

# Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge- Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions

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## INTRODUCTION

At a 1993 meeting of his organization Operation PUSH, on the topic of street crime, the Reverend Jesse Jackson told the audience, ““There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery . . . . Then look around and see somebody white and feel relieved.””<sup>1</sup> Jackson’s observation reflects an unfortunate but often held belief, one that even a famous and deeply committed national civil rights leader cannot escape: a white stranger is probably less threatening than a black stranger.

Such a reaction is an example of implicit bias. Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. Indeed, social scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them.

My own introduction to implicit bias was deeply unnerving. Associate Dean Russ Lovell of the Drake University Law School, with whom I have co-taught Advanced Employment Discrimination Litigation for many years, suggested that I visit a Harvard University website about Project Implicit. The site, [www.implicit.harvard.edu](http://www.implicit.harvard.edu), includes an online test on different types of biases called the Implicit Association Test (IAT). At that time, I

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I wish to thank the Federal Judicial Center and U.S. District Court Judges Bernice Donald and Elaine Bucklo for their encouragement and assistance in my exploration of implicit bias in the legal system; and my law clerk Nicholas Herbold, invaluable “career” law clerk Roger W. Mastalir, and the editorial staff of the *Harvard Law & Policy Review* for their assistance with the preparation of this Article.

<sup>1</sup> Mary A. Johnson, *Crime: New Frontier; Jesse Jackson Calls It Top Civil-Rights Issue*, CHI. SUN-TIMES, Nov. 29, 1993, at 4.

knew nothing about the IAT, but as a former civil rights lawyer and seasoned federal district court judge—one with a lifelong commitment to egalitarian and anti-discrimination values—I was eager to take the test. I knew I would “pass” with flying colors. I didn’t.

Strongly sensing that my test performance must be due to the quackery of this obviously invalid test, I set out to learn as much as I could about both the IAT and what it purported to measure: implicit bias. After much research, I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system, particularly in our jury system. I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. Implicit biases cause subtle actions, like Jackson’s reaction to footsteps behind him in the night. But they are also powerful and pervasive enough to affect decisions about whom we employ, whom we leave on juries, and whom we believe. Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.

I have come to the conclusion that present methods of addressing bias in the legal system—particularly in jury selection—which are directed primarily at explicit bias, may only worsen implicit bias. Specifically, judge-dominated voir dire and the *Batson* challenge process<sup>2</sup> are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish. At the beginning of the jury selection process, judge-dominated voir dire, with little or no attorney involvement, prevents attorneys from using informed strikes to eliminate biased jurors. For a variety of reasons, judges are in a weaker position than lawyers to anticipate implicit biases in jurors and determine how those biases might affect the case. Thus, permitting judges to dominate the initial jury selection causes more biased jurors to remain on a case and exacerbates the role of implicit bias in jury trials. Additionally, the *Batson* process, which permits defendants to challenge a prosecutor’s peremptory strikes of jurors if the strikes seem to have been racially motivated, is thoroughly inadequate. It both allows the implicit and explicit biases of attorneys to impact jury composition and may provide a false veneer of racial neutrality to jury trials.

This Article begins with a brief examination of the existence and prevalence of implicit bias, including the history of implicit bias testing and other social science research into the phenomenon. Next, this Article turns to a more detailed examination of the two problematic aspects of jury selection mentioned above—judge-dominated voir dire and the *Batson* challenges—

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<sup>2</sup> See *Batson v. Kentucky*, 476 U.S. 79 (1986). In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994), the Supreme Court expressly extended *Batson* to gender-based peremptory challenges, holding that the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race. In this Article, I intend references to “the *Batson* challenge process” to include the process for challenging gender-based peremptory strikes as well as the process for challenging race-based peremptory strikes. Likewise, my arguments in this Article apply with equal force to both types of strikes.

and the way in which those processes may exacerbate rather than alleviate the problems of implicit bias in jury selection and jury determinations. Finally, this Article considers what lawyers and judges can and should do about implicit bias in the legal system. I propose twin solutions to the problems of judge-dominated voir dire and the flawed *Batson* challenge process. The first solution is to increase lawyer participation in voir dire, thereby placing the primary onus to detect and address the implicit bias of jurors in the hands of the trial participants best equipped to do so. The second solution is the total elimination of peremptory challenges, a solution to the failed *Batson* process perhaps as brutally elegant and effective as Alexander the Great's solution to the Gordian Knot.<sup>3</sup> True, there is some tension between increasing lawyer participation in voir dire while stripping lawyers of peremptory challenges. But it is my contention that the two proposed solutions work best in tandem. The implicit bias of *jurors* can be better addressed by increased lawyer participation in voir dire, while the implicit bias of *lawyers* can then be curbed by eliminating peremptory strikes and only allowing strikes for cause.

## I. THE EXISTENCE AND PREVALENCE OF IMPLICIT BIAS

### A. *Explicit Bias Versus Implicit Bias*

Society in general and courts in particular have been aware of explicit bias for years. *Price Waterhouse v. Hopkins*<sup>4</sup> presents an excellent example of explicit bias. In *Price Waterhouse*, when a highly successful woman was denied partnership, her supervisor expressly advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>5</sup> The bias on which the supervisor's comments were based was open and obvious. There are also myriad cases involving actions based on conscious bias that is not explicitly stated, so-called circumstantial evidence cases. For example, in *McDonnell Douglas Corp. v. Green*,<sup>6</sup> the plaintiff could not offer a “smoking gun” comment revealing racial bias. He was nevertheless given the opportunity to prove his claim of race discrimination by establishing a prima facie case,<sup>7</sup> and then overcoming the employer's proffered legitimate, non-discriminatory reasons

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<sup>3</sup> Gordius, King of Phrygia, tied his chariot to a hitching post before the temple of an oracle with an intricate knot, which, it was prophesied, none but the future ruler of all Asia could untie. In the course of his conquests, Alexander the Great came to Phrygia and, frustrated with his inability to untangle the knot, simply sliced through it with his sword. His subsequent success in his Asian campaign has been taken to mean that his solution to the “Gordian knot” fulfilled the prophesy. See THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 78 (Viking Press 1979).

<sup>4</sup> 490 U.S. 228 (1989).

<sup>5</sup> *Id.* at 235.

<sup>6</sup> 411 U.S. 792 (1973).

<sup>7</sup> *Id.* at 802. The plaintiff's burden to establish a prima facie case required him to show that he was a member of a racial minority, he applied and was qualified for a job for which the

for its decision with a showing that the proffered reasons were a pretext for intentional race discrimination.<sup>8</sup> A battery of state and federal laws are aimed at eradicating intentional discrimination, that is, discrimination based on explicit bias, from the workplace, from housing, and from the dissemination of public services.

Implicit biases, on the other hand, are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful. Unfortunately, they are also much more difficult to ascertain, measure, and study than explicit biases. One scientific explanation suggests that implicit bias is formed by repeated negative associations—such as the association of a particular race with crime—that establish neurological responses in the area of the brain responsible for detecting and quickly responding to danger.<sup>9</sup> While federal and state laws often adopt statutory or judicial doctrines that seek to eradicate intentional discrimination and explicit bias, they may actually exacerbate the impact of implicit bias as it is now understood, perpetuating and reinforcing discrimination more broadly. Lawyers, judges, and other legal professionals need to heighten their awareness and understanding of implicit bias, its role in our civil and criminal justice system, and in particular, the problems that it creates with regard to juries.

### *B. Testing for Implicit Bias: Project Implicit and the IAT*

The centerpiece for research into implicit bias is Project Implicit. Project Implicit was originally launched at Yale University as a demonstration website in 1998. With a grant from the National Institute of Mental Health in 2003, it then operated as a research and virtual laboratory. Project Implicit is now a collaborative effort among research scientists, technicians, and laboratories at Harvard University, the University of Virginia, and the University of Washington. It exists “to facilitate the research of implicit social cognition: cognitions, feelings, and evaluations that are not necessarily available to conscious awareness, conscious control, conscious intention, or self-reflection.”<sup>10</sup> The Project “blends basic research and educational

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employer was seeking applicants, he was rejected, and the employer continued to seek applicants with his qualifications. *Id.*

<sup>8</sup> *Id.* at 807.

<sup>9</sup> See generally Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120 (2006); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COG. NEUROSCI. 729 (2000).

<sup>10</sup> Project Implicit, What is Project Implicit?, <http://www.projectimplicit.net/about.php> (on file with the Harvard Law School Library). Project Implicit currently has tests for race bias, Native American bias, disability bias, age bias, religious bias, weight bias, Arab-Muslim bias, skin tone bias, Asian American bias, sexuality bias, and bias on social and political issues. See Project Implicit, Stimulus Materials, <http://www.projectimplicit.net/stimuli.php> (on file with the Harvard Law School Library).

outreach in a virtual laboratory at which visitors can examine their own hidden biases.”<sup>11</sup>

The description of the IAT format is somewhat technical.<sup>12</sup> However, to give a non-specialist’s summary, the IAT pairs an “attitude object” (such as a racial group) with an “evaluative dimension” (such as “good” or “bad”) and suggests that the speeds of responses to the association of the two shows automatic attitudes and stereotypes, that is, implicit biases. “The IAT is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with [European American] faces and names than with African American faces and names—and that the same pattern will be found for other traditionally disadvantaged groups.”<sup>13</sup> In other words, implicit bias against African Americans is shown when “African American” is more rapidly paired with “bad” than with “good.” Attributes that are associated with some feature are easier and faster to pair than attributes that are not associated. Once the test is completed, you receive ratings like “slight,” “moderate,” or “strong” as a measure of your implicit bias on the subject tested.

The IAT’s general findings, after seven years on the Internet, are summarized here:

- **Implicit biases are pervasive.** They appear as statistically “large” effects that are often shown by majorities of samples of Americans. . . .
- **People are often unaware of their implicit biases.** Ordinary people, including the researchers who direct this project, are found to harbor . . . implicit biases . . . even while honestly . . . reporting that they regard themselves as lacking these biases.
- **Implicit biases predict behavior.** . . . [T]hose who are higher in implicit bias have been shown to display greater discrimination. . . .
- **People differ in levels of implicit bias.** Implicit biases vary from person to person—for example as a function of a person’s group memberships, the dominance of a person’s membership group in society, consciously held attitudes, and the level of bias existing in the immediate environment. This last observation makes clear that implicit attitudes are modified by experience.<sup>14</sup>

These findings are deeply troubling not only for our legal profession, but also for society as a whole. While I was surprised by the results of my own

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<sup>11</sup> Project Implicit, General Information, <http://www.projectimplicit.net/generalinfo.php> (on file with the Harvard Law School Library).

<sup>12</sup> See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 355–56 (2007) (describing the test in detail).

<sup>13</sup> Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2008).

<sup>14</sup> Project Implicit, General Information, *supra* note 11.

IAT, these general findings show that virtually none of us, despite our best efforts, is free from implicit bias.

Certainly, there are critics who claim that there is no validity to the IAT. One need only cruise the titles of the rapidly growing social science literature and the popular press on the subject to discover the brewing controversy.<sup>15</sup> The research and methodological criticisms reported in the literature of the IAT, some of which are conceded by supporters of the test, suggest that questions remain about the IAT's validity.<sup>16</sup> On the other hand, a 2009 study suggests that the IAT is valid,<sup>17</sup> and it has been discussed and relied upon by many legal and social science researchers investigating implicit bias.<sup>18</sup>

### C. *A Glimpse at Other Social Science Research Into Implicit Bias*

Regardless of the IAT's validity, empirical evidence from other social science studies show that implicit bias is pervasive in our society. I highlight only a few such studies that appear to demonstrate the implications of implicit bias in law enforcement and courtroom contexts.

#### 1. *The Seminal Study*

Any survey must begin with the 1989 article by Patricia G. Devine, which uncovered a previously unexplored class of racial biases.<sup>19</sup> Devine posited that prior social science work was limited to explicit racial biases, and that it was equally important to study "subconscious" and "automatic biases." Her research revealed that American whites may attribute character

<sup>15</sup> See, e.g., John Tierney, *In Bias Test, Shades of Gray*, N.Y. TIMES, Nov. 18, 2008, at D1.

<sup>16</sup> See Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1056–58 (2006) (contending that the IAT and "unconscious processes" should not be the basis for legislative action or litigation until more valid research is done).

<sup>17</sup> In a new meta-analysis of more than 100 studies, Drs. Greenwald, Banaji, and others reviewed 122 research reports with 184 independent samples and 14,900 subjects. As a result, they concluded that the IAT is valid. See generally T. Andrew Pohlman et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009).

<sup>18</sup> See, e.g., Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023 (2008); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 954 (2006) (discussing the IAT's predictive validity generally); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1035 (2006) (describing researchers' discoveries regarding implicit biases); Jolls & Sunstein, *supra* note 13; Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-as Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451 (2008); Steven R. Pruetz & Fong Chan, *The Development and Psychometric Validation of the Disability Attitude Implicit Association Test*, 51 REHABILITATION PSYCHOL. 202, 207 (2006) (involving a study of 223 volunteer students).

<sup>19</sup> Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

traits such as hostility or aggressiveness to blacks.<sup>20</sup> Devine also showed that even the preconscious presentation of racial material (material that is shown so quickly that the perceiver cannot consciously register it) was sufficient to trigger racial stereotypes, and that this was true of individuals with both high and low levels of overt prejudice.<sup>21</sup>

Since Devine's groundbreaking work, there has been an explosion of social science research into implicit bias, but I focus here on those studies that I believe best highlight the reach of implicit bias in society.<sup>22</sup>

## 2. "Shooter Bias" Studies

A fascinating series of so-called "shooter bias" studies sheds light on implicit bias in critical law enforcement decision making. These studies use custom-designed video games to examine implicit bias in the recognition of proper shooting targets, including both white and black hand-gun-toting bad guys, and improper shooting targets, including unarmed black and white bystanders holding cell phones or other innocuous items. The studies' participants are instructed to shoot the bad guys, regardless of race, but not to fire at the innocent bystanders. Implicit bias emerges, reflecting the operation of racial stereotyping, which here links black persons to danger. These studies are succinctly summarized by Professor Justin D. Levinson in a law review article about implicit memory bias in decision making by judges and juries:

The "shooter bias" refers to participants' propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders. Studies have also shown that participants more quickly identify handguns as weapons after seeing a Black face, and more quickly identify other objects (such as tools) as nonweapons after seeing a White face.<sup>23</sup>

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<sup>20</sup> *Id.* at 8–9 (citing studies documenting subjects' perceptions of the personality traits of blacks).

<sup>21</sup> *Id.* at 12.

<sup>22</sup> For additional social science research on implicit bias, see generally Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000); Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007); Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees* (Nat'l Bureau of Econ. Research, Working Paper No. 13206, 2007), available at <http://www.nber.org/papers/w13206.pdf>.

The last study is particularly interesting to me, as a member of the judiciary, in light of then-Supreme Court nominee John Roberts's observation: "Judges are like umpires. Umpires don't make the rules; they apply them. . . . It is a limited role. Nobody ever went to a ball game to see the umpire." See Press Release, The White House Office of Comm'ns, Fact Sheet: Judges Who Honor the Constitution (Oct. 6, 2008), available at 2008 WL 4460385. I am dubious of Chief Justice Roberts's analogy, but even if he is right that judges are primarily "umpires," the study of NBA referees suggests that not even umpires can escape their implicit biases.

<sup>23</sup> Levinson, *supra* note 12, at 357 (citations omitted).

One recent “shooter bias” follow-up study contains valuable insights regarding implicit bias. In that study, researchers found that greater “shooter bias” existed for community members and university students than for police officers.<sup>24</sup> Community members and university students were faster to shoot armed black persons than armed white persons, and they were faster to decide not to shoot unarmed white persons than unarmed black persons. Both groups were more likely to shoot a black target, armed or unarmed, than a white target. The police officers also showed evidence of racial bias in their reaction times—the presence of an unarmed black target delayed the police officers’ responses. However, importantly, the police officers showed no implicit or explicit racial bias in their ultimate decisions to shoot the armed and not shoot the unarmed—regardless of race. The lead author of this study stated, “‘We don’t mean to suggest that this is conclusive evidence that there is no racial bias in police officers’ decisions to shoot . . . . But we’ve run these tests with thousands of people now, and we’ve never seen this ability to restrain behavior in any other group than police officers.’”<sup>25</sup> Thus, this study suggests that training can restrain responses that might otherwise be affected by implicit bias. This glimmer of hope must not be overlooked!

### 3. *Judicial Decision Making Studies*

In a groundbreaking series of studies on judicial decision making, two law professors and a United States magistrate judge studied whether trial court judges primarily engage in deliberative judging, as so-called formalists argue, or intuitive decision making, as so-called realists maintain.<sup>26</sup> The authors suggest that an “intuitive-override” model of judging best reflects how trial court judges judge. This model views trial court judging as neither purely deductive decision making nor purely intuitive rationalization.

The researchers reached these conclusions after administering Shane Frederick’s three-question Cognitive Reflection Test (CRT) to 252 Florida circuit (trial court) judges—nearly half of the trial court judges in Florida.<sup>27</sup> Additionally, the authors conducted several other studies involving hundreds of federal and state trial judges across the nation. These studies suggest that trial court judges rely heavily on intuitive faculties when deciding traditional problems from the bench. While not explicitly discussing implicit bias the

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<sup>24</sup> Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1015 (2007).

<sup>25</sup> Benedict Carey, *Study Finds Police Training Plays Key Role in Shootings*, N.Y. TIMES, June 2, 2007, at A8 (interview with Professor Joshua Correll of the University of Chicago).

<sup>26</sup> See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

<sup>27</sup> The CRT’s three questions are: (1) A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost? (2) If it takes five machines five minutes to make five widgets, how long would it take one hundred machines to make one hundred widgets? (3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes forty-eight days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? *Id.* at 10.



authors observed, “[I]ntuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system,” and that intuitive associations, for example, of African Americans with violence, “seem to reflect automatic, intuitive judgments, while active deliberation limits such biases.”<sup>28</sup>

A still more recent study by the same authors asked whether “judges, who are professionally committed to egalitarian norms, hold [the] same implicit biases” as most other Americans.<sup>29</sup> Based on their study involving the participation of 133 judges from various jurisdictions, both elected and appointed, the authors found “that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.”<sup>30</sup> Among their most significant observations, the authors concluded that the necessary motivation to avoid the influence of bias can come from codes of judicial conduct that require judges to act impartially and to make unbiased decisions.<sup>31</sup> The study also suggested that judges “probably engaged in cognitive correction to avoid the appearance of bias.”<sup>32</sup> Thus, as with some of the “shooter bias” studies, this study suggests that “cognitive correction” may be able to overcome implicit bias.

Finally, a recent law review article concludes that implicit bias causes judges and jurors to unknowingly misremember case facts in racially biased ways.<sup>33</sup> This article draws upon a wide array of studies into implicit social cognition, human memory, and legal decision making. The researcher conducted an empirical study “to examine whether people’s recollections of legal stories are shaped by the race of the actors in the stories.”<sup>34</sup> He found that systematic and implicit stereotyping-driven memory errors affect legal decision making and that the nature of group deliberations appears unlikely to alter this phenomenon. The researcher concluded, “[S]o long as implicit biases go unchecked in legal decision-making, it is hard to be confident that social justice is at hand.”<sup>35</sup>

These last studies of judicial decision making should disabuse the legal profession of the notion that donning a black robe somehow relieves judges of their implicit biases. To the contrary, judges and other participants in the legal system are as susceptible to implicit biases as anyone else. It is unrealistic to expect attorneys to be free of implicit biases in, for example, their

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<sup>28</sup> *Id.* at 31.

<sup>29</sup> Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009).

<sup>30</sup> *Id.* See also *id.* at 1205–06 for characteristics of the participating judges.

<sup>31</sup> *Id.* at 1223.

<sup>32</sup> *Id.* Explaining why black judges are more likely to acquit black defendants than white judges, the authors suggest that both black and white judges were motivated to avoid an appearance of racial bias in the form of favoring white defendants, but that black judges might be less concerned with appearing to favor the black defendants. *Id.* at 1223–24.

<sup>33</sup> Levinson, *supra* note 12, at 391–95.

<sup>34</sup> *Id.* at 390.

<sup>35</sup> *Id.* at 421.

selection of jurors, or to expect that jurors, who are given only crude instructions about how to decide a case, will somehow overcome their implicit biases in considering questions presented to them. Indeed, combining these social science studies and law review articles with a smattering of common sense suggests that implicit bias likely permeates our civil and criminal justice system—from the pretrial decision to detain the accused, to the selection of a jury, to the jury’s rendering of a verdict or damage award, to appellate review.

## II. THE IMPLICATIONS OF IMPLICIT BIAS IN JURY SELECTION

Although the problem of implicit bias goes beyond jury selection, I will examine it alone to demonstrate the larger reach of implicit bias in the legal system as a whole. This focus is appropriate because the process of selecting fair and impartial jurors in both civil and criminal cases goes to the very heart of the principle of trial by jury that the founders enshrined in the Sixth and Seventh Amendments. Indeed, two decades ago, before much research into implicit bias had even begun, Justice Thurgood Marshall described discrimination in jury selection as “perhaps the greatest embarrassment in the administration of our criminal justice system.”<sup>36</sup>

Because there has been so little recognition of the role of implicit bias by either federal or state courts, the judiciary remains complicit, albeit perhaps unknowingly, in permitting continued discrimination. As I indicated at the outset of this Article, judge-dominated voir dire and the *Batson* challenge process are prime examples of well-intentioned methods of attempting to eradicate bias from the judicial process that, unfortunately, actually perpetuate legal fictions that allow implicit bias to flourish. Judge-dominated voir dire at the beginning of the jury selection process may exacerbate implicit bias in the selected jury’s determinations because it prevents detection and removal of implicitly biased jurors. The *Batson* challenge process, at the end of the jury selection, may create further implicit bias in jury selection by “sanitizing” or providing “cover” for the biased selections that it is purportedly designed to detect and eliminate, thus failing to prohibit explicitly and implicitly biased peremptory strikes.

Ordinarily, in civil and criminal cases in both state and federal courts, the panel of jurors that decides a case is selected from a much larger pool. Voir dire is the process of questioning prospective jurors about their qualifications to serve on the jury panel to decide the case. The rules of almost all courts, state and federal, provide that the questioning of prospective jurors may be conducted by the judge, the attorneys for the parties, or both.<sup>37</sup> In the course of the questioning, both the parties and the court may strike po-

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<sup>36</sup> *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

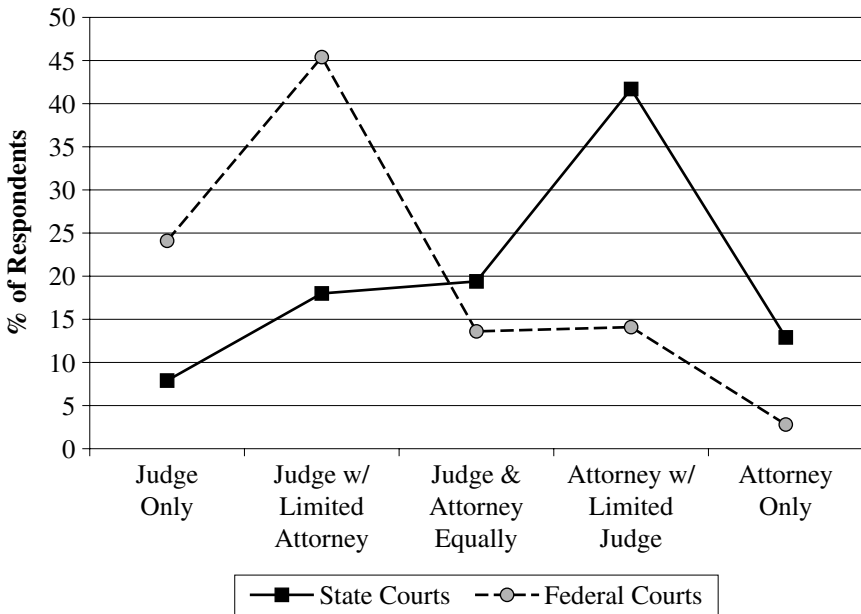
<sup>37</sup> *See, e.g.*, FED. R. CRIM. P. 24; FED. R. CIV. P. 47.

tential jurors for cause when the prospective juror’s views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.”<sup>38</sup> At the conclusion of voir dire, the parties are also ordinarily authorized to make a certain number of “peremptory challenges” to strike jurors without stating a reason for doing so.<sup>39</sup> Both the voir dire process and the exercise of peremptory strikes pose particular problems for eradication of implicit bias from the jury selection process.

A. Judge-Dominated Voir Dire

State and federal procedural rules allow, and court practice may often result in, judge-dominated voir dire—that is, voir dire with little or no attorney involvement. As the following chart demonstrates, federal district courts generally allow far less attorney involvement in voir dire than state courts.

FIGURE 1: WHO CONDUCTS VOIR DIRE?<sup>40</sup>



I suspect that most trial court judges who dominate voir dire do so because of perceived efficiency and local legal tradition rather than any mis-

<sup>38</sup> *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

<sup>39</sup> *See, e.g.*, FED. R. CRIM. P. 24(b); FED. R. CIV. P. 47(b).

<sup>40</sup> GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 27 fig.1, (2007), available at [http://www.ncsconline.org/D\\_research/cjs/pdf/SOSCompendiumFinal.pdf](http://www.ncsconline.org/D_research/cjs/pdf/SOSCompendiumFinal.pdf).

guided belief that the judge is more adept at ferreting out biases, whether explicit or implicit. However, judge-dominated voir dire allows jurors with undetected and undeterred implicit biases to decide cases by preventing attorneys from using preemptory or for cause strikes to eliminate such jurors. Because lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome. Moreover, trial lawyers have greater access than trial court judges to cognitive psychologists, jury consultants, and other resources to develop voir dire strategies to address both explicit and implicit biases of prospective jurors. Using such resources, trial lawyers can formulate questions that may reveal prospective jurors' biases and can more thoroughly and realistically evaluate the jurors' answers. In contrast, judges commonly ask questions such as, "Can all of you be fair and impartial in this case?" This question does not begin to address implicit bias, which by its nature is not consciously known to the prospective juror. Thus, a trial court judge schooled in the basics of implicit bias would be delusional to assume that this question adequately solves implicit bias.

Still more troubling, empirical research suggests that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges.<sup>41</sup> As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can "be fair." I find it remarkable when a juror has the self-knowledge and courage to answer that he or she cannot be fair in a particular case, and even more remarkable when the juror's explanation for that inability is based on a factor that neither I, nor the parties, have raised. There is also a temptation, not always resisted on my part, to pose questions with the intent of educating jurors about proper responses, in light of the presumption of innocence or other considerations in the trial. Thus, the trial judge is probably the person in the courtroom least able to discover implicit bias by questioning jurors. As a result, jurors unknowingly make crucial determinations in cases that are influenced by their implicit biases.

Recent social science research suggests that implicit bias is a potential problem in juror determinations. But it was clear to some much longer ago that even good faith answers to the question of whether or not one is prejudiced may be unhelpful—particularly when the question comes from a figure of authority, such as a judge. In 1921, Lena Olive Smith, the first African American woman licensed to practice law in Minnesota, recognized the effect of unconscious racial preferences. In the case of a black man convicted by an all-white jury of raping a white woman, Smith argued for a new trial based on racial prejudice, explaining that:

The Court fully realizes I am sure, that the very fact that the defendant was a colored boy and the prosecutrix a white woman, and

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<sup>41</sup> See, e.g., Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987).

the entire panel composed of white men—there was a delicate situation to begin with, and counsel for the State took advantage of this delicate situation. . . . Perhaps [the jurors] were, with a few exceptions, conscientious in their expressions [of no racial prejudice]; yet it is common knowledge a feeling can be so dormant and subjected to one’s sub-consciousness, that one is wholly ignorant of its existence. But if the proper stimulus is applied, it comes to the front, and more often than not one is deceived in believing that it is justice speaking to him; when in fact it is prejudice, blinding him to all justice and fairness.<sup>42</sup>

I believe that implicit bias has the potential to influence many jury trials in both state and federal courts. This effect may extend beyond criminal cases involving minority defendants to tort cases involving minority parties, patent and other business litigation cases involving foreign or minority-owned corporations or foreign or minority officers and employees, and the full range of discrimination and civil rights cases. Such cases are just the more obvious examples.

### B. *The Batson Challenge Process*

In 1986, the United States Supreme Court held in *Batson v. Kentucky* that the Equal Protection Clause “forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.”<sup>43</sup> *Batson* and its progeny established a three-step process for assessing purportedly race-based (or gender-based) peremptory strikes. Step one requires that a defendant raise an inference that a prosecutor’s peremptory challenge was race-based. Step two requires the prosecutor to proffer a race-neutral reason for the challenge. If the prosecutor meets this burden of production, not persuasion, then step three requires the trial court judge to decide whether the prosecutor’s exercise of the peremptory challenge is nevertheless purposeful discrimination.

Because *Batson*’s framework is flawed, it has produced the lingering and tragic legacy that the courts almost always *do not* find purposeful discrimination, regardless of how outrageous the asserted race-neutral reasons are. Although *Batson* and its progeny purportedly prohibit striking members of a protected class on account of class membership alone, this limitation is easily circumvented if the prosecutor proffers a facially class-neutral justification and the defendant cannot establish purposeful discrimination to the court’s satisfaction. Moreover, the *Batson* challenge process may allow the implicit biases of the judges and attorneys to go unchecked during jury selection. Thus, while judge-dominated voir dire may result in implicitly bi-

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<sup>42</sup> Def.’s Mot. for New Trial, *Minnesota v. Hayward* (4th Dist. Ct. 1928) (No. 26421) (filed June 18, 1928), at 7–8, quoted in Ann Juergens, *Lena Olive Smith: A Minnesota Civil Rights Pioneer*, 28 WM. MITCHELL L. REV. 397, 447–48 (2001).

<sup>43</sup> *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

ased jurors deciding cases, the *Batson* challenge process may result in implicitly biased courtroom actors selecting jurors.

In his concurring opinion in *Batson*, Justice Marshall foreshadowed the discovery of implicit bias, stating:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.<sup>44</sup>

In the most comprehensive and thoughtful article on the relationship between implicit bias and *Batson* challenges, Professor Anthony Page agreed, concluding, "Not surprisingly, *Batson* has engendered an enormous amount of often virulent criticism. . . . One even less charitable commentator has said, '*Batson* is either a disingenuous charade or an ill-conceived sink-hole.'"<sup>45</sup> *Batson* and its progeny appear to remain ineffective, despite the fact that other members of the Court have recognized the role of implicit bias in the legal system.<sup>46</sup>

The promise of *Batson* remains illusory for two reasons in particular: trial judges are reluctant to doubt prosecutors' proffered reasons for their challenged strikes, and appellate courts are highly deferential to the trial courts' decisions on these matters. Here, I consider these tendencies in more detail.

### 1. Trial Judges' Reluctance to Reject Proffered Explanations

The third step of a successful *Batson* challenge requires the trial judge to reject a prosecutor's justification. As one state appellate court observed, "[T]he defendant's practical burden [is] to make a liar out of the prosecutor."<sup>47</sup> Most trial court judges will only find such deceit in extreme situations. For example, a federal district court found no *Batson* violation, even though the prosecutor struck a potential juror, perceived to be Indian and probably Hindu, because "Hindus tend . . . to have feelings a good bit differ-

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<sup>44</sup> *Id.* at 106 (Marshall, J., concurring).

<sup>45</sup> Anthony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 178–79 (2005) (citations omitted).

<sup>46</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias . . . remain alive in our land, impeding realization of our highest values and ideals."); *Georgia v. McCollum*, 505 U.S. 42, 68 (1991) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.").

<sup>47</sup> *Munson v. State*, 774 S.W.2d 778, 780 (Tex. Crim. App. 1989).

ent from us” and the prosecutor preferred an “American juror.”<sup>48</sup> Likewise, neither a state trial court nor a federal appellate court on habeas appeal found a *Batson* violation when a prosecutor struck the lone African American in the jury pool because he “worked” in an unknown capacity at a community college and gave “short form” answers on the juror questionnaire. The prosecutor claimed that he routinely struck everyone “involved in education,” yet he left a retired schoolteacher on the panel. In addition, other prospective jurors who gave “short form” answers remained on the panel, and the judge even admitted that he “encouraged” the rapid completion of the forms by potential jurors.<sup>49</sup> Finally, another state trial court found no *Batson* violation where a black potential juror was struck, in part, for dying her hair blonde, where the prosecutor claimed that black women who dye their hair blonde are “not cognizant of their own reality and existence” and are, therefore, undesirable jurors.<sup>50</sup> Some of the purportedly race-neutral explanations for peremptory strikes, accepted despite *Batson* challenges, have an uncanny similarity to the explicit gender stereotyping considered unlawful in *Price Waterhouse*.<sup>51</sup> These examples corroborate one court’s observation that “[a]ny neutral reason, no matter how implausible or fantastic, even if it is silly or superstitious, is sufficient to rebut a prima facie case of discrimination.”<sup>52</sup>

At the same time some prosecutors are explicitly trained to subvert *Batson*. For example, the Third Circuit Court of Appeals detailed a prosecutor training session that encouraged striking black people from juries because, among other reasons, “blacks from the low-income areas are less likely to convict.”<sup>53</sup> Another court’s experience with prosecutor justifications led it to remark, “[W]e wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, ‘Handy Race-Neutral Explanations’ or ‘20 Time-Tested Race-Neutral Explanations.’”<sup>54</sup>

## 2. Appellate Courts’ Deference to Trial Judges’ *Batson* Determinations

The reluctance of judges to find *Batson* violations is only part of the reason that *Batson* is ineffective in addressing explicit and implicit biases.

<sup>48</sup> *United States v. Clemmons*, 892 F.2d 1153, 1160 (3d Cir. 1990).

<sup>49</sup> *Rankins v. Carey*, 36 F. App’x 296, 297 (9th Cir. 2002) (reversing a federal district court for granting relief to a state prisoner pursuant to 28 U.S.C. § 2254 for a *Batson* violation).

<sup>50</sup> *Davis v. State*, 596 So. 2d 626, 628 (Ala. Crim. App. 1991).

<sup>51</sup> Compare the proffered “race-neutral” reasons in *Clemmons*, 892 F.2d at 1160, and *Davis*, 596 So. 2d at 628, with the explicitly biased comments in *Price Waterhouse*, 490 U.S. 228, 235 (1989). See *infra* Part I(A).

<sup>52</sup> *Pruitt v. McAdory*, 337 F.3d 921, 928 (7th Cir. 2003) (internal quotation marks and citations omitted).

<sup>53</sup> *Wilson v. Beard*, 426 F.3d 653, 656 (3d Cir. 2005).

<sup>54</sup> *People v. Randall*, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996). Another frightening question is whether the race-neutral explanation, offered with a smile, is received with a wink by an equally consciously or unconsciously biased judge.

Another reason is that appellate courts give trial court judges considerable deference on appeal. Consequently, the reporters are filled with appellate decisions affirming flimsy justifications.<sup>55</sup> Indeed, each of the decisions rejecting a *Batson* challenge described in the preceding section was affirmed by an appellate court.<sup>56</sup>

Given the emerging knowledge of implicit bias, it is perhaps just as troubling that some appellate courts have held that “a juror’s demeanor and body language may serve as legitimate, race-neutral reasons to strike a potential juror.”<sup>57</sup> In this context, some reviewing courts have been willing to affirm the trial court’s acceptance of a “demeanor and body language” rationale, because the trial court was purportedly in the best position to evaluate the credibility of the proffered reason. However, they have sometimes done so without requiring the trial court to develop or evaluate the factual basis for the “demeanor” objection, thus apparently taking the explanation as credible on its face.<sup>58</sup> Yet we now know that implicit biases can lead members of different races to perceive members of other races as lazy, or hostile, or threatening.<sup>59</sup> Thus, accepting “body language or demeanor” as a purportedly legitimate reason for a peremptory challenge provides another “Handy Race-Neutral Explanation” because it disregards the effect of implicit bias upon perceptions of body language or demeanor.

The Sixth Circuit Court of Appeals has advanced a more tenable version of the rule that body language and demeanor may provide race-neutral grounds to strike a potential juror, at least in the context of implicit bias. The rule requires the trial judge independently assess the potential juror’s body language and demeanor to determine the validity of the proffered explanation.<sup>60</sup> In practice, when a district court does not merely credit the explanation of the prosecutor, but itself finds that the juror was, for example, passive and disinterested, then the defendant will be unable to demonstrate that the district court clearly erred in dismissing his *Batson* challenge.<sup>61</sup>

The Supreme Court has indicated that a potential juror’s demeanor may be a race-neutral reason for striking the juror. However, the Court has also recognized that when demeanor is the offered reason, “the trial court’s first-hand observations [are] of even greater importance” as to the demeanor of *both* the potential juror and the attorney making the peremptory strike.<sup>62</sup> The

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<sup>55</sup> See, e.g., *United States v. Clemmons*, 892 F.2d 1153, 1162 (3d Cir. 1989) (Higginbotham, J., concurring) (“[O]n appeal, even a flimsy explanation may appear marginally adequate and be sustained.”).

<sup>56</sup> See also *Rankins v. Carey*, 36 F. App’x 296, 298 (9th Cir. 2002) (Hawkins, C.J., dissenting) (describing the prosecutor’s accepted explanations as “gossamer at best and smack[ing] of pretext”).

<sup>57</sup> *United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir. 2007), *cert. denied*, 550 U.S. 952 (2007).

<sup>58</sup> See, e.g., *Bell-Bey v. Roper*, 499 F.3d 752, 758 (8th Cir. 2007).

<sup>59</sup> See, e.g., Devine, *supra* note 19, at 8–9.

<sup>60</sup> See *Braxton v. Gansheimer*, 561 F.3d 453, 461–62 (6th Cir. 2009).

<sup>61</sup> *Id.* (citing *McCurdy v. Montgomery County, Ohio*, 240 F.3d 512, 521 (6th Cir. 2001)).

<sup>62</sup> *Snyder v. Louisiana*, 128 S. Ct. 1203, 1208 (2008); see also *United States v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009) (citing *Snyder*).



Court also found that the prosecutor's credibility can best be judged by his own demeanor. So, "the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor."<sup>63</sup>

In sum, it ought to be obvious that the *Batson* standards for ferreting out lawyers' potential explicit and implicit bias during jury selection are a shameful sham. The rapid growth of social science knowledge about implicit biases has only affirmed Justice Marshall's prediction that *Batson* would become "irrelevant" and that "racial discrimination in jury selection. . . would go undeterred."<sup>64</sup> Because *Batson* is ineffectual in addressing bias in jury selection, it permits implicit bias—and probably even explicit bias—to have an impact on jury selection.

### III. WHAT WE CAN AND SHOULD DO ABOUT IMPLICIT BIAS IN THE LEGAL SYSTEM

Carl Gustav Jung, the great Swiss psychiatrist and founder of analytical psychology, wrote, "All the greatest and most important problems of life are fundamentally insoluble. They can never be solved, but only outgrown."<sup>65</sup> If this is true, it may take a very long time indeed for society to outgrow the problem of implicit bias. While we wait, I suggest we follow wisdom attributed to Voltaire: no problem can stand the assault of sustained thinking. Somewhere between Jung and Voltaire, there should be something that the legal profession can do now to address implicit bias in jury selection specifically and, perhaps, in the legal system more generally.

#### A. Addressing Implicit Bias in Judge-Dominated Voir Dire

Once trial court judges recognize the pervasiveness of implicit bias in juror decision making, I believe that they will consider significantly expanded lawyer participation in jury selection. Expanded lawyer participation in jury selection will help eliminate jurors' tendency to give socially acceptable answers to questions by judges.<sup>66</sup> It will also address two particular flaws in the current system: (1) judges do not have the same access as lawyers to resources to develop voir dire strategies to address both explicit and implicit biases of prospective jurors; and (2) judges generally do not have the knowledge of the case that would indicate the possible impact or jurors' implicit biases. Trial lawyers can formulate questions that more thor-

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<sup>63</sup> *Snyder*, 128 S. Ct. at 1208.

<sup>64</sup> *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

<sup>65</sup> JAMES B. SIMPSON, *SIMPSON'S CONTEMPORARY QUOTATIONS* 230 (Houghton Mifflin Co. 1988).

<sup>66</sup> See, e.g., Jones, *supra* note 42.

oughly and realistically evaluate the effect of the jurors' possible biases on the case. Few arguments for greater lawyer participation in the voir dire process seem more persuasive than implicit bias.<sup>67</sup>

The obvious counterargument is that increased lawyer participation simply puts selectors who are potentially explicitly or implicitly biased in charge of the jury selection process. Moreover, lawyers may have an incentive to *keep* a juror whose biases increase the lawyer's chances of winning. As explained more fully below, however, both problems can be addressed by the elimination of peremptory strikes. The hopeful implications of "shooter bias" and "judicial bias" studies further suggest that training and "cognitive correction" can help individuals recognize their implicit biases and refuse to act upon them.<sup>68</sup> Even lawyers acting as advocates should be motivated by a sense of professional duty, ethics, or fairness. Another counterargument is that lawyer-dominated voir dire will be more expensive and time-consuming.<sup>69</sup> However, guaranteeing a fair trial by eradicating implicit bias seems an overriding constitutional priority.<sup>70</sup>

### B. Addressing Implicit Bias in the Batson Challenge Process

As Justice Marshall suggested, one solution for managing implicit bias in the persons selecting or striking jurors would be the total elimination of peremptory challenges, permitting only challenges for cause.<sup>71</sup> While other scholars seem to have more faith in the unfulfilled promise of *Batson*, I endorse Justice Marshall's view that eradication of discriminatory peremptory challenges "can be accomplished only by eliminating peremptory challenges entirely."<sup>72</sup>

More specifically, Justice Marshall reasoned that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge."<sup>73</sup> This was so because challenges to peremptory strikes would only be successful when the strikes were so flagrant as to demonstrate a prima facie case and because trial courts were ineffective in assessing the prosecutors' motives, in part because of their own conscious or

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<sup>67</sup> For additional arguments for increased participation of lawyers in voir dire, see, for example, John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1254–55 (2001) (increased juror impartiality); Paula Hannaford-Agor, *When All Eyes Are Watching: Trial Characteristics and Practices in Notorious Trials*, 91 JUDICATURE 197, 199 (2008) (increased perceptions of fairness).

<sup>68</sup> See Correll et al., *supra* note 24, at 1017, 1020–22; Rachlinski et al., *supra* note 30, at 1223.

<sup>69</sup> See, e.g., Ryan Brett Bell & Paula Odysseos, *Sex, Drugs, and Court TV? How America's Increasing Interest in Trial Publicity Impacts our Lawyers and the Legal System*, 15 GEO. J. LEGAL ETHICS 653, 665 (2002).

<sup>70</sup> *Id.*

<sup>71</sup> *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 105.

unconscious racism.<sup>74</sup> Subsequent studies of implicit bias strongly suggest that Justice Marshall was correct. Justice Marshall then argued that elimination of peremptory challenges entirely was the only adequate solution. Only that course would maintain the balance between freedom from bias against the accused and freedom from prejudice against the prosecution. His proposal recognized the potential for bias inherent in the defendant's challenges as well as in the prosecution's.<sup>75</sup> Again, subsequent studies indicate that Justice Marshall was correct that *neither side* is free from the effects of implicit bias.

Justice Marshall has not been alone among Supreme Court Justices to call for the elimination of peremptory challenges. Twice in recent years, Justice Breyer has called for such a remedy.<sup>76</sup> Justice Breyer questions:

*Batson* asks prosecutors to explain the unexplainable, so how can it succeed? . . . [N]o one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype. How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?<sup>77</sup>

Thus, I join Justice Marshall and Justice Breyer's call for banning peremptory challenges entirely as the only means to eliminate lawyers' tendency to strike jurors due to stereotype and bias. Permitting only for cause strikes avoids many of the problems with *Batson*. The court would not simply evaluate whether the proffered reason was a pretext for discriminatory animus as the last step of a burden-shifting analysis weighted in favor of upholding the peremptory strike. It would instead evaluate the sufficiency of the proffered reason as a basis for striking the juror in the first place. The onus of justifying the strike would always lie with the party that *wished* to strike, rather than the one resisting the strike. In that context, courts are far less likely to accept implausible or marginally adequate reasons.

Such a simple solution to a complex problem—akin to slashing through the Gordian Knot—is not my usual approach to complex problems.<sup>78</sup> Moreover, for the reasons explained more fully below, elimination of peremptory challenges alone is not likely to be sufficient; that solution would work most effectively in tandem with increased lawyer participation in voir dire.

Nevertheless, short of elimination of peremptory challenges—a solution for which there has admittedly been little support from courts or legislatures<sup>79</sup>—there is no lack of suggested alternatives. These other solutions

<sup>74</sup> *Id.* at 105–06.

<sup>75</sup> *Id.* at 108.

<sup>76</sup> *Rice v. Collins*, 546 U.S. 333, 342–44 (2006) (Breyer, J., concurring); *Miller-El v. Dretke*, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring).

<sup>77</sup> *Rice*, 546 U.S. at 343 (citing his concurrence in *Miller-El*, 545 U.S. at 267–68).

<sup>78</sup> See, e.g., *Rural Water Sys. No. 1 v. City of Sioux Center*, 967 F.2d 1483, 1510 (N.D. Iowa 1997); *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 922 F. Supp. 1334, 1339 (N.D. Iowa 1996).

<sup>79</sup> See, e.g., Page, *supra* note 46, at 246.

include a variety of sanctions against offending lawyers, category-conscious jury selection,<sup>80</sup> and changing the *Batson* three-step analysis.<sup>81</sup> Most of these solutions, however, are incompatible with the constitutional right of jurors to serve on a jury irrespective of race or gender. Or like the *Batson* process, they are unlikely to discover even biased peremptory challenges.<sup>82</sup>

C. *The Need for Tandem Remedies to Implicit Bias in Jury Selection and Jury Determinations*

Expanded lawyer participation in jury selection, with appropriate training of lawyers to avoid implicit biases, and the elimination of peremptory challenges must be adopted together for either remedy to be fully effective.<sup>83</sup> Without this coupling, expanded lawyer participation in jury selection could allow lawyers to unwittingly expand their implicitly biased reactions to greater information obtained from potential jurors. In this sense, expanded lawyer participation in jury selection is a double-edged sword. The more information a lawyer obtains from a potential juror, the better informed the lawyer and the judge are on challenges for cause, but the greater the likelihood that the lawyer would exercise a peremptory challenge based upon the lawyer's own explicit and implicit biases.

It is only by using the two remedies together that the flaws of judge-dominated voir dire and of the *Batson* challenge process both can be alleviated. Where expanded attorney participation in voir dire might seem to put biased selectors in control of the jury selection process, the selectors' ability to act on their own biases will be inhibited by the necessity of demonstrating cause for any strikes of prospective jurors. Similarly, where elimination of peremptory challenges might seem to increase the chances that biased jurors will not be stricken, increased lawyer participation in voir dire will increase the information about juror biases on which strikes for cause can be based. Thus, the two remedies work in tandem to prevent attorneys from exercising challenges in an implicitly biased way, but allow attorneys to use their resources to eliminate jurors who would make determinations based on their implicit biases.

Thus, each solution, while independently beneficial, aids in curbing the other's unintended consequences. That is not to say each is pointless without the other. Even without the elimination of peremptory challenges, increased lawyer participation in voir dire should increase the information about jurors' biases and beliefs and debunk the more fanciful justifications for strikes. And even without increased lawyer participation, the *Batson* challenge pro-

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<sup>80</sup> For example, one method would secure greater representation of defendant's race on a jury in a criminal case through a "reverse of the peremptory challenge system" that allows parties the right to affirmatively choose some or all of the potential jurors on the basis of race or other protected characteristics.

<sup>81</sup> See Page, *supra* note 46, at 245-62.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* at 245, 262.

cess would be more effective if trial courts required stronger showings of legitimate grounds for strikes and if appellate courts gave less deference to trial courts' *Batson* determinations.

#### D. Other Remedies

There are additional steps to address implicit bias, either while awaiting implementation of the remedies suggested above or as standalone measures.

##### 1. *Jury Selection Presentations and Jury Instructions on Implicit Bias*

I suggested above that common questions by judges in voir dire, such as "Can all of you be fair and impartial in this case?", are inadequate to address implicit bias in jury determinations. Nevertheless, I do think that there are things judges can do in jury selection and in jury instructions to minimize the likelihood that jurors will act on their implicit biases. First, efforts can be made to educate attorneys and potential jurors of the possible impact of implicit biases. For example, I now include a slide about implicit bias in the PowerPoint presentation that I show before allowing attorneys to question potential jurors. As some of the "shooter bias" studies and the recent study of unconscious racial bias in trial judges have demonstrated, such information may mitigate the effect of the bias.<sup>84</sup> Beyond informing various participants at the start of trial, jury instructions could include a brief discussion of implicit bias and urge jurors to attempt to control or eliminate them.<sup>85</sup> Many of my colleagues are unreceptive to this idea, fearing that implicit biases will only be exacerbated if we call attention to them. However, the positive outcomes of studies attempting to teach actors about their implicit biases leave me undeterred.

##### 2. *Recognition, Investigation, Training, and Testing*

As Justice O'Connor observed, "That the Constitution does not give federal judges the reach to wipe all marks of racism from every courtroom in the land is frustrating, to be sure."<sup>86</sup> Thus, we simply cannot rely on judges

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<sup>84</sup> See Correll, *supra* note 24, at 1017, 1020–22; Rachlinski et al., *supra* note 30, at 1223.

<sup>85</sup> I use the following jury instruction before opening statements in all civil and criminal jury trials: As we discussed in jury selection, growing scientific research indicates each one of us has "implicit biases," or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.

<sup>86</sup> *Georgia v. McCollum*, 505 U.S. 42, 69 (1992).

alone to remedy the problem of implicit bias. That does not mean that the legal system is powerless. Other remedies besides those discussed above range from the conceptual to the concrete.

First, we need to recognize that implicit bias is both real and pervasive in our legal system. Without this recognition, solutions are impossible.

Second, each and every member of the legal community who has internet access should immediately visit [www.implicit.harvard.edu](http://www.implicit.harvard.edu) and perform an implicit bias “Demonstration Test.” I am confident that the test will be an enlightening experience for lawyers, judges, and other court personnel, regardless of their skin color, gender, or other immutable traits. We must then be mindful of our experience in our everyday practice of the law or judging or working in a courthouse.

Third, with the recognition that implicit bias is both real and pervasive, various legal organizations, state bar associations, and the states’ highest courts could take the concrete step of adopting standing committees to study implicit bias. Failing the standing-committee approach, each of these entities should make a formal commitment to the ongoing study of the implications of implicit bias and engage in state-of-the-art implicit bias training on at least an annual basis.

Finally, we could also routinely attempt to assess the implicit biases of potential jurors. Courts could administer computer or hand-written bias sensitivity tests to potential jurors and share the results with the lawyers before voir dire. Such a procedure would be a judge-neutral and lawyer-neutral method to attempt to discover and address implicit bias of jurors, without placing the burden on attorneys, for example, to use other expensive resources to develop strategies to address the implicit biases of prospective jurors. The tests would also eliminate some concerns about lawyers using additional information gained from extensive lawyer-dominated voir dire to act on their own implicit biases in selecting jurors.

#### IV. CONCLUSION

Early civil rights pioneers like Lena Olive Smith, who intuitively recognized the possibility of unconscious biases, and more recent pioneers in the field of implicit bias, including social scientists and lawyers, have planted the seeds that will germinate solutions to the daunting problems of implicit bias in the civil and criminal justice systems. The outlook is not entirely bleak. President John F. Kennedy observed, “[E]very area of trouble gives out a ray of hope—and the one unchangeable certainty is that nothing is certain or unchangeable.”<sup>87</sup> There is great promise from the most recent “shooter bias” study from 2007 indicating that police officers are able to completely overcome implicit racial bias with adequate training and in the

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<sup>87</sup> John F. Kennedy, President, Second State of the Union Address (Jan. 11, 1962), in “LET THE WORD GO FORTH”: THE SPEECHES, STATEMENTS, AND WRITINGS OF JOHN F. KENNEDY, 1947–1963, at 230 (Theodore C. Sorensen ed., Dellacore Press 1988).

2009 study of judges indicating that judges are able to apply a “cognitive correction” to their implicit biases.<sup>88</sup> While the legal profession has come a long way from the days of *Ex parte Virginia*,<sup>89</sup> when the United States Supreme Court affirmed a federal conviction of a state court judge for systematically excluding qualified black jurors from grand and petit juries, there is still a long road to travel. Through greater appreciation of the problem by the legal profession and creative problem solving, I am optimistic that the ray of hope will outshine the darkness of implicit bias.

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<sup>88</sup> See Correll, *supra* note 24, at 1017, 1020–22; Rachlinski et al., *supra* note 30, at 1223.

<sup>89</sup> *Ex parte Virginia*, 100 U.S. 339, 348–49 (1879).

