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Color as a *Batson* Class in California

Emily Rose Margolis*

Batson v. Kentucky prohibits race-based discrimination in the exercise of peremptory challenges during jury selection in criminal and civil jury trials. In *People v. Bridgeforth*, New York’s highest court recently expanded this well-established protection to include discrimination based on skin color. Courts throughout the nation should adopt the same holding, despite potential administrability concerns. In California, courts should recognize skin color as a cognizable *Batson* class based on language in the state’s Code of Civil Procedure and its Government Code, which distinguish between race and skin color as separate identifiers. This shift will become increasingly necessary as California, along with the rest of the nation, becomes more multi-racial and multi-ethnic. Moreover, compelling research demonstrates that “colorism” is a troubling phenomenon that courts must address. This Note describes the history of *Batson v. Kentucky*, explains the holding and concerns raised by *People v. Bridgeforth*, argues that other states should recognize “skin color” as a cognizable class, and proposes two methods to do so in California.

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INTRODUCTION

Batson v. Kentucky is seminal jurisprudence that affects the selection of juries in both civil and criminal courts across the nation every day. *Batson* created a test for determining whether peremptory strikes were impermissibly based on race when prosecutors struck black jurors in cases with black defendants.¹ Under *Batson* and its progeny, criminal defendants—disproportionately people of color—gained an avenue through which to challenge the creation of juries from which minority races had been purposely excluded. The Supreme Court has since extended the holding to apply in civil trials and to encompass two other protected groups, Latinxs² and women. Most

1. *Batson v. Kentucky*, 476 U.S. 79, 100 (1986). *Batson* was not the first case to hold that discrimination in jury selection is unconstitutional. In 1879, *Strauder v. State of West Virginia* invalidated, on Fourteenth Amendment equal protection grounds, a state law limiting jury service to whites. 100 U.S. 303, 309–10 (1879). Almost a century later, *Swain v. Alabama* specifically addressed peremptory challenges in juror selection in holding that intentional exclusion of black venire members using peremptory strikes violated the Equal Protection Clause. 380 U.S. 202, 203–04, 223–24 (1965). There, no African American had ever served on a jury in the county as a result of the State’s peremptory challenges. *Id.* *Batson* overruled *Swain* in that the earlier case required no inquiry be made into the prosecution’s reasons for its strikes. *Batson*, 476 U.S. at 89, 92, 96. *Batson* is now the standard for determining whether discrimination in peremptory challenges has occurred. For a thorough discussion of *Batson*’s history and import today, see ELISABETH SEMEL & TOM MEYER, *Batson and the Discriminatory Use of Peremptory Challenges in the 21st Century*, in *JURYWORK: SYSTEMATIC TECHNIQUES* 225 (1983).

2. The term “Latinx” is used here to refer to individuals of Latin American ancestry. Using an “x” instead of an “a” or “o” is meant to avoid gendering the term and refers to all persons of all genders of Latin American descent. However, the term is arguably inaccurate in this context. In California, for instance, proof of discrimination may be made based on Hispanic surname; this potentially includes

recently, *People v. Bridgeforth* held that, under the New York state Constitution, “color” constitute a cognizable *Batson* class.³ This represents the first holding of its kind, expanding the *Batson* framework by distinguishing race from skin color. *Bridgeforth* recognizes the realities of racial and ethnic identity in the United States today, and other state courts should adopt its holding. In California, creating a color-based class would require a different approach than the New York Court of Appeals took. “Color” is identified as a cognizable group in California’s Government Code and in its Code of Civil Procedure (instead of in the state constitution, as in New York). Or, courts may apply this change through the state case *People v. Wheeler*, which rests on the state Constitution’s fair cross-section provision.⁴

This Note argues that courts in other states, especially California, should follow the lead of the New York Court of Appeals in recognizing color as a cognizable class under *Batson*. Part I begins with a discussion of the history and import of *Batson v. Kentucky*. Part II introduces *People v. Bridgeforth*. Part III describes why *Bridgeforth*’s ruling should be adopted nationwide, including a discussion of colorism and demographic data. Part IV explores how color might be acknowledged as a cognizable class in California, with a look at relevant state statutes and caselaw, proposing two means through which *Bridgeforth*’s holding might be applied. Finally, Part V responds to potential administrability and efficacy concerns.

I.

BATSON V. KENTUCKY AND CHALLENGING RACIALLY-DISCRIMINATORY PEREMPTORY STRIKES

In 1982, James Kirkland Batson, an African American man, was charged with second-degree robbery and receipt of stolen property and was tried in Louisville, Kentucky’s Jefferson Circuit Court.⁵ At his trial, the jury venire included only four African Americans and the prosecutor used his peremptory challenges to remove all of them.⁶ Consequently, Batson was tried by an

people from Spain or other non-Latin American countries. *See* *People v. Reynoso*, 31 Cal. 4th 903, 915 (2003). The California Supreme Court uses “Hispanic.” *See* *People v. Gutierrez*, 2 Cal. 5th 1150 (2017). Meanwhile, the US Supreme Court used the terms “Hispanic” and “Latino” interchangeably in its plurality opinion that extended *Batson* protections to Latinx individuals. *See* *Hernandez v. New York*, 500 U.S. 352 (1991).

3. *People v. Bridgeforth*, 28 N.Y.3d 567, 574 (2016).

4. *People v. Wheeler*, 22 Cal. 3d 258 (1978).

5. *Batson*, 476 U.S. at 82; *see also* Garret Epps, *When Is It Constitutional to Purge Black Jurors?*, ATLANTIC (Oct. 28, 2015), <https://www.theatlantic.com/politics/archive/2015/10/race-based-strikes/412825/> [<https://perma.cc/3Q62-5AZY>].

6. *Id.* at 83. Peremptory strikes are the challenges by which attorneys remove jurors without justifying that removal; essentially, they are free strikes for which the court requires no rationale. The Court in *Batson* stated that “a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried.” *Batson*, 476 U.S. at 89 (quoting *States v. Robinson*, 421 F. Supp. 467, 473 (Conn. 1976) (internal quotations omitted)). These take place after prospective jurors are removed for hardship,

all-white jury.⁷ Before the jury was sworn, Batson's attorney made a motion to discharge it on the ground that the prosecutor's removal of every black venire member violated Batson's Sixth and Fourteenth Amendment rights.⁸ The judge denied the motion and the jury convicted Batson of all charges.⁹ Batson appealed to the Kentucky Supreme Court, arguing that both his Sixth Amendment right (to a jury made up of a fair cross-section of the community) and Fourteenth Amendment right (to equal protection in the non-discriminatory use of peremptory strikes) had been violated.¹⁰ Batson argued that the state should adopt the holding of California's *People v. Wheeler* and other state cases, which had concluded that a prosecutor's racially discriminatory strikes in a single case—short of systematic exclusion in every case—violated the state constitution's fair cross-section guarantees.¹¹ The Kentucky Supreme Court rejected this argument, holding that Batson's constitutional claims failed because he did not “demonstrate *systematic exclusion* of a group of jurors from the venire.”¹² The Kentucky Supreme Court also based its holding on *Swain v. Alabama*, a 1965 Supreme Court case holding that a state's “purposeful or deliberate denial” of the jury-service right to African Americans violated the Equal Protection Clause, but only when the defendant could prove a systematic exclusion of African American jurors in multiple cases.¹³ The Supreme Court granted certiorari of the Kentucky Supreme Court's decision and reversed.¹⁴

or for cause based on bias. In some states, each side has a predetermined number of peremptory strikes based on statute or rule that changes depending upon on the nature of the case. For instance, in California, a single-defendant case affords each side ten peremptory challenges, unless the punishment is life without the possibility of parole or death, in which case ten additional strikes (a total of twenty per side) are allowed. Cal. Code Civ. Proc. § 231(a). Though the Constitution does not guarantee a federal right to a peremptory challenge, these strikes have been considered essential to jury trials for well over a century. *See, e.g.*, *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (describing the peremptory challenge as “a necessary part of trial by jury”); *Batson*, 476 U.S. at 112, 120 (describing the peremptory challenge as “a procedure which has been part of the common law for centuries and part of our jury system for nearly 200 years” and calling the tradition “venerable”) (Burger, J., dissenting); *but see* *Miller-El v. Dretke*, 545 U.S. 231, 272 (2005) (stating that “[f]inally, a jury system without peremptories is no longer unthinkable. . . . [m]embers of the legal professional have begun serious consideration of that possibility”) (Breyer, J., dissenting).

7. *Id.*

8. *Id.*

9. *Id.*

10. *See* U.S. CONST. amend. VI; U.S. CONST. amend. XIV.

11. *See* *People v. Wheeler*, 22 Cal. 3d 258, 272 (1978) (holding that Article 1 of the California Constitution guaranteed a right to an impartial jury selected from a representative cross-section of the community); *see also* *Commonwealth v. Soares*, 377 Mass. 461, 478 (1979).

12. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (emphasis added).

13. *Swain v. Alabama*, 380 U.S. 202, 203–04, 223–24 (1965); *see also* *Batson*, 476 U.S. at 92 (stating that “[a] number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause”).

14. *Batson* noted that *Swain*'s standard, requiring a defendant to prove systematic exclusion from more than one case, was unduly burdensome. *See* *Batson*, 476 U.S. at 92–93.

The Supreme Court found that the race-based peremptory strikes of prospective jurors from *Batson*'s venire constituted a Fourteenth Amendment equal protection violation.¹⁵ The state's conduct resulted in two primary harms to (1) *Batson* as the defendant, and (2) the prospective jurors who were struck.¹⁶ *Batson*'s equal protection rights were violated when he was subjected to a trial by a jury created through discriminatory means.¹⁷ The Court reflected that trial by jury protects defendants by ensuring that their rights are determined by "neighbors, fellows, associates, persons having the same legal status in society."¹⁸ These jurors prevent prosecutors or judges from imposing unjust or arbitrary punishment.¹⁹ At the same time, the venire members themselves were injured when they were denied the right to participate in jury service due to racial bias.²⁰ Prospective jurors who are struck are deemed unfit for jury service—unqualified and unable to impartially consider evidence—and race is unrelated to jurors' fitness to serve.²¹ Additionally, the Court saw harm done to the public confidence in the system of justice: "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."²² The Court called discrimination in the justice system "the most pernicious" because it catalyzes racism that prevents the law from achieving its purpose of securing equal rights for all.²³

Batson initially applied only to strikes of black jurors in cases involving black defendants, but has since been expanded substantially. Now, *Batson* applies to civil juries and to litigants of all races and protects other groups of jurors, such as Latinxs and women.²⁴ Some lower courts have expanded *Batson*

15. *Batson*, 476 U.S. at 99.

16. *See id.* at 86–88.

17. *See id.* at 86–87 (stating that "[t]hose on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice'") (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)).

18. *Batson*, 476 U.S. at 85.

19. *Id.*

20. For a similar rationale predating *Batson*, see *Ballard v. United States*, 329 U.S. 187, 195 (1946) (holding that women could not be deliberately excluded from jury service and stating that "the injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts"); *see also Swain v. Alabama*, 380 U.S. 202, 244 (1965) (holding that prosecutorial strikes were impermissible when they were made "for reasons wholly unrelated to the outcome of the particular case on trial," but instead were designed to deny African American venire members "the same right and opportunity to participate in the administration of justice enjoyed by the white population").

21. *Batson*, 476 U.S. at 87.

22. *Id.*

23. *Id.* at 87–88.

24. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 631 (1991) (holding that *Batson* applies in civil trials); *see also Hernandez*, 500 U.S. at 352 (plurality opinion) (applying *Batson* to Hispanic and Latino and employing the terms interchangeably in the plurality opinion); *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994) (applying *Batson* to strikes based on gender). *Compare Powers v. Ohio*, 499 U.S. 400, 416 (1991) (holding that *Batson* applies regardless of the litigants' race) *with Batson*, 476 U.S. at 94, 96 (holding that "the defendant first must show that he is a member of a cognizable racial group" that is "capable of being singled out for differential treatment).

to other groups, such as persons of particular religions, though other courts have rejected such applications.²⁵ These expansions have been based on the identification of those groups as cognizable classes.²⁶ *Batson* motions are also now available to both defendants and prosecutors.²⁷ *Batson*, however, is used most frequently today by defendants in criminal trials: criminal defendants bring over ninety percent of *Batson* challenges.²⁸

Batson motions follow three steps. First, the moving party must make a *prima facie* showing that the totality of the circumstances give rise to an inference that a strike discriminated against a protected group.²⁹ Second, the burden shifts to the non-moving party to come forward with a non-discriminatory (in *Batson*, race-neutral) reason for its use of the peremptory strike.³⁰ Finally, at step three, the court determines whether the strike was in fact discriminatory.³¹ If the court finds a *Batson* violation, two common remedies exist: the court may reseal the juror, or it may dismiss and replace the entire venire.³²

25. Regarding discriminatory strikes based on jurors' religious affiliation, see *People v. Wheeler*, 22 Cal. 3d 258, 276–77 (1978) (including religious affiliation as a protected class); see also *United States v. Girouard*, 521 F.3d 110 (5th Cir. 2008) (applying *Batson* to the strike of a Jewish juror); *Casarez v. State*, 913 S.W.2d 468, 496 (holding that *Batson* does not apply to strikes based on religious affiliation); *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003) (holding that *Batson* protects Muslim jurors). Other groups have been protected under *Batson* as well. See *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484–86 (9th Cir. 2014) (holding that *Batson* prohibits the removal of prospective jurors based on sexual orientation); *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006) (prohibiting discriminatory strikes against Native American prospective jurors under *Batson*); *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1995) (applying *Batson* to Asians); *United States v. Lorenzo*, 995 F.2d 1448 (9th Cir. 1993) (holding that *Batson* applies to Hawaiians and Samoans).

26. In *Batson*, the court defined a cognizable class “a recognizable, distinct class, singled out for different treatment under the laws, as written or applied.” 476 U.S. at 96. This definition comes from *Castaneda v. Partida*, 43 U.S. 482, 494 (1977). This concept will be discussed in more detail in Part IV.

27. See *Georgia v. McCollum*, 505 U.S. 42 (1992). Sometimes, instances of prosecutors using *Batson* objections to challenge defense strikes of white jurors are called “reverse *Batson*” motions. See, e.g., *United States v. Thompson*, 528 F.3d 110, 114 (2d Cir. 2008).

28. See Kenneth Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 457 (1996).

29. *Batson*, 476 U.S. at 97. This objection must be timely, which means before the jury has been sworn in. *Id.* at 99–100. The “*prima facie*” case must “give rise to” an “inference of discrimination” based on “all relevant circumstances.” *Id.* at 96–97. Those relevant circumstances can include a pattern of discriminatory strikes in the instant case, as in *Batson*, or other factors such as the prosecutor’s prior conduct or disparate questioning of jurors during voir dire. See, e.g., *Ex parte Branch*, 526 So. 2d 609, 622–23 (Ala. 1987).

30. *Batson*, 476 U.S. at 97. However, the non-moving party does not bear a burden of persuasion; they must only proffer a reason that is non-discriminatory, not “persuasive, or even plausible.” *Rice v. Collins*, 546 U.S. 333, 338 (2006) (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1993)).

31. *Id.* at 98. At step three, the court must take into account all circumstances to determine “whether the trial court finds the . . . explanations to be credible.” *Miller-El v. Cockrell*, 537 U.S. 332, 339 (2003). If the proffered explanation is “implausible or fantastic,” then the court may find that the supposedly non-discriminatory justification was a mere pretext for purposeful discrimination. Put differently, when the court determines that the strike was discriminatory, it has found that the proffered justification was a pretext for purposeful discrimination. See *Purkett*, 514 U.S. at 768.

32. The *Batson* Court discussed each remedy but ultimately left the decision to individual trial courts on a case-by-case basis. *Batson*, 476 U.S. at 99 n.24. Courts have also come up with other creative

Although the symbolic impact of *Batson* is difficult to overstate, litigants, especially criminal defendants, who rely on its holding rarely succeed.³³ In practice, even when judges find a *prima facie* showing of discrimination at the first step, non-moving parties have an exceedingly easy time providing “race-neutral” justifications for their strikes at the second step.³⁴ Critics suggest that this stage “actually helps hide prejudice in socially acceptable forms.”³⁵ Indeed, Justice Thurgood Marshall’s concurring opinion in *Batson* predicted that “[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.”³⁶ Justice Marshall anticipated that enforcement of the *Batson* framework would prove problematic for at least three reasons. First, except in circumstances of flagrant discrimination, it would be difficult for moving parties to establish a *prima facie* showing. Second, judges would struggle to assess prosecutors’ real motives. And, third, both parties and judges alike would be affected by their own unconscious bias.³⁷ Many today

remedies, such as granting additional peremptories rather than reseating struck jurors. *United States v. Walker*, 490 F.3d 1282, 1295 (11th Cir. 2007). California had already adopted the remedy of mistrial: “the complaining party is entitled to a random draw from an entire venire not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges.” *Wheeler*, 22 Cal. 3d at 282. The California Supreme Court later acknowledged that trial judges could employ alternative solutions, including reseating improperly struck jurors, but only with the moving party’s permission. *People v. Willis*, 27 Cal. 4th 811, 823–24 (2002); see also Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 94–95 (1996).

33. See Muller, *supra* note 32 (1996); see also Joshua E. Swift, *Batson’s Invidious Legacy: Discriminatory Juror Exclusion and the Intuitive Peremptory Challenge*, 78 CORNELL L. REV. 336 (1993); Melilli, *supra* note 28, at 459 (finding in an empirical analysis that criminal defendants succeed on fewer than 16 percent of all *Batson* claims and calling this rate “manifestly unimpressive, especially as contrasted with the success rates of other categories of litigants” such as civil defendants and criminal prosecutors). *But see* Laura I. Appleman, *Reports of Batson’s Death Has Been Greatly Exaggerated: How the Batson Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607 (2005).

34. See Appleman, *supra* note 33.

35. See *id.* at 629.

36. See *id.*; see also *Batson*, 476 U.S. at 105 (Marshall, J., concurring).

37. See *Batson*, 476 U.S. at 105–06 (Marshall, J., concurring); see also Appleman, *supra* note 33, at 629. This Note does not discuss unconscious and implicit bias at length, though they represent extremely important issues in jury selection. A new rule of court adopted by the Supreme Court of Washington in April 2018 was the first in the nation to address unconscious bias in jury selection. It prohibits challenges based on “implicit, institutional, and unconscious” bias. WASH. CT. R. 37, <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/GR37.pdf> [<https://perma.cc/2FZT-NF7D>]. The rule was spearheaded by the ACLU and is explicitly intended to make it more difficult for parties to cite bogus “race-neutral” reasons for peremptory strikes. See ACLU, *New Rule Addresses Failings of U.S. Supreme Court Decision* (Apr. 9, 2018), <https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection> [<https://perma.cc/58N5-Z73Q>]. General Rule 37 reads, in part:

The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination An objective observer

would argue that Justice Marshall's fears became reality.³⁸ Judicial enforcement of *Batson* has been called "nothing short of shameful and has confirmed Justice Marshall's prediction" that the holding would not end race discrimination in jury selection.³⁹

Prosecutors' ease in stating race-neutral justifications for peremptory strikes has prompted criticism.⁴⁰ For example, a training video starring Philadelphia District Attorney Jack McMahon from 1987 (one year after *Batson* was decided) advised trainees that "when you do have a black juror, you question them at length and on this little sheet that you have, mark something down that you can articulate at a later time if something happens."⁴¹ The same video went on to instruct that keeping black, low-income prospective jurors (especially women) off of juries is in prosecutors' best interest.⁴² McMahon said: "The case law says the object of getting a jury . . . is to get a competent, fair, and impartial jury. Well, that's ridiculous. You're not trying to get that."⁴³ Other sources indicate that this perspective is widespread among criminal prosecutors. A 1995 conference of District Attorneys provided a handout to participants titled

is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State. WASH. CT. R. 37. The Rule goes on to instruct courts to take into account the nature and number of questions posed during voir dire, comparison to other jurors, whether purported reasons are disproportionately associated with a particular race or ethnicity, and more. *Id.* Deemed "presumptively invalid" are justifications including prior contact with or distrust of law enforcement, close relationships with people who have been arrested or convicted of crimes, living in high-crime neighborhoods, and more. *Id.* For more on this new rule, see Sydney Brownstone, *Washington Courts Now Have the County's First Rule for Tackling Implicit Bias in Jury Selection*, STRANGER (Apr. 10, 2018), <https://www.thestranger.com/slog/2018/04/10/26024644/washington-courts-now-have-the-county-first-rule-for-tackling-implicit-bias-in-jury-selection> [<https://perma.cc/8E3D-MBFA>].

38. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 265–67 (stating that "Justice Thurgood Marshall predicted that the Court's rule [in *Batson*] would not achieve its goal . . . this case illustrates the practical problems of proof that Justice Marshall described") (Breyer, J., concurring).

39. SEMEL & MEYER, *supra* note 1, at 231.

40. See, e.g., Barry Siegel, *Storm Still Lingers Over Defense Attorney's Training Video*, L.A. TIMES (Apr. 29, 1997), http://articles.latimes.com/1997-04-29/news/mn-53632_1_one-defense-attorney [<https://perma.cc/7Y69-DXHR>].

41. YouSchtupp, *Jury Selection with Jack McMahon*, YOUTUBE (Nov. 3, 2015), <https://www.youtube.com/watch?v=HPIZ6pe3ScQ> [<https://perma.cc/R9QZ-S2SL>].

42. *Id.* McMahon taught:

In selecting blacks, you don't want the real educated ones. This goes across the board. All races. You don't want smart people. If you're sitting down and you're going to take blacks, you want older black men and women, particularly men. Older black men are very good My experience, young black women are very bad. There's an antagonism. I guess maybe because they're downtrodden in two respects. They are women and they're black . . . so they somehow want to take it out on somebody and you don't want it to be you The blacks from the low-income areas are less likely to convict. I understand it. It's an understandable proposition. There's a resentment for law enforcement. There's a resentment for authority. And as a result, you don't want those people on your jury.

Id. See Imandi Gandy, *Washington Supreme Court Passes New Rule to Tackle the State's All-White Jury Problem*, REWIRE NEWS (Apr. 11 2018), <https://rewire.news/abl/2018/04/11/washington-supreme-court-passes-new-rule-tackle-states-white-jury-problem/> [<https://perma.cc/6DXF-3LL2>].

43. YouSchtupp, *supra* note 41.

“*Batson* Justifications: Articulating Juror Negatives,” which suggested using age, attitude, body language, and other facially-neutral factors to justify race-based strikes.⁴⁴ More recently, in 2015, a group of former state and federal prosecutors filed an amicus brief with the Supreme Court in *Foster v. Chapman* to shed light on common prosecutorial practices that help to cover up race discrimination in jury selection.⁴⁵ The amicus brief cited numerous studies demonstrating that prosecutors strike black jurors at significantly higher rates than white jurors.⁴⁶ The amici stated that while some discriminatory misconduct is flagrant, “most discrimination occurs under the guise of purportedly ‘race-neutral’ justifications prepared by prosecutors with the specific objective of defeating *Batson* challenges.”⁴⁷ Some examples of these justifications include: wearing eyeglasses, being single, being married, being separated, being too old (at age forty-two), being too young (at age twenty-eight), walking in a certain way, and chewing gum.⁴⁸ In 2018, the Supreme Court of Washington passed a revolutionary new rule of court prohibiting not just purposeful, but also “implicit, institutional, and unconscious” bias in peremptory strikes.⁴⁹ The rule states that “the following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection . . . allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact” and other justifications based on “body language” or supposed lack of intelligence.⁵⁰ In short: step two, some argue, is too easy.

44. See Brief of Joseph Digenova, Gil Garcetti, Glenn F. Ivey, Robert M. A. Johnson, Harry L. Shorstein, Larry D. Thompson, Scott Turow & John Van De Kamp as Amici Curiae in Support of Petitioner at *8, *Foster v. Chatman*, 136 S. Ct. 1737 (2016) [hereinafter Amici Curiae Brief in Support of Petitioner].

45. *Id.* at *3–4. Eight former federal and state prosecutors signed onto this brief.

46. *Id.* These studies include: David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) (finding that prosecutors struck 51 percent of available black jurors but only 25 percent of white jurors over seventeen years in Philadelphia capital murder trial); Amici Curiae Brief in Support of Petitioner, *supra* note 44, at *5; *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (citing Richard Bourke, Joe Hingston & Joel Devine, *Black Strikes: A Study of Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney’s Office* (2003)) (finding that prosecutors struck black jurors at three times the rate they struck white jurors over 390 felony trials between 1994 and 2002 in Louisiana); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (finding that prosecutors used 60 percent of strikes against black jurors, who comprised only 32 percent of the venire, in thirteen noncapital felony trials in North Carolina). This trend is arguably even more exaggerated in capital trials. The Equal Justice Initiative reviewed jury selection procedures in eight southern states and “uncovered shocking evidence of racial discrimination in jury selection in every state,” such as Houston County, Alabama prosecutors removing 80 percent of blacks qualified for jury service between 2005 and 2009 resulting in half of the county’s death verdicts being imposed by all-white juries in a county whose residents are 27 percent African American. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4, 16–18 (2010).

47. Amici Curiae Brief in Support of Petitioner, *supra* note 44, at *3.

48. EQUAL JUSTICE INITIATIVE, *supra* note 46, at 14.

49. WASH. R. CT. 37(f).

50. *Id.* at (i).

An additional challenge in applying *Batson* is fashioning an effective remedy for the violation. In *Batson* the Supreme Court left it up to the trial courts to decide whether to “discharge the venire and select a new jury . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.”⁵¹ Both options present issues. Reseating a juror is sometimes impossible if he or she has been dismissed. Or, doing so can be prejudicial if the juror or others on the venire have been privy to comments made by parties or the judge throughout the making and granting of the *Batson* motion. Meanwhile, dismissing a whole panel of jurors who have been tainted by the *Batson* conversation is judicially inefficient.⁵² Another alternative is to add prospective jurors to the venire and grant additional challenges to the defendant.⁵³ No solution is perfect.

II.

PEOPLE V. BRIDGEFORTH'S EXPANSION OF BATSON TO PROTECT SKIN COLOR IN NEW YORK

A recent case from New York highlights both the strengths and weaknesses of the past three decades of *Batson* jurisprudence and raises questions about *Batson's* relevance in today's jury trials. In *People v. Bridgeforth*, the Court of Appeals found that “color” constitutes a cognizable class under *Batson*.⁵⁴ There, a dark-skinned African-American man was tried for robbery.⁵⁵ When the prosecution struck five dark-skinned women from the venire, Bridgeforth's attorney made a *Batson* objection. She said, “The District Attorney has now perempted all the female black women and I don't believe there are valid reasons other than their face and their gender that they have been challenged,” adding that “the Guyanese women [were] included in that” group.⁵⁶ The prosecution responded, “Well, Judge, we are either going to do Guyanese or African American, can't do black or skin color, Judge. But I have reasons for everybody.”⁵⁷ Before the judge had made a step one finding on the question of *prima facie* discrimination, the prosecutor immediately gave his reasons for striking four of the five women.⁵⁸ When he came to a woman whom the

51. *Batson v. Kentucky*, 476 U.S. 79, 99 n.24 (1986).

52. See Muller, *supra* note 32, at 94–95 (1996). On appeal, a *Batson* violation is treated as a Constitutional error that warrants a reversal of conviction without harmless error analysis.

53. See McCrory v. Henderson, 82 F.3d 1243, 1247 (2d Cir. 1996).

54. *People v. Bridgeforth*, 28 N.Y.3d 567, 572 (2016).

55. *Id.* at 574.

56. *Id.*

57. *Bridgeforth*, 28 N.Y.3d at 574.

58. *Id.* A second issue in *Bridgeforth* flowed directly from the prosecutor's failure to offer a reason for the strike of one of the prospective jurors. Under *Hernandez*, where the judge does not make a step one ruling, but makes a final determination at step three, the step one question is moot. 500 U.S. 352, 359 (1991). In *Bridgeforth*, the majority held that “because the trial court failed to reach the ultimate issue”—that is, did not accept a non-pretextual reason from the prosecutor but nonetheless did not reseat the juror—“as to the juror in question, defendant's challenge” was not moot. 28 N.Y.3d at 575–76. In

prosecutor described as “Guyanese,” though, the district attorney said, “I’m trying to remember why I got rid of her . . . I haven’t gotten rid of all [the] Guyanese people on this panel or gotten rid of all . . . the African Americans on this panel.”⁵⁹ He never remembered.⁶⁰ Bridgeforth’s counsel repeated her objection.⁶¹ The judge excused four of the women, including the “Guyanese” juror for whom the prosecutor failed to offer a reason for his strike, and seated one of them.⁶²

The five dark-skinned women were not all of the same racial or ethnic background.⁶³ The “Guyanese” woman, as to whose identity the court and all parties agreed, was in fact not Guyanese at all. Rather, her jury questionnaire revealed that she was born in India.⁶⁴

Bridgeforth appealed his conviction on *Batson* and other grounds, but this appeal failed in the appellate court.⁶⁵ He then appealed to the state’s highest court, which reversed his conviction and ordered a new trial.⁶⁶ Writing for the majority, Justice Abdus-Salaam announced that “dark skin color is a cognizable class and, indeed, must be one unless the established protections of *Batson* are to be eviscerated by allowing challenges based on skin color to serve as a proxy for those based on race.”⁶⁷ The court first based its holding on the New York State Constitution, which separates “race” and “color” in its list of separate groups implicated by equal protection concerns.⁶⁸ The court also grounded its

his concurring opinion, Justice Garcia criticized the majority for “abandoning this well-established [mootness] policy.” 28 N.Y.3d at 579. Garcia wrote that, here, “the People failed to provide a race-neutral reason for striking the juror at issue and, accordingly, the trial court erred by failing to seat her . . . [o]ur analysis should begin and end at that.” *Id.* at 581. But *Hernandez*’s plurality opinion has engendered some controversy. For example, the California Supreme Court has held that where a trial court explicitly finds no *prima facie* showing, but invites the prosecutor to state reasons anyway and the prosecutor provides reasons that result in a step three ruling against the defendant, step one is not moot for purposes of appellate review. *People v. Scott*, 61 Cal. 4th 353 (2015).

59. *Bridgeforth*, 28 N.Y.3d at 574, 579.

60. *Id.* at 574–75.

61. *Id.* at 575.

62. *Id.*

63. *Id.* at 579.

64. *Bridgeforth*, 28 N.Y.3d at 574.

65. *See id.* at 567.

66. *Id.* at 570.

67. *Id.* at 576 (Abdus-Salaam, J.) (quoting from the Defendant’s argument in the case).

Tragically, Justice Abdus-Salaam passed away a few months after deciding this case. She was the first black woman to serve on New York’s highest court and was the country’s first Muslim woman judge. *See Alan Fleur, Death of Pioneering New York Judge Is Ruled a Suicide*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/nyregion/judge-sheila-abdus-salaam-suicide.html> [<https://perma.cc/TWE4-SE5Z>].

68. N.Y. CONST. art. I, § 11. This section, “Equal Protection of Laws; discrimination in Civil Rights Prohibited,” reads:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Id. Bridgeforth, 28 N.Y.3d at 571; *People v. Kern*, 75 N.Y.2d 638, 650 (1990).

reasoning in the state's Civil Rights Law, which lists "race" and "color" as two cognizable groups.⁶⁹ The court concluded that these constitutional and statutory provisions support treating "race" and "color" as differentiable under *Batson*.

The second basis for the majority's decision was the extensive research on "colorism" presented by the defendant and amicus briefs.⁷⁰ The Fred T. Korematsu Center for Law and Equality, joined by the Society of American Law Teachers, twenty other civil rights organizations including the NAACP Legal Defense and Education Fund and the Anti-Defamation League, and thirty-two individual law professors filed *amicus curiae* briefs on behalf of the defendant.⁷¹ These briefs provided evidence of the pervasiveness of "colorism" as a distinct issue which, though "often subsumed under racism . . . can also be an independent phenomenon that the law should address directly."⁷² The amicus briefs argued that "color discrimination inflicts lasting harms both on individuals and on society as a whole, across racial and ethnic groups."⁷³ This research persuaded the court that discrimination based on skin color is rampant and is a different problem than racism. The court stated that "colorism . . . has been well researched and analyzed, demonstrating that not all skin colors (or tones) are equal."⁷⁴ It went on to recognize that persons with similar skin tones experience similar discrimination even if they are of different races or ethnicities and said that this "is why color must be distinguished from race . . . we acknowledge color as a classification separate of race for *Batson* purposes."⁷⁵

In his concurring opinion in *Bridgeforth*, Justice Garcia emphasized the revolutionary nature of the majority's opinion, calling it a "dramatic[] expan[sion]" of *Batson* jurisprudence "beyond what any court has done before."⁷⁶ He wrote that "to hold that 'skin color' is a cognizable class for

69. *Bridgeforth*, 28 N.Y.3d at 572; see also McKinney's Civil Rights § 13; N.Y. Civ. Rts. § 13 (mandating that "[n]o citizen of the state possessing all other qualifications which are or may be required or prescribed by law, shall be disqualified to serve as a grand or petit juror in any court of this state on account of race, creed, color, national origin or sex").

70. *Bridgeforth*, 28 N.Y.3d at 572.

71. Vinay Harpalani, *A 'Colorable' Claim of Discrimination*, SOC'Y OF AM. LAW TEACHERS (Jan. 18, 2017), <https://www.saltlaw.org/colorable-claim-discrimination/> [<https://perma.cc/ER4X-PX66>].

72. See *id.*

73. Press Release from Robert S. Chang, The Korematsu Center Joins 19 Organizations and 32 Law Professors in Filing Amicus Brief with the New York Court of Appeals Addressing Color Discrimination in Jury Selection (Oct. 24, 2016), <https://law.seattleu.edu/Documents/korematsu/Amicus%20Brief%20Press%20Release%20-%20Korematsu%20Center%20-%20final.pdf> [<https://perma.cc/Y6C9-LXXE>] (quoting Jennifer Weddle, President of the National Native American Bar Association).

74. *Bridgeforth*, 28 N.Y.3d at 572.

75. *Id.*

76. *Bridgeforth*, 28 N.Y.3d at 581 (Garcia, J., concurring). Justice Garcia only concurred in the result. Beyond expressing concern about the revolutionary nature of the court's ruling coupled with its minimal guidance for lower courts, Justice Garcia's concurrence focused primarily on the mootness issue. *Id.* He also emphasized that the record in this case was inadequate to properly make this "monumental" ruling, calling it "a garbled record at a moot stage of the proceeding." *Id.*

purposes of *Batson*” was “a monumental ruling.”⁷⁷ Justice Garcia, however, expressed concern that the court failed to offer the lower courts sufficient guidance in applying this novel, yet “vague,” ruling.⁷⁸ In Justice Garcia’s view, the “the majority announce[d] its holding . . . without any discussion of the wide-ranging ramifications of its decision in the *Batson* context and beyond.”⁷⁹

Bridgeforth is binding only in New York, though it remains to be seen whether other jurisdictions will adopt its ruling.⁸⁰ The majority held that courts should apply the standard *Batson* framework to objections made on the basis of skin color. The court explained that “it is for the trial court, using the existing *Batson* protocol, to decide whether the individuals identified as part of that group share a similar skin color, in the same way that the trial court makes determinations about race, gender, and ethnicity classifications.”⁸¹ Justice Garcia’s concurrence criticized this approach as supplying “little concrete or practical instruction for lower courts tasked with creating a record that allows for meaningful appellate review.”⁸² It is possible that skin-color designation will prove more difficult than race to confirm on appellate review. While transcripts or juror questionnaires may include an individual’s racial or ethnic self-identity, no photographs or other visual evidence will later serve to confirm jurors’ skin color or appearance.

Indeed, one New York court has already struggled to apply *Bridgeforth*. In *People v. Ortega*, a New York trial court elaborated on Justice Garcia’s criticisms while emphasizing explicitly that *Bridgeforth* correctly decided to protect color as a class.⁸³ There, the defendant had made a *Batson* motion at trial based on the prosecution’s use of peremptory challenges to strike “every male of color.”⁸⁴ Defense counsel stated that he did not know the jurors’ ethnicities, which led to a dispute between the court and the parties as they attempted to make guesses.⁸⁵ The trial judge pushed defense counsel to explain who he meant to be included in a group defined by “color.”⁸⁶ The trial judge eventually concluded that the defendant had not established a *prima facie* showing because

77. *Bridgeforth*, 28 N.Y.3d at 581.

78. *Id.*

79. *Id.*

80. At time of writing, no other state or federal jurisdictions had explicitly held that color constitutes a class separate from race for *Batson* purposes. The Second Circuit is the only federal appellate court to allow distinct racial and ethnic groups to be combined for *Batson* purposes, though it did not rule that skin color could be the basis of such groupings. *Green v. Travis*, 414 F.3d 288, 297 (2d Cir. 2005).

81. *Bridgeforth*, 28 N.Y.3d at 574.

82. *Id.* at 581.

83. *See generally* *People v. Ortega*, 62 N.Y.S.3d 879 (N.Y. App. Div. 2017).

84. *Id.* at 881.

85. *Ortega*, 62 N.Y.S.3d at 881–82. Colloquy participants described one juror in the following ways: “middle complexion,” “his hair is even more coarse than mine,” “he looks pretty black to me, Judge,” “he’s got darker skin,” “his skin is at least darker than my client’s,” and “I was thinking Hawaiian.” *Id.* at 886.

86. *Id.*

he “had not articulated a cognizable class under *Batson*.”⁸⁷ Ortega was convicted, lost on appeal, and then moved in state post-conviction proceedings to vacate his conviction.⁸⁸ His motion to vacate relied on *Bridgeforth*, which the New York Court of Appeals decided after his trial.⁸⁹ The New York County court denied this motion on multiple grounds and, in doing so seemed entirely unable to apply *Bridgeforth* to the trial record.⁹⁰ The court expressed concern that, when it is not visibly obvious whether jurors’ skin colors are similar, “there will also be cases where drawing an appropriate line and making a discernable record . . . may be practically impossible.”⁹¹ The court imagined that use of photographs or skin color charts for reference “would likely be seen as both ridiculous and offensive.”⁹²

III.

BRIDGEFORTH SHOULD BE ADOPTED THROUGHOUT THE COUNTRY

A. *Why Color Matters*

1. *Race and Color are Distinct*

Other states would do well to follow New York’s lead in recognizing skin color as a cognizable class under *Bridgeforth* and *Batson*. This Note will focus on the special necessity for this change in California. California is one of the most dynamic states in the country with regards to race and demographic change, and these demographic shifts will only increase in coming years.⁹³ Courts in California and throughout the nation should protect skin color as a cognizable class for jury selection (1) because colorism represents a well-documented source of discrimination separate from racism, and (2) because the increasing

87. *Id.* at 882.

88. *Id.*

89. The court held in *Ortega* that, because *Bridgeforth* did not overrule any prior precedent, the defendant was barred from raising it once his case was no longer subject to direct appeal. *Ortega*, 62 N.Y.S.3d at 883. Ortega’s appeals were finalized in May 2016, and *Bridgeforth* was decided in December 2016. *Id.* Though it did not decide the issue, the court found that factors weighed against *Bridgeforth* applying retroactively. *Id.*; see also *People v. Pepper*, 423 N.E.2d 366, 369 (N.Y. 1981) (outlining retroactivity principles for New York cases).

90. The court cited three grounds for denying Ortega’s motion to vacate: retroactivity, procedural bar, and its determination that the defendant had not established a *prima facie* case of discrimination. *Ortega*, 62 N.Y.S.3d at 883–86.

91. *Id.* at 885.

92. *Id.*

93. See PUBLIC POLICY INST. OF CAL., A PORTRAIT OF RACE AND ETHNICITY IN CALIFORNIA: AN ASSESSMENT OF SOCIAL AND ECONOMIC WELL-BEING (Belinda L. Reyes ed., 2001); see also Mark Hugo Lopez, *In 2014, Latinos Will Surpass Whites as Largest Racial/Ethnic Group in California*, PEW RESEARCH CTR. (Jan. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/01/24/in-2014-latinos-will-surpass-whites-as-largest-raciaethnic-group-in-california/>, [https://perma.cc/AKF2-CQ5B]; see also QuickFacts: California, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/ca> [https://perma.cc/AZP4-5PB9].

number of citizens of mixed race or ethnicity render race-based classifications inadequate.

Because race and color are often viewed as synonymous—both colloquially and also as a term of art under the law—the distinction between the two may not be readily apparent. Nonetheless, “it is important to keep the two concepts analytically distinct in order to detect the operation of colorism.”⁹⁴ While skin color is one of many phenotypical characteristics used to indicate a person’s race, race encompasses a much broader concept than skin tone. Many factors other than skin color determine the race with which a person is associated, such as ethnicity or bloodlines.⁹⁵

Race, as a concept, has changed drastically over the past two centuries and yet the use of racial categories for subjugation has been a constant theme.⁹⁶ The term originated in the eighteenth century in attempts to categorize people biologically.⁹⁷ For decades, race was viewed in purely biological terms with humanity broken up into supposedly naturally determined groups.⁹⁸ Of course, scientists of countless disciplines have now deemed these groups non-existent, and present-day race discussions have largely moved away from a biological framework.⁹⁹

Today, both scholars and courts lack a clear definition of *race* despite their legitimate concerns about *racism*. Paradigms including ethnicity, class, nationality, phenology, and other characteristics all coalesce to form our collective understanding of racial identity.¹⁰⁰ Other people might guess a person’s race by observing hair texture, nose shape, language spoken, religion practiced, ancestral bloodlines, grandparent’s country of origin, or any combination of these sometimes unrelated factors. Race is simultaneously all-important and elusive: “[r]ace may be America’s single most confounding

94. Trina Jones, *Shades of Brown: The Law of Skin Color*, 29 DUKE L.J. 1487, 1498 n.31 (2000).

95. See *id.* at 1495; see also Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994). Still, this definition is inherently vague and flexible. As Haney-Lopez writes, “race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics. [S]ocial meanings connect our faces to our souls. Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decision.” *Id.*

96. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 2 (3d ed. 2015).

98. Alynia Phillips, *The Multiracial Option: A Step in the White Direction*, 105 CALIF. L. REV. 1854, 1860 (2017). See also Ian F. Haney López, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 996 (2007).

98. See OMI & WINANT, *supra* note 96, at 2.

99. See *id.* at 6–7. This shift began in the 1920s when Robert E. Park, building directly from the scholarship of W. E. B. DuBois and other black writers, produced work at the Chicago School of Sociology, which reframed racial categories as primarily sociological, economic, and political. And, according to Robert E. Park, “racial and ethnic groups are neither central nor persistent elements of modern societies[;] racism and racial oppression are not independent dynamic forces but are ultimately reducible to other causal determinants, usually economic or sociology.” *Id.*

100. See *id.* at 7.

problem, but the confounding problem of race is that few people seem to know what race is.”¹⁰¹ This confusion has gone so far that “in the contemporary United States it is frequently claimed that race has become meaningless, that it is an outdated idea, a throwback to earlier, benighted times, an empty signifier at best.”¹⁰² In reality, many of us recognize the extraordinary influence of race in our daily individual and communal lives, and yet few of us can explain the concept or come to an agreement on its meaning.

Color, on the other hand, is far more straightforward. This Note’s references to “color” specifically relate to the pigmentation of a person’s skin—that is, their skin tone or hue—as a very narrow, specific phenomenon. Historically, skin color has never been completely determinative of race. Even when racial definition relies on phenological characteristics, it has always required a combination of qualities on top of skin pigmentation, though some of our common parlance (e.g. signifiers such as “black” and “white”) may belie this fact. In fact, the determination of one’s race has sometimes been considered possible even *despite* the presence of skin coloration that would be atypical for that racial group. For example, the “one drop rule” refers to a standard that classified individuals as African American (or “black”) no matter how light-skinned (or “white”) they appeared, based solely on the existence of even “one drop” of African American blood in their lineage.¹⁰³ Similarly, the presence of the medical condition of albinism does not re-categorize light-skinned people of all races as racially “white.”¹⁰⁴ Thus, “race and skin color are distinct phenomena that sometime[s] overlap.”¹⁰⁵

Sometimes, laws recognize this distinction between color and race. The Fifteenth Amendment to the US Constitution states that citizens’ right to vote shall not be denied “on account of race, color, or previous condition of servitude.”¹⁰⁶ Title VII of the Civil Rights Act of 1964 includes numerous sections making discrimination against an individual unlawful when it is “because of such individual’s race, color, religion, sex, or national origin.”¹⁰⁷

101. Haney-Lopez, *supra* note 95, at 5–6; see also Sharona Hoffman, *Is There a Place for “Race” as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1094 (2004) (finding that “the best research in genetics, medicine, and the social sciences reveals that the concept of ‘race’ is elusive and has no reliable definition”).

102. OMI & WINANT, *supra* note 96, at 4; see also Enrique Schaefer, *Intragroup Discrimination in the Workplace: The Case for “Race Plus,”* 45 HARV. C.R.-C.L. L. REV. 57, 68 (2010) (noting that “race has no fixed meaning outside of law, to say nothing of the profound incoherence surrounding the term as a descriptive legal category”).

103. See Jones, *supra* note 94, at 1505. For instance, beginning in 1930 and through the year 2000, the US census categorized mixed race individuals with any small amount of black ancestry as strictly black regardless of their phenological characteristics. See Phillips, *supra* note 97, at 1860 (2017).

104. See *People of Color with Albinism Ask: Where Do I Belong?*, NPR CODE SWITCH (Dec. 7 2015), <https://www.npr.org/sections/codeswitch/2015/12/07/457147952/people-of-color-with-albinism-ask-where-do-i-belong> [<https://perma.cc/SME8-WFM6>].

105. *Id.* at 1493.

106. U.S. CONST. amend. XV.

107. 42 U.S.C. § 2000e-2(a) (2011).

Indeed, some of the legislative history behind Title VII suggests that race and color were to be understood as separate from each other.¹⁰⁸ Moreover, some state constitutions and federal statutes also list “color” and “race” as separate items. As discussed in Part II, the Equal Protection Amendment to the New York State Constitution, for instance, provides that “no person shall be denied the equal protection of the laws of this state or any subdivision thereof” or “because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights.”¹⁰⁹ And in legal scholarship, Trina Jones, Angela Harris, and others have written extensively about color discrimination as distinct from racism.¹¹⁰

At the same time, though, the law consistently conflates race with color and confuses the two concepts. The Supreme Court has used the terms interchangeably, defining race discrimination in the Title VII context as retaining “employees of one color while discharging those of another color.”¹¹¹ This reliance on skin color to determine race is entrenched in our judicial history. In 1806, for example, the Supreme Court of Virginia heard a case involving three enslaved black women who sued for their freedom on the ground that their maternal lineage included a free Native American woman.¹¹² Under Virginia law, since 1691, “no native American Indian could be made a slave.”¹¹³ The court assessed the women’s appearance, including their skin color and hair texture, to determine whether to credit their claim.¹¹⁴ The court ultimately granted plaintiffs their freedom because of the ways in which they looked white or Native American rather than African American.¹¹⁵ Citing their light skin color, the attorney for the women told the court that they were “perfectly white”

108. See Schaerer, *supra* note 102, at 91 (“In fact, the legislative record for Title VII notes ‘that the basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color.’”) (quoting 110 CONG. REC. 2556 (1964) (remarks of Rep. Celler) (emphasis added by Schaerer)).

109. N.Y. CONST. art. I, § 11.

110. See Jones, *supra* note 94, at 1505; Angela P. Harris, *From Color Line to Color Chart: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 52 (2008); Margaret L. Hunter, “If You’re Light You’re Alright”: *Light Skin Color as Social Capital for Women of Color*, GENDER & SOC’Y (2002), 175, 175–76 (stating that “[Racism] refer[s] to the U.S. system of prejudice, discrimination, and institutional power that privileges whites and oppresses various people of color . . . [Colorism] describe[s] the system that privileges the lighter skinned over the darker-skinned people within a community of color”).

111. See *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 284 (1976).

112. See *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (1806). Enslavement of Native Americans had only been permitted in Virginia briefly, from about 1679 to 1705; therefore, if the Wrights descended from a Native American woman later than that, they should be free because this status was passed maternally. See H. Jefferson Powell, *1806: Hudgins v. Wright and the Place of Slavery*, in *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 101 (2002).

113. *Id.*

114. *Id.*

115. *Id.*

although reports actually indicated that “there were gradual shades of difference in color” among them.¹¹⁶

Today, courts’ difficulty in defining race becomes even more of a challenge when the issue of color is added to the mix. Courts routinely “apply the same standards for colorism claims as they do for racism claims[;] many judges, attorneys, and legal scholars are not knowledgeable about the complexity of colorism and the nuances that make it systematically distinct from racism.”¹¹⁷ However, colorism research increasingly indicates that the two concepts remain distinct. Though statutes and judicial precedent sometimes identify and treat separately race and color, more often they confuse and conflate the concepts. This is one reason why other states should adopt New York’s model of recognizing both race and color as separate classes worthy of protection.

a. Colorism

The term “colorism” was first coined by Alice Walker in a 1982 essay in which she observed that skin color alone can “result[] in differential treatment.”¹¹⁸ Usually, “the lighter one’s skin tone, the better one is likely to fare economically and socially.”¹¹⁹ Skin color is typically an immutable characteristic tending to create a “color hierarchy” where “[l]ighter is better and darker is worse.”¹²⁰ Courts have only recently begun to acknowledge that “purposeful discrimination can exist with respect to skin color apart from any consideration of race or ethnicity.”¹²¹

Both intraracial and interracial types of colorism are well-documented.¹²² Intraracial colorism refers to situations where members of a racial group treat their own group’s lightest-skinned members preferentially, such as lighter-skinned Asian people being seen as more attractive by other Asians.¹²³ Interracial colorism refers to people treating the lightest-skinned members of other racial groups preferentially, for example, when a white manager prefers

116. *Id.* at 102. The attorney for the respondent in *Hudgins* argued that the plaintiffs had brought up the women’s appearance “more to excite the feelings of the court as *men*, than to address them as *judges*.” *Id.* at n.101.

117. Tennille McCray, *Coloring Inside the Lines: Finding a Solution for Workplace Colorism Claims*, 30 LAW & INEQ. 149, 150 (2012) (footnotes omitted).

118. *See* Jones, *supra* note 94, at 1489, 1497.

119. *See id.* at 1498.

120. Schaerer, *supra* note 102, at 64 (internal quotations omitted) (quoting Leonard M. Baynes, *If It’s Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 133 (1997)); *but cf id.* at 58 (assuming that “color is immutable insofar as it reflects a natural complexion rather than a suntan”).

121. *People v. Ortega*, 62 N.Y.S.3d 879, 884 (N.Y. App. Div. 2017).

122. *See* Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U REV. L. & SOC. CHANGE 657, 660 (2010) (providing an overview of both inter- and intra-group discrimination and examining the legal viability of intra-group discrimination claims).

123. *Id.*

lighter-skinned black employees over darker-skinned black employees.¹²⁴ The employment context offers ample illustrations.¹²⁵ The Equal Employment Opportunity Commission (EEOC) defines color discrimination as occurring when a person faces discrimination “based on his/her skin pigmentation (lightness or darkness of the skin), complexion, shade, or tone.”¹²⁶ The preference for lighter-skinned members of a race over darker-skinned members of the same race quite simply cannot be called racism, though certainly racial undertones have meaningful—and perhaps concurrent—influence over much color discrimination.

While discrimination based on skin color sometimes results from assumed racial identity, colorism is not always a matter of linking color to race. Race and color discrimination create something of a Venn diagram with considerable overlap, but at each edge, both racism and colorism are completely distinct from one another.¹²⁷ Some scholars instead visualize such phenomena as concentric circles, in which one form of discrimination always occurs as a subset of another. This visual would assume that colorism is always a form of racism. However, this concentric view fails to take into account cases in which other prejudices underlay colorism. For instance, in some Asian nations, darker-skinned individuals might be considered inferior, not for racial reasons, but as a result of classism.¹²⁸ Darker skin is associated with work outdoors, such as manual labor in fields and, therefore, signifies a lower economic class.¹²⁹ In that situation, colorism is rooted in classism rather than racial associations with skin tone.¹³⁰ In short, the motive underlying colorism may vary, but the principal action is the same: discrimination on the basis of skin tone.

124. *Id.*

125. See Goldsmith, Darrick Hamilton & William Darity, Jr., *Shades of Discrimination: Skin Tone and Wages*, 96 AMER. ECON. REV. 242, 246 (2006) (finding that skin tone or shade has significant effects on wages; specifically, that employers show a preference for lighter-skinned employees over darker-skinned candidates even of the same race); Christina Gomez, *The Continual Significance of Color: An Exploratory Study of Latinos in the Northeast*, 22 HISP. J. BEHAV. SCI. 94, 99 (2000) (finding that darker skin tone negatively affects wages in Latino men).

126. *Questions and Answers about Race and Color Discrimination in Employment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (May 16, 2006), https://www.eeoc.gov/policy/docs/qanda_race_color.html [<https://perma.cc/2XQT-3QD2>].

127. See, e.g., Schaerer, *supra* note 102, at 86 (describing the intersection of race and color as “an intersection that occurs inside the identity circle of race” in contrast to “a Venn diagram,” stating that “[t]he identity circle of race does not merely overlap with that of color, but subsumes it, such that a smaller color circle falls within a larger race circle”). I do not necessarily disagree with Schaerer on a fundamental level, as I would view circles as “racism” and “colorism” rather than “race” and “color” and therefore not directly comparable. Nonetheless, I prefer a Venn diagram image in order to acknowledge those times in which color is not “subsumed” by race, which is of particular importance outside the US context.

128. See Trina Jones, *The Significance of Skin Color in Asian and Asian-American Communities: Initial Reflections*, 3 U.C. IRVINE L. REV. 1105, 1114 (2013) (discussing how darker skin tone is associated with lower socioeconomic class in Vietnam, China, Taiwan, Korea, Japan, Cambodia, the Philippines, and Laos as well as in other South East and Southeast Asian countries).

129. *Id.* at 1114.

130. See *id.* at 1116.

b. Mixed-Race Identity

Mixed racial identity is becoming a more prevalent reality across the country.¹³¹ The United States “has always been a multi-racial” nation and, every year, “our society is rapidly becoming more multi-racial.”¹³² In 2016, almost three percent of the country’s population identified as belonging to “two or more races.”¹³³ This number might sound small, but in total it includes about nine million Americans. States with high mixed-race populations include Hawaii (23.7 percent), Alaska (7.3 percent), Oklahoma (6.1 percent), Nevada (4.2 percent), Oregon (3.8 percent), California (3.8 percent), and Colorado (3.0 percent).¹³⁴ And these numbers may be deceptively low: typically, respondents check a box to pick their race out of a list. A different measurement method, which required respondents to instead identify the races of their parents and grandparents, resulted in categorizing almost seven percent of Americans as mixed-race.¹³⁵ The vast majority of this seven percent (eighty-nine percent) identified as biracial and about ten percent were of three or more races.¹³⁶ These numbers represent a complex web of generations of identity, even as categories are limited by arguably outdated census titles; “from the five races currently recognized by the US Census Bureau—white, black or African American, Asian, American Indian or Alaska Native, and Native Hawaiian or Pacific Islander—spring dozens of possible combinations of two or more races.”¹³⁷

These demographic shifts are particularly salient in California; therefore, Part IV will discuss the application of *Bridgeforth* in California in depth. In the state, changing demographics increasingly complicate racial identity. California has one of the nation’s highest percentages of mixed-race residents with about four percent of its population identifying as belonging to two or more racial

131. See generally RONALD E. HALL, ED., *RACISM IN THE 21ST CENTURY: AN EMPIRICAL ANALYSIS OF SKIN COLOR* (2008); CEDRIC HERRING, VERNA KEITH & HAYWARD DERRICK HORTON, EDS., *SKIN DEEP: HOW RACE AND COMPLEXION MATTER IN THE “COLOR-BLIND” ERA* (2004). Throughout this section, I prefer to use the term “mixed-race” over “multiracial.” For an explanation of the difference between these terms, including an argument that the “multiracial” identifier has a problematic “whitening” effect, see Phillips, *supra* note 97, at 1853 (2017). However, where sources use “multiracial” or “multi-racial,” those quotations will remain unchanged. Note that for the purposes of this section, sources frequently use “multiracial” broadly to encompass both mixed-race and mixed-ethnicity individuals. See *id.*

132. *People v. Ortega*, 62 N.Y.S.3d 879, 885 (N.Y. App. Div. 2017).

133. See *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/00> [<https://perma.cc/265B-VJBV>]. This number is based on people who selected two or more race response check boxes or who selected some combination of other responses.

134. See *id.* All other states have a population of mixed-race residents that is below three percent.

135. *Multiracial in America: Proud, Diverse and Growing in Numbers*, PEW RESEARCH CTR. (June 11, 2015), <http://www.pewsocialtrends.org/2015/06/11/multiracial-in-america/> [<https://perma.cc/S85V-ZZ4Z>].

136. *Id.*

137. *Id.*

groups.¹³⁸ This figure represents one-and-a-half to two million individuals, the highest number of mixed-raced residents of any state in the country.¹³⁹

Over time, problems of racial identification will take on “immense contemporary significance as the rate of interracial marriage increases, and as questions surface concerning what ‘race’ is and who belongs in what racial category.”¹⁴⁰ In 2013, a record twelve percent of newly married couples were interracial (up from less than one percent in 1970).¹⁴¹ The US Census Bureau estimates that “the two or more races population is projected to be the fastest growing over the next 46 years . . . with its population expected to triple in size (an increase of 226 percent).”¹⁴² This projection will total twenty-six million people, or over six percent of the population, by 2060.¹⁴³ At present, the population of the “two or more races” group mostly includes children: two percent of the total population falls into that category, but over four percent of children do.¹⁴⁴ The median age of all multiracial Americans is nineteen; for single-race Americans, the median age is thirty-eight.¹⁴⁵ Multiracial babies made up ten percent of births in 2013 but only one percent in 1970.¹⁴⁶ This data reflects “the greater diversity of the child population relative to the total population” and anticipates how US demographics will inevitably shift over time.¹⁴⁷

Colorism and the increasing complexity of racial identity in this nation should encourage courts to seriously consider the importance of color as a legitimate protectable class designation. Without this recognition, judges will continue to struggle to make appropriate, accurate racial identifications in both civil and criminal contexts. Today, characteristics like complexion “still influence whether we are figuratively free or enslaved” and the law is “a prime instrument in the construction and reinforcement of racial subordination”—even though “opinions and articles by judges and legal academics reveal[] a startling

138. See *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/00> [<https://perma.cc/6ZVE-XZUA>].

139. In 2010, approximately 1,923,350 of California’s 39,250,017 residents identified as belonging to two or more racial groups. In 2015, about 1,487,503 of the state’s 39,144,818 residents identified as multi-racial. *Id.*

140. Jones, *supra* note 94, at 1544.

141. Wendy Wang, *Interracial Marriage: Who is “Marrying Out”?*, PEW RESEARCH CTR. (June 12, 2015), <http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/> [<https://perma.cc/6QB4-T7Y2>].

142. SANDRA L. COLBY & JENNIFER M. ORTMAN, PROJECTIONS OF SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, PEW RESEARCH CTR. (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf> [<https://perma.cc/BH8Y-YRHE>].

143. *Id.*

144. See *id.* at 11.

145. *Multiracial in America: Proud, Diverse and Growing in Numbers*, PEW RES. CTR. (June 11, 2015), <http://www.pewsocialtrends.org/2015/06/11/multiracial-in-america/> [<https://perma.cc/TPK4-9BE9>].

146. See *id.*

147. COLBY & ORTMAN, *supra* note 142, at 11.

fact: few seem to know what race is and is not.”¹⁴⁸ Cases and statutes define racial protections using outdated language and describe an American society that has dramatically changed in recent decades. It is time for the justice system to catch up. Recognition of color as a distinct cognizable class may aid in establishing an operational alternative to race.

Racial complexity challenges the basic *Batson* framework. In some trials, jurors self-identify their racial or ethnic heritage during voir dire or on questionnaires. Other times, judges and attorneys simply guess jurors’ racial or ethnic identity based on physical appearance or answers to questions during voir dire. In either situation, “the presence of persons of mixed racial heritage or mixed ancestry may complicate matters in ways that render reliance upon race problematic but reliance upon color helpful.”¹⁴⁹ No bright-line rule exists to guide trial courts as to how to categorize mixed-race prospective jurors for *Batson* purposes: if a person’s physical appearance and self-identified race or ethnicity do not match attorneys’ or the trial judge’s assumptions, whose definition controls? If a prospective juror identifies as belonging to multiple racial groups, in which of those groups may they be placed for making *Batson* motions and rulings? In some instances, using skin color to group individuals who will likely experience similar discrimination due to their similar appearance could address these possible errors. Given these growing concerns, other states should allow *Batson* motions that acknowledge the similar discrimination faced by individuals with similar skin tone, regardless of race or ethnicity.

B. Color as a Cognizable Class

Batson addressed racial discrimination, but the rule it created has applied beyond race to other “cognizable classes” of people. But what is a “cognizable class”? Courts use two standards in determining class definition in relation to jury service, and both are “based on the existence of an identifiable group that can be objectively and significantly recognized as distinct from the rest of society.”¹⁵⁰ One standard, found in *United States v. Sgro*, lays out three factors to identify a class: a group should (1) be clearly identifiable, (2) share ideas or attitudes, and (3) have interests that would not be adequately represented if the court excluded members from jury service.¹⁵¹ Another standard, from *Castaneda v. Partida*, defines a cognizable group as “a recognizable, distinct class, singled

148. Haney-Lopez, *supra* note 95, at 3–5.

149. Jones, *supra* note 94, at 1544.

150. Lisette E. Simon, *Hispanics: Not a Cognizable Ethnic Group*, 63 CIN. L. REV. 497, 498 (1994).

151. *United States v. Sgro*, 816 F.2d 30, 33 (1st Cir. 1987); *see also* Simon, *supra* note 150, at 502.

out for different treatment under the laws, as written or applied.”¹⁵² The Supreme Court adopted this second standard in *Batson*.¹⁵³

Under these definitions, colorism research supports the inclusion of skin color as a cognizable class for *Batson* purposes. Color, as noted in *Bridgeforth*, constitutes an immutable characteristic.¹⁵⁴ Individuals with the same skin color are identifiable by visual comparison. Of course, not everyone with the same skin color shares the same attitudes, just as ideas within any racial, ethnic, or gendered group are infinitely diverse. However, people with similar skin color share similar experiences of discrimination. These common experiences, according to colorism research, create meaningful similarities between individuals with similar skin tones.¹⁵⁵ Finally, the interests motivated by these experiences could not be represented by people with different colored skin. Colorism research has demonstrated that members of the same racial group with different skin colors can experience different discrimination, and so racial representation without skin color representation does not suffice. Under *Castaneda*, too, the existence of color and race distinctions in many federal and state laws suffices to support a finding of color as class.

IV.

HOW TO APPLY *BRIDGEFORTH* IN CALIFORNIA

To protect color as a class in California, courts will have to take a different approach than the New York Court of Appeals did. New York’s Constitution reads: “No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights.”¹⁵⁶ In contrast, the California Constitution guarantees equal protection in Article 1, Section 7, which provides that “[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.”¹⁵⁷ Therefore, California courts cannot rely on the state Constitution to hold that color constitutes a distinct class under *Batson*, because it does not use the word “color” (or “race,” or any similar terms).

Instead, I suggest two possible avenues to protect color as a *Batson* class in California. First, and most promising, courts may rely on California Code of

152. *Castaneda v. Partida*, 430 U.S. 482, 494 (1997).

153. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). Some lower courts use the more stringent standard from *Sgro*. SEMEL & MEYER, *supra* note 1, at 15.

154. *People v. Bridgeforth*, 28 N.Y.3d 567, 573 (2016).

155. See Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14 WASH. U. GLOBAL STUD. L. REV. 665 (2015); see also Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Changes, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 SOC. FORCES 1105 (1990); Trina Jones, *The Case for Legal Recognition of Colorism Claims*, in SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 233 (Evelyn Nakano Glenn ed., 2009).

156. N.Y. CONST. art. 1 § 11 (adopted Nov. 8, 1938, eff. Jan. 1, 2002) (emphasis added).

157. WEST’S ANN. CAL. CONST. art. 1, § 7.

Civil Procedure Section 231.5 and California Government Code Section 11135. Second, courts may use the language of *People v. Wheeler*.

A. *The Statutory Basis for Recognizing Color as a Batson Class in California*

California Government Code Section 11135 falls under Title 2 of the California Government Code, in a specific Article relating to discrimination in programs or activities funded by the state. Subsection 11135(a) reads:

No person in the State of California shall, on the basis of sex, race, *color*, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded by the state, or receives any financial assistance from the state.¹⁵⁸

Subsection (d) states that “the protected bases used in this section include a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.”¹⁵⁹

Section 11135 is narrow in scope, providing equal protection only for people participating in programs that receive state funding, but in combination with another state statute may already provide *Batson* protection for skin color in California. Jury service in a criminal trial would not typically be considered an activity covered by Section 11135.¹⁶⁰ However, the list of protected classes contained in Section 11135 is incorporated in California’s Code of Civil Procedure Section 231.5. That statute reads: “A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds.” The state thus already protects individuals identified in Section 11135 classes—including color

158. WEST’S ANN. CAL. GOV. CODE § 11135 (emphasis added). Some of these categorizations are defined in further detail in Government Code Section 12926, as indicated by Section 11135(c). WEST’S ANN. CAL. GOV. CODE § 12926.

159. WEST’S ANN. CAL. GOV. CODE § 11135(d).

160. For examples of discussions of the definition of “program or activity” under Section 11135, see, e.g., *Comunidad En Accion v. Los Angeles City Council*, 219 Cal. App. 4th 1116, 1121 (2013) (finding that the city’s citing of waste facilities in a predominately Latino neighborhood was not part of a “program or activity” under the statute); see also *People v. Levinson*, 155 Cal. App. 3d Supp. 13 (1984) (holding that a municipal court’s discretionary traffic school was not a “program or activity” under this section). There appears to be no state court decision holding that jury service constitutes a program or activity under this statute. Litigation involving the section focuses primarily on disability issues. For an example of a race-based claim under section 11135, see *Darensburg v. Metropolitan Transp. Comm’n.*, 636 F.3d 511 (2011), which involved a disparate impact discrimination claim brought by patrons of municipal transit district alleging racial disparity in funding policies.

as a separate identification from race—from discrimination in the exercise of peremptory challenges. Read together, the two statutes recognize skin color as a protected class of prospective jurors.

Section 231.5 was adopted by the California Legislature in 2000. It codifies the California Court of Appeals' holding in *People v. Garcia*, which prohibited strikes based on sexual orientation.¹⁶¹ There, the court held that sexual orientation is a cognizable class.¹⁶² This decision rested on the Sixth Amendment of the US Constitution and on Article 1, Section 16 of the California Constitution, each of which guarantee representative cross-sections of the community in an impartial jury.¹⁶³ The state constitutional violation at issue in *Garcia*—the exclusion of gays and lesbians from jury service—was then codified into law through CCP Section 231.5 and expanded to cover all Section 11135 classes rather than only the LGBT population.

Litigants in California should make *Batson* objections when skin color discrimination appears to occur and, based on CCP Section 231.5, trial court judges should be amendable to such motions. Indeed, this statute already seems to quite clearly provide protection based on skin color in the context of peremptory strikes. All courts must do is enforce this existing provision.

B. *The Caselaw Basis for Recognizing Color as a Batson Class in California*

1. *Caselaw Context: California's Judicial Precedent*

In California, *People v. Wheeler* predated *Batson*.¹⁶⁴ In *Wheeler*, two African American defendants were accused of the murder of a white man in the course of a robbery.¹⁶⁵ The prosecution struck every black venire member using its peremptory challenges.¹⁶⁶ An all-white jury convicted both defendants.¹⁶⁷ The California Supreme Court held that the removal of jurors using peremptory strikes on the sole ground of potential group bias violates a criminal defendant's

161. *People v. Garcia*, 77 Cal. App. 4th 1269, 1281 (2000).

162. *Id.* at 1281.

163. *Id.* at 1274–75.

164. *People v. Wheeler*, 22 Cal. 3d 258 (1978). Motions made in California are often referred to as “*Batson/Wheeler*” or “*Wheeler/Batson*” motions. In *Wheeler*, the California Supreme Court required that a judge find a “strong likelihood” that strikes were based on group bias. *Id.* at 280. This amounts to a higher standard than in *Batson*, which requires only enough evidence to permit an inference of discrimination. Almost three decades after *Wheeler*, in *Johnson v. California*, the Supreme Court held that *Wheeler*'s standard was too onerous a test, calling it “an inappropriate yardstick by which to measure” a *Batson* step one inquiry. 545 U.S. 162 (2005). The California Supreme Court had found in *Johnson* that striking all of the prospective African-American jurors (in a case with a black defendant and white victim) was “suspicious,” but still permissible under *Wheeler*'s standard. *Id.* The US Supreme Court reversed, holding that there was enough evidence of bias to grant a *prima facie* case of discrimination under *Batson*. *Id.*

165. *Wheeler*, 22 Cal. 3d at 261.

166. *Id.* at 263.

167. *Id.*

right to a trial by a jury selected from a fair cross-section of the community.¹⁶⁸ The California Constitution guarantees this right: “trial by jury is an inviolate right and shall be secured to all.”¹⁶⁹ “Trial by jury” is defined in caselaw as an impartial jury made up of unprejudiced jurors.¹⁷⁰

The primary distinction between *Batson* and *Wheeler* is that *Batson* rested on Fourteenth Amendment Equal Protection grounds while *Wheeler* rested on the state Constitution’s fair cross-section guarantee.¹⁷¹ The Court in *Batson* acknowledged that defendants’ equal protection rights are violated through discrimination in peremptory strikes.¹⁷² *Wheeler*, on the other hand, uniquely held that jurors’ diverse perspectives, which are “derived from their life experiences” as members of distinct groups, must be brought to the courtroom.¹⁷³ The court in *Wheeler* saw the perspectives of each diverse group as necessary to achieve true impartiality, because “the respective biases of their members, to the extent that they are antagonistic, will tend to cancel each other out.”¹⁷⁴

The California Supreme Court’s 2009 decision in *People v. Davis* held that “people of color” did not constitute a cognizable group in California.¹⁷⁵ There, defense counsel made a *Batson/Wheeler* motion based on the prosecutor’s striking of five jurors with Spanish surnames.¹⁷⁶ The court denied the motion because the prosecutor referred to three of the five as “Caucasian” but with “possible Hispanic surnames,” indicating that the prosecutor did not believe those jurors to be of the same race.¹⁷⁷ The court did not identify those struck jurors as Latinx in part because the defense counsel did not contest the district attorney’s description of them as “Caucasians.”¹⁷⁸ The defense instead argued that these venire members were “people of color.”¹⁷⁹ Both the trial and appellate courts rejected this claim, and the California Supreme Court agreed, explaining that “no California case has ever recognized ‘people of color’ as a cognizable group.”¹⁸⁰ Indeed, state caselaw has held that members of all minority groups

168. See *Wheeler*, 22 Cal. 3d at 276–77.

169. WEST’S ANN. CAL. CONST. Art. 1, § 16.

170. See *Wheeler*, 22 Cal. 3d at 265 (declaring that the right to an impartial and unprejudiced jury is a right “no less implicitly guaranteed by our charter, as the courts have long recognized”).

171. See SEMEL & MEYER, *supra* note 1, at 230–31.

172. *Batson v. Kentucky*, 476 U.S. 79, 80 (1986).

173. *Wheeler*, 22 Cal. 3d at 267; see also SEMEL & MEYER, *supra* note 1, at 231.

174. *Id.* The California Supreme Court has moved away from this recognition and toward a “colorblind” view of the Fourteenth Amendment. See SEMEL & MEYER, *supra* note 1, at 230.

175. *People v. Davis*, 46 Cal. 4th 539, 583 (2009).

176. *Id.* at 584.

177. See *id.* For purposes of group identity, *Wheeler* had held that a Spanish surname is sufficient to identify a juror as Hispanic or Latino. *People v. Wheeler*, 22 Cal. 3d 258, 283 n.30 (1978).

178. *Davis*, 46 Cal. 4th at 584.

179. *Id.* at 583.

180. *Id.*

cannot be combined into a mega-class as “people of color” or “minorities” generally.¹⁸¹

2. *Color Protection through People v. Wheeler*

The second avenue through which California litigants, specifically criminal defendants, might pursue recognition of skin color as a cognizable class flows from *People v. Wheeler*.¹⁸² The court in *Wheeler* cited a long history of federal constitutional precedent on the fair cross-section guarantee afforded to criminal defendants.¹⁸³ Some of those citations support the notion of color as a cognizable group. In *Peters v. Kiff*, for example, the Supreme Court raised concerns about the exclusion from jury service of “any large and identifiable segment of the community.”¹⁸⁴ Similarly, *Taylor v. Louisiana* warned against “large, distinctive groups” not being part of the jury pool.¹⁸⁵ Both *Peters* and *Taylor* suggest thinking broadly about whichever groups in the community are harmfully excluded from jury service.¹⁸⁶ Their language moves beyond race.

Wheeler defined the problem with preemptory strikes plaguing the justice system as one based on “group bias,” which occurs “when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds.”¹⁸⁷ This presumption violates the defendant’s right under the California Constitution to a trial by jury by creating a jury that is “dominated by the conscious or unconscious prejudices of the majority.”¹⁸⁸

Using this language, criminal defendants should make *Batson/Wheeler* motions in California by arguing that their juries do not fairly represent their communities as required by the state’s Constitution. This violation occurs through exclusion of prospective jurors based on their skin color. Skin color

181. See *People v. Neuman*, 176 Cal. App. 4th 571, 578 (2009) (holding that “people of color” is not a cognizable class under *Batson/Wheeler*). Specifically, the court there held that members of different minority groups cannot all be combined into one class for the purpose of making a *Batson/Wheeler* motion. *Id.*

182. See *People v. Wheeler*, 22 Cal. 3d 258 (1978).

183. *Id.* at 267; see, e.g., *Smith v. Texas*, 311 U.S. 128 (1940); *Glasser v. United States*, 315 U.S. 60 (1942); *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946); *Ballard v. United States*, 329 U.S. 187 (1946); *Peters v. Kiff*, 407 U.S. 493 (1972); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

184. *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (located in *Wheeler*, 22 Cal. 3d at 269).

185. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). Later, the court in *Wheeler* clarified the differences between the eligible juror candidates, the initial juror pool, and the specific venire as stages at which discrimination is possible to varying degrees. See *Wheeler*, 22 Cal. 3d at 273.

186. *Peters* dealt with the systematic exclusion of African Americans from jury service through jury rolls. 407 U.S. at 503. Likewise, *Taylor* addressed the exclusion of women from jury service. 419 U.S. at 530. These two federal cases involved Fourteenth Amendment equal protection claims. Therefore, they differ from *Wheeler* in that the latter’s holding is strictly based on the state Constitution’s fair cross-section provision. However, these cases are relevant here insofar as their language supports protection more broad than the subjects of their disputes—African Americans and women.

187. *Wheeler*, 22 Cal. 3d 258 at 276 (emphasis added).

188. *Id.*

should fall under *Wheeler*'s "racial, religious, ethnic, or similar grounds" language.¹⁸⁹ Colorism research demonstrates that, while a distinct problem from racism, colorism relates to racism in important ways. Therefore, skin color is comparable to race, religion, and ethnicity as a class under *Wheeler*. In theory, this claim could hold—focusing on the state constitutional right to a jury—even if a federal *Batson* motion, which rests on the Fourteenth Amendment, is unsuccessful. Because skin color is a "similar ground" for discrimination to race, religion, and ethnicity, judges in California should be open to granting objections to color-based discriminatory peremptory strikes under *Wheeler*'s state constitutional precedent.¹⁹⁰

V.

CHALLENGES WITH COLOR AS A CLASS IN CALIFORNIA

A. Administrability

The primary critique of *Bridgeforth*, from both the concurrence and subsequent decisions, is that the majority failed to guide trial judges as to how to apply the ruling on a daily basis in jury selection. The court in *Ortega*, for example, objected to the idea of a "color chart" as likely "ridiculous and offensive" and expressed concern that, in our increasingly "multi-racial" society, "there is no defined skin color line above or below which prospective jurors can be placed into cognizable groups."¹⁹¹ While the notion of a courtroom "color chart" seems laughable, this criticism fails to consider the simple ways in which skin color may prove even more workable than race or gender in a courtroom context.

As discussed in Part III, courts struggle today to accurately administer *Batson* challenges based on race or other characteristics. Compared to race, however, skin color might be more straightforward in practice. In *Bridgeforth*, the court instructed that "the movant may meet the prima facie burden by demonstrating that the preempted potential jurors have a similar skin color."¹⁹² Skin color is perhaps the most salient and easily-observed quality to perceive of a person; race, gender, and other *Batson*-protected categories are arguably much more difficult to ascertain by visual assessment, and yet we trust judges as factfinders on those characteristics.¹⁹³ If those decisions did not require any formal printed guideline, then a color chart is unnecessary as well. Furthermore, the dispositive question for a color-based *Batson/Wheeler* motion is simply this:

189. *Id.* (emphasis added).

190. *Id.*

191. *People v. Ortega*, 62 N.Y.S.3d 879, 885 (N.Y. App. Div. 2017).

192. *People v. Bridgeforth*, 28 N.Y.3d 567, 573 (2016).

193. Issues with race identification have been discussed throughout; gender is additionally mentioned here to acknowledge that a person's gender performance can lie anywhere on or outside of the male-female binary, regardless of their gender identity or biological sex, and therefore assumptions about gender identity based on appearance can be both inaccurate and inappropriate.

was any single peremptory strike an instance of skin color discrimination? This inquiry requires no comparison between a face and a color wheel. The “color chart” critique reflects one court’s understandable apprehension about applying a watershed opinion in its daily decisions. Perhaps the reactionary discomfort with open discussion of skin color in the courtroom reflects a deeper problem of inability to deal with issues of race and other discrimination openly. The court in *Ortega* describes this fear:

Our courts may need new tools and training to adequately address such issues. We will also need the courage to talk about the subject honestly, recognizing that lawyers and judges who have their every word recorded will have to be given some slack if they are unable to address the fraught issues of race, color, and ethnicity on their feet in the heat of a courtroom battle with the optimal degree of sensitivity and cogence.¹⁹⁴

Regardless, these legitimate concerns should not be artificially boiled down to absurd visuals in the form of courtroom props. Instead, we can view the responsibilities of judges and attorneys in this context as unchanged from their previous *Batson* obligations. And as the *Ortega* court suggests, all parties could benefit from more grace and courage in addressing these issues.

B. Skin Color vs. “People of Color”

A concern especially relevant in California will be distinguishing color as a class from “people of color,” which the California Supreme Court has held does not constitute a cognizable group for purposes of a *Batson/Wheeler* motion, as discussed in Part IV. However, there are important differences between skin color as a class and “people of color” as a class. In *People v. Neuman*, for example, the California Court of Appeal expressed concern with the defendant’s attempt at using “people of color” as a *Batson* class primarily because the defendant was attempting to place all racial minorities into a single mega-class for the purpose of a *Batson* motion.¹⁹⁵ Skin color, on the other hand, would involve a more limited inquiry of only grouping jurors with the same appearance. The class of “people of color” potentially includes people whose skin color varies widely and who have different races, ethnicities, and national origins. Indeed, the point of that category is to be capacious.¹⁹⁶ However, “color” is limited to individuals whose appearance by skin tone is similar. The court in *Bridgeforth* anticipated this issue and clearly stated that its holding did not make way for a large class of all minorities.¹⁹⁷ The court called the color-based class “much narrower” than a classification like “minority.”¹⁹⁸

194. *Id.* at 641.

195. *People v. Neuman*, 176 Cal. App. 4th 571, 575 (2009).

196. In *Green v. Travis*, Justice Sotomayor (while on the Second Circuit) wrote for the majority that members of different cognizable classes can be combined in making *Batson* motions. 414 F.3d 288, 297–98 (2005).

197. *People v. Bridgeforth*, 28 N.Y.3d 567, 573–74 (2016).

198. *Id.*

Moreover, the California case holding that “people of color” does not constitute a cognizable class, *People v. Davis*, rested on *Wheeler* rather than *Batson* grounds.¹⁹⁹ The court there did not fully delve into this question because the record was too limited to investigate the relevant jurors.²⁰⁰ The California Supreme Court’s final holding in *Davis* involved a more focused issue of Hispanic-surnamed jurors whom the prosecutor had personally identified as Caucasian, implying that the prosecutor did not subjectively believe that those jurors belonged to the same race.²⁰¹ Therefore, the case does not undermine the recognition of skin color as a class. The main concern of jurisprudence addressing the broad “people of color” question should not pose a problem to the “skin color” class, as skin color will prove to be a more narrow and focused identifier that cannot be used to simply combine every minority juror into a single group.²⁰²

C. Record on Appeal

The difficulty of creating a useful record for appellate review presents another possible issue with using skin color as a class. As was the case in *Wheeler*, ascertaining necessary information from the record on appeal is already a challenge. The record there was frustratingly limited, just like in *Ortega*: “[n]ot surprisingly, the record is unclear as to the exact number of blacks struck from the jury by the prosecutor: veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire.”²⁰³ Today, counsel often base their *Batson* motions and judges base their subsequent determinations on nothing more than speculation as to the race or ethnicity of prospective jurors. Sometimes, jurors self-identify in juror questionnaires or offer clarifying information during voir dire. There remains, however, no consistent process by which jurors provide their race or ethnicity at the outset of the selection process. And as *Bridgeforth* exemplifies, the judge and counsel’s ad hoc means of identifying race, ethnicity, and national origin are not always accurate. In contrast, skin color determinations should be simpler to handle in the trial court: essentially, the judge will be tasked

199. See *People v. Davis*, 46 Cal. 4th 539, 583 (2009).

200. *Id.*

201. *Id.*

202. In California, though, Code of Civil Procedure 231.5 might arguably already allow for a “people of color” or “minority” class. As discussed in Part IV, the language of that section states that “[a] party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds.” Because there is no apparent statutory basis for combining racial or ethnic groups together, if courts were to ground their holdings in the language of this statute, litigants might have success arguing that “people of color” are protected under Section 231.5. Moreover, the California Supreme Court could overrule *People v. Davis* to allow for protection of “people of color” as a state constitutional guarantee under *Wheeler*.

203. *People v. Wheeler*, 22 Cal. 3d 258, 263 (1978). In such a case, the defense counsel asked black venire members to identify their race in order to make a record.

with deciding whether or not jurors appear to have sufficiently similar skin colors to fall into the same class.

On appeal, however, skin color categories will be harder to handle than race-based challenges. This is because no visual record typically exists to show jurors' appearances. On appeal, *Batson* claims question one of the three steps of the *Batson* procedure: (1) whether or not a *prima facie* case was or should have been found; (2) whether or not the non-moving party provided sufficient race-neutral justification; and ultimately, (3) whether the trial court erred in accepting the proffered justification. The most important part of the record is not the juror's *actual* race but the race identified by the striking party and the justifications provided, because it is the striking party's subjective opinion that controls. Therefore, so long as the parties and judge state clearly for the record their assessment of the jurors' skin tones, later courts have a basis for review. Appellate review then need not be meaningfully different under a skin color analysis versus a race-based analysis because the parties' subjective discrimination is at issue rather than a fact-finding investigation into the jurors' identity or appearance.

D. Limited Impact for Communities of Color

Another potential downfall of the color-based class framework under *Batson* is that it might have little to no impact. Generally, though not exclusively, *Batson* is viewed as existing to help and protect criminal defendants and minority communities. Critics have rightly pointed out, however, the incredible ease with which prosecutors are able to invent "race-neutral" explanations for their strikes.²⁰⁴ In a recent California case, *People v. Gutierrez*, for example, the prosecutor reasoned that he was striking Hispanic jurors from the venire because they were from Wasco, California—an area where the population is overwhelmingly Hispanic.²⁰⁵ The trial court judge accepted this reason, which defense counsel maintained was a pretext for a discriminatory strike (calling "an individual's residence in Wasco . . . a proxy for Hispanic ethnicity").²⁰⁶ Countless other examples of suspiciously pretextual justifications were described in Part I.

There is no reason to believe that litigators will have any more difficulty inventing justifications for skin color-based *Batson* claims than they currently do for race-based claims.²⁰⁷ Therefore, while this concern is nothing new within

204. See Muller, *supra* note 32, at 93; see also Swift, *supra* note 33, at 336. But see *supra* note 46; Appleman, *supra* note 33, at 607.

205. *People v. Gutierrez*, 395 P.3d 186, 197 (Cal. 2017).

206. *Id.* at 197, 202. The California Supreme Court upheld this strike as facially neutral, but in doing so quoted *Purkett* in reminding that the justification need not be "persuasive, or even plausible." *Id.* (citing *Purkett v. Elem*, 514 U.S. 765, 768 (1993)).

207. See *supra* note 46.

Batson jurisprudence, it may temper any undue excitement about color-based claims revolutionizing the landscape of jury selection for indigent defendants.

CONCLUSION

Recognizing color as a cognizable class under *Batson* represents an important step toward acknowledging the complex realities of racial identity in the United States today. In the coming decades, and nowhere more dramatically than in California, race-based *Batson* categories will become outdated and difficult to administer. Validating extensive research on colorism and skin color-based discrimination as separate from racism requires creating a *Batson* class for skin color. Perhaps, inclusion of such categories will have a meaningful symbolic effect and even truly change discriminatory practices in our courtrooms. Even if these results prove difficult to measure, courts have a constitutional obligation to continue to protect both jurors and defendants who face discrimination in order to ensure fair, reliable jury trials and justice for all. In affirming *Bridgeforth*'s decision to include color as a *Batson* class, the court in *Ortega* observed that discrimination "remains one of the most invidious and corrosive features of our criminal justice system" today. As the *Ortega* court reflected, "[t]o fulfill the aspirations of *Bridgeforth*, we may all need to think in new ways."²⁰⁸

208. *People v. Ortega*, 62 N.Y.S.3d 879, 886 (N.Y. App. Div. 2017).