GEORGE MASON AMERICAN INN OF COURT

Implicit Bias, *Voir Dire* and *Batson* Reprised

Panel: Honorable Judith Wheat, Nina Ginsberg and Mark Cummings

Honorable Judith L. Wheat

Judge Judith L. Wheat is the Chief Judge for the 17th Judicial Circuit Court of Virginia in Arlington County and has served as a judge since 2019. Prior to her judicial career, she was a founding partner at Griffith & Wheat in the District of Columbia. Before that, Wheat was a partner at Venable, LLP and Cacheris & Treanor. Judge Wheat began her legal career as a judicial law clerk to the Hon. Barbara M. Keenan with the Court of Appeals of Virginia. Wheat received a bachelor's degree from Georgetown University and then completed her J.D. studies at Georgetown Law School in 1989. Judge Wheat has served as a board member of the Arlington Alcohol Safety Program and the Walter T. McCarthy Law Library. She also taught advocacy and deposition skills at the National Institute of Trial Advocacy. From a civic standpoint, she has been involved with the Aurora House Citizens' Advisory Committee and the Rock Spring Civic Association.

Nina Ginsberg

Nina J. Ginsberg, a founding partner at DiMuro Ginsberg, P.C., in Alexandria, VA, has practiced criminal law for more than 35 years. She has represented individuals and corporations in a wide range of matters, with a focus on national security law, white collar investigations and prosecution, financial and securities fraud, computer crime, copyright fraud, and professional ethics. She is a frequent litigator in the federal courts for Eastern District of Virginia and is known for her experience in handling criminal cases on the "Rocket Docket."

Nina has served multiple terms on the Virginia State Bar Council and on the Virginia State Bar's Board of Governors of the Criminal Law Section. She was recently named a Fellow of the Virginia Law Foundation and is a member of the State Bar Indigent Defense Task Force. She serves on the Criminal Justice Act Panel Screening Committee for the Eastern District of Virginia, Alexandria Division and is a member of the Merit Selection Panel for U.S. Magistrate Judges in the Eastern District of Virginia, Alexandria Division.

Nina has been an active member of the National Association of Criminal Defense Lawyers for decades. She served three terms on the Board of Directors and spent 2019 as NACDL's

President. She also serves on the Board of NACDL's Criminal Justice Foundation. Nina has chaired numerous committees and currently serves on the White Collar and National Security Committees. She has received numerous awards and recognition by state and national bar groups.

Mark D. Cummings

Mark D. Cummings is a trial lawyer and founding partner of Sher, Cummings and Ellis LLC, a successful litigation firm in Arlington, Virginia.

Throughout his career, Mr. Cummings has been actively involved in the Arlington County Bar Association, serving as President (1990-91); Judicial Selection Committee (1993-2002); and is currently Chair of the Arlington Circuit Court Committee. He is an active member and former chair of the Arlington Bar Foundation, the charitable arm of the Arlington Bar Association. He co-founded and directs the Vicky Collins Charitable Foundation, a nonprofit dedicated to supporting indigent, disabled children in the community. Mr. Cummings earned his B.A. in History from the University of Virginia and his J.D. from Antonin Scalia Law School of George Mason University. He has been an adjunct professor of law at George Mason University's Antonin Scalia Law School since 2000, teaching Virginia Practice and Virginia Remedies. Mr. Cummings was also Plaintiff/Appellant's attorney in *Coleman v. Hogan*.[1] In this case, a Black woman on the jury pool was struck from the venire panel based on gender but not re-seated by the trial judge. The case ultimately went to the Virginia Supreme Court, which reversed the case reasoning that *Batson v. Kentucky* forbade the Defendant from striking the same juror on a subsequently articulated gender and race neutral reason.[2]

Introduction

In the mid-1990s, psychologists in the United States began using the terms "implicit stereotypes" and "implicit or unconscious bias" to refer to the hidden ways in which our biases enter human behavior. Many studies followed concluding that biases exist, are often involuntary and shaped by social and external influences. These influences include sex, race, economics, social groups, age, lineage, and religious affiliation.

Usually, human beings intend well. However, despite elaborate civil rights statutes

[1] *Coleman v. Hogan*, 254 Va. 64 (1997).
[2] *Id.* at 67.

and Supreme Court decisions intended to level the playing field in the courts, the refrain of injustice continues to arise. This presentation will acquaint you with what implicit bias is and present methods to confront it in a jury trial setting. As a natural adjunct, a discussion on recent Virginia Law applying *Batson v. Kentucky* is also included in the materials as well ethical considerations.

What is Implicit Bias?

The American Psychological Dictionary defines implicit bias as "[a] negative attitude of which one is not aware against a specific group. It is shaped by experience and based on learned associations between qualities and social categories including race and/or gender."[3] Implicit bias is an aspect of implicit social recognition. Implicit social recognition is the phenomenon that perceptions and stereotypes can operate prior to conscious intention or endorsement.[4]

One of the key factors underlying implicit bias is the voluminous amount of information people are expected and required to process every minute. To compensate, the mind designs mental strategies for simplifying the surrounding environment. In that simplification process the mind typically perceives members of the same group as similar and

[3] American Psychological Association, *Implicit bias*, *https://www.apa.org/topics/implicit-bias#:~:text=Implicit%20bias%2C%20also%20known%20as,against%20a%20specific%20social%20group*.

[4] *See* Mahzarin Banaji, PhD, *Speaking of Psychology: Can we unlearn implicit biases*, AMERICAN PSYCHOLOGICAL ASSOCIATION, https://www.apa.org/news/podcasts/speaking-of-psychology/implicit-biases, [B]y the mid-1990s studies had demonstrated that implicit bias aggregated by region (i.e. zip code, county state or metro area) often predicts many socially consequential outcomes such as use of lethal force by law enforcement, mortality rates, upward mobility, performance on standardized tests to mention a few.

members of different groups as dissimilar. Cognitive psychologists refer to this sorting as "schemas."

Schema theories show that the schema functions to imply information structures that organize "input, storage in, and recall from memory." These structures bias what people see, how people interpret information, and how that information is stored. In a group setting, i.e. a jury room, these biases can lead to discrimination "[w]hether we intend it or not, [and] whether we know it or not."

A recent video study by the New York Times explains that implicit bias is not the same as racism, but it is just as important to understand and dismantle[5]. An NYU professor recently sent emails to over 6,500 professors expressing an interest in discussing the PhD program at their school. The emails were signed by people with either male, female, white, Chinese, Indian or Hispanic sounding names. If you were a white male, you were more likely to receive an email back than all the other groups combined[6]

While social scientists are in the early stages of how to "debias" it is self-evident that media and culture makers have a role to play by ceasing to perpetuate stereotypes in the news and popular culture. Encouraging people to be mindful of the risks of implicit bias can help to avoid actions and decision making that are based on bias contrary to our conscious values and beliefs.

[5] Saleem Reshamwala, Peanut Butter, Jelly and Racism, *The New York Times*, December 16 2016, https://www.nytimes.com/video/us/100000004818663/peanut-butter-jelly-and-racism.html.
[6] Perception Institute, *Implicit Bias*, https://perception.org/research/implicit-bias.

Strategies to Counter Implicit Bias

The first step is awareness of biases which can be achieved through tests such as The Implicit Association Test (IAT) developed by psychologists at Harvard University. By auditing one's relationships, you can determine who are your social media connections and whose emails you respond to.[7] Through this awareness, one can discern the groups which one purposefully engages with and may unconsciously avoid. To counteract this "reflex," exposure to diverse groups and interacting with people from diverse backgrounds can help counteract stereotypes and prejudices. This coupled with learning the concepts underlying bias and how it functions can assist in recognizing when it may be influencing your perceptions and behaviors. In decision making settings, having procedures in place to ensure fairness and equality in addition to understanding the experience and perspective of others can also help reduce bias. These are just a few strategies to help counter implicit bias when it occurs, but there are also several strategies applicable to guarding against implicit bias before it happens.

Guarding Against Implicit Bias involves Several Strategies[8]

a. Awareness: The first step is recognizing that we all harbor implicit biases. Awareness of your biases can be achieved through tests such as the Implicit Association Test (IAT) discussed above.

b. Education: Learning about the concept of implicit bias and how it functions can help in recognizing when it may be influencing your perceptions and behaviors.

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[7] American Bar Association, *Implicit Bias Videos and Toolkit*, https://www.americanbar.org/groups.diversity/resources/implicit-bias.
[8] *Id.*

c. Mindfulness: Being mindful of your thoughts and reactions in various situations can help you recognize when a bias may be at play.

d. Exposure to diverse groups: Interacting with people from diverse backgrounds can help counteract stereotypes and prejudices.

e. Implementing checks and balances: In decision-making settings, having procedures in place to ensure fairness and equality can help prevent and mitigate the effects of implicit bias. This could include things like blind resume reviews in a hiring process.

f. Practicing empathy and perspective-taking: Trying to understand the experiences and perspectives of others can help reduce bias.

The Lawyer's Challenge

The lawyer's challenge when it comes to confronting implicit bias is the jury. The Constitution guarantees the right to an impartial jury.[9] Intrinsically, the Virginia lawyer is armed by Section 8.01-358 of the Code of Virginia to discover bias or prejudice of jury panel members:

> ". . . court and counsel for either party **shall** have the right to examine . . . any person who is called as juror . . . the right to ask such person . . . any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein . . . ."[10]

The issue for the lawyer is the statutory phrase; "sensible of any bias." The juror would not be "sensible" of an "implicit bias" adhering strictly to this definition.[11] For example, the

[9] *Breeden v. Commonwealth*, 217 Va. 297 (1976).
[10] Va. Code § 8.01-358.
[11] *Lincoln v Commonwealth*, 217 Va. 370 (1976).

Court of appeals in *Foley v. Commonwealth*, appears to have contemplated implicit bias in the underlying *voir dire*.[12] In *Foley*, when asked if there was doubt in a perspective juror's mind about her ability to sit impartially, she responded: "It's possible but not likely."

Although the record was silent on what she meant, it's relevant to our discussion herein. Whether or not she was referring to implicit bias or overt bias when she responded, "not likely," the trial court should have been on notice that her impartiality was suspect. The appellate court concluded that all doubts concerning impartiality of a juror must be resolved in favor of the accused. The trial court in this instance abused its discretion by refusing to strike the juror for cause.[13]

The Supreme Court of Virginia supports a wide scope of *voir dire* to disclose statutory factors of relationship, interest bias, opinion or prejudice. According to the Commonwealth, it "must be permitted."[14] Likewise, the U.S. Fifth Circuit Court of Appeals clearly states law requires the scope of *voir dire* "must" be sufficient to permit the parties to discover bias and make intelligent use of preemptory challenges.[15]

While it is abundantly clear that trial courts are charged to ensure the defendant in a criminal case or a plaintiff in a civil case has an "impartial" jury, often the trial judge will "rehabilitate" a potential juror that has given a troubling response. However, judges are often

[12] *Foley v. Commonwealth*, 379 S.E.2d 915 (Va. Ct. App. 1989).
[13] *See also Clements v. Commonwealth*, 21 S.E.2d 534 (Va. Ct. App. 1995).
[14] *Powell v. Commonwealth*, 267 Va. 107, 143 (2004) (citing *La Vasseur v. Commonwealth*, 225 Va. 564, 581 (1983)).
[15] *See, e.g., Cimino v Raymark Inds.*, 1998 U.S. App. LEXIS 25982.

resistant to questioning a potential juror who has given a response to an "en banc" inquiry. In this setting, the trial judge should be reminded he or she is under an affirmative duty to secure an impartial jury. Jurors are often reluctant to admit they may have a bias, and many will make it through the questioning without having answered a question or provided any information whatsoever.

After a Juror is Struck for Cause

Typically, the Court "backfills" the panel after a juror is struck for cause. Most judges and lawyers will ask if the other panelists have heard all the prior *voir dire* questions and, if so, whether they have any answers to share. This typically ends with the panelist nodding their head indicating no or nothing to add. As an alternative, if the entire process is explained prior to generalized questions, there is less likelihood of reticence to answer. If you explain the process and that their silence to requests for responses degrades the process of seeking an impartial jury, more members of the panel are likely to respond.

It is important to create an atmosphere that encourages transparency and openness. Some of these strategies come naturally to the practitioner:

1. create rapport by introducing yourself and your client and the legal team seated with you and give a brief overview of the case;
2. clearly explain the purpose of *voir dire* and how important their honesty is in selecting an impartial jury;
3. try to pose questions that allow jurors to express their thoughts and encourage them to share their own experiences. Ensure their responses are confidential to this exercise;
4. use a respectful and non-confrontational tone to encourage response;

5. make it clear you are attempting to understand their viewpoints, not to change their minds;

6. try not to use labels like," blue collar," "professionals," "laborers," etc. and

7. show genuine interest in a response by making eye contact and nodding to acknowledge you are actively listening.

Discovering Bias in Jurors[16]

a. General Bias Questions: Ask about their general beliefs regarding the justice system, discrimination, and prejudice. For example:

i. "Do you believe our justice system treats everyone equally?"

ii. "Do you believe racial/religious/gender bias exists in our society?"

iii. Have any of you been involved in a criminal or civil case before?

iv. Do any of you have any personal or professional connections to the parties involved in this case or to the legal field in general?

v. Are any of you members of organizations or groups that advocate for specific causes?

b. Preconceived Opinions:

i. Have any of you formed any opinions or beliefs about the defendant/or plaintiff based on personal experiences, media coverage, or discussions with others?

ii. How do you feel about a defendant charged with a crime or plaintiff in a personal injury case in general? Do you believe they are necessary to ensure justice, or do you have reservations about them?

iii. In your opinion, are people who file lawsuits generally honest, or do you think they often exaggerate their injuries?

iv. Do you understand that a defendant in a criminal case is presumed innocent?

v. What do you think is the most common cause of car accidents?

vi. Do you believe some groups of people are more prone to cause accidents than others? If yes, can you elaborate?

[16] Many of the questions are lifted with permission from the VTLA's Advanced Auto Retreat hosted on July 28-29, 2023. This program entitled *Overcoming Implicit Bias in Voir Dire* was prepared by Amy S. Griggs, Esq. and Les S. Bowers, Esq.

vii. Do you believe that because the defendant is charged he is most likely guilty?

viii. Do you believe that the type or price of a car someone drives indicates something about their character or driving habits?

ix. Do you believe the age of a car indicates anything about the driver?

x. If I told you my client was using their phone while driving but insists, they weren't distracted, would you find it harder to believe their testimony?

xi. Some people believe young drivers are often reckless or careless. What are your thoughts on this?

xii. Would you automatically tend to favor the testimony of a police officer over that of a civilian witness?

xiii. Do you believe people who claim they have been injured are usually telling the truth, or do you think they might exaggerate their pain for sympathy or compensation?

xiv. Do you believe wealthy individuals are more or less likely to act responsibly than others?

xv. Some people have strong views about lawsuits and believe they are often frivolous or excessive. Do you hold such views?

xvi. If a person doesn't have any visible injuries after an accident, do you assume that they weren't seriously hurt?

xvii. Can you set aside any preconceived notions or biases you may have and base your decision solely on the evidence presented in court? HOW WOULD YOU DO IT?

c. Personal Experience Questions: Ask about personal experiences with law enforcement, the crime in question, or with people from similar backgrounds to the parties involved in the trial. For example:

i. "Have you or anyone close to you ever been a victim of a similar crime?"

ii. Have you or anyone close to you been involved in a car collision? How would you describe what happened in that collision? Would that impact your ability to listen to the evidence about how this collision occurred?

d. Opinion and Attitude Questions: Ask about their attitudes or opinions towards certain groups. For example:

i. "What's your opinion on [the group relevant to the case]?"

ii. Would you tend to trust the testimony of a medical expert more if they were employed by the defense or the plaintiff?

iii. If someone is accused of negligence, do you believe they're more likely to be guilty?

iv. Do you believe that individuals from certain backgrounds or areas are more likely to commit certain kinds of infractions?

v. Would you be more inclined to believe the testimony of a man over a woman, or vice versa?

vi. Do you feel that some professions make a person more credible or trustworthy than others?

e. Empathy and Fairness:

i. Do you believe that a person who sustains a personal injury is automatically entitled to compensation, or do you think that such matters should be carefully evaluated on a case-by-case basis?

ii. Can you consider the perspective of both the plaintiff and the defendant and make a fair judgment based on the evidence presented in court?

iii. How would you feel about awarding damages for pain and suffering in this case? Do you believe it is a valid component of compensation in personal injury cases?

f. Media Influence Questions: Ask about their media consumption habits. Media can shape perceptions and biases about certain groups. For example:

i. "What news sources do you regularly follow?"

g. Scenario-Based Questions: Ask hypothetical or scenario-based questions that could reveal potential biases. For example:

i. "If you heard testimony from a law enforcement officer and a civilian, would you give one more weight than the other?"

Implicit Association Questions: These are subtle questions designed to assess an individual's implicit biases. For example:

i. "When you hear about a case involving [specific crime], what type of person comes to mind?"

ii. If I told you to imagine a car collision, what do you think of?

h. Judicial Instructions and Burden of Proof:

i. Are you familiar with the concept of "burden of proof" and the standard of "preponderance of the evidence" in civil cases? Can you apply this standard in your decision-making process?

ii. Are you familiar with the concept of “beyond a reasonable doubt”? Can you apply it?

iii. Can you follow the instructions provided by the judge regarding the law, even if you may personally disagree with them?

iv. Do you have any concerns or reservations about awarding damages in a personal injury case? If so, please explain your perspective.

i. Locking in bad responses

i. Defense lawyers, and sometimes even judges (despite a clear line of cases saying that judicial rehabilitation of jurors is impermissible) will ask jurors some variation of “can you be fair” or “could you set aside your biases and follow the law and instructions of the court”? These questions clearly strong-arm jurors to provide a socially desirable answer.

ii. Proactively ask your jurors:

1. Tell me about that…
2. How long have you held that belief?
3. What is the basis of that belief?
4. Is it a strongly kept belief?
5. Is it a core value for you?
6. Could you change that belief given that you felt it that long?
7. Could you easily set it aside? How would you do it?
8. Do you have friends and family who feel similar?
9. How could you possibly put that bias aside?
10. How would you know that you had put that bias aside?
11. Do you think that bias could color how you view the evidence and testimony, even if you are aware of it?
12. Have you ever had a situation in the past where you feel you have successfully set that bias aside?
13. What would you do during the course of this trial if you realized that you could not set that bias aside?

14. If you were in the plaintiff's position, do you think you could give a fair trial?
15. Does anyone else agree with _____'s belief?

j. Other open-ended questions to have jurors reflect on their potential biases:

i. "In your own experiences or observations, what factors do you think could influence how people form judgments or opinions about others involved in a case like this?"

ii. "Can you share any personal experiences or beliefs that you think might shape your perspective or attitudes in a situation similar to the one presented in this trial?"

iii. "What aspects of a person's background or characteristics do you think could impact your perception of their credibility or reliability as a witness?"

iv. "Are there any particular biases or assumptions that you think individuals in our society might unintentionally hold without even realizing it?"

v. "How do you believe your own personal experiences and values might influence your ability to remain fair and impartial while considering the evidence in this case?"

vi. "When forming opinions or making decisions, what kind of information or factors do you typically rely on? Are there any potential limitations or biases associated with that approach?"

vii. "Have you ever been in a situation where you realized your initial impression or judgment of someone was incorrect or influenced by preconceived notions? If so, what did you learn from that experience?"

viii. "Can you think of any instances where people's judgments might be influenced by societal stereotypes or assumptions, even if they are not consciously aware of it?"

ix. "What steps do you think you could take to ensure that your decision-making process remains fair, unbiased, and based solely on the evidence presented in court?"

k. "Are there any concerns or considerations that you think may arise when it comes to evaluating the credibility or reliability of witnesses with different backgrounds or life experiences?"

Recognized Trial Court Instructions: Consideration of Interest, Bias, Demeanor on Stand, etc.

The court instructs the jury that they are the sole judges of the weight and credibility of evidence. The jury also has the right to discard or accept the testimony or any part thereof of any witness in connection with the whole evidence of the case. In determining the credibility of the witnesses, and the weight to be given their testimony, the jury may consider the interest of the witness in the thing about which he testifies, his means of knowledge, bias and prejudices, and his demeanor while testifying.[17] Where witnesses have testified directly opposite to each other, the jury is not bound to determine the facts to be on the side of the greater number but from all surrounding circumstances and may determine which of them are worthy of credit.[18]

Preemptory Exclusion of Jurors

In 1965, the Supreme Court also addressed the prosecution's use of peremptory strikes to exclude Black jury members in *Swain v. Alabama* in 1965.[19] While *Swain* was a welcomed decision, the test set forth by the Court made it difficult to prove that the juror was struck for a prejudicial or biased reason. In *Swain*, the Court held that the test required proof of intention. In 1986, the Court revisited the *Swain* decision in *Batson v. Kentucky*. In *Batson*, the Court reaffirmed the ruling that a juror could not be struck based solely on their race and removed the need for proof of intention.[20] *Id.*

[17] *Lincoln v. Commonwealth*, 217 Va. 370 (1976).
[18] *Burke v. Scott*, 192 Va. 16, 24 (1951); *see also Williams v. Auto Brokers*, 370 S.E.2d 321 (Va. Ct. App. 1988) (holding that well-established principles dictate that factors to be considered in assessing credibility include: the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of that case, their bias, and if any has been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case).
[19] *Swain v. Alabama*, 380 U.S. 202 (1965).
[20] *Batson v. Kentucky*, 476 U.S. 79. 85 (1986).

The problem remained though because it was still easy for an attorney to preclude a juror-based race by giving a "pretext" obscuring a race or gender-based strike. The Virginia Supreme Court grappled with this issue in *Coleman v. Hogan*.[21] *Coleman* was a civil case in which the plaintiff, a black woman, sought damages against a white male defendant. The sole black juror on the panel was peremptorily struck.

On query from plaintiff's counsel, defense counsel stated: "I didn't strike her because she was black, but because of her gender. I thought she would be sympathetic to the plaintiff because they were both women…" After that colloquy, the court reseated the juror. The defense counsel again struck the same juror but stated that he was striking her because she was a student. Despite counsel's strenuous objections, the court permitted the defense counsel's second strike because she was also a "student," a racially neutral reason. Plaintiff's motion for mistrial was repeatedly raised in the lower court's record.

On appeal to the Virginia Supreme Court, plaintiff argued that "[c]ounsel cannot qualify or lessen the discriminatory effect of a peremptory strike based on gender by relying on the explanation of the juror's 'student' status." The plaintiff argued that once a constitutionally infirm reason was articulated, "any additional neutral reasons are suspect" and "that strike must be disallowed *in toto*." The Virginia Supreme Court agreed, holding that "[o]nce the trial court determines that the basis for a preemptory strike is unconstitutional, any other reasons proffered at the same time, or subsequently, cannot erase the discriminatory motivation underlying the original challenge."[22]

[21] *Coleman v. Hogan*, 254 Va. 64 (1997).
[22] *Coleman*, 254 Va. at 68.

Batson and *Coleman* have largely been followed since the cases were decided. But a recent Virginia case, *Bethea v. Commonwealth*, casts doubt. In *Bethea*, a black defendant raised a *Batson* challenge when a prosecutor used two of four allotted peremptory strikes to remove two black jurors.[23] In response to the *Batson* challenge, the prosecutor stated that she used the strike because the juror appeared "emotional" during *voir dire* and was not responsive to specific questions.[24] The trial judge accepted this suspicious but "neutral" explanation.[25]

After being convicted, the defendant moved to set aside the verdict through a *Batson* challenge,

arguing that the prosecutor's reasoning was pretextual because there was no evidence in the record that the juror was "unresponsive."[26] The prosecutor could not recall the unresponsive behavior and the record was silent on the issue. The Supreme Court of Virginia stated that "implausible and fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination," but a mere mistake of memory alone is not sufficient proof of pretext and underlying discriminatory motive.[27] This rationale flouts dicta in *Batson*.

In the *Bethea* dissent, Justice Cleo Powell opined the trial court and majority erroneously dismissed the *Batson* challenged.[28] Judge Powell believed that the trial court erred on the third step of the *Batson* challenge. She stated that believing the prosecutor's race

[23] *Bethea v. Commonwealth*, 297 Va. 730, 753 (2019).
[24] *Id.* at 737.
[25] *Id.* at 737-38.
[26] *Id.* at 738, 742.
[27] *Id.* at 751.
[28] *Bethea*, 297 Va. at 760 (Powell, J., dissenting).

neutral explanation of the dismissal of the juror was based in falsity.[29] A *Batson* challenge is three-step:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.[30]

Justice Powell concluded that this three-step test was met.[31] The prosecutor had previously made racially charged comments about Bethea's prior trial where the hung jury resulted from the three Black jurors refusing to convict. The Commonwealth did not rebut that statement. Thus, a prima facie showing and step one is met.[32] For the second step, the Commonwealth did assert a racially neutral reason.[33] For the third step, the plausibility of that reason must be analyzed. Given that the reason was based in falsity, the Commonwealth failed to offer a *plausible* race neutral reason.[34] Thus, the *Batson* challenge should have been granted.[35]

The Commonwealth's race-neutral explanation had no basis in the record of what happened during *voir dire*.[36] The prosecutor claimed that the jurors did not raise their hand for a question about whether they would consider all the evidence, but this never happened. This question was never asked.[37] There was only one question, an entirely different one, where

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[29] *Id.*
[30] *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991)).
[31] *Bethea*, 297 Va. at 767.
[32] *Id.* at 767-68.
[33] *Id.* at 768.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 762.
[37] *Bethea*, 297 Va. at 759.

jury members were asked to raise their hand, and no juror raised their hand in response.[38] All other questions that elicited an oral response that were used to justify the dismissal should make it inherently suspect. Yet, the majority of the Supreme Court of Virginia held otherwise.[39]

Once the court determined that the purported reasoning was false, the credibility of such an explanation should have evaporated.[40] While an honest mistake cannot be a pretext, the dissent argues that a prosecutor relying on untrue facts to assert a race-neutral reason for striking a juror is not putting forth a plausible reason, *because the reason is not true.*[41] The dissent also relied on *Flowers v. Mississippi* in recognizing that, when considering the circumstances around alleged discrimination, continued false explanations for why black jurors were struck can be "telling."[42] This logic should have applied in *Bethea*.[43] Because there was no legitimate reason given to rebut the claim of discrimination, the only reason given, based on all the facts, was the allegation of discrimination.[44] After *Bethea*, it seems that, in Virginia, a judge may determine that even a factually inaccurate explanation can withstand a *Batson* challenge when a challenger fails to carry his/her burden in proving purposeful discrimination.[45]

Some prosecutors and Judges are taking Justice Powell's dissent in *Bethea v.*

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 762-63.
[42] *Id.* at 766-67.
[43] *Bethea*, 297 Va. at 767.
[44] *Id.*
[45] *Id.* at 753.

Commonwealth to heart. Arlington Commonwealth Attorney Parisa Dehghani-Tafti adopted a policy that her assistants will not use peremptory strikes. Certain circuit judges have *sua sponte* disallowed a peremptory strike of a minority juror if a party to the case is also a minority. Peremptory strikes are dangerous because our own implicit biases seep into all our daily interactions. When a strike is used to dismiss the only juror of color where the defendant is also a juror of color, the implicit biases of an all-white jury can dangerously impact the outcome.

Ethical Issues

"A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so."[46]

Pretextual strikes implicate attorney ethical issues as well. In a recent article, one scholar discussed how ethics rules—particularly Rule 8.4(g) which governs misconduct, states that it is a violation to engage in any form of discrimination related to the practice of law.[47] Model Rule 8.4(g) states:

> It is professional misconduct for a lawyer to: (g) engage in 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 or socioeconomic status in conduct related to the practice of law.

This generally worded responsibility can be used as a mechanism for preventing discrimination in jury selection. The Model Rules even modified the *mens rea* element in this

[46] *Commonwealth v. Shipp*, 2020 Va. Cir. LEXIS 486.
[47] *See* Anna Offit, *Playing by the Rule: How ABA Model Rule 8.4(g) Can Regulate Jury Exclusion*, 89 FORDHAM L. REV. 1257 (2021).

rule to further encompass discriminatory behavior.[48] The language was changed from "knowingly manifest[]" to "reasonably should know."[49] While this rule would not make one discriminatory challenge an ethical violation, it serves as a minimal backstop to ensure that attorneys recognize such discriminatory action violates their duty.

Offit argues that Model Rule 8.4(g) can be understood as a "less stringent check on illegal jury exclusion than *Batson*."[50] She notes that Comment 5 to the Model Rules explicitly states that the rule can implicate misconduct in jury selection and impose regulation upon attorneys.[51] When an ethical violation is possibly at stake, lawyers may act with more care in striking jury members on potentially suspect reasons.[52]

Duty to Zealously Represent Your Client

The ABA Model Rules also establish a duty to zealously represent clients and diligently advocate for their interests. This guideline can help ensure discrimination is absent from representation. By advocating with zeal, attorneys must work to erase discrimination in their own practice and as it impacts their clients. The Virginia State Bar Rules of Professional Guidelines Rule 1.3- Diligence reads:

> (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services but may withdraw as permitted under Rule 1.16.
>
> (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

[48] *Id.* at 1270.
[49] *Id.*
[50] *Id.* at 1271.
[51] *Id.*
[52] *Id.*

The comments to follow also detail exactly how zealous representation fits in:

> Comment: [1] "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with *zeal in advocacy* upon the client's behalf." (emphasis added).

Additionally, the Virginia State Bar Rules of Professional Guidelines Rule 1.1 on competence also provides an ethical layer to represent without discrimination. It states "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Duty to Donate Legal Services–Pro Bono Guidelines

Ethical rules setting goals for pro bono work can also play a part in eradicating discrimination in providing legal services. Many states and the ABA have guidelines for the minimum amount of pro bono work that should be done per year. Pro bono work increases access to justice and when attorneys commit to doing their part, they help erase inequities in legal representation. A lack of legal representation makes one vulnerable to discrimination both inside and outside the legal system. When more people have more access to legal assistance, justice is more honest and fairer, and discrimination is harder to conduct. The Virginia State Bar Rules of Professional Guidelines Rule 6.1 on Voluntary Pro Bono Publico Service states,

(a) A lawyer should render at least two percent per year of the lawyer's professional time to pro bono publico legal services. Pro bono publico services include poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services.

(b) A law firm or other group of lawyers may satisfy their responsibility collectively under this Rule.

(c) Direct financial support of programs that provide direct delivery of legal services to meet the needs described in (a) above is an alternative method for fulfilling a lawyer's responsibility under this Rule.

Comment:

[1] Every lawyer, regardless of professional prominence or professional workload, has a personal

responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer…Pro bono legal services consist of any professional services for which the lawyer would ordinarily be compensated, including dispute resolution as a mediator or third party neutral.

[3] Pro bono publico legal services in civil rights law consists of free or nominal fee professional services to assert or protect the rights of individuals in which society has an interest. Professional services for victims of discrimination based on race, sex, age or handicap would be typical examples of "civil rights law," provided the free or nominal fee nature of any such legal work is established in advance.

Discrimination in Employment

Many jurisdictions also impose explicit ethical duties to avoid discrimination in their own employment practices at law firms and other legal organizations.

For example, the D.C. Bar Rules of Professional Conduct Rule 9.1 on Discrimination in Employment states, "[a] lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap."

A comment to follow provides "[t]his provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law."

These kinds of ethical rules would require lawyers to practice what they preach and

ensure that discrimination in employment is prohibited robustly and recognize the obligations imposed already by applicable laws.

Ethical Practice in front of the Tribunal: Rule 4.1

The Ethics Rules also provide that attorneys have a duty to be honest when appearing in front of a tribunal. Rule 4.1 of the Virginia Rules of Professional Responsibility states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of fact or law; or
>
> (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Discriminatory peremptory strikes and misleading justifications violate such a requirement. These and other discriminatory actions implicate an attorney's ethical duty under this Rule.

Conclusion

Implicit bias in the courtroom is an apparent issue within the legal realm. Both attorneys and judges must be vigilant is discerning when true biased motivations are driving certain decisions before and during a trial. Being aware and retraining one's subconscious is not an easy task, and it does take work. It is without this work, however, that lawyers and judges altogether may allow and make decisions that deprive both parties of an equal and fair adjudication.