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Illinois Courts Struggle with Implicit Bias and Justice Stevens's Legacy: Why Illinois Should Revisit His Dissenting Opinion in *Purkett v. Elem*

*Ted A. Donner**

Contemporary racial justice movements and increased interest in implicit bias are shining a spotlight on the role of peremptory challenges in jury selection and how best to combat prejudice in this essential step of the criminal justice system. States such as Arizona and Washington have undertaken reforms designed to shift a dynamic that, under Batson*, has prioritized obvious and intentional discrimination and ignored the more subtle but perhaps equally insidious effects of implicit bias. Focusing first on the history of peremptory challenges in Illinois, this article next looks to how the current state of the law can be reconciled with the law on challenges for cause and what areas of inquiry may be pursued in voir dire. The author concludes that Illinois should consider taking steps along a path specifically avoided by the United States Supreme Court in* Purkett v. Elem*—one that Justice John Paul Stevens embraced in his dissent in that case. Such an approach would require less of a focus on the intent of the attorneys and more on jurors' ability to perform their duties under law.*

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INTRODUCTION

There were not a lot of jury trials in Illinois during the pandemic; however, as life started to pick up again, so, too, did court proceedings—and with them, the number of arguments over who may have been denied a fair trial because of how the jury was selected. The country was still reeling from the circumstances surrounding the death of George Floyd in Minnesota,[1] and the Black Lives Matter movement was getting some long overdue attention. Problems in jury trials throughout the country were thus more pervasive for many reasons, but disproportionately evident in cases involving whether jurors had been wrongly excused because of their race.[2]

In *People v. Little*,[3] the First District Appellate Court in Illinois found that a claim for ineffective assistance should go forward because counsel had failed to pursue a *Batson* hearing after the State excused the only African American juror, despite evidence that the questioned juror "share[d] common characteristics with [other] selected jurors, except for race."[4] The Second District found that "procedural irregularities" in a *Batson* hearing held in *State v. Trejo*[5] warranted a remand.[6] And, in

1. *See, e.g.*, People v. Ammons, 2021 IL App (3d) 150743, ¶ 63 ("There is currently a widespread distrust of, and often antipathy toward, the police by many in the community, particularly in the wake of the killing of George Floyd.").

2. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that a peremptory challenge cannot be used to exclude jurors solely based on their race). The prohibition on excusing jurors under the Equal Protection Clause applies when the process tends to exclude members of other protected classes as well. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994) ("While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'" (citing Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)). But problems with racism have garnered particular attention in the last few years, giving rise to some dramatic changes in how voir dire is conducted in some states, and this article focuses on those changes in the law.

3. People v. Little, 2021 IL App (1st) 191108, ¶ 41.

4. *Id.* ¶ 29; *see also* People v. Williams, 807 N.E.2d 448, 459 (Ill. 2004) ("*Batson* established a three-step procedure to determine whether the State's use of peremptory challenges resulted in the removal of venirepersons on the basis of race. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, once such a showing has been made, the burden shifts to the State to provide a race-neutral explanation for excluding each of the venirepersons in question. Defense counsel may rebut the proffered explanations as pretextual. Finally, the trial court determines whether the defendant has met his burden of demonstrating purposeful discrimination." (internal citations omitted)).

5. People v. Trejo, 2021 IL App (2d) 190424, ¶ 17.

6. *Id.* ¶¶ 17–19.

People v. Bradshaw,[7] the Third Circuit held that a murder case should be remanded for a new trial because the State's reliance on a prospective juror's "criminal contacts" did not qualify as a race-neutral reason for striking that juror.[8]

In all of these cases, the courts used particularly strong terms to emphasize the importance of the problem, but the prosecution of these defendants, despite evidence that their convictions stemmed at least in part from racism, nevertheless continued. In *Bradshaw*, the court reiterated that "racial discrimination in jury selection offends the Equal Protection Clause" but found that the defendant could be subjected to a second trial because "the evidence was sufficient to convict [but for] a defective jury selection process."[9] In *Trejo*, the court acknowledged that the prosecution "is forbidden from using peremptory challenges to exclude potential jury members based on race or gender," but then retained jurisdiction so that a more procedurally correct hearing could be conducted, perhaps without the need for a new trial.[10] And in *Little*, the case was remanded for further proceedings, despite finding that "racial discrimination in jury selection is universally recognized as a constitutional error of the highest magnitude,"[11] because the only question before the court was whether certain claims of ineffective assistance should have been dismissed.[12]

As in too many other cases decided in the almost four decades since *Batson,* these three Illinois cases highlighted the need to answer a number of particularly important questions about racism in Illinois jury trials. Is there a better way to approach the use of peremptory challenges in this state? Can Illinois address how bigotry and prejudice still infect our judicial process while protecting the parties' interests in having some say over who decides their case? And can we somehow protect against the possibility that those participating in a given trial, including the litigants, the judge, and the jurors themselves, may eventually fall victim to their

7. People v. Bradshaw, 2020 IL App (3d) 180027, ¶¶ 40–41.

8. *Id.*

9. *Id.* ¶¶ 35, 43.

10. *Trejo*, 2021 IL App (2d) 190424, ¶¶ 7, 17–19. On remand, the trial court judge held the hearing required by the appellate court and found there had been no discrimination. *See* Clifford Ward, *Judge Rules No Racial Bias in Selection of Jury That Convicted Baseball Bat Killer of Two*, CHI. TRIB. (Oct. 25, 2021), https://www.chicagotribune.com/suburbs/lake-county-news-sun/ct-lns-trejo-hearing-st-1026-20211025-gy7x7lk4z5gxppwou2ztdmnx24-story.html [https://perma.cc/CE78-YPKL] (reporting *Trejo* case's outcome).

11. People v. Little, 2021 IL App (1st) 191108, ¶ 40.

12. *Id.* ¶ 41; *see also* Winston v. Boatwright, 649 F.3d 618, 627 (7th Cir. 2011) ("[W]hen a violation of equal protection in jury selection has been proven, the remedy is a new trial, without the need for any inquiry into harmless error or examination of the empaneled jury. . . . In fact, since a time well before *Batson* was decided, the Court has followed an automatic reversal rule once a violation of equal protection in the selection of jurors has been proven.").

own implicit biases?[13]

Recognizing that good intentions often make for bad asphalt, this article seeks to address these questions from three different perspectives. Focusing first on the history of challenges in Illinois to anticipate which next steps might make the most sense in the context of that evolution, this article then looks to how the current law on peremptory challenges can be reconciled with the law on challenges for cause and what areas of inquiry may be pursued in voir dire.[14] This article concludes that the linchpin to reconciling these laws and principles—how voir dire is intended to determine whether prospective jurors can do what would be expected of them as members of the jury—should likewise play a more important part in determining whether peremptory challenges are being abused in a given case.

I. JUSTICE STEVENS'S DISSENT IN *PURKETT* AND ITS RELEVANCE TODAY

The Washington Supreme Court has introduced a new rule that specifically requires judges to consider implicit bias the same way they do intentional discrimination under *Batson*.[15] Arizona has found, in the

13. *See* Michael I. Norton et al., *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467, 476 (2007) ("Do attorneys, aware of the proscription against the use of race and gender . . . continue to use race and gender in an effort to select juries favorable to their clients? The limited available evidence suggests that they do. Rose observed jury selection proceedings for 13 criminal trials, 12 of which had a Black defendant. Based on the logic underlying our experiments, we would expect prosecutors to challenge Black jurors—presumed to be sympathetic to a Black defendant—while defense attorneys would want to retain such jurors, making them more likely to challenge White jurors. This is exactly what Rose observed: 71% of observed Black juror challenges were made by the prosecution and 81% of White juror challenges were made by the defense." (internal citations omitted)).

14. *See* Hall v. Cipolla, 2018 IL App (4th) 170664, ¶ 170 ("As the name suggests, a challenge for cause asserts a reason why the prospective juror is unqualified to serve, such as bias or prejudice. A peremptory challenge, by contrast, need not be supported by a reason.").

15. *See* WASH. SUP. CT. GEN. R. 37:

> (a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.
>
> . . .
>
> (d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.
>
> (e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge.

Id. The rule in *Batson* otherwise requires a finding that any wrongful use of peremptory challenges be intentional before the court can fashion a remedy.

> "[The] State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause [which] forbids [counsel] to challenge potential jurors solely on account of their race. . . ." This principle also applies

meantime, that the best way to avoid the problems inherent in the use of peremptory challenges may well be to eliminate the practice altogether.[16] While a number of states are in turn looking at reforms based, more or less, on either the Washington or Arizona solutions,[17] this article concludes that Illinois should pursue a different path altogether. Instead of maintaining the three-step analysis in *Batson* and its progeny, Illinois should consider taking a few additional steps along a path specifically avoided by the United States Supreme Court in *Purkett v. Elem*,[18] one that Justice John Paul Stevens embraced in his dissent and that the U.S. Court of Appeals for the Eighth Circuit first concluded was necessary in that case.

Maybe, as Justice Stevens and the Eighth Circuit both reasoned, it makes sense to be skeptical of supposedly race-neutral reasons for peremptory challenges when they don't actually relate to whether a prospective juror can do what is required of them under the law. Maybe the Eighth Circuit was right when it concluded that

> [i]n a case such as this, where the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, "I

> to gender discrimination in peremptory challenges. . . . While the striking of even a single prospective juror for a discriminatory purpose violates a defendant's constitutional rights, the mere fact that the State peremptorily challenged a venireman of the same race as the defendant, or the mere number of veniremen of the defendant's race peremptorily challenged, will not by itself make a prima facie case. . . . [Thus, the] court determines whether the defendant has shown purposeful discrimination in light of [any proffered] explanation [for the challenge] and any rebuttal [by the movant].

People v. Bridges, 158 N.E.3d 1198, 1205–06 (Ill. App. Ct. 2020) (quoting Batson v. Kentucky, 476 U.S. 79, 89 (1986)).

16. *See* Arizona Supreme Court, No. R-21-0020, Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure (Aug. 30, 2021) (eliminating peremptory challenges in Arizona); *see also* Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021, 1:52 PM), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/ [https://perma.cc/A4EB-X8B7] ("Arizona's top court shocked even some advocates last week when it unexpectedly, even quietly, became the first state to eliminate outright the century-old practice of peremptory juror challenges, which have historically been plagued with race discrimination. Beginning Jan. 1, [2022] only for-cause challenges will be allowed in Arizona under a landmark rule change ordered by the state Supreme Court on Monday.").

17. *See Batson Reform: State by State*, BERKELEY L. DEATH PENALTY CLINIC, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/white-washing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ (last visited Apr. 25, 2022) [https://perma.cc/3NX2-FM7M] (tracking state changes in peremptory challenge practices).

18. Purkett v. Elem, 514 U.S. 765 (1995) (per curiam).

> don't like the way he looks, with the way the hair is cut. . . . And the mustache and the beard look suspicious to me," do not constitute such legitimate race-neutral reasons for striking [a prospective] juror.[19]

There is likely some truth to the idea that history will never care whether counsel's motivations were consciously or unconsciously racist in a given case, so long as the result was to perpetuate institutional racism.[20] But Washington's General Rule 37 still isn't likely to solve the problem because it relies as much on judges getting past their implicit biases as the existing law does of counsel.

Likewise, no matter how many well-meaning jurists, attorneys, and scholars may call for peremptory challenges to be done away with altogether,[21] surrendering what little control a criminal defendant may still have over the process remains a fundamentally undemocratic way to proceed in any case. It is a choice akin to abolishing the popular vote in presidential elections,[22] and it does little more than substitute one potentially biased decision-maker (counsel) with another (the judge).

A more balanced approach, which allows for peremptory challenges to remain available but would require more scrutiny into whether they are used as they should be warrants consideration. In the end, what Justice

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19. Elem v. Purkett, 25 F.3d 679, 683 (8th Cir. 1994), *rev'd per curiam*, 514 U.S. 765 (1995).

20. *See, e.g.*, Hon. 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, 150 (2010) ("[P]resent methods of addressing bias in the legal system—particularly in jury selection—which are directed primarily at explicit bias, may only worsen implicit bias. Specifically, judge-dominated voir dire and the *Batson* challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish.").

21. *See* Richard Gabriel, *Thank and Excuse: Five Steps Toward Improving Jury Selection*, JURY EXPERT, Aug. 2015, at 6, 6 ("The main arguments given for removing the peremptory challenge are that the challenges can be used to discriminate against a particular protected class (e.g., minorities, women) or that they can unfairly stack a jury in favor of one side over the other. The elimination of peremptory challenges would, in fact, harm the rights of the parties to obtain a fair and impartial jury and is a wrong-headed solution to a very real problem that does exist in today's jury selections across the country."); *see also* Courtney A. Waggoner, Comment, *Peremptory Challenges and Religion: The Unanswered Prayer for a Supreme Court Opinion*, 36 LOY. U. CHI. L.J. 285, 325–26 (2004) ("The peremptory challenge has been argued to not effectively remove bias from the jury. In fact some studies have shown that prosecutors peremptorily strike as many jurors that fit the perception of unwilling to convict as those actually willing to find the defendant guilty. Ultimately, some argue that these inconsistencies render the peremptory challenge not as beneficial to the judicial system as first thought.").

22. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 206, 215–16 (1995) ("[T]he link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure, spanning three centuries and eight amendments: the Fifth, Sixth, Seventh, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth. . . . [The] slippery slope problems [we find in defining which cognizable groups warrant protection in jury selection] have plagued courts because the doctrine at present is not informed by a workable theory to identify protected groups. . . . But the . . . slippery slopes disappear when we recognize jury service is analogous to other important rights of political participation, especially voting.").

Stevens said in his dissent in *Purkett* all those years ago, given how prescient his concern turned out to be, at least warrants his home state's contemplating a different path than that mapped out by either Washington or Arizona. Adopting procedures to ensure that each peremptory challenge has at least some relationship to whether the prospective jurors are able to do what the law requires of them, whether at the trial or the appellate level, would at least put an end to the inherently problematic dialogue over whether an attorney's "silly or superstitious" reasons for excusing a particular juror should be upheld.[23]

It would encourage counsel to think about the more constructive question of why they do or do not want a given candidate on the jury rather than about how they will defend themselves if they choose to excuse a woman or a person of color from the venire. And it would help to reconcile other internal conflicts in the law of jury selection generally, establishing more of a relationship between what questions are allowed and what counsel should be allowed to do with the information each question generates.

As the Eighth Circuit concluded in *Purkett* (before the Supreme Court reversed that decision and first confirmed that "silly or superstitious" reasons could be sufficient), counsel ought to be able to demonstrate that their reasons for striking a prospective juror have at least something to do with "whether that person is qualified to serve as a juror in the particular case."[24] So Justice John Paul Stevens, the Chicago native who dissented from the Supreme Court's majority opinion in *Purkett*,[25] may well have

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23. *See* Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam); *id.* at 775 (Stevens, J., dissenting).

24. Elem v. Purkett, 25 F.3d 679, 683 (8th Cir. 1994), *rev'd per curiam*, 514 U.S. 765 (1995). The Eighth Circuit continued:

> *Batson* leaves room for the State to exercise its peremptory challenges on the basis of the prosecuor's legitimate 'hunches' and past experience, so long as racial discrimination is not the motive. . . . [But] we do not believe . . . that *Batson* is satisfied by "neutral explanations" which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, *Batson* would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote "neutral explanations" which bear facial legitimacy but conceal a discriminatory motive.

Id. at 682–83 (quoting State v. Antwine, 743 S.W.2d 51, 65 (Mo. 1987)).

25. *Purkett*, 514 U.S. at 770 (Stevens, J., dissenting). Justice Stevens was notably joined in his dissent by only one other member of the Court, Justice Stephen Breyer. *Id.* Ironically, Justice Breyer announced his retirement just as this article was completed. *See* Mark Sherman & Michael Balsamo, *Justice Breyer to Retire from Supreme Court, Giving President Biden Opening to Fill Vacancy*, CHI. TRIB. (Jan. 26, 2022), https://www.chicagotribune.com/nation-world/ct-aud-nw-breyer-supreme-court-retires-20220126-p3wmda4hm5b4ramg3kd4xoslg4-story.html [https://perma.cc/9WPH-2BF4] (describing potential implications of Justice Breyer's retirement). Justice Breyer's successor, Justice Ketanji Brown Jackson, was confirmed by the Senate in April 2022, making her the first African American woman to serve on the high court. *Ketanji Brown Jackson to Serve on the U.S. Supreme Court*, https://www.whitehouse.gov/kbj/ [https://perma.cc/D92X-YMHE].

gotten it right when he embraced the Eighth Circuit's view on the subject. Indeed, Illinois could do worse than to follow his lead and require that counsel here at least do what he said should have been required in *Purkett.* As he wrote in his dissent,

> In my opinion, preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried. I would adhere to the *Batson* rule that such an explanation does not satisfy step two. Alternatively, I would hold that, in the absence of an explicit trial court finding on the issue, a reviewing court may hold that such an explanation is pretextual as a matter of law. The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in *Batson*.[26]

II. HISTORY OF CHALLENGES TO PROSPECTIVE JURORS IN ILLINOIS

Before turning to the ways in which Justice Stevens's perspective differed from that of the majority in *Purkett*, and why that still matters today, it is important to consider the role that peremptory challenges play in the jury selection process. It has always been the stated goal of the Illinois courts, in this regard, to ensure that the jury selected through voir dire is prepared to fairly weigh the evidence, follow the law, and decide the case as a group in a fair and even-handed manner. But the process through which the parties and the public have gotten any assurance that is what actually happens is somewhat fragile in its construction, based as it is on an evolving understanding of what people think, how they make decisions, and what needs to be done to ensure that what they do comports with the applicable law and their obligations as jurors.

The struggle over how that process should be managed is as old as the state itself. Indeed, the first case to consider what challenges for cause should be allowed for prospective jurors was decided just four years to the day after Illinois was first admitted as a state to the Union.[27] On December 1, 1822, the Illinois Supreme Court considered whether "[a] juror [who had] formed an opinion but had not expressed it" should have been

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26. *Purkett*, 514 U.S. at 777–78 (Stevens, J., dissenting).

27. *See* Coughlin v. People, 33 N.E. 1, 9 (Ill. 1893) ("The first case in which the competency of a juror who had formed an opinion was considered [was] *Noble v. People*, Breese 54 [decided on December 1, 1822]."); *see also* James A. Edstrom, *"With . . . Candour and Good Faith": Nathaniel Pope and the Admission Enabling Act of 1818*, 88 ILL. HIST. J. 241, 243 (1995) (noting that Illinois was admitted to the Union on December 3, 1818).

permitted to serve.[28] In *Noble v. People*, the court found it clear that "all men shall be tried by an impartial jury" but went on to find that, because human beings are proud by nature, whether one should be permitted to sit as a juror could rightly turn, not on whether someone had any particular bias or view on the issues to be tried, but instead on whether he had ever publicly expressed about those views.[29] "[A]s the mind of man is so organized," the court thus held, "it is almost impossible for a jury to be perfectly impartial."[30] So in *Smith v. Eames*, the court found that "[t]he human mind is so constituted that it is almost impossible, on hearing a report freely circulated in a county or neighborhood, to prevent it from coming to some conclusion on the subject . . . ."[31] In *Gray v. People*, the court found that a juror should not have been allowed to sit who testified that he would believe the defendants guilty if it turned out they were the same men referenced in certain newspaper articles.[32] And in *Albrecht v. Walker*, a case involving a defendant accused of brewing beer without a license,[33] the court found a juror should not have been permitted to sit who had said he would "do anything, short of inciting a mob, to put down the manufacture of beer . . . ."[34]

By the end of the nineteenth century, the possibility of a juror "setting aside" any predisposition they might have was gaining favor in the courts. As the court held in *Coughlin v. People*,

> [The law] makes the statement of [a] juror that he can render a fair and impartial verdict, according to the law and the evidence, competent as bearing upon the question of his impartiality, and requires the court to hear and consider such statement, if the juror sees fit to make it; and the result, therefore, would seem to be that the question of the competency of a juror, as affected by his opinion, based upon rumor or newspaper statements, must in all cases be treated as a question of fact.[35]

Likewise, by 1876, the Illinois Supreme Court had found that no one

28. Noble v. People, 1 Ill. 54, 55 (1822).
29. *Id.*
30. *Id.*
31. Smith v. Eames, 4 Ill. 76, 78 (1841); *see also* Albrecht v. Walker, 73 Ill. 69, 72 (1874) ("Life, liberty [n]or property would . . . be safe with such a man. Lamentable indeed would be the condition of each and of all, if the jury box shall be occupied by men who are governed by [such] mean [prejudices]—by men who fancy themselves pre-eminently virtuous and good, in proportion as they are bigoted and fanatical.").
32. *See* Gray v. People, 26 Ill. 344, 346 (1861) ("[H]e declared on his examination, that he believed the statements in the newspapers that there had been a housebreaking, and if the prisoners were the persons named in the newspapers, he had an opinion of their guilt or innocence . . . . The prisoner ought not to be forced to encounter a preëxisting opinion, deliberately formed on statements believed to be true, and which he would be required to remove. Had the witness said he neither believed nor disbelieved the statements, he would have been competent.").
33. Albrecht v. Walker, 73 Ill. 69–70 (1874).
34. *Id.* at 72.
35. Coughlin v. People, 33 N.E. 1, 14 (Ill. 1893).

who has not exhausted their peremptory challenges has standing to appeal an erroneous decision on a challenge for cause.[36] In *Robinson v. Randall*, the court found that, so long as counsel had at least one peremptory available to them, the conclusion was fairly drawn that their client was "not injured by the ruling of the court . . . ."[37]

The two most significant obstacles to any appeal from the denial of a challenge for cause have since remained the need to exhaust one's peremptory challenges[38] and the deference which must be afforded to the trial court on any questions of fact that arise during the voir dire.[39] The availability of peremptory challenges remains an important factor in the voir dire for any criminal or civil trial in Illinois. On the one hand, they provide a safeguard against judicial bias, their use is largely left to the discretion of the litigants, and their availability ensures that the parties have at least some ability to take part in the selection process. On the other, they help to limit the number of meritless appeals because no one can be heard to complain about the character of the jury deciding their case as long as they had retained an ability to change that character.

III. WHAT IS REQUIRED OF JURORS UNDER ILLINOIS LAW

Given the historic role that peremptory challenges have played in Illinois, the value of preserving what good has come from that history cannot be overstated. There is still reason, however, to consider whether some change in the process might help answer some of the problems that still arise in this state. Cases involving claims of intentional discrimination still arise with startling frequency, as evidenced by the recent decisions in *Little*, *Trejo*, and *Bradshaw*,[40] so there is reason to at least consider Justice Stevens's admonitions in *Purkett* and the ways in which Illinois might effectuate such changes in the process.

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36. Robinson v. Randall, 82 Ill. 521, 522–23 (1876).

37. *Id.* at 522–23. The dissent in *Robinson* was short and to the point. *Id.* at 524 (Dickey, J., dissenting) ("The position is taken that no injury can be done to a party where he challenges a juror for cause, and his challenge is improperly overruled, and the juror is challenged peremptorily, if it turns out afterwards that the party making such challenge does not, in selecting the other jurors, exhaust *all* his peremptory challenges. This position seems to me untenable. No one can tell how many of those subsequently accepted jurors he would have challenged peremptorily, if he had not already expended one of his challenges upon the offensive juror in question.").

38. *See, e.g.*, People v. Bowens, 943 N.E.2d 1249, 1257 (Ill. App. Ct. 2011) (stating that the Court will only review a lower court's ruling on a challenge for cause after one exhausts their peremptory challenges).

39. *See* Ittersagen v. Advoc. Health & Hosps. Corp., 2021 IL 126507, ¶¶ 45–46, 51 ("[R]ooting out juror bias necessarily involves assessing the juror's credibility, which is especially significant when, as here, the juror is the sole source of evidence.").

40. *See* People v. Little, 2021 IL App (1st) 191108, ¶ 41 (concluding that petitioner demonstrated prejudice); People v. Trejo, 2021 IL App (2d) 190424, ¶ 16 (noting claim of purposeful discrimination); People v. Bradshaw, 177 N.E.3d 396, 405–06 (Ill. App. Ct. 2020) (detailing charges of intentional discrimination).

Justice Stevens agreed with the Eighth Circuit that a peremptory challenge should not survive a *Batson* hearing, once a prima facie case was established, unless counsel could articulate how the challenge was not "facially irrelevant to the question of whether [the prospective juror was] qualified to serve as a juror in the particular case."[41] He agreed with that court's conclusion that counsel should be expected to "at least articulate some plausible race-neutral reason for believing [whatever factors they considered would] somehow affect the person's ability to perform his or her duties as a juror."[42]

There is little in the way of precedent to define what specific inquiry would be necessary to get to the question of whether a particular challenge is in fact "related to the case to be tried," but the case law about what areas of inquiry should be permitted certainly provides something of a starting point. To determine whether anyone should be sworn in as a juror for a given trial, the same three concerns should always warrant inquiry: (1) whether they will fairly consider the evidence presented to them; (2) whether they will follow the law as instructed by the court; and (3) whether they will abide by their obligations as members of a jury, drawn from a fair cross-section of the community, to deliberate and decide the case before them on the merits.[43]

To illustrate how these factors bear on a juror's ability to serve, one noteworthy example of how an inability to follow the law can prove dispositive is *Morgan v. Illinois*. In *Morgan*, the Illinois Supreme Court had affirmed the lower court's decision, finding (among other things) that there was no error in refusing to ask prospective jurors whether they

41. Elem v. Purkett, 25 F.3d 679, 683 (8th Cir. 1994), *rev'd per curiam*, 514 U.S. 765, 767 (1995); *see also* Purkett v. Elem, 514 U.S. 765, 774 (1995) (Stevens, J., dissenting) (agreeing with Eighth Circuit's conclusions).

42. *Purkett*, 514 U.S. at 767 (per curiam) (quoting *Elem*, 25 F.3d at 683); *see also Purkett*, 514 U.S. at 774 (Stevens, J., dissenting) (agreeing with Eighth Circuit's conclusions); In re A.S., 65 N.E.3d 485, 497 (Ill. App. Ct. 2016) ("Whatever idea the trial judge meant to convey by his . . . comment [that he agreed with the dissent in *Batson*], he was not at liberty to follow the reasoning of a dissent in a controlling United States Supreme Court case. And while prosecuting attorneys may offer any race-neutral reason for exercising a peremptory, including the way a member of the venire looks and acts, such subjective observations should be subject to close scrutiny.").

43. Adopting a more stringent standard for the exercise of peremptory challenges in Illinois would also help to correct the wrongs Justice Stevens said went unaddressed in *Holland.* Holland v. Illinois, 493 U.S. 474 (1990). In *Holland*, a case in which the petitioner did not argue equal protection under the Fourteenth Amendment, the Supreme Court rejected a claim that the State's use of peremptory challenges to exclude African American jurors as a class ran afoul of the Sixth Amendment's guarantee of a jury drawn from a fair cross section of the community. *Id.* at 487–88. Justice Stevens, writing in dissent, observed that, "[r]ather than eliminating jurors on an individualized basis on the grounds of partiality or necessity, the prosecutor allegedly removed all the black jurors in the belief that no black citizen could be a satisfactory juror or could fairly try the case. As the Court acknowledges, that practice is 'obviously' unlawful. . . . A jury that is the product of such a racially discriminatory selection process cannot possibly be an 'impartial jury' within the meaning of the Sixth Amendment." *Id.* at 505–06.

would automatically vote for the death penalty regardless of any mitigation evidence.[44] The United States Supreme Court reversed that decision, however, finding that counsel was entitled to pursue an inquiry on the subject of whether prospective jurors would consider mitigation evidence. The Court found, in fact, that any juror who was unwilling to consider such evidence would necessarily be unable to follow the law as instructed:

> Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death penalty. . . . Indeed, the Illinois Supreme Court recognizes that jurors are not impartial if they would automatically vote for the death penalty, and that questioning in the manner petitioner requests is a direct and helpful means of protecting a defendant's right to an impartial jury. The State has not suggested otherwise in this Court. . . . Any juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial. Accordingly, the defendant in this case was entitled to have the inquiry made that he proposed to the trial judge.[45]

There is a nexus between what questions are relevant to challenges for cause and a given candidate's ability to serve as a member of the jury, just as the same level of inquiry has been found appropriate to determine the propriety of a peremptory challenge. It is notably the case that "silly" and "superstitious" reasons have never been specifically found necessary in this context, but questions about a juror's ability to serve—their willingness to fairly consider the evidence, follow the law, and deliberate with other jurors to reach a just verdict—are routinely allowed.

IV. WHAT AREAS OF INQUIRY MAY BE EXPLORED IN VOIR DIRE

One aspect of the law of jury selection which bears particular scrutiny, in the context of this question, is the dichotomy between what questions are allowed to be asked in voir dire and what reasons an attorney may give to justify the exercise of a peremptory challenge. On the one hand, the Supreme Court has held that peremptory challenges may be used to excuse prospective jurors for even the most "superstitious" or "silly"

44. *See* People v. Morgan, 568 N.E.2d 755, 778 (1991), *rev'd*, 504 U.S. 719 (1992) ("The defendant also contends that he was denied an impartial jury when the trial court refused to ask potential jurors if they would automatically impose the death penalty if they found the defendant guilty. During jury selection, the defendant requested that the trial court ask prospective jurors: 'If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?' The trial court denied this request.").

45. Morgan v. Illinois, 504 U.S. 719, 738–39 (1992).

reasons, so long as the decision is not motivated by discriminatory intent.[46] On the other hand, while courts have also repeatedly held that counsel should be allowed to pursue questioning relevant to their ability to peremptorily challenge prospective jurors,[47] there isn't any precedent, at least that the research for this article has disclosed, for the idea that this, too, should be guided by superstition or silliness.[48] To the contrary, although every state in the union (save one) has specifically found that the subject matter of voir dire should be limited only by its relevance to peremptory challenges,[49] that limit is consistently defined, in practice, by whether the inquiry bears on prospective jurors' ability to perform their legal duties as jurors. Areas of inquiry that do not at least potentially bear on the propriety of a challenge for cause—despite the rhetoric about what little should be required for peremptory challenges—are generally refused by the trial court.

This is a dichotomy that the Illinois courts have yet to confront but that at least one appellate court judge in Texas has specifically addressed (albeit in a dissenting opinion on the subject):

> From the *dicta* in [some of our prior cases] has grown the doctrine of a right to ask questions to intelligently exercise peremptory challenges. That the doctrine rests on *dicta* and fallacy may not be a sufficient justification to abandon it, and I do not say that it is sufficient. More important is the failure of the courts to consider the differences between the right to a qualified jury and the right to eliminate unfavorable jurors.

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46. Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

47. *See, e.g.*, Art Press, Ltd. v. W. Printing Mach., 791 F.2d 616, 618 (7th Cir. 1986) ("A trial judge has broad discretion in limiting the voir dire of potential jurors, but this discretion is subject to the parties' right to an impartial jury. To protect this right, a trial court 'should permit a reasonably extensive examination of prospective jurors so that the parties have a basis for an intelligent exercise of the right to challenge.' . . . This court 'has been zealous in its protection of probing voir dire,' and will reverse a trial court for abuse of its discretion 'when limitations placed on the parameters of voir dire threaten to undermine the purpose for conducting an examination of prospective jurors.'" (internal citations omitted)).

48. *But see* People v. Baker, 924 P.2d 1186, 1190 (Colo. App. 1996). The trial court prosecuting attorney in *Baker* offered, as justification for a peremptory challenge, that an African American woman the attorney was questioning "did seem to react negatively towards me for even raising the issue [when he pointed out that she and the defendant were both black and asked her if that would matter]." *Id.* He continued, "I'm assuming that I handled it poorly, but I am not sure that that's necessarily the case. She's the only black juror that I'm aware of on this panel [. . . and] the impression that I got [was] that she resented me bringing it up at all. And based on that I believe that she would not be the best juror to hear this case." *Id.* The Court found that "[c]ounsel's justification suggests that the ultimate reason for making the challenge was based on the juror's resentment of the questions. Under these circumstances, racial discrimination was not inherent in the explanation offered." *Id.*

49. *See* Kidder v. State, 256 A.3d 829, 835 (Md. 2021) ("This Court has frequently emphasized that, unlike courts in many other jurisdictions, Maryland courts allow only 'limited *voir dire*'—meaning that the sole purpose of *voir dire* questioning is to determine whether prospective jurors should be struck for cause, not to elicit information for the exercise of peremptory strikes in the second stage of jury selection.").

> . . . Questioning about [a juror's qualification to serve] is essential to attaining a qualified jury. The statutory provision of peremptory challenges [on the other hand] provides a method of obtaining a more favorable jury, but it does not include a procedure of asking questions to implement the use of the challenges. There is no right to a favorable jury. . . . [So, g]iven the inadequate jurisprudential basis for this doctrine, its irreconcilable conflict with [other law], the impossibility of its predictable application, the effect it has in unduly lengthening the process of jury selection, and the development of alternate sources of information [such as juror questionnaires], I would renounce it.[50]

There is a great deal of argument in the cases over the subject matter about which counsel should be permitted to ask prospective jurors, the use of hypothetical questions or sentence structures which tend toward indoctrination,[51] and even the fundamental question of whether counsel should be allowed to ask their own questions.[52] But the reasons counsel may offer for why they peremptorily excuse a prospective juror, regardless of how that choice may affect the jury's makeup or diversity, are likely to be upheld no matter how "superstitious, silly, or trivial,"[53] "implausible or fantastic"[54] they may be. Indeed, as one Illinois appellate court concluded, "[a] legitimate race-neutral reason [for excusing a prospective juror] is not [necessarily] a reason that makes sense, but [may just be] a reason that does not deny equal protection."[55]

It remains a constant source of criticism, leveled by those who would eliminate peremptory challenges altogether, that peremptory challenges are allowed in such meaningless circumstances—and *Purkett* remains to blame for this state of affairs.[56] So, Illinois should again consider the

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50. Barajas v. State, 93 S.W.3d 36, 44–45 (Tex. Crim. App. 2002) (Womack, J., concurring).

51. *See* Ted A. Donner, *Limits on Questioning Prospective Jurors: The Rule Against "Indoctrination," in* 2 BLUE'S GUIDE TO JURY SELECTION, APP'X O (2022) (discussing a case where the prosecution may have used hypotheticals to emphasize the State's theory of case).

52. *See* ILL. SUP. CT. R. 234 ("The court may permit the parties to submit additional [voir dire] questions to it for further inquiry if it thinks they are appropriate, and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature and extent of the damages.").

53. United States v. Tercier, 835 Fed. App'x 471, 479 (11th Cir. 2020).

54. Stevens v. Commonwealth, 826 S.E.2d 895, 904 (Va. App. 2019); *see also* Bell v. State, 287 So.3d 944, 957 (Miss. Ct. App. 2019).

55. Mack v. Anderson, 861 N.E.2d 280, 292 (Ill. App. Ct. 2006).

56. *See, e.g.*, Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 837 (1997) ("How exactly is a trial judge to decide whether a prosecutor's exclusion of the only black men in a venire is or is not race-based, when the proffered neutral explanation is that they have facial hair, and they are the only ones in the entire venire with facial hair? What if the proffered reason is something more closely associated with race, such as having curly hair? By dispensing with any plausibility requirement at step two of the *Batson* inquiry, the *Purkett* Court may be making it marginally more difficult for trial courts at step three to separate out nonsensical reasons that are truly race-neutral from nonsensical reasons that may indeed be pretextual.").

possibility of looking at the problem from a different angle and restricting the use of peremptory challenges in a manner consistent with the standards Justice Stevens advocated in his dissent in *Purkett*, so that all of the questioning and subsequent challenges, including both challenges for cause and peremptories, relate to whether the prospective jurors are in fact able to do what is required of them under the applicable law.

V. WASHINGTON STATE'S FOCUS ON IMPLICIT BIAS

"Project Implicit," which started in the 1990s with an online program called the Implicit Association Test (IAT), provides a way for anyone interested in learning about themselves to take anonymous tests that gauge which unconscious biases they might have.[57] The IAT, which has been since taken by millions and is still available today,[58] asks that visitors to the site view a number of images as they are prompted to make choices along the way. An IAT keeps track of both what choices a user makes and the time that elapses between each choice, because hesitancy in making a decision can be telling (the user having presumably paused to consider what the "right" answer should be).[59] The IAT thus demonstrates how people are inclined to stereotype, and it shows us how we tend to rely upon mental associations from learned biases, whether we know it or not.

Implicit bias affects all of us in ways we don't always realize:

> A father and his son are in a car accident. The father dies at the scene and the son, badly injured, is rushed to the hospital. In the operating room, the surgeon looks at the boy and says, "I can't operate on this boy, he is my son." . . . If your immediate reaction is puzzlement, that's because automatic mental associations caused you to think "male" on reading "surgeon." The association *surgeon = male* is part of a stereotype. In this riddle, the stereotype works as the first piece of a mindbug. The second piece is an error in judgment—in this case a failure or delay in figuring out that the surgeon must be the boy's mother. . . . For those who are strong believers in women's equal rights and abilities, being tripped up by this riddle is especially annoying. Feminists are not likely to suspect that they possess the automatic *surgeon = male* association—

57. *Overview*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/education.html (last visited Mar. 21, 2022) [https://perma.cc/Z8PH-6JWT]; *see also* People v. Birge, 2021 IL 125644, ¶ 152 (Neville, J., dissenting) ("I would amend Rule 431(b) by mandating that a pretrial questionnaire be sent prior to trial to every prospective criminal trial juror [which includes a version of the Implicit Association Test such as that included as Appendix B to Justice Neville's dissent]. [Such a] pretrial questionnaire can be used to familiarize jurors with legal principles, e.g., proof beyond a reasonable doubt, the presumption of innocence, and implicit and unconscious bias.").

58. *See, e.g.*, *Preliminary Information*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html [https://perma.cc/VKQ8-APGC].

59. TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY & SCIENCE § 20:6 (2020–21 ed.).

> but most of them do. Consider that feminist just a bit further. Why should he base his thinking on a stereotype that clashes with his personal views? (Did you just discover that you have a *feminist = female* association?)[60]

The implications this study has had for how the courts should treat the likelihood of unconscious bias in jury selection and in jury deliberations remain daunting problems for all concerned. As Justice Michael Hyman observed in an article for the *Illinois Bar Journal*, "In our role as lawyers and judges we must be conscious of implicit bias' hold on us. . . . [Indeed], [t]he phenomenon of implicit bias must be addressed if we are really determined to eliminate bias, 'root and branch,' from our legal system."[61]

Justice Hyman's reference to both the "root and branch" of the problem is certainly apt, given how difficult it is to tell how deep these particular roots may run, but he is not alone in his thinking, and it is at least clear that a great many others in Illinois share his commitment to working on the problem. In 2018, the Illinois Supreme Court introduced a new pattern jury instruction, IPI 1.08, that encourages jurors to think about which implicit biases they may harbor before they decide the case in front of them.[62] As this article was being completed, the state's legal community was considering an amendment to Rule 8.4 of the state's ethics rules to confirm that "professional misconduct" should be defined to include "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status

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60. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 71–72 (2013).

61. Hon. Michael B. Hyman, *Implicit Bias in the Courts*, ILL. BAR J., Jan. 2014, at 40, 47. *See also* DONNER & GABRIEL, *supra* note 59, §20:6 ("The courts are taking these studies seriously, it bears emphasizing. The American Bar Association's Judiciary Division, for example, published a special edition of its Judges' Journal in the Fall of 2015 focused entirely on implicit bias and its impact on the way court proceedings unfold. As one of the judges contributing to that issue wrote, there is value in understanding one's own implicit biases and guarding against them." (citing Judge Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 JUDGES' J. 4 (2015))).

62. The pattern jury instruction states:

> We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called "implicit biases" or "unconscious biases."
>
> Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.
>
> As jurors you are being asked to make very important decisions in this case. You must resist jumping to conclusions based on personal likes or dislikes. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status . . . .

Illinois Pattern Jury Instructions, Criminal, No. 1.08 (approved May 2018).

or socioeconomic status in conduct related to the practice of law."[63] And as Kendra Abercrombie and Jayne Reardon pointed out in an article for the Illinois Supreme Court Commission on Professionalism:

> In Illinois, our courts and judges have created educational tools, resources, and trainings to support judges in understanding and disrupting possible biases so they can render fair judgments.
>
> Since December 2018, Dr. Andrea Miller, a clinical assistant professor of psychology at the University of Illinois Urbana-Champaign and a senior court research associate at the National Center for State Courts, and Judge Joseph G. McGraw of the 17th Judicial Circuit have conducted a deliberative decision-making training at Illinois' biennial Judicial Education Conference and during seminars for new judges in the state.
>
> The training introduces judges to the science behind implicit bias and fosters an awareness that judges, like all people, aren't immune to the influence of implicit bias.
>
> There isn't a clear path from implicit bias to discriminatory decision-making, explained Kimberly Ackmann, Deputy Trial Court Administrator to Judge McGraw. However, the training teaches how being motivated to control potential biases can determine how those biases manifest and what judicial officers can do to interrupt the cycle.[64]

While the Illinois courts have been encouraging in-depth study and some initial steps to address this problem in the community, other states have concluded that more aggressive approaches are necessary. In *State v. Saintcalle*, for example, a 2013 opinion that runs for almost 100 pages,[65] the Washington Supreme Court concluded that what is now known about implicit bias should serve as a wake-up call, demonstrating that the entire process is in need of an overhaul. "With limited information and time," the court concluded in *Saintcalle*, "and a lack of any reliable way to determine the subtle biases of each prospective juror, attorneys tend to rely heavily on stereotypes and generalizations in deciding

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63. Michelle Silverthorn, *Banning Harassment in the Legal Profession*, WOMEN'S BAR ASS'N ILL. (Aug. 18, 2016), https://wbaillinois.org/banning-harassment-in-the-legal-profession/ [https://perma.cc/MB3R-3EY2]. "Shouldn't we hold ourselves to a higher standard? Our profession is certainly better than it was fifty, or even twenty years ago. But we still have work to do. And it's easy for us attorneys to identify problems. It's what we do. Offering solutions though, that's less easy." *Id.*

64. Kendra Abercrombie & Jayne Reardon, *Interrupting Implicit Bias in the Illinois Judiciary*, 2CIVILITY (July 29, 2021), https://www.2civility.org/interrupting-implicit-bias-in-the-illinois-judiciary/ [https://perma.cc/Q7FF-KN78]; s*ee also* People v. Birge*,* 2021 IL 125644, ¶ 152 (Neville, J., dissenting) ("This court can take judicial notice of the fact that the United States incarcerates more people than any other country in the world and that the largest percentage of the people incarcerated are people of color. In light of [these] facts, absent a discussion of implicit bias with each juror during voir dire, there is an impermissible risk that jurors' individual biases will influence their jury deliberations.").

65. State v. Saintcalle, 309 P.3d 326 (Wash. 2013).

how to exercise peremptory challenges."[66] The court found there were "too many unanswered questions . . . under *Batson*, which [would] continue to cause much confusion and impose substantial litigation costs, all without addressing the underlying problem" of bias in jury selection.[67] The court in *Saintcalle* committed to introducing mechanisms that they hope will address the prevalence of bias in jury selection, including ways to acknowledge and deal with the fact that implicit bias, not just intentional discrimination, plays a part in perpetuating the institutional racism endemic to the process.[68]

The Washington State courts then introduced General Rule 37, which requires that trial courts refuse to allow the exercise of a peremptory challenge, regardless of whether there is evidence of intentional discrimination, so long as there is evidence to support the conclusion that "race or ethnicity [was] a factor."[69] The rule requires that a trial court "presume" that the reasons given for a peremptory challenge are the result of "improper discrimination" if there is evidence to show counsel relied upon such suspect criteria as whether the juror had "prior contact with law enforcement officers," had expressed "a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling," or had "a close relationship with people who have been stopped, arrested, or convicted of a crime."[70]

Rule 37 may thus be seen as a step forward by those who want to see the problem in jury selection addressed[71]—the rule's admonition against reliance on some of what has been described as pretext under *Purkett*

66. *Id.* at 353 (González, J., concurring) (citing TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION: STRATEGY AND SCIENCE §§1–7 to 1–8 (3d ed. 2007)).

67. *Id.* at 360 (citing TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION: STRATEGY AND SCIENCE §§1–7 to 1–8 (3d ed. 2007)).

68. *See id.* at 336 (opinion of Wiggins, J.) ("Unconscious stereotyping upends the *Batson* framework. *Batson* is equipped to root out only 'purposeful' discrimination, which many trial courts probably understand to mean conscious discrimination. But discrimination in this day and age is frequently unconscious and less often consciously purposeful. That does not make it any less pernicious." (internal citations omitted)).

69. *See* WASH. SUP. CT. GEN. R. 37(e) ("The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.").

70. WASH. SUP. CT. GEN. R. 37(h).

71. *See, e.g.*, Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 91 (2020) ("[Rule 37] is aimed at stopping attorneys from using race-based peremptory challenges at not only a conscious and explicit bias level, but also at an implicit, unconscious, and systematic bias level. Washington is the first state to put these challenges in the forefront to be constantly addressed by attorneys and judges alike. It is extremely innovative and should help reduce jury selection bias issues. This statewide rule is revolutionary. It addresses implicit bias in a way unlike courts have in the past and attempts to address what *Batson* did not.").

would certainly seem to be just such a step[72]—but it could also be said that Rule 37 serves to perpetuate some of the very problems it is intended to cure.

In stark contrast to the Illinois Supreme Court's recent decision in *State v. Ittersagen*, in which the court reiterated the importance of deferring to the trial court on questions of fact,[73] in *Washington v. Lahman*, an appellate court in that state reversed the conviction of a defendant who had been "arrested for the brutal assault of his long-term girlfriend" because the court concluded that the analysis under Rule 37 was "purely objective"[74] and reversal was appropriate because "the record left open the possibility that the prosecution implicitly and unsuitably relied on a stereotype in deciding [that one prospective juror] lacked the frame of mind to side with the State."[75] The court found that

> [o]ur assessment of this case does not mean the prosecutor's decision to strike [this prospective juror] was in fact driven by improper discrimination, purposeful or not. GR 37 was written in terms of possibilities, not actualities. The rule recognizes the trial process must be free from the appearance of discrimination, regardless of actual motives or intent. The switch from *Batson*'s focus on purposeful discrimination to GR 37's emphasis on the objective possibility of discrimination is significant.[76]

As the Illinois Appellate Court observed in *Mesich v. Austin*, "[i]t is an old, legal truism that 'hard cases make bad law,'"[77] and so it may be with Washington State's Rule 37. Indeed, while "[h]aving prior contact with law enforcement officers" is one reason that the Washington State courts are now required to presume intentional discrimination,[78] it is not at all uncommon for criminal-defense attorneys in Illinois to be concerned over whether a prospective juror has a relationship with police,[79] just as

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72. *See* WASH. SUP. CT. GEN. R. 37(i) ("The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers.").

73. *See* Ittersagen v. Advoc. Health & Hosps. Corp., 2021 IL 126507, ¶ 51 (discussing juror bias and validating their credibility).

74. State v. Lahman, 488 P.3d 881, 882, 885 (Wash. Ct. App. 2021).

75. *Id.* at 886.

76. *Id.*

77. Mesich v. Austin, 217 N.E.2d 574, 578 (Ill. App. Ct. 1966).

78. WASH. SUP. CT. GEN. R. 37(h).

79. *See, e.g.*, People v. Harris, 596 N.E.2d 1363, 1365 (Ill. App. Ct. 1992) ("Your Honor, I think that [this juror]'s familiarity with members of the police force, including Police Lieutenant Reno, is a problem which may prejudice [him] against my client, and I would ask that the Court remove [him] for cause or that in the alternative I be granted an additional peremptory challenge based on the Court's earlier rulings to remove [him]." (quoting defense counsel)); *see also* People v. Brooks, 542 N.E.2d 64, 66 (Ill. App. Ct. 1989) ("The Court: 'Yeah. I would hope all people would tell the

prosecutors are often concerned with whether prospective jurors have criminal records or other experience with the police that could lead them to have a negative impression of such witnesses.[80] The State of Washington has such assumptions baked into its law on the subject, it bears emphasizing, because its law is focused on whether such assumptions might be borne of implicit bias. A more constructive standard might well focus instead on whether such evidence is relevant to a given juror's ability to serve.

VI. ARIZONA STATE'S ELIMINATION OF PEREMPTORY CHALLENGES

The most effective way to curtail the use of stereotypes in peremptory challenges, according to the Arizona Supreme Court, is not to search for implicit bias in what motivates counsel to exercise such challenges, as they are doing in Washington, but to eliminate peremptory challenges altogether.[81] This dramatic change in Arizona law was the recommendation of two appellate-court judges who had first advocated for a new rule like that embraced by Washington.[82] Then, in the course of debate over how peremptory challenges were used in one particular case before them,[83] both the Arizona Supreme Court and the state's bar association changed

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truth. But the thrust of the question is whether you would believe the policeman and give his credit more weight or more credibility than the testimony of a citizen like yourself solely because he is a police official.' [Prospective Juror]: 'I think so.'").

80. *See, e.g.*, People v. Baisten, 560 N.E.2d 1060, 1071 (Ill. App. Ct. 1990) ("The trial court refused to excuse him for cause, but found that the State's use of a peremptory strike against him on account of his criminal record was racially neutral and legitimate."); *but see* People v. Horton, 78 N.E.3d 489, 503 (Ill. App. Ct. 2017):

> The negative interactions between the police and members of the community form the basis of minority communities' fear and distrust of police. And thus, it is not difficult to imagine why a young black man having a conversation with friends in a front yard would quickly move inside when seeing a police car back up.
>
> In 2015, the American Civil Liberties Union identified a historical pattern of disproportionate stops from May through August 2014 in Chicago. Black Chicagoans were subjected to 72% of all stops even though this demographic constitutes just 32% of the city's population. During the same time, more than 250,000 stops –primarily of Blacks– did not lead to an arrest. . . . Not only law enforcement, but also a significant proportion of the public, implicitly perceive young black men as a threat and more likely to be involved in criminal activity.

Id. (citing Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 354 (2007)).

81. Arizona Supreme Court, No. R-21-0020, *supra* note 16.

82. *See* Kanu, *supra* note 16 (identifying Arizona appellate judges Peter Swann and Paul McMurdie as advocating Arizona adopt rules like Washington's).

83. *See* State v. Porter, 460 P.3d 1276, 1283 (Ariz. Ct. App. 2020) ("We agree with the dissent that our state supreme court could (and should) improve the *Batson* framework to promote the Supreme Court's purpose.").

their recommendation to propose elimination of peremptory challenges.[84] Arizona's Supreme Court then vacated the appellate court decision in that case,[85] entering soon thereafter the order amending Arizona Rules 18.4 and 18.5, which eliminated the use of peremptory challenges statewide.[86] The result was a new rule which, although barely noticed at the time, has quickly inflamed debate in other states[87] and prompted Arizona's state legislature to introduce an "emergency" measure to restore at least some number of peremptory challenges,[88] a measure which had not passed as this article was completed.[89]

Whether this Arizona experiment will prove constructive is anybody's guess, given that the rule in question is not yet a year old. Still, while there is plenty of reason to be concerned with how peremptory challenges are used, the idea that there is some good to be had from taking the peremptories away from counsel altogether—so that every decision over who should be excused from the venire would have to be the subject of a challenge for cause which is ruled on by the judge—would certainly seem

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84. Howard Fischer, *Court Aims to End Racial Bias in Jury Selection with New Rules*, ARIZ. CAPITOL TIMES (August 29, 2021), https://azcapitoltimes.com/news/2021/08/29/court-aims-to-end-racial-bias-in-jury-selection-with-new-rules/ [https://perma.cc/DMA3-PE4H].

> [T]he Supreme Court justices accepted the recommendation of two judges from the state Court of Appeals, Peter Swann and Paul McMurdie, who argued that the move will go a long way to eliminating persistent problems with juries that often do not reflect the racial and ethnic backgrounds of their communities. "The primary tool by which this discrimination is practiced is the peremptory strike," they wrote in their petition. No one has disputed that lawyers have used peremptory challenges to fashion a jury they think will be more favorable to their arguments. But the appellate judges noted this is not anything guaranteed in the U.S. Constitution. In fact, they said, most states did not allow for it until after the Civil War. "A cynical observer might note that the power came into being in the years after black Americans obtained the right to serve on juries," they wrote.

Id.

85. State v. Porter, 491 P.3d 1100, 1108–09 (Ariz. 2021) ("We also express our confidence that trial judges—who are in a better position to discern the intent and demeanor of prosecutors and jurors—are uniquely situated to determine whether peremptory challenges are being used to discriminate against minority jurors.").

86. Arizona Supreme Court, No. R-21-0020, *supra* note 16.

87. *See, e.g.*, Commentary, *New Jersey Needs and Open Discussion on the Future of Peremptory Challenges*, N.J. L.J. ONLINE (Sept. 12, 2021), https://www.law.com/njlawjournal/2021/09/12/new-jersey-needs-an-open-discussion-on-the-future-of-peremptory-challenges/?slreturn=20220326012957 [https://perma.cc/PPC5-MKW5] ("Has the time come to give serious consideration to elimination or serious restriction of the peremptory challenge? We think it is much too premature for us to be able to give any informed opinion on the underlying substantive question. But we do take to heart the court's entreaty that the legal community be willing to engage in a 'probing conversation' and not summarily close off serious discussion merely due to the ancient provenance and engrained tradition underlying the practice.").

88. *See* HB2413, 55th Leg., 2d Reg. Sess. (Ariz. 2022) ("This act is an emergency measure that is necessary to preserve the public peace, health or safety . . . .").

89. On February 28, 2022, the bill failed by a 28-29-3 margin to advance from the Arizona House to the Senate. HB2413, 55th Leg., 2d Reg. Sess., Bill Status (Ariz. 2022), https://apps.azleg.gov/BillStatus/BillOverview/76919 [https://perma.cc/6Z2Z-KYKB].

to be one that deserves more scrutiny than it has gotten. There have not been a great many studies on the question of whether judges are likely to render decisions guided by their own implicit biases, after all, but those which have been conducted all tell the same story.

The simple truth is that "judges harbor the same kinds of implicit biases as [everybody else and] these biases can influence their judgment."[90] In fact, one recent study found that, no matter how well intentioned they may be otherwise, judges tend to not only be "just as biased [but in some cases appear to be] even more biased than the general public in deciding court cases . . . ."[91] As another 2017 study of over 200 judges concluded,

> our findings confirm that the federal and state judges we surveyed indeed harbored strong to moderate negative implicit biases about groups that are largely viewed not as subordinated but rather as American success stories. In light of the heavy ethical burden resting on the shoulders of judges—and lifetime-appointed federal judges in particular—these results are concerning. The biases revealed by the study focused on the judges' implicit judgments of morality, connecting group membership with traits such as scheming, dominating, and controlling, and manifested without regard to judges' length of service, age, or type of judgeship. Thus, the primary message revealed by the study is that implicit biases, even about groups not usually discussed in the national conversation of discrimination, may be lurking as part of a complex, deep, and hidden network of cognitive associations, even in the most egalitarian of judges.[92]

For these reasons, to say that implicit bias can somehow be avoided by taking the decision away from one group of biased people, who at least have competing interests to keep each other in check, and turning it over to someone else, who studies have confirmed will be just as prone to the

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

91. Stephen Waldron, *Gender Roles Highlight Gender Bias in Judicial Decisions*, SOC'Y PERSONALITY & SOC. PSYCH. (April 3, 2018), https://www.spsp.org/news-center/press-releases/gender-judicial-bias [https://perma.cc/95W3-5YDD] ("This study examined the role of gender bias relating to judges and legal decisions, and the sex discrimination worked both ways, sometimes against women and sometimes against men. 'These results show that judges' ideology and life experiences might influence their court decisions,' said Andrea Miller, PhD, a visiting assistant professor of psychology at the University of Illinois Urbana-Champaign. 'Many judges are not able to factor out their personal beliefs while they are considering court cases, even when they have the best possible intentions.'").

92. Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 110 (2017); *see also* Rachlinski et al., *supra* note 90, at 1210–11 ("Because we used a commonly administered version of the IAT [Implicit Association Test], we are able to compare the results of our study to the results of other studies involving ordinary adults. We found that the black judges produced IAT scores comparable to those observed in the sample of black subjects obtained on the Internet. The white judges, on the other hand, demonstrated a statistically significantly stronger white preference than that observed among a sample of white subjects obtained on the Internet.").

same biases, doesn't make a whole lot of sense.[93]

VII. JURY SELECTION AS STATE ACTION

The legal community's attempts at rooting out and eradicating institutional racism may be laudatory in the end, but the exercise has historically required that people try to be "color blind" in how they look at things.[94] That's something Vernā Myers, Jerry Kang, and others engaged in the study of implicit bias say ultimately runs contrary to what people actually should be doing. What Myers advocates, for example, is that people "walk boldly toward" their implicit biases, educate themselves about the many wonderful people there are among every cognizable group, and ultimately embrace diversity.[95] But while that may be what it takes to actually eliminate racism, sexism, and every other prejudice this community may be challenged by, the fact remains that members of the venire—people drawn from a "fair cross section" of a community that still includes bigots and misogynists—are themselves likely to harbor explicit and implicit biases that drive their thinking.

As one anonymous juror pointed out in a letter about their experience, when all of the jurors in the deliberations are white, it is entirely possible they will sink to the occasion:

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93. *See also* Bennett, *supra* note 20, at 150 ("[P]ermitting judges to dominate the initial jury selection causes more biased jurors to remain on a case and exacerbates the role of implicit bias in jury trials. Additionally, the *Batson* process, which permits defendants to challenge a prosecutor's peremptory strikes of jurors if the strikes seem to have been racially motivated, is thoroughly inadequate. It both allows the implicit and explicit biases of attorneys to impact jury composition and may provide a false veneer of racial neutrality to jury trials.").

94. *See also* People v. Mack, 473 N.E.2d 880, 900 (Ill. 1984) (Simon, J., concurring in part and dissenting in part) ("In comparing the large percentage of blacks excluded with the smaller percentage in the pool of potential jurors, David Draper, a statistics professor at the University of Chicago, said blacks were excluded at 'well over double the rate you would have expected if the peremptory challenges had been exercised in a color-blind fashion.'" (quoting Douglas Frantz, *Many Blacks Kept Off Juries Here*, CHI. TRIB., Aug. 5, 1984, at 1, 14).

95. *See, e.g.*, Vernā Myers, *How to Overcome Our Biases? Walk Boldly Toward Them*, TED (Nov. 14, 2014), https://www.ted.com/talks/verna_myers_how_to_overcome_our_biases_walk_boldly_toward_them?language=en [https://perma.cc/R443-LYRH]. Myers advocated,

> We gotta get out of denial. Stop trying to be good people. We need real people. . . . [W]hat the scientists are telling us [in the studies on implicit bias] is, no way. Don't even think about color blindness. In fact, what they're suggesting is, stare at awesome Black people. Look at them directly in their faces and memorize them, because when we look at awesome folks who are Black, it helps to dissociate the association that happens automatically in our brain. . . . [It can help to] reset your automatic associations about who Black men are. I'm trying to remind you that young Black men grow up to be amazing human beings who have changed our lives and made them better. . . . [T]hink Jeffrey Dahmer and Colin Powell. Just stare at them, right? . . . [T]hese are the things. So go looking for your bias. Please, please, just get out of denial and go looking for disconfirming data that will prove that in fact your old stereotypes are wrong.

Id.

> During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about "those people" rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). Had just one African-American been sitting in that room, the content of discussion would have been quite different. And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome. I pass these thoughts onto you in the hope that the jury system can some day be improved.[96]

It may be easy enough to understand how an attorney, in this context, could be tempted to use their peremptory challenges in ways that recognize how the implicit biases of a jury could serve their client's cause. After all, as Jerry Kang, Judge Bennett, and others working with them concluded in a study in 2012, it remains true, for good or ill, that "racial diversity in the jury alters deliberations."[97] Although a jury trial may be said to inherently reflect the view of the community as much as any election,[98] that does not mean that the courts or counsel should be studying how to exploit the demographics of the venire the way the Pew Research Center studies how different groups may be exploited to get their votes in an election.[99]

To the contrary, while voters go to the poll to express their own self-interest or beliefs, jurors are expected to abide by specific obligations, as

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96. Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting a letter from anonymous juror).

97. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1180 (2012).

> In a mock jury experiment, [a researcher] compared the deliberation content of all-White juries with that of racially diverse juries. Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer uncorrected statements, and greater discussion of race-related topics. In addition to these information-based benefits, [the researcher] found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.

Id. at 1180–81.

98. *See* Amar, *supra* note 22, at 206 ("[T]he link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure . . . .").

99. *See, e.g.*, Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RSCH. CTR. (Sept. 23, 2020), https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/ [https://perma.cc/FK4K-QYZ5] ("[U]nderstanding the changing racial and ethnic composition in key states helps to provide clues for how political winds may shift over time. The ways in which these demographic shifts might shape electoral outcomes are closely linked to the distinct partisan preferences of different racial and ethnic groups.").

state actors. The process by which they are selected is one "which the government alone administers,"[100] so when counsel, also serving as state actors, engage in voir dire, exercise peremptories, and argue challenges for cause, they are essentially deciding who should be eligible for a specific government job. As the Supreme Court held in *Edmonson*:

> A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction. As we noted in *Powers*, the jury system performs the critical governmental functions of guarding the rights of litigants and "ensur[ing] continued acceptance of the laws by all of the people."[101]

This means there is indeed reason to be concerned about what motivates counsel to exercise their peremptory challenges one way or another and that means the days are over in which "the essential nature of the peremptory challenges" should allow for a prospective juror's exclusion based upon "a real or imagined partiality . . . sudden impressions [or] unaccountable prejudices."[102] *Batson* called for an end to such unfettered use of peremptory challenges because the Court recognized that "the peremptory challenge occupies an important position in our trial procedures, . . . [but the] reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors."[103]

It is thus particularly disappointing that a study conducted twenty-five years later by Kang and Bennett left its researchers "skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most."[104] Kang's and Bennett's group may not have been without cause to reach that conclusion, given how onerous the burden is for anyone who

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100. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991).

101. *Id.* at 624 (citing Powers v. Ohio, 499 U.S. 404, 407 (1991)). Seeing prospective jurors as government job candidates also suggests that the laws relating to their selection should be consistent with those governing employment generally. A more heightened standard, such as that advocated by Justice Stevens in his dissent from *Purkett*, is thus again more desirable because it is more consistent with what is required in employment-discrimination cases. Discrimination may be found in the employment context, after all, whenever there is evidence that the employer's claimed reason for letting someone go is "unworthy of belief." *See, e.g.*, Venturelli v. ARC Cmty. Servs., 350 F.3d 592, 601 (7th Cir. 2003) ("[One category] of circumstantial evidence . . . which may suffice by itself to establish discrimination . . . is evidence that the plaintiff was qualified for the position in question but passed over in favor of a person not having the forbidden characteristic and that the employer's stated reason for its decision is 'unworthy of belief [or] a mere pretext for discrimination.'" (internal citations omitted)).

102. Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79, 106 (1986).

103. *Batson*, 476 U.S. at 98–99.

104. Kang et. al, *supra* note 97, at 1181.

seeks to establish a *Batson* violation in a given case, but that burden could be lessened both by taking the focus away from whether any bias in the process was intentional (something which should be irrelevant, given what we know about implicit bias) and by requiring what Justice Stevens said should have been expected in *Purkett v. Elem*, a reason for the challenge related to the case to be tried.[105]

VIII. WHY ILLINOIS SHOULD CHANGE THE STANDARDS FOR PEREMPTORY CHALLENGES

As the court held in *People v. Williams*,[106] the current analysis under *Batson* involves a great deal of focus on whether a particular attorney's use of a peremptory challenge was rooted in some unfounded prejudice or bias that they may have harbored against the members of a particular protected class:

> Once a defendant alleges his or her rights have been violated because the State has used its peremptory challenges in a racially discriminatory way, *Batson* requires the trial court conduct a three-part inquiry: (1) determine whether the defendant has established a *prima facie* case of purposeful discrimination; once a *prima facie* case is shown, (2) the State has the burden to articulate a nondiscriminatory, race-neutral explanation, based on the facts of the case; and considering the State's explanation, (3) the court then must determine whether the defendant has shown purposeful discrimination.[107]

The seriousness of this standard is highlighted by the ABA's recent adoption of a Model Rule which makes it an ethics violation for counsel to engage in any conduct in the practice of law which amounts to unlawful discrimination.[108] If judges weren't reluctant enough to chastise the attorneys before them under *Batson*, this new rule would raise the stakes in ways that could challenge any trial judge's ability to keep perspective. How likely is any court to find there has been purposeful discrimination when that finding could mean that the attorney appearing before them could be censured, suspended, or even disbarred because of that finding?

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105. Purkett v. Elem, 514 U.S. 765, 777–78 (1995) (Stevens, J., dissenting).

106. People v. Williams, 48 N.E.3d 1203, 1211 (Ill. App. Ct. 2015).

107. *Id.*

108. *See* Kristine A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS'N (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [https://perma.cc/4BTJ-RBH9] (describing the 2016 amendment to rule 8.4(g)); *but see also* Erika Kubik, *ISBA Assembly Opposes Adoption of 8.4(g) in Illinois*, 2CIVILITY (Jan. 2, 2017), https://www.2civility.org/isba-assembly-opposes-adoption-8-4g-illinois/ [https://perma.cc/CP42-74Y8] ("The ISBA Assembly believed the rule does not properly define 'discrimination' and 'harassment' to properly apply the Rule to achieve its intent. Model Rule 8.4(g) also raised a number of concerns about subjecting lawyers to unfounded disciplinary complaints.").

It may be that in some cases, counsel's actions would in fact warrant just such a result. In others—particularly given what is now known about implicit bias—the court's ability to protect the interests of the parties and jurors under the Equal Protection Clause should not require that every lawyer who falls victim to their own implicit bias should be caught in the cross-hairs of an ethics charge.[109] By limiting the circumstances in which peremptory challenges are available to begin with, a trial court might never need to reach the question of whether counsel's motivations were discriminatory in nature. Illinois law that governs the use of peremptory challenges in both civil cases[110] and criminal cases[111] could be amended to establish a more onerous standard than the "silly or superstitious" proviso embraced by the court in *Purkett*, while shifting the focus from counsel's intent to the more important consequences of their actions. One possible version of such an amendment would incorporate the legal principles discussed in this article as follows:

> Peremptory challenges may be exercised hereunder only for reasons relevant to whether a prospective juror can perform their duties as a member of the jury. Such reasons include (1) whether the prospective juror would follow the law as instructed by the court, (2) whether they would fairly consider the evidence presented at trial, and (3) whether they would be able and prepared to participate in deliberations with others on the jury to reach a just and fair decision on the merits. For purposes of this section, a prospective juror's membership in a protected class, as defined under the Illinois Human Rights Act (775 ILCS 5/2-101, *et seq.*), is irrelevant to whether they could perform their duties as a member of the jury.

With such a limitation on the statutory grant of peremptory challenges, there would still be circumstances in which a *Batson* hearing would be necessary (and in which the related question of counsel's intent could still be relevant), but the need to ever reach the third stage in the *Batson* inquiry would be inherently less likely.

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109. *See also* Hon. J. Michele Childs, Implicit Bias in the Courtroom, Panel Presentation for the ABA Thirteenth Annual Labor and Employment Law Conference (Oct. 2019), *in* IS USING IMPLICIT BIAS TO PROVE DISCRIMINATION UNDER TITLE VII AND OTHER ANTIDISCRIMINATION STATUTES A VIABLE OPTION?: COMPILATION OF RELEVANT WRITTEN MATERIALS, Nov. 8, 2019, at 12, 16, https://www.americanbar.org/content/dam/aba/events/labor_law/2019/annual-conference/papers/compilation-of-written-materials.pdf [https://perma.cc/KU3H-9Z7W] ("Judges should be careful in determining the outcome of *Batson* challenges. Judge Bennett [thus] concludes that trial court judges only grant *Batson* challenges in 'extreme situations.' First, he contends that trial judges are reluctant to reject the purportedly race-neutral reasons offered by the prosecution or plaintiff. Second, he opines that appellate courts give deferential treatment to the decisions of trial court judges." (citing Bennett, *supra* note 20, at 166–68)).

110. 735 ILCS 5/2-1106.

111. 725 ILCS 5/115-4.

CONCLUSION

Limiting the circumstances in which peremptory challenges may be used in Illinois, to specifically allow only peremptory challenges that meet the threshold endorsed by Justice Stevens, could resolve a number of concerns and conflicts in Illinois law and could thus establish a threshold for peremptory challenges' use, which would:

- Be consistent both with that endorsed by Justice Stevens in *Purkett v. Elem* and that required by *Batson v. Kentucky* and its progeny;
- Address the problem of implicit bias, as the courts have done in Washington, and the likelihood that discrimination may play a wrongful role in the exercise of peremptory challenges even when it is unconscious, by disallowing any peremptory challenge which is not specifically based on a prospective juror's ability to perform their duties as a member of the jury;
- Further Illinois's stated interest in addressing implicit biases in ways that ensure that juries in this state are fairly drawn from a fair cross section of the community;
- Reduce the need for trial courts to consider whether their ruling on any given *Batson* challenge would trigger an ethics charge against the attorneys before them, thus deescalating the possibility of unnecessary and inappropriate collateral injury stemming from such a decision;
- Avoid the prospect of disallowing peremptory challenges altogether, as Arizona has done, by limiting the use of such challenges to the specific circumstances for which the Supreme Court has long found they are intended, namely cases in which the propriety of a challenge for cause is unclear;
- Ensure that the parties and their counsel continue to have some part to play and some decision-making authority with regard to who is sworn in as a member of the jury that will decide their case;
- Bring the law governing jury selection more in line with employment law by allowing a finding of discrimination when there is evidence to show that the reason for excusing a prospective juror is unrelated to their ability to perform as a member of the jury;
- Reconcile the limits that are often imposed on what areas of inquiry may be pursued in voir dire with the objectives of that process; and
- Give the public confidence in the state court system and its commitment to eradicating racism in jury selection.

There is nothing in the applicable law that should inhibit the possibility of such an approach, and, indeed, the U.S. Supreme Court has at least confirmed that Illinois has every right to establish a more restrictive structure for peremptory challenges than that required by *Purkett*, if it determines that is appropriate. Indeed, if there has been a case which basically flips *Purkett* on its head in some ways, that case would have to be *Rivera v. Illinois*.[112]

Rivera considered whether a peremptory challenge should have been permitted as to a juror where counsel said he was concerned because she "saw victims of violent crime on a daily basis" and that he was "pulled in two different ways" because she had "some kind of Hispanic connection given her name."[113] The trial court's decision to disallow a peremptory challenge in such circumstances thus stood in stark contrast to the concern with a juror's haircut in *Purkett*, but the Supreme Court nevertheless affirmed the disallowance of a peremptory in such circumstances:

> [T]he loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws. . . . [T]his Court has consistently held that there is no freestanding constitutional right to peremptory challenges. We have characterized peremptory challenges as "a creature of statute," and have made clear that a State may decline to offer them at all.[114]

Illinois does not have to allow peremptory challenges for "silly or superstitious reasons" but could, instead, require that peremptory challenges be allowed only if they meet Justice Stevens's threshold requirement that they "relate to the case to be tried." For the reasons stated, that is a direction this state should certainly consider.

112. Rivera v. Illinois, 556 U.S. 148, 156 (2009).
113. *Id.* at 153.
114. *Id.* at 157 (internal citations omitted).