

Our Lower Courts Must Get in “Good Trouble, Necessary Trouble,” And Desert Two Pillars of Racial Injustice—*Whren v. United States* and *Batson v. Kentucky*

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*We must get in trouble, good trouble . . . use the law, use the law, use
the Constitution to bring about a nonviolent revolution.*

- Rep. John Lewis²

I. INTRODUCTION

On July 10, 2015, Sandra Bland was on the way to her alma mater, Prairie View A&M University, a historically Black university in Texas, to take a new job.³ When Trooper Encinia’s patrol car got into the lane behind her car, Sandra failed to use her signal to change lanes. At that point, under *Whren v. United States*, Trooper Encinia had probable cause to stop Sandra regardless of whether his actual motivation in stopping her was (explicitly or implicitly) tethered to racial profiling rather than to policing this extremely minimal traffic violation.⁴

When the trooper asked Sandra to get out of the car, she asked why.⁵ Opening her driver’s side door and standing in the door frame, Trooper

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² Am. Const. Soc’y Convention, *Highlights of Rep. John Lewis’ Speech to 2013 ACS National Convention* (Nov. 21, 2013), <https://www.acslaw.org/video/highlights-of-rep-john-lewis-speech-to-2013-acs-national-convention/>

³ Ray Sanchez, *Who was Sandra Bland*, CNN (July 23, 2015), <https://www.cnn.com/2015/07/22/us/sandra-bland/index.html>; David A. Graham, *How Many Sandra Blands Are Out There?*, THE ATLANTIC (July 22, 2015), https://www.theatlantic.com/national/archive/2015/07/how-many-sandra-blands-are-never-caught-on-video/399173/?gclid=EAlaIqobChMlvqWqubWE6wIVxsDACH0YsQVoEAMYASAAEgIQuvD_BwE; Bill Chappell, *Sandra Bland’s Phone Video of Her Own Arrest Surfaces, Reviving Calls for New Inquiry*, NPR (May 7, 2019), <https://www.npr.org/2019/05/07/721086944/sandra-blands-phone-video-of-her-own-arrest-surfaces-reviving-calls-for-new-inqu>.

⁴ See *Whren v. United States*, 517 U.S. 806 (1996).

⁵ Chappell, *supra* note 3.

Encinia ordered Sandra to get “out of [the] car.”⁶ When Sandra asked why she was being apprehended, the trooper pointed his finger in her face, then drew his taser, and yelled, “Get out of the car now . . . I will light you up . . . get out, now!”⁷ Sandra was not a suspect in an armed robbery, the car she was driving was not stolen, and she had no warrants for her arrest. She simply failed to use her signal. And she was Black. Three days later, on July 13, 2015, after having been arrested for allegedly “assaulting” Trooper Encinia and lingering in a jail cell for days as she could not make her \$5,000 bail, Sandra was found dead.⁸

This story really began twenty-two years before Sandra’s fateful meeting with Trooper Encinia, on June 10, 1993, in Washington, D.C., in the thick of the “War on Drugs.”⁹ Vice-squad police officers, who were tasked with investigating drug activity, were patrolling a “high drug area,” and became suspicious of two young Black men in a dark Pathfinder.¹⁰ The officers became suspicious when they passed the Pathfinder and observed the driver look down into the lap of the passenger.¹¹ With their eyes fixed on the Pathfinder, the officers noted that it remained at a stop sign for an “unusually long time” and so the officers executed a U-turn to get behind the truck.¹² Eventually, the officers stopped the Pathfinder and located drugs in the passenger’s hands.¹³

It was readily apparent that the minimal traffic violations observed by the officers were not the actual reasons for the traffic stop. They had less than a hunch that the Pathfinder’s youthful Black occupants were engaged in drug activity; however, they did have probable cause for the traffic violations, and, per our Supreme Court, that was all they needed.¹⁴ In *Whren*, after criticizing the petitioners for asking the Court to design a test to combat “nothing other than the *perceived* danger” of the pretextual stop, the Supreme Court unanimously disregarded any actual harm in pretextual stops and gave police carte blanche to conduct traffic stops regardless of ulterior motives.¹⁵

Whren is harmful precedent created by our Supreme Court that has had

⁶ *Id.*

⁷ *Id.*

⁸ Graham, *supra* note 3.

⁹ *Whren*, 517 U.S. at 808; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2010-2011) (describing President Reagan’s “War on Drugs”).

¹⁰ *Whren*, 517 U.S. at 808.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 809.

¹⁴ *Id.* at 819.

¹⁵ *Id.* at 814–15 (emphasis added).

repugnant real-world consequences.¹⁶ It permits both explicit and implicit racial profiling. As a result of *Whren*, officers can and will—purposefully or unconsciously—decide to pull over the Sandra Blands rather than the Lauren McLanes of the world for minimal traffic violations.¹⁷ Critically, that decision could be infused by explicit discriminatory thought or by implicit, unconscious bias. Specifically, strong empirical data demonstrates that based on the officer’s engrained beliefs, opinions, and life experiences, he is much more likely to pull over African Americans than whites even if he does not specifically intend to do so.¹⁸

The harm in this rule of law is caused by an under-appreciation of the presence of systemic racism as well as implicit racial bias in our criminal justice system. The harm is more than the discriminatory thought or implicit bias of an officer; it is also a matter of life or death for African Americans. Many Black motorists have been killed at the hands of law enforcement after having been stopped for simple traffic violations.¹⁹ *Whren*’s over-inclusion of racial minorities as targets (defendants) in our criminal justice system not only offends basic notions of fairness and decency, but it is also deadly. Further, if that were not enough, the Supreme Court has also ensured that racial minorities, while over-included as defendants, will be over-excluded as decision-makers (jurors) in our criminal justice system. The impossible standards set out in *Batson v. Kentucky* and its progeny have made it impossible to secure a reasonably diverse jury box. This rule of law, too, suffers from the courts’ ignorance (perhaps blissful) of systemic racism.²⁰

What is systemic racism? First, it is a set of systems or processes that exist in our institutions, policies, thinking, and way of life that disadvantage racial minorities.²¹ Next, while explicit bias is conscious racial bias manifested in one’s attitudes, beliefs, and actions,²² implicit biases can and

¹⁶ See, e.g., FRANK R. BAUMGARTNER, DEREK A. EPP, & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE (2018) [hereinafter BAUMGARTNER et al.]; see also Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021); David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, An American Civil Liberties Union Special Report, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>.

¹⁷ The author, Lauren McLane, is white.

¹⁸ See, e.g., BAUMGARTNER et al., *supra* note 16, at 88.

¹⁹ See Christopher Wright Durocher, *How the Supreme Court Helped Create “Driving While Black,”* POLITICO, (April 17, 2021), <https://www.politico.com/news/magazine/2021/04/17/how-the-supreme-court-helped-create-driving-while-black-482530>.

²⁰ See *Batson v. Kentucky*, 476 U.S. 79 (1986).

²¹ See N’dea Yancey-Bragg, *What is systemic racism? Here’s what it means and how you can help dismantle it*, USA TODAY (June 15, 2020), <https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism-what-does-mean/5343549002/>

²² Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012).

do go unnoticed. Implicit biases have been defined as “attitudes and stereotypes that are not consciously accessible through introspection. If we [do] find out that we have them, we may indeed reject them as inappropriate.”²³ Substantial research in the area of implicit bias has been conducted, and with the development of the Implicit Association Test (IAT), anyone can assess their implicit biases online these days.²⁴ Based on data collected through the IAT and examined by social psychologists, “implicit bias is pervasive (widely held), large in magnitude (as compared to standardized measures of explicit bias), dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are separate mental constructs), and predicts certain kinds of real-world behaviors.”²⁵

The under-appreciation of systemic racism and implicit racial bias is linked to “colorblindness.” Colorblindness stretches far beyond the simplistic description of being “colorblind,” i.e., where one claims to not see or be impacted by race.²⁶ Implicit biases are living proof that colorblindness does not exist.

There is . . . simply too much evidence of automatic classification of individuals into social categories, including race, to maintain this position. To the contrary, race and ethnicity are highly salient and chronically assessable categories. Thus, when people claim colorblindness, they cannot be claiming perceptual colorblindness; instead, they are likely claiming to be cognitively colorblind.²⁷

“Colorblind” individuals claim they do not treat any racial group different from the next and that they have no racial stereotypes.²⁸ There is strong evidence, however, opposing the idea that one can truly be colorblind.²⁹ Just as individuals cannot be colorblind, neither can our courts.

Nevertheless, our courts continue to rule as if colorblindness, although perhaps not real in practical life, somehow still exists within the four walls of our courthouses. *Whren* is one example of the courts sustaining a process that harms African Americans, causing them to be disproportionately over-

²³ *Id.* at 1132.

²⁴ See generally *id.* at 1128–31 & nn.9–18; see also PROJECT IMPLICIT, IMPLICIT ASSOCIATION TEST (IAT), <https://implicit.harvard.edu/implicit/takeatest.html> (last visited 8/3/2020).

²⁵ Kang, et al., *supra* note 22, at 1130–31 & nn.15–18.

²⁶ See *id.* at 1184.

²⁷ Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 468–69 (2010).

²⁸ *Id.*

²⁹ *Id.* at 472–89.

included as targets (defendants) in the criminal justice system.³⁰ That is systemic racism. Another example is that despite our Supreme Court’s efforts to diversify the jury box, it continues to be whitewashed due to *Batson v. Kentucky* and its progeny.³¹ The merciless reality is that in addition to being over-included as defendants, African Americans are also over-excluded as jurors in our criminal justice system.

In *Batson*, the Supreme Court effectively made it easier to bury racial bias during jury selection.³² Before *Batson* was decided, the Court was on notice that the problem of excluding racial minorities from juries was becoming less of an overt one and more of a problem with discrimination under the guise of race-neutral justifications for striking minority jurors from the jury.³³ The *Batson* court, ignoring any implicit bias impacting the prosecution’s use of peremptory challenges, crafted a race-neutral test to treat an increasingly race-neutral problem.³⁴ The Court held that the prosecution must provide a “race-neutral” explanation for its strike of a minority juror if a challenge is raised by the defendant.³⁵ The confines of a “race-neutral” explanation were further delineated nine years later by the Supreme Court in *Purkett v. Elem*, where it held that the justification given by the prosecution did not even have to be possible or plausible.³⁶ Essentially, any reason, so long as it is not admittedly because the juror is a minority, will suffice.³⁷

That the prosecution can offer any old reason for striking a racial minority from the jury has resulted in African Americans being disproportionately struck from the jury box because of their dress, demeanor, thoughts about law enforcement, past history with law enforcement or the criminal justice system, as well as due to a host of other reasons historically or implicitly intertwined with race.³⁸ Further, *Batson*’s requirement that “purposeful discrimination” must be demonstrated in order to prevail in a claim of racial discrimination during jury selection wrongfully discounts implicit racial bias and embraces the disproportionate exclusion

³⁰ See *infra* notes 99–146 and accompanying text.

³¹ See *infra* notes 147–167 and accompanying text.

³² See *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986).

³³ *Id.* at 106 (Marshall, J., concurring) (citing *People v. Hall*, 35 Cal. 3d 161, 165 (1983); *King v. County of Nassau*, 581 F. Supp. 493, 498 (E.D.N.Y. 1984)).

³⁴ See *Batson*, 476 U.S. at 96–98.

³⁵ *Id.* at 97–98.

³⁶ *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

³⁷ See *id.*; see also ALEXANDER, *supra* note 9, at 122–23.

³⁸ See, e.g., BERKELEY L. DEATH PENALTY CLINIC, *WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS*, vi–vii (2020).

of racial minorities from the jury box.³⁹

Both *Whren* and *Batson*, in spite of being decided during the rise of the racially motivated “War on Drugs” and mass incarceration in America, fail to account for systemic racism and implicit racial bias.⁴⁰ At this moment, Americans are marching and protesting for Rayshard Brooks, George Floyd, Breonna Taylor, Ahmaud Arbery, Sandra Bland, and too many other African Americans killed at the hands of police.⁴¹ Americans are waking up to systemic racism (fueled by explicit and implicit racial bias) throughout our nation. Our criminal justice system and its outcomes have been severely impacted by systemic racism. One of those systems is in our courts with respect to the Supreme Court’s decisions in *Whren* and *Batson*, two pillars of racial injustice in our criminal procedure jurisprudence.

Our courts should work to root out racial injustice. Specifically, the lower courts must get in “good trouble, necessary trouble.”⁴² The lower courts should refuse to follow Supreme Court precedents that sustain racial injustice in our criminal courts. Our judges are leaders in our communities across the country; they are administrators of justice, and they must not only issue statements, they must also send messages.⁴³ They can start by removing from the legal textbooks *Whren* and *Batson*, which reflect our courts’ destructive endorsement of colorblindness and implicit bias.

Very rarely does the judiciary take a step beyond the four corners of the courthouse to comment on public events or social movements. In summer

³⁹ See *Batson*, 476 U.S. at 98 (describing step three of *Batson* as the trial court having to determine if the defendant established purposeful discrimination); see also BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38, at ix.

⁴⁰ It could reasonably be argued that these two decisions also fail to account for hidden overt racial discrimination as well. See also ALEXANDER, *supra* note 9, at 5–7, 60, 98.

⁴¹ See *Washington Post Police Shootings Database, 2015-present day*, WASH. POST (2020), <https://raw.githubusercontent.com/washingtonpost/data-police-shootings/master/fatal-police-shootings-data.csv>; Malachy Browne et al., *The Killing of Rayshard Brooks: How a 41-Minute Police Encounter Suddenly Turned Fatal*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/video/us/100000007198581/rayshard-brooks-killing-garrett-rolfe.html>; Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>; Rukmini Callimachi, *Breonna Taylor’s Family Claims She Was Alive After Shooting but Given No Aid*, N.Y. TIMES (July 6, 2020), available at <https://www.nytimes.com/2020/07/06/us/breonna-taylor-lawsuit-claims.html>; Elliot C. McLaughlin, *Ahmaud Arbery was hit with a truck before he died, and his killer allegedly used a racial slur, investigator testifies*, CNN (June 4, 2020), <https://www.cnn.com/2020/06/04/us/mcmichaels-hearing-ahmaud-arbery/index.html>; see also Sanchez, *supra* note 3; Graham, *supra* note 3; Chappell, *supra* note 3.

⁴² This is from an oft-cited message from Representative John Lewis. See, e.g., John Lewis, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), available at <https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html>

⁴³ See Coach George Raveling on *This Unique Moment in Time, How to Practice Self-Leadership, Navigating Difficult Conversations, and Much More (#438)*, THE TIM FERRISS SHOW (JUNE 8, 2020), <https://tim.blog/guest/george-raveling/> (Coach Raveling describing the difference between statements and a message).

2020, as the Wall Street Journal noted, there was a “break with tradition.”⁴⁴ At least six state supreme courts released statements about racism in America and the courts’ role in the preservation of systemic racism.⁴⁵ Chief Justice Cheri Beasley of the North Carolina Supreme Court boldly stated that “black people are ostracized, cast out, and dehumanized.”⁴⁶ She went on to comment, “[a]s chief justice, it is my responsibility to take ownership of the way our courts administer justice, and acknowledge that we must do better, we must be better.”⁴⁷ That is key—our courts must do better, be better. Although these courts’ statements should be applauded, in order to do and be better, the lower courts (and the Supreme Court) must reckon with their own reinforcement of systemic racism and use the law, use the Constitution to dismantle oppressive precedents.

This article is primarily a call to action for our lower courts to reject *Whren* and *Batson*. It applauds the efforts of state courts for interpreting state constitutions and precedents separately from their federal counterparts and promulgating protective court rules.⁴⁸ But, getting into “good trouble, necessary trouble” requires a far more direct message to our nation’s highest court and, significantly, to the American people—outright rejection of precedents of racial injustice, such as *Whren* and *Batson*.

Part II of this article details the *Whren* and *Batson* decisions, the relevant backdrop to these cases, and their real-world consequences supported by significant empirical data and research. Part III proposes an analytical framework through which the lower courts can reject, either by overruling or “narrowing,” *Whren* and *Batson*. This proposed approach includes Justice Kavanaugh’s three considerations of *stare decisis* and its applicability, an analysis of “perceived” versus “actual” harms, and the need to make the Supreme Court more proficient in its rulings. The article concludes by calling upon the lower courts to implement this framework and get into

⁴⁴ Jess Bravin, *Breaking With Tradition, Some Judges Speak Out on Racial Injustices*, WALL ST. J., (June 13, 2020), <https://www.wsj.com/articles/breaking-with-tradition-some-judges-speak-out-on-racial-injustices-11592060400>

⁴⁵ *Id.* Notably, New York is conducting “an independent review of the ‘court system’s response to issues of institutional racism.’” In addition, other state courts or justices have made similar statements note included in the article. See *State Court Statements on Racial Justice*, NEWSROOM, NAT’L CTR. FOR STATE COURTS (2020), <https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice>

⁴⁶ Bravin, *supra* note 44.

⁴⁷ *Id.* Cheri Beasley is now the former chief justice and has announced her candidacy for the North Carolina Senate. Alex Rogers, *First Black woman to be North Carolina Supreme Court chief justice announces Senate bid*, (April 27, 2021), <https://www.cnn.com/2021/04/27/politics/cheri-beasley-democrat-north-carolina-senate-campaign-launch/index.html>

⁴⁸ The Washington State Supreme Court promulgated GR 37 to help address the problems with *Batson*’s test. See *State v. Jefferson*, 429 P.3d 467, 477 (2018). At the same time, in interpreting its own past precedents, the Washington State Supreme Court developed an alternative to *Batson*’s step three analysis in *Jefferson*. See *id.* at 480.

“good trouble, necessary trouble” by dismantling *Whren* and *Batson*.

II. TWO PILLARS OF RACIAL INJUSTICE: THE OVER-INCLUSION OF AFRICAN AMERICANS AS TARGETS (*WHREN V. UNITED STATES*) AND THEIR OVER-EXCLUSION AS DECISION-MAKERS (*BATSON V. KENTUCKY*)

In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color “criminals” and then engage in all the practices we supposedly left behind.

- Michelle Alexander⁴⁹

To get in “good trouble, necessary trouble,” our courts must reckon with two pillars that sanction racial injustice in our criminal procedure jurisprudence. African Americans are over-included as targets (defendants) in our criminal justice system and its processes when it is at the convenience of law enforcement, but over-excluded as decision-makers (jurors) when it is no longer convenient to the prosecution. Contact with the criminal justice system substantially begins at the time of a police stop; in one state alone there were over twenty million traffic stops over a fourteen-year-period.⁵⁰ The criminal justice system is most inclusive of the citizenry during the jury selection process; this is where citizens have the opportunity to uphold their civic duties and become decision-makers in a system that is otherwise largely exclusive of the community. When considering where African Americans are systemically over-included as targets and over-excluded as decision-makers in our system, our courts should reckon first with *Whren* and *Batson*.

A. *Whren v. United States*—License to Conduct Racially Motivated Police Stops

On the evening of June 10, 1993, Mr. Brown, a Black man, along with his Black passenger, Mr. Whren, were riding in a dark Pathfinder truck in Washington, D.C., when police noticed them.⁵¹ Vice-squad officers who were patrolling a “high drug area” became suspicious of Mr. Brown and Mr. Whren when they passed the Pathfinder.⁵² The officers’ objective was to

⁴⁹ ALEXANDER, *supra* note 9, at 2.

⁵⁰ See generally BAUMGARTNER ET AL., *supra* note 16.

⁵¹ *Whren v. United States*, 517 U.S. 806, 808 (1996).

⁵² *Id.*

“find narcotics activity going on.”⁵³ Their “suspicions were aroused” when they passed the Pathfinder, which had temporary license plates and was stopped, with its “youthful occupants” inside, at a stop sign for “an unusually long time—more than [twenty] seconds.”⁵⁴ Apparently, the driver looked into the lap of the passenger and this was suspicious enough that the officers decided to make a U-turn to get behind the Pathfinder.⁵⁵ That U-turn, particularly the officers’ decision to execute it when they did, cannot be glossed over. At that moment, the officers were convinced enough that the Pathfinder, which stayed at a stop sign for a longer period than the officers deemed normal, with its “youthful” driver having looked into the lap of his “youthful” passenger needed to be investigated further. Behavior that would be considered innocuous in most people led these officers to target two young Black men. After the police officers were behind the Pathfinder, it then, without its signal, suddenly turned right and sped off at an “unreasonable” speed.⁵⁶

Those were the facts from which the constitutional pretextual, racially motivated police stop was borne. As Michelle Alexander noted, a “classic pretext stop” is a police stop intended to search for drugs, but without any evidence of such illegal activity; thus, the police use minimal traffic violations as an excuse for the stop and proceed from there.⁵⁷ “Pretext stops, like consent searches, have received the Supreme Court’s unequivocal blessing.”⁵⁸

This was a unanimous decision by the Supreme Court without a single dissent or simple concurrence expressing any sort of reservations by the Justices of how this rule of law may result in racial disparities.⁵⁹ Instead, the “cruel irony” was that the Court referred Mr. Brown and Mr. Whren back to the Equal Protection Clause of the Fourteenth Amendment to redress any racial discrimination on the part of officers in effecting police stops, exclaiming “[s]ubjective intentions play no role in ordinary, probable-cause

⁵³ Brief for Petitioner at 4, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 75758, at *4.

⁵⁴ *Whren*, 517 U.S. at 808.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ ALEXANDER, *supra* note 9, at 67.

⁵⁸ *Id.*

⁵⁹ In addition to expected silence from several justices in the Rehnquist Court (including the Chief Justice Rehnquist himself, Justice Scalia—who wrote the majority—, and Justice Thomas), silent, too, were Justices Ginsburg, Breyer, Souter, Stevens, Kennedy, and O’Connor. Noteworthy is that five years later in *Atwater v. City of Lago Vista*, Justice O’Connor was extremely vocal about a white woman’s misdemeanor arrest where the Court granted virtually unfettered discretion to police officers in exercising their arrest power. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 360–73 (2001) (O’Connor, J., dissenting).

Fourth Amendment analysis.”⁶⁰ The irony of this referral is that the Fourteenth Amendment, under *Washington v. Davis*, requires evidence of discriminatory intent, not disparate impact alone; this is an incredibly high, if not impossible burden to satisfy. Thus, unless Mr. Brown and Mr. Whren could provide evidence of “purposeful discrimination” on the part of the officers, that they were victims of systemic racism and implicit bias would not matter to any court under any amendment.⁶¹

The *Whren* court cited approvingly to the notion that an officer’s observations, which supply individualized suspicion for the stop, adequately constrain police discretion.⁶² In *Whren*, the Supreme Court effectively closed the courthouse doors to any attempts to litigate racial discrimination under the Fourth Amendment by holding that the subjective motivations of police were irrelevant—the amendment that, as Justice Stevens wrote five years before the *Whren* decision, was to be “a restraint on Executive power. The Amendment [that] constitute[d] the Framers’ direct constitutional response to unreasonable law enforcement practices employed by agents of the British Crown.”⁶³

In the end, the Court held that because the officers had probable cause to stop the Pathfinder for a traffic code violation, the stop was reasonable under the Fourth Amendment.⁶⁴ In relying on its precedents, the Supreme Court rejected the argument that “the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”⁶⁵ In other words, an officer can be actually motivated to

⁶⁰ *Whren*, 517 U.S. at 806; see also ALEXANDER, *supra* note 9, at 109 (describing the *Whren* court’s reference to the Fourteenth Amendment as amounting to “cruel irony” based on previously decided equal protection cases requiring discriminatory intent to establish racial discrimination captured by the Fourteenth Amendment).

⁶¹ See *Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (holding discriminatory intent is required for an equal protection violation and disparate impact standing alone is insufficient to sustain such violation).

⁶² See *Whren*, 517 U.S. at 817–18 (citing *Delaware v. Prouse*, 440 U.S. 648, 654–55 (1979) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1975))).

⁶³ *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (citing *Weeks v. United States*, 232 U.S. 383, 389–91 (1914); *Boyd v. United States*, 116 U.S. 616, 624–25 (1886); 1 W. LaFave, *SEARCH AND SEIZURE* 3–5 (2d ed. 1987).

⁶⁴ *Whren*, 517 U.S. at 819. State courts have since adopted “reasonable suspicion” as the standard required for traffic code violation stops. See e.g., *Loveless v. State*, 789 S.E.2d 244 (Ga. Ct. App. 2016); *Marshall v. State*, 117 N.E.3d 1254, 1259 (Ind. 2019); *City of E. Grand Rapids v. Vanderhart*, 2017 WL 1347646, No. 329259, at *6 (Mich. Ct. App. April 11, 2017); *State v. McBreairty*, 142 N.H. 12, 697 A.2d 495, 497 (N.H. 1997); *Comm’n v. Chase*, 599 Pa. 80, 960 A.2d 108, 120 (2008); *State v. Casas*, 900 A.2d 1120 (R.I. 2006); *State v. Donaldson*, 380 S.W.3d 86 (Tenn. 2012); *State v. Richardson*, 2002 WL 34423170, No. 2001-064, at *1 (Vt. June Term 2002) (unpublished); *Warner v. Comm’n*, 2019 WL 6314821, Record No. 0871-18-4, at *4 (Va. Ct. App. November 26, 2019); *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289, 299 (Wash. 2012) (does not address *Whren*, rather adopts reasonable suspicion standard for traffic stops).

⁶⁵ *Whren*, 517 U.S. at 813.

investigate a crime wholly unrelated to any of his observations or, much worse, be motivated (either in part or whole) by the race of the person he decides to seize under the guise of minimal traffic violations.⁶⁶ As researchers have noted, “*Whren* was a watershed moment.”⁶⁷

1. *Batson v. Kentucky*—The failure to recognize that the prosecution will discriminate based on race in selecting (or de-selecting) the decision-makers

In 1986, *Batson v. Kentucky* was considered landmark; today, *Batson*’s acceptance of any race-neutral reason proffered by the prosecution for striking a racial minority from the jury along with its colorblind “purposeful discrimination” requirement has become impervious to implicit racial bias. The *Batson* court recognized, “Discrimination within the judicial system is most pernicious because it is ‘a stimulant to that race prejudice which is an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others.’”⁶⁸ If our courts permit the systemic exclusion of racial minorities from participation in the judicial process, what lines then would we expect to be drawn outside the courthouse walls that would hold firm to equal protection? Although *Batson* may have been “a nod to the newly minted public consensus that explicit race discrimination [was] an affront to American values,” its continued application is now repressive.⁶⁹

Mr. *Batson*, a Black man, was tried on charges of second-degree burglary and receipt of stolen property in Kentucky.⁷⁰ During jury selection, the prosecutor used his peremptory challenges to strike the only four Black jurors on the venire; Mr. *Batson*’s trial proceeded with an all-white jury.⁷¹ Ruling on the defense objection to this, the trial judge pointedly stated that the parties were allowed to use their peremptory challenges to “strike anybody they want to.”⁷²

In *Batson*, the Supreme Court crafted a three-part test triggered when the defendant contends that the prosecution’s use of its peremptory challenge to strike a racial minority from the jury was race-based. First, the

⁶⁶ “To be clear, *Whren* would indeed authorize an officer to observe a car or driver, develop a suspicion or an inkling that something may be of interest, and then wait for the driver to violate one of hundreds of different traffic laws, including driving too fast (speeding), driving too slow (impeding traffic), touching a lane marker, or any of a number of equipment or regulatory violations.” BAUMGARTNER ET AL., *supra* note 16, at 11.

⁶⁷ *Id.* at 11.

⁶⁸ *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

⁶⁹ ALEXANDER, *supra* note 9, at 119.

⁷⁰ *Batson*, 476 U.S. at 82.

⁷¹ *Id.* at 83.

⁷² *Id.*

petitioner must satisfy a prima facie burden of purposeful discrimination; this is intended to be a low bar, one that can be met by establishing a reasonable inference of discrimination.⁷³ The *Batson* court reasoned that one way this threshold could be met is by pointing out a “pattern” of peremptory strikes against Black jurors in the instant venire.⁷⁴ Second, the Government must then offer any race-neutral explanation for its peremptory strike against a racial minority.⁷⁵ Third, the trial court must then deploy a totality of the circumstances test where the ultimate question is whether or not the petitioner demonstrated purposeful discrimination.⁷⁶

The sad reality is that *Batson*, especially after *Purkett v. Elem* (in 1995), is nothing more than feel-good rhetoric. *Purkett* sanctions that the prosecution may offer any reason at all, even a ridiculous one, to explain away any overt or implicit bias in exercising the peremptory challenge against a racial minority.⁷⁷ In *Purkett*, the prosecutor explained his striking of Black jurors as follows:

I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact . . . Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. . . . And I don’t like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.⁷⁸

The Eighth Circuit held that this reason was factually irrelevant to whether or not the juror was qualified to serve in the case; however, the Supreme Court reversed, holding that the explanation given by the prosecutor need not be persuasive or even plausible.⁷⁹ “Once the reason is offered, a trial judge may choose to believe (or disbelieve) any ‘silly or superstitious’ reason offered by prosecutors to explain a pattern of strikes that appear to be based on race.”⁸⁰

Indeed, in modern-day practice, the absurdity in step two, though perhaps more subtle, continues. For example, in Wyoming’s *Roberts v. State*, after striking a minority juror, the prosecution offered a laundry list of

⁷³ *Batson*, 476 U.S. at 96–97; see also *Johnson v. California*, 545 U.S. 162, 166 (2005).

⁷⁴ *Batson*, 476 U.S. at 97.

⁷⁵ *Id.* at 96.

⁷⁶ *Id.* at 96; see also *Roberts v. State*, 2018 WY 23, ¶ 17, 411 P.3d 431, 438 (Wyo. 2018).

⁷⁷ See *Purkett v. Elem*, 514 U.S. 765, 775 (1995) (Stevens, J., dissenting).

⁷⁸ *Id.* at n.4 (quoting the prosecutor’s explanation).

⁷⁹ *Id.* at 768.

⁸⁰ ALEXANDER, *supra* note 9, at 123.

why he struck the juror in response to the *Batson* challenge, including that Juror 364 was “‘crumpling’ her face, wearing a hat in the courtroom, stating that she ‘want[ed] more proof’ of a [DUI] thus indicating that ‘[s]he might be uncomfortable with the bright line of a .08 as the state law in Wyoming,’ crossing her arms, ‘shifting,’ being ‘really silent,’ and expressing ‘distrust of law enforcement.’”⁸¹ This explanation was accepted and the trial court denied the *Batson* challenge; however, on appeal, the trial record revealed that Juror 364 never actually spoke during jury selection.⁸² Based on the inaccuracy of the prosecutor’s explanation as compared to the record and, significantly, because the Wyoming Supreme Court could not decipher whether the trial court would have, in spite of this error, still accepted the prosecutor’s descriptions of Juror 364’s alleged demeanor as sufficiently race-neutral, the Court issued a limited remand in the case.⁸³ But for the prosecutor’s explanation being contrary to the trial record, it is significantly likely the case would not have been remanded.

The excuse of demeanor is particularly problematic. It can serve as a “catch-all” for any prosecutor looking to survive a *Batson* challenge. And courts have put much trust in the prosecutor, including when the trial court did not observe the behaviors or demeanor alleged by the prosecutor. For example, in *Thayler v. Haynes* (2010), the Supreme Court stated that a demeanor-based peremptory challenge does not need to be corroborated by the trial court’s own observations.⁸⁴ In turn, relying on *Thayler*, the *Roberts* court in Wyoming has declared that while “purely subjective impressions” without objective support do not satisfy *Batson*’s step two, it believed that the prosecutor’s descriptions in *Roberts* were not impermissibly subjective.⁸⁵ The Wyoming Supreme Court was apparently satisfied that the lower court could have found the prosecutor to be credible (even if the trial court did not make its own independent observations) when describing Juror 364’s alleged behaviors as facial expressions that included “nodding, and grimacing, ‘crumpl[ing]’ her face, crossing her arms, and ‘shifting.’”⁸⁶

That the prosecutor can offer any plausible reason at *Batson*’s step two only adds to the impossibility that is step three’s requirement of “purposeful

⁸¹ *Roberts*, 411 P.3d at 438.

⁸² *Id.* at 439.

⁸³ *Id.* at 439–40. On the limited remand, the case was dismissed by the Laramie County District Court following an evidentiary hearing. *State of Wyoming v. Brandon Roberts*, In the District for the First Judicial District, State of Wyoming, County of Laramie, Docket No. 32-855, Order Vacating Conviction and Dismissing Case With Prejudice, May 29, 2018, Judge Catherine R. Rogers (on file with author and Wyoming Supreme Court) (Order on file with Journal).

⁸⁴ *Thayler v. Haynes*, 559 U.S. 43, 49 (2010) (“[I]n the absence of a personal recollection of the juror’s demeanor, the judge [may accept] the prosecutor’s explanation.”).

⁸⁵ *Roberts*, 411 P.3d at 439.

⁸⁶ *Roberts*, 411 P.3d at 438.

discrimination.”⁸⁷ In addition, even if there is solid evidence of discriminatory purpose, it takes tremendous effort to succeed on appeal (when the challenge is lost at trial) due to the deference given to the trial court. The Washington State Supreme Court encountered this problem in *State v. Jefferson* and, ultimately, decided to provide an alternative (to purposeful discrimination) in *Batson*’s step three. In *Jefferson*, the trial court accepted the prosecutor’s “race-neutral” explanations and found no purposeful discrimination had occurred.⁸⁸

There are legitimate non-discriminatory reasons, that are not race based, why Mr. Curtis wants to strike No. 10, notwithstanding the fact that they are both African American men; the fact that he didn’t bond with him; he didn’t feel comfortable with him in terms of his earlier responses; the issue about *12 Angry Men* and his familiarity with the movie And I don’t, in essence, I don’t believe that the state has—that the defense has shown that that, in some—in any way is pretext or a cover for race-based strike, so I’m going to deny the motion.⁸⁹

The Washington State Supreme Court held that under *Batson*’s step three, the trial court’s finding that there was no purposeful discrimination on the part of the state was not clearly erroneous.⁹⁰ The *Jefferson* court went on to apply *Batson*’s step three to demonstrate how even questionable actions and reasoning on the part of the prosecutor failed to reach the high bar of purposeful discrimination. First, the court noted that Juror 10’s answers to questions were not that different from those jurors who were empaneled on the jury.⁹¹ In addition, the court found that the prosecutor’s belief that Juror 10 would “bring outside evidence into the jury room” lacked support in the trial record.⁹² Lastly, the court highlighted that Juror 10 faced disparate questioning from that of other jurors.⁹³

Significantly, however, the *Jefferson* court held that under the current *Batson* step-three framework, the challenge failed.⁹⁴ The court found that

⁸⁷ *Batson v. Kentucky*, 476 U.S. 79, 93–96 (1986) (citing *Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (holding that petitioners must demonstrate discriminatory intent, not disparate alone, to prove an equal protection violation)).

⁸⁸ *State v. Jefferson*, 429 P.3d 467, 472 (2018).

⁸⁹ *Id.* at 472 (quoting 3 VRP (May 5, 2015) at 246–47).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 473.

⁹³ *Id.* at 474.

⁹⁴ *Id.*

although the prosecutor’s reasons may have well been pretextual in nature, the record did not support that the trial court’s denial of the *Batson* challenge (based on the failure to demonstrate purposeful discrimination) was clearly erroneous.⁹⁵ “Based on this record, it is impossible to say with certainty that the prosecution’s reasons for its peremptory strike of Juror 10 were based on purposeful race discrimination.”⁹⁶

The Washington State Supreme Court then, based on its own precedents, proceeded to offer an alternative route in analyzing *Batson* challenges that considers unconscious, implicit, and unintentional racial bias.⁹⁷ The court framed this as an “alteration” to *Batson*.⁹⁸ After a comprehensive discussion of the history and evolution of *Batson* and its progeny at both the state and federal levels, the *Jefferson* court crafted a new step three to *Batson* analysis, holding that the central inquiry was “[w]hether ‘an objective observer could view race as a factor in the use of the peremptory challenge.’”⁹⁹ The court noted that this was “an objective inquiry based on the average reasonable person—defined as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated ways.”¹⁰⁰ Perhaps the Washington State Supreme Court gave too much credit to the “average reasonable person,” but, nevertheless, it took a bold step in dismantling the oppressive burden of establishing purposeful discrimination under *Batson*.

C. *The Relevant Backdrop to the Whren and Batson Decisions*

The *Whren* and *Batson* decisions were fueled by a colorblind view that, at the time, defied reality. Both cases were decided during the era of the “War on Drugs” and mass incarceration. There was turbulence centered on race relations across the country. In no way were the 1980s and 1990s reflective of a utopian, colorblind, “we are all created equal” society.

Specifically, in the 1980s and 1990s, although the nation might not have been ready to admit it, President Ronald Reagan’s “War on Drugs” was overwhelmingly and disproportionately putting Black men in prison.¹⁰¹ “In

⁹⁵ *Id.* at 472.

⁹⁶ *Id.* at 474.

⁹⁷ *Id.* at 476–77. In addition, the Washington State Supreme Court has also enacted General Rule 37, which provides a framework for evaluating peremptory strikes and addressing the shortcomings of *Batson*. Here, the *Jefferson* court found that the rule did not apply retroactively. *See id.* at 477.

⁹⁸ *Id.* at 480.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ It must be noted that while many individuals believe that the “War on Drugs” was a war that actually responded to a drug crisis, President Reagan “officially announced the current drug war in 1982, before crack became an issue in the media or a crisis in poor black neighborhoods.” ALEXANDER, *supra*

less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase.”¹⁰² As Michelle Alexander wrote:

Drug offenses alone account[ed] two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000. Approximately a half-million people [were] in prison or jail for a drug offense in [2010-2011], compared to an estimated 41,100 in 1980—an increase of 1,100[%].”¹⁰³

Black men were disproportionately represented in these numbers with the “War on Drugs” fully in effect in the mid-1980s; specifically, “prison admissions for African Americans skyrocketed, nearly quadrupling in three years, and then increasing steadily until it reached in 2000 a level *more than twenty-six times* the level in 1983.”¹⁰⁴

In 1991, just two years before Mr. Brown and Mr. Whren were stopped by police, “the Sentencing Project reported that the number of people behind bars in the United States was unprecedented in world history, and that one fourth of young African American men were now under the control of the criminal justice system.”¹⁰⁵ In April 1992, a Ventura County jury (based in “a community that is close to Los Angeles in distance but a world away in lifestyle and racial composition”)¹⁰⁶ returned a verdict of not guilty for four white police officers who were captured on video brutally beating a Black

note 9, at 5. As Alexander highlighted, “The *New York Times* made the national media’s first specific reference to crack in a story published in late 1985. Crack became known in a few impoverished neighborhoods in Los Angeles, New York, and Miami in early 1986.” ALEXANDER, *supra* note 9, at Introduction, n.2, (citing Craig Rienarman & Harry Levine, *The Crack Attack: America’s Latest Drug Scare, 1986-1992*, in IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 152 (New York: Aldine De Gruyter, 1995)).

¹⁰² *Id.* (citing MARC MAUER, RACE TO INCARCERATE 33 (New York: The New Press, rev. ed., 2006)).

¹⁰³ *Id.* at 60.

¹⁰⁴ *Id.* at 98 (citing JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER RE-ENTRY 28 (Washington, DC: Urban Institute Press, 2002)) (emphasis in original). The problem still persists. In a 2016 report, the Sentencing Project found that African Americans were incarcerated in state prisons “more than five times the rate of whites, and at least ten times the rate in five states.” Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT, 3–8 (June 14, 2016), file:///Users/Morgen/Downloads/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.

¹⁰⁵ ALEXANDER, *supra* note 9, at 56.

¹⁰⁶ Lou Cannon, *Trial in Videotaped Beating of Motorist Opens Today*, WASH. POST (Feb. 3, 1992), at A3, available at <https://www.washingtonpost.com/archive/politics/1992/02/03/trial-in-videotaped-beating-of-motorist-opens-today/f5b6cd00-d4eb-4438-83f1-e253f43eae08/>

man, Rodney King, on a traffic stop in Los Angeles.¹⁰⁷ This was the impetus for the Los Angeles riots, which occurred primarily in the Black South Central neighborhood, leaving a trail of carnage and wreckage.¹⁰⁸

The Supreme Court could have drawn from multiple sources of information to consider the impact of systemic racism on policing and the operation of our criminal justice system when it decided *Whren* and *Batson*. The 1980s and 1990s were turbulent times for race relations in America, but our Supreme Court turned a blind eye and a deaf ear to it all.

D. *The Real-World Impact of Whren—Over-Inclusion of African Americans as Targets (Defendants) in the Criminal Justice System*

Since *Whren*, statistics have demonstrated that African Americans are disproportionately pulled over by police; however, this is perfectly acceptable under *Whren*.¹⁰⁹ The real-world consequences of *Whren* have led to a “free-for-all” policing approach where officers conduct stops based on their unlimited discretion and in spite of their conscious (racism) or unconscious motivations (implicit racial bias).

To be sure, that evening in 1993, the vice-squad officers did locate illegal drugs in Mr. Whren’s hands. This is ultimately how we get to address these issues; contraband is seized or alleged illegal activity occurs, the case is adjudicated below, and, upon conviction, sometimes an appeal is generated that may, such as in the case of *Whren*, result in a seminal decision. The cases where individuals are arbitrarily stopped, searched, and then released by police when nothing turns up do not make it into Westlaw and LexisNexis.

Lest one be tempted to baldly conclude that African Americans commit more crime and, hence, are overrepresented in prison; the data demonstrates otherwise. For example, as it pertains to drug crime, “[p]eople of all races use and sell illegal drugs at remarkably similar rates. If there are significant differences in the surveys to be found, they frequently suggest that whites,

¹⁰⁷ Michael A. Santivasci, *Change of Venue in Criminal Trials: Should Trial Courts Be Required to Consider Demographic Factors When Choosing a New Location For a Criminal Trial?*, 98 DICK. L. REV. 107, 112–13 (1993) (indicating the case of Rodney King had “racial overtones” as the officers were white and Mr. King was African American and discussing the granted motion for venue change for the defendant officers to Ventura County) (citing Lou Cannon, *Trial in Videotaped Beating of Motorist Opens Today*, WASH. POST, at A3 (Feb. 3, 1992) (“[T]he highly publicized videotape has inflamed racial feelings in Los Angeles, where members of the black and Hispanic communities said the incident reflects deep-seated attitudes of prejudice in the Los Angeles Police Department.”)); see also, *Black History Milestones: Timeline*, History.com (June 6, 2020), <https://www.history.com/topics/black-history/black-history-milestones> (last visited July 25, 2020).

¹⁰⁸ See Santivasci, *supra* note 107, at 113 (citing Tom Mathews et al., *The Siege of L.A.*, NEWSWEEK, at 30 (May 11, 1992) (“Denied the justice they demanded for Rodney King, protesters and looters unleashed the deadliest riot in 25 years—and issued a wake-up call to the rest of America”); see also History.com, *supra* note 107.

¹⁰⁹ See, e.g., BAUMGARTNER et al., *supra* note 16; see also Rushin & Edwards, *supra* note 16.

particularly white youth, are more likely to engage in illegal drug dealing than people of color.”¹¹⁰ In 1995, when asked during a survey to envision a person believed to be a drug user and describe that person, “[n]inety-five percent of the respondents pictured a Black drug user, while only [five] percent imagined other racial groups.”¹¹¹ However, in 1995, African Americans represented only fifteen percent of drug users.¹¹² Further, in 2002, researchers at the University of Washington found that “contrary to the prevailing ‘common sense,’ the high arrest rates of African Americans in drug-law enforcement could not be explained by rates of offending; nor could they be explained by other standard excuses, such as the ease and efficiency of policing open-air drug markets, citizen complaints, crimes rates, or drug-related violence.”¹¹³ The racial disparities in police stops and searches cannot be washed away by oversimplifying the issue and citing to crime rates or arguing “no harm, no foul.” The overall unproductivity of racial profiling is glaring when reviewing the data on police stops and the output thereof.

Even when *Whren* was decided, there was some evidence of racial

¹¹⁰ ALEXANDER, *supra* note 9, at 99 (citing U.S. Dep’t of Health and Hum. Serv.’s, Substance Abuse and Mental Health Serv.’s Admin., *Summary of Findings from the 2000 National Household Survey on Drug Abuse*, NHSDA series H-13, DHHS pub. No. SMA 01-3549 (Rockville, MD: 2001) (indicating that 6.4% of whites, 6.4% of African Americans, and 5.3% of Hispanics were current illicit drug users in 2000); *Results from the 2002 National Survey on Drug Use and Health: National Findings*; NSDUH series H-22, DHHS pub. No. SMA 03-3836 (2003) (finding nearly identical rates of illicit drugs users among whites and Blacks with only a single percentage point between the two); *Results from the 2007 National Survey on Drug Use and Health: National Findings*, NSDUH series H-34, DHHS pub. No. SMA 08-4343 (2007) (indicating similar findings); Marc Mauer & Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* 19 (Washington, DC: Sentencing Project, Sept. 2007) (citing a study suggesting that African Americans have slightly higher rates of illegal drug users than whites); Howard N. Snyder & Melissa Sickman, *Juvenile Offenders and Victims: 2006 National Report*, U.S. Dep’t of Just., Officer of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (Washington, DC: 2006) (indicating that white youth are more likely than Black youth to sell illicit drugs); Lloyd D. Johnson et al., *Monitoring the Future, National Survey Results on Drug Use, 1975-2006, vol. 1, Secondary School Students*, U.S. Dep’t of Health and Hum. Serv.’s, National Institute on Drug Abuse, NIH pub. No. 07-6205, 32 (Bethesda, MD: 2007) (“African American 12th graders have consistently shown lower usage rates than White 12th graders for most drugs, both licit and illicit”); Lloyd Johnston, Patrick M. O’Malley, and Jerald G. Bachman, *Monitoring the Future: National Results on Adolescent Drug Use: Overview of Key Findings 2002*, U.S. Dep’t of Health and Hum. Serv.’s, National Institute on Drug Abuse, NIH pub. No. 03-5374 (Bethesda, MD: 2003) (data shows “African American adolescents have slightly lower rates of illicit drug use than their white counterparts”).

¹¹¹ ALEXANDER, *supra* note 9, at 106 (citing Betty Watson Burston, Dionne Jones, and Pat Robertson-Saunders, *Drug Use and African Americans: Myth Versus Reality*, J. ALCOHOL & DRUG ABUSE 40, 19 (Winter 1995)).

¹¹² ALEXANDER, *supra* note 9, at 106.

¹¹³ *Id.* at 126. See also Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 no. 3 SOC. PROBS. 419–41 (2005); Katherine Beckett, Kris Nyop, & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44(1) CRIMINOLOGY 105 (2006).

profiling in traffic stops. In the 1990s, in New Jersey and Maryland, “[a]llegations of racial profiling in federally funded drug interdiction operations resulted in numerous investigations and comprehensive data demonstrating a dramatic pattern of racial bias in highway patrol stops and searches.”¹¹⁴ For example, in New Jersey, the data demonstrated “that only [fifteen] percent of all drivers on the New Jersey Turnpike were racial minorities, yet [forty-two] percent of all stops and [seventy-three] percent of all arrests were of black motorists—despite the fact that blacks and whites violated traffic laws at almost exactly the same rate.”¹¹⁵ In the Maryland studies, “African Americans comprised only seventeen percent of drivers along a stretch of I-95 outside of Baltimore, yet they were [seventy] percent of those who were stopped and searched.”¹¹⁶

Critically, since *Whren*, substantial research and investigation into police stops occurring from 2002 to 2016 in the state of North Carolina was conducted by Frank R. Baumgartner, Derek A. Epp, and Kesley Shoub and produced in their 2018 book *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race*.¹¹⁷ These researchers analyzed, in remarkable detail, over twenty million traffic stops effected by the various police agencies in North Carolina over the course of fourteen years.¹¹⁸ They found that African Americans were consistently over-policed as compared to whites.¹¹⁹ In just one year’s worth of data, African Americans were sixty-three percent more likely than whites to be stopped by police.¹²⁰ From the complete data set (over twenty million traffic stops), it was demonstrated that African Americans are more likely to be stopped for investigatory purposes where, frequently, pretextual stops occur to engage the driver for some investigatory reason unrelated to the reason for the traffic stop.¹²¹

To discern what the data collected by Baumgartner et al. shows, “the proper baseline for comparison” must be realized.¹²² Importantly, not everyone has a car or drives (or drives often).¹²³ In addition, “[s]ome people drive more than others. Some people drive safely while others speed, change lanes erratically and without signaling, or drive while impaired.”¹²⁴

¹¹⁴ ALEXANDER, *supra* note 9, at 133.

¹¹⁵ *Id.* at 133 (citing *State v. Soto*, 324 N.J. Super. 66, 69–77, 83–85 (N.J. Super. Ct. Law Div. 1996)).

¹¹⁶ *Id.* at 133 (citing Harris, *supra* note 16, at 80).

¹¹⁷ See generally BAUMGARTNER et al., *supra* note 16.

¹¹⁸ See *id.* at 2, 29, 31–34.

¹¹⁹ *Id.* at 65.

¹²⁰ *Id.* at 68–69 tbl.3.1.

¹²¹ *Id.* at 53–54 tbl.2.1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

Baumgartner et al. proceeded with a “population comparison” because, “on average, whites drive more than blacks and Hispanics.”¹²⁵ Baumgartner et al. found “that regardless of how one calculates [the baseline population], black drivers in North Carolina are consistently over-policed, compared to whites.”¹²⁶ Significantly, “disparities found in comparisons to the community population are *low* estimates of disparate treatment rather than high ones, since whites can on average be expected to be more likely to own a car and drive more miles compared to blacks and Hispanics.”¹²⁷

Using 2010 to demonstrate whether drivers of different racial groups are stopped at the same rates, Baumgartner et al.’s collected data demonstrated that while Blacks made up 22.46% of the state of North Carolina’s population in 2010, 32.02% of the traffic stops that occurred in the state that year were of Black drivers.¹²⁸ On the other hand, that year the white population for North Carolina was 68.77% while white drivers comprised 60.12% of the 2010 traffic stops.¹²⁹ “This means that the black proportion of those stopped is almost 10 points higher than in the population—a 42.59[%] increased risk. Conversely, the population is 68.77[%] white, while only 60.12[%] of those stopped are white. This is a gap of 8.65 points—a 12.58[%] decreased risk.”¹³⁰

In calculating the “stop rate ratio” from this 2010 data, by comparison of the number of traffic stops to the state population, the data showed that Blacks were [sixty-three] percent more likely to be pulled over than whites.¹³¹ “With 843,060 traffic stops in 2010, and 6.3 million whites in the population, the odds of a given white person to be pulled over were 13.4%.”¹³² Blacks, with 449,012 stops and a population just over two million, had much higher odds of being stopped: 21.9%.”¹³³ Further, based on two different national surveys that helps determine who in the population drives, this data is a “vast underestimate.”¹³⁴

In looking more broadly at the whole data set collected over the course of fourteen years from the over twenty million traffic stops, Baumgartner et al.’s data indicated that 46.27% of the stops were “investigatory” in nature; in other words, were stops due to police observations related to violations labeled as “vehicle equipment,” “vehicle regulatory,” “investigation” (e.g.,

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 68–69 tbl.3.1.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 75–76.

where officers are searching for a specific individual via “attempt to locate,” “be on the lookout for,” or other investigations), seat belt, and other vehicle violations.¹³⁵ Black drivers represented 51.85% of these stops (whereas white drivers made up 46.98%).¹³⁶ According to Baumgartner et al., the stops for “investigatory purposes are more likely to relate to minor offenses that may serve as a pretext for pulling a driver over.”¹³⁷

Notably, in assessing both the search rates as well as outcomes of traffic stops, Baumgartner et al. demonstrate how racial profiling, including implicit bias, impacts police discretion negatively in terms of crime control; this data significantly calls into question the deferential treatment given to police by the *Whren* court. The data collected from the more than twenty million traffic stops indicated that 700,000 resulted in a search.¹³⁸ From this data, it is shown that “white drivers are searched 2.35% of the time [and] black drivers 5.05[%]. . . .”¹³⁹ Critically, “blacks are 2.15[%] as likely as whites to be searched, or 115[%].”¹⁴⁰ Recalling the data on “investigatory stops” above, “black drivers face a 170[%] increased chance of search, compared to whites” following a stop for investigatory purposes.¹⁴¹

Can it, however, be stated: “no harm, no foul?” Do officers find more contraband on Black drivers rather than white ones? In the 700,000 searches that were conducted, if one reviews “all searches” (without separating out the searches by type, i.e., consent, probable cause, incident to arrest, *Terry* frisk, and warrant), “police are equally likely to find contraband on blacks as compared to whites.”¹⁴² Nevertheless, when differentiated among types of searches, this is where stark deviations occur; Baumgartner et al. note these deviations are most pronounced when evaluating the data between discretionary and procedural searches.¹⁴³ “Officers are [twenty-two] percent less likely to find contraband on black drivers following consent searches and [twelve] percent less likely after probable cause searches.”¹⁴⁴ However, searches incident to arrest and those resulting from warrants are “essentially race neutral and blacks are more likely to be found with contraband after protective frisks.”¹⁴⁵ The researchers state:

¹³⁵ *Id.* at 53–54 tbl.2.1.

¹³⁶ *Id.*

¹³⁷ *Id.* at 53.

¹³⁸ *Id.* at 59 tbl.2.7, 85 tbl.4.1.

¹³⁹ *Id.* at 85.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 86.

¹⁴² *Id.* at 112–13.

¹⁴³ *Id.* at 113.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

[t]his indicates that officers are either worse at making probable cause assessments as to whether black motorists have contraband or have a lower threshold for what qualifies as cause when interacting with a black driver. Either possibility suggests that black and white drivers are treated in a disparate manner not justified by any difference in criminal behavior.¹⁴⁶

Next, Baumgartner et al. separated potential outcomes of a traffic stop into three categories—light, expected, and severe.¹⁴⁷ A light outcome was defined as nothing happened to the driver, a verbal warning was given, or a written warning was issued.¹⁴⁸ Meanwhile, an expected outcome was defined as the issuance of a ticket or citation, and a severe outcome, was an arrest.¹⁴⁹ “A stop resulting in light action indicates one of two things: the driver is perceived as a negligible threat; or the driver was pulled over because of a suspicion which is immediately relieved once the officer speaks with the driver, perhaps giving an apology for the inconvenience. A warning may also be appropriate for a young driver not fully stopping at a stop sign or in other cases where the officer rightfully uses his or her discretion.”¹⁵⁰

In the more than twenty million traffic stops, “Black drivers are [ten] percent more likely to get a ‘light outcome,’ [seven] percent less likely to get a ticket, and [sixty-eight] percent more likely to be arrested, compared to white drivers.”¹⁵¹ Baumgartner et al. asked what the disparities in outcome might indicate and noted, “[l]ight action taken against a driver might indicate either that the officer made a mistake in pulling the driver over or that they were barely breaking the law (e.g., going one mph over the speed limit). Our data indicates that blacks are disproportionately likely to experience a light outcome.”¹⁵² The researchers discuss that one concern of lawmakers in North Carolina was that officers were pulling over Black drivers for no reason at all, and that there was some evidence that this was indeed the case.¹⁵³ Interestingly, Baumgartner et al. also note that Black drivers were less likely to be ticketed than white drivers, suggesting that “the racial disparities that we do find are perhaps driven less by outright racial animus on the part of police officers (because, in that case, why not ticket blacks at higher rates) than by implicit biases that lead officers to be more suspicious

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 86–87 tbl.4.3.

¹⁴⁸ *Id.* at 86–87.

¹⁴⁹ *Id.* at 87.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 57 tbl.2.5, 87 tbl.4.3.

¹⁵² *Id.* at 87–88.

¹⁵³ *Id.* at 88.

of black drivers.”¹⁵⁴ The researchers offer that “most officers are not necessarily out to punish black drivers but they, perhaps unconsciously, have a lower threshold for stopping and searching African Americans.”¹⁵⁵ All the more evidence that the Supreme Court’s demand for “purposeful discrimination” is severely misguided.¹⁵⁶

Finally, Baumgartner et al.’s data illustrates that the targeting of Black drivers is on the rise. From the data collected up until 2016, it is shown that while white traffic stops are consistently falling, minority stops are not.¹⁵⁷ Black drivers are “among an increasing share of those stopped over time. If at the same time the racial disparities in search rates are also growing, this suggests a ratchet effect: increasing targeting of blacks over time.”¹⁵⁸

At what point do we decide that the costs of *Whren* outweigh its benefits? While the *Whren* court weighed heavily in favor of police discretion, actual data in one state alone is illustrating the costs of the *Whren* mandate. As distrust in police continues to deepen not just in communities of color, but now, also in white people who have been marching over the past few months in our Nation for Black lives, *Whren* is starting to look more and more like a Nineteenth century opinion that was built on a false premise, colorblindness. Although beyond the scope of this article, briefly, in place of *Whren*, our courts should consider a totality of the circumstances approach as viewed through eyes of an objective, detached, neutral, and race-conscious judge where, *inter alia*, the reason for the stop, the credibility of the officer (along with any evidence of his subjective intent), and the progression of the stop (e.g., whether a simple traffic stop leads to a consent or probable cause search) should be considered.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Significantly, in addition to the Baumgartner et al.’s work in this area, there is a comprehensive study (based on data from traffic stops 2008–2015) in the state of Washington that assesses the impacts of the state’s modified *Whren* approach and demonstrating overwhelming statistics of police disproportionately stopping racial minorities. See Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021). In addition, the ACLU released a report in 1999 consisting of statistics gained from litigation in eight states challenging *Whren*. See Harris, *supra* note 16. There is another broader noteworthy analysis supporting similar findings that was published in July 2020. Emma Pierson, Camelia Simoiu, Jan Overgoor, et al., *A Large-scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (2020), available at <https://5harad.com/papers/100M-stops.pdf>.

¹⁵⁷ BAUMGARTNER et al., *supra* note 16, at 67 fig.3.2.

¹⁵⁸ *Id.* at 97.

E. *The Real-World Impact of Batson—Over-Exclusion of African Americans as Jurors Evidenced by “Whitewashing the Jury Box” Report*

After *Batson*, it was readily apparent that the opinion was, perhaps, rhetorically powerful, but had little-to-no influence on ferreting out racial discrimination via peremptory challenges exercised by the prosecution. As Michelle Alexander noted, “one comprehensive study reviewed all published decisions involving *Batson* challenges from 1986 to 1992 and concluded that prosecutors almost never fail to successfully craft acceptable race-neutral explanations to justify striking black jurors.”¹⁵⁹

Much like the case with *Whren*, the data demonstrates that *Batson* is not a workable rule of law today; in fact, as Michelle Alexander has noted, and the Washington State Supreme Court reminds us, it never really was. Recent empirical evidence collected and analyzed in the state of California further supports it is time to rethink and reframe *Batson*.

In June 2020, the Berkeley Law Death Penalty Clinic released a substantial report that corroborates the abuse and manipulation of *Batson* by the prosecution in exercising peremptory challenges against racial minorities.¹⁶⁰ The Clinic evaluated 683 cases decided by the California Courts of Appeal from 2006 through 2018 that involved *Batson* challenges against prosecution peremptory challenges in the state’s lower courts.¹⁶¹ The data overwhelmingly showed that Black jurors were subject to peremptory strikes by the prosecution far more than any other racial group.¹⁶² “In nearly [seventy-two percent] of these cases, district attorneys used their strikes to remove Black jurors. They struck Latinx jurors in about 28% of the cases, Asian-American jurors in less than 3.5% of the cases, and White jurors in only 0.5% of the cases.”¹⁶³

Not surprisingly, the “race-neutral” explanation at the forefront was demeanor-based reasons; this justification was used in 40.6% of the cases reviewed.¹⁶⁴ In “the 480 cases in which prosecutors struck Black jurors, they offered a demeanor-based reason in 37.5% (180 cases) of these cases.”¹⁶⁵ Second to demeanor was “a prospective juror’s relationship with someone

¹⁵⁹ ALEXANDER, *supra* note 9, at 121 (citing Michael J. Raphael & Edward J. Ungvasky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 UNIV. MICH. J. L. REFORM 229, 236 (1993)).

¹⁶⁰ See generally BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38.

¹⁶¹ *Id.* at vi, 13.

¹⁶² *Id.*

¹⁶³ *Id.* at vi; see also *id.* at 13.

¹⁶⁴ *Id.* at vi, 15.

¹⁶⁵ *Id.* at 16.

who had been involved in the criminal legal system.”¹⁶⁶ Thereafter, frequently, it was “a prospective juror expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially-and/or class-biased.”¹⁶⁷ Such reasons are racialized as African Americans do have a “greater distrust—compared to Whites’—of law enforcement and the criminal legal system based on the history of anti-Black racism in the United States and their lived experiences.”¹⁶⁸

Other justifications that might be typified as the “silly” or “ridiculous” reasons authorized by *Purkett*, included challenges against Black jurors “because they had dreadlocks, were slouching, wore a short skirt and ‘blinged out’ sandals, visited family members who were incarcerated, had negative experiences with law enforcement (often many years before they were called for duty), or lived in East Oakland, Los Angeles County’s Compton, or San Francisco’s Tenderloin.”¹⁶⁹

The Report highlighted that in the last thirty years, the California Supreme Court had “reviewed 142 cases involving *Batson* claims and found a *Batson* violation only [3] times (2.1%).”¹⁷⁰ In addition, the California Courts of Appeal, from 2006 through 2018, found error in the trial court’s denial of a defense *Batson* challenge “in just 18 out of 683 decisions (2.6%).”¹⁷¹ Further, “[i]t has been more than [thirty] years since the California Supreme Court found a *Batson* violation involving the peremptory challenge of an African American prospective juror.”¹⁷² As recently as May 2020, in a dissenting opinion, Justice Liu of the state supreme court stated that the “*Batson* framework, as applied by this court, must be rethought in order to fulfill the constitutional mandate of eliminating racial discrimination in jury selection.”¹⁷³

Batson looks more and more like the product of perhaps a well-intentioned court, but its effect is counter-productive because it is based on the fiction of colorblindness.¹⁷⁴ Although in 1879, in *Strauder v. West Virginia*, the Supreme Court struck down state statutes that excluded Black

¹⁶⁶ *Id.* at vi; *see also id.* at 15.

¹⁶⁷ *Id.* at vi; *see also id.* at 15.

¹⁶⁸ *Id.* at 17, 36–43.

¹⁶⁹ *Id.* at vi.

¹⁷⁰ *Id.* at vii.

¹⁷¹ *Id.* at viii.

¹⁷² *Id.* at vii.

¹⁷³ *Id.* at viii.

¹⁷⁴ Another study based on empirical data collected from Mississippi found that African American jurors are far more likely to be removed from the venire. *See Whitney DeCamp & Elise DeCamp, It’s Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. RSCH. CRIME & DELINQ. 3, 3–30 (2020).

jurors from jury service, “institutional opposition to Black enfranchisement and political participation had taken hold in the South, ushering in ‘the Jim Crow era of white supremacy, state terrorism, and apartheid’ Although laws no longer explicitly barred African Americans from jury service, in many states, “‘local officials achieved the same result by . . . implementing ruses to exclude black citizens.’”¹⁷⁵ The ruses to exclude African Americans from fundamental process remain in full effect today and can be seen in the prosecution’s disproportionate exercise of peremptory challenges against Black jurors.

It is time for our courts to scrutinize *Batson* through a well-informed, race-conscious Twenty-First-Century lens, and reject its precedential position in our criminal procedure jurisprudence. While it is beyond the scope of this article, when considering the methodology that must replace *Batson*, the courts should view peremptory challenges through the perspective of an objective, detached, neutral, and race-conscious judge. Further, the courts should consider those recommendations made by the Berkeley Law Death Penalty Clinic in replacing the *Batson* test.¹⁷⁶

III. COURTS SHOULD USE THE LAW, USE THE LAW, USE THE CONSTITUTION TO REJECT *WHREN* AND *BATSON*

“[S]tare decisis isn’t supposed to be the art of methodically ignoring what everyone knows to be true.”

- Justice Neil Gorsuch, *Ramos v. Louisiana*¹⁷⁷

Nearly all fifty states have accepted *Whren* in their jurisdictions.¹⁷⁸

¹⁷⁵ BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38, at 2 (quoting Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 9–10 (2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf>); *see also* *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879).

¹⁷⁶ *See* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38, at ix–xi.

¹⁷⁷ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020).

¹⁷⁸ *See, e.g.*, cases cited *supra* note 64; *State v. Williams*, 249 So.3d 527 (Ala. Crim. App. 2017); *Jones v. Sterling*, 110 P.3d 1271 (Ariz. 2005); *State v. Harmon*, 113 S.W.3d 75 (Ark. 2003) (noting that it has the capacity to diverge from *Whren* under the state constitution, but upholding pretext stops); *People v. Lomax*, 234 P.3d 377 (Cal. 2010); *People v. Cherry*, 119 P.3d 1081 (Colo. 2005); *State v. McClean*, No. N23NCR170176771, 2019 WL 6736793 (Conn. Super. Ct. November 15, 2019) (unpublished); *State v. Rickards*, 2 A.3d 147 (Del. Super. Ct. 2010) (addressing *Whren* under state constitution and apparently applying it); *Hilton v. State*, 961 So.2d 284 (Fla. 2007); *State v. Taylor*, 144 P.3d 22 (Haw. 2006) (unpublished); *Flieger v. State*, No. 40690, 2015 WL 1406316 (Idaho Ct. App. March 25, 2015); *People v. McDonough*, 940 N.E.2d 1100 (Ill. 2010); *State v. Brown*, 930 N.W.2d 840 (Iowa 2019) (adopting *Whren* under the state constitution); *State v. Greever*, 183 P.3d 788 (Kan. 2008); *Stigall v. Com.*, No. 2007-CA-001880-MR, 2008 WL 4182363 (Ky. Ct. App. 2008); *State v. Sherman*, 931 So.2d 286 (La. 2006); *State v. Sasso*, 143 A.3d 124 (Me. 2016) (largely applying *Whren* with mention

Similarly, *Batson* has also been accepted in most jurisdictions.¹⁷⁹ The multiple state supreme courts and justices who have made statements condemning racial injustice have accepted and applied *Whren* and *Batson*.¹⁸⁰ As Part II illustrated, there is solid evidence that these precedents have substantial, disparate impact on racial minorities (African Americans in particular). Now it is time for our courts to get into that “good trouble,

it may apply a secondary test to consider subjective motivations); *Thornton v. State*, 214 A.3d 34 (Md. 2019); *Com. v. Buckley*, 90 N.E.3d 767 (Mass. 2018) (adopting *Whren* under the state constitution); *State v. George*, 557 N.W.2d 575 (Minn. 1997); *Goff v. State*, 14 So.3d 625 (Miss. 2009); *State v. Brink*, 218 S.W.3d 440 (Mo. Ct. App. 2006); *State v. Farabee*, 22 P.3d 175 (Mont. 2000); *State v. Bartholomew*, 602 N.W.2d 510 (Neb. 1999); *State v. Dickey*, 706 A.2d 180 (N.J. 1998); *People v. Robinson*, 767 N.E.2d 638 (N.Y. 2001); *State v. McClendon*, 517 S.E.2d 128 (N.C. 1999); *State v. Bartelson*, 704 N.W.2d 824 (N.D. 2005); *Bowling Green v. Godwin*, 850 N.E.2d 698 (Ohio 2006); *Dufries v. State*, 133 P.3d 887 (Okla. Crim. App. 2006); *State v. Sleep*, 590 N.W.2d 235 (S.D. 1999); *Walter v. State*, 28 S.W.3d 538 (Tex. Crim. App. 2000); *State v. Miller*, 438 P.3d 1011 (Utah Ct. App. 2019); *Miller v. Chenoweth*, 727 S.E.2d 658 (W. Va. 2012); *State v. Iverson*, 871 N.W.2d 661 (Wis. 2015); *Fertig v. State*, 146 P.3d 492 (Wyo. 2006). *But cf.* *Moran v. State*, 162 P.3d 636, 638 (Alaska Ct. App. 2007) (neither accepting nor rejecting *Whren*); *cf.* *State v. Ochoa*, 206 P.3d 143 (N.M. Ct. App. 2008) (rejecting *Whren* and holding pretext stops as unconstitutional under state constitution); *State v. Arreola*, 290 P.3d 983 (Wash. 2012) (holding that “mixed-motive” stops are constitutional).

¹⁷⁹ See, e.g., *Ex Parte Phillips*, 287 So.3d 1179, 1215–16 (Ala. 2018); *Mooney v. State*, 105 P.3d 149 (Alaska 2005); *State v. Urrea*, 421 P.3d 153 (Ariz. 2018); *Lewis v. State*, 139 S.W.3d 810 (Ark. Ct. App. 2004); *People v. Chism*, 324 P.3d 183 (Cal. 2014); *People v. Rodriguez*, 351 P.3d 423 (Colo. 2015); *State v. King*, 735 A.2d 267, 279, n.19 (Conn. 1999) (eliminating step one); *Sells v. State*, 109 A.3d 568 (Del. 2015); *Spencer v. State*, 238 So.3d 708, 712, 717 (Fla. 2018) (although the court had applied a modification to *Batson*, it appears the court has backed away from that standard); *Johnson v. State*, 809 S.E.2d 769 (Ga. 2018); *State v. Daniels*, 122 P.3d 796, 799, n.6, 800 (Haw. 2005) (largely following the *Batson* framework, but applying a de novo standard of review to challenges and providing for more protected categories); *State v. Ish*, 461 P.3d 774 (Idaho 2020); *People v. Houston*, 874 N.E.2d 23 (Ill. 2007); *Jeter v. State*, 888 N.E.2d 1257 (Ind. 2008); *State v. Veal*, 930 N.W.2d 319 (Iowa 2019); *State v. Gonzalez*, 460 P.3d 348 (Kan. 2020); *Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015); *State v. Draughn*, 950 So.2d 583 (La. 2007); *State v. Hollis*, 189 A.3d 244 (Me. 2018); *Spencer v. State*, 149 A.3d 610, 621–22 (Md. 2016) (applying *Batson* to defense counsel); *Commonwealth v. Robertson*, 105 N.E.3d 253 (Mass. 2018); *People v. Knight*, 701 N.W.2d 715 (Mich. 2005); *State v. Adams*, 936 N.W.2d 326 (Minn. 2019); *Hardison v. State*, 94 So.3d 1092 (Miss. 2012); *State v. Meeks*, 495 S.W.3d 168, 173 (Mo. 2016) (applying *Batson*, but the first step requiring only that the struck juror is of a “cognizable racial group”); *State v. Warren*, 2019 MT 49, 439 P.3d 357 (Mont. 2019); *State v. Wofford*, 904 N.W.2d 649 (Neb. 2017); *Mathews v. State*, 466 P.3d 1255 (Nev. 2020); *State v. Ouahman*, 58 A.3d 638 (N.H. 2012); *State v. Thompson*, 132 A.3d 1229 (N.J. 2016); *State v. Salas*, 236 P.3d 32 (N.M. 2010); *People v. Bridgeforth*, 69 N.E.3d 611, 613 (N.Y. 2016) (applying *Batson* but covers more protected categories); *State v. Bennett*, 843 S.E.2d 222 (N.C. 2020); *State v. Galvez*, 858 N.W.2d 619 (N.D. 2015); *State v. Were*, 890 N.E.2d 263 (Ohio 2008); *Smith v. State*, 157 P.3d 1155 (Okla. Crim. App. 2007); *State v. Curry*, 447 P.3d 7 (Or. Ct. App. 2019); *Commonwealth v. Cook*, 952 A.2d 594 (Pa. 2008); *State v. Porter*, 179 A.3d 1222 (R.I. 2018); *State v. Inman*, 760 S.E.2d 105 (S.C. 2014); *State v. Scott*, 829 N.W.2d 458 (S.D. 2013); *State v. Kiser*, 284 S.W.3d 227 (Tenn. 2009); *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508 (Tex. 2008); *State v. Colwell*, 994 P.2d 177 (Utah 2000); *State v. Yai Bol*, 29 A.3d 1249 (Vt. 2011); *Betha v. Commonwealth*, 831 S.E.2d 670 (Va. 2019); *State v. Boyd*, 796 S.E.2d 207 (W. Va. 2017); *State v. Lamon*, 664 N.W.2d 607 (Wis. 2003); *Pickering v. State*, 464 P.3d 236 (Wyo. 2020). *But cf.* *State v. Jefferson*, 429 P.3d 467 (Wash. 2018) discussed *supra* note 48.

¹⁸⁰ See cases cited *supra* notes 176–77.

necessary trouble.”¹⁸¹

While independent analysis of a court’s own state constitution and the promulgation of court rules to dismantle *Whren* and *Batson* are all honorable quests, a far more explicit and powerful message from our courts would be the overt act of dismantling and rejecting these two racially oppressive precedents. This is, of course, like all things in life, much easier said than done. We lawyers are taught right out of the gate the supremacy of *stare decisis*, precedent, and the Supreme Court. This is a call to the lower courts to be the administrators of justice they have taken oaths to be.¹⁸²

To that end, this Part provides lower courts with an analytical framework for rejecting *Whren* and *Batson*. This framework draws upon principles of *stare decisis*, namely Justice Kavanaugh’s methodology for *stare decisis*; the concept of “perceived versus actual harms” of precedent; and “narrowing from below” as articulated by legal scholar Richard M. Re.¹⁸³ While the application of Justice Kavanaugh’s approach would suffice for lower courts in overturning their own precedent (i.e., horizontal *stare decisis*) and the Supreme Court should it ever again have the occasion of revisiting *Whren* and *Batson* (though one cannot be too optimistic given the Court just applied *Batson* in 2019 in *Flowers v. Mississippi*), steps two and three of the proposed framework are for the lower courts to take action on *Whren* and *Batson* in spite of “vertical *stare decisis*.”¹⁸⁴

Specifically, the proposed framework is as follows. Step one requires lower courts to weigh Justice Kavanaugh’s three considerations in his *stare decisis* approach; if those considerations weigh in favor of rejecting the precedent, then courts move to step two. Step two of the analysis asks courts to evaluate whether inaction on the precedent will result in continued actual, rather than perceived or theoretical, harms. If this query is answered affirmatively then courts move to the final step. Step three obligates the court to deliberate whether rejecting the precedent will make the Supreme Court more proficient in its rulings. This step draws upon one of four models or views—“the Proficiency Model”—of vertical *stare decisis* discussed by legal scholar Richard M. Re.¹⁸⁵ In the end, if evaluation of all three steps leads the lower court to reject the precedent, then the court can either narrow or overrule the precedent. Under this framework, the lower courts most certainly should narrow or overrule *Whren* and *Batson*.

A. *An Analytical Framework for Dismantling Whren and Batson, Step*

¹⁸¹ Am. Const. Soc’y Convention, *supra* note 2.

¹⁸² See, e.g., 28 U.S.C.A. § 453 (West); WIS. STAT. ANN. § 757.2 (West 2020).

¹⁸³ See generally Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

¹⁸⁴ *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234–38 (2019).

¹⁸⁵ Re, *supra* note 183, at 939–40.

*One: The Use of Justice Kavanaugh’s Stare Decisis Methodology*¹⁸⁶

Particularly in moments of social change and progress, the Supreme Court has untethered itself from burdensome, outdated precedent.¹⁸⁷ If courts stubbornly cling to prior case law that is no longer principled or just, the legitimacy of the judiciary becomes apocryphal. Indeed, “the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”¹⁸⁸

On the other hand, *stare decisis* carries with it a predictability and, arguably, a sense of certainty that can positively impact our society and its relationship to the courts and law. As Chief Justice Roberts recently noted, *stare decisis* “brings pragmatic benefits. Respect for precedent ‘promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’”¹⁸⁹

What then tips the scales one way or the other, for or against the application of *stare decisis* by our courts? Although the answer supposedly lies in a discussion of a multitude of factors that the Supreme Court has applied on an ad hoc basis, *stare decisis* has been in somewhat of a disarray until very recently (in April 2020) when *Ramos v. Louisiana* was decided.¹⁹⁰

1. *The Casey factors and the vortex that is stare decisis*

Stare decisis might be best understood as inapposite to the frequently cited mantra: “Don’t let your past define your future.” *Stare decisis*, definitionally, is that the past controls the future. There are two recognized types of *stare decisis*—horizontal and vertical *stare decisis*. Horizontal *stare decisis* is when a court is bound by its own precedents unless it finds, in consideration of the principles of *stare decisis*, that it should not be so bound.¹⁹¹ Vertical *stare decisis*, however, is when a court is bound by a

¹⁸⁶ We all watch and wonder whether Justice Kavanaugh (and any of his other colleagues) will seek to dismantle *Roe v. Wade* one day. After *Ramos v. Louisiana*, there will certainly be more scholarship in this area. Although such research and comment are beyond this article, it is worth noting here that given the framework he set out in his concurrence in *Ramos*, Justice Kavanaugh may have great difficulty in taking on *Roe*. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410–20 (2020).

¹⁸⁷ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁸⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 866 (1992) (plurality).

¹⁸⁹ *June Med. Serv., L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (C.J. Roberts, dissenting) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

¹⁹⁰ See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020).

¹⁹¹ Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 CALIF. L. REV. 1441, 1467 (2004).

higher court's (such as the Supreme Court's) precedents.¹⁹² Complicating things for the lower courts, some commentators have remarked that it is "settled law" that lower courts should abide by "vertical precedent."¹⁹³ Justice Stevens went as far as accusing a lower court of "'engag[ing] in an indefensible brand of judicial activism' when it 'refused to follow' a 'controlling precedent' of the Supreme Court."¹⁹⁴

The Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* offers one of the most comprehensive discussions of horizontal *stare decisis* (where the Supreme Court was analyzing its own precedent) prior to *Ramos*. At issue in *Casey* were five provisions of Pennsylvania's Abortion Control Act of 1982 (as amended in 1988 and 1989), placing limitations on abortion in spite of the precedent of *Roe v. Wade*.¹⁹⁵ It has been noted that *Casey* is where *stare decisis* is "most comprehensively formulated and defended."¹⁹⁶ Indeed, "one searches the first 500 volumes of the U.S. Reports in vain for a full-blown theory or doctrine of precedent. Think about it: after over 200 years in operation, *Casey*, 1992, is the Court's first grand theology of precedent[.]"¹⁹⁷

In reaffirming *Roe*, the *Casey* court applied factors in assessing the continued utility of *Roe* along with "an additional set of prudential, policy, and (seemingly) political judgments to lay on top of the more-legal factors."¹⁹⁸ The court analyzed factors and notions of workability (and/or judicial efficiency), reliance, abandonment, "changed facts," societal views (i.e., changed perceptions), and judicial integrity.¹⁹⁹ No factor "is treated as dispositive; none is identified as essential; the relative weight of each is unclear."²⁰⁰

As to the "workability" factor, the inquiry is whether a prior rule previously announced "has proven to be intolerable simply in defying

¹⁹² *Id.*

¹⁹³ *Id.* at 1466–67.

¹⁹⁴ *Id.* at 1466 (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting). "This statement [was] unanimous because the four dissenters explicitly agreed with the majority's statement on this point," though the majority did not use the term "judicial activism." Kmiec, *supra* note 191, at 1466 n.155 (citing *Rodriguez de Quijas*, 490 U.S. at 484).

¹⁹⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992); *see also* *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹⁶ Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1166 (2008).

¹⁹⁷ *Id.* at 1169.

¹⁹⁸ *Id.* at 1172.

¹⁹⁹ *See generally id.* at 1172–75, 1177–85, 1192–94, 1198–99; *see also Casey*, 505 U.S. at 845, 854–56, 863–64, 869.

²⁰⁰ Paulsen, *supra* note 196, at 1172.

practical workability.”²⁰¹ The *Casey* court held that *Roe* was not “unworkable,” and, rather, represented “a simple limitation beyond which a state law is unenforceable.”²⁰² The Court noted that the judicial assessments of state laws affecting abortion rights that occurred in the wake of *Roe* have fallen “within judicial competence.”²⁰³ A commentator attempting to unpack this analysis of workability/unworkability has noted:

[A] precedent or line of precedents . . . tends to be thought “unworkable” where there exists no readily discoverable, judicially manageable standards to guide judicial discretion or where the purported “rule” supplied by precedent seems to require judicial policy determinations of a kind not appropriate for courts to be making.²⁰⁴

Perhaps closely aligned with “workability” is the concept of judicial efficiency. “The Court’s discussion of *stare decisis* in *Casey*, before plowing through specific factors one at a time, began with the idea of efficiency, noting that the idea of following precedent ‘begins with necessity, and a contrary necessity marks its outer limit.’”²⁰⁵ The Court, wary of coming to every single issue anew, highlighted the importance of precedent, but also indicated the outer limit where the necessity to discard precedent would arise “if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.”²⁰⁶

Another factor in *Casey* was the assessment of reliance interests in the perpetuation of the existing rule. That is, “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.”²⁰⁷ The Court’s goal here is to comprehend what the reliance costs would be to those who have steadily leaned on the precedential value of the rule under scrutiny.²⁰⁸ Arguably, part of that calculus, per the *Casey* court, is the societal interests in continuing on with the old rule, or “social reliance.”²⁰⁹ It has been highlighted that “*Casey* appears to broaden the inquiry, framing the question of reliance as whether changing a legal interpretation to correct a perceived

²⁰¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992); *see also* Paulsen, *supra* note 196, at 1173.

²⁰² *Casey*, 505 U.S. at 855.

²⁰³ *Id.*

²⁰⁴ Paulsen, *supra* note 196, at 1173; *see also Casey*, 505 U.S. at 855.

²⁰⁵ Paulsen, *supra* note 196, at 1174 (quoting *Casey*, 505 U.S. at 854).

²⁰⁶ *Casey*, 505 U.S. at 854; *see also* Paulsen, *supra* note 196, at 1175.

²⁰⁷ *Casey*, 505 U.S. at 854.

²⁰⁸ *Id.* at 855; *see also* Paulsen, *supra* note 196, at 1177–78.

²⁰⁹ Paulsen, *supra* note 196, at 1180.

error would cause ‘significant damage to the stability of the society governed by’ the rule in question.”²¹⁰

On the other end of the spectrum of reliance costs, however, is where societal interests in continued application of precedent carry much less weight than reliance interests related to individual rights. For example,

“The holding in *Bowers [v. Hardwick]*,” wrote Justice Kennedy for the Court, “has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual *or societal* reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so.”²¹¹

The balance of individual or societal reliance costs seems to be in the “eye of the beholder,” in that the “Court sometimes accords social reliance significant weight and sometimes it does not. (The cynic might be inclined to say that the choice depends on the Court’s social policy preferences.)”²¹²

The next *Casey* factor, and perhaps the simplest, is “whether a precedent decision’s premises, analysis, or holding have been significantly (or significantly *enough*) undermined by a subsequent case or by subsequent cases that the precedent” has essentially been abandoned.²¹³

The *Casey* court also asked, “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification,” i.e., the “changed facts” factor.²¹⁴ It has been argued, however, that:

[I]f changes in factual circumstances mean precedent no longer *applies* to very many real-world situations—its relevance has been overtaken by historical changes—that scarcely seems a reason to change the governing legal interpretation and abandon the precedent. Presumably, the precedent might still be right; it simply does not matter

²¹⁰ *Id.* (quoting *Casey*, 505 U.S. at 855).

²¹¹ Paulsen, *supra* note 196, at 1182 (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (emphasis added)).

²¹² Paulsen, *supra* note 196, at 1182. Significantly, Paulsen, in demonstrating the problems with the “reliance” factor, maintains that, for example, “*Plessy [v. Ferguson]* was as wrong as wrong precedent can be,” but that “[i]f ‘reliance’ and stability interests ever should counsel against overruling a precedent, under the reasoning of *Casey*, *Plessy* would have been such a case. But that cannot possibly be right, can it?” *Id.* at 1184.

²¹³ *Id.* at 1184–85; *see also Casey*, 505 U.S. at 855.

²¹⁴ *Casey*, 505 U.S. at 855.

much anymore.²¹⁵

The *Casey* court’s “changed facts” (or “changed perceptions”) analysis centered primarily on *Plessy v. Ferguson* (1896) to *Brown v. Board of Education* (1954).²¹⁶ “Society’s understanding of the facts upon which a constitutional ruling was sought in 1954 was . . . fundamentally different from the basis claimed for the decision in 1896.”²¹⁷ It has been noted that while *Plessy* clearly needed to be rejected:

[T]he [“changed facts”] factor, as used in *Casey* to explain the propriety of the Court’s repudiation . . . entails a subtle and disturbing implication—almost impossible to reconcile with the other factors comprising the Court’s *stare decisis* doctrine—that *the meaning of the Constitution properly depends on how society views social facts at different times*.²¹⁸

This has the potential to swallow the entirety of *stare decisis* analysis based on the current temperament of the judiciary as informed by a majoritarian society’s beliefs and interests. This poses a whole other line of inquiry as to whether the judiciary is tasked with, *inter alia*, promoting social norms or what is “morally” right versus wrong.

Finally, the *Casey* court was concerned with judicial integrity. In a nutshell, this factor queries:

[W]hether, even if a precedent is thought erroneous, it would seem arbitrary, capricious, or fickle for the Court to be changing its mind too often or too readily (especially if its decisions change along with personnel changes) or to be changing its interpretation in response to public, or political, or even scholarly criticism or pressure.²¹⁹

As the *Casey* court acknowledged:

There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to

²¹⁵ Paulsen, *supra* note 196, at 1192.

²¹⁶ *Casey*, 505 U.S. at 863.

²¹⁷ *Id.*

²¹⁸ Paulsen, *supra* note 196, at 1194; *see also id.* at 1192–93.

²¹⁹ *Id.* at 1198.

drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.²²⁰

On the other hand, with the evolution of societal thought and tolerance or, perhaps better put, acceptance, should the Nation's highest court not also so evolve?

One could efficiently wrap up the *Casey* factors as follows: “[t]he end result of this inquiry is that the current doctrine of stare decisis does not require adherence to the current doctrine of stare decisis.”²²¹ Perhaps for good reason, the doctrine has been called “embarrassingly unworkable.”²²² Most problematic with the *Casey* factors is that the factors are tethered to an extremely broad inquiry—should *stare decisis* apply or not? Instead, a far better approach, one that is crafted by Justice Kavanaugh, is that the *Casey* factors and related questions ought to be tethered to several inquiries that serve as a compass in answering the overarching probe of whether *stare decisis* should be followed or not.

2. *The Ramos Court's focus on race and Justice Kavanaugh's foothold for disparate impact to become legally significant*

In April 2020, we saw the Court's willingness to engage in critical analysis of race as a factor in our criminal procedure jurisprudence. *Ramos v. Louisiana* dealt with the utility of continuing (in the states of Louisiana and Oregon) *Apodaca v. Oregon* (1972), where the Supreme Court held that unanimous verdicts were not constitutionally required in criminal trials under the Sixth and Fourteenth Amendments.²²³ It is critical, and extremely poignant when considering the future existence (or demise) of *Whren* and *Batson*, that the Supreme Court so candidly and openly discussed the history of racism and its role in the *Apodaca* decision. The *Ramos* opinion gives us hope that the current Supreme Court is ready and willing to reckon with both the historical and continued presence of racial injustice in its criminal procedure jurisprudence.

At the outset of *Ramos*, the Supreme Court demonstrates its willingness to engage in intellectual honesty about the racial backdrop of some of its criminal procedure jurisprudence. It is all about race from the beginning of *Ramos*; encouragingly, the opinion recognizes the injustice of rules and laws that are “facially race-neutral,” but are, nevertheless, tethered to the

²²⁰ *Casey*, 505 U.S. at 866.

²²¹ Paulsen, *supra* note 196, at 1167.

²²² *Id.*

²²³ See *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); see also *Apodaca v. Oregon*, 406 U.S. 404 (1972).

promotion of racism.²²⁴ The Supreme Court also appears to acknowledge the injustice of racial disparities in its discourse on race and its historical position in both Louisiana and Oregon as it pertains to non-unanimous verdicts.

First, Justice Gorsuch went back to the nineteenth century by describing a Louisiana state constitutional convention in 1898. At this convention, there was an endorsement for non-unanimous verdicts for serious crimes seeking to “‘establish the supremacy of the white race,’ and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.”²²⁵ Justice Gorsuch noted that, in a successful attempt to circumvent both “unwanted national attention” (that would result from the recent U.S. Senate’s call for an investigation into Louisiana’s exclusion of African Americans from juries) and the Fourteenth Amendment, Louisiana delegates at the convention crafted an alleged “race-neutral” mechanism to render African American juror contributions moot.²²⁶ “With a careful eye on racial demographics, the convention delegates sculpted a ‘facially race-neutral’ rule permitting ten-to-two verdicts in order to ‘ensure that African American juror service would be meaningless.’”²²⁷ Justice Gorsuch also addressed the state of Oregon’s history of racism, tracing non-unanimous verdicts in that state back “to the rise of the Ku Klux Klan and efforts to dilute ‘the influence of racial, ethnic, and religious minorities on Oregon juries.’”²²⁸

Next, in her concurrence, Justice Sotomayor stated that, in part, she wrote separately because “the racially biased origins of the Louisiana and Oregon laws uniquely matter here.”²²⁹ In particular, Justice Sotomayor took issue with the Louisiana and Oregon state legislatures’ failure to reckon with the discriminatory purpose and effect of the laws they issued. She wrote, “Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law’s tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here.”²³⁰

²²⁴ *Id.* at 1394.

²²⁵ *Id.* (first citing OFF. J. OF THE PROC. OF THE CONST. CONVENTION OF THE STATE OF LA. 374 (H. J. Hearsey ed. 1898); then citing Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 HARV. L. REV. 279, 286–87 (1899); and then citing *Louisiana v. United States*, 380 U.S. 145, 151–53 (1965)).

²²⁶ *Id.*

²²⁷ *Id.* (quoting *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018), App. 56–57) (citing Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018)).

²²⁸ *Id.* (quoting *State v. Williams*, No. 15-CR-58698 (C.C. Ore., Dec. 15, 2016), App. 104).

²²⁹ *Id.* at 1408 (Sotomayor, J., concurring in part).

²³⁰ *Id.* at 1410.

Justices Gorsuch and Sotomayor were troubled by the overt racism that led to the institution and continuation of alleged race-neutral laws in Louisiana and Oregon; however, Justice Kavanaugh took it a step further when he, albeit nominally, expressed that disparate impact without per se overt racism matters. Justice Kavanaugh joined Justice Gorsuch in a historical discussion of race in Louisiana, referring to the 1898 state convention and its approval of “non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African Americans, especially in voting and jury service.”²³¹ Justice Kavanaugh diverged from the other two justices in his discussion on race when he claimed an intolerance for racially discriminatory effects. Justice Kavanaugh queries, *inter alia*, “[w]hy stick by an erroneous precedent . . . that tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?”²³²

In perhaps a narrow, but still noteworthy manner, Justice Kavanaugh acknowledged a foothold for disparate impact to matter through the lens of *stare decisis* analysis. While Justice Kavanaugh, much like Justices Gorsuch and Sotomayor, was clearly troubled by the racist origins of non-unanimous verdicts, he also indicated that its continued racially discriminatory effects are problematic. Justice Kavanaugh homes in on the discriminatory effects of non-unanimous verdicts when he wrote:

Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The [ten] jurors “can simply ignore the views of their fellow panel members of a different race or class.” That reality—and the resulting perception of unfairness and racial bias—can undermine the confidence in and respect for the criminal justice system. The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors. In effect, the non-unanimous jury allows backdoor and unreviewable

²³¹ *Id.* at 1417 (Kavanaugh, J., concurring in part) (first citing THOMAS AIELLO, JIM CROW’S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA 16–26 (2015); and then citing Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1620 (2018)).

²³² *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring in part) (emphasis added). Noteworthy is that Justice Sotomayor mentioned both “discriminatory taint” and “discriminatory effect” in her concurrence, but was not as explicit about this as Justice Kavanaugh. *See id.* at 1410 (Sotomayor, J., concurring in part). In her analysis of Louisiana’s reenactment of the law at issue, she noted that “Louisiana’s perhaps only effort to contend with the law’s discriminatory purpose and effects came recently, when the law was repealed altogether.” *Id.*

peremptory strikes against up to [two] of the [twelve] jurors.²³³

Lower courts should be discussing race and its interaction with *Whren* and *Batson* like the Supreme Court did in *Ramos*. Though perhaps not as overtly racist, the origins of *Whren* and *Batson* are arguably very similar to *Ramos*'s roots. While there was no constitutional convention that involved explicit proclamations of the supremacy of the white race, both *Whren* and *Batson* were decided in questionable periods of our nation's history. Both cases were decided during a time where Black men were rapidly and disproportionately sent to prison.²³⁴ At the time of *Whren*, racial animus in parts of our country was extremely high following the cruel, senseless beating of Rodney King.²³⁵ In the face of all of this, the *Whren* court mustered the confidence to tell us that race did not matter in police contacts.

Further, the *Batson* court crafted a test that embraced colorblindness in an effort to dissuade overt racism in the exercise of peremptory challenges by the government, even though, at the time of *Batson*, there were very few published cases demonstrating overt, explicit racism during jury selection by the government.²³⁶ Indeed, *Batson* created a race-neutral test to deal with a race-neutral problem.

Non-unanimous jury verdicts and the law established in *Whren* and *Batson* share common origins—the perpetuation of a criminal justice system centered on social control, not crime control.²³⁷ As the non-unanimous verdict suppresses the voices of minority jurors and serves as a mechanism to keep those jurors in check, *Whren* authorizes the over-policing and targeting of racial minorities and over-includes African Americans in one of the most powerless chairs of the courtroom, that of the defendant. In addition, *Batson* ensures the continued exclusion of racial minorities as decision-makers in a process that looks more and more like it

²³³ *Id.* at 1418 (Kavanaugh, J., concurring in part).

²³⁴ *See supra* notes 101–107.

²³⁵ *See supra* notes 105–107.

²³⁶ *See Batson v. Kentucky*, 476 U.S. 79, 10 (Marshall, J., dissenting) (“Although the means used to exclude blacks have changed, the same pernicious consequence has continued.”) (first citing *Strauder v. West Virginia*, 100 U.S. 303 (1880); then citing *Swain v. Alabama*, 380 U.S. 202, 231–58 (1965) (Goldberg, J., dissenting); then citing Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968); and then citing JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 155–57 (1977)). Notably, in *State v. Washington*, a prosecutor “admitted that he had ‘utilized a large percentage of his peremptory challenges in the exclusion of blacks,’ but he stated he did not do so ‘on the basis of color’ rather ‘on the nature of the case, the intelligence of the juror, and on whether or not the juror could related, not only to me as a person, but to the theory of my case.’” *State v. Washington*, 375 So. 2d 1162, 1163 (La. 1979).

²³⁷ ALEXANDER, *supra* note 9, at 21 (describing how following the collapse of one system of control, such as slavery and Jim Crow, there is a transition period where “backlash intensifies and a new form of racialized social control begins to take hold”); *id.* at 21–22.

was designed for the control of certain people, not for “blind justice.”

3. *Justice Kavanaugh’s stare decisis methodology*

Justice Kavanaugh’s concurrence in *Ramos* provided courts with a step-by-step “how-to” in reckoning with the past and tearing down these “monuments” of racial injustice that remain in our criminal procedure jurisprudence. As noted previously, *stare decisis* is not a model that exemplifies clarity; given its complete disarray, it is open to criticism of simply being results-oriented or a gateway for judicial activism.²³⁸ *Stare decisis* desperately needed synthesis and organization; enter Justice Kavanaugh’s approach in *Ramos*.

a. *Justice Kavanaugh’s three considerations for the applicability of stare decisis*

In *Ramos*, Justice Kavanaugh addressed a central problem of *stare decisis*—the doctrine seems to have endless factors floating about that attempt to answer whether it should be applied. As Justice Kavanaugh noted, “the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together.”²³⁹ Justice Kavanaugh then provided us with that roadmap by proposing three considerations for whether the doctrine of *stare decisis* should be applied in cases going forward.

The first consideration was whether “the prior decision is not just wrong, but grievously or egregiously wrong?”²⁴⁰ Justice Kavanaugh described this inquiry as more than a “garden-variety error or disagreement.”²⁴¹ Factors that courts may consider in this inquiry are “the quality of the precedent’s reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors.”²⁴² Justice Kavanaugh cites to *Korematsu v. United States* and *Plessy v. Ferguson* as cases that were egregiously wrong when they were decided.²⁴³ He also provides an example, *Nevada v. Hall*, of where a case “may be unmasked as egregiously wrong or based on later legal or factual

²³⁸ See Kmiec, *supra* note 191, at 1466–67.

²³⁹ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 1414–15.

²⁴³ *Id.* at 1415; see also *Korematsu v. United States*, 323 U.S. 214 (1944); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

understandings or developments.”²⁴⁴

The second inquiry proffered by Justice Kavanaugh is whether “the prior decision caused significant negative jurisprudential or real-world consequences?”²⁴⁵ Justice Kavanaugh indicated that courts may consider factors such as “workability” and “consistency and coherence with other decisions” again.²⁴⁶ Justice Kavanaugh further stated that courts “may also scrutinize the precedent’s real-world effects on the citizenry, not just its effects on the law and the legal system.”²⁴⁷ Here, Justice Kavanaugh cited *Brown v. Board of Education* as one such example.²⁴⁸

The third and final consideration developed by Justice Kavanaugh is whether “overruling the prior decision [would] unduly upset reliance interests?”²⁴⁹ Much like the *Casey* court utilized this factor, “[t]his consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent.”²⁵⁰ Factors considered by the court here include, *inter alia*, “a variety of reliance interests and the age of the precedent.”²⁵¹ Notably, the “variety of reliance interests” here appeared to embrace *Casey*’s inclusion of “society’s interests,” as does Justice Gorsuch’s majority opinion in *Ramos* where he stated, “[i]n its valiant search for reliance interests, the dissent somehow misses maybe the most important one: the reliance interests of the American people.”²⁵²

Justice Kavanaugh is quite candid that, although this “structure methodology and roadmap” in deciding whether or not to adhere to *stare decisis* is better organized, its application “is not a purely mechanical exercise”²⁵³ Nonetheless, Justice Kavanaugh writes that “[t]he three considerations correspond to the Court’s historical practice and encompass various individual factors that the Court has applied over the years as part of the *stare decisis* calculus.”²⁵⁴ He also notes that they are consistent with the founding principle that “overruling is warranted when (and only when) a

²⁴⁴ *Ramos*, 140 S. Ct. at 1415; *see also* *Nevada v. Hall*, 440 U.S. 410 (1979), *overruled by* *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (overruling *Hall* under *stare decisis* finding that the states “retain their sovereign immunity from private suits brought in the courts of other [s]tates.”).

²⁴⁵ *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*; *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁴⁹ *Ramos*, 140 S. Ct. at 1415.

²⁵⁰ *Id.*; *see also* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992).

²⁵¹ *Casey*, 505 U.S. at 854–55.

²⁵² *Ramos*, 140 S. Ct. at 1408 (majority opinion); *see also* Paulsen, *supra* note 196, at 1180, 1182 (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)).

²⁵³ *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

²⁵⁴ *Id.*

precedent is ‘manifestly absurd or unjust.’”²⁵⁵

b. *Application of Justice Kavanaugh’s analytical framework to Whren and Batson*

Justice Kavanaugh’s *stare decisis* analysis is instructive in evaluating the continuing viability of *Whren* and *Batson*, with particular focus on his application of considerations two and three in *Ramos*. When extrapolating Justice Kavanaugh’s *Ramos* analysis to *Whren* and *Batson*, it is evident that these two cases no longer deserve the protection of *stare decisis*—vertical or horizontal.

In *Ramos*, Justice Kavanaugh began his examination of the utility of *stare decisis* and its application with his first consideration—whether *Apodaca* is egregiously wrong. Although his application of this first consideration is not entirely on point, as *Whren* and *Batson* were not “outliers” of their time, the understanding of the importance of factual developments under this consideration cannot be overstated.²⁵⁶ One of the factors to examine in this inquiry, per Justice Kavanaugh, is “changed facts.”²⁵⁷ The substantial research conducted in North Carolina on traffic stops may not necessarily show “changed facts,” as there is evidence racial profiling was prevalent before (and at the time) of *Whren*, but the *Casey* court, in analyzing this factor, noted that when facts “come to be seen so differently, as to have robbed the old rule of significant application or justification,” such as in *Brown v. Board of Education*, then that is reason to reject the precedent.²⁵⁸ The research and data demonstrating factually what is happening on traffic stops and how African Americans are disproportionately harmed is striking. It is not too far afield to say that how we view traffic stops has “come to be seen so differently” as to make *Whren* look like the modern-day *Plessy v. Ferguson* in need of a *Brown*.

Similarly, the research on *Batson*, as produced in the Berkeley Death Penalty Clinic June 2020 report, shows what Justice Marshall already knew, but *Purkett* was blind to; that is, race-neutral explanations would circumvent any, perhaps rhetorically stated, goal of addressing the systemic exclusion of African Americans from juries by the Supreme Court.²⁵⁹ *Batson* no longer has significant application (nor did it ever) as it is so easily thwarted by the

²⁵⁵ *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 70).

²⁵⁶ Justice Kavanaugh found that *Apodaca* was egregiously wrong, noting that *Apodaca* was an outlier in the Supreme Court’s jurisprudence even when it was decided. He also noted that the original meaning and the Court’s prior cases illustrate that the Sixth Amendment required unanimous verdicts. *Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring in part).

²⁵⁷ *Id.* at 1414.

²⁵⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855, 863 (1992); see also ALEXANDER, *supra* note 9, at 133 (detailing 1990’s data on racial profiling).

²⁵⁹ See *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring); see also *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

litany of alleged race-neutral explanations offered by the prosecution.

It is true that it was earlier noted that “changed facts” analysis has the potential to swallow the entirety of *stare decisis* analysis based on the temperament of the bench affected by a majoritarian society’s beliefs and interests. In addition, as noted previously, this begs the question of whether the courts are tasked with promoting social norms or what is “morally” right versus wrong. It is therefore necessary for all of Justice Kavanaugh’s considerations to be viewed together and balanced by the courts.

The second inquiry proffered by Justice Kavanaugh is whether “the prior decision caused significant negative jurisprudential or real-world consequences?”²⁶⁰ In *Ramos*, Justice Kavanaugh found that although *Apodaca* was “workable,” it caused “significant negative consequences.”²⁶¹ This is where Justice Kavanaugh discusses race, both the history of racism related to *Apodaca*’s rule as well as its “continued racially discriminatory effects.”²⁶² In addition to what is detailed *supra* in section B, Justice Kavanaugh stated that “the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling, in my respectful view.”²⁶³ He goes on to cite to *Pena-Rodriguez v. Colorado* for the proposition that the Supreme Court “has emphasized time and time again the ‘imperative to purge racial prejudice from the administration of justice’ generally and from the jury system in particular.”²⁶⁴

For *Whren*, the primary negative real-life consequence is that African Americans are stopped by police at an astronomically higher rate than whites, but for little reason other than (quite likely) their race. These consequences can be demonstrated in statistical form. For example, per Baumgartner et al.’s findings, in the year 2010 alone, Black motorists were sixty-three percent more likely to be pulled over than whites.²⁶⁵ Black drivers made up 51.85% of “investigatory” stops (as defined by Baumgartner et al.), where the stop is more likely to serve as a pretext. Black drivers stopped are 115% as likely as whites to be searched.²⁶⁶ Police are twenty-two percent less likely to find evidence on Black drivers following consent searches and twelve percent less likely to find evidence subsequent to searches allegedly based on probable cause, demonstrating “that officers are either worse at making probable cause assessments as to whether black motorists have contraband or have a lower threshold for what qualifies as

²⁶⁰ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

²⁶¹ *Id.* at 1417.

²⁶² *Id.* at 1418–19.

²⁶³ *Id.* at 1418.

²⁶⁴ *Id.* (quoting *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017)).

²⁶⁵ See *supra* Part II(D).

²⁶⁶ See *supra* Part II(D).

cause when interacting with a black driver.”²⁶⁷ The truth is that African Americans are over-included in our criminal justice system as targets.

While there is apparently plenty of room for African Americans at the defense counsel table, there is a corresponding paucity of room in the jury box. For *Batson*, the principal negative real-life consequence is that African Americans are being over-excluded as the decision-makers in our courtrooms. As Part II demonstrated, out of 683 cases (where *Batson* challenges were at issue) decided by the California Courts of Appeal over the span of twelve years, in approximately seventy-two percent of those cases, the prosecution used peremptory challenges against African American jurors.²⁶⁸ In addition, this research shows *Batson*'s utter lack of utility and how easy it is to circumvent a purposeful discrimination finding by making up any “silly” or “ridiculous” reason for the peremptory strike against a racial minority.²⁶⁹ It also demonstrates how “race-neutral” justifications can be linked to systematic racism through the over-inclusion of racial minorities in the criminal justice system. For example, frequent “race-neutral” reasons for striking a racial minority were “a prospective juror’s relationship with someone who had been involved in the criminal legal system,” or “a prospective juror expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially-and/or class-biased.”²⁷⁰

These real-world consequences of *Whren* and *Batson* are not only negative, but also (literally, not theoretically) harmful. Therefore, *Whren* and *Batson* “fail” the second consideration of Justice Kavanaugh’s *stare decisis* approach.²⁷¹

Finally, under Justice Kavanaugh’s third consideration the reliance interests are considered. That analysis primarily focuses on what the resultant costs will be to those who have relied upon the precedent if overturned. It has also been construed as an accounting of society’s interests.²⁷² Justice Kavanaugh found that the reliance costs of overturning *Apodaca* were minimal, highlighting that other than “the effects on that limited class of directed review cases, it will be relatively easy going forward for Louisiana and Oregon to transition to the unanimous jury rule that the

²⁶⁷ See *supra* Part II(D).

²⁶⁸ See *supra* notes 101–107 and accompanying text; see also *supra* notes 120–123.

²⁶⁹ See *supra* notes 101–107 and accompanying text; see also *supra* note 126.

²⁷⁰ See *supra* notes 101–107 and accompanying text; see also *supra* notes 126–128.

²⁷¹ Justice Kavanaugh recognizes that courts will disagree on how to balance the considerations as well. See *Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring in part). The word “failure” is used here to indicate that *Whren* and *Batson* do not impress on whether they should be adhered to considering their negative, harmful consequences in the real world.

²⁷² See *supra* Part III(C)(2).

other [forty-eight] states and the federal courts use.”²⁷³

To be sure, the reliance costs on law enforcement in overturning *Whren* will be significant, but not unduly burdensome. No longer will police be permitted to stop citizens to investigate situations for which they have no cause under the guise of a minimal traffic code violation. Nevertheless, it does not necessitate a leap in logic to say that police officers will, in fact, continue to stop drivers for traffic code violations and will still ask for consent or use their understanding of probable cause to investigate beyond such violations. However, without *Whren*, they would be required to articulate that the traffic code violation was the actual reason for the stop and that the stop would not progress further without the appropriate cause. In addition, police officers would be heavily scrutinized on how the stop progresses to limit pretextual stops. This is not that different from what police officers are already required to do under other precedent, such as *Terry v. Ohio*.²⁷⁴ Further, it ought to be axiomatic by now what the reliance interests of the American people are in seeing that *Whren*, be overturned.²⁷⁵

As to the rejection of *Batson*, the reliance costs to the prosecution will be minimal, particularly considering suggested reforms. If the prosecution has a legitimate reason to exclude a minority juror from the panel, it should not be difficult to tether this exclusion to a strategic trial decision or theory. The elimination of *Batson* will bring with it reform efforts, such as what the *Jefferson* court did in Washington; it will not result in the total loss of peremptory challenges, but, rather, only the racially biased ones. Society’s interest in including African Americans (and other racial minorities) on juries heavily outweighs the prosecution’s implicit biases and assumptions made during the exercise of its peremptory challenges. This third and final consideration weighs heavily in favor of overturning *Whren* and *Batson*.

In sum, the scales tip heavily toward justice under Justice Kavanaugh’s analytical framework and towards uprooting *Whren* and *Batson* from our criminal procedure jurisprudence. These two pillars of racial injustice are “manifestly unjust.”²⁷⁶

If that was the only change necessary to address *stare decisis*, then the analysis could end here. However, the truth is, the Supreme Court only accepts review and takes on a comparatively insubstantial number of cases

²⁷³ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1419 (2020) (Kavanaugh, J., concurring in part).

²⁷⁴ See *Terry v. Ohio*, 392 U.S. 1 (1968). In seizing individuals short of de facto arrest or formal arrest, officers are required to articulate reasonable suspicion for such seizure; in addition, the scope or progression of that seizure is scrutinized for its relationship to what inspired the initial inception of the seizure. See *id.* at 19–21.

²⁷⁵ See *Ramos*, 140 S. Ct. at 1408.

²⁷⁶ *Id.* at 1415 (Kavanaugh, J., concurring in part) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 70).

a year.²⁷⁷ Our lower courts are therefore best positioned to take on the injustices of *Whren* and *Batson*; however, the Supreme Court has simply stated that its precedent is its own “prerogative,” and that the lower courts should accept it and move on.²⁷⁸ What, then, can be done by the lower courts due to the supremacy of the Supreme Court and the principles of vertical *stare decisis*?

B. *The Persistence of the Framework for Dismantling Whren and Batson Despite Vertical Stare Decisis, Step Two: “Perceived Harms Versus Actual Harms” Analysis*

After strong admonitions from the Supreme Court, such as its 2016 reiteration that “[i]t is this Court’s prerogative alone to overrule one of its precedents,” lower courts will be hesitant to directly overturn “vertical precedent” out of fear of being labeled judicial activists.²⁷⁹ However, the Supreme Court’s inertia in overturning *Whren* and *Batson* (and the lower courts’ perpetuation of these cases) in light of the real-world consequences and impacts for racial minorities is oppressive.²⁸⁰

Many lower courts will feel constricted in what they can do about *Whren* and *Batson* because of their internalization of the principles of vertical *stare decisis*.²⁸¹ In short, vertical *stare decisis* is the Supreme Court telling the lower courts “respect our authority.” It broadcasts to the lower courts that errors or problems with Supreme Court precedent is best left to the High Court to correct, accentuating “a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”²⁸² Although state courts—thanks to federalism—may have more leeway in interpreting Supreme Court precedent, it can be equally argued that state courts are more restricted in their interpretation of

²⁷⁷ The Supreme Court accepts approximately 100 to 150 of the more than 7,000 cases where the Court’s review is sought each year. *Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Aug. 8, 2020). This last term, the Court granted review in seventy-one cases.

²⁷⁸ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); see also *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

²⁷⁹ *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal quotation marks omitted)); see *Kmiec*, *supra* note 191, at 1466; see also *Ramos*, 140 S. Ct. at 1416, n.5 (Kavanaugh, J., concurring in part) (citing *Rodriguez de Quijas*, 490 U.S. at 484); see also *Hutto*, 454 U.S. at 375.

²⁸⁰ See *supra* notes 109–156.

²⁸¹ See *Re*, *supra* note 183, at 949, 949 n.125 (citing RICHARD A. POSNER, *HOW JUDGES THINK* 45 (2008) (“Lower court judges follow Supreme Court precedent less out of fear of reversal if they do not than because (in my terms) adhering to precedents created by a higher court is one of the rules of the judicial ‘game’ that judges internalize.”)).

²⁸² *Hutto*, 454 U.S. at 375.

such precedent.²⁸³

Lower courts would do well to recall that courts are not forever bound by prior decisions; rather, the rule (or perhaps better put, the judicial policy) of *stare decisis* is not static, and is not an “inexorable command.”²⁸⁴ Significantly, “the doctrine of *stare decisis* is not constitutionally required, in any sense, and has never been so understood.”²⁸⁵ As opposed to a black letter law or an inherent power of the judiciary, “the doctrine of *stare decisis* is one of policy and practice only”²⁸⁶ Thus, although the Supreme Court has thrown around its weight and announced that its precedent is its own “prerogative,” lower courts should remain undeterred by this policy or practice, remembering that a Supreme Court ruling is not black letter law nor an “inexorable command” according to the Supreme Court itself.²⁸⁷

The second step of the proposed framework for the lower courts to reckon with *Whren* and *Batson* is related to Justice Kavanaugh’s second consideration, namely, whether “the prior decision caused significant negative jurisprudential or real-world consequences?”²⁸⁸ However, rather than looking solely at the real-world consequences, lower courts should also interrogate the results of continued inaction. More specifically, will the lower courts’ own inertia result in perceived (merely theoretical) harms or actual harms? One commentator has discussed the concept of “perceived harms” within the context of *stare decisis* analysis, concluding that “perceived harms” are not appropriate in examining whether a precedent should be overruled.²⁸⁹ Similarly, if the evidence of real-world consequences demonstrates that the harms were isolated or will not continue with inaction, then lower courts could feel free to allow the precedent to stand.

As shown in Part II, the real-world consequences of *Whren* and *Batson* are not isolated to any particular time; rather, there is substantial evidence

²⁸³ “Federalism considerations may counsel in favor of affording state courts more leeway to narrow from below. For instance, even though the Supreme Court can review state court rulings on federal law, state courts are not referenced as ‘inferior courts’ in Article III [section 1 of the Constitution] and may not be subject to the Court’s ‘supervisory power.’” Re, *supra* note 183, at 937 n.79 (citing Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 342 nn.77–78 (2006)). Nevertheless, it can also be effectively argued that state courts are constrained in their attempt at independent state constitutional analysis. See Katharine Goodloe, *A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations*, 35 N.Y.U. REV. L. & SOC. CHANGE 749, 758–65 (2011).

²⁸⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992).

²⁸⁵ Paulsen, *supra* note 196, at 1169.

²⁸⁶ *Id.* at 1170.

²⁸⁷ See *Casey*, 505 U.S. at 854.

²⁸⁸ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

²⁸⁹ See Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 827 (2018) (asserting that “[o]ne potential takeaway [from Chief Justice Roberts’ concurrence in *Citizens United v. F.E.C.*] is that precedents are in greater need of overruling when they are not only wrong in their reasoning, but detrimental in their results.”). The author further proposes that “[o]n balance, then, a precedent’s perceived harms generally should be excluded from the *stare decisis* calculus.”); *id.* at 828.

that the harm these decisions inflict has worsened. These harms are not merely theoretical in nature; they are actual in fact. The over-policing of African Americans and, thus, their over-inclusion in the criminal justice system, is well-supported by the data provided herein. One hopes that no one on the modern-day judiciary would contend it is not an actual harm to over-include African Americans as targets of the criminal justice system. Similarly, the over-exclusion of African Americans as decision-makers in the process constitutes an actual, continuing harm. Justice Gorsuch, Sotomayor, and Kavanaugh recognized as much in *Ramos*.²⁹⁰

This step calls upon statisticians and researchers to continue to produce empirical data that shines a light on the actual harms of jurisprudence across our nation, such as the vast research conducted by Baumgartner et al. and the Berkeley Law Death Penalty Clinic. There is truth in the numbers and the data, and lower courts will need that work to successfully contend with the Supreme Court's harmful precedents.

If the answer is that actual harms will persist unless there is action, then step three is designed for lower courts to do the work that needs doing. Lower courts should next evaluate whether some action against the precedent will make the Supreme Court's jurisprudence in the relevant area more proficient (i.e., assist the Court in maintaining necessary proficiency as the supreme court of the land).

C. The Persistence of the Framework for Dismantling Whren and Batson Despite Vertical Stare Decisis, Step Three: Rejecting Precedent to Support the Supreme Court's Proficiency

This final step in the proposed framework requires the lower courts to decide whether some action on its part is necessary to uphold the image of the Supreme Court. The Supreme Court is the highest court of our nation. Of course, the cynic would argue that the Court is the sum of its members' dueling or complimentary political leanings and ideologies, but one can also hope that our Supreme Court is the most adept court of the land.

Lower courts should ask whether acting counter to vertical *stare decisis* will refine the Court's expected proficiency; it is contemplated that the Supreme Court will be the most accurate and competent court in our nation given its position of supremacy. Necessarily, the lower courts should engage in "narrowing" or overruling of precedent when they determine it is the correct action to take.²⁹¹

Finally, even though the lower court may be ready to overrule or

²⁹⁰ See *supra* Part III(A)(2).

²⁹¹ Although both *Whren* and *Batson* could, arguably, be distinguished by the lower courts as they encounter similar situations, this article focuses on the more complex or, perhaps, heady actions of "narrowing" or overruling precedents. Of course, distinguishing cases, when veritably available, also remains an option.

“narrow” a precedent, it must be guided by the inquiry of whether so doing will make the Supreme Court more proficient in its rulings.

1. “Narrowing from below”

“Narrowing,” a concept coined by scholar Richard M. Re, is an alternative to distinguishing or outright rejecting precedent for lower courts.²⁹² It may also be a more palatable route for lower courts as they consider abandoning Supreme Court precedent and dwell on their inferiority to the Supreme Court.²⁹³ “Narrowing” is defined by Re as “interpreting a precedent not to apply where it is best read to apply” or, put more succinctly, it “is interpreting a precedent more narrowly than it is best read.”²⁹⁴ The appropriateness of “narrowing down” depends largely on the reasonableness of the lower court’s reading of the precedent and the theory of vertical *stare decisis* at play.²⁹⁵ Re asserts that “it is in the nature of ambiguity that the reasonable interpreters may disagree about which reading is best, in part because they use different interpretive tools.”²⁹⁶ Re further notes that, although interpreters can occasionally conclude that multiple readings could be deemed the best or that no reading whatsoever could be considered the best, “courts are often able to rank precedential interpretations, such that options are deemed best, reasonable, or unreasonable.”²⁹⁷

“Narrowing” should be differentiated from “distinguishing” and “overruling” (in part or in full). First, “distinguishing means interpreting a precedent not to apply where it is best read not to apply.”²⁹⁸ Therefore, if a court can distinguish precedent from the situation before it, then the precedent is found not to apply, and the court decides the case outside the bounds of the precedent. On the other hand, if the best reading of the precedent applies to the situation before it, then the court is left with either “narrowing” or overruling the precedent. Meanwhile, “[o]verruling” occurs when a new precedent trumps an older one. By contrast, “partial overruling” occurs when a new precedent trumps only part of an older precedent.²⁹⁹

A helpful example that Re provides of “narrowing down” is what ultimately led to the Supreme Court’s decision in *Arizona v. Gant*.³⁰⁰ Before *Gant*, the Arizona Supreme Court had guidance in two precedents dealing

²⁹² See Re, *supra* note 183 at 932–35.

²⁹³ U.S. CONST. art. III, § 1.

²⁹⁴ *Id.* at 927–28, 932.

²⁹⁵ *Id.* at 925.

²⁹⁶ *Id.* at 928.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 928; see also *id.* at 929 tbl.1.

²⁹⁹ *Id.* at 929.

³⁰⁰ *Arizona v. Gant*, 556 U.S. 332 (2009).

with the issue before it, either *New York v. Belton* or *Thornton v. United States*.³⁰¹ In *Belton*, the Supreme Court crafted “a bright-line rule: when police arrest the driver of a car, they may search the vehicle’s passenger compartment.”³⁰² Lower courts followed that precedent for years when they encountered similar circumstances.³⁰³ Approximately twenty-three years later, in *Thornton*, “three [justices] in concurrences and two in dissent . . . expressly signaled serious concerns with how the lower courts were approaching *Belton*.”³⁰⁴ Three years later, the Arizona Supreme Court “narrowed from below” in its interpretation of *Belton*, and aligned itself with the dissent in *Thornton*.

Although finding it “possible” to construe *Belton*’s “bright-line” holding broadly, the Arizona court concluded that that the interpretation was in tension with some language in *Belton* would require “abandoning” other Fourth Amendment precedents. The Arizona court therefore limited *Belton* to the “precise” factual situation it addressed: cases where police were attempting to maintain control over multiple unsecured individuals.³⁰⁵

In other words, the Arizona court held that *Belton* did not apply to Mr. Gant’s situation because he was secured in the back of a police car prior to the officers searching his car. “This certainly was not the best reading of *Belton*, which had been read much more broadly by almost every court to encounter it, including the Supreme Court itself.”³⁰⁶ Nevertheless, in *Gant*, the Supreme Court agreed with the Arizona court’s “narrowed” approach.³⁰⁷

A careful reading of both *Whren* and *Batson* shows that these two cases can validly be “narrowed from below” by the lower courts.

³⁰¹ *New York v. Belton*, 453 U.S. 454 (1981); *Thornton v. United States*, 541 U.S. 615 (2004).

³⁰² Re, *supra* note 183, at 957 (citing *Belton*, 453 U.S. at 460).

³⁰³ Re, *supra* note 183, at 957 (citing *Gant*, 556 U.S. at 342) (noting that this view had “predominated”); see also *Davis v. United States*, 131 S. Ct. 2419, 2424 n.3 (2011) (listing prior cases adhering to *Belton*).

³⁰⁴ Re, *supra* note 183, at 957.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 957–58.

³⁰⁷ *Id.* at 958. Re refers to *Arizona v. Gant* as an example of “signal narrowing,” a form of “provocative narrowing”; according to Re, “signaled provocation occurs when lower courts narrow from below in response to a Supreme Court signal and thereby provoke the Court to reconsider its own precedent.” *Id.* at 956.

a. *Narrowing Whren*

“Narrowing” a case simply means interpreting a precedent more narrowly than its best reading.³⁰⁸ There are at least two reasonable, though not the best, readings available in *Whren* for “narrowing down.”

On at least two occasions, the *Whren* court cited to precedents that embraced the well-recognized “totality of the circumstances” analysis. First, when discussing *United States v. Robinson* for support that the subjective intent of officers matters not, the Court noted that *Robinson* stood for the proposition that “the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken *as long as the circumstances, viewed objectively, justify that action.*”³⁰⁹ Then when criticizing the petitioners for arguing for an objective test to uncover the subjective intent of police, the Court cites to *Robinson* again, stating that “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken *in certain circumstances*, [whatever] the subjective intent.”³¹⁰ The *Whren* court did not discard a “totality of the circumstances” approach to Fourth Amendment analysis, nor could it given its prevalence in evaluating cases that arise under the amendment.³¹¹

A lower court could legitimately “narrow” *Whren* by heavily scrutinizing the specific set of circumstances in the situations before it. The *Whren* court also pointed out that the petitioners’ proposed test was “designed to combat nothing other than the perceived ‘danger’ of the pretextual stop, albeit only indirectly and over the run of cases.”³¹² Here, there is an opportunity for lower courts, based on the data, to find that there is no longer merely a “perceived danger” of pretextual stops, but a demonstrated danger in the circumstances now before it.³¹³ In addition, in its frustration with the petitioners and their proposed objective test, the *Whren* court could not understand why such a test would be fashioned where “the court cannot take into account *actual and admitted pretext . . .*”³¹⁴ Here, too, there is room for lower courts to assess the totality of the

³⁰⁸ *Id.* at 932.

³⁰⁹ *Whren v. United States*, 517 U.S. 806, 813 (1996) (quoting *Scott v. United States*, 436 U.S. 128, 136, 138 (1978)) (emphasis added); *see also* *United States v. Robinson*, 414 U.S. 218 (1973).

³¹⁰ *Whren*, 517 U.S. at 814 (citing *Robinson*, 414 U.S. at 236) (emphasis added).

³¹¹ *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213 (1983) (establishing a totality of the circumstances standard for assessing probable cause); *see also* *Alabama v. White*, 496 U.S. 325 (1990) (applying a totality of the circumstances approach to reasonable suspicion).

³¹² *Whren*, 517 U.S. at 814.

³¹³ *See supra* notes 109–158 and accompanying text.

³¹⁴ *Whren*, 517 U.S. at 814. Of course, why would a police officer ever admit to let alone an investigatory pretextual stop (unless of course it was licensed by the Supreme Court), much less a stop based on racial profiling.

circumstances before it and hold that the “actual” (though, perhaps not admitted) reason for stopping a motorist was race.³¹⁵ The Supreme Court has already struck down “roving patrols” and found that race (alone) is not sufficient cause to seize an individual; if the totality of the circumstances showed that the stop was primarily focused on race, the lower court could take action against such egregious behavior on the part of the police.³¹⁶

Next, a lower court could decide that even though the officer had probable cause to stop a motorist for a traffic violation that the Fourth Amendment still requires balancing. The balancing would be of the citizenry’s privacy interests versus law enforcement interests; such balancing would weigh heavily in favor of the privacy interests because pretextual stops have become unusually harmful to the privacy of African Americans. Specifically, the *Whren* court declined to engage in such balancing because of the existence of probable cause in the case, highlighting that this balancing in prior cases “was necessary because they involved seizures without probable cause.”³¹⁷ The Court, however, noted that where probable cause was present, the only cases where it found that the balancing of interests needed to occur “involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests. . . .”³¹⁸ The Court cited *Tennessee v. Garner* and *Wilson v. Arkansas* as examples.³¹⁹ Although it is not the best reading (which is acceptable under “narrowing”) of *Whren* to assert that pretextual stops are “unusually harmful” to the privacy interests of African Americans, a lower court could conclude that the disproportionate impacts on African Americans in police stops has become unusually harmful to their privacy using the available empirical data from North Carolina described earlier in this piece.³²⁰ In addition, because many of the recent police killings of African Americans have occurred during traffic stops, this reasoning

³¹⁵ This necessarily involves reading the “and” in “actual and admitted pretext” as an “or,” but it not entirely out of the realm of possibility under a totality of the circumstances approach. And, again, “narrowing” is not dedicated to the best reading, only a narrower reasonable reading of the precedent.

³¹⁶ See *id.* at 818 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–84 (1975)). Critically, as *Brignoni-Ponce* also presents its own problems where, at the very end of the opinion, the Court comments “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.” *Brignoni-Ponce*, 422 U.S. at 886–87. As Michelle Alexander asserted, “[t]he likelihood that a person of Mexican ancestry is an ‘alien’ could not be significantly higher than the likelihood that any random black person is a drug criminal.” ALEXANDER, *supra* note 9, at 131.

³¹⁷ *Whren*, 517 U.S. at 818.

³¹⁸ *Id.*

³¹⁹ *Id.*; see also *Tennessee v. Garner*, 471 U.S. 1 (1985) (involving a fifteen-year-old Black teen who was “seized” by deadly force); *Wilson v. Arkansas*, 514 U.S. 927 (1995) (involving a no knock-and-announce entry into a home).

³²⁰ See *supra* notes 109–160 and accompanying text.

could also extend to the physical interests of African Americans.³²¹

b. *Narrowing Batson*

Any direct “narrowing” of *Batson* may be far more difficult; indeed, the lower courts may have to take the bolder step—therefore getting into that “good trouble, necessary trouble”³²²—by directly rejecting or overruling *Batson* or “narrowing” it indirectly.

At the start of *Batson*, the Court goes through great detail to express its goal in furthering its jurisprudence to combat the exclusion of African Americans in jury selection.³²³ For example, the Court starts its analysis by recalling that “[m]ore than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.”³²⁴ The Court stated “that [*Strauder*] laid the foundation for the Court’s unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which the individual jurors are drawn.”³²⁵ It further noted that “[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.”³²⁶ The Court also asserted some guarantees of the Fourteenth Amendment, including that the accused be tried by a jury selected “pursuant to nondiscriminatory criteria,” that the State will not be permitted to exclude members of the accused’s race from the venire on account of race, and that those on the jury must be “indifferently chosen” in order to “secure the defendant’s right . . . to ‘protection of life and liberty against race or color prejudice.’”³²⁷ The Court also discussed the harms of racial discrimination in jury selection; that it harms not only the accused, but also the targeted juror as well as the community at large.³²⁸

In his concurrence in *Batson*, Justice White commented that, although *Swain v. Alabama* should have sufficed in warning prosecutors that “using peremptories . . . on the assumption that no black juror could fairly judge a black defendant would violate” equal protection, there was a need to further

³²¹ Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, WASH. POST, (Dec. 24, 2015), https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html; see also *Washington Post Police Shootings Database*, *supra* note 41.

³²² Am. Const. Soc’y Convention, *supra* note 2.

³²³ See *Batson v. Kentucky*, 476 U.S. 79, 85–87 (1986).

³²⁴ *Id.* at 85 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ See *id.* at 86–87 (citing *Martin v. Texas*, 200 U.S. 316, 321 (1906); *Strauder*, 100 U.S. at 305, 309).

³²⁸ *Batson*, 476 U.S. at 87.

the Court's jurisprudence in the area.³²⁹ Justice White stated, "[i]t appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs."³³⁰ Furthermore, as Justice Marshall highlighted in his concurrence, the statistics on jury selection from 1970's supporting this widespread practice were striking.³³¹ There was explicit willingness on the part of at least two of the *Batson* Justices to refine the Court's strategy in contending with systemic exclusion of African American jurors.³³² As Part II indicates, there is strong data of the perpetuation of such harmful exclusion and for all intents and purposes, *Batson* has contributed nominally to the effort.³³³

In large part, *Batson*'s insubstantial impact is due not only to its purposeful discrimination requirement, but also its acceptance of any "race-neutral" explanation dreamed up by the prosecution. In his concurrence, Justice Marshall predicted as much, proclaiming:

How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore, "did not possess the sensitivities necessary to realistically look at the issues and decides the facts of the case"?³³⁴

Justice Marshall then protested, "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory."³³⁵ Based on current data, it appears Justice Marshall was correct.

Lower courts could "narrow" *Batson* by asserting that it never effectively served its own purposes. Data, such as those collected by the Berkeley Law Death Penalty, demonstrating the systemic exclusion of African Americans (and other racial minorities) from juries under the guise of "race-neutral" reasons on the part of the prosecution supports the widespread continuation of this harmful practice today.³³⁶ Indeed, it shows a need, not unlike the need demonstrated in the 1970s, for the Court to weigh in once more. One potential method of using *Batson* for "narrowing" would

³²⁹ *Id.* at 101 (White, J., concurring).

³³⁰ *Id.* at 101.

³³¹ *See Batson*, 476 U.S. at 104.

³³² *Id.* at 100–08.

³³³ *See supra* notes 161–177 and accompanying text.

³³⁴ *Batson*, 476 U.S. at 106 (internal citations omitted).

³³⁵ *Id.*

³³⁶ *See generally* BERKELEY L. DEATH PENALTY CLINIC, *supra* note 38.

be for lower courts to laboriously scrutinize race-neutral explanations and where, for example, the prosecution’s justification is historically or implicitly intertwined with racism, reject it, and deny removal of the challenged juror.³³⁷

In addition, the exclusion of African Americans from juries is still so pervasive even after the Court’s attempts to address it, it may well be considered “invidious discrimination” at this point. To this end, lower courts could, rather than directly “narrow” *Batson*, indirectly narrow through *Washington v. Davis*, which *Batson* cites to in adopting its purposeful discrimination requirement for step three.³³⁸ Specifically, if “narrowing” *Batson* proves too difficult for the lower courts, they could narrow *Davis* and its rule that disparate impact is insufficient in reaching an equal protection violation.³³⁹ Significantly, the *Davis* court, in rejecting disparate impact alone as evidence that an otherwise facially valid and neutral law was racially discriminatory, made some striking comments about jury selection.³⁴⁰ The *Davis* court stated that, “[i]t is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”³⁴¹ This pointed description of the invidious discriminatory nature of systemic exclusion of African Americans from juries supports lower court endeavors to use *Davis* to “narrow” *Batson*.

Further, the current Supreme Court has arguably signaled in *Ramos* its willingness to consider the continued discriminatory effects of a law or practice that has discriminatory origins.³⁴² As noted previously, Justices Gorsuch, Sotomayor, and Kavanaugh were troubled with the origins of Louisiana and Oregon’s non-unanimous laws.³⁴³ Justices Sotomayor and Kavanaugh were also, quite explicitly, troubled by the laws’ continued “discriminatory effects” or “taint.”³⁴⁴ Justice Kavanaugh specifically asked, “Why stick by an erroneous precedent . . . that tolerates and reinforces a practice that is thoroughly racist in its origins *and has continuing racially*

³³⁷ See *id.*, *supra* note 38, at x–xi.

³³⁸ *Batson*, 476 U.S. at 93 (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)).

³³⁹ See *id.* at 93.

³⁴⁰ Notably, the *Davis* decision, in 1976, was issued ten years prior to the *Batson* opinion. See *Davis*, 426 U.S. at 229.

³⁴¹ *Davis*, 426 U.S. at 242. This could be an example of “signaling” from the Supreme Court to the lower courts with regard to its holding in *Swain* prior to its decision in *Batson*.

³⁴² See *supra* Part III(A)(2); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring in part).

³⁴³ See *supra* Part III(A)(2).

³⁴⁴ *Ramos*, 140 S. Ct. at 1410, 1418.

discriminatory effects?”³⁴⁵ Although the exercise of peremptory challenges may be facially race-neutral, the *Davis* court left open the possibility that a petitioner could demonstrate such invidious discrimination that disproportionately in and of itself would be enough. The lower courts could use *Davis* to “narrow” *Batson* and find that the continued widespread exclusion (supported by statistical data) of African Americans from juries through peremptory challenges by the prosecution is “invidious discrimination” and, thus, an equal protection violation.

2. *Determining whether the lower court action would make the Supreme Court more proficient in its rulings*

The building blocks of this overarching inquiry of step three of the proposed framework consists of ideas drawn from legal scholar Michael M. Re’s categorized models of viewing vertical *stare decisis*, namely the “Proficiency Model.”³⁴⁶ In his article that formally introduces a concept he refers to as “narrowing” (discussed *infra* at subsection 2), Re discusses four different models related to vertical *stare decisis*.³⁴⁷ In the third step of the proposed framework, this article specifically draws upon the Proficiency Model (or view) as it is truest to assuring the accuracy and competency of the highest court in the land. Nevertheless, it is informative to review all the models discussed by Re, including the Authority Model as particularly lower courts may be initially drawn to it.

a. *The Authority View of vertical stare decisis*

Under this view or model, the Supreme Court’s supremacy is fully embraced; the *Hutto*, *Rodriguez de Quijas*, and *Bosse* cases aptly wrap up this view in their professing that the Supreme Court’s precedents are its own prerogative.³⁴⁸ “The [A]uthority [M]odel thus calls for lower courts to treat the Court’s majority holdings as law in much the way that a statute is law.”³⁴⁹ In a nutshell, “[u]nder the authority model, the holdings of Supreme Court majority opinions are not just relevant to legal correctness, but constitutive

³⁴⁵ *Id.* at 1419 (emphasis added). Of course, it should not go unsaid that Justice Kavanaugh compared non-unanimous juries to what the practice of peremptory challenges *used* to be in describing how non-unanimous verdicts can “silence the voices and negate the votes of black jurors” This seems to indicate that Justice Kavanaugh may not be ready to accept the “discriminatory effects” argument under *Batson* analysis; though, it is hard to know given that his recent opinion in *Flowers v. Mississippi*, where the Supreme Court last applied *Batson*, was propelled by such appalling facts. *See Flowers*, 139 S. Ct. at 2234–38.

³⁴⁶ *See Re*, *supra* note 183, at 936–45.

³⁴⁷ *See id.*

³⁴⁸ *See supra* note 281; *see id.* at 949, 949 n.125, 939–40.

³⁴⁹ *Re*, *supra* note 183, at 936.

of it.”³⁵⁰

The Authority View (or model) of vertical *stare decisis* does not necessarily mean that Supreme Court precedent is impenetrable. As Re asserts (and we lawyers know to be true), precedent is frequently ambiguous, leading to two or more reasonable readings of it.³⁵¹ There is room for lower courts to “narrow” Supreme Court precedent when there is an alternative reasonable reading to that of the precedent’s best reading.³⁵² “When a precedent is open to alternative meanings, there is competition for the mantle of constitutive correctness. The winner of that competition largely turns on an important issue: the lower court’s degree of confidence that what seems like the best reading of higher court precedent actually is.”³⁵³

“Narrowing,” as described above, can still occur despite operating within the Authority View; nevertheless, lower courts should boldly rely upon the Proficiency View as that assures accuracy and competency of the Supreme Court remains intact.

b. *The Prediction View of vertical stare decisis*

The Prediction View (or model) of vertical *stare decisis* instructs that the lower courts should do what they believe the Supreme Court would do when reviewing the precedent under similar circumstances.³⁵⁴ Under this view, it is understood that rejecting precedent will be infrequent; rather, it will only be “an unusual subset of cases [where] a lower court might predict that the higher court will overrule or otherwise set aside its own case law.”³⁵⁵

Rather than anticipate what the Supreme Court may do, lower courts should be dedicated to upholding the Supreme Court’s accuracy and competency through the Proficiency View.

c. *The Signals View of vertical stare decisis*

The Signals View of vertical *stare decisis* is the notion that the Justices may “signal” or “indicate some aspect of how lower courts should decide cases.” It is distinguished from the Prediction View’s “forward-looking orientation and openness” by considering extrajudicial statements that are made by the Justices in gauging its predictions. The *Gant* case discussed *supra* is an example of signals from the Supreme Court.³⁵⁶

³⁵⁰ *Id.*

³⁵¹ *See id.* at 937.

³⁵² *See id.*

³⁵³ *Id.*

³⁵⁴ *Id.* at 940.

³⁵⁵ *Id.* (citing *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251 (S.D.W. Va. 1942), *aff’d*, 319 U.S. 324 (1943) (as an example of this unusual situation)).

³⁵⁶ *See supra* notes 342–354 and accompanying text.

Rather than wait on signals from the Supreme Court, the time is ripe for lower courts to act now, and they can do so under the Proficiency View of vertical *stare decisis*.

d. *The Proficiency View of vertical stare decisis and its dedication to assuring the accuracy and competency of the Supreme Court*

The Proficiency View (or model) of vertical *stare decisis* is the most persuasive model given the role of supremacy the Supreme Court plays in our nation.³⁵⁷ Under this view, “as a nine-member body at the apex of the United States judicial system, the Supreme Court has unusual and perhaps unmatched skill at answering legal questions.”³⁵⁸ It is the “special features” of the Supreme Court that “may render it more likely to be correct than virtually any lower court, but those features plainly do not preclude the possibility of faulty results and reasoning.”³⁵⁹ In addition, “there may be reasons in particular cases to think that the Court’s general decision-making superiority has failed.”³⁶⁰ Among others, one indicator of the unreliability of precedent is that the Court’s ruling was “dependent on out-of-date premises.”³⁶¹

The business of the lower courts in applying the Proficiency View of vertical *stare decisis* is essentially one of caretaking; caring for the Supreme Court’s supremacy and proficiency in its holdings. Under step three of the framework, this model is responsible for the question: does the lower court action make the Supreme Court more proficient?

That *Whren* and *Batson* are based on outdated premises has been demonstrated. To make our Supreme Court’s jurisprudence more race-conscious and, thus, more accurate and competent, lower courts should take action against *Whren* and *Batson* under this model.

D. *Application of Step Three to Whren and Batson—the Supreme Court Will Become More Proficient if These Two Pillars of Racial Injustice are Acted Upon by the Lower Courts*

It should be evident, by now, whether some lower court action—by “narrowing” or overruling—against *Whren* and *Batson* would make the Supreme Court more proficient in its rulings. Even in the 1980s and 1990s, the information was there for the Court to gain competence about systemic

³⁵⁷ See U.S. CONST. art. III § 1. “The judicial Power of the United States, shall be vested in one supreme Court . . .”; see also Re, *supra* note 183, at 939–40.

³⁵⁸ Re, *supra* note 183, at 939.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* at 940.

racism and its prevalence in our criminal justice system.³⁶² Justice Scalia’s comment about the “perceived” danger of the pretextual stop in *Whren* was misplaced even in 1996, but certainly more so today in light of the statistics and data demonstrating the disparate impact on African Americans in police traffic stops.³⁶³ In addition, the Court’s summary rejection of the Fourth Amendment as the correct amendment to seek recourse for racial profiling in policing is ludicrous given that the Fourth Amendment’s design can be traced to the Founders’ worries about unfettered discretion in the hands of the British Crown.³⁶⁴

Further, *Batson* has failed miserably. Indeed, we are right where it all began in *Batson*, right where Justice Marshall said we were in 1986.³⁶⁵ In *Batson*, the Court fashioned a test that only permitted more, albeit subtle, racial discrimination.³⁶⁶ This test promulgated a “race-neutral” approach to deal with a, primarily, race-neutral, though still racially discriminatory, problem.³⁶⁷ Other than the outlying cases with extreme facts, *Batson* does very little in the way to address its original goal—stop the systemic exclusion of African Americans from the democratic process of serving on a jury.³⁶⁸

Our Supreme Court’s rulings would become far more adept and, thus, credible, if the lower courts would cease “methodically ignoring what everyone knows to be true.”³⁶⁹ *Whren* and *Batson* are two pillars of racial injustice that, if not already, will become stains on the Supreme Court’s legacy, much like *Plessy v. Ferguson*.

Under the entire proposed framework, balancing Justice Kavanaugh’s three considerations of *stare decisis*, recognizing that there will be actual (not merely perceived) harms if their precedential value remains, and determining that action against the precedents will make the Supreme Court more proficient, the lower courts should act dauntlessly to overturn or “narrow” *Whren* and *Batson*.

IV. CONCLUSION

Some courts have avoided getting into trouble (honorably so) by conducting independent state constitutional analysis or by promulgating a

³⁶² See *supra* notes 101–107 and accompanying text.

³⁶³ See *supra* notes 109–158 and accompanying text.

³⁶⁴ See ALEXANDER, *supra* note 9, at 67.

³⁶⁵ *Batson v. Kentucky*, 476 U.S. 69, 103–04 (1986) (Marshall, J., concurring).

³⁶⁶ See *id.* at 97–98 (majority opinion).

³⁶⁷ *Id.* at 106 (Marshall, J., concurring).

³⁶⁸ See *supra* notes 158–17 and accompanying text.

³⁶⁹ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020).

court rule to address the inequities of *Whren* and *Batson*.³⁷⁰ Nevertheless, that is not as effective, not as powerful as sending a very direct, explicit message to the Supreme Court (as well as other lower courts) that it is time to become a twenty-first century bench in this fast-emerging race-conscious nation. More importantly, to the American people, the lower courts should send a message that the courts are places of equity, not disparity. It is time to stop pretending that Lady Justice never looks out from under her blindfold to ascertain the race of those in her courts. It is time for our courts to see, talk about, and take on race and all the concepts that come along with it—colorblindness, implicit bias, etc.

Let the legacy of Rayshard Brooks, George Floyd, Breonna Taylor, Ahmaud Arbery, and Sandra Bland, in part, be that our courts “get in good trouble, necessary trouble,”³⁷¹ and decline to uphold *Whren* and *Batson*. Lower courts should boldly take action applying this article’s proposed framework. Piece-by-piece, step-by-step, *Whren* and *Batson* should be dismantled through application of Justice Kavanaugh’s *stare decisis* considerations, an analysis of actual versus perceived harms, and finally, by asking whether destructing these pillars of racial injustice will make our Supreme Court more proficient. The analysis under these three steps instructs that *Whren* and *Batson* must be “narrowed” or overruled by the lower courts.

This moment, as Americans march and protest in our streets for Black Lives, is ripe for our courts to not just issue statements, but to send a message that racial injustice no longer has a place in the courts’ criminal procedure jurisprudence. It is time, as Representative John Lewis stated, “to use the law, to use the law and the Constitution to bring about a non-violent revolution” in our criminal courtrooms.³⁷² If our criminal justice system really is a system dedicated to crime control, not social control, then no longer can courts acquiesce to strict notions of *stare decisis* when faced with precedent that sustains racial injustice. No longer can our courts “methodically ignor[e] what everyone knows to be true.”³⁷³

³⁷⁰ In addition, as a 2011 law review article detailed, constraints on state courts when interpreting their own state constitutions exist and impact progress for criminal justice reform. *See generally* Goodloe, *supra* note 283.

³⁷¹ Am. Const. Soc’y Convention, *supra* note 2.

³⁷² *Id.*

³⁷³ *Ramos*, 140 S. Ct. at 1405.