BLACK JURORS MATTER: WHY THE LAW MUST PROTECT MINORITIES' RIGHT TO JUDGE

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Abstract: *Trial lawyers too often unlawfully strike potential minority jurors from the jury pool for truthfully sharing their experiences as victims of discrimination. Counsel claim these potential jurors are "biased," when in fact potential jurors often impartially expose the duality of the American experience for people of color.*

The use of the peremptory strike against people of color reveals our "ideal" juror as a white male juror who lacks any experience with bias; violates the spirit of Batson v. Kentucky;[1] *and places into question the continued use of peremptory challenges. Striking minorities from the venire for sharing their honest opinions after they affirm their willingness to follow the facts and apply the law otherizes people of color, deprives the community of minority experiences, and perpetuates systemic bias.*

In our post-Floyd world, this article argues that the ongoing failure of courts and counsel to identify and cease this practice for the discrimination it is reflects a failure of the jury selection process as a matter of Constitutional law and participatory democracy.

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I dedicate this article to my parents, Joseph Kanjirappallil Paulose and Lucy Joy Kunjummen Paulose, whose sacrifices made possible my opportunities.

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

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INTRODUCTION

Historically, courts, litigants, and scholars have viewed the impartial juror as someone who has not experienced discrimination. In the context of a case in which the very issue is racism, the traditional view has prevented people who have certain experiences, largely people of color, from serving on a jury in order to remedy the wrong. The traditional view has perpetuated alienation of people of color from their government, denied litigants the judgment of the whole community, and perpetuated injustice.

All this has come at the cost of truly representative juries. Does anyone have standing to invoke the rights of the citizens to oversee their government and participate in the judicial process? In a government "of the people, by the people, and for the people,"[2] do not the people possess a right to jury service? If so, does the government have the power to vindicate this service? Could those rights to serve be implicated by explicit bias, as the Supreme Court seems to have recognized, as well as by implicit bias? Does implicit bias reveal itself in the ideal of the purported unbiased juror as an older white male juror? Does this implicit bias exact a toll on individual trials, our government, and our culture that is just as pernicious as explicit bias? Do state legislatures and Congress have the power to remedy this implicit bias by limiting the grounds on which defendants may exercise peremptory strikes?

In this article, I argue that the answer to all these questions is "yes." I review Congressional attempts to eliminate race as a basis for jury service. I examine the evolution of Supreme Court cases that tiptoe toward recognizing a juror's right to serve and toward a defendant's right to an impartial jury. I consider the role of microaggressions[3] and implicit bias,

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[2] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) ("[W]e here highly resolve . . . that government of the people, by the people, for the people, shall not perish from the earth.").

[3] Dr. Chester Pierce coined the term "microaggression" in the 1970s to describe an "offensive mechanism":

> For it is from feelings of superiority that one group of people proceeds to brutalize, degrade, abuse, and humiliate another group of individuals. The superiority feelings and the accompanying contemptuous condescension towards a target group are so rampant in our society that it is virtually impossible for any negotiation between blacks and whites to take place without the auspices of such offensive tactics. . . .
>
> Most offensive actions are not gross and crippling. They are subtle and stunning. The enormity of the complications they cause can be appreciated only when one considers that these subtle blows are delivered incessantly. Even though any single negotiation of offense can in justice be considered of itself to be relatively innocuous, the cumulative effect to the victim and to the victimizer is of an

in denying minorities a seat on the jury by reviewing the few cases in which pretextual reasons are recorded. I describe why the voir dire process must be modified to weed out implicit bias during jury selection to ensure a truly representative jury. I review current state laws prohibiting using race as a basis to strike a juror. I also lay out pending state legislation addressing the role implicit bias plays in juror selection and peremptory strikes. I conclude that Congress and individual state legislatures must amend current laws to explicitly prohibit implicit bias during juror selection. Finally, I consider and respond to critiques of the ideas advanced in this article.

Although implicit bias in trial procedures has inspired many law review articles,[4] no scholar has yet written about the implicit bias ongoing in voir dire of minority jurists who testify truthfully as to their experiences. The present voir dire process unfairly excludes out people

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> unimaginable magnitude. Hence, the therapist is obliged to pose the idea that offense mechanisms are usually a *microaggression*, as opposed to a gross, dramatic, obvious *macroaggression* such as lynching.

Chester Pierce, *Offensive Mechanisms*, *in* THE BLACK SEVENTIES 255, 255-56 (Floyd B. Barbour ed., 1970) (emphasis in original).

[4] *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 789 (2020) ("For over a century, both state and federal actors justified the exclusion of black jurors from criminal trials, in whole or in part, on the grounds that few possess the requisite objectivity (*e.g.*, 'sound judgment and fair character') to serve."); Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 80 (2020) ("With the new developments and recent expansion by psychologists studying biases, some courts have taken steps to address implicit or unconscious biases."); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1293 (2018) ("The model criminal jury instructions published by the federal circuit courts mention bias briefly if at all and do not mention implicit bias or stereotypes, thus leaving to trial judges the discretion to introduce these topics to jurors."); Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 181 (2015) ("Research by Samuel Sommers and Phoebe Ellsworth into implicit bias suggests that making race salient in jury voir dire can reverse the effects of implicit bias and influence the jurors' perceptions of the trial and their decisions."); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 867 (2015) ("[A] wealth of social science research suggests that making race salient or calling attention to the possibility of racial bias can encourage prospective jurors to reflect on their own possible biases and consciously counter what would otherwise be automatic stereotype-congruent responses."); Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 151 (2010) ("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.").

who have no actual bias, simply because they articulate a different reality than what white America lives, breathes, and experiences every day. Ironically, the implicit bias of the justice system is given force by the voir dire process, in which attorneys can accuse Black jurists of bias as a way to infringe their right to serve. This article aims to articulate a claim for why minority experiences on the jury fundamentally matter and advocate for minority inclusion as a matter of constitutional law and good public policy.

I. THE LEGAL FRAMEWORK FOR JURY SERVICE

1. The United States Constitutional Jury Right

A juror's right to serve has longstanding roots in the Anglo-American legal tradition. The Constitution provides for an unbiased jury made up of American citizens from any walk of life:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[5]
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[6]

Every American citizen is constitutionally eligible to serve on a jury. However, in most districts, citizens are selected for jury duty only if they have registered to vote or drive.[7] The clerk of court uses those registration rolls to send out a questionnaire and summon citizens to appear for jury duty. Citizens then appear in court to submit to the voir dire process before selection as a juror.

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[5] U.S. CONST. amend. VI.

[6] U.S. CONST. amend. XIV, § 1.

[7] *See* Learn About Jury Service, U.S. COURTS, https://www.uscourts.gov/services-forms/jury-service/learn-about-jury-service (last visited Nov. 2, 2022).

2. Congressional Prohibition on Racial Discrimination

The rights of Black Americans and other minorities to serve on juries is the result of a hard fought and ongoing struggle. In 1948, Congress prohibited the use of race as a basis to exclude potential jurors from the legal system following earlier laws[8] attempting to do the same, including of the Fourteenth Amendment:[9]

Exclusion of jurors on account of race or color

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.[10]

Declaration of policy

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.[11]

Discrimination prohibited

> No citizen shall be excluded from service as a grand or petit

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[8] The legendary historical champion of Black civil rights, Representative Charles Sumner, introduced the Civil Rights Act of 1875 to prohibit discrimination against potential jurors, among other protections for minorities in the public sphere, during Reconstruction. *See generally* Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 898 (1966). The bill became law that year over the nay votes of every single Democrat Senator, joined by a handful of Republicans in Congress. *Id.* at 912. Section 4 protected potential Black jurors. *Id.* at 903 n.161. A divided Supreme Court struck down large parts of the Civil Rights Act of 1875 as unconstitutional, though Section 4 survived. *See* The Civil Rights Cases, 109 U.S. 3, 26 (1883).

[9] *See* Powers v. Ohio, 499 U.S. 400, 416 (1991) ("The statutory prohibition on discrimination in the selection of jurors, 18 U.S.C. § 243, enacted pursuant to the Fourteenth Amendment's Enabling Clause, makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition.").

[10] 18 U.S.C. § 243.

[11] 28 U.S.C. § 1861.

> juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.[12]

Despite these clear guarantees of juror eligibility to all American citizens, implicit bias continues to undermine the rights of all to serve.

3. The Complex Jury Selection Process

Part of the challenge of weeding out implicit bias is identifying it in a system not given to simplicity. Jury selection is a complicated process under the law.

> At the outset of the selection process, prospective jurors must complete jury qualification forms as prescribed by the Administrative Office of the United States Courts. *See* 28 U.S.C. § 1864. Failure to do so may result in fines and imprisonment, as might a willful misrepresentation of a material fact in answering a question on the form. In a typical case, counsel receive these forms and rely on them when exercising their peremptory strikes. The clerk of the United States district court, a federal official, summons potential jurors from their employment or other pursuits. They are required to travel to a United States courthouse, where they must report to juror lounges, assembly rooms, and courtrooms at the direction of the court and its officers. Whether or not they are selected for a jury panel, summoned jurors receive a per diem fixed by statute for their service. 28 U.S.C. § 1871.
>
> The trial judge exercises substantial control over voir dire[13] in the federal system. *See* FED. RULE CIV. PROC. 47. The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. In some cases, judges may even conduct the entire voir dire by themselves, a common practice in the District Court where the instant case was tried. The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes. In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them. 28 U.S.C. § 1870. When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused.[14]

[12] 28 U.S.C. § 1862.

[13] Voir dire is "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* FED. R. CIV. P. 47.

[14] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 623-24 (1991) (certain internal citations omitted). *See generally* GORDON BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS (Federal Judicial Center 1982).

Narrowing in on the jury selection process, the peremptory challenge,[15] which does not require a party to identify any reason for striking a prospective juror from the venire, has long been subject to criticism as a tool to perpetuate systemic racism. Judges, lawyers, and scholars alike have described the peremptory challenge as a tool to perpetuate implicit bias.[16]

4. Supreme Court Pathway to Service for All

The United States Supreme Court has handed down a handful of critical decisions regarding minority rights to serve on a jury from which we can discern key principles regarding the people's right to serve.

A. Women's Right to Serve: Taylor v. Louisiana

In the story affirming the people's right to serve, the Supreme Court first dealt with the systematic exclusion of women from jury pools.

After his indictment for aggravated kidnapping, Billy Taylor filed a motion to quash the petit jury venire[17] on the grounds that women, who made up 53 percent of the potential jury population, were systematically excluded from the jury rolls in Louisiana.[18] The trial court denied Taylor's motion, after which an all-male jury convicted him.[19] The court sentenced Taylor to death, and the Supreme Court of Louisiana affirmed. The United States Supreme Court granted certiorari on the question of whether the exclusion of women in "the Louisiana jury-selection system deprived appellant of his Sixth and Fourteenth Amendment right to an impartial jury trial."[20]

The Court reversed Taylor's conviction. Louisiana did not exclude women in fact but in practice, so the Court looked at the systemic

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[15] A peremptory challenge is "[o]ne of a party's limited number of challenges that do not need to be supported by a reason unless
the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex." *Peremptory Challenge*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[16] *Cf.* Batson v. Kentucky, 476 U.S. 79, 98-99 (1986) ("The reality of practice, amply reflected in many state- and federal-court opinions, shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors.").

[17] The petit jury venire is the pool of jurors who may be called to serve in any given trial. *See Venire*, BLACK'S LAW DICTIONARY (11th ed. 2019) .

[18] Taylor v. Louisiana, 419 U.S. 522, 524 (1975) (wherein Taylor asserted he would "be deprived of . . . his federal constitutional right to 'a fair trial by jury of a representative segment of the community.'").

[19] *Id.* at 524-25.

[20] *Id.* at 525.

bias operating to exclude women.[21] The Court first held that Taylor possessed standing to question the composition of his jury in that the Constitution's requirement of a fair jury called for a cross-section of the community on the venire.[22] The Court then found that a fair cross-section of the community must be represented on the jury venire under the Sixth Amendment.[23] This right was incorporated against the states under the Fourteenth Amendment.[24] The Court found that the state of Louisiana violated the fair cross-section right by systematically excluding women from the jury pool[25] after noting women were a numerous and distinct group from men.[26] The Court then reversed and remanded the case.[27]

Taylor is important to our current analysis for two reasons. First, *Taylor* makes clear that parties in addition to the harmed prospective juror possess standing to raise claims of their unfair exclusion. Thus, *Taylor* paved the way for future cases considering the systemic harm done by a juror's exclusion.

Second, *Taylor* reminds us that we must consider how laws operate in practice, beyond their innocuous wording on the books. A rule or Constitutional principle that any party uses to manipulate the result of a fair cross section of the community's ability to serve is a rule misused. That is, society is goal-oriented in seeking a diverse jury for the good of all.

B. The Batson *Revolution:* Batson v. Kentucky

The Supreme Court next turned its attention to the systematic exclusion of Black Americans from the jury, in particular through the peremptory challenge process, which at one time was and remains a process that is largely indecipherable.

The state of Kentucky tried Jason Kirkland Batson, a Black man, for second degree burglary and receipt of stolen goods.[28] During jury

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[21] *Id.* ("The Louisiana jury-selection system does not disqualify women from jury service, but in operation its conceded systematic impact is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury service.").
[22] *Id*. at 526 ("The presence of a fair cross section of the community on venires, panels, of lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions.").
[23] *Id.* at 530.
[24] *Id.* at 526.
[25] *Id.* at 531.
[26] *Id.*
[27] *Id.* at 538.
[28] Batson v. Kentucky, 476 U.S. 79, 82 (1986).

selection, the prosecutor used peremptory challenges to strike all four Black Americans on the venire.[29] Before the trial judge administered the all-white jury's oath, Batson's counsel made a motion to discharge the jury as unfairly drawn, on the grounds that the jury selection process "violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws."[30] The trial judge denied the motion, holding that one party's peremptory challenges could not be subject to question by the opposing party.[31] The jury convicted Batson of both counts, and the Supreme Court of Kentucky affirmed Batson's conviction.[32] The Supreme Court granted certiorari.

The Court began its analysis by observing that the state's exclusion of Black people from the jury violated the defendant's rights under the Equal Protection Clause of the Fourteenth Amendment.[33] The Court reiterated that while a defendant possessed no right to be tried by a jury representing members of his own race, "the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria."[34] Moreover, even a peremptory challenge could not shield the state from excluding potential jurors on the basis of race or the basis that members of the defendant's racial group were all unqualified to serve.[35] The Court grounded its holding in the principle that purposeful discrimination denied the defendant the right to a jury "indifferently chosen"[36] from a "body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal

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[29] *Id.* at 83.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 85. The Court traced this holding back a century to *Strauder v. West Virginia*, 100 U.S. 303 (1880). The Court noted 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 individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85 (citations omitted).

Thereafter, the Court held that the "state's purposeful or deliberate denial to [Black Americans] on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Swain v. Alabama, 380 U.S. 202, 203-04 (1965).
[34] *Batson*, 476 U.S. at 85-86.
[35] *Id.* at 86.
[36] *Id.* at 87.

status in society as that which he holds."[37]

Beyond the defendant's right to a jury chosen without the taint of bias, the Court also held that prospective jurors possessed a constitutional right to serve.[38] This right too, the Court grounded in the Equal Protection Clause of the Fourteenth Amendment.

Even more, the Court found that racial bias in jury selection harmed the legal system itself.[39] Therefore, the Court placed the peremptory challenge itself, previously thought to be unquestionable even though the Constitution makes no mention of it,[40] in a position to be probed under the Equal Protection Clause of the Fourteenth Amendment.[41] A defendant could pull back the curtain to ask whether a peremptory challenge was rooted in race or the assumption that members of his race could not be fair.[42]

The Court then outlined a process by which a defendant could question the prosecutor's use of a peremptory challenge.[43] The Court held that a defendant must show: (1) that the defendant is a member of a particular racial group;[44] (2) that the prosecutor used peremptory challenges to remove members of the defendant's racial group;[45] and (3) that the prosecutor demonstrated prejudice on the basis of race.[46]

Ultimately, the Court placed upon the defendant the burden to raise a prima facie case of discrimination.[47] What facts could the defendant assert to show discrimination? The Court laid out several examples, including the total exclusion of Black Americans from a petit

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[37] *Id.* at 86.

[38] *Id.* at 87 ("[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.").

[39] *Id.* at 87-88 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. 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.'") (citations omitted).

[40] *See id.* at 91 ("While the Constitution does not confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.") (citations omitted).

[41] *See id.* at 89.

[42] *See id.* The Court grounded this holding in *Swain v. Alabama*, 380 U.S. 202, 222 (1965). However, the Court also discarded *Swain*'s overly harsh process for proving discrimination. *Batson*, 476 U.S. at 92-93.

[43] *Batson*, 476 U.S. at 93.

[44] *Id.* at 96.

[45] *Id.*

[46] *Id.*.

[47] *Id.* at 93-94.

jury.[48]

The Court then shifted the burden to the state to show a race-neutral reason for excluding jurors.[49] Because the trial judge in *Batson* summarily dismissed the defendant's challenge, the Supreme Court reversed and remanded the case.[50]

Batson gave us three critical rules. First, the peremptory challenge is not a Constitutional right and may be challenged for bias. Second, the right to a jury trial belongs not just to the parties, but also to the people. In other words, the people have a right to serve, and that right undergirds the democratic character of our government. Third, an unfairly chosen jury creates harm that causes ripple effects beyond the parties or even the potential jurors. All of society is harmed by bias in even one trial. That notion of broad harm is significant when we consider that the ability to identify and name an endemic problem is a necessary predicate to mitigate the defect, and ultimately, to dismantle systemic bias, brick by brick.

Batson undertook a revolutionary change in jury selection. Today, a challenge to a peremptory strike[51] asserting racial bias is known as a *Batson* challenge, and the Court has extended the rule beyond a defendant's claim in a criminal case.[52] A fifty state survey reveals that thirty-six states have codified the *Batson* rule as to state jury selection processes to guarantee citizen rights under state law.[53] Nevertheless,

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[48] *Id.* at 94. Importantly, the Court also held "circumstantial evidence of invidious intent may include proof of disproportionate impact." *Id.* at 93.

[49] *Id.* at 94. This neutral reason cannot be that prosecutor assumed minorities would be unfair. *See id.* at 89. The Court also stated, "The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" *Id.* at 94.

[50] *Id.* at 100.

[51] Moreover, the Court does not require proof of any pattern of discrimination, because the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." Foster v. Chatman, 578 U.S. 488, 499 (2016).

[52] *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019) ("*Batson* now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases.").

[53] *See, e.g.,* MINN. R. CRIM. P. 26.02(1) ("Rule. No party may purposefully discriminate on the basis of race or gender in the exercise of peremptory challenges."). *See also* ALA. CODE § 12-16-56 (2022); CAL. CIV. PROC. CODE § 231.7(a) (West 2022); COLO. REV. STAT. ANN. § 13-71-104(3)(a) (West 2022); DEL. CODE ANN. tit. 10, § 4502 (West 2021); HAW. REV. STAT. ANN. § 612-2 (West 2022); IDAHO CODE ANN. § 2-203 (West 2022); 705 ILL. COMP. STAT. ANN. 305/2(b) (West 2022); IND. CODE ANN. § 35-46-2-2 (West 2022); IOWA CODE ANN. § 607A.2 (West 2022); KAN. STAT. ANN. § 43-156 (West 2022); LA. CODE CRIM. PROC. ANN. Art. 795(c) (2022); MD. CODE ANN., CTS. & JUD. PROC. § 8-102(b) (West 2022); MASS. GUIDE EVID. § 1116; MICH. CT. R. 2.511; MISS. CODE ANN. § 13-5-2 (West 2022);

Batson challenges are rarely won even today.[54]

C. Batson *Extended to Civil Cases:* Edmonson v. Leesville Concrete Co.

The Court soon extended *Batson* beyond the confines of a criminal trial.

Thaddeus Donald Edmonson, a Black construction worker, sued Leesville Concrete Company, Inc. for a job site injury.[55] During the voir dire of the federal civil trial, Leesville used two of its three peremptory challenges to remove Black Americans from the future jury.[56] Edmondson attempted to invoke a *Batson* challenge, but the district court denied the motion, holding that *Batson* did not apply to civil proceedings.[57] The petit jury at trial included one Black juror and eleven white jurors.[58]

The jury awarded Edmonson only $18,000 in damages after finding the company liable but Edmonson contributorily negligent.[59] After a panel of the U.S. Court of Appeals for the Fifth Circuit reversed the judgment on the grounds that *Batson* applied to civil proceedings, the appellate court sitting *en banc* affirmed the judgment of the district court.[60] In light of the circuit split regarding whether *Batson* applied to civil cases, the Supreme Court granted certiorari.[61]

The Court used *Edmonson*[62] to extend *Batson* to civil cases as a violation of the challenged juror's rights under the Due Process Clause of

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MO. ANN. STAT. § 494.400 (West 2022); NEB. REV. STAT. ANN. § 25-1645(4) (West 2022); N.H. REV. STAT. ANN. §500-A:4 (2022); N.J. STAT. ANN. § 10:1-8 (West 2022); N.M. STAT. ANN. § 38-5-3(B) (West 2022); N.Y. CIV. RIGHTS LAW § 13 (McKinney 2022); N.D. CENT. CODE ANN. § 27-09.1-02 (West 2021); OHIO REV. CODE ANN. § 2313.13 (West 2021); OR. REV. STAT. ANN. § 10.030(1) (West 2022); 9 R.I. GEN. LAWS ANN. § 9-9-2 (West 2022); S.D. CODIFIED LAWS § 16-13-10.2 (2022); TEX. CODE CRIM. PROC. ANN. art. 35.261 (West 2021); UTAH CODE ANN. § 78B-1-103(2) (West 2022); WASH. GEN. R. 37; W. VA. CODE ANN. § 52-1-2 (West 2022); WIS STAT. ANN. § 756.001(3) (West 2022); WYO. STAT. ANN. § 7-11-101 (West 2022); WYO. STAT. ANN. § 1-11-101(b) (West 2022); D.C. CODE ANN. § 11-1903 (West 2022).

[54] Annie Sloan, *"What to do about Batson?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 1, 235 (Feb. 2020).

[55] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

[56] *Id.*

[57] *Id.* at 617.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 618.

[62] *Id.* at 616.

the Fifth Amendment. In doing so, the Court made several observations which it framed as part of "a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process."[63]

First, the Court held that since race discrimination is only illegal when attributable to a state actor, any civil litigant who exercises a peremptory challenge[64] during a trial is a state actor[65] because she is invoking the machinery of the government[66] with the assistance of state officials to exercise power over the composition of the potential jury during a trial,[67] a "traditional function of government,"[68] in a courthouse, a center of democratic government in the United States.[69] Second, the Court determined that a litigant could raise an objection to the jury

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[63] *Id.* at 618-19 ("Indeed, discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. In either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice.").

[64] *Id.* at 619.

[65] *Id.* at 620 ("By their very nature, peremptory challenges have no significance outside a court of law. Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact.").

[66] *Id.* at 626 ("The objective of jury selection proceedings is to determine representation on a governmental body. Were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state action. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised.").

[67] *Id.* at 622, 624 ("Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.' In so doing, the government has 'create[d] the legal framework governing the [challenged] conduct,' and in a significant way has involved itself with invidious discrimination.") (citations omitted).

[68] *Id*.

[69] *See id.* at 628 ("Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. . . .

Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. In the many times we have addressed the problem of racial bias in our system of justice, we have not 'questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.' To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.") (citations omitted).

selection process on behalf[70] of a wronged prospective juror.[71] Third, the Court found that racial discrimination in the jury selection process harms the potential juror as well as the legal system.[72]

The Court reversed and remanded the case to determine whether Edmonson could prove a prima facie case of racial discrimination against potential jurors or whether the defendant could offer race-neutral explanations for its peremptory challenges.[73]

Edmonson paints a picture of the legal system that in some ways astonishes. Any person who uses the levers of government to perpetuate bias becomes an agent of the state who may be held accountable for his actions in a court of law. This view of state action was and is transformative.

Edmonson also solidified the Court's commitment to a broad consideration of both standing and harm, both of which are viewed as expansively as one could fathom in an effort to rip out racism by its roots.

D. Reverse Batson *Challenges:* Georgia v. McCollum

The Supreme Court next extended *Batson* to allow either party to raise the challenge.

Thomas McCollum, William Joseph McCollum and Ella Hampton McCollum, all white, committed assault and battery upon Jerry

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[70] *See* Powers v. Ohio, 499 U.S. 400, 414 (1991); *Edmonson*, 500 U.S. at 629 ("While individual jurors subjected to peremptory racial exclusion have the right to bring suit on their own behalf, "'[t]he barriers to a suit by an excluded juror are daunting.'")(quoting *id.*).

[71] *Edmonson*, 500 U.S. at 629 ("[A] litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests.").

[72] *See id.* at 630-31 ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes. The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes. Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror. And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.").

[73] *Id.* at 631.

and Myra Collins, Black citizens of Georgia.[74] At trial, the prosecution sought to prevent the defendants from using their peremptory challenges to remove Black Americans from the jury in a county that was 43% Black.[75] The trial court denied the motion, and the Georgia Supreme Court affirmed. Both courts asserted that defendants could use peremptory challenges in a racially discriminatory manner.[76]

Once again, the Supreme Court of the United States reversed a southern court loathe to recognize the rights of minority citizens.[77] The Court recounted its commitment to preventing any party in any court from using race as a basis to eliminate prospective jurors.[78] The Court described *Batson* as three-fold in purpose: protection of individual defendants from discrimination in juror selection; elimination of the harm done to individual jurors; and preservation of the courts' integrity.[79]

The *McCollum* Court focused on the second purpose[80] as a way of underscoring the right to a jury trial does not belong solely to the defendant, to be exercised at his whim. Indeed, the Court found the defendant to be a governmental actor when the defendant exercised his peremptory challenges in a manner that discriminated against potential

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[74] Georgia v. McCollum, 505 U.S. 42, 44 (1992).

[75] *Id.* at 45.

[76] *Id.* at 45-46.

[77] *Id.* at 46 ("Over the last century, in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service.").

[78] *Id.* at 46-48 ("In *Strauder v. West Virginia*, the Court invalidated a state statute providing that only white men could serve as jurors. While stating that a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race,' the Court held that a defendant does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria. . . . In *Powers v. Ohio*, it held that in the trial of a white criminal defendant, a prosecutor is prohibited from excluding African American jurors on the basis of race.") (citations omitted).

[79] *Id.* at 48.

[80] *See id.* at 48-49 ("As long ago as *Strauder*, this Court recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror. . . . Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same–in all cases, the juror is subjected to open and public racial discrimination.

But '[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.' One of the goals of our jury system is 'to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.' Selection procedures that purposefully exclude African Americans from juries undermine that public confidence–as well they should. 'The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.'") (citations omitted).

jurors[81] for in the sphere of jury selection, the defendant "relies on 'governmental assistance and benefits'."[82] So the Court found it logical to extend the teaching of *Batson* to the defendant's use of peremptory challenges in that "regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State."[83] The Court also found that the prosecutor possessed standing, under the limited third party standing doctrine, to challenge a defendant's discriminatory exercise of a peremptory challenge.[84] The Court even raised the possibility that the peremptory challenge could be altogether eliminated,[85] a result Justice Thomas predicted was inevitable given the Court's evolving jurisprudence.[86] The Court concluded:

> Defense counsel is limited to 'legitimate, lawful conduct.' It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race. . . . We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.[87]

The Court reversed and remanded the case.[88]

McCollum continued our march toward liberation of the legal process from the taint of bias by reiterating that any racist conduct under any pretense by any party in the selection of jurors would taint the state and therefore must cease. It also fired a clear warning shot over the bow of the boat of the stubbornly biased: continued misuse of the peremptory challenge might result in its wholesale revocation.

E. Batson *Extended to Gender:* J.E.B. v. Alabama

The Court extended *Batson* again to cover challenges based on gender as well as race.

J.E.B. exercised his right to a jury trial on paternity and child

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[81] *Id.* at 52.
[82] *Id.* ("By enforcing a discriminatory peremptory challenge, the Court 'has . . . elected to place its power, property and prestige behind the [alleged] discrimination.'").
[83] *Id.* at 53.
[84] *Id.* at 56 ("As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial. Indeed, the Fourteenth Amendment forbids the State to deny persons within its jurisdiction the equal protection of the laws.").
[85] *Id.* at 57.
[86] *Id.* at 60 (Thomas, J., dissenting).
[87] *Id.* at 57-59 (citations omitted).
[88] *Id.*

support charges in the state of Alabama.[89] An all-female jury was seated after the state used nine of its ten peremptory challenges to strike men from the panel.[90] The trial court rejected J.E.B.'s attempt to extend *Batson* to strikes based on gender. The jury found J.E.B. to be the father of the minor child, and the court ordered J.E.B. to pay child support.[91]

After the appellate court affirmed the judgment, the Supreme Court granted certiorari.[92] The Court reversed and remanded the case.[93] The Court held, "Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."[94]

The court used *J.E.B.* to also clearly state that a criminal defendant is not the only person who possesses rights that must be protected in a criminal trial. As well, any potential juror has a Constitutional right to serve on a jury.[95]

> In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures. . . . All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.' It denigrates the dignity of the excluded juror, and … reinvokes a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals … are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.[96]

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89 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).
90 *Id.*
91 *Id.*
92 *Id.* at 130.
93 *Id.* at 146.
94 *Id.* at 130-31.
95 *See id.* at 145-46 ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law–that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.") (citations omitted).
96 *Id.* at 140-42 (citations omitted).

The Court also celebrated diversity as a basis for better decision making:

> It is said . . . that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men–personality, background, economic status–and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act like a class. . . . The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.[97]

Ironically, when the state used the alleged differences between men and women, rooted in old stereotypes, to justify its exclusion of men from the jury, the Court rejected that reasoning as "the very stereotype the law condemns."[98]

J.E.B. should be recognized for multiple reasons. First, it returned to the original *Taylor* line of theory, showing that categories beyond race are cognizable as grounds for discrimination. Second, *J.E.B.* noted that different communities contributed to the American experiment, and all of those communities had unique voices. Simultaneously, *J.E.B.* found that unique voice could not be assumed to be monolithic as to classes of people (by gender, race, ethnicity), but once again, the goal-oriented principle drove its conclusion that something is lost when unique voices outside the mainstream experience are excluded.[99] Unique voices are not unqualified "to decide important questions upon which reasonable persons could disagree."[100]

F. Batson *Extended Regardless of Shared Race:* Powers v. Ohio

The Court next used *Batson* to allow litigants to question the exercise of peremptory challenges whether or not the litigant and the

[97] *Id.* at 133-34.
[98] *Id.* at 138.
[99] One line in the *J.E.B.* case remains problematic: "Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext." See *id.* at 143. With this caveat, the Court opened the door to strikes that are, in fact, proxies for race.
[100] *Id.* at 142.

struck potential juror share the same race.[101]

An Ohio grand jury indicted Larry Joe Powers, a white male, for murder with a firearm and related charges.[102] Powers challenged seven of the prosecutor's peremptory challenges removing Black Americans from the venire.[103] The trial court overruled Powers' objections, after which the jury convicted him.[104] The appellate courts overruled Powers' constitutional arguments, but the Supreme Court granted certiorari.[105]

The Court reversed and remanded the case.[106] In doing so,[107] the Court recognized that discrimination in juror selection inflicts an injury not just upon a litigant, but also upon the potential juror and the community.[108] But for voting, "for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[109] The Court emphasized that the defendant had standing to challenge a potential juror's dismissal because of the threat to

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[101] Powers v. Ohio, 499 U.S. 400, 402 (1991) ("[W]e hold that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races.").

[102] *Id.* at 402.

[103] *Id.* at 403.

[104] *Id.*

[105] *Id.* at 403-04.

[106] *Id.* at 404.

[107] *Id.* at 404 ("The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.") (citations omitted).

[108] *Id.* at 406.

[109] *Id.* at 407. *See also id.* at 406-07 ("The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. . . . And, over 150 years ago, Alexis de Tocqueville remarked: '[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society. The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society. I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.'

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. It 'affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.'") (citations omitted).

the integrity of the process.[110] The Court grounded its holding in the Fourteenth Amendment, rather than the Sixth Amendment.[111]

Powers leaves no doubt that the harm of bias, inflicted to unfairly remove even one potential juror in one case, leaves the ugly imprint of systemic harm. Jury service, second only perhaps to the franchise, is the way in which every day Americans have the privilege of shaping their government. Therefore, the integrity of the process demands its protection.

G. Limits of Batson*:* Rosales-Lopez v. United States

As much progress as the Court has forced recalcitrant parties to accept, work remains to be done in ensuring fairness in jury selection. For example, the Court has not yet mandated voir dire on bias issues, drawing a hard line around *Batson*.

A grand jury indicted Humberto Rosales-Lopez, of Mexican descent, for smuggling non-citizens into the United States.[112] At trial, the defendant asked the trial judge to voir dire the jury pool on racial bias: "Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?"[113] The trial judge declined the defendant's request, and asked instead about jurors' feelings regarding the "alien problem," any feelings about aliens, and jurors' fairness and impartiality.[114] The jury convicted the defendant, the Ninth Circuit affirmed his conviction, and the Supreme Court granted certiorari given the federal courts' conflicting views on the requirements of voir dire into racial bias.[115]

Noting the high level of discretion granted to district courts on how to conduct voir dire, the Court nonetheless held that the Constitution required some inquiry into possible racial bias where requested by a defendant accused of a violent crime and where the defendant and victim are members of different racial or ethnic groups.[116] Here no such special circumstance existed, so the Court found no reversible error.[117] In essence,

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[110] *See id.* at 411 ("[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt.") (citations omitted).
[111] *See id.* at 409.
[112] *See* Rosales-Lopez v. United States, 451 U.S. 182, 184 (1981).
[113] *Id.* at 185.
[114] *Id.* at 186.
[115] *Id.* at 187-88.
[116] *Id.* at 192.
[117] *Id.*

the Court denied the existence of everyday implicit bias.

> There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups … there is no per se constitutional rule in such circumstances requiring inquiry as to racial prejudice. Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.[118]

Rosales-Lopez was an unusual step backward for the Court's jurisprudence in juror selection. The Supreme Court has broad supervisory powers over the federal courts. Even if the Fourteenth Amendment does not require voir dire into racial bias in every case, the Court could have exercised its supervisory role to model best practices for trial courts by recommending an inquiry into bias. Moreover, the Court's false dichotomy between violent crime and other categories of trials, which does not trace back to any case or statute, is puzzling. So too, the requirement that a bias instruction rests on the identification of parties from different racial or ethnic groups, seems to undermine the Court's *Batson* line of cases demolishing the need for racial identity to predicate an inquiry into bias.

Of more concern, the Court's foray into social science was demonstrably wrong. The type of crime and backgrounds of the defendant and victim are not the only possible triggers for discrimination.[119] Indeed, majorities of peoples of color state that substantial discrimination is sadly still their everyday existence; and well over one-third of white people agree that Black Americans face "a lot" of discrimination.[120]

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[118] *Id.* at 190 (citation omitted).

[119] *See id.* at 196-97 (Stevens, J., dissenting) ("Before any citizen may be permitted to sit in judgment on his peers, some inquiry into his potential bias is essential. Such bias can arise from two principal sources: a special reaction to the facts of the particular case, or a special prejudice against the individual defendant that is unrelated to the particular case. Much as we wish it were otherwise, we should acknowledge the fact that there are many potential jurors who harbor strong prejudices against all members of certain racial, religious, or ethnic groups for no reason other than hostility to the group as a whole. Even when there are no 'special circumstances' connected with an alleged criminal transaction indicating an unusual risk of racial or other group bias, a member of the Nazi Party should not be allowed to sit in judgment on a Jewish defendant.").

[120] *See* Andrew Daniller, *Majorities of Americans see at least some discrimination against Black, Hispanic and Asian people in the U.S.*, PEW RSCH. CTR. (Mar. 18, 2021), https://www.pewresearch.org/fact-tank/2021/03/18/majorities-of-americans-see-at-least-some-discrimination-against-black-hispanic-and-asian-people-in-the-u-s/.

H. Precedential Principles

The combined teaching of *Batson* and its progeny establish clear principles which should undergird our approach to jury selection.

First, the source of minority rights to serve is the Sixth and Fourteenth Amendments (Equal Protection Clause). These rights may be asserted in civil or criminal trials, by defendants or plaintiffs, and on the basis of race or gender.[121] This service is important to a participatory government that is defined by its people.

Second, the right may be asserted by any counsel as an officer of the court.[122] Counsel need not represent a particular party or interest. The system relies on the advocates whose trial combat maintains the adversarial battle for truth.

Third, denying minorities the right to serve on a jury harms that individual,[123] the community,[124] and the legal system.[125] Racial bias in jury selection harms the legal system as a whole by undermining confidence in our judiciary.[126] Denial of the right to serve undermines

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[121] *See* Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019).

[122] *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 412 (1991) ("Active discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or a victim, or in some more subtle manner as by casting doubt upon the credibility or dignity of a witness, or even upon the standing or due regard of an attorney who appears in the cause.").

[123] *Id.* at 402 ("[R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.").

[124] *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.").

[125] *See* Georgia v. McCollum, 505 U.S. 42, 49-50 (1992) ("The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes. '[B]e it at the hands of the State or the defense,' if a court allows jurors to be excluded because of group bias, '[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice–our citizens' confidence in it.' Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.") (citations omitted).

[126] Batson v. Kentucky, 476 U.S. 79, 94 (1986) ("Proof of systematic exclusion from the

citizen participation in government.[127] Denial of minority service perpetuates false notions of racial supremacy.

Fourth, potential jurors have a right to serve. Stating that principle, for example, would have been a clearer way for the Court to resolve *Georgia v. McCollum*. The right to serve on a jury is as fundamental as the right to vote. The state cannot assume that people of color will be unfair because of their racial or ethnic background.[128]

Fifth, there is value in a racially and ethnically diverse jury.[129] This value goes beyond simple color of skin. Rather, the value of diversity is in diversity of perspective that may lead a collective body to a deeper well of experience.[130] There is also value in dissent regarding matters on which reasonable people could disagree.

Sixth, peremptory challenges are not beyond question.[131] There is no constitutional right to a peremptory challenge. The continued abuse of the peremptory challenge may be grounds to reconsider its function and appropriateness in the jury selection process.

Finally, implicit bias[132] and systemic discrimination are real

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venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.'") (citation omitted).

[127] *Powers*, 499 U.S. at 402 ("Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.").

[128] *See McCollum*, 505 U.S. at 57 ("'[I]f race stereotypes are the price for acceptance of a jury panel as fair,' we reaffirm today that such a 'price is too high to meet the standard of the Constitution.' . . . It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.") (citations omitted).

[129] *See* Ballard v. United States, 329 U.S. 187, 193-94 (1946) ("The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men–personality, background, economic status–and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. . . . [A] flavor, a distinct quality, is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.").

[130] Studies find that jury deliberation improves with more racially diverse juries. *See, e.g.*, Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & HUM. BEHAV. 232 (2019); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 *J. PERSONALITY & SOC. PSYCH.* 597 (2006).

[131] *See McCollum*, 505 U.S. at 58-59 (1992) ("We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.").

[132] *See Powers*, 499 U.S. at 416 (1991) ("[R]ace prejudice stems from various causes and may manifest itself in different forms.").

factors in juror selection. Neither the legislative nor judicial branch has provided tools to fully combat discrimination at the federal level.

II. THE INFECTION OF IMPLICIT BIAS

1. Dual Reality

Racism exists in everyday life for people of color. Part of the perpetuation of implicit bias in the jury selection process is the failure to recognize that white Americans have different experiences with law enforcement, the legal system, and government than do people of color. People of color have different perceptions of the fairness of the legal system, including law enforcement.[133] This perspective does not make minorities "biased." It simply reflects the ill treatment minorities have long endured as well documented by social scientists.

For example, one in 1,000 Black men will die at the hands of police.[134] Black Americans are at least two or three times as likely as white Americans to be shot and killed by police.[135] Some scholars place the risk much higher.[136] Police are twice as likely to use force, handcuffs, or threats of force on Black people than on white people.[137] Unarmed Black

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[133] *See* Drew DeSilver, Michael Lipka & Dalia Fahmy, *10 things we know about race and policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/ ("84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites.").

[134] Frank Edwards, Hedwig Lee & Michael H. Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. 16793, 16793 (2019) ("Our results show that people of color face a higher likelihood of being killed by police than do white men and women, that risk peaks in young adulthood, and that men of color face a nontrivial lifetime risk of being killed by police.").

[135] *Fatal Force*, WASH. POST (last visited June 25, 2022).

[136] *See* Frank Edwards, Michael H. Esposito & Hedwig Lee, *Risk of Police-Involved Death by Race/Ethnicity and Place, United States, 2012-2018*, 108 AM. J. PUB. HEALTH, 1241, 1243 (2018) ("Our models estimated, with 95% posterior certainty, that the risk of mortality in interactions with law enforcement for men who are aged at least 18 years in the United States is between 0.8 and 1.0 per 100 000 men per year. For Black men, we estimated a risk of between 1.9 and 2.4 deaths per 100 000 men per year. . . . For White men, we estimated a risk of between 0.6 and 0.7."). *See also* Jacob Bor, Atheendar S. Venkataramani, David R. Williams & Alexander C. Tsai, *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 302 (2018) ("Black Americans are nearly three times more likely than are white Americans to be killed by police–accounting for more than 40% of victims of all police killings nationwide–and five times more likely than are white Americans to be killed unarmed.").

[137] Erika Harrell & Elizabeth Davis, U.S. DEPT. OF JUST., *Contacts Between Police and*

people are three times more likely to be shot by police than unarmed white people.[138] Black people are twice as likely to be searched than white people, but those searches of Black people are less likely to yield contraband than searches of white people, according to one state study.[139] Police killings lead to 1.7 additional poor mental health days per Black person every year, or 55 million more poor mental health days for Black Americans annually.[140] Black Americans are overrepresented at every level of the justice system.[141] Most remarkably, both white and Black Americans now acknowledge that Black people are treated less fairly by law enforcement in the United States.[142] These gross disparities undermine trust in public institutions, including the legal system.[143]

Still, key differences in perception persist. About two-thirds of Black people have experienced racially discriminatory situations where they were treated with suspicion, whereas only one-quarter of white

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the Public, 2018–Statistical Tables (Dec. 2020), https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf ("A higher percentage of blacks (4%) and Hispanics (3%) than whites (2%) or other races (2%) experienced threats or use of force. . . . Four percent of blacks and 4% of Hispanics reported being handcuffed during their most recent contact with police, compared to 2% of whites and 2% of other races.").

[138] Elle Lett, Emmanuella Ngozi Asabor, Theodore Corbin & Dowin Boatright, *Racial Inequity in Fatal US Police Shootings*, 2015-2020, 75 J. EPIDEMIOLOGY & CMTY. HEALTH 394 (2020).

[139] Magnus Lofstrom, Joseph Hayes, Brandon Martin & Deepak Premkumar, *Racial Disparities in Law Enforcement Stops*, PUB. POL'Y INST. OF CAL. (Oct. 2021).

[140] Edwards et al, *supra* note 136, at 1243. *See also* Lett et al., *supra* note 138, at 396 ("Our findings suggest the influence of an insidious anti-Black and anti-Indigenous logic to police violence that warrants further exploration into the role of these factors in fatal police encounters.").

[141] *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 180 (Ballantine Books 1992) ("The starting point is that black Americans make up between 12 and 13 percent of the general population…. In virtually all spheres–offenders, victims, prisoners, and arrests by the police–the rates for blacks are disproportionate to their share of the population. Thus black men and women account for 47 percent of the individuals awaiting trial in local jails or serving short terms there. They also comprise 40.1 percent of the prisoners currently under sentence of death. And they make up 45.3 percent of the inmates in state and federal prisons.").

[142] *See* Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, PEW RSCH. CTR., (Apr. 9, 2019); DeSilver et al., *supra* note 133 ("Majorities of both black and white Americans say black people are treated less fairly than whites in dealing with the police and by the criminal justice system as a whole. . . . 84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites; 63% of whites said the same. Similarly, 87% of blacks and 61% of whites said the U.S. criminal justice system treats black people less fairly.").

[143] *See* Joscha Legewie, *Racial Profiling and Use of Force in Police Stops: How Local Events Trigger Periods of Increased Discrimination*, 122 AM. J. SOCIO. 379, 382 (2016).

people have expressed similar concerns.[144] Black people are five times more likely than white people to assert they have been racially profiled by police.[145] Black people's ratings of police competence are far lower than those of white people. [146] Most white Republicans dispute the notion that police treat Black people unfairly. [147] Even amongst police officers, views regarding racism in policing vary dramatically based on the race of the officer.[148] Yet self-described conservatives, including Justice Amy Coney Barrett, have acknowledged the existence of implicit bias in the legal system.[149]

However, the juror selection process reflects none of this reality. The jury selection system presently reflects only the Anglo perspective. *The minority perspective is viewed as inherently biased*.[150] When a person of color truthfully describes her experience, *e.g.*, being profiled by law enforcement, she is automatically categorized as biased against law enforcement when in fact she has simply repeated what is well established as fact: as a group, people of color, particularly Black men, are targeted by law enforcement in ways that white people are not. Similar questions during voir dire — questions touching on how people perceive law enforcement, if they have had any prior contacts with law enforcement, and whether they know anyone who has been arrested, indicted, convicted, or jailed — all are likely to lead to different answers by people of color than white people because of the systemic bias of police. By

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[144] *See* DeSilver et al., supra note 133.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* Nearly all white police officers surveyed dispute the notion of discrimination, while only 29% of black officers polled believed blacks are treated equally under the law. *Id.*
[149] Samantha Raphelson, *Sen. Booker Challenges Judge Barrett on Bias in the Justice System*, NPR (Oct. 13, 2020, 7:34 PM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923481075/sen-booker-challenges-judge-barrett-on-bias-in-the-justice-system (Now-Justice Coney Barrett testified during her Supreme Court confirmation hearings, "It would be hard to imagine a criminal justice system as big as ours without having an implicit bias in it. I think that in our large criminal justice system, it would be inconceivable that there wasn't some implicit bias.").
[150] Batson v. Kentucky, 476 U.S. at 97-98 ("Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it 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. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.").

otherizing the minority perspective, the law has perpetuated discrimination that has gone largely unchallenged in the courtroom.[151] In

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[151] See The Paul and Jordana Show, *Professor Rachel Paulose with Paul and Jordana*, WCCO RADIO, at 02:56 (Mar. 25, 2021), https://www.audacy.com/wccoradio/podcasts/the-paul-jordana-show-155/325-professor-rachel-paulose-with-paul-and-jordana-360154963 ("Of course, every individual is his own person, is her own person, but it is important to have a set of diverse views in the jury room that truly represents the judgment of the community. . . .

I was concerned about how aggressively the defense was striking minorities and especially African Americans from the jury pool, and I thought part of what was happening was when African Americans spoke truthfully, as they're obligated to do, of course, as any potential juror would be obligated to do, when they spoke truthfully about their life experiences with racism, that was used by the defense as a basis to strike them from the jury pool. And so, what I'm concerned about is that we now have a legal system that has eradicated the formal barriers to jury service that had long been in place and had long been used to systemically, systematically, deny women and people of color a role on the jury. But we have these informal processes in place that strike people because of their life experiences.

So to draw an analogy, if the vast majority of American women have experienced sexual harassment in the workplace, does that mean that you are disqualified from a jury in a sexual harassment case because of your life experience? Would anyone say that was fair, when that is the daily experience of women in this country? And so I'm concerned that that is happening to African American people. . . .

That is their truth. And it is the truth. And so it is not an opinion to say that police treat people of color differently.

The facts are that black and Hispanic people are 50% more likely to experience force by police. The facts are that unarmed black people are three times more likely to be shot by police than unarmed white people. The facts are that 1 in 1000 black men will be killed by police. The facts are that the Minneapolis Police Department in this city is seven times more likely to use force against black people than any other group.

Those are not my opinions. Those are facts that have been gathered by scientists, by the media, and in the last case, by the Minneapolis Police Department itself.

So my question is why is expressing that fact, those collective facts, why is that considered bias? That's reality. . . .

And that I think is the critical question. Because when you had Anglo jurors saying they had never had a negative experience with the police, they had never been profiled, they didn't know what discrimination was, they had never experienced it, they didn't even know someone who had experienced discrimination. Those people were not struck. So why is the model of the unbiased juror the model, of basically, an older white male experience as opposed to the full range of Americans' experience with the police?

I hope that the full range of experience is brought into the jury room just as it should be brought into the ballot box area when we're voting.

We would not say you are not able to vote because you have certain life experiences so do we say that you can't serve on a jury because of those life experiences that are visited upon you, that are not even your own choice, but that are the result of a system that treats certain people differently. . . .

I think we, the people, need to change it because this is happening in courtrooms around the country. And I think the Chauvin trial has put a spotlight on it because it's

other words, the law demands that people have a monolithic experience, the white experience, or otherwise be labeled "biased." This discrimination also justifies and perpetuates police discrimination against people of color; what starts on the streets carries into the courtroom.

2. Courts Rarely Focus on Implicit Bias

In spite of the *Batson* revolution, the Court's focus on explicit bias, and the everyday experience of discrimination by people of color, very few courts have recognized the possibility of implicit bias during jury selection, although Justice Marshall predicted *Batson* would have its limits even as he concurred in the judgment:

> 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. As Justice Rehnquist concedes, prosecutors' peremptories are based on their 'seat-of-the-pants instincts' as to how particular jurors will vote. Yet 'seat-of-the-pants instincts' may often be just another term for racial prejudice. 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. It is worth remembering that '114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a

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being broadcast live unlike any other trial in Minnesota history. I think that standards need to be revisited to say that life experience does not mean that you are prejudiced or biased, especially when a juror truthfully states that he or she can set aside his past experiences and judge a particular case on the facts and the evidence before him or her. That needs to be taken seriously. People can't be excluded because of their experiences with discrimination or bigotry or police brutality. . . .

I think that right now there may be two Supreme Court cases that address this. We have traditionally viewed the courts as the way to solve the problem. But part of what we're seeing here is that the courts are embracing the problem and not looking at it. And so I think that one thing that regular citizens can do is ask your legislators to look at Minnesota laws and how jurors are selected.

So if we know for example, that people of color are underrepresented on voter rolls, and those are the rolls from which we draw the names of prospective jurors, is that a fair way of putting together a jury pool? If we know that defense attorneys or attorneys in general are striking people of color based on life experiences, do we need to write into Minnesota law that may not be a basis for striking someone? I think this really starts with local government, city councils, the state legislature, the governor, and people talking about why this is a problem. Part of the challenge here is that we have not openly talked about how this routinely happens in courtrooms around the country. . . .").

> fact of life, in the administration of justice as in our society as a whole.'[152]

Justice Breyer described the challenges of implicit bias in compelling language that describes the mechanization of the jury selection process:

> Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem. . . .
>
> The use of race–and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before. . . .
>
> For example, one jury-selection guide counsels attorneys to perform a 'demographic analysis' that assigns numerical points to characteristics such as age, occupation, and marital status–in addition to race as well as gender. . . .
>
> For example, a bar journal article counsels lawyers to 'rate' potential jurors 'demographically (age, gender, marital status, etc.) and mark who would be under stereotypical circumstances their natural enemies and allies.'
>
> For example, materials from a legal convention, while noting that 'nationality' is less important than 'once was thought,' and emphasizing that 'the answers a prospective juror gives to questions are much more valuable,' still point out that 'stereotypically' those of 'Italian, French, and Spanish' origin 'are thought to be pro-plaintiff as well as other minorities, such as Mexican and Jewish; persons of German, Scandinavian, Swedish, Finnish, Dutch, Nordic, British, Scottish, Oriental, and Russian origin are thought to be better for the defense'; African Americans 'have always been considered good for the plaintiff,' and 'more politically conservative minorities will be more likely to lean toward defendants.'
>
> For example, a trial consulting firm advertises a new jury-selection technology: 'Whether you are trying a civil case or a criminal case, SmartJURY™ has likely determined the exact demographics (age, race, gender, education, occupation, marital status, number of children, religion, and income) of the type of jurors you should select and the type you should strike.'[153]

Lower courts have struggled with how to root out implicit bias in juror selection. Some courts have refused to acknowledge the presence of

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[152] *Batson*, 476 U.S. at 106-07 (Marshall, J., concurring) (citations omitted).

[153] Miller-El v. Dretke, 545 U.S. 231, 268, 270-71 (2005) (Breyer, J., concurring) (internal citations omitted).

implicit bias at all.[154] These decisions reflect a failure to inquire further into potential implicit bias.[155]

Some courts have applied one standard to white jurors and another to Black jurors, *e.g.*, by striking Black people with criminal backgrounds but refusing to strike white people with law enforcement backgrounds, despite polling suggesting that law enforcement self-perceptions are out of step with the national norm.[156]

Others have acknowledged potential bias in the jury selection process but asserted their hands are tied by the lack of Supreme Court

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[154] Johnson v. Russo, No. 15-13599-LTS, 2017 WL 5177609, at *8 (D. Mass. Nov. 8, 2017) (citing *Rosales-Lopez* and denying habeas relief in interracial rape case where defense counsel mistakenly failed to request voir dire on race) ("Binding law forecloses this Court from simply presuming implicit bias of any juror for or against the defendant or a witness based solely on race or ethnicity. As such, there is no basis from which to conclude that any seated juror in [defendant]'s case would have answered questions about race bias in such a way that would have resulted in his or her removal for cause. Absent such proof, there can be no finding of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.").

[155] *See* United States v. Murry, 31 F.4th 1274, 1288-89 (10th Cir. 2022) ("Diann argues that the district court violated her Sixth Amendment rights by failing to ask the jury pool about racial bias. We disagree. The district court did not commit reversible error in voir dire. The Constitution requires a trial judge to grant the request for racial-bias questions only if 'racial issues [are] inextricably bound up with the conduct of the trial.'"); United States v. Young, 6 F.4th 804, 809 (8th Cir. 2021) (holding district court's failure to inquire into implicit bias did not constitute reversible error).

[156] *Compare* Delgado v. Koenig, No. 17-CV-06614-HSG, 2020 WL 6342919, at *12 n.5 (N.D. Cal. Oct. 29, 2020), *certificate of appealability denied sub nom.* Delgado v. Hatton, No. 20-17384, 2022 WL 2035608 (9th Cir. Mar. 2, 2022) ("In support of his argument that Juror No. 8 [former prosecutor] was biased, Petitioner alleges that the prosecutor excused a potential juror for cause based on his occupation as a defense attorney. As discussed *supra*, whether a potential juror is biased is fact and context specific. Whether Juror No. 8 was biased must be determined by examining the facts specific to her. That the prosecutor excused a defense attorney for cause does not establish that defense attorneys or prosecutors, as a matter of law, harbor actual or implicit bias to such an extent that they cannot be impartial jurors."), *and* LaFlamme v. Davis, No. 5:18-CV-134, 2019 WL 2075874, at *4 (S.D. Tex. May 10, 2019) ("Petitioner further contends that he was tried by a biased and partial jury because the officer charged with summoning the venire corruptly constructed a panel filled with people associated with law enforcement, thus forcing Petitioner to accept a jury with an implicit bias against him. Petitioner offers no evidence to substantiate this allegation; instead, he relies on his own demographic perceptions to claim that too many people with law enforcement connections were on the panel. However, a relationship with law enforcement does not render a potential juror *per se* biased.") (citations omitted), *with* United States v. Hughes, 840 F.3d 1368, 1382 (11th Cir. 2016) ("Striking Juror Number 3 for his criminal background in a criminal case could well have been a race-neutral, reasonable trial strategy.").

precedent and the limits of *Batson*.[157] Individual judges have taken pains to document their frustration with the limits of the law.[158] Occasionally, judges have tried to recognize the racial implications of jury selection.[159]

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[157] *See* Shirley v. Yates, 807 F.3d 1090, 1110 n.26 (9th Cir. 2015), *as amended* (Mar. 21, 2016) ("Vague preferences are particularly likely to conceal implicit bias, as the district judge–to his credit–recognized. Prosecutors might well conceive of 'life experience' in ways that have a profoundly disparate impact on members of different racial groups. Young black people may be less likely to enroll in college than young white people, but this can hardly be taken to signify that the average young black person has less 'life experience' than the average young white person. Moreover, a vague preference may be more likely to play a part in a prosecutor's decision to strike a veniremember who is black than it would if that juror were white, if the prosecutor is motivated to a substantial degree by racial bias.

It is true (and most unfortunate) that *Batson* is not designed to root out implicit bias, as Justices Breyer and Marshall, along with one of our colleagues in the Northern District of Iowa, have discussed in some depth.") (citations omitted.).

[158] *See* Hollis v. Magnusson, 32 F.4th 1, 9 (1st Cir. 2022) (Lipez, J., concurring) (denying writ of habeas corpus yet expressing concern about implicit bias as true reason for striking Black man who allegedly possessed low "level of education"; describing why "the outcome required by the law does not address aspects of this case that 'raise the judicial antennae.'"); Jamison v. McClendon, 476 F. Supp. 3d 386, 422 n.284 (S.D. Miss. 2020) (reluctantly granting summary judgment motion for officer in § 1983 action) ("The Court recognizes that juries have not always done the right thing. As the Supreme Court noted in *Ramos*, some states created rules regarding jury verdicts that can be 'traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities'' on their juries. As other courts have noted, 'racial discrimination remains rampant in jury selection.' Like any actor in our legal system, juries may succumb to 'unintentional, institutional, or unconscious' biases. However, the federal courts' adoption and expansion of qualified immunity evinces an obvious institutional bias in favor of state actors. With its more diverse makeup relative to those of us who wear the robe, a jury is best positioned to 'decide justice.'") (citations omitted); Smith v. Mitchell, No. 3:20-CV-519, 2021 WL 325928, at *10 (S.D. Ohio Feb. 1, 2021), *report and recommendation adopted sub nom.* Smith v. Warden, Warren Corr. Inst., No. 3:20-CV-519, 2021 WL 764139 (S.D. Ohio Feb. 26, 2021) ("The very existence of peremptory challenges–the ability to excuse a juror without good cause to do so–opens a pathway for an attorney to rely on the implicit biases that guide his or her decisionmaking.")

[159] *See Young*, 6 F.4th at 811 (Kelly, J., concurring) ("Although the district court here did not abuse its discretion when conducting voir dire, I nevertheless suggest that more can be done to diminish any influence implicit bias may have on a jury's deliberations. For example, a district court might take meaningful steps to educate the venire and the empaneled jury about implicit bias.") (citations omitted); Lee v. Parshall, 816 F. App'x 15, 16 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1726 (2021) ("[T]he questions as to race identified that the case involved an African-American man accusing a white police officer of excessive force, acknowledged the historical struggles in our country involving such scenarios, and asked the potential jurors whether it would be difficult for them to serve as an impartial juror."); United States v. Adkinson, 916 F.3d 605, 609 (7th Cir. 2019) (affirming conviction) ("To the extent Adkinson subjectively worried about implicit bias, voir dire was the appropriate vehicle to address it."); United States v. Robinson, 872 F.3d

Judges have rarely acknowledged the growing groundswell regarding the existence of implicit bias, and have granted relief on these grounds even less frequently.[160]

A handful of reported decisions show that courts have looked behind the curtain to question whether peremptory strikes are pretextual. In other words, a few courts have expressed skepticism about a lawyer's proffered reason for striking a Black venireperson in comparison to similarly situated white jurors ultimately seated.[161]

Most ideally, some district courts are now providing instructions and education regarding implicit bias to jurors in the hope that education

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760, 785 (6th Cir. 2017) (Donald, J., concurring in part, dissenting in part) ("Implicit biases threaten the very foundation of our criminal justice system. Our system is one that is built on fairness. The right to a fair trial. The right to a trial by jury of one's peers. The right to be assumed innocent until proven guilty. The prevalence of these biases that are so pervasive and involuntary erodes the rights that our Constitution aims to protect, and undermines the advances that our society has made towards eliminating the role that race plays in our criminal justice system."); United States v. Walters, No. 3:20-CR-89 (JAM), 2022 WL 1498247, at *2 (D. Conn. May 12, 2022) (inquiring to some extent about jurors' views on implicit bias but rejecting questions on Confederate flag and critical race theory as "inflammatory").

[160] *See* Long v. Hooks, 972 F.3d 442, 472 n.2 (4th Cir. 2020), *as amended* (Aug. 26, 2020) ("New evidence can, of course, include advances in scientific knowledge that cast old evidence in a new light. A defendant convicted before the existence of DNA testing, for example, could certainly be exonerated by a later DNA analysis. So, too, may we consider advances in our understanding of the psychology of memory formation, eyewitness identification, and implicit bias.") (citations omitted); United States v. Ray, 803 F.3d 244, 259-60 (6th Cir. 2015) (finding no implicit bias in reference to "felon" in possession) ("[W]e recognize the proven impact of implicit biases on individuals' behavior and decision-making. Social scientists have examined extensively the theory of implicit bias in recent decades, especially as it relates to racial bias.") (citations omitted); Kennedy v. Warden, Marysville Reformatory for Women, No. 2:20-CV-2979, 2021 WL 1909671, at *32 (S.D. Ohio May 12, 2021), *report and recommendation adopted*, No. 2:20-CV-2979, 2021 WL 3578096 (S.D. Ohio Aug. 13, 2021) (still recommending denial of COA) ("That is one reason why relying on claims of bias after the fact are so potentially disruptive to the trial system. Much has been recently written about implicit bias and how pervasive it is in the human subconscious, even that of judges. But as long as we have human judges, both those who preside and those who sit as jurors, the risk is inescapable.") (citation omitted).

[161] *See Shirley*, 807 F.3d at 1112 (granting writ of habeas corpus where prosecutor struck Black potential juror for lack of "life experience" but voiced no objection to similarly situated white juror); United States v. Cain, No. 1:16-CR-00103-JAW, 2020 WL 68302, at *4 (D. Me. Jan. 7, 2020) (denying motion to recuse for alleged bias, among other grounds) ("[M]ore recently courts and the academy have developed the concept of implicit bias, where a person may 'unconsciously act on such biases even though we may consciously abhor them.'") (citation omitted).

will help people recognize and restrain their biases.[162] On the other hand, some courts are refusing to take this simple step of educating jurors.[163]

Of most concern, some courts are perpetuating implicit bias, perhaps unconsciously, and occasionally with the aid of lawyers seeking to strike minority jurors who speak about their encounters with discrimination.[164] A significant challenge in identifying and rooting out

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[162] United States v. Ramadan, No. 17-20595, 2021 WL 2895668, at *1 (E.D. Mich. July 9, 2021) ("The Court GRANTS Ramadan's motion for attorney conducted voir dire and showing of unconscious bias video."); United States v. Huerta-Zuniga, No. 2:20-CR-00122-DCN, 2021 WL 2109188, at *6 (D. Idaho May 25, 2021) ("Defendants additionally request the Court to play an instructional video on unconscious or implicit bias for the jury. The Government does not oppose this request. The Court has already included the video to which Defendants refer in its routine jury procedures and will ensure the video is played for the prospective jurors in this case. The request is GRANTED.").

[163] United States v. Mercado-Gracia, 989 F.3d 829, 839, 841 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1374 (2022) ("Mercado-Gracia argues that the district court abused its ample discretion in denying his request to show an eleven-minute video produced by the federal district court for the Western District of Washington to educate prospective jurors on implicit bias. We cannot agree. . . . Mercado-Gracia cites no authority requiring a trial court to educate prospective jurors about implicit biases."); United States v. Nishida, No. 20-10238, 2021 WL 3140331, at *2 (9th Cir. July 26, 2021) (affirming in part, reversing in part defendant's conviction) ("[T]he district court acted within its discretion in declining to give an 'implicit bias' instruction, and Nishida cites no authority for the proposition that the district court was under any obligation to so instruct the jury.").

[164] *See* Saintcalle v. Uttecht, No. C15-0156-BJR-MAT, 2017 WL 11556413, at *2 (W.D. Wash. Oct. 12, 2017) (recommending denial of habeas petition where prosecution struck sole Black potential juror after exhaustive interrogation and attempted to strike sole Hispanic person in venire), *report and recommendation adopted*, No. C15-0156-BJR-MAT, 2018 WL 11182681 (W.D. Wash. Jan. 16, 2018), *aff'd*, 772 F. App'x 424 (9th Cir. 2019). The juror in this case voices uncomfortable views widely held by minorities regarding the fairness of the system:

> *Juror 34:* Gosh, I feel like I am on the spot here.
>
> But being a person of color, I have a lot of thoughts about the criminal system. I see—I have seen firsthand—and a couple people have already mentioned that if you have money, you tend to seem to work the system and get over. And regardless if you are innocent or guilty, if you want to be innocent, your money says you are innocent.
>
> And a person of color, even if you do have an affluent lawyer who has the background, the finance to get you off, because you are a person of color, a lot of times you are not going to get that same kind of opportunities.
>
> And especially with this person being a person of color and being a male, I am concerned about, you know, the different stereotypes. Even if we haven't heard anything about this case, we watch the news every night. We see how people of color, especially young men, are portrayed in the news. We never hardly ever see anyone of color doing something positive, doing something good in their community.
>
> So kind of like what the person behind me is saying, since most of the people in this room are white, I am wondering what's running through their mind as

implicit bias at work in jury selection is that the process itself is far from transparent. Voir dire is not always transcribed, included as part of the record of trial, or subjected to scrutiny by appellate courts. Nevertheless, some examples have emerged in trials across the country that provide proof of the added scrutiny to which potential jurors of color are subjected.[165]

3. A Case Study in Implicit Bias Poisoning Juror Selection: "Maybe I'll Be in the Room to Know Why"

Let us consider a case study in which implicit bias reared its head, defense counsel used a peremptory strike to deny the impartial potential juror a seat, the prosecution failed to object on *Batson* grounds, and the judge unconsciously endorsed the implicit bias voiced by defense counsel. No one defended the right of a Black man to serve on the jury in one of the most notorious trials implicating race relations in our nation's history.

A. The Derek Chauvin Trial

The trial of fired police officer Derek Chauvin for the murder of George Floyd in police custody on May 25, 2020, in Minneapolis centered on issues of race, human dignity, and systemic bias. Yet the trial

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they see this young man sitting up here.
Prosecutor: Right.

Id.

[165] *See* Smith v. Mitchell, No. 3:20-CV-519, 2021 WL 325928, at *6-7 (S.D. Ohio Feb. 1, 2021), *report and recommendation adopted sub nom.* Smith v. Warden, Warren Corr. Inst., No. 3:20-CV-519, 2021 WL 764139 (S.D. Ohio Feb. 26, 2021) (district court overruled *Batson* challenge and allowed peremptory strike after government complained prospective juror was likely to be overly sympathetic to defense; magistrate judge recommended denial of habeas petition). The potential juror expressed her ability to be fair as well as her concerns about the criminal justice system, again in terms reminiscent of widely held minority views:

Prosecutor: Have you encountered people in your job that you feel have been treated fairly by the criminal justice system?
Prospective Juror [J.N.]: Yes.
Prosecutor: Have you encountered people in your job that you feel have been treated unfairly by the criminal justice system?
Prospective Juror [J.N.]: Yes.
Prosecutor: Okay. Which do you encounter more?
Prospective Juror [J.N.]: Fairly.
Prosecutor: Fairly?
Prospective Juror [J.N.]: Uh-huh.
…
Prosecutor: Okay. You could come in with fresh eyes and be fair?
Prospective Juror [J.N.]: Uh-huh, yes.

Id.

perpetuated ugly stereotypes of Black men, women, and inner-city minorities.[166] The problems began during jury selection and continued well through closing arguments. Let us look at the transcript to dissect how at least one Black man, Juror 76, was denied an opportunity to serve by the weaponization of the white, allegedly "impartial" experience:[167]

a. Juror 76, in His Own Words

After the judge called him to the stand, Juror 76 acknowledged he had seen some information on the news regarding the case, as most Americans had. He stated he was aware of the City's $27 million civil settlement, but that it would not affect his decision in the criminal case. He affirmed he could decide the case on facts and law. He stated he did not recognize any witnesses on the list. In a sweet aside, he noted that his birthday would occur during the trial and also that his wife had health challenges, but even these potential obstacles would not keep him from jury duty. He described himself as a quiet person who enjoyed watching the Chicago Bulls play basketball.

Juror 76 then described both his concerns about the weight of jury service in this particular case as well as his sense of duty to serve.

> *Defense Counsel:* You at some point received this packet of information in the mail. And you learned that you were a prospective juror in this case. You had heard about this case before you got this information?
>
> *Juror 76:* Yes.
>
> *Defense Counsel:* How did it make you feel when you learned that you were a potential juror here, in this case?
>
> *Juror 76:* I mean it was like, mixed emotions.
>
> *Defense Counsel:* Okay. Can you explain what you mean by that?
>
> *Juror 76:* Well, on one hand, it was just something that you didn't want to be a part or see. I don't want to be a part of something like this. And then on the other hand, you do want to be a part of something like this.
>
> *Defense Counsel:* Why would you not want to be a part of this? What would be the specific concerns about being a part of this?

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[166] *See* Rachel K. Paulose commentary on *Hallie Jackson Reports* (MSNBC television broadcast Mar. 19, 2022) (on file with author).

[167] *See* WASH. POST, *Jury Selection for Derek Chauvin Murder Trial Continues, 3/17*, YOUTUBE, 2:36:50-3:24:24, at 2:53:46 (Mar. 17, 2021), https://www.youtube.com/watch?v=Cq6aRHzmGdg (memorializing trial proceedings in State v. Derek Chauvin, 27-CR-20-12646 (D. Minn. Mar. 17, 2021)) (transcribed by author).

Juror 76: Because it's like all of the … it's like the weight. If someone knows, like, the weight. Guilty or not guilty. I mean, it carries a big weight on you as a person,

Defense Counsel: Right.

Juror 76: You know. If you make the right decision, if you didn't make the right decision. So that's the biggest.[168]

In the interaction *supra*, we see Juror 76 express genuine concern about what the public knew was a trial of global implications, all televised live. He understood the pressure at hand. Importantly, he expressed the possibility the defendant might be "not guilty" and said nothing to suggest he could be biased against the defendant. But he next expressed his countervailing interests.

Defense Counsel: Okay. Why would you, what are the specific reasons that you would want to be on the jury?

***Juror 76:* Because me as a Black man, you see a lot of Black people get killed and no one is held accountable for it and you wonder why or what was the decisions. And so with this maybe I'll be in the room to know why.**

***Defense Counsel:* Okay. So I am just going to jump a little bit ahead. You understand that there is two possible. . . . And can you foresee yourself entering a not guilty vote?**

***Juror 76:* If the evidence was there and it presented itself as that, yes I could see myself doing that.**

Defense Counsel: Okay.[169]

In the conversation *supra*, Juror 76 invoked his experience as a "Black man" who has "wonder[ed]" why the highly publicized killings of Black people have not resulted in "accountab[ility]". He expressed the opinion that now perhaps he will know why courtroom results have not squared with his own perceptions, but critically, he articulated no desire to pursue a certain agenda or a predetermined result. Even the tone of his voice was questioning, not angry. Furthermore, he reiterated that he would rely on "the evidence" and affirmed that he could indeed vote for an acquittal if the evidence supported such a verdict.

Juror 76 then described his own previous jury service, demonstrating that he was qualified at least once before for civic service. During that prior service, he was a member of a jury which reviewed "the facts in front of us."[170] Juror 76 then described his own decision-making process.

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[168] *Id.* at 2:44:18 to 2:45:40.
[169] *Id.* at 2:45:40 to 2:46:36 (emphasis added).
[170] *Id.* at 2:47:51-53.

> *Juror 76:* You can't rush to judge. You have to sit and you have to look and observe every detail before you can make a decision. Sometimes you jump up and you make a decision because you think that that's right and then sometimes you're too quick to judge. You didn't take a look at all of the facts and the information.
>
> *Defense Counsel:* Okay. Good. Well let me ask you this. As you again, from personal experience, you know that at the end of the case the judge is going to give you the law that applies in this case. Can you apply the law even if you think the law should be different or you disagree with it?
>
> *Juror 76:* I should be able to apply.
>
> *Defense Counsel:* Okay.[171]

In this exchange, Juror 76 reiterated that he would follow the law, even if he personally disagreed with it. There was no jury nullification issue percolating in Juror 76's mind. He also showed qualities of fairness and self-awareness, and he described the need to take careful consideration of "all the facts and the information," prompting a "good" affirmation from the defense counsel.

Juror 76 then described watching clips of the Floyd murder video on television. He described rather clinically what he saw:

> *Defense Counsel:* There was a video that was taken by a bystander of the arrest of Mr. Floyd. That became a major news story, locally, nationally, internationally. Is that the video you had in mind?
>
> *Juror 76:* I am adamantly CNN. I stay away from social media. I don't like looking at stuff like that.
>
> *Juror 76:* I see police officers talking to Mr. Floyd; later it went to Mr. Floyd being in handcuffs; then it went to Mr. Chauvin knee on his neck.[172]

Juror 76 did not use any type of incendiary language to describe the video, in spite of the worldwide outrage the tape called forth. Defense counsel then turned to Juror 76's opinions about his client.

> *Defense Counsel:* And based on what you saw and heard you formed opinions about Mr. Chauvin as well as Mr. Floyd, is that fair to say?
>
> *Juror 76:* I mean, I didn't form an opinion on Mr. Chauvin because I didn't know him. But I just said, it's sad. It's another Black man being murdered in police hands. That's all I could say.

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[171] *Id.* at 2:49:30 to 2:50:25.
[172] *Id.* at 2:50:58 to 2:52:46.

Defense Counsel: Right. And sir, I've said this to several jurors. We are entitled to our opinions.

Juror 76: Yes, sir.

Defense Counsel: Your opinion is as valuable as my opinion is, right?

Juror 76: Yes, sir.

Defense Counsel: But ultimately the question becomes is your ability to be an impartial juror. Right?

Juror 76: Right.

Defense Counsel: And so, I'm not questioning any of your opinions. Okay?

In the questionnaire, you checked a box that said you had a very negative opinion of Mr. Chauvin. And like you just said, that a Black man was killed by police, right?

Juror 76: Right.

Defense Counsel: And what you also just used was a term 'murdered,' right? Is that your opinion of what happened? Did Mr. Chauvin murder Mr. Floyd?

Juror 76: In going through, doing the questionnaire, you will get to a point, to where it's anger. And like I said before, you have to sit and take and evaluate all of the information and put all of that. My opinion doesn't really matter. It's whether if I can do what the judge and what you guys ask me to do.

Defense Counsel: Okay. Good. All right.[173]

In this exchange, Juror 76 first expressed that at the time he completed the questionnaire, he had a very negative opinion of Mr. Chauvin, but this first impression was widely held across racial lines based on the fact that people believed their own eyes when watching the encounter between Chauvin and Floyd. In other words, there was nothing controversial or even unusual about Juror 76's initial thoughts regarding Mr. Chauvin. Second, as a lay person, he could not have been understood to be expressing a legal opinion on Mr. Chauvin's guilt in the trial at hand when he described the murder. Rather, he simply used a term that seemed to encapsulate to many people, including other law enforcement, what Mr. Chauvin did to Mr. Floyd. Indeed, part of the purpose of voir dire is to educate jurors on the standards of the law; standards with which they may not have the easy familiarity that trial lawyers possess. Third, Juror 76 honestly shared his own "anger" over the situation, but given the worldwide protests the Floyd murder sparked, this was hardly a reaction off the spectrum. Fourth, Juror 76 reiterated he did not "know" Mr.

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[173] *Id.* at 2:53:00 to 2:55:00.

Chauvin and would set aside any preconceptions to follow his oath as a juror, which is all the system could ask of any juror. Defense counsel then turned to the victim.

> *Defense Counsel:* And you, with respect to Mr. Floyd, you had a more neutral opinion, and ultimately wrote that a Black man was killed in police hands. Right? Again, the question is, the law presumes Mr. Chauvin innocent of these charges. Do you understand that?
>
> *Juror 76:* Yes, sir.
>
> *Defense Counsel:* Do you agree with that?
>
> *Juror 76:* Yes, sir.
>
> *Defense Counsel:* Can you apply that?
>
> *Juror 76:* Yes, sir.
>
> *Defense Counsel:* Will you apply that?
>
> *Juror 76:* Yes, sir.[174]

During the conversation *supra*, Juror 76 affirmed he would apply the law, and he agreed Mr. Chauvin was innocent of any legal charges until proven guilty. He did not "fight" the defense counsel on any fundamental principles important to the establishment of an impartial jury. Defense counsel next turned to the community reaction to Mr. Floyd's murder.

> *Defense Counsel:* You were asked about the impact on the community after the protests and the rioting and all of that stuff. You would recognize there's a difference between protests and riots, right?
>
> *Juror 76:* Yes.
>
> *Defense Counsel:* And you were asked about whether you thought it was a negative or a positive impact on the community. And you wrote, "I think it has stayed the same." Okay. So have you seen any positive or negative impacts as a result of the "aftermath" of Mr. Floyd's death?
>
> *Juror 76:* I could say in some ways, yeah, and then in some ways, it stayed the same. Because back when Trayvon Martin had got killed, and it was like the Black Lives Matter came about. And then it was like, Black lives mattered, every life mattered. And now, people seeing it happen in our city. Now it's like a lot of white people come.
>
> It some ways, it stayed the same because everyone noticed it when it happened when it was fresh, but now that it's not happened, it's like it's back to the same, you know the areas, the neighborhood is still the same.

[174] *Id.* at 2:54:52 to 2:55:26.

Defense Counsel: Okay, you were asked a question, and I'll read the question to you, and it says "No matter what you have heard or seen about this case, and no matter what opinions you might have formed, can you put all of that aside and decide this case only on the evidence you receive in court, follow the law and decide the case in a fair and impartial manner? And your response was "I don't know." Right. And so that's the dilemma. Right. We're human. We have our opinions. I have to take what you tell me at face value, Sir. I don't know what's in your heart. I don't know what's in your mind. Right? And I think there's a difference between filling out a questionnaire at home and then coming into court and answering. So, why don't you know?

Juror 76: Like I said, sir, in doing that, it was a lot of emotions. Like I said, on one hand, I didn't want to have jury duty, and especially like this type of trial. Like I said before, then, it's like, hey, I could be in there. I could make a difference, and I could know why. You know? So, it's a mixed feeling. You know?

Defense Counsel: Right. And that's the ultimate question. And we understand people. You're not the first guy to come in here and say, I've got mixed emotions about being a part of this. Right?

Juror 76: Right.

Defense Counsel: It's the question of can you, and will you?

Juror 76: Yes, sir. I mean with my character, and who I am, I think that I can do what's right.

Defense Counsel: Okay. So you believe without question, that you can set everything that you, every opinion, all of the information, you can set that aside, and you can judge this case based exclusively on the evidence in court?

Juror 76: Yes, sir.[175]

The aftermath of George Floyd's murder left Minneapolis burning with anger. Yet, Juror 76 did not quibble with the defense counsel's distinction between protests and riots. He described a neighborhood that had largely returned to stasis. He reaffirmed that he could set aside the trauma that he had witnessed and judge the case "based exclusively on the evidence in court."

Juror 76 next described how his brother was arrested for a crime and later convicted. He attended one court hearing for his brother, who never said he felt he was treated unfairly. The defense counsel then pivoted to Mr. Chauvin's right to trial, and Juror 76 affirmed that he understood the right to trial and agreed with counsel's statement that he would not "hold that against [Mr. Chauvin]."[176] The conversation then

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[175] *Id.* at 2:56:48 to 3:00:38.
[176] *Id.* at 3:03:15.

turned to race in America based on Juror 76's response to the pre-voir dire court questionnaire to venirepersons.

> *Defense Counsel:* Now I'm going to ask you some questions that you were asked a series of statements. They're just broad generalized statements. And you were asked to have your opinion ranked, from strongly agree to strongly disagree.
>
> …You were asked the question, "Discrimination is not as bad as the media makes it out to be." And you strongly disagreed with that.
>
> Why do you strongly disagree with that proposition?
>
> ***Juror 76:*** **Because being a Black man in America, I experience racism on a day-to-day basis.**
>
> ***Defense Counsel:*** **Okay. How do you feel that that would affect your ability to be a juror in this case?**
>
> ***Juror 76:*** **Not at all.**
>
> ***Defense Counsel:*** **Okay.**
>
> You were asked a question, or the statement reads "Blacks and other minorities do not receive equal treatment as whites in the criminal justice system." And you strongly agreed with that. Right? I mean, it's kind of the same answer I assume.
>
> *Juror 76:* Yes.
>
> *Defense Counsel:* Because of both your personal experiences, the experiences of your friends and family members as well?
>
> *Juror 76:* Yes.
>
> *Defense Counsel:* And again, you can set all of those personal experiences aside, and judge this case based only on the evidence?
>
> *Juror 76:* Yes.
>
> *Defense Counsel:* The question was raised, the Minneapolis police officers are more likely to respond with force when confronting Black suspects than when dealing with white suspects. And you strongly agreed with that.
>
> *Juror 76:* Yes.
>
> *Defense Counsel:* Do you have personal experience or you have people in your family who have experienced such treatment at the hands of the Minneapolis Police Department?
>
> …
>
> *Juror 76:* I stayed right around in the area where this happened, this incident happened. And so, on numerous occasions, if someone in the area got shot or someone went to jail, it was known for the police to ride through the neighborhood with "another one bites the dust." It's like they just antagonized us in the area. You can go to St. Louis Park or Plymouth; and it's none of the treatment like that with whites.

Defense Counsel: Okay. So, I mean you've witnessed this in your personal life. Right?

Juror 76: Yes.

Defense Counsel: You live in the area where this offense is alleged to have occurred. Right?

Juror 76: Well I used to live in that area.

Defense Counsel: Okay you used to live in that area. And you again, you can take your personal experiences, put them aside, and judge this case exclusively **(laughter)** based on the evidence in this case.

Juror 76: Yes, sir.

Defense Counsel: I mean, I am not trying to be glib with you, sir. I have to take you at face value. All right.[177]

During this critical exchange, Juror 76 reiterated his identity as a Black man in America who experienced racism as a daily reality. He described the well-known fact of differential treatment based on racial identity, the very issue that many people assert led to Mr. Floyd's murder. Without emotion, he described an anecdote regarding the lack of professionalism by the Minneapolis Police Department. And yet, he stated that his experiences would not affect his ability to serve. The defense counsel's response to all this? He laughed. He seemed incredulous that a Blackman who lived the daily experience of racism could be fair to an officer, who many people agreed, had been deathly unfair to a Black man. Yet the truth that Juror 76 expressed was that his experience has a Black man in America could make his service valuable, indeed invaluable in a case in which many people felt the daily discrimination against Black men in America was itself on trial.

Juror 76 then described his army service and his service on a juror in a domestic case before counsel pressed more deeply on the issue of differential treatment.

Defense Counsel: …You were asked a question, about your opinions, or a series of questions about your opinions regarding the justice system in general.

And the first question reads, "Do you believe that the jury system in this country is a fair system? Why or why not?" And you wrote, "It depends on your color." Or it depends on your colors.

Can you explain what you meant by that?

Juror 76: Well, I mean, like we said before, in my experience, if you're Black, I mean it's like we get the "you want to take a plea deal, or this" or we get the things where you have to go to jail.

[177] *Id.* at 3:03:22 to 3:06:58 (emphasis added).

> When you're white, I have white friends that do some stuff, they get a slap on the wrist. That's why I said it depends on your color in the justice system.
>
> *Defense Counsel:* Okay, so you feel that the justice system, again, as we talked about, is discriminatory towards people of color.
>
> *Juror 76:* Yes.
>
> *Defense Counsel:* And the second question was do you believe our criminal justice system works. Why or why not? And your answer was the same, right?
>
> *Juror 76:* Yes.
>
> *Defense Counsel:* Again, you are entitled to your opinions. You have personal experiences. Can you just set all of those personal experience aside?
>
> *Juror 76:* Yes, sir.
>
> *Defense Counsel:* Are you going to hold you know, those opinions against one side or the other?
>
> *Juror 76:* These are my opinions and how I feel about the situation. It's not whether someone is guilty or not. I have to see the information that's in front of me before I can just determine that. And my opinions and how I feel shouldn't be a part of that.
>
> *Defense Counsel:* Okay.[178]

In this encounter, Juror 76 revealed the depth of Black disappointment in the legal system. These views are widely held in the Black American community.[179] Yet the defense counsel, after noting that we all have our own opinions, seemed to be suggesting that Black people could not express their opinions and still be rendered fit for jury service.

Juror 76 then noted his aversion to blood and his concerns about the tension inherent in jury service. However, he never stated that he was unwilling or unable to serve.

b. Implicit Bias Forces Juror 76 Off the Venire

The questioning of Juror 76 was extensive, in-depth, and intensely personal. Not once did Juror 76 express an opinion outside the mainstream of the American view of events that led to the indictment of Mr. Chauvin. Indeed, he took pains to repeatedly affirm that he would follow the law, examine the facts, and take his role seriously. His tone remained

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[178] *Id.* at 3:08:58 to 3:11:21.

[179] Monica Anderson, *Vast Majority of Blacks View the Criminal Justice System as Unfair*, PEW RSCH. CTR. (Aug. 12, 2014) ("Seven-in-ten blacks said that blacks in their community were treated less fairly than whites in dealings with the police. In comparison, 37% of whites and 51% of Hispanics held that view. Also, 68% of blacks said that the court system was unfair to blacks, far more than whites (27%) or Hispanics (40%).").

respectful, deferential, and polite throughout. Juror 76 said nothing to raise red flags. And yet, after failing to strike Juror 76 for cause, the defense exercised a peremptory strike to dismiss the juror. Disappointingly, the government made no *Batson* challenge to the defense's peremptory strike of Juror 76.

> *Judge:* All right. Mr. Nelson, do you wish to exercise a peremptory?
>
> *Defense Counsel:* Yes, your honor.
>
> *Judge:* All right sir, thank you for the time that you've taken to answer all these questions. You've been very honest and open with us, and we appreciate that.
>
> You are excused from this panel and so you don't have to worry about other jury service because you are excused from possible other service otherwise. And let's make a record while we're [silence].[180]

Juror 76 departed the courtroom at this time.

> *Judge:* All right. Mr. Nelson, you want to make a record that you did off the record make a challenge for cause.
>
> *Defense Counsel:* I did your Honor. I made a motion for cause. Essentially, on the basis that this juror made several remarks regarding the Minneapolis Police Department, his experiences with the Minneapolis Police Department, referring to them as murder, that they had murdered people, that Mr. Floyd was murdered. That he made references to another one biting the dust when he lived in the area. His express views about the Minneapolis Police Department and that those similar behaviors not happening in other neighboring communities.
>
> And so I felt that his bias was against the Minneapolis Police Department specifically. And that was the basis of the motion for cause.
>
> I recognize that he said he indicated that he could set that aside. However, in view of the entire context of his testimony as well as his questionnaire, I felt that the cause existed.[181]

In these comments, defense counsel never asserted that Juror 76 would be unfair to his client. He simply rehashed Juror 76's statements regarding troubling behavior by the Minneapolis Police Department. Yet, government reports support Juror 76's opinion that the Minneapolis Police Department desperately needed a culture change.[182] Indeed, the

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[180] WASH. POST, *supra* note 167, at 3:19:00 to 3:19:32.

[181] *Id.* at 3:19:35 to 3:20:49.

[182] *See, e.g.*, MINN. DEPT. OF HUM. RTS., *Investigation into the City of Minneapolis and the Minneapolis Police Department: Findings from the Minnesota Department of Human Rights*, at 5 (Apr. 27, 2022) ("After completing a comprehensive investigation, the

Minneapolis Police Department is presently the subject of a federal investigation.[183] Reiterating anecdotal evidence of the department's culture was hardly evidence of bias. It was rather a factual recitation of Juror 76's experience as a minority living in an inner-city area.

More significantly, the Minneapolis Police Department was not on trial; Derek Chauvin was. Juror 76's views on the department simply did not bear on his fairness to sit in judgment of Derek Chauvin's actions on May 25, 2020.

The judge seemed to draw a distinction between Juror 76's opinions about George Floyd's murder and the suggestion of systemic bias by the Minneapolis Police Department.

> *Judge:* I can address the latter issue. There was not a Batson challenge made and I think appropriately withheld because there was a substantial basis for the defense to exercise a peremptory, that being a strong negative view of Minneapolis Police Department, in contrast to suburban police departments, which was interesting, it was not just a global… And so Minneapolis being the department that Mr. Chauvin was a member of at some point.
>
> His opinions about this is another Black man murdered, certainly an honest opinion widely held by many people. And that by itself would not justify an excuse.
>
> What I am relying on is, in listening to this juror, was when he talked about the response to his jury summons and whether to sit on the jury and he talked about how yet this was another Black man murdered.
>
> But it was interesting that he said he could be fair and impartial. And what he would get out of it is he would have the ability to tell people why. Because this time he gets to be in the room.
>
> Which is, I have certain strong opinions, I can put them aside. And if he had said, I'm going to use those opinions or even inferred.
>
> My inference from what he said was I can put it aside, and if it is not guilty, I can reach that verdict because I feel comfortable telling people why it happened.

Minnesota Department of Human Rights finds there is probable cause that the City and MPD engage in a pattern or practice of race discrimination in violation of the Minnesota Human Rights Act").

[183] *See* Press Release, U.S. Dept. of Just., Attorney General Merrick B. Garland Announces Investigation of the City of Minneapolis, Minnesota, and the Minneapolis Police Department (Apr. 21, 2021), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-investigation-city-minneapolis-minnesota-and.

> And he recognized that on other verdicts that he might have these strong opinions he wasn't in the room. So he doesn't know why they decided that way.
>
> And thus saw this as maybe a chance to tell people why a certain verdict, which it put him right in the middle as far as fair and impartial. I think he was being very introspective about it that holding these beliefs.
>
> But also that these strong beliefs could give, including a very negative opinion of the defendant, could give him a basis, or give the defense a basis for an appropriate challenge, but not for cause.
>
> Cause challenge is denied.
>
> We'll add that as a peremptory.[184]

The judge's reflections, while insightful and made under the most intense pressure, drew an artificial distinction between Juror 76's views about the tragedy inflicted upon George Floyd and the tragedy inflicted regularly by the Minneapolis Police Department on inner city people of color. Ironically, it was the very murder of Mr. Floyd that triggered a nationwide reckoning on systemic bias and the ways in which not just random individuals, but whole systems of authority, may consciously or unconsciously discriminate against people of color.

Consequently, Juror 76 was never offered the opportunity to serve. How could this happen in a trial where race was front and center? How could the voices we most desperately needed to hear be purposefully excluded from the table when decision time came nigh?[185] Sadly, Juror 76's experience is hardly unique.[186]

4. Who is the Unbiased Juror?

The experience of Juror 76 starkly illustrates that some courts are now excluding as overly sensitive[187] all people of color who truthfully

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[184] WASH. POST, *supra* note 167, at 3:21:55 to 3:24:22.

[185] Ultimately, four black people sat on the Chauvin jury, a much higher proportion than in other juries judging police brutality cases. *See* Adrian Florido, *Half of the Jury in the Chauvin Trial Is Nonwhite. That's Only Part of the Story*, NPR (Mar. 25, 2021, 9:00 AM), https://www.npr.org/2021/03/25/980646634/half-of-the-jury-in-the-chauvin-trial-is-non-white-thats-only-part-of-the-story.

[186] A review of the caselaw, *supra*, shows some judges would have followed this judge's lead in denying a Batson challenge to Juror 76 because of the lack of education about what is or is not bias.

[187] Hamling v. United States, 418 U.S. 87, 107 (1974) ("This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.") (citations omitted).

speak about their own experiences from the jury pool. A court's denial of the everyday experiences of people of color unfairly affects our concept of the "community standard" or the "societal norm" by baselining the white experience.[188] At a minimum, jurors ought to be able to show that their experiences constitute a class experience,[189] rather than an "overly sensitive" experience.[190]

To guard against juror selection bias, the law must import classic civil rights doctrine into the juror selection process. Minorities experience the world differently than white Americans. Microaggressions, blatant racism, and a resultant conditioning toward bias are part of the daily lives of people of color. The law must understand and value these perspectives, which is part of the experiential reality, not merely the perception, of people of color.[191] In other words, the venire process must not fall to racially disparate treatment or adverse impact.[192]

Why is the current model insufficient? The *Batson* process currently only recognizes overt bias. But implicit bias also taints the legal system.

Too often, however, these experiences are used as a proxy for "bias." Black Americans who truthfully speak about their encounters with

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[188] *See id.* at 105 (putting emphasis "on the ability of the juror to ascertain the sense of the 'average person, applying contemporary community standards'" to render a fair verdict).

[189] *Id.* at 104-05 ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.") (citation omitted).

[190] *See, e.g.*, Hernandez v. State of Tex., 347 U.S. 475, 479 (1954) ("The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites.' One method by which this may be demonstrated is by showing the attitude of the community.").

[191] *Cf.* Batson v. Kentucky, 476 U.S. 79, 97-98 (1986) ("Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it 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. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.") (citations omitted).

[192] *See id.* at 99 ("By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

racism, particularly at the hands of law enforcement, are struck for cause from the venire.[193] This is actually a failure of judges and lawyers to understand what bias is. Bias is an unwillingness to view a defendant fairly; bias is not the willingness to share a different life experience.[194]

Let us consider an everyday example. If a white man testifies truthfully during venire that law enforcement has never stopped him for a minor traffic offense, and a Black man testifies that he is stopped almost monthly by law enforcement, why is the white man considered "unbiased" and the Black man considered "biased?" in a case involving a police officer? Both men are speaking from their factual experiences.[195] And the fact is, Black people are stopped demonstrably more often than white men for traffic offenses. To ignore this fact is to perpetuate systemic racism by failing to allow the Black experience a voice in the jury room.

As scholars have faithfully chronicled, people of color experience the systemic bias of the legal system, and law enforcement in particular, more severely than white people. Striking people with diverse experiences creates lopsided juries where the model of an unbiased juror is a white male juror, *i.e.*, a person who has not experienced discrimination. A person of color who speaks truthfully about his experiences with discrimination but still states he will be able to judge a trial fairly, is considered a biased juror. Such differential treatment of people of color institutionalizes racism in the jury system, the only avenue the people possess to participate in the judicial branch.

We saw this perpetuation of systemic bias transpire in the Chauvin trial. Repeatedly, prospective jurors of color who clearly stated they could judge the evidence fairly were struck from the venire, most notably in the case of "Juror 76". After repeatedly describing factors supporting his ability to judge the case fairly, including his lack of fear, his ability to justify an acquittal, and his commitment to hearing both sides of a story, Juror 76 was unfairly excluded from the Chauvin jury pool for speaking the "inconvenient truth."[196]

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[193] I explored this theory in real-time in media commentary during the trial of Derek Chauvin. *See, e.g.*, The Paul and Jordana Show, *supra* note 151.

[194] *Cf. Batson*, 476 U.S. at 85-86 ("The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors.") (citations omitted).

[195] "It is not surprising, then, that some African American jurors are forced to sneak through the back door what is not allowed to come in through the front: the idea that 'race matters' in criminal justice." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 681 (1995).

[196] *See Prayer for Injustice by Mother Teresa*, *in* THE NOTRE DAME BOOK OF PRAYER

The exclusion of people of color who courageously speak their truth perversely incentivizes bad apple conduct by police, who thus create a circular pattern of abuse-marginalization-exclusion against people of color. In the end, racial profiling by police is justified by the courts who fail to recognize repetitive differential conduct impacts perceptions of fairness. The longstanding failure to recognize the wrongs visited upon people of color, including in jury selection, poisons the venire process.[197]

Perpetuation of racial stereotypes in the courtroom during the voir dire process also further isolates people of color, especially in trials where a state actor is the defendant. The exercise of lethal authority ought not prevent accountability of officers wherein the only thing standing between the officer and the loss of human life is a badge.[198]

III. POTENTIAL SOLUTIONS

The problems I have outlined in this article are within the reach of Congress, state legislatures, state bars, judges, and counsel to resolve. Indeed, each has a role to play and a responsibility to strive for a more inclusive jury system.

My argument is the next evolutionary extension of *Batson*: we must recognize that just as a peremptory challenge may be used to mask explicit bias, it may be used to mask implicit bias. Racial discrimination in the jury selection process infects the legal process[199] by perpetuating systemic bias.[200] This is true even when judges and lawyers seemingly act

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183-84 (Heidi Schlumpf ed., 2010) ("O God, we pray for all those in our world who are . . . hounded for speaking the inconvenient truth.").

[197] This discrimination is complicated further when other layers of identity, such as sex, are added onto race. Professor Kimberlé Williams Crenshaw created the concept of "intersectionality" to describe the uniquely oppressive experiences of Black women. *See, e.g.*, KIMBERLÉ WILLIAMS CRENSHAW, ON INTERSECTIONALITY: ESSENTIAL WRITINGS (The New Press 2017); Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

[198] Rachel K. Paulose, *The Third-Degree Murder Charges Against Derek Chauvin Carry Worthwhile Risks*, WASH. POST (Mar. 12, 2021, 1:01 PM), https://www.washingtonpost.com/opinions/2021/03/12/derek-chauvin-third-degree-murder/.

[199] *See Batson*, 476 U.S. at 87 ("Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try.").

[200] *See id.* at 87-88 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an

in a race-neutral way but are implicitly excluding certain races.[201]

Discrimination hurts the defendant, the prospective juror, and the whole community. A community that sees racial stereotypes endorsed in a courtroom may perpetuate discrimination.[202] "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself."[203]

1. Attorneys Should Preserve Trial Objections and Propose Jury Instructions on Implicit Bias

Proactively, trial attorneys should propose motions in limine and jury instructions that explicitly warn about the dangers of implicit bias, as well as the duty of impartiality.

Reactively, trial attorneys must aggressively challenge on constitutional grounds any attempt to erase the experiences of people of color in the jury process. Counsel must begin to see implicit bias as a *Batson* violation, make their objection on the record, and renew their objections to preserve the fight for the appellate court.

2. Courts Should Conduct Thorough *Batson* Processes

Judges should thoughtfully consider *Batson* abuses. Whether the challenge to a minority juror comes through a strike for cause or a peremptory strike, judges should question whether the strike is pretextual. A trial judge should consider whether counsel objecting to a potential minority jurist sought to strike similarly situated white jurists; what percentage of people of color are struck as compared to the percentage of white people struck; if minorities with criminal backgrounds are struck, whether people with law enforcement backgrounds are also struck; whether a lawyer's attempted strike premises its rationale on the juror's discussion of the fact of discrimination, whether historical or everyday; and if the court is an open space for people from all backgrounds to participate in the jury process.

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impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'") (citations omitted).

[201] *See id.* at 88 ("Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors.").

[202] *See id.* at 87-88 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.") (citations omitted).

[203] Mapp v. Ohio, 367 U.S. 643, 659 (1961).

3. Legislative Bodies Should Pass Laws Prohibiting Striking Impartial Minorities Who Describe Discriminatory Experiences

The most logical actor to address systemic bias are the bodies that represent the will of the people: Congress and state legislatures, as two states already have done at the time of this writing. Already, rules exist regarding jury selection. Legislative bodies should take immediate action to prohibit implicit bias as a form of discrimination. These statutes should explicitly prohibit striking for cause any juror who testifies she will faithfully serve without prejudice and who may describe anecdotal evidence of racist episodes she has experienced, observed, or of which she has become aware.

In the wake of the *Chauvin* trial, some states did undertake reform of their jury selection processes.[204] At the time of this writing, both California[205] and Washington[206] passed legislation and court rules to outlaw implicit bias during juror selection. Further, in Colorado, state legislators introduced a bill to eradicate implicit bias in jury selection. In addition to the California and Washington statutes, Colorado's proposed legislation provides a useful model:

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[204] *See, e.g.*, Petition to Amend Rules 18.4 and 18.5 of the Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure, ARIZ. R. CRIM. P. 18.4-18.5 (filed Jan. 11, 2021), www.azcourts.gov/Rules-Forum/aft/1216; S.B. 212, 2021-2022 Reg. Sess. (Cal. 2021); S.B. 128, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022); Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson (Dec. 31, 2021), available at https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf; S.B. 442, 2021 Leg. (Fl. 2021); S.B. 918, 2021-2022 Leg., 192nd Gen. Ct. (Mass. 2022); S.B. 2211, 2021 Leg., 136th Sess. (Miss. 2021); S.B. 2307, 2022 Leg., 137th Sess. (Miss. 2022); H.B. 2421, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022); S.B. 2778, 2022-2023 Reg. Sess. (N.J. 2022); S.B. 6066, 244th Leg., 2021 Reg. Sess. (N.Y. 2021); H.B. 723, 2021-2022 Reg. Sess. (N.C. 2021); H.B. 4073, 2022 Reg. Sess. (Or. 2022); S.B. 2763, 2021-2022 Leg., 112th Gen. Assemb. (Tenn. 2022).

[205] *See* CAL. CIV. PROC. CODE § 231.7(2)(A) (West 2001) ("For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.").

[206] *See* WASH. REV. CODE ANN. pt. I, GR 37 § (a)-(c) (West 2018). ("**(a) Policy and Purpose.** The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity. **(b) Scope.** This rule applies in all jury trials. **(c) Objection.** A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.").

> CONCERNING ADDRESSING IMPLICIT BIAS IN JURY SELECTION IN CRIMINAL PROCEEDINGS.
>
> Bill Summary . . . . The bill allows courts and opposing counsel to raise objections to the use of peremptory challenges with the potential to be based on racial or ethnic bias in criminal cases. The bill provides a list of presumptively invalid reasons for peremptory challenges. Presumptively invalid reasons include:
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> - Having prior contact with law enforcement officers;
> - Expressing distrust of law enforcement officers or a belief that law enforcement officers engage in racial profiling;
> - Having a close relationship with an individual who has been stopped, arrested, or convicted of a crime;
> - Residing in certain neighborhoods;
> - Having a child outside of marriage;
> - Receiving state benefits; or
> - Speaking English as a second language.
>
> The bill requires appellate courts to hear peremptory challenge cases de novo and review a trial court's factual findings for substantial evidence.[207]

4. State Bars Should Require Implicit Bias Training

State bars also have a role to play in combatting implicit bias. While many state bars have CLE diversity requirements,[208] states could supplement their current requirements by specifically incorporating programs educating lawyers on implicit bias in the jury selection process.

Further, counsel should seek, and judges should grant, motions educating jurors on implicit bias. Studies show education about discrimination may reduce its impact in the jury room.[209] As noted, some courts are already requiring such education, as advocated by at least one former federal judge.[210]

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[207] *See* S.B. 128, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022).

[208] *See, e.g.*, Minn. Rules of the Bd. of Continuing Legal Educ. 2G, 9B(2), Minn. State Bd. of Continuing Legal Educ. (eff. Jan. 1, 2021).

[209] *See, e.g.*, Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *1 (E.D. Wash. Jan. 3, 2012); Chelsea R. Teague, *ASFA: How Policy and Prejudice Undermine Immigrants' Rights*, 99 TEX. L. REV. 1041, 1060 (2021).

[210] Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1181-83 (2012) ("For example, Judge [Mark] Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection. At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias . . . . He also gives a specific jury instruction on implicit biases

5. The Supreme Court Should Consider Eliminating the Peremptory Challenge

Several justices of the Supreme Court have concluded that *Batson* is on a collision course with the peremptory challenge.[211] The peremptory challenge is not a constitutional guarantee. If its abuse persists, eliminating the peremptory challenge altogether, as many legal scholars have advocated,[212] may be the best option for achieving a jury selection process untainted by bias.

IV. CRITIQUES AND RESPONSES

The chief critique of the approach I advocate in this article is that trial lawyers do not in fact want unbiased juries; they want jurors sympathetic to their position. Indeed, the jury selection process has become big business.[213] Relying on lawyers to critique other lawyers'

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before opening statements:

> Do not decide the case based on 'implicit biases.' As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, 'implicit biases,' that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.") (citations omitted).

[211] *See supra* Part II(2).

[212] *See, e.g.*, Matt Haven, *Reaching* Batson's *Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard*, 11 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 97, 98 (2011) ("While peremptory challenges 'occup[y] an important position in our trial procedures,' they have been used 'to discriminate against black jurors,' which in turn harms black defendants, potential jurors, and the judicial system's integrity and perceived legitimacy."); Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 156 (2005) ("[T]he *Batson* peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection.") (italics omitted); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 871 (1997) ("[E]ven assuming the peremptory challenge ever worked in this country as anything other than a tool for racial purity, and even assuming it is working today in its post-*Batson* configuration to eliminate hidden juror biases without being either unconstitutionally discriminating or unconstitutionally irrational, I submit that its institutional costs outweigh any of its most highly-touted benefits.").

[213] *See* Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U. L. REV. 463, 464

biases may simply incentivize concealing underground biases that already lie latent beneath the surface.

This critique goes to the structure of *Batson* and its overreliance on lawyers to police each other, which I agree is insufficient protection, especially for the juror who has no advocate. Unless and until we eliminate the peremptory challenge, however, we must rely on both lawyers and judges to weed out bigotry in the legal system. It is a challenge to which we all must rise.

A second critique may be that however well-intentioned a lawyer may be, a client still possesses final authority. The client may direct a lawyer to object to certain jurors based on the client's own racist views.

I agree that lawyers have a constitutional duty to represent their clients with zeal. However, just as we do not permit lawyers to perpetuate fraud at the direction of their clients, we ought not tolerate lawyers who aid and abet their client's pursuit of overtly racist strategies. Both the bench and bar should hold all counsel to the highest standards to rip out racism by its roots.

A third critique goes to the heart of my argument by claiming we ought to live in a colorblind society. Some people hold that systemic racism does not exist, and we ought not treat people as if we come from different worlds.

My response is that I, too, yearn for a society in which no one is oppressed because of the color of their skin. But the facts on the ground do not yet support the notion that we have created the beloved community.[214] Until then, "[i]n order to get beyond racism, we must first take account of race"[215] and the ways in which race and racism affect our daily realities.

CONCLUSION

Our present legal system demands that minority jurors conform to norms of whiteness by erasing their unique life experiences, at the cost of participating in our judicial process. This implicit bias undermines the integrity of the jury selection process. The judges, lawyers, and litigants who discount the experiences of racial minorities, which in many ways are different than the experience of white people, are preventing democracy from flourishing. Implicit bias in jury selection must be acknowledged, prohibited, and eradicated.

(1999).

[214] *See* Kipton Jensen, *The Growing Edges of Beloved Community: From Royce to Thurman and King*, 52 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC'Y 239 (2016).

[215] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J.).