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## Opinion

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### **Guest: Trial by jury of peers undermined by racial bias**

The Washington Supreme Court has identified a pervasive problem of racial bias in jury selection, writes guest columnist Eva Paterson.

By Eva Paterson

Special to The Times



THE Washington Supreme Court has called for more careful scrutiny when prosecutors knock minorities off juries for a trial of a person of the same race. This is a new reality and the state's courts will have to adjust to it.

The court's statements came Aug. 1 in an appeal by Kirk Saintcalle, an African-American man convicted of murder and assault in an Auburn apartment break-in. He was sentenced to 48 years in prison.

At trial, the prosecution removed the only African-American juror using a "peremptory challenge" — an option provided to both the defense and prosecution that does not require an explanation.

The prosecutor also tried to remove the only Latino juror. In both cases, Saintcalle's attorney raised a "Batson challenge," named after the U.S. Supreme Court case *Batson v. Kentucky*, which established a three-part test to determine if removing a juror of the defendant's race is unconstitutional.

The removal of the African-American juror met that test, the court said, because she had lost a friend in a murder two weeks before. But the court's majority opinion also stated that "racial discrimination remains rampant in jury selection." The Batson challenge is designed to stop purposeful discrimination — and that has proved to be insufficient.

The court's decision admits to the reality that racism has changed. Overt racism is largely unacceptable, but the court said we all have "stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them." In other words, we can be racist even when we don't intend to.

The high court's opinion references numerous law-review articles, research and reports that explain how racism is often an unintentional function of our minds rather than a moral decision. I was co-author of one of those articles, "The Id, the Ego, and Equal Protection in the 21st Century," in the Connecticut Law Review of May 2008.

Studies have revealed that the brain reacts in a biased way toward people of color. Specific areas of the brain, called amygdalae, activate when we feel fear, threat, anxiety and distrust.

For many people, the amygdala activates upon seeing spiders and snakes. This same area of the brain was found in one study to light up when Caucasian participants viewed African-American male faces versus Caucasian male faces.

Unconscious decisions by the brain are as old as the cave man. The ability to discern in a split-second between a member of one's tribe and a dangerous animal is something hard-wired into us that creates implicit bias.

Justice Steven González, in a concurring but separate opinion, characterizes how attorneys fall victim to implicit biases and use peremptory challenges to remove jurors "based solely on superficial judgments" even in cases where the available information about the juror shows no signs that the person is unqualified.

González believes Washington state should abolish peremptory challenges because there are no longer enough protections against using those challenges in a racially biased way, even unintentionally.

Short of abolishing peremptory challenges, there are remedies that can be implemented more quickly.

One is training. My organization, the Equal Justice Society, of Oakland, Calif., offers the training of judges on understanding implicit bias and its impact on the court system. The Montgomery, Ala.-based Equal Justice Initiative provides reports on racial bias in the courts, including one on illegal racial discrimination in jury selection.

Training is also available from Washington's Continuing Judicial Education program on an array of anti-bias and diversity subject matters.

The state and federal courts must also re-examine the sources of jury pools in order to maximize diversity and ensure that jury pools best represent their communities. Selection could be expanded beyond voter-registration and motor-vehicle-registration lists.

The struggle against racial bias in the court system is not over. Some hard work remains.

*Eva Paterson is co-founder and president of the Oakland, Calif.,-based Equal Justice Society.*