county, broken down by race, enabling comparison of the distinctive group’s percentage of the county’s Census population to the distinctive group’s percentage of the defendant’s jury pool and jury panel, necessary to determining whether a defendant can establish standing for a fair cross-section challenge. If that comparison reveals underrepresentation of a distinctive group, then the court must determine whether there is underrepresentation of the distinctive group on the jury data for the six to twelve months preceding trial, and, if so, whether the underrepresentation is statistically significant at the 1 standard deviation level for claims invoking the Iowa Constitution, or two standard deviations for those relying only on the Sixth Amendment. Finally, if Duren prong 2 underrepresentation is proven, the court must determine whether it was caused by systematic exclusion.

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207. A copy of the Memorandum is on file with the Drake Law Review and available upon request made to the Review or to the Authors.

Second, OSCA “will direct jury managers to monitor the racial and ethnic composition of their jury pools in relation to the estimated racial and ethnic composition of their jurisdiction.” Necessarily this OSCA commitment to monitoring means that the jury managers will collect, compile, and make a preliminary analysis of data on jury composition at the various stages of the juror selection process, which should be available upon request to counsel. Jury managers are then instructed to report to OSCA “if ongoing monitoring of jury pool racial and ethnic composition reveals anomalies or apparent inconsistency between the racial and ethnic composition of jury pools and the jurisdiction as a whole (as estimated in American Community Survey data).” If that occurs, OSCA will investigate “and, when necessary, endeavor to determine if root causes of the issue can be identified and addressed.”

Third, and finally, on an annual basis State Court Administration will conduct a review independent of the monitoring conducted by the jury managers. OSCA currently is in the process, the Memorandum stated, “of developing an analytical tool that can be applied in a uniform fashion to jury pools drawn from each county each year. This tool will include: 1) a feature that displays the range of observed values of representation from distinctive groups that would fall within one, two, and three standard deviations, 2) functionality to calculate the difference between observed and expected jury pool composition, and 3) the calculated standard deviation of observed values of representation from a distinctive group.”

The Authors believe OSCA’s commitment to the monitoring of each stage of the jury selection process, to ongoing coordination of that effort by OSCA and jury managers at the local level, and to an independent annual review process by OSCA holds great promise. In Iowa counties with significant minority populations and counties where jury trials are more numerous, the OSCA Jury Composition/Monitoring Plan will have major impact. In practice, as the Authors recommended and urged,<sup>208</sup> defense counsel will be able to obtain the necessary information for making a fair cross-section claim well in advance of trial and, should the jury pool or panel with which counsel is presented fall short of fair representation of a distinctive group, assert defendant’s fair cross-section objection.

## VI. CONCLUSION

Jury pools and jury panels in the future should include greater representation of African Americans and other persons of color. Reasons for this conclusion are

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208. See Article, *supra* note 1, at 534-41.

threefold. One is the reform and improvement of jury management practices that has taken place since 2018 and the issuance, effective January 1, 2019, of the new Jury Management Policy.<sup>209</sup> A second is the Court's Supervisory Order of February 19, 2021, in conjunction with the Governor's Executive Order Number 7, eliminating previous conviction of a felony as a basis for exclusion from jury service for persons whose voting rights had been restored. It will not be cause for dismissal, as it was in *State v. Veal*, that members of the jury pool or panel had previously been convicted of a felony. And the third is the monitoring policies being put in place by the Office of State Court Administration, applicable statewide, concerning jury data collection, reporting, and analysis. These will surely facilitate determination of whether a distinctive group is underrepresented in jury pools and panels, making both practice and court administration more effective and efficient, and no doubt leading to further improvements to secure fair cross-sections in Iowa juries. These progressive steps reflect a joint effort by the Court and OSCA to bolster fairness and the appearance of fairness in the criminal justice system and are without question grounds for celebration.

Civil rights progress is never linear; it is almost always a step or two forward, followed by a step back or sideways. Regrettably, in what we may characterize as a fourth recent development, a bill that would have expanded the master juror source pool and enabled State Court Administration to obtain more current address information failed to be reported out of the Senate Judiciary Committee during the 2021 Legislative Session; and it did not receive a vote in the Iowa House, where it had passed unanimously the year before. HF455 was strongly supported by the Judicial Branch, the NAACP, and the Attorney General's Office, among others, and been drafted in collaboration with the Iowa Department of Revenue. Contrary to the Authors' expectation and hope, however, it did not pass and has not become law.<sup>210</sup>

Looking ahead, it appears there will be at least four cases on the Iowa Supreme Court's 2021-22 Term's Docket that will provide further definition to the Court's fair cross-section jurisprudence.<sup>211</sup> The State is asking the Court to revisit prong 2 underrepresentation issues and to require a level of specificity as to systematic exclusion that the NAACP believes is unrealistic. The NAACP will

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209. Iowa Judicial Branch Jury Management Policy (published Dec. 5, 2018) (copy on file with the Authors). See Article, *supra* note 1, at 592-93.

210. See Article, *supra* note 1, at 527-28 & note 143.

211. *State v. Plain II*, Iowa Supreme Court No. 20-1000; *State v. Lilly II*, Iowa Supreme Court, No. 20-0617; *State v. Veal II*, Iowa Supreme Court, No. 21-0144; and *State v. Williams II*, Iowa Supreme Court, No. 21-0158. See *Cases Retained by the Supreme Court*, IOWA CTS., <https://www.iowacourts.gov/iowa-courts/supreme-court/pending-cases/>.

appear as *Amicus Curiae* in three of those cases. The Court has advised the NAACP that it will act on the proposed amendments to the Rules of Criminal Procedure in August, and we are hopeful progress will be made on individualized voir dire and implicit bias instructions. The NAACP has provided Justice Mansfield and the Criminal Rules Revision Committee with an Update on *Batson* reforms that have occurred through legislation and court rules in other states since it filed its Public Comments on June 30, 2020; Justice Mansfield has invited the NAACP to submit its proposed amendment of *Batson* procedures, and it has done so.

The NAACP anticipates it is readily foreseeable that peremptory challenges will be used to strike many individuals whose voting rights have been restored— with, as in *Veal*, a racially disproportionate impact— regardless of the nature of the crime for which one was convicted, how long ago it occurred, evidence of subsequent acceptance of responsibility and good citizenship, and restoration of voting rights. Recent empirical scholarship suggests that challenges for cause may also surface with regard to persons whose citizenship rights have been restored, again with a likely racial impact.<sup>212</sup> The NAACP’s concern that the *Batson* procedure is sorely in need of reform has not abated. The Authors promise an in depth examination of *Batson* reform in the future.

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212. Thomas Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785 (2020). Frampton’s research has found greater adverse racial impact in the striking of African American jurors for “cause” than through peremptory challenges.