

“Social justice should be the underlying goal of all humanity.”

-Alan V. Lowenstein, Institute Founder



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do social justice.

New Jersey Advisory Committee on Professional Ethics

Attn: Carol Johnson, Committee Secretary

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Re: Comment on Potential New Opinion After the Withdrawal of Opinion
685

Dear Advisory Committee on Professional Ethics,

My name is Yannick Wood and I am the Director of Criminal Justice Reform at the New Jersey Institute for Social Justice (the “Institute”). The Institute uses cutting-edge racial and social justice advocacy to empower people of color by building reparative systems that create wealth, transform justice and harness democratic power – from the ground up – in New Jersey. The Institute is also a member of the Supreme Court Judicial Conference on Jury Selection which has been convened to address discrimination in jury selection.

I am writing in support of the withdrawal of Opinion 685 and to propose a replacement opinion that recognizes that *Batson* and *Gilmore* violations in individual court cases are unethical and violate the New Jersey Rules of Professional Conduct. The Institute supports an opinion that requires additional training in implicit and explicit bias for violators and discipline where necessary. This change will help ensure that communities of color, which have been historically excluded from the jury selection process, will be seated in juries.

In *Batson v. Kentucky*, the United States Supreme Court held that the use of peremptory challenges to exclude a juror solely on the basis of their race was a violation of the Fourteenth Amendment.¹ However, in a concurrence, Justice Marshall predicted that “[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process.”² He was sadly correct. The New Jersey Supreme Court expanded upon *Batson* in *State v. Gilmore* by prohibiting attorneys from using peremptory challenges to remove jurors based on their “group affiliation” or presumptions about their “group bias.”³ Notwithstanding *Batson* and *Gilmore*, attorneys continue to use peremptory challenges to intentionally or unintentionally exclude Black and Brown people.

The Institute supports the total elimination of peremptory challenges. Studies have shown how peremptory challenges have been used in courts in

Mississippi,⁴ North Carolina,⁵ and Philadelphia⁶ to remove jurors of color. A recent study commissioned by the New Jersey Supreme Court even concluded that the use of peremptory challenges did have an impact on minority representation on New Jersey's juries.⁷

While peremptory challenges are not at issue in the committee's request for comment, their inappropriate use is at issue today. A replacement opinion must provide meaningful consequences for *Batson* and *Gilmore* violations.

It is not enough to say that post-*Gilmore* court-imposed remedies are sufficient to combat the abuse of peremptory challenges. At best, these remedies would only impact the *individual* case of the offending attorney and range from "reseating a wrongfully dismissed" juror or causing the "offending" party to lose their peremptory challenges.⁸ The harm that *Batson* and *Gilmore* violations inflict on the integrity of the court system is so impactful that it goes beyond the attorney's individual case. It erodes confidence in the system. Defendants of color may believe that the system is rigged against them when they see jurors of color being removed from the panel. Jurors of color, who heed the call for jury service, may feel demoralized when they are removed from a panel without any reason.⁹ Because of this harm, there must be a more targeted remedy for *Batson* and *Gilmore* violations that addresses the root cause – not simply to deter such inappropriate attorney behavior but to truly educate attorneys. Correspondingly, *Batson* and *Gilmore* violations should be regarded as violations of the New Jersey Rules of Professional Conduct 8.4(g).¹⁰

RPC 8.4(g) states: "[It is professional misconduct for a lawyer to:] engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm."

We applaud the Advisory Committee for recognizing that *Batson* and *Gilmore* violations are clearly against the plain reading of 8.4(g). As such, we are recommending that the Advisory Committee adopt an opinion which finds that *Batson* and *Gilmore* violations are ethical violations of RPC 8.4(g). Attorneys who violate this rule should be retrained in implicit and explicit bias and, where necessary, should receive discipline like other unethical conduct.

Such an opinion could require judges presiding over a trial, where they have determined that an attorney violated *Batson* and *Gilmore*, to file an ethics grievance against that attorney. If it is the first such grievance, then, after being investigated, the attorney could be required to complete Continuing Legal Education courses on implicit and explicit bias. It is not unprecedented to recommend courses for violations of the rules of professional conduct.¹¹

However, if this is not the first time a grievance has been filed, after the grievance has been investigated, prosecuted by the Office of Attorney Ethics and the attorney has been found guilty the attorney could receive sanctions, including "reprimand, censure, suspension or disbarment."¹²

These recommendations reflect that *Batson* and *Gilmore* violations contravene the plain language of New Jersey's Rules of Professional Ethics. We thus urge the Committee to replace Opinion 685 with an opinion that protects communities of color's right to participate in New Jersey's juries.

Thank you for considering the Institute's recommendations.

¹ *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

² *Id.* at 102.

³ *State v. Gilmore*, 511 A.2d 1150, 1161 (N.J. 1986).

⁴ In a recent study in Mississippi, Black jurors were 4.51 times as likely as white jurors to be removed from a jury by prosecutors through peremptory challenges while white jurors were 4.21 times as likely as Black jurors to be removed from a jury by defense peremptory challenges. Whitney DeCamp & Elise DeCamp, *It's Still about Race: Peremptory Challenge Use on Black Prospective Jurors* 57 J. RSCH. CRIME & DELINQ. 3, 20 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/0022427819873943>.

⁵ In a study of North Carolina non-capital felony trials, prosecutors used 60% of their peremptory challenges against Black jurors although they were only 32% of the jury pool while defense attorneys used 87% of their peremptory challenges against white jurors although they made up 68% of the pool. Catherine M. Grosso and Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials* 97 IOWA L. REV. 1531, 1539 (2012) <https://poseidon01.ssrn.com/delivery.php?ID=788024004085068114067071119115080014018059046068005069022080029023003121104121005106096055049121118013030088121095113117078091006041089092044064068096005024097100024000094098068126115127080003069115107100103124121022066001023093085119080027103115027&EXT=pdf&INDEX=TRUE>.

⁶ In a study of capital cases in Philadelphia from 1981 to 1997, prosecutors used peremptory challenges to remove 51% of Black jurors compared to 26% of similarly situated non-Black jurors while defense attorneys used peremptory challenges to remove 26% of Black jurors and 54% of similarly situated non-Black jurors. David C. Baldus, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis* 3 J. CONST. L. 155, 155-156 (2001) <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1415&context=jcl>.

⁷ Mary R. Rose, *Final Report on New Jersey's Empirical Study of Jury Selection Practices and Jury Representativeness* v (June 1, 2021), https://www.njcourts.gov/courts/assets/supreme/judicialconference/Mary_Rose_Final_Report.pdf?c=Og.

⁸ In *State v. Andrews*, a successor case to *Gilmore*, New Jersey's Supreme Court outlined potential remedies for violations which include, "dismissing the empaneled jury member(s) and the venire and beginning jury selection anew; reseating the wrongfully excused juror(s); reseating the wrongfully excused juror(s) and ordering forfeiture by the offending party of his or her improperly exercised peremptory challenge(s); permitting trial courts to require challenges to prospective jurors outside the presence of the jury; granting additional peremptory challenges to the aggrieved party, particularly when wrongfully dismissed jurors are no longer available; or a combination of these remedies as the individual case requires." 78 A.3d 971, 984 (N.J. 2013). Note, that none of these remedies involve personal liability for ethics violations for the offending attorney.

⁹ An article recounts the experience of a biracial juror who wanted to serve on her jury, made arrangements for childcare and with her employer and college professors, but was singled out for removal from that jury causing her embarrassment. Emmanuel Felton, *Many juries in America remain mostly White, prompting states to take action to eliminate racial discrimination in their selection*, WASH. POST (Dec. 23, 2021), https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html.

¹⁰ N.J. Rules Pro. Conduct R. 8.4.

¹¹ *In re Pinto*, 773 A.2d 71, 71 (N.J. 2001) (where a respondent was found to have violated RPC 8.4(g) among other provisions and was ordered to participate in 20 hours of sensitivity training); *Matter of Toth*, 226 A.3d 63, 63 (N.J. 2020)(where a respondent was found to violate RPC 1.4(b) and was required to complete continuing legal education courses).

¹² N.J. Ct. R. 1:20-6(c)(2)(E)(iii).