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September 7, 2022

Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle St., 13th Floor
Chicago, Illinois 60601

Dear Hon. Joseph G. McGraw and Members of the Committee on Equality,

I am writing in opposition to the proposed changes to Illinois Supreme Court Rule 434.

The "Objective Observer Test" Only Confuses the Jury Selection Process and Will Yield False Positives:

The "objective observer" is defined as one "aware that implicit, institutional, and unconscious biases, have resulted in the unfair exclusion of potential jurors." Not quite an "objective observer" in that she must first profess a heavy and dogmatic conclusion currently the subject of much political and academic dispute.

In any case, under the proposed "objective observer" standard, if a judge "could view" the venireperson's membership in a protected class as merely a "factor" in the use of the preemptory strike, the *Batson* challenge must be sustained. If it is true that "implicit, institutional, and unconscious biases" are pervasive such that they routinely direct or influence the use of preemptory strikes by unsuspecting attorneys despite their conscious intentions, than it follows that "implicit, institutional, and unconscious biases" could be a factor in any and every preemptory strike. Problematically, however, whether the use of a specific preemptory strike was actually the work of "implicit, institutional, and unconscious biases" (purported to exist in the inaccessible mind or as a "taken for granted" "institutional" feature of the criminal justice system) is entirely unknowable and, accordingly, unfalsifiable.

If we are to admit of these decisive "implicit, institutional, and unconscious" forces such that we can no longer trust that our affirmative acts are tied to our conscious wills or reason, how is the proposed rule change likely to correct for this problem? Moreover, if the unconscious bias in the unconscious mind can corrupt a lawyer's use of preemptory strikes, why can it not do the same to the judges' rulings on *Batson* challenges? It would stand to reason that the only

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effective solution would be to conceal the race, gender, religion, sexual orientation, etc. from the lawyer and judge selecting the panel.

The "Presumptively Invalid" Reasons Betray A Double-Standard

The "presumptively invalid" reasons of §(d)(6) appear designed to target prosecutors. At the outset, it is worth pointing out that while the collective experience of Committee members is certainly impressive, it is regrettable that the Committee does not include any practicing prosecutors. After all, prosecutors as a group likely engage in jury selection as much if not more than any other type of lawyer and likely face the most *Batson* challenges.

That said and though *Batson* applies to all lawyers, the new rule seems as preoccupied with protecting certain viewpoints as it does protected classes. For example, while the State cannot strike a native Finnish speaking potential juror for having had multiple prior arrests or believing that police routinely engage in the moral, ethical, and professional evil of "racial profiling," the defendant can strike a Hispanic potential juror for being family members, friends, or associates with a policeman or expressing a high regard for police.

If the Illinois Supreme Court feels that it is right and fair and in furtherance of an unbiased jury to allow a defendant to strike a venireperson due to a favorable opinion of law enforcement in cases where a police officer may testify, why is this not true in the inverse?

It is odd too that the only profession singled out is law enforcement. Could not lawyers pretextually strike jurors in a protected class for varying views on doctors, landlords, accountants, factory owners, and real estate agents?

Before Recommending Such a Rule, the Committee Should Be More Transparent

I was unable to find any report, studies, or other Committee materials publicly available that support the proposed rule changes. I would respectfully submit with this particular rule, which has the potential to inject such turbulence into the jury selection process and involves such contentious issues, that the Committee "show its work" to address any number of lingering questions:

1) What is the extent of the problem, or precisely how often, when, and where is it happening?
2) Precisely how much or by what degree does "implicit, institutional, and unconscious bias" factor into to a lawyer's use of preemptory challenges?
3) To what degree can a lawyer's own will or conscious mind countermand the unconscious or implicit impulse to use a preemptory strike?
4) What evidence is there that the "objective observer" test effectively uncovers and adequately redresses implicit, institutional, or unconscious bias?
5) What other remedies were considered by the Committee, and why were they rejected?
6) What evidence is there that men or women, the Irish or Pakistanis, or Protestants or Taoists are being unjustly excluded from jury service such that they require enhanced protection under this rule?

7) What current "institutional" aspects of the criminal justice system (e.g. laws, rules, officials) are contributing to the unfair exclusion of potential jurors, and why not simply address these institutional aspects directly?

I submit that the Committee must engage the position that it is far from academically settled that implicit or unconscious associations are determinative of or influence actual behavior – such as using a preemptory strike. One of the most recent meta-analysis synthesizing 492 implicit association studies concluded, "perhaps automatically retrieved associations really are causally inert."[1] Professor Anthony Greenwald, the founder of implicit association research, has stated that he "does not regard [implicit association testing] as diagnosing something that inevitably results in racist or prejudicial behavior."[2] Professor Greenwald has stated further, "implicit association testing should not be used to select a bias-free juries." *Id.*

Conclusion and Thanks

I wish to thank the members for sacrificing their time to participate in the important work of promoting equality. The courts' first duty, however, is to the truth. In my opinion, the truth is best pursued by allowing the merits of a dispute or petition to be determined solely on the particular facts at issue and by third-parties not beholden to inapt generalizations (i.e. prejudice) that they could reasonably apply under the circumstances. Put simply, this rule does more to inject prejudice into the process than it does to dispel it.

Sincerely,

Patrick Kenneally

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[1] Patrick Forscherer, *et al., A Meta-Analysis of Procedures to Change Implicit Measures,* August 9, 2019 available at file:///C:/Users/pdkenneally/Downloads/Forscher%20Lai%20Axt%20Ebersole%20Herman%20Devine%20Nosek%202017%20-%20A%20Meta-Analysis%20of%20Change%20in%20Implicit%20Bias%20(1).pdf.

[2] Tom Bartless, *Can We Really Measure Implicit Bias? Maybe* Not, The Chronicle of Higher Education, January 5, 2017, available at https://www.chronicle.com/article/can-we-really-measure-implicit-bias-maybe-not/.