Techniques and Tips for Raising Implicit Bias in Court: Use of Videos, Jury Instructions, and Voir Dire

Selected Materials From Multiple Presenters

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Materials for Further Self-Study and Education*
Justice Adrienne Nelson

Unconscious Bias Video for Jurors

- A direct link to the video: Understanding the Effects of Unconscious Bias: https://www.youtube.com/watch?v=BA-z4mS_Evg

Websites

- **ABA Achieving an Impartial Jury (AIJ) Toolbox**
  https://www.judges.org/wp-content/uploads/Achieving-an-Impartial_Jury_Toolbox.pdf

- **ABA Diversity and Inclusion 360 Commission Toolkit**
  https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/implicitbias_toolkit.pdf

- **National Center for State Courts**
  Helping courts address implicit bias: Resources for education
  https://www.ncsc.org/ibeducation

- **Love Has No Labels**
  https://lovehasnolabels.com/why-it-matters/

Articles/Primer/Handbook

- **Jerry Kang**
  Implicit Bias: A Primer For Courts, National Center for State Courts (2009)
  https://www.ncsc.org/__data/assets/pdf_file/0025/14875/kangibprimer.pdf

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

- **Southern Poverty Law Center**
  Speak Up: Responding to Everyday Bigotry
  https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/splcspeak_up_handbook_0.pdf

Podcasts

- "Seeing White" podcast series www.sceneonradio.org/seeing-white/

- Uncomfortable Conversations with a Black Man Emmanuel Acho podcast https://uncomfortableconvos.com/

Books

- Oregon Historical Quarterly Special Issue White Supremacy & Resistance Winter 2019, Volume 120, Number 4 by Oregon Historical Society
- Blink: The Power of Thinking Without Thinking by Malcolm Gladwell
- Thinking, Fast and Slow by Daniel Kahneman
- How to be an Antiracist by Ibram X. Kendi
- Racing to Justice by john a. powell
- Racism Without Racists by Eduardo Bonilla-Silva
- Slavery by Another Name by Douglas A. Blackmon
- The Color of Law by Richard Rothstein
- The Hidden Brain by Shankar Vedantam
- The Myth of the Model Minority by Rosalind S. Chou & Joe R. Feagin
- The New Jim Crow: Mass Incarceration in the Age of Color Blindness by Michelle Alexander
- They Can't Kill Us by Wesley Lowery
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- White by Law Ian Haney López
- When Affirmative Action was White by Ira Katznelson
- White Fragility by Robin DiAngelo
- Why I'm No Longer Talking to White People About Race by Reni Eddo-Lodge

PROPOSED OREGON UNCONSCIOUS BIAS JURY INSTRUCTION
(These instructions are based on the Ninth Circuit Model Instructions, with additions)

1.1 DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you. Perform these duties fairly and impartially. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or gender, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community. Finally, you should make an effort to be aware of your unconscious biases and what effect those may have on your decision-making.

You may recall during jury selection, [the attorneys/I] asked the panel if any of you had ever heard the term "unconscious bias." That term is one used by social scientists to describe the reality that everyone[, including me,][1] has feelings, assumptions, perceptions, fears, and stereotypes, that is, "unconscious biases," that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions.

[1] The court can omit reference to "including me."

3.1 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or gender, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community. You will recall that you took an oath promising to do so at the beginning of the case. Finally, you should make an effort to be aware of your unconscious biases and what effect those may have on your decision-making.

You may recall at the beginning of this trial during jury selection, [the attorneys/I] asked the panel if any of you had ever heard the term "unconscious bias." That term is one used by social scientists to describe the reality that everyone[, including me,][2] has feelings, assumptions, perceptions, fears, and stereotypes, that is, "unconscious biases," that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions. Because you are making very important decisions in this case, you should evaluate the evidence carefully and resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluations of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

[2] The court can omit reference to "including me."

NINTH CIRCUIT MODEL INSTRUCTIONS

Perform these duties fairly and impartially. You should not be influenced by any person's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including unconscious biases. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias can affect how we evaluate information and make decisions.

Ninth Circuit Model Criminal Jury Instructions 1.1 – Duty of Jury

You must avoid bias, conscious or unconscious, based on a witness's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances in your determination of credibility.

Ninth Circuit Model Criminal Jury Instructions 1.7 – Credibility of a Witness

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including unconscious biases. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. You will recall that you took an oath promising to do so at the beginning of the case.

Ninth Circuit Model Criminal Jury Instructions 3.1 – Duty of Jury to Find Facts and Follow Law

Perform these duties fairly and impartially. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including unconscious biases. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.

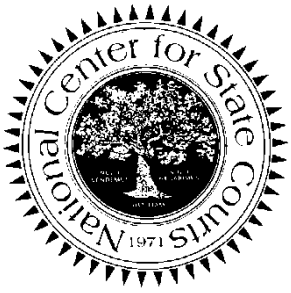
Ninth Circuit Model Criminal Jury Instructions 7.1 – Duty to Deliberate

Jurors, of course, are expected to bring their own life experiences, thoughts, opinions, beliefs, and common sense to this court and the deliberation room. Everyone, including me, makes assumptions and forms opinions arising from our own personal backgrounds and experiences. These biases or assumptions may have to do with any number of things, including an individual's race, color, nationality, ethnicity, age, disability, socio-economic status, religious beliefs, gender, or sexual orientation. I instruct you that a verdict must not be based on any such bias, including conscious or subconscious bias.

Bias, whether it is conscious or subconscious, can affect how we evaluate information and make decisions. It can impact what we see and hear, how we remember what we see and hear, how we make important decisions, and may even cause us to make generalizations or to pre-judge.

While each of you brings your unique life experience with you to court today, as jurors, you must be alert to recognize whether any potential bias might impact your ability to fairly and impartially evaluate the evidence in this case, follow my instructions, and render a fair and just verdict that is based solely on the evidence presented in this case.

-Massachusetts Model Jury Instruction 1.100, Impaneling a Jury



CAN EXPLICIT INSTRUCTIONS REDUCE EXPRESSIONS OF IMPLICIT BIAS?

NEW QUESTIONS FOLLOWING A TEST OF A SPECIALIZED JURY INSTRUCTION

JENNIFER K. ELEK & PAULA HANNAFORD-AGOR

APRIL 2014

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Ninth Circuit Model Criminal Jury Instructions 7.1 – Duty to Deliberate

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Abstract

Judges, lawyers, and court staff have long recognized that explicit, or consciously endorsed, racial prejudices have no place in the American justice system. However, more subtle biases or prejudices can operate automatically, without awareness, intent, or conscious control. Members of the court community are beginning to identify this subtler form of racial bias, or implicit racial bias, as a partial explanation for persistent racial disparities in the criminal justice system. In the absence of empirically vetted interventions, some judges have created and currently use their own specialized jury instructions in hopes of minimizing expressions of such bias in juror judgment. However, depending on how these instructions are crafted, they may produce unintended, undesirable effects (e.g., by increasing expressions of bias against socially disadvantaged group members among certain types of individuals, or by making jurors feel more confident about their decision(s) without actually reducing expressions of bias in judgment). To prevent the distribution and implementation of jury instructions that may do more harm than good, any instruction of this kind must be carefully evaluated.

In the present study, the authors sought to examine the efficacy of one specialized implicit bias jury instruction. Mock jurors who received the specialized instruction evaluated the strength of the defense's case in subtly different ways from those who received a control instruction, but the instruction did not appear to significantly influence juror verdict preference, confidence, or sentence severity. Interestingly, the authors were unable to replicate with this sample the traditional baseline pattern of juror bias observed in other similar studies (c.f., Sommers & Ellsworth, 2000; Sommers & Ellsworth, 2001), which prevented a complete test of the value of the instructional intervention. Authors address several possible explanations for this failure to replicate, explore the possibility of shifts in cultural awareness and in the spontaneous correction for bias, and discuss implications for future work.

Introduction

A large body of research evidence indicates that the disparate treatment of racial minorities persists in modern times and pervades all stages of the criminal justice process (e.g., Banks, Eberhardt, & Ross, 2006; The Sentencing Project, 2008; Wooldredge, Griffin, & Rauschenberg, 2005). In the courtroom, even high-stakes verdict and sentencing decisions appear unduly influenced by race bias (e.g., Baldus, Woodworth, & Pulaski, 1990; Mitchell, Haw, Pfeifer, & Meissner, 2005; Rachlinski, Johnson, Wistrich, & Guthrie, 2009). Court leaders across the country have taken aggressive steps to confront this problem over the past three decades (e.g., Casey, Warren, Cheesman, & Elek, 2012; National Center for State Courts, 2007; Spohn, 2000) and in recent years have focused on addressing more subtle or *implicit* forms of racial bias through in-depth education and training of judges and court staff (Casey, Warren, Cheesman, & Elek, 2013; Elek & Hannaford, 2013; Kang, Bennett, Carbado, Casey, Dasgupta, Faigman, Godsil, et al., 2012).

Unlike with judges and court staff, the courts have limited opportunities to educate jurors about the pernicious effects of complex psychological phenomena like implicit bias and how implicit forms of bias may distort jurors' interpretation of trial evidence. Jurors, by definition, are randomly selected to serve from the local community; most jurors in this country serve only for the duration of the trial (typically 2 to 3 days) and then are released from service. There is no time available during this short period to provide the type of in-depth education on strategies to reduce the impact of implicit bias that judges and court staff may receive.

To address the problem of racial bias in juror decision-making, some judges have expressed interest in developing a specialized instruction on implicit bias to include in the set of jury instructions typically proffered on the applicable law governing the case. Judge Mark Bennett (U.S.D.C., Northern District of Iowa) has already created and regularly uses his own implicit bias jury instructions (see Kang et al., 2012). To date, no known studies have examined the effect of a specialized implicit bias jury instruction on expressions of racial bias in jurors' judgments about a case. The authors explore this possibility for the first time in the present study.

Racial Bias in Juror Decision-Making

According to the widely accepted Story Model of juror decision-making (Bennett & Feldman, 1981; Hastie, Penrod, & Pennington, 1983), jurors use the information they receive at trial to construct a narrative or story about the case that is consistent with their world knowledge and that fits the legal categories provided in instructions to the jury. Story construction of this sort is inevitably colored by jurors' personal preconceptions, attitudes, and experiences (i.e., schemas), all of which are used to resolve ambiguities and fill in details missing from evidence and arguments presented at trial. During deliberations, jurors compare elements from their individual narratives (e.g. whether a witness's earlier inconsistent statements means she cannot now be believed) in their effort to arrive at a consensus about the "correct" interpretation of the evidence and the verdict that should follow.

The Story Model approach to understanding juror decision-making helps to explain variation between jurors in individual assessments of the strength of trial evidence. In a 2002 study of hung juries, for example, ratings of the strength of prosecution and defense evidence varied widely between individual jurors serving on the same juries (Hannaford-Agor, Hans, Mott & Munsterman, 2002). Demographic factors accounted for less than three percent of this variation in ratings of evidentiary strength, whereas factors like the perceived importance and credibility of witness testimony played a much larger role. Racial fairness becomes an issue in this context given that racial and ethnic biases have the potential to influence juror perceptions of evidentiary factors (e.g., strength of evidence, eyewitness credibility, attributions of causality) and, through this influence, may inform juror decisions regarding the verdict and sentence (e.g., Levinson, Cai, & Young, 2010; Sommers & Ellsworth, 2000; see Lynch & Haney, 2011).

Overt racial prejudice may explain some of the individual variation in juror judgments, but even individuals who explicitly report egalitarian racial attitudes may nevertheless make racially biased decisions and behave in racially biased ways (see Dasgupta & Asgari, 2004; Dasgupta & Rivera, 2008). This discrepancy may arise in part because (a) explicit self-reports about attitudes are easily contaminated by the respondent's motivated impression management concerns whereas certain behaviors are less easily corrected, and (b) individuals may not be consciously aware of the attitudes and stereotypes they hold that can influence their judgment and behavior (Nosek, 2007). These more subtle cognitions can operate automatically, without awareness, intent, or conscious control, to help shape and to potentially bias decisions (see Greenwald & Banaji, 1995). Although explicit or consciously endorsed racial prejudices in contemporary American society may be on the decline, this "modern," subtler form of racial bias persists (Dovidio, Kawakami, & Gaertner, 2000). Indeed, over the past few decades, various techniques have been used and a number of specialized tests have been developed (such as the popular Implicit Association Test or IAT; Greenwald, McGhee, & Schwartz, 1998) to help researchers identify, measure, and study these so-called *implicit biases* (for a comprehensive review, see Wittenbrink & Schwarz, 2007). These implicit biases are valuable independent predictors of social behavior and judgment in a variety of social and professional decision-making contexts (for a recent meta-analysis, see Greenwald, Poehlman, Uhlmann, & Banaji, 2009; for an review of key studies on the impact of implicit racial bias in settings like voting, hiring, performance assessment, budget setting, policing, and medical treatment, see Jost, Rudman, Blair, Carney, Dasgupta, Glaser, & Hardin, 2009; see also Kang & Lane, 2010; Greenwald & Krieger, 2006).

Minimizing Juror Bias

Social scientists have made great strides in recent years to identify effective (and ineffective) strategies for combating more insidious forms of racial bias. For example, cumulative evidence shows that a multiculturalism approach to egalitarianism (i.e., one that acknowledges group differences and promotes diversity) is more effective in counteracting biases than the popular 'colorblindness' approach that explicitly encourages individuals to ignore race and other differences (e.g., Apfelbaum, Pauker, Sommers, & Ambady, 2010; Apfelbaum, Sommers, & Norton, 2008; Richeson & Nussbaum, 2004; see also Plaut, Thomas, & Goren, 2009). Increased exposure to minority group members who contradict

prevailing social stereotypes can also help to reduce implicit racial biases (e.g., Dasgupta & Asgari, 2004; Dasgupta & Greenwald, 2001; Kawakami, Dovidio, Moll, Hermsen, & Russin, 2000; for a review of this literature, see Dasgupta, 2009). These and other research findings can inform the development of valuable educational or training programs for judges and other court-employed decision-makers (see also Rudman, Ashmore, & Gary, 2001) in the long term. However, they translate less readily into a viable strategy for use with jurors.

The court's ability to reduce bias in juror decision-making is in many ways restricted; desired solutions are not always feasible. A complete jury trial from start to finish may last only one or two days; time constraints and additional resource limitations (e.g., funding, staffing, technology) often prohibit more elaborate interventions. In this context, viable solutions must already be inherent in the jury trial process or must be easily integrated. Jury deliberations, for example, may help to foster more analytical rather than intuitive or heuristic decision-making, particularly when jurors are prompted to explicitly articulate the basis for their individual verdict preferences (Salerno & Diamond, 2010). When people expect to be held accountable for their decision, they tend to consider a broader array of relevant information, pay more attention to the information they use to support their decision and weight this information more impartially. Through this increased investment of cognitive effort, jurors are more self-aware of the thought process for formulating the decision (see Lerner & Tetlock, 1999). The processing style used depends on the person(s) to whom the decision-maker expects to be held accountable. More racially diverse juries tend to produce decisions less influenced by the defendant's race, presumably for these very reasons (Sommers, 2006). Although more research is needed on the precise mechanisms by which jury diversity affects juror decision-making, it appears that the presence of nonwhites on a jury not only allows for more diverse perspectives to be considered, but may also increase white juror awareness of race-related concerns in a way that stimulates a more thorough and more factually accurate discussion of the evidence. Unfortunately, it is not always possible to ensure such diversity, particularly in jurisdictions with more homogeneous jury pools. Even in more diverse communities, jury panels often fall short of a representative selection of citizens (Sommers, 2008). Thus, other interventions have been proposed.

Historically, courts have relied extensively on jury instructions to guide juror decision-making (Simon, 2012). This approach has been adopted primarily for practical reasons, as instructions are relatively inexpensive, expedient, and easy to administer to each new jury. However, pattern jury instructions developed for use in state and federal jury trials typically rely on the simple admonition that jurors should not let "bias, sympathy, prejudice, or public opinion influence your decision" (Judicial Conference Criminal Jury Instructions, CALCRIM No. 101, 2013). As a next step, judges and lawyers have expressed interest in developing a jury instruction to specifically target the issue of implicit bias.[1]

[1] In addition to the implicit bias jury instructions that Judge Mark Bennett has created and implemented in his own jurisdiction (Kang et al., 2012), an American Bar Association Criminal Justice Section recently assembled a task force to concurrently develop their own instructions (S. Cox and S. Redfield, personal communication, June 3, 2013).

Crafting clear, effective jury instructions on the topic of implicit bias requires extensive subject matter expertise not only to ensure that the language used is an accurate reflection of the state of the science, but also to ensure that the instruction intervention does not incorporate components or delivery approaches known to exacerbate expressions of bias in certain subpopulations. For example, in a direct approach like that adopted by Judge Mark Bennett, instructions could explain the subtle cognitive phenomenon of implicit bias to jurors clearly and in a manner that promotes self-awareness (see Simon, 2012), as individuals can only work to correct for sources of bias that they are aware exist (Wilson & Brekke, 1994) and that they perceive to be self-relevant (see Wegener, Kerr, Fleming, & Petty, 2000). Studies show that individuals can control the behavioral expression of implicit biases in specific laboratory contexts if provided with a concrete strategy for bias reduction (Kim, 2003; Mendoza, Gollwitzer, & Amodio, 2010; Stewart & Payne, 2008). However, strategies which impress an extrinsic motivation to be non-prejudiced (i.e., mandates and other authoritarian language typical of jury instructions) may provoke hostility and resistance, failing to reduce and perhaps even exacerbating expressions of prejudice (e.g., Devine, Plant, Amodio, Harmon-Jones, & Vance, 2002; Plant & Devine, 2001). Instead, communications designed to foster intrinsic egalitarian motivations may more effectively reduce both explicit and implicit expressions of prejudice (Legault, Gutsell, & Inzlicht, 2011). These and other research findings are important to consider in crafting an effective implicit bias jury instruction.

Any new jury instruction should be carefully evaluated to determine its actual impact on jury decision-making before broadly promoting the instruction as a solution for general use in the courtroom. This is particularly important for the issue of implicit bias, given the possibility that a specialized instruction may successfully reduce expressions of racial bias with some jurors yet exacerbate these expressions (i.e., elicit a backlash effect) among others. To date, no known studies have examined the efficacy of any such jury instruction in reducing racial disparities in juror judgments. For the first time in the present study, authors examined the effect of one specialized implicit bias jury instruction on mock juror judgments.

Method

Design. The present two-part mock trial study used a 2 (defendant race: black or white) x 2 (victim race: black or white) x 2 (instructions: specialized implicit bias or control) factorial design to examine the impact of a specialized implicit bias jury instruction on expressions of racial prejudice in juror decision-making. The two parts of the study were presented to participants as two ostensibly separate and unrelated online surveys, but only participants who completed the first phase of the study (Part 1) were invited to complete the second phase (Part 2).

Participants. To secure a sample of participants, authors contracted with Research Now, an online market research firm with over 6.5 million active panel members. For this experiment, Research Now supplied a nationally representative sample of participants, balanced on age, gender, geographic location, and ethnicity (defined as six possible groupings by Research Now: African American/Black, Asian/Asian American, Caucasian/White, Native American/Inuit/Aleut, Native Hawaiian/Pacific Islander, and Other). To qualify for the present study, authors imposed a set of typical jury eligibility

requirements on participation: participants must be U.S. citizens, must reside in the United States, be at least 18 years of age, be able to speak and understand English, and, at the time of the experiment, have no prior felony convictions. Research Now supplied 1287 unique panelists who accessed the experiment online. Of these, 901 panelists (70.0%) completed Part 1 of the study; 386 panelists (30.0%) either failed to meet the minimum eligibility requirements and were thus automatically excluded from further participation or voluntarily chose to withdraw participation by discontinuing with the survey. Of the 901 eligible panelists who completed Part 1, 579 (62.9 %) also completed Part 2 of the study. Of these, 12 participants were excluded based on their IAT error rates (i.e., too many erroneous responses, keystrokes entered too quickly to register as a feasible response to a trial), as recommended by Project Implicit staff (J. Axt, personal communication, August 1, 2013). In addition, due to technical errors in recording the participant identification number, Part 1 and Part 2 responses from six participants could not be matched, leaving 561 participants with a complete, matched set of data from both parts of the study.

Stimulus materials. Authors developed several stimulus materials for use in this experiment. First, four written versions of a mock criminal trial scenario, adapted from Sommers and Ellsworth (2000, 2001), were created in which a defendant was charged with assault and battery with intent to cause serious bodily injury of a victim. In this mock trial scenario, the defendant and victim were described as teammates on a college basketball team and the alleged assault resulted from a locker room altercation.[2] The intent was to utilize a trial scenario with mixed evidence that would elicit a guilty or not guilty verdict in roughly equal proportions**.** Each of the four versions of the mock trial scenario systematically varied the race of the defendant and the race of the victim (see Appendix A).

Second, two versions of jury instructions were constructed and videotaped for use in the experiment. Both versions of the jury instructions were delivered by an older white man in judicial robes from behind a judge's bench. The judge presented standard pattern jury instructions for reasonable doubt (CALCRIM No. 220, 2013), battery causing serious bodily injury (CALCRIM No. 925, 2013) and self-defense (CALCRIM No. 3470, 2013) in both instruction conditions (Appendix B). However, the experimental manipulation focused on the use of a specialized implicit bias jury instruction versus a control instruction of comparable length. Based loosely on a jury instruction developed and used by Judge Mark Bennett of the U.S. District Court, Northern District of Iowa, authors developed a specialized implicit bias jury instruction which incorporates concepts consistent with several promising bias-reduction strategies identified in the broader research literature (for the specialized implicit bias jury instruction with citations to research upon which each component of the instruction is based, see Appendix C). For the control condition instruction, authors selected a pattern instruction of comparable length (adapted from the New York Committee on Criminal Jury Instructions, n.d.), which cautions jurors against conducting internet research about the trial while serving on the jury (Appendix D).

[2] Adaptations from the original Sommers and Ellsworth (2000) scenario included the removal of racially charged language and other cues designed to make race a salient issue to the reader. In addition, the setting of the altercation was described as a college locker room, rather than high school, to avoid special legal considerations and potential biases related to juvenile defendants.

Procedure. Participants completed two ostensibly separate and unrelated web-based surveys in the early summer of 2013. Each survey was estimated to take participants 20 minutes to complete. In exchange for completing each survey, each participant received a "thank you" token reward of through Research Now's online e-Rewards incentive system. The first part of the study (Part 1) connected participants with an experiment designed using Confirmit online survey software. Participants began Part 1 by completing a series of eligibility questions to confirm whether they were indeed jury-eligible. Those who failed to meet the jury eligibility criteria were excluded from further participation in the study.

Participants who met eligibility requirements then received a brief description of the study in which they were asked to assume the role of a juror in a trial case. Participants were randomly assigned to one of eight possible conditions in the experiment: They watched one of the two videotaped sets of jury instructions and then read one of four possible versions of the mock trial scenario describing the evidence in the case against the defendant.

Following the jury instructions and presentation of the evidence in the mock trial, participants then answered a series of questions concerning their verdict preference (guilty/not guilty), confidence in their verdict preference (0% to 100%), assessments of the strength of case for the prosecution and for the defense (7-point Likert scale, 1=extremely weak to 7=extremely strong), and sentencing recommendations (9-point Likert scale, no punishment to maximum punishment of 365 days incarceration). Participants then completed several basic demographic questions to conclude the survey.

Three weeks following the launch of Part 1 and one week following the closure of Part 1 data collection, the second phase of the study (Part 2) launched online. Participants who completed Part 1 of the study were individually invited by Research Now to complete the ostensibly separate Part 2 survey study. To complete Part 2 of the study, respondents were directed to a secure site hosted by Harvard University's Project Implicit, a non-profit research organization with which the authors contracted services. On the Project Implicit hosted survey site, participants completed a measure of race Implicit Association Test (IAT; Greenwald, McGhee, & Schwartz, 1998). The IAT is a popular computer-based measure of implicit attitudes that relies on the individual's response times in a sorting task. This approach is supported by logic that easier pairings (faster responses in the sorting task) reflect stronger associations between concepts (for a complete description, see Greenwald et al., 1998 and Greenwald, Nosek, & Banaji, 2003). In addition, participants answered standard questions provided by Project Implicit that were designed to measure explicit racism by asking how "warm" or "cold" participants felt toward Whites or Blacks, called feeling thermometers. Participants also completed the Symbolic Racism scale (Henry & Sears, 2002) and the Internal and External Motivation to Respond without Prejudice scales (Plant & Devine, 1998).

The explicit and implicit racial bias measures were administered separately from Part 1 to avoid the possibility that either these measures or the mock trial scenario may make race-related norms more accessible to participants than they would otherwise be. Increased salience of race-related norms (c.f. Sommers & Ellsworth, 2006) could potentially alert participants to the primary purpose of the study and

influence participant responses on whichever part of the study followed in the sequence if both parts were conducted in a single survey. Authors combined the datasets from Part 1 and Part 2 of the study by matching unique participant identifier numbers supplied by Research Now.

Results

Profile of participants. Of the 901 participants retained for analysis who completed Part 1 of the study, most were female (*n* = 518, 57.5%), white (*n* = 727, 80.7 %), with at least some collegiate-level education (*n* = 803, 89.1%), and of an average age of 50 years.[3] Forty (4.4%) self-identified as Hispanic or Latino/a. The study captured an approximately equal distribution of participants across the West (*n* = 256, 28.4%), Midwest (*n* = 218, 24.2%), South (*n* = 261, 29.0%), and Northeast (*n* = 166, 18.4%) regions of the United States, with the Northeast being slightly underrepresented. Liberal (*n* = 299, 33.2%), moderate (*n* = 246, 27.3%), and conservative (*n* = 356, 39.5%) political attitudes were approximately equally represented. Participant characteristics were distributed across experimental conditions in approximately equal proportions.

Attrition between Part 1 and Part 2 of the study occurred approximately proportionally across all eight experimental conditions and between genders (57.9% female), race and ethnic groups (83.8% white and 3.2% Hispanic), education level (88.7% with at least some college education), geographic region (approximately balanced), political orientation (approximately balanced), and experimental condition (approximately balanced).

Of the 561 participants who completed Part 2 of the study, a large majority exhibited an implicit preference for whites on the race IAT (*n* = 483, 86.1%), with n = 21 (3.7%) exhibiting an implicit preference for blacks and *n* = 57 (10.2%) exhibiting no implicit racial preference (*M* = .61, *SD* = .40).[4] Of the explicit racism feeling thermometer measures, participants on average self-reported slightly warmer feelings towards whites (*M* = 4.17, *SD* = 1.95) than blacks (*M* = 4.76, *SD* = 1.95), with lower scores on each 11-point scale representative of warmer feelings. In addition, to compute the Symbolic Racism 2000 scale index, the eight items on the scale were recoded following procedures used by Henry and Sears (2002) so that 0 = low and 1 = high symbolic racism; items then averaged to create the Symbolic Racism index (α=.831). The scale means for participants in the present study (overall, *M* = 0.46, *SD* = 0.19; for whites, *M* = 0.47, *SD* = 0.19; for nonwhites, *M* = 0.41, *SD* = 0.19) corresponded to means observed by the developers of the Symbolic Racism 2000 scale (Henry & Sears, 2002).

To create the Internal and External Motivation to Respond Without Prejudice scale indices, one item was reverse-coded and participant responses on all items comprising each scale were then averaged to

[3] Of the 19.3% respondents who self-identified as a racial minority, 50 indicated that they were black (5.5%), 77 indicated Asian (8.5%), 7 indicated Native American (0.8%), 5 indicated Hawaiian/Pacific Islander (0.6%), 17 indicated other (1.9%), 16 indicated two or more races (1.8%), and 2 did not provide a selection (0.2%).
[4]The tendency to demonstrate an implicit preference for whites on the race IAT is common in other studies drawing on U.S. samples, particularly among non-black participants (e.g., Nosek, Smyth, Hansen, Devos, Lindner, Ranganath, & Smith, 2007; see also https://implicit.harvard.edu/implicit/demo/background/raceinfo.html).

create the Internal Motivation Scale (IMS) index (α=.813) and the External Motivation Scale (EMS) index (α=.766). Participants were on average externally motivated to respond without prejudice (*M* = 4.90, *SD* = 1.81 on the 9-point EMS index) and highly internally motivated to respond without prejudice (*M* = 7.33, *SD* = 1.64 on the 9-point IMS index); these averages are comparable to results found in the original scale development research (Plant & Devine, 1998).

As expected, several of the racism measures were intercorrelated (Table 1). Of the explicit measures, participants who reported higher symbolic racism also reported cooler feelings towards blacks (r = .18, p < .01) and warmer feelings towards whites (r = -.20, p < .01). In addition, participants' IAT scores positively correlated with their explicit Symbolic Racism index scores, r = .22, p < .01. Participants' IAT raw scores also correlated with their reported feelings towards whites such that stronger implicit preferences for whites were associated with warmer self-reported feelings, r = -.13, p < .01. Interestingly, participants' IAT raw scores were not significantly related to their self-reported feelings towards blacks, r = .05, *ns*. Participants may have engaged in self-monitoring and correction when responding to this particular self-report measure. Participant IAT scores were also positively related to their reported political orientation, with participants who more strongly identified with political conservativism showing a stronger implicit preference for whites, r = .12, p < .01.

Consistent with prior research (Legault, Green-Demers, Grant, & Chung, 2007), we also found that IMS scores were negatively related to IAT scores, with participants who scored lower on IMS demonstrating a stronger implicit preference for whites, r = -.12, p <.01. A positive relationship between IAT scores and EMS scores also emerged, with participants who scored higher on EMS demonstrating a stronger implicit preference for whites, r = .10, p <.05.

Profile of mock trial judgments. Of the 901 participants retained for analysis in Part 1 of the study, 572 (63.5%) submitted a guilty verdict, suggesting that the evidence for defendant culpability was somewhat ambiguous in the mock trial scenario presented to participants. On average, participants reported being fairly confident of their verdict choice (*M* = 77.8% confident, *SD* = 20.53). In addition, participants on average rated the prosecution's case as moderate-to-strong (*M* = 4.87, *SD* = 1.60) and the defense's case as moderate-to-weak (*M* = 3.54, *SD* = 1.63). As expected, perceptions of case strength and verdict choice were intercorrelated: Participant judgments of the strength of the defense's case were negatively related to the reported strength of the prosecution's case (r = -.47, p < .01) and to the decision to submit a guilty verdict (r = -.52, p < .01). Similarly, participants' ratings on the strength of the prosecution's case had a positive relationship with judgments of guilt (r = .66, p < .01). Finally, the most common sentencing recommendation of mock jurors who voted for conviction was for probation only, no incarceration (n = 204, or 35.7%), followed by three response options which called for 120 days incarceration or less (n = 231, or 40.4%, across all three sentencing options). Only 72 participants (12.6% across three sentencing options) recommended more incarceration time (between 121 and 364 days), and 64 participants selected the maximum penalty of 365 days incarceration (11.2%). One participant recommended no punishment (0.2%).

Participant IAT scores also correlated positively with verdict choice, $r = .09$, $p < .05$. Higher implicit bias scores (i.e., a stronger preference for whites) were associated with the decision to convict the defendant. No other significant relationships were found between participants' IAT score and judgment measures.

Participant EMS scores did not correlate with verdict choice, $r < .01$, *ns*. However, EMS score correlated with other judgment measures. Higher EMS scores were associated with judgments of a stronger case for the prosecution, $r = .68$, $p < .001$, and a weaker case for the defense, $r = -.52$, $p < .001$.

Effects of defendant race on juror judgments. To establish whether or not this experiment successfully replicated previously established juror race bias effects (e.g., Sommers, 2006; Sommers & Ellsworth, 2000, 2001; Cohn, Bucolo, Pride, & Sommers, 2009), we examined if white jurors in control conditions, on average, judged black defendants more harshly than white defendants.[5] Because the race of the victim may not be a critical factor in the expression of juror bias (p. 215, Sommmers & Ellsworth, 2001), we first examined this question across all control conditions, regardless of victim race. We found no evidence that white participants were more likely to convict a black defendant than a white defendant overall, χ^2 (1, $N = 350$) = 1.97, *ns*. Among these participants, we also found no direct effect of defendant race on confidence of verdict, strength of the prosecution's case, strength of the defense's case, or sentence recommendation, *t*s < 1.61. However, an effect of defendant race on the strength of the defense's case approached significance, $t(348) = 1.90$, $p = .06$. Instead of a white juror bias against black defendants, however, white participants in the present study provided higher ratings of the strength of the defense's case when the defendant was described as black ($M = 3.68$, $SD = 1.66$) compared to white ($M = 3.34$, $SD = 1.62$).

To demonstrate the juror bias effect in prior studies, other researchers have commonly relied on interracial trial scenarios as stimulus materials (see Sommers & Ellsworth, 2000, 2001). In a second attempt to establish a juror bias baseline effect, we restricted the analysis to white participants in only those control conditions in which a combination of either a white defendant and black victim or black defendant and white victim was described in the trial scenario.[6] We found no evidence of a white juror bias against black defendants when examining verdict choice in only those control conditions which described an interracial alleged offense, χ^2 (1, $N = 171$) = 0.32, *ns*. We also found no effect of defendant race on confidence of verdict, strength of the prosecution's case, strength of the defense's case, or sentence recommendation, *t*s < 1.59.

[5] Small cell sizes (ns < 5) prohibited a more comprehensive examination of in-group bias or favoritism (e.g., Mitchell, Haw, Pfeifer, & Meissner, 2005; Kerr, Hymes, Anderson, & Weathers, 1995) among other racial or ethnic groups.

[6] Researchers have found stronger expressions of in-group bias or favoritism among Black mock jurors than in White mock jurors in some circumstances (Mitchell et al., 2005; Sommers & Ellsworth, 2009). However, the small subsamples of black mock jurors (*n*s < 5 in some conditions) prohibited further exploration of potential differential effects among racial subgroups.

Effect of instructions. Despite our inability to establish as a baseline the traditional pattern of race bias in the present study, we further explored the effect of the specialized implicit bias jury instruction on participant judgments. We looked first at the entire participant sample, then focused on the judgments of white jurors only,[7] and concluded with an assessment of only those individuals who demonstrated an implicit preference for Whites.

Overall. To examine the effects of the specialized implicit bias jury instructions on participants' reported confidence in their chosen verdict, perceived strength of the prosecution's evidence, perceived strength of the defense evidence , and recommended sentence if found guilty, we conducted 2 (defendant race) x 2 (victim race) x 2 (instruction condition) analysis of variance (ANOVA) tests. A significant three-way interaction effect on strength of the defense's case was observed, F (1, 901) = 3.81, p = .05. No statistically significant effects emerged when the victim was described as white, Fs < 0.96. However, when the victim was described as black, we observed a two-way interaction between instruction condition and defendant race, F(2, 459) = 3.90, p < .05. Among these participants, of those who received the implicit bias instruction, we found no difference in strength of the defense's case when the defendant was described as black (M = 3.56, SD = 1.66) compared to white (M = 3.59, SD = 1.59), F(1, 238) = 0.03, *ns* (Table 2). In the control instruction conditions with black victims, however, participants judged the defense's case to be slightly stronger when the defendant was also described as black (M = 3.85, SD = 1.74) than when the defendant was described as white (M = 3.28, SD = 1.64), F(1, 221) = 6.21, p = .01. Other than a main effect of defendant race explained by this interaction effect, No other statistically significant effects on these variables were observed, Fs < 2.264.

We also found a significant difference in conviction rate by defendant race, χ^2 (1, N = 901) = 4.23, p < .05, with participants convicting the white defendant more often overall (66.8%) than the black defendant (60.2%). No other significant differences were noted, χ^2s < 2.47.

White participants only. We found no differences between conditions in conviction rate among white participants, χ^2s < 2.62. To examine the effects of the specialized implicit bias jury instructions on white participants' reported confidence in their chosen verdict, perceived strength of the prosecution's evidence, perceived strength of the defense evidence , and recommended sentence if found guilty, we conducted 2 (defendant race) x 2 (victim race) x 2 (instruction condition) analysis of variance (ANOVA) tests. A significant three-way interaction effect on strength of the defense's case was observed, F (1, 736) = 6.03, p = .01. No statistically significant effects emerged when the victim was described as white, Fs < 1.45. However, when the victim was described as black, we observed a two-way interaction between instruction condition and defendant race, F(2, 365) = 7.18, p < .01. Among these participants, of those who received the implicit bias instruction, we found no difference in strength of the defense's case when the defendant was described as black (M = 3.47, SD = 1.67) compared to white (M = 3.80, SD = 1.60), F(1, 188) = 1.91, *ns* (Table 3). In the control instruction conditions with black victims, however, participants judged the defense case to be slightly stronger when the defendant was also described as black (M = 3.83, SD = 1.74) than when the defendant was described as white (M = 3.25, SD = 1.59), F(1,

[7] See footnote 6.

177) = 5.392, p =.02. In contrast with prior studies that focus on the race of the juror and defendant (Sommers & Ellsworth, 2000, 2001), this pattern underscores the importance of the race of the victim in understanding expressions of juror bias.

Participants with an implicit preference for whites. Among participants who showed an implicit preference for whites on the IAT (n = 483), we found no differences between conditions in conviction rate, χ^2s < 2.61. To examine the effects of the specialized implicit bias jury instructions on these participants' reported confidence in their chosen verdict, perceived strength of the prosecution's evidence, perceived strength of the defense's case, and recommended sentence if found guilty, we conducted 2 (defendant race) x 2 (victim race) x 2 (instruction condition) analysis of variance (ANOVA) tests. No statistically significant effects emerged, Fs < 3.229.

Probing for a possible backfire effect. To explore for the possibility of a backfire effect among some participants (Plant & Devine, 2001; Legault, Gutsell, & Inzlicht, 2011), we wished to determine whether the specialized implicit bias jury instruction elicited different responses from high- and low-EMS jurors toward black vs. white defendants. We conducted a 2 (instruction condition) x 2 (defendant race) x 2 (juror: primarily IMS vs. primarily EMS) analysis of variance test on strength of the defense's case. We found no evidence of a backfire effect, $F(1, 526) = 0.11$, *ns*. However, because so few jurors in this study were primarily externally motivated to respond without prejudice (n = 76), these results should be interpreted with caution. Small cell sizes prohibited further exploration.

Discussion

The present study found no significant effects of the instruction on judgments of guilt, confidence, strength of the prosecution's evidence, or sentence length. Unexpectedly, the control conditions of the present study failed to generate the traditional patterns of juror bias, in which white mock jurors judge black defendants more harshly than white defendants. Without replicating this pattern of bias to establish a baseline against which participants in the experimental conditions could be compared, we were unable to fully examine the effectiveness of the specialized implicit bias jury instruction in reducing bias in juror judgments.

Despite our inability to replicate the traditional juror bias effect in this study, we uncovered some evidence to suggest that the specialized implicit bias jury instruction could influence juror appraisals in a mock trial case. Participants who received these specialized instructions prior to reading the trial scenario produced a different pattern of judgments of the strength of the defense's case compared with participants who received a control instruction. Specifically, in control conditions, jurors indicated that the defense's case was stronger (in fact, the strongest of all eight conditions) when the alleged offense occurred between a black defendant and a black victim, rather than between a white defendant and a black victim. However, the specialized implicit bias jury instructions tempered this racial disparity. Further research could explore why the black defendant – black victim crime produced the highest strength-of-case ratings for the defense. Was it perceived as easier to defend, or as most easily justified? Perhaps the present study failed to detect the traditional pattern of juror bias because people are

getting better at detecting straightforward racial issues and correcting for potential bias in their judgments about a defendant, but not yet good at detecting or correcting for more complex expressions of racial bias.

In addition, we found no evidence to suggest that the specialized instruction produces a harmful backfire effect among those likely to feel threatened by and react against external pressure to comply with mandatory non-discrimination standards (Plant & Devine, 2001; Legault, Gutsell, & Inzlicht, 2011). These findings should be considered strictly preliminary. Future research efforts should oversample individuals who are more externally motivated to respond without prejudice to permit a more conclusive analysis and to further probe for possible differential effects. For an instruction approach to remain a feasible solution in the context of jury trials, judges must be able to administer the instruction to the jury as a whole without risking a backfire effect among an unknown proportion of the trial's jurors.

Possible explanations for the failure to replicate the traditional juror bias effect. Ultimately, we found no conclusive evidence regarding whether or not the specialized implicit bias jury instruction used in this study is effective as a bias-reduction intervention, primarily because the present study failed to replicate the original baseline effect of juror bias documented by Sommers and Ellsworth (2001) using the original version of the same stimulus materials. Without a replication of the baseline pattern of juror bias, a clear test of the full value of the specialized implicit bias jury instruction is not possible. Many potential explanations for these findings focus on differences between the present study and the original Sommers and Ellsworth (2000) study, such as:

(1) Differences in materials. For example, the slight modifications we made to the original Sommers and Ellsworth (2000) stimulus materials effectively eliminated the expected effects. Alternatively, perhaps the traditional pattern jury instructions on reasonable doubt, battery causing serious bodily injury, and self-defense used in the present study were sufficient to wipe out the juror bias effect observed in Sommers and Ellsworth (2000), making the specialized instruction superfluous.
(2) Differences in setting. In the present study, participants completed surveys individually online. However, Sommers and Ellsworth (2000) conducted the original study in person, in group settings. Moreover, their participants were relatively homogeneous assemblies of fraternity and sorority members on a single college campus who likely knew one another prior to the experiment. It is possible that in the original study, the presence of others from the participants' own social in-group could have influenced participant judgment in ways that differed meaningfully from the present study, and in ways that may not generalize to the typical jury.[8] Alternatively, the responses from the current sample of jury-eligible adult web users may be

[8] For an example of how even racial homogeneity of otherwise unfamiliar fellow jury members can influence juror decision-making, see Sommers (2006). See also Sommers (2007) for further discussion regarding the influence of the composition of a jury on the juror decision-making process.

unique because of factors in the uncontrolled environment in which the experiment was completed.

(3) Differences in the composition of participant samples. Sommers & Ellsworth (2000) observed the original juror bias effect with a sample of college students, whereas the present study used a national sample of jury-eligible adult web users. It is possible that findings among samples of college students do not generalize well to other samples, such as the one used in this experiment (see, generally, Wiener, Krauss, & Liberman, 2011).

However, the above explanations for the failure to replicate Sommers and Ellsworth's (2001) original juror bias finding using nearly identical stimulus materials are unlikely. The juror bias effect documented by Sommers and Ellsworth (2000) has been replicated in group and individual participant settings, with college students and broader community samples of jury-eligible adults, using different trial scenarios as stimulus materials, and using methods to present those materials with more and less ecological validity, such as by asking mock jurors to read a short trial summary, watch a videotaped summary presentation, or participate in a large-scale trial simulation (e.g., Sommers & Ellsworth, 2000; Sommers & Ellsworth, 2001; Cohn, Bucolo, Pride, & Sommers, 2009). Moreover, the failure in the current experiment to replicate the Sommers and Ellsworth (2000) baseline pattern of juror bias has since been duplicated: At least three other research studies conducted after the present experiment (between November 2013 and January 2014) also failed to replicate the original juror bias effect, with college students and with two samples of web users recruited through Amazon Mechanical Turk (P. Ellsworth, personal communication, February 16, 2014). This provides convergent evidence of what is potentially a broader contemporaneous shift in the pattern of bias expression.

Although one might argue from these findings that the problem of implicit bias has been "solved," such a conclusion is both premature and unlikely. Even in the present experiment, the majority of participants exhibited a strong implicit race bias in favor of Whites. Indeed, other research continues to demonstrate the persistence of implicit forms of bias in general and as expressed in social judgment and behavior (Greenwald, Poehlman, Uhlmann, & Banaji, 2009; Jost, Rudman, Blair, Carney, Dasgupta, Glaser, & Hardin, 2009; Kang & Lane, 2010). A more likely explanation for the failure to replicate the original Sommers and Ellsworth (2000) juror bias effect is that Americans may have become increasingly aware of the cultural attention to race bias over the past decade and are now more sensitive to the possibility of revealing such bias, particularly in research settings. This heightened level of awareness and sensitivity may trigger spontaneous self-correction of the kind measured (and in some cases, experimentally manipulated) in prior research (e.g., see Green, et al., 2007; Sommers & Ellsworth, 2000; Sommers & Ellsworth, 2001). Whether this sensitivity is temporary or a more permanent reflection of the modern age is another empirical question to be answered: The trends observed in the present study could be the first sign of a permanent change in the efforts of Americans to self-monitor and correct for expressions of bias, but it is possible that contemporaneous media attention on race bias and the justice system throughout 2013, such as the Zimmerman and Alexander "Stand Your Ground" trials in Florida, could have served to temporarily enhance awareness of and sensitivity to these issues. The increased salience of race and race norms in routine media communications about the American justice system could have primed participants to spontaneously self-monitor and correct for possible bias. If the latter

is the case, a simple reminder to consider race and race norms may be sufficient to prompt jurors to engage in corrective action against expressions of bias in judgment.

Until some of the above questions are addressed, the verdict on any question regarding the utility of specialized implicit bias jury instructions cannot be rendered. Although highly unlikely, if everyone is routinely engaging in self-monitoring and correction of bias in decision-making, there is no need to engage in future efforts to develop and test specialized implicit bias jury instructions. However, if some individuals do not spontaneously engage in self-correction or if people inconsistently engage in self-correction, further research is needed to determine whether or not the technique in general can effectively and more consistently trigger corrective action. If the technique works generally, additional research could identify the instructional components that most effectively trigger corrective action for inclusion in a recommended model instruction. If warranted, future research should account for more complex effects: A specialized implicit bias jury instruction may produce desired bias-reduction effects on only particular subpopulations of individuals or under particular conditions. Jury deliberations could amplify the intended effect (and/or backfire effect) of a well-crafted implicit bias jury instruction, and meaningful effects may be observed only when providing the instruction to actual jurors in real world trials with real consequences. Alternatively, it remains possible that a specialized implicit bias jury instruction (including or limited to the specific instruction developed for and tested in the present study) simply will not work as a bias-reduction intervention.

Beyond a specialized implicit bias jury instruction, researchers could explore the utility of any of several other justice system intervention strategies for reducing the effects of implicit bias on judgment (e.g., see Casey, Warren, Cheesman, & Elek, 2012; Elek & Hannaford, 2013). These strategies show promise but have not yet received sufficient empirical scrutiny. Because of the potential for a backfire effect and the possibility of "doing harm," these approaches should be fully vetted by research scientists before recommending practical implementation.

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Table 1. Correlations Between Implicit and Explicit Measures of Racial Bias (n = 561)

	IAT raw score	Symbolic Racism Index	Black Thermometer	White Thermometer	EMS Index	IMS index
IAT raw score	-					
Symbolic Racism Index	.22**	-				
Black Thermometer	.05	.18**	-			
White Thermometer	-.13**	-.20**	.63**	-		
EMS Index	.10*	.08	-.03	-.19**	-	
IMS Index	-.12**	.42**	-.37**	-.02	.04	-

*$p < .05$, ** $p < .01$

Table 2. Mean Ratings for Strength of the Defense's Case as a Function of Instruction Condition, Defendant Race, and Victim Race Among All Jurors (n = 901)

	Control Instruction				Implicit Bias Instruction			
	White Defendant		Black Defendant		White Defendant		Black Defendant	
	M	SD	M	SD	M	SD	M	SD
White Victim	3.48	(1.62)	3.54	(1.56)	3.35	(1.57)	3.66	(1.64)
Black Victim	3.28	(1.64)	3.85	(1.74)	3.59	(1.59)	3.56	(1.66)

Table 3. Mean Ratings for Strength of the Defense's Case as a Function of Instruction Condition, Defendant Race, and Victim Race Among White Jurors (n = 736)

	Control Instruction				Implicit Bias Instruction			
	White Defendant		Black Defendant		White Defendant		Black Defendant	
	M	SD	M	SD	M	SD	M	SD
White Victim	3.44	(1.64)	3.51	(1.56)	3.31	(1.52)	3.64	(1.62)
Black Victim	3.25	(1.59)	3.83	(1.74)	3.80	(1.60)	3.47	(1.67)

Appendix A

Mock Trial Scenario

***State v. Matthew Stevenson,* Superior Court no. CR12-563425.**

Defendant: Matthew Stevenson, 21-year-old [white or black] male, 6' 4" 210 lbs.

Victim: Rod Bentley, 19-year-old [white or black] male, 6' 2" 192 lbs.

The prosecution charges that the defendant, Matthew Stevenson, is guilty of battery with serious bodily injury. Stevenson was the starting point guard on the basketball team for Johnson State College, but the team had been struggling, and the coach decided to bench him in favor of Rod Bentley, a younger, less experienced player. Before the next game, Stevenson approached Bentley in the locker room and began yelling at him. Witnesses explain that the frustrated defendant told Bentley that he was a "fuckin' bench warmer" and he couldn't wait to put him "back in his place." When another teammate, Jacob Thompson, stepped between the two players, Stevenson shoved him and told him to get out of the way. The prosecution claims that Bentley then grabbed Stevenson to separate him from Thompson, but the defendant threw Bentley off, pushed him into a row of lockers, and ran out of the room. As a result of this fall, two of Bentley's teeth were broken and he was knocked unconscious. Bentley now suffers from a permanent 80% loss of hearing in his right ear as a result of this assault. The prosecution claims that Stevenson has shown no remorse for his crime and has even expressed to friends that Bentley "only got what he had coming."

The defense claims that Stevenson was merely acting in self-defense and that Bentley's injuries were accidental. Stevenson felt he had been the subject of nasty remarks and unfair criticism throughout the season from his teammates. Stevenson claims that he was afraid during the altercation in the locker room. He admits he "might have said something inappropriate to Bentley," but he says that he was just frustrated and it was nothing worse than what he had heard from the rest of the team all season. Stevenson claims that when Bentley then grabbed him, he felt that he was in danger and tried to break free, and that he must have accidentally knocked into Bentley in the attempt to get out of the locker room. He explained that the reason he never apologized to Bentley in the hospital was that he knew no one on the team would've visited him if he'd been the one hurt, but he did say that it was "a shame" that Bentley had been injured so seriously.

Appendix B

Standard Pattern Jury Instructions

Reasonable Doubt

The fact that a criminal charge has been filed against the defendant, [defendant name], is not evidence that the charge is true. You must not be biased against Mr. Stevenson just because he has been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the prosecution prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the prosecution must prove something, I mean they must prove it beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the prosecution has proved its case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves [defendant name] guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.

Battery Causing Serious Bodily Injury

[Defendant name] is charged with battery causing serious bodily injury. To prove that he is guilty of this charge, the prosecution must prove that:

1. [Defendant name] willfully touched the victim, [victim name], in a harmful or offensive manner; AND
2. [Victim name] suffered serious bodily injury as a result of the force used; AND
3. [Defendant name] did not act in self-defense.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

Making contact with another person, including through his or her clothing, is enough to commit a battery.

Self-Defense

Self-defense is a defense to battery. [Defendant name] is not guilty of that crime if he used force against another person in lawful self-defense. [Defendant name] acted in lawful self-defense if:

1. He reasonably believed that he was in imminent danger of suffering bodily injury; AND

2. He reasonably believed that the immediate use of force was necessary to defend against that danger; AND

3. He used no more force than was reasonably necessary to defend against that danger.

When deciding whether [defendant name]'s beliefs were reasonable, consider all the circumstances as they were known to and appeared to him and consider what a reasonable person in a similar situation with similar knowledge would have believed. If [defendant name]'s beliefs were reasonable, the danger does not need to have actually existed.

Appendix C

Annotated Specialized Implicit Bias Jury Instruction

Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful and fair decisions.[9] What we are asked to do is difficult because of a universal challenge: We all have biases. We each make assumptions and have our own stereotypes, prejudices, and fears.[10] These biases can influence how we categorize the information we take in.[11] They can influence the evidence we see and hear, and how we perceive a person or a situation. They can affect the evidence we remember and how we remember it. And they can influence the "gut feelings" and conclusions we form about people and events.[12] When we are aware of these biases, we can at least try to fight them.[13] But we are often not aware that they exist.

We can only correct for hidden biases when we recognize them and how they affect us. For this reason, you are encouraged to thoroughly and carefully examine your decision-making process to ensure that the conclusions you draw are a fair reflection of the law and the evidence.[14] Please examine your reasoning for possible bias by reconsidering your first impressions of the people and evidence in this case. Is it easier to believe statements or evidence when presented by people who are more like you?[15] If you or the people involved in this case were from different backgrounds – richer or poorer, more or less educated, older or younger, or of a different gender, race, religion, or sexual orientation – would you still view them, and the evidence, the same way?[16]

Please also listen to the other jurors during deliberations, who may be from different backgrounds and who will be viewing this case in light of their own insights, assumptions, and

[9] When leadership sets an egalitarian example, others may also pursue this goal (see Aarts, Gollwitzer, & Hassin, 2004).

[10] To avoid potential backfire effects, instructional language should reduce external pressure to comply (by avoiding authoritarian language) and promote intrinsic motivation to counteract biases (Plant & Devine, 2001; Richeson & Nussbaum, 2004; Legault, Gutsell, & Inzlicht, 2011).

[11] See Guthrie, Rachlinski, and Wistrich (2007); Legault et al. (2011)

[12] See Levinson, Cai, and Young (2010); Plant and Devine (1998); Kang, Dasgupta, Yogeeswaran, and Blasi (2010). On the effects of bias on perception and judgment, and regarding how awareness of potential bias may help trigger self-correction efforts, see Green, Carney, Pallin, Ngo, Raymond, Iezzoni, and Banaji (2007).

[13] People often are not aware of their own biases. For people to attempt to correct for bias, they must know that it is a problem and also believe the problem to be self-relevant (see Wilson & Brekke, 1994; see also Wegener, Kerr, Fleming, & Petty, 2000; Wegener & Petty, 1995; 1997).

[14] A more deliberative mode of thinking may help to reduce expressions of bias (see Langer, Bashner, & Chanowitz, 1985; Djikic, Langer, & Stapleton, 2008; see also see Guthrie et al., 2007; Pfeifer & Ogloff, 1991).

[15] For a discussion on processing fluency and perceptions of trust, see Reber and Schwarz (1999); Alter and Oppenheimer (2009). See also Clark and Maass (1988), Yuki, Maddux, Brewer, and Takemura (2005).

[16] Perspective-taking may help to reduce the accessibility and expression of stereotypes (see Galinsky & Moskowitz, 2000).

even biases.[17] Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making.[18]

Our system of justice relies on each of us to contribute toward a fair and informed verdict in this case. Working together, we can reach a fair result.[19]

[17] Instructions which encourage people to attend to and appreciate one another's differences (i.e., a multiculturalism philosophy) are more effective at reducing expressions of bias than instructions to ignore individual differences (i.e., a colorblindness philosophy); the latter may induce a backfire effect, thereby increasing expressions of prejudice (e.g., Apfelbaum, Sommers, & Norton, 2008). Note that the mere presence of a racial minority on a panel of mostly white jurors may reduce the likelihood of a biased verdict (Sommers, 2006).

[18] See Wegener et al. (2000). When individuals are held accountable for the decision-making process itself, they tend to think more deliberatively; however, when they are only held accountable for the outcome, they may be more likely to attempt to justify unjust decisions retrospectively (see Lerner & Tetlock, 1999). These instructions are designed to focus the juror on the process. In addition, if people are made aware of their biases, those who endorse egalitarianism but remain implicitly biased may actively correct for bias in their decision-making (see Son Hing, Li, & Zanna, 2002). If in the presence of a relatively egalitarian-minded group, an individual's judgments may become less stereotypic (see Sechrist & Stangor, 2001).

[19] Emphasizes goal-setting and leadership involvement; see footnote 9.

Appendix D

Control Condition Instruction

Juror Conduct During the Trial

Do not converse, either among yourselves or with anyone else, about anything related to the case.

Do not visit the place where the crime was allegedly committed. You must not use Internet maps, or Google Earth, or any other program or device to search for any location discussed in the testimony.

Do not read or listen to any accounts of the case reported by newspapers, television, radio, the Internet, or any other news media.

Do not attempt to research any fact or law related to this case, whether by discussion with others or by research on the Internet.

I want to emphasize that you must not communicate with anyone about the case by any means, including telephone, text messages, email, Internet chat or chat rooms, blogs, or social Web sites such as Facebook, MySpace, or Twitter.

You must not provide any information about the case to anyone by any means, including posting information about the case, or what you are doing in the case, on any device or Internet site. You also must not Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge.

BAR BULLETIN
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U.S. District Court Produces Video, Drafts Jury Instructions on Implicit Bias

By Judge Theresa Doyle

We all have biases. These unconscious, instantaneous, almost automatic judgments can help us get through the day. However, when those unconscious biases stereotype a person because of race, gender, national origin, sexual orientation, age or other qualities, they are no longer helpful but harmful to the right to a fair trial.

Results of the widely taken Implicit Association Test (IAT) and other research show a high and nearly universal preference of whites over blacks.[1] Even with African-American test-takers, 40 percent showed a pro-white preference. Jurors bring these biases to court when they report for jury service.

A recent U.S. Supreme Court case, *Colorado v. Pena-Rodriguez,*[2] shows the damage inflicted by jurors who harbor racial bias. In *Pena-Rodriguez*, during deliberations a juror revealed his opinion that the defendant "did it because he's Mexican" and that an alibi witness was not credible because the witness "was an illegal" (the witness was a legal resident).

The Supreme Court reversed the conviction despite the federal no-impeachment rule for jury verdicts. Regarding *voir dire* about race, the Court stated:

> In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*.[3]

So, what should courts do about the biases and prejudices that jurors bring with them to court? After the May 2015 annual meeting for the U.S. District Court, Western District of Washington, judges and lawyers began discussing the issue. This led to then-Chief Judge Marsha Pechman appointing a bench-bar-academic committee, chaired by Senior Judge John C. Coughenour, to develop an answer.[4]

"While the committee was meeting, a criminal trial occurred in front of Judge Jones," said committee member Jeffery Robinson, an eminent member of the criminal defense bar. "The federal defenders representing the person accused showed a videotape that dealt with potential race bias as part of the *voir dire*. After the trial was concluded, the committee spoke to Judge Jones, the federal prosecutors, defense lawyers and some of the jurors. Based on all of the committee work, including the interviews, the committee developed a script and worked with a production company to produce a video presentation on the nature and impact of implicit or unconscious bias."

In February, after nearly two years of work, the video was finished and the committee had developed pattern jury instructions on implicit bias for use in criminal cases; they were adopted by the Court.[5] The instructions incorporate language regarding unconscious bias into a preliminary instruction, the witness credibility instruction, and a closing instruction. The preliminary instruction states:

> It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual preference, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

The Court has included the following statement with the online version of the instructions and video:

> The Western District of Washington's bench and bar have long-standing commitments to a fair and unbiased judicial process. As a result, the emerging social and neuroscience research regarding unconscious bias prompted the Court to create a bench-bar-academic committee to explore the issue in the context of the jury system and to develop and offer tools to address it….
>
> Accordingly, the proposed instructions are intended to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility and in its decision-making. The instructions thus serve the purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations.

The video features Judge Coughenour, Robinson, and Annette Hays, acting U.S. attorney for the Western District of Washington. These three explain how such automatic preferences and biases can influence our perceptions and decisions,

threatening the constitutional right to fair trial and due process, and jeopardizing public confidence in the legal system.

Introducing the topic of implicit bias during juror orientation is optimal. Research shows that awareness of unconscious biases is key to minimizing their effects on perceptions and decision-making. Social science research also shows that impressions formed early can shape the understanding of what follows; this is termed "priming" and "cognitive filtering."[6]

Such timing is important because it is during orientation that jurors are introduced to the concepts of the right to fair trial, the role of the jury system, and the need to discard bias and prejudice to decide the case fairly. Awareness of unconscious stereotypes and biases is logically related.

Building on the juror orientation video are the pattern jury instructions. Preliminary instructions prepare jurors for questioning during *voir dire* related to conscious and unconscious bias. They also legitimize the attorneys' subsequent inquiries because the instructions come from the judge. Other instructions in the packet, to be used before opening statements and at the close of the evidence, caution jurors not to allow biases and stereotypes to affect their evaluation of the evidence and decisions. These instructions are similar to those used in other jurisdictions.[7]

Some have questioned whether these instructions constitute an impermissible comment on the evidence, in violation of Article IV, Section 16 of the Washington Constitution.[8] This is nonsense.

"It's not a comment on the evidence," Robinson says, "it's a comment on the way people think. It's a comment on the existence of unconscious bias and how to identify it and eliminate it. It's the court saying you can't use race to determine if a witness is being truthful, or as a reason to convict my client."

Moreover, courts already caution jurors against relying on prejudice or bias, e.g., WPIC 1.01 and 1.02, in reaching a verdict. The implicit bias instructions simply add references to unconscious prejudices and biases.

Targeted *voir dire* is the third and an essential component when it comes to implicit bias. Studies show that racial bias is most influential when race is not an overt issue in the trial. Where race is prominent, as in a prosecution for a hate crime or a civil case involving racial epithets, jurors make an effort to combat their prejudices.

However, where race is never mentioned but lurks in the background, e.g., where a party in a civil case, or the defendant or victim in a criminal case, or important witness in any type of case, is a person of color, that racial or ethnic bias is most likely to rear its ugly head.[9] Consider *Colorado v. Pena-Rodriguez*. Would the juror who did not reveal his racist views until he got to the jury room have been removed for cause during *voir dire* if he had expressed those views during jury selection?

Counsel's job in jury selection "is to get jurors to reveal their real beliefs," Robinson says. Open-ended questions are best for sparking discussion, especially if focused on controversial subjects such as Donald Trump's travel ban, Black Lives Matter, the Confederate flag, etc. Or lawyers could simply ask what the jurors thought about the implicit bias video. The point is to get jurors talking in order to give the lawyers sufficient information for an intelligent exercise of for-cause and peremptory challenges.

Racial and other prejudice/bias are part of the fabric of American life and, hence, are endemic to the jury system. "The fact is that every single person in that courtroom has racist thoughts. It's not a white or black issue; it's an American issue," Robinson says. ■

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[1] The IAT is available at *https://implicit.harvard.edu/implicit/takeatest.html*.

[2] No. 15-606, slip opinion, March 6, 2017.

[3] *Colorado v. Pena-Rodriguez*, slip op. at 14.

[4] The committee members, drawn from the bench, academia, the civil bar, the U.S. Attorney's Office and the criminal defense bar, were: Judge Coughenour, Judge Richard Jones, Annette Hayes, Corrie Yackulic, Jonathan Markovitz, L. Song Richardson, Michael Filipovic, Patty Eakes, Tessa Gorman and Jeffery Robinson.

[5] The jury instructions and video are available online at: *http://www.wawd.uscourts.gov/jury/unconscious-bias*.

[6] Anna Roberts, "(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias," 44 Conn. L. Rev. 827, 863–66 (2012). See also, "Jury Diversity and Implicit Bias: Tilting the Scales Toward Racial Balance" (Parts One & Two), KCBA Bar Bulletin, November 2016 at 4–5 – *https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=11&Year=2016&AID=article3.htm*; KCBA Bar Bulletin, December 2016 at 16–17 – *https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=12&Year=2016&AID=article11.htm*.

[7] See American Bar Association, "Achieving an Impartial Jury (AIJ) Toolbox," at 17–22, available at *http://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.authcheckdam.pdf*.

[8] "Judges shall not charge juries with respect to matters of fact, nor comment thereon ...." Wash. Const. Art. IV, section 16. A statement or instruction would be a comment on the evidence "[i]f the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable ...." *State v. Lane*, 125 Wn.2d 825, 838 (1995).

[9] See Samuel R. Sommers and Phoebe C. Ellsworth, "'Race Salience' in Juror Decision-Making: Misconceptions, Clarifications and Unanswered Questions," 27 Behav. Sci. & L. 599 (2009).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CR. NO. 1:16-cr-00059-S-PAS-1
	)	
JACOREY SANDERS	)	

JACOREY SANDERS'S MOTION FOR ATTORNEY CONDUCTED VOIR DIRE ON IMPLICIT RACE BIAS

JACOREY SANDERS, by and through his counsel, moves the Court for an Order allowing counsel for the parties to question the potential jurors on issues of implicit race bias. In support thereof Mr. Sanders submits the attached memorandum.

Respectfully submitted

JACOREY SANDERS
By his attorney,
/s/ Tara I. Allen
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CERTIFICATION

I hereby certify that a copy of this MOTION was delivered by electronic notification to all parties registered on ECF this June 3, 2017.

/s/ Tara I. Allen

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CR. NO. 1:16-cr-00059-S-PAS-1
	)	
JACOREY SANDERS	)	

MEMORANDUM IN SUPPORT OF JACOREY SANDERS'S MOTION FOR ATTORNEY CONDUCTED VOIR DIRE ON IMPLICIT RACE BIAS

I. INTRODUCTION

JACOREY SANDERS is a young Black man charged with possessing a firearm in violation of 18 U.S.C. § 922(g). Shortly, he will appear for trial in the Federal District of Rhode Island where a group of predominantly White jurors will decide his guilt or innocence. He has moved for an order that would allow the lawyers to voir dire the jury panel on matters of implicit race bias. The Court should grant the motion.

II. ARGUMENT

1. Implicit Social Bias Poses A Challenge to Jury Selection.

Jury impartiality is a core requirement of the right to trial by jury guaranteed by the U.S. Constitution. *See Morgan v. Illinois*, 504 U.S. 719, 727 (1992) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."(internal citations omitted)).

Specifically, the Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

> cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI (emphasis added).

An impartial jury is one that has not formed an opinion prior to hearing and assessing all of the evidence, and one that bases its decision only on the assessment of the evidence not on pre-formed conclusions and biases. *See Morgan*, 504 U.S. at 727.

Implicit bias stands in stark contrast to impartiality. "Implicit bias" is a term of art referring to the formation of opinions based on the "relatively unconscious and relatively automatic features of prejudiced judgment and social behavior." *See* Brownstein, Michael, "Implicit Bias", The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.), available at https://plato.stanford.edu/entries/implicit-bias/. In other words, implicit bias draws conclusions based on pre-formed opinions rather than the evidence presented. In terms of juror impartiality, "[t]he theory of the law is that a juror who has formed an opinion cannot be impartial." *Morgan*, 504 U.S. at 727 (internal citation omitted). Drawing conclusions on the basis of "implicit bias" would contravene the core principle of impartiality of the Sixth Amendment.

The research group Perception Institute[1] offers the following definition of "implicit bias" --

> Thoughts and feelings are "implicit" if we are unaware of them or mistaken about their nature. We have a bias when, rather than being neutral, we have a preference for (or aversion to) a person or group of people. Thus, we use the term "implicit bias" to describe when we have attitudes towards people or associate stereotypes with them without our conscious knowledge. A fairly commonplace example of this is seen in

[1] According to its website, the Perception Institute is a national consortium of social scientists, law professors, and advocates focusing on the role of the mind sciences in law, policy, and institutional practices. Its cofounders are Alexis McGill Johnson, of Princeton and Yale Universities, and Seton Hall University School of Law Professor Rachel Godsil renowned author and lecturer on issues of implicit bias and racial anxiety. *See* https://perception.org/about-us/team/

> studies that show that white people will frequently associate criminality with black people without even realizing they're doing it.

"Implicit Bias," Perception Institute, available at https://perception.org/research/implicit-bias/.

The Sixth Circuit has explained the concept this way,

> The concept of "implicit bias" is defined, generally, as bias that is "not necessarily openly and explicitly expressed, but [is] harbored nonetheless." Implicit biases are "often not conscious, intentional, or maliciously—based," as opposed to explicit bias—generally defined as "bias that is openly expressed."
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> *United States v. Ray*, 803 F.3d 244, 260–61 (6th Cir. 2015) (citing Melissa L. Breger, The (in)visibility of *Motherhood in Family Court Proceedings*, 36 N.Y.U. Rev. L. & Soc. Change 555, 560 (2012).

Massachusetts State Judge Kenneth Desmond has said, "[i]n the most basic sense, implicit bias is 'thoughts about other people you didn't know you had.' Consequently, it is often difficult for individuals who do not fall victim to the impact of certain biases to identify the ways they are manifested." Hon. Kenneth V. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, Boston B.J., Summer 2016, at 3.

A plethora of scholarly articles support that implicit social bias poses a challenge to legal theory and practice, and to jury selection in particular because it can lead to erroneous assumptions that contravene the accused's Sixth Amendment right to a trial by an impartial jury. *See e.g., Ray*, 803 F.3d at 260–61 (citing 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, 152 (2010); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 465 (2010); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007)). *See also* Anna Roberts, (*Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. L. Rev. 827, 833 (2012); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC Irvine L. Rev. 843, 844 (2015) ("'Implicit

biases' are discriminatory biases based on either implicit attitudes-feelings that one has about a particular group-or implicit stereotypes-traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do. . . African-Americans, for example, are stereotypically linked to crime and violence; their behavior is more likely to be viewed as violent, hostile, and aggressive than is the behavior of whites; and they are more readily associated with weapons than are whites."); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DePaul J. for Soc. Just. 139, 154 (2010) ("Implicit bias against socially underprivileged groups and outgroups is prevalent in our culture. As a result, there is a chance that implicit bias is present anytime a member of such a group is the defendant in a criminal trial. "); Siegfried C. Coleman, *Reliance on Legal Fiction: The Race-Neutral Juror*, 41 S.U. L. Rev. 317 (2014) ("This article highlights the notion that these unchecked biases are alive and well in all jurors as an innocent and necessary human characteristic and advocates the position that these biases should be acknowledged and formally addressed."); Hon. Kenneth V. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, Boston B.J., Summer 2016, at 3 ("Throughout the past several decades, State and Federal appellate courts have candidly acknowledged the implicit biases of litigants and jurors.").

2. Ferreting Out Implicit Bias is Essential to the Selection of an Unbiased Jury in This Case.

Jacorey Sanders is a 23-year old young adult Black man accused of possessing firearms that were seized following a traffic stop encounter with Rhode Island State Police. The issue of suspected gun possession by Black males and the growing tension between the police and Black communities, has been a hotly discussed issue in the United States in light of the publicity surrounding recent police shootings of unarmed Black males.[2] In light of

[2] *See e.g.,* Associated Press, "Demonstrators Protest Not Guilty Verdict for Cop who Shot an Unarmed Black Man," New York Post (May 18, 2017), available at http://nypost.com/2017/05/18/cop-found-not-guilty-in-shooting-of-unarmed-black-man//; "Black and Blue" examines divide between police and black communities, CBS This Morning (May 9, 2017), available at http://www.cbsnews.com/news/black-and-blue-police-black-america-book-by-cbs-

these issues as well as the abundance of research documenting the existence implicit race bias, it only makes sense to acknowledge Mr. Sanders's race and some of the implicit biases that may present in this case. Jacorey Sanders has an ethnic sounding first name.[3] He presents with dark brown skin, and his hair is fashioned in a style called "locs" or "dreadlocks."[4] These race-related traits and characteristics may evoke all types of

news-correspondent-jeff-pegues/; Tribune News Service, "Videos Show Fatal Police Shooting of Unarmed Black Man Near San Diego, Chicago Tribune (Sept 30, 2016), available at http://www.chicagotribune.com/news/nationworld/; Somashekhar, Sandhya, et al., "Black and Unarmed: A Year After Michael Brown's Fatal Shooting, Unarmed Black Men are Seven Times More Likely than Whites To Die By Police Gunfire," The Washington Post (Aug. 8, 2015)(" It begins with a relatively minor incident: A traffic stop. A burglary. A disturbance. Police arrive and tensions escalate. It ends with an unarmed black man shot dead."), available at http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/?utm_term=.e841c59de4bb.

[3] "In the 1970s and 1980s it had become common within African-American culture to invent new names. Many of the invented names took elements from popular existing names. Prefixes such as La/Le, Da/De, Ra/Re, or Ja/Je . . . are common, as well as inventive spellings for common names." *See* "African-American Names," Wikipedia, The Free Encyclopedia (citing Rosenkrantz, Linda; Satran, Paula Redmond, *Baby Names Now: From Classic to Cool—The Very Last Word on First Names* (St. Martin's Griffin Aug.16, 2001), available at https://en.wikipedia.org/wiki/African-American_names#cite_note-rosenkrantz-9 (last visited June 3, 2017).

[4] Dreadlocks is an ethnic hairstyle popular among people of African descent, achieved by washing and twisting strands of hair into permanently tangled braids that are uncombed. *See* Dreadlocks," Wikipedia, The Free Encyclopedia, available at https://en.wikipedia.org/wiki/Dreadlocks#cite_note-21 (last visited June 3, 2017). The English Oxford dictionary defines "dreadlocks" as "[a] Rastafarian hairstyle in which the hair is washed but not combed and twisted while wet into tight braids or ringlets hanging down on all sides." *See* English Oxford Living Dictionary, Available at https://en.oxforddictionaries.com/definition/dreadlocks.

presuppositions in the minds of the jurors. Such presuppositions need to be ferreted out and frankly discussed to allow for a fair trial. For example, yesterday the government filed a Pretrial Memorandum in which it indicated it will seek to show the jury some marijuana that was found inside the driver's side door of the car in which Mr. Sanders was a backseat passenger. (ECF Doc. No., 39 at 7). As mentioned above, Mr. Sanders wears his hair in locs. Locs or dreadlocks are commonly associated with the Rastafari, a predominantly Black religious movement that originated in Jamaica and which is known, in part, for its ceremonial use of marijuana.[5] Although Jacorey Sanders is neither Rastafari nor a drug user, prior to the prospective jurors hearing, seeing or fairly assessing the evidence, they could perceive Mr. Sanders as culpable based solely on an implicit bias that associates marijuana with a dreadlocks hairstyle. Direct and thorough inquiry into the potential jurors' perceptions would sift out this type of implicit bias and identify prospective jurors who may have predetermined key issues relevant to Mr. Sanders trial. Such inquiry will also assist both the Court and the lawyers to determine whether the prospective jurors can consciously put aside any such bias.

[5] The Rastafari interpret Bible passages and biblical traditions from a pro-Black perspective. They observe a strict vegetarian dietary code, a distinctive dialect, and a ritual calendar devoted to, among other dates, the celebration of various Ethiopian holy days. Melissa R. Johnson, *Positive Vibration: An Examination of Incarcerated Rastafarian Free Exercise Claims*, 34 New Eng. J. on Crim. & Civ. Confinement 391, 399 (2008).

"Perhaps the most familiar feature of Rastafari culture is the growing and wearing of dreadlocks, uncombed and uncut hair which is allowed to knot and mat into distinctive locks." *See* Kamille Wolff, Out of Many, One People; E Pluribus Unum: (Fn2) an Analysis of Self-Identity in the Context of Race, Ethnicity, and Culture, 18 Am. U. J. Gender Soc. Pol'y & L. 747, 785, n. 99 (2010).

"[T]he majority of Rastafari endorse the religious smoking of marijuana because they associate it with Biblical passages, such as 'thou shalt eat the herb of the field' and 'eat every herb of the land.' It is considered to be the high sacrament and essential to religious observance." *See* Johnson, 34 New Eng. J. on Crim. & Civ. Confinement 391 at 399. *See also* Derek O'Brien & Vaughan Carter, *Chant Down Babylon: Freedom of Religion and the Rastafarian Challenge to Majoritarianism*, 18 J.L. & Religion 219, 226 (2002).

3. A Thorough Voir Dire on Implicit Race Bias is Important to the Proper Exercise of Peremptory Challenges.

The Constitution prohibits exercising racially discriminatory peremptory challenges. *See Georgia v. McCollum*, 505 U.S. 42, 48 (1992). Under *Batson v. Kentucky,* 476 U.S. 79 (1986), and its progeny, including *Georgia v. McCollum*, 505 U.S. 42 (1992), and *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994), no party can exercise peremptory challenges based on personal race biases, gender biases or prejudices. Under the prevailing case law, where there is a *prima facie* case of racial discrimination in the exercise of a party's peremptory challenges, a party "must articulate a racially neutral explanation for the peremptory challenge." *McCollum,* 112 S.Ct. at 2359; *see Batson,* 476 U.S. at 98. To enable Mr. Sanders to exercise his peremptory challenges intelligently and adequately, and to ensure that the challenges can be supported by a race and gender neutral explanation, individualized voir dire is essential.

The Supreme Court's decision in *J.E.B.* declared:

> If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently. *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602 . . . (1976) (Brennan, J., concurring in judgment) (voir dire 'facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause'); *United States v. Whitt*, 718 F.2d 1494, 1497 (CA10 1983) ('Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges').

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143–44 (1994).

As Justice O'Connor pointed out in her concurring opinion in *J.E.B.,* litigants can no longer simply rely on their intuition in exercising peremptory challenges. Fairness dictates

that the lawyers be permitted the opportunity to voir dire the jury panel to ensure that a fair and impartial jury is selected consistent with the dictates of *Batson* and its progeny.

4. Relative to the Court, the Attorneys are in the Better Position to Question the Jurors About Implicit Race Bias in this Case.

Discussing some of the shortfalls of judge conducted voir dire, Federal District Court Judge Mark Bennett acknowledged that, in testing for prospective jurors' biases judges commonly ask questions such as, 'Can all of you be fair and impartial in this case?'" *See* 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, 152 (2010). While jurors almost uniformly answer that they can be fair, *Id.* 159, Judge Bennet noted that merely asking potential jurors that question does little or nothing to ferret out implicit bias, in part, because the question itself presumes that implicit bias is consciously known to the prospective juror, even though by its nature an implicit bias is not consciously known to the prospective juror. *See id.* ("Thus, a trial court judge schooled in the basics of implicit bias would be delusional to assume that this question adequately solves implicit bias.").

Indeed, according to the National Center for State Courts, social scientists have observed that simply asking people to report their attitudes about race and fairness is a flawed approach because most people do not consciously recognize their own implicit biases, or they may not wish or may not be able to accurately report their own bias. "This is because people are often unwilling to provide responses perceived as socially undesirable and therefore tend to report what they think their attitudes *should* be rather than what they know them to be. More complicated still, people may not even be consciously aware that they hold biased attitudes."[6]

[6] National Center for State Courts, Helping Courts Address Implicit Bias, Frequently Asked Questions, What is Implicit Bias?, available at http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx (last visited May 27, 2017).

VOIR DIRE – ATTORNEY RESPONSE

what it is.

There is a question in this case about items, guns, drugs, and other property and who it belongs to. And our concern is that you may treat or may be inclined to treat, because of some unconscious association, one type of witness differently than another type of witness. And that's the reason why we played the video, so we could spur this discussion. Does that make sense?

I see, Juror Number 21, that you're nodding your head. What are you thinking?

VOIR DIRE – LENSE QUESTIONS

MS. SYKES: Do you think it's possible that people can see things -- based on, you know, their racial composition, that people see things from a different lens and that that can kind of direct outcomes?

I haven't heard from you, sir.

PROSPECTIVE JUROR: Do I think that? Yes, I do. I think that there's a -- probably a discrepancy between, like, news broadcasting channels that one might actually try to stir up some trouble with a very biased reporting on issues that would infuriate anybody, or some people, whereas another station may report on the same -- same issue and present it in a way that is -- does not infuriate a

VOIR DIRE – LENSE QUESTIONS

interactions, and then the -- the -- or the conclusion or the reason is attributed to racial problems.

MS. SYKES: So that brings me kind of to another question, which is, you know, you're going to hear throughout the trial that there are going to be different perceptions of events, you know, based on the lens from which the person is seeing it.

How do you reconcile that in your mind and -- you know, I'd like to ask people we haven't

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heard from, but you.

PROSPECTIVE JUROR: Yeah, I mean the fact that we view the same events through different lenses because of the color of our skin is racism, right? It's because we were raised in a systemically racist society. And both sides can be presenting -- what they see as the series of events can be true.

But the fact of the matter is we need to recognize that we have a racist history in Oregon, and we have a predominantly white society in Oregon, and we have a lack of diversity in Oregon, and we need to take those claims seriously. We need to try to see it from other people's side, need to try to be empathetic to racial relations.

VOIR DIRE – RAISING RACE

MS. SYKES: Would anybody agree or disagree there's more work to be done in eliminating racism? Who agrees with that?

PROSPECTIVE JUROR KENT: Yeah, bottom line.

VOIR DIRE – RAISING RACE

MS. SYKES: So others also raised their hands. Has anybody else been impacted by race discrimination in their lives or know of someone else who has?

PROSPECTIVE JUROR: I haven't been impacted, but I teach adults of all ethnic groups, and I see it in the classroom all the time.

MS. SYKES: So where -- what classroom setting?

PROSPECTIVE JUROR: I teach at Portland Community College and Mt. Hood Community College, and it's a class for people who are trying to open a foster home, adult foster home.

MS. SYKES: And what have you observed with this class in the form of discrimination?

VOIR DIRE – RAISING RACE

Who's familiar with the racial history of Oregon? What is your experience?

PROSPECTIVE JUROR: That Oregon was called the white utopia, and that while slavery was not permitted, black people were not allowed in the state, and we also have a -- well, a colored history with Vanport, the shuffling off of minorities to undesirable parts of the city. That's the resettling of people that lived there after the flooding. It's -- we built -- it doesn't surprise me that we have a long way to go, considering our history here.

MS. SYKES: Does anybody have thoughts on whether that still plays out today, that history carrying forward?

VOIR DIRE – RAISING RACE

Anybody else find it difficult to talk about race issues? It's a difficult topic. You smiled. Do you have thoughts on that?

PROSPECTIVE JUROR: Me? I mean I -- I grew up in West Linn; I went to school in West Linn. It's one of the whitest suburbs around, honestly. And yeah, I've thought a lot over the last couple of years about the fact that race is difficult to talk about, and I think that it hurts us that we don't talk about it.

PROSPECTIVE JUROR: Comments on breaks, comments sometimes even right to the face, too. And it's not one ethnic group; it's all ethnic groups.

MS. SYKES: How did that make -- how does that make you feel when you hear that kind of negative race -- racially toned --

PROSPECTIVE JUROR: First of all I get embarrassed, and then I think, "Oh, my God, what am I going to do now to try to stop that?" I try to preface that from the very beginning, no comments, blah-blah-blah, everybody's got their own particular curriculum kind of thing, but it always happens.

MS. SYKES: It's difficult to talk about race, right?

PROSPECTIVE JUROR: And it comes up in my curriculum, too.

(EXCERPT OF PROCEEDINGS)

(September 29, 2020)

* * * * * * * *

MR. KIM: Good morning. My name is Benjamin Kim, and I represent Mr. [redacted]s with Mr. Kauffman here. I just have a few questions for you, and I have limited time. I'm going to refer to your juror number rather than your name. I apologize for that. I'm not trying to be rude.

And I do have -- would like to start off with some questions about race and your feelings about race. As you can see, my client is African American. He's pretty much the only person who is African American who is participating in this jury -- excuse me, courtroom that you see in front of you.

Can you all hear me? Okay. Is there anyone who can't hear me? Sorry.

I'm going to start with Juror No. 15. Can you hand the mic to him?

So if I were to ask you, Juror No. 15, if you took like a hundred random people, and then of those hundred random people, is there a number, a percentage of that hundred that you think would let race affect their decision about determining somebody's credibility or whether or not that person was guilty of a crime if they had to decide that? Is there a percentage that you can think of when we're talking about a hundred people?

PROSPECTIVE JUROR NO. 15: The first number that came to mind was around 40 to 50 percent.

MR. KIM: Forty to 50 percent.

I'll ask it this way. Does anybody think the number by Juror No. 15 is low? Would you please raise your hand if you think it's low.

PROSPECTIVE JUROR NO. 17: Would you repeat the question?

MR. KIM: Sure. And that's Juror No. 17.

The question is if I were to ask you to estimate, in your opinion, you take a hundred random people and you ask them -- and of that hundred random people, how many, percentage of those hundred random people do you think would allow race to affect their ability or their judgment in deciding somebody's credibility or whether that person was guilty of a crime, if they were the ones that had to decide that. Is there a percentage? So the question, Juror No. 15 said, was 40 to 50 percent, and then my follow-up question was do you think that number is low? If it's low, please raise your hand.

Okay. There are two jurors.

Could you please raise your hand if you think that number is high?

(Hands raised.)

MR. KIM: Okay. So Juror No. 17, what do you think that number should be?

PROSPECTIVE JUROR NO. 17: In a perfect world it would be zero percent. Everybody would give everybody equal chance. But I believe, though, since we are in America, it probably is about half of the people who would actually take race into consideration and not give an honest or true evaluation of the trial.

MR. KIM: Okay. So I think maybe you misheard me. But I think Juror No. 15 said about 40 to 50 percent would let race factor in. And you agree with that?

PROSPECTIVE JUROR NO. 17: Yes.

MR. KIM: And Juror No. 19, you raised your hand. Do you think that number is high or low?

PROSPECTIVE JUROR NO. 19: I think it's way high.

MR. KIM: The microphone is coming to you.

PROSPECTIVE JUROR NO. 19: I would say maybe 7 percent. But it also depends on the geographics. Inner city, maybe it's higher. I don't know. It depends on the crime rate, where you're living, things. But on the whole, I'd say it's low. But maybe I'm naive. But I think most people would say 7 percent.

MR. KIM: Okay. Is there anyone -- could I see a show of hands who thinks that Juror No. 17 and Juror No. 15 are probably around correct, 50 percent? Please raise your hand if you agree with that.

(Hands raised.)

MR. KIM: I see a number of hands that are going up agreeing with that.

So I'm going to ask a follow-up question, and I don't mean to offend anyone. But of you, all of you 13 individuals, how many would let race affect your decision making if you were to decide credibility or whether or not a person was guilty of a crime? Could you please raise your hand if you would allow race to do that, whether you intend to or not.

And I don't see a show of hands.

Juror No. 15, do you see the problem that I have? Can you explain to me what the problem I have is?

PROSPECTIVE JUROR NO. 15: I think -- I don't think everybody is aware of their implicit biases. And that can come to show if they're presented with a situation where they needed to be unbiased. You know, you're raised a product of your environment, so if you're around certain groups, you can sort of build up implicit bias towards another race and not even know it.

MR. KIM: So given the answers to the questions that I've asked, is there -- does anybody feel 100 percent sure that race, which I think we agree shouldn't play a factor in decision making, is there anybody who is 100 percent sure that race isn't going to affect this case? Please raise your hand if you thank you're 100 percent sure.

PROSPECTIVE JUROR NO. 17: Race isn't going to affect

our decision?

MR. KIM: That you're concerned that race might play a factor in this case. It's a hard question.

PROSPECTIVE JUROR NO. 19: I wouldn't be concerned.

MR. KIM: Juror No. 19.

JUROR NO. 19: Yeah. I don't know why it wouldn't be a concern to everybody having race as a -- we're just human.

MR. KIM: Can everybody promise me, to the best of their abilities, that they will not allow race to play a factor in this case? Does anybody disagree with that? Please raise your hand. I don't see any hands.

I do have a couple specific questions. Mr. -- actually, Juror No. 19, you had -- you have the microphone sir.

PROSPECTIVE JUROR NO. 19: Yes, sir.

MR. KIM: You had mentioned in your questioning from the judge, you asked whether this was a Black Lives Matter case. Can you tell me why you were concerned about that?

PROSPECTIVE JUROR NO. 19: Well, it's frightening, and I think they're racist.

MR. KIM: Who are?

PROSPECTIVE JUROR NO. 19: Black Lives Matter.

MR. KIM: Would you let that feeling affect your ability to deliberate in this case? And this isn't a Black Lives Matter case at all.

PROSPECTIVE JUROR NO. 19: Well, no, but I -- you're

talking about a subject that's in every -- I mean, I would try not to, yeah.

MR. KIM: When you say -- this isn't a Black Lives Matter case. When you say you'd try not to, do you have a concern that it would enter in somehow?

PROSPECTIVE JUROR NO. 19: Yeah, I would have a concern. You have a concern. Why wouldn't I?

MR. KIM: Thank you. And I know it's a difficult process we're going through, and I'm trying to ask you questions and, frankly, I'm trying to ask them quickly, and I apologize, but --

PROSPECTIVE JUROR NO. 19: I'm sorry, too.

MR. KIM: That's okay. Could you explain why you have a concern and what that concern is?

PROSPECTIVE JUROR NO. 19: Because I see more racial tension in this country in the last few years than I've seen in a lifetime. And it's scary and I don't see how anybody sitting here couldn't think about it.

MR. KIM: But is there something about that that you think would affect how you look at this case?

PROSPECTIVE JUROR NO. 19: Well, I hope not, but when you walk in the place, there's Black Lives Matters across the street, and, you know, the riots and everything. I don't know.

MR. KIM: So are you saying that you think there's a chance that even though you're not -- you're trying not to,

that you're concerned that somehow the Black Lives Matter issues would affect your deliberations in this case, even though you don't want it to?

PROSPECTIVE JUROR NO. 19: I don't want it to, no. I don't think it would, but I -- I just -- I don't know. I'm terrified. I'm worried for my kids. I don't even feel right what's going on in our country today, so I don't know.

THE COURT: Mr. Kim, you're fine. You don't need to follow up anymore.

MR. KIM: Thank you, Your Honor.

And then Juror No. 20, I think I just misheard some of your answers and I want to clarify. When the judge asked you about your brothers who are -- your family members who are Torrence police officers, I believe the judge asked you something to the effect of do you think it might affect your ability to deliberate in this case, and I heard you say first yes and then no. Are you concerned about --

PROSPECTIVE JUROR NO. 20: It wouldn't affect my ability.

MR. KIM: So when you were answering the judge, you weren't implying at all that it would affect your ability, right?

PROSPECTIVE JUROR NO. 20: Right.

MR. KIM: And Juror No. 24 -- excuse me. Juror No. 25, I'm sorry. Mr. Miller.

PROSPECTIVE JUROR NO. 25: Yes.

MR. KIM: You described an incident that occurred with -- where you were arrested for domestic violence.

PROSPECTIVE JUROR NO. 25: That's right.

MR. KIM: And then the case was dropped, correct?

PROSPECTIVE JUROR NO. 25: Correct.

MR. KIM: Can you describe for me a little about how you felt about that experience? I'm sure it's not going to be pleasant, but if you could elaborate for me a little more.

PROSPECTIVE JUROR NO. 25: Well, I was pretty upset with my wife. It was kind of uncalled for. Of course, there was a little alcohol involved, but there's nothing else really to say. I mean, the law worked.

MR. KIM: But you were arrested in that case?

PROSPECTIVE JUROR NO. 25: I was.

MR. KIM: Do you have any bad feelings about the fact you were arrested and you didn't do anything?

PROSPECTIVE JUROR NO. 25: No. They were doing their job.

MR. KIM: Thank you, Your Honor.

(Further proceedings were held but are not herein transcribed.)

* * * * * * * *

MR. KIM: Good morning. My name is Benjamin Kim, and Mr. Kauffman and I, we represent Mr. [redacted] here. I do have a few questions for you. I'm going to refer to you by jury

numbers. It's easier and a little faster. I apologize if it appears rude.

As you can tell, my client is African American. I think that's pretty obvious here, and I think he's the only African American person in this room right now. So I do need to ask you some questions about race, particularly in this climate and the feelings about race.

And I'm just going to pick on somebody.

THE COURT: I'm going to pause you there for just a moment. I forgot something I need to talk to the lawyers about.

(Discussion held off the record at sidebar between Court and counsel.)

THE COURT: I want to thank the jurors who answered honestly, but you two who I've talked to, 34 and 38, about your ability to be fair, you gave me honest answers, and I appreciate that. That means I am going to excuse you. I'll have someone escort you down to the second floor, where you'll be able to collect your belongings and move on.

Thank you for coming in today. I really appreciate it.

Mr. Kim, go ahead.

MR. KIM: Thank you. I'm going to pick on somebody who is still here, and that's Juror No. 37.

So if I were to ask you your opinion, if you took

like a hundred random people, and of those hundred random people you asked -- you were trying to make a decision, what percentage do you think of those hundred random people would use race as a factor in determining somebody's credibility or if they had to decide whether that person had committed a crime or not? So a hundred random people, the percentage that race would be a factor for them. What do you think?

PROSPECTIVE JUROR NO. 37: A hundred random people making a decision and race would be the factor? That's the question?

MR. KIM: A factor.

PROSPECTIVE JUROR NO. 37: I think unfortunately that it's more obvious that that's a huge factor for a lot of people these days, so --

MR. KIM: If I were to ask you to quantify it?

PROSPECTIVE JUROR NO. 37: It seems like, from the current social situation, that it's -- I would say a conservative would be like 70 percent that that would be a factor.

MR. KIM: Does anyone think that Juror No. 37 is quoting too high a number and that the number is significantly lower? And if you could please raise your hand.

I don't see anybody raising their hand. Is there anyone that thinks the number is actually higher than 70 percent? Please raise your hand.

(Hands raised.)

MR. KIM: Okay, Juror No. 37, since you have the mic, you think it's higher than 70 percent?

PROSPECTIVE JUROR NO. 37: I think the 70 percent is conservative, what we're seeing now and what the response --

MR. KIM: So I'm going to ask a follow-up question of everyone. Of the remaining 10 to 11 people, how many of you would allow race to play a factor in determining whether or not somebody's credibility or whether or not that person -- you found that person had committed a crime? Could you please raise your hand if you think that you would factor in.

I see no show of hands.

So Juror No. 17, do you see the problem that I have?

THE COURT: 37, you mean?

MR. KIM: 37.

PROSPECTIVE JUROR NO. 37: No. I am hesitant. I think we hope it doesn't raise. I love your point, and I think that's a good point. I should have raised my hand. I hope it wouldn't be a factor, but the realistic -- what we're seeing, what we're seeing with the current social situation is we know race is a factor. We don't want it to be, and we hope we can make judgments, but we have to be aware it's a factor and think of it from a more objective perspective.

MR. KIM: Does anyone disagree with Juror No. 37, what she just said there? Anyone think we shouldn't be aware

that is a factor? Please raise your hand if you do.

(Hands raised.)

MR. KIM: I see a show of hands.

I'm sorry, Juror No. 36.

THE COURT: Wait just a moment, sir, for the microphone.

PROSPECTIVE JUROR NO. 36: I just think it's very hard to answer those questions based on lack of specifics.

MR. KIM: I'm sorry, I missed a word that you said.

PROSPECTIVE JUROR NO. 36: Specifics. It's hard to answer those questions that they're so unspecific to a certain situation.

MR. KIM: Sure. Do you think that there is a significant chance that because my client is African American, that somehow his race would be used improperly somehow, affecting what happens in this trial? Are you concerned at all about that?

PROSPECTIVE JUROR NO. 36: Am I concerned that it would be used by one side or the other? Yes. I could not speak to improperly because I don't know the specifics.

MR. KIM: Sure. Is anyone concerned or have any strong feelings about the Black Lives Matter movement, particularly here in Portland, and whether or not that would in any way affect -- this is not like a Black Lives Matter case, but is there anyone who has strong feelings about that, that

you think might affect you in this case? Please raise your hand if you do.

And I see no show of hands.

Juror No. 31 -- excuse me, I have a glare. I just noticed, I'm not sure whether you had a comment about my question or whether or not you don't like my question.

JUROR NO. 31: No, it would be remiss, and I agree, it would be remiss if I didn't say that it's not an important thing. As a teacher, I have two children who are part Hawaiian, and this is something we talk about daily in our household, especially with my husband being a deputy. But he is also a strong ally of Black Lives Matter. It's a social movement and it's important, and it would be remiss of me to say -- I'm white. I know I have privilege and it surrounds a lot.

MR. KIM: Thank you. And I appreciate your answer and I'm certainly not trying to make anyone uncomfortable or feel bad about it, but under the circumstances, I'm just trying to do my job and make sure my client gets a fair trial in this matter.

Juror No. 31 --

PROSPECTIVE JUROR NO. 31: That's me.

MR. KIM: I'm sorry. Excuse me. I had some questions. Your husband is a jailer?

PROSPECTIVE JUROR NO. 31: Yeah, he works in the jail

at Yamhill County.

MR. KIM: And I believe the jail is staffed by the sheriff's department there?

PROSPECTIVE JUROR NO. 31: That's correct.

MR. KIM: How long has he been an officer?

PROSPECTIVE JUROR NO. 31: We've been here about 14 years.

MR. KIM: Has he ever done patrol?

PROSPECTIVE JUROR NO. 31: He did in the very beginning, and then -- he's a Marine, so he, you know, follows the law and follows the rules and the captain --

MR. KIM: Did he ever come home and tell you stories about what he did at work?

PROSPECTIVE JUROR NO. 31: No.

MR. KIM: No?

PROSPECTIVE JUROR NO. 31: No.

MR. KIM: And Juror No. -- Mr. Trapp, 28, you said you were a reserve officer?

PROSPECTIVE JUROR NO. 28: Sure was.

MR. KIM: For how many years?

JUROR NO. 28: I think about two years.

MR. KIM: As a reserve officer, did you actually go on patrol and do things like that?

PROSPECTIVE JUROR NO. 28: Occasionally I rode along with a regular officer.

MR. KIM: How long ago was that, sir?

PROSPECTIVE JUROR NO. 28: I think it was around '82 and '83.

MR. KIM: Anything about that experience then that would affect you, since it was so long ago?

PROSPECTIVE JUROR NO. 28: I don't think so, it's been so long ago. Like I said, I only did it for two years, and I moved over to the Park Bureau, and I was there ever since.

THE COURT: Any other follow-up, Mr. Kim?

MR. KIM: No, Your Honor.

(END OF EXCERPT)

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RAISING UNCONSCIOUS BIAS IN VOIR DIRE

1. **MAKE A RELATIONSHIP WITH YOUR JURY**
   - **Invite exploration**
   - **Welcome perspectives, don't ask for agreement**
   - **Don't get defensive**

2. GOAL OF VOIR DIRE FOR UNCONSCIOUS BIAS IS BUY-IN AND ACCEPTANCE
   - **Get the jury to agree to use the tools**

Achieving an Impartial Jury (AIJ) Toolbox

INTRODUCTION to the AIJ Project & Toolbox

The ideal of a fair and impartial jury is enshrined in the American ethos.[1] But achieving this ideal has remained elusive.[2] Many years of research focusing on the judicial system demonstrates that, at nearly every point, from school discipline[3] to death sentences,[4] results are unduly skewed along lines of race, ethnicity, or other group identity.[5] These results persist despite the deep and

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[1] *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); *see also* U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved . . . ."); Georgia v. McCollum, 505 U.S. 42, 49 (1992) ("The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes."); Strauder v. West Virginia, 100 U.S. 303, 309 (1880) ("And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?"); AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS (2005), Principle 11, at 13–17.

[2] *See generally*, e.g., Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361 (2012); Equal Justice Initiative, *Illegal Discrimination in Jury Selection: A Continuing Legacy* 6, 38–40 (2010), available at http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf. *See also* Dennis J. Devine & Laura D. Clayton, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH. PUB. POL'Y & L. 622 (2001) (offering literature review and concluding, "To summarize, the pattern is overwhelmingly clear: Defendant race and victim race are related to the decisions of juries in the sentencing phase of capital trials."); Leslie Ellis & Shari Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1033, 1038–39 (2003) (discussing perceptions of fairness and the legitimizing value of diversity of juries).

[3] *See, e.g.*, U.S. Dep't of Educ. Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot: School Discipline* (Mar. 21, 2014), http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf.

[4] *Race and the Death* Penalty, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/race-and-death-penalty (last visited Mar. 24, 2015) (cumulating data and research and summarizing, "Racial bias has always been a significant issue in death penalty debates. There have been many careful statistical studies indicating that race plays a significant role in determining who lives and who dies.").

[5] *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS ch. 3 (2010); Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON 1017 (2012), *available at* http://qje.oxfordjournals.org/content/127/2/1017.full.pdf+html; Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157 (2013) (cumulating research in criminal justice); Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin,

long-standing commitment of the bench and bar to eliminate bias in our legal institutions.[6]

Emerging social and neuroscience research offers a new and promising approach to achieve greater impartiality by focusing more on *implicit* bias than on *explicit* bias.[7] The American Bar Association (ABA) has been a leader in applying aspects of this research in various practice settings to reduce bias.[8]

Continuing this leadership, the *Achieving an Impartial Jury* (*AIJ*) project focuses on implicit bias in the context of the jury system and offers tools to address its impact.[9] Funded by an ABA Enterprise Grant, implementation of the *AIJ Project* was led by the Criminal Justice Section, the Section of Litigation, several ABA diversity entities, and a strong Advisory Group of leaders from the social sciences, the legal academy, the ABA, and the practicing bench and bar.[10]

This *Toolbox* is the core of the *AIJ Project*. Determining the contents of the *Toolbox* was an evolutionary process that began with a review of the

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Implicit Bias in the Courtroom, 59 UCLA L. REV. 1124, 1135–49 (2012) (reviewing points from first encounter with police to sentencing and also reviewing civil litigation); Sarah E. Redfield, Salma Safiedine & Sarina Cox, *Voir Dire*, *in* THE STATE OF CRIMINAL JUSTICE (2013) (cumulating discussion re: jury selection and voir dire); As these few references suggest, the literature is extensive.

[6] *See, e.g.*, AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT, Cannons 1–2, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html (last visited Mar. 24, 2015); *Id.* R. 2.2; ("A judge shall . . . perform all duties of judicial office fairly and impartially."); *Id.* R. 2.3. (A) ("A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice."); AM. BAR ASS'N JUDICIAL DIVISION, PERCEPTIONS OF JUSTICE SUMMIT REPORT (Mar. 14–15 2013); Pamela Casey, Roger K. Warren, Fred L. Cheesman & Jennifer K. Elek, *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64 (2013), *available at* http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Casey.pdf. *See generally, e.g.*, Kevin Burke & Steven Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007); Tom R. Tyler, *Procedural Justice and the Court*, 44 CT. REV. 26 (2007). *See also infra* note 12 and accompanying text.

[7] *See, e.g.*, R. Richard Banks, Jennifer L. Eberhardt & Leet Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Kang et al., *supra* note 5, at 1124, 1149.

[8] *E.g.*, Am. Bar Ass'n Criminal Justice Section, *Building Community Trust Model Curriculum*, A.B.A., http://www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html (last visited Mar. 24 2015); AM. BAR ASS'N NAT'L TASK FORCE ON STAND YOUR GROUND LAWS, PRELIMINARY REPORT AND RECOMMENDATIONS (Aug. 29, 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_justice/aba_natl_task_force_on_syg_laws_preliminary_report_program_book.authcheckdam.pdf; Am. Bar Ass'n Section of Litigation Task Force on Implicit Bias, *Implicit Bias Toolbox & Training Manual*, A.B.A. http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html (last visited Mar. 24 2015).

[9] *See generally* Sarah E. Redfield & Salma Safiedine, *Achieving an Impartial Jury*, *in* THE STATE OF CRIMINAL JUSTICE 2012 (summarizing issues).

[10] *See* Appendix A.

literature,[11] and engaged large numbers of experts in the academy and among the practicing bench and bar in both formal and informal interviews, discussions, and peer review. These early conversations led to a focus on judges, based, in part, on their commitment to an unbiased judicial process and, in part, on their role as the permanent and sustaining figure in the courtroom.[12] Versions of the *Toolbox* were piloted and presented in courts and other legal forums across the country, and feedback informed the version presented here.[13] The feedback across this wide range of practices and locations was diverse, and helped us to coalesce around a rich set of tools that offer courts options for best practices.

The *AIJ Toolbox* includes:[14]

- **RECOMMENDED ORIENTATION MATERIALS**: This preliminary section offers a short set of materials that provide background on the concept of implicit bias generally and in court settings. Additional extensive

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[11] *See generally, e.g.*, Justin D. Levinson, Danielle M. Young, & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 19–24 (Justin D. Levinson & Robert J. Smith eds. 2012); KIRWAN INSTITUTE & CHERYL STAATS, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW (2014), *available at* http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf; KIRWAN INSTITUTE & CHERYL STAATS, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW (2013), *available at* http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf.

[12] *See, e.g.*, AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT, R. 2.3 ("(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.; (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others."), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment.html.

[13] Formal pilots were held in North Carolina, California, and Washington. Additional informational sessions and interviews were held over a year and a half in conjunction with ABA midyear and annual meetings, with ABA committee meetings, and with meetings of other groups such as the Federal Judicial Center. In addition, several members of the Advisory Group reviewed the drafts of this material as they developed, and, throughout, Professor Redfield received feedback from the Advisory Group and from a significant number of judges and bar leaders by phone and email.

[14] There are, of course, many areas that were beyond the scope of this effort. One needs particular mention, *Batson*. The issues raised by and surrounding *Batson* are many and longstanding, but a decision was made in the review process for this project that they were regrettably beyond its scope. While Batson is mentioned at some points here, it is the hope that other projects can focus on these concerns with particularity. Batson v. Kentucky, 476 U.S. 79 (1986).

research and articles in the field are further reflected in the Additional Materials Section as well as by the Bibliography at Appendix B.

- **INTRODUCTION TO THE CONCEPT OF IMPLICIT BIAS**: This section offers a brief overview of the social science and its applications.
- **THE MINDFUL COURTROOM CHECKLIST**: Checklists are often identified as a known de-biasing technique, and this checklist offers one illustrative list focused on courtroom dynamics.
- **SUGGESTED JURY INSTRUCTIONS**: While developing a jury instruction related to implicit bias proved both difficult and somewhat controversial, this section offers suggested instructions based on the expertise of the Advisory Group and feedback received from pilot sites and other venues throughout the project. We encourage those who choose to use any of these jury instructions or some other version to stay in touch with the project through Professor Redfield at sarah.redfield@gmail.com.
- **SUGGESTED *VOIR DIRE***: Like the suggested jury instructions, *voir dire* to reveal implicit bias proved difficult to develop and reviewers were again varied in their views. We settled on a new approach, one where the focus is on questions to determine where the potential juror might have been in de-biasing situations and therefore more likely to bring an open-minded approach to the proceedings. Because this is a new approach, we particularly encourage those who choose to use any of these *voir dire* suggestions or some other version to stay in touch with the project through Professor Redfield at sarah.redfield@gmail.com.
- **DIVERSITY RECOGNITION POSTER—HOW TO**: Another de-biasing technique is exposure to others different from oneself. This includes exposure to images of those different from oneself. To help make this kind of image readily available to courts, a diversity poster was produced as part of this project and it will be offered to selected courts and also on the ABA Criminal Justice Section website.
- **SELECTED ADDITIONAL RESOURCES:** This section offers additional materials in a bit more depth than the orientation section.
- **APPENDICES AND OTHER MATERIALS**
    - **Appendix A. Advisory Group for the Achieving an Impartial Jury Project**
    -

- **Appendix B.** BIBLIOGRAPHY **(by category and alphabetical)**
- **Appendix C. Quick Tips for De-biasing**

A note on metrics—Request for Reporting: This project launches a *Toolbox* based on review of the extant literature, development of draft iterations, pilot testing, presentations, and a significant number of interviews with judges and colleagues working in law and social science across the country and in Canada.[15] Additional feedback will be critical so we may continually revise our information to be most helpful to the justice system. Although the grant period has concluded, ideas and recommendations on this critical issue necessarily remain a work in progress as relevant social science develops further and as use and testing of the *AIJ Toolbox* in more real-world settings proceeds.[16] To help measure this, we invite anyone who uses (or considers and rejects using) all or part of these materials to continue to be in touch through Professor Redfield, sarah.redfield@gmail.com, and to report their experiences, good or bad. This continued dialogue can inform any future additions or revisions.

RECOMMENDED ORIENTATION MATERIALS

Introductory Note on Orientation Materials:

Research and writing on implicit bias continues to emerge at an explosive rate. Listed below are a few selected resources that may serve as an orientation to the questions and emerging research. Other useful basic materials are provided in the Selected Additional Resources Section, *infra*, and in the Bibliography at Appendix B.

- Project Implicit, *Implicit Association Test*. This website offers the opportunity to test one's own implicit associations in a variety of comparisons including, by way of examples, race, age, ability, and gender. (https://implicit.harvard.edu/implicit/)
- Mahzarin R. Banaji & Anthony G. Greenwald, *Blind Spot: Hidden Biases of Good People* (2013). This book is a very readable overview of the topic of implicit bias by two of the fields' leading experts.
- Jerry Kang, *Implicit Bias, A Primer*, Nat'l Center for State Courts (2009). As its title suggests, this primer continues to offer a helpful starting point. (wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf)

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[15] Researchers should note that research on this version was largely concluded by the fall of 2014, although additional articles continued to appear.

[16] Professor Sarah E. Redfield, sarah.redfield@gmail.com, mailing address: 20 Prilay Rd. Newport, ME 04953; cell 207-752-1721.

- Pamela M. Casey et al., Nat'l Center for State Courts, *Helping Courts Address Implicit Bias: Resources for Education*. This excellent work provides a basic overview of implicit bias from a judicial perspective and offers important potential strategies courts and individuals might use to address bias concerns; it was an invaluable resource for this project. (www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx)
- ABA Section of Litigation, *The Science and Implications of Implicit Bias*. This brief video provides a useful introduction to the subject. (http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-videos.html)

INTRODUCTION TO THE CONCEPT OF IMPLICIT BIAS

As the Introduction to the *AIJ Project* and *Toolbox* observes the way we perceive our system of justice and the way we are perceived and treated by that system differs based on gender, race, ethnicity, and other group identities.[17] At the same time, the legal community stands strongly committed to a fair and unbiased judicial process. We know that most of the participants in our justice system make decisions in good faith, believing their decisions are unbiased.[18] How is it, then, that the data continues to show results unduly differentiated by race or other group-identity?[19] Why is progress in eliminating such disproportionalities so slow?[20]

Emerging social science offers a partial answer as it turns from a focus on *explicit* bias, which is deliberately generated and consciously experienced, expressed, and self-reported as one's own, to a focus on *implicit* bias, which is unconsciously generated and often at odds with what we express or self-

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[17] *See generally, e.g.*, Jody Armor, *Stereotypes and Prejudice Helping Legal Decisionmakers*, *in* CRITICAL RACE REALISM INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW (Gregory S. Parks, Shayne Jones & W. Jonathan Cardi eds. 2008) (looking at the role racial bias plays at many junctures in the legal system including witness identification and jury selection); Tara L. Mitchell, Ryann M. Haw, Jeffrey E. Pfeifer & Christian A. Meissner, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 625, 627 (2005) (meta-analysis finding a small but significant racial bias when focusing on group dynamics and observing that "research has repeatedly shown that jurors treat members of "outgroups," such as those of a different race, more harshly than those jurors perceive to be substantially like them").

[18] *See* Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Racial Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 1 (2009); Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61 (John F. Dovidio & Samuel L. Gaertner eds. 1986).

[19] Full review of various disparities and disproportionalities is beyond the scope of this Project, but sentencing offers one obvious and enduring example. *See* The Sentencing Project, *Racial Disparity*, http://www.sentencingproject.org/template/page.cfm?id=122 (last visited Mar. 24, 2105). *Compare* David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001), *with* Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 190–91 (1992). *See also* Order Granting Motion for Appropriate Relief, North Carolina v. Robinson, 91 CRS 23143, at 30 (N.C. Super. Ct. Apr. 20, 2012), *available at* http://www.wral.com/asset/news/local/2012/04/20/11008391/262217-M._Robinson_RJA_Order.pdf; Order Granting Motions for Appropriate Relief, North Carolina v. Golphin, at 92, 97 CRS 47314-15 (Golphin), 98 CRS 34832, 35044 (Walters), 01 CRS 65079 (Augustine) (N.C. Super. Ct. Dec. 13, 2012), *available at* http://www.aclu.org/files/assets/rja_order_12-13-12.pdf (both construing and applying the North Carolina Racial Justice Act); *supra* note 4 (discussing the death penalty).

[20] This question is one asked repeatedly in many contexts. *See, e.g.*, VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN (1999) (asking this very question and discussing women in academia but equally applicable to other settings).

report.[21] Critically, research demonstrates that self-reports are often unreliable because we may not know our implicit biases and associations or we may not choose to reveal them.[22] This is apt to be particularly likely where self-reports are proffered on socially-sensitive topics or in stressful or ambiguous situations,[23] situations that are apt to arise during jury selection and deliberation. Individuals being questioned in a court room by a judge[24] are unlikely to lightly report matters or to answer questions in a way that could

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[21] *See* Adam Hahn, Charles M. Judd, Holen K. Hirsh & Irene V. Blair, *Awareness of Implicit Attitudes*, 143 J. EXPERIMENTAL PSYCHOL. 1369 (2014) (cumulating research); Jerry Kang, *Implicit Bias, A Primer*, NAT'L CENTER FOR STATE CTS. (Aug. 2009), *available at* http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf; Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY 17–19 (Summer 2009), http://www.ncsconline.org/D_Research/ref/IMPLICIT%20BIAS%20Marsh%20Summer%202009.pdf; Brian A. Nosek, Carlee Beth Hawkins & Rebecca S. Frazier, *Implicit Social Cognition: From Measures to Mechanisms*, 15 TRENDS COGNITIVE SCI. 152, 152 (2011) ("This is not to say that self-report is never accurate, but that its accuracy is uncertain and can be based on information distinct from the actual causes of behavior.").

[22] *See, e.g.*, Nosek et al., *supra* note 21, at 153 ("A variety of factors limit the value of introspectively derived explicit measurement. People may have limits in their motivation to report mental content of which they are aware; limits in their opportunity to report the mental content, as, for instance, the circumstances of measurement might constrain what is reported; limits in their ability to translate mental contents into a report; as well as limits in their awareness**,** the mental content may simply be inaccessible to introspection." (internal citation and emphasis omitted)).

[23] *See* Pamela M. Casey, Roger K. Warren, Fred L. Cheesman II & Jennifer K. Elek, *Helping Courts Address Implicit Bias: Resources for Education*, NAT'L CENTER FOR STATE CTS. 2 (2012), http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx (cumulating research references); *see also* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

[24] *See, e.g.*, The Honorable Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008) (further summarizing research and including Judge Arterton's own observations); Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1182–86, 1201 (2003) (favorably comparing attorney voir dire to judge's questioning); Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection*, 63 AM. PSYCHOLOGIST 528, 532 (2008).

make them appear biased.[25] The data shows us that biases very often remain undetected in this setting.[26]

Social and neuroscientists have now developed methods to measure such unconscious bias indirectly so a "response is used to *infer* the mental content rather than itself indicating the mental content."[27] The leading approach is the Implicit Association Test (IAT),[28] which measures unconscious preferences by comparing the speed with which we make certain associations.[29]

The workings and results of the IAT are widely documented.[30] Using IAT data, researchers have found pervasive implicit biases in associations[31] in favor of Whites as compared to Blacks, women in families as compared to women in careers, and the abled as compared to the disabled.[32] For example, in a large

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[25] *See, e.g.,* 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, 161 (2010) ("As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can "be fair."). For attorneys operating with knowledge of a potential Batson challenge, this limitation on the reliability of self-reporting is of even greater significance. Id. at 158.

[26] Dale Larson, A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire, 3 DEPAUL J. SOC. JUST. 1, 27 (2009); *see also* Rachel A. Ream, z, CRIM. JUST., Winter 2009, at 22.

[27] Nosek et al., *supra* note 21, at 153.

[28] PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ (last visited Mar. 24, 2015).

[29] Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465–68 (1998).

[30] *See, e.g.*, Mahzarin Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265 (John A. Bargh ed. 2013); Anthony G. Greenwald, T. Andrew Poehlman, Eric Uhlmann & Mahzarin Banaji, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009), *available at* http://faculty.washington.edu/agg/pdf/GPU&B.meta-analysis.JPSP.2009.pdf; Wilhelm Hofmann, Bertram Gawronski, Tobias Gschwendner, Huy Le & Manfred Schmitt, *A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures*, 31 PERSONALITY & SOC. PSYCHOL. BULLETIN 1369 (2005); Jerry Kang & Kristine Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476–81 (2010) (providing summary regarding reliability and validity). *But see, e.g.*, Philip E. Tetlock & Gregory Mitchell, *Calibrating Prejudice in Milliseconds*, 71 SOC. PSYCHOL. Q. 12 (2008).

[31] In addition to the categories noted in the text, tests involving additional groups are available at the IAT site, *IAT Demo*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo (last visited Mar. 24, 2015).

[32] *See, e.g.*, Kang & Lane, *supra* note 30, at 474–75 ("Most participants demonstrated implicit attitudes in favor of one social group over another, away from the neutral position of no bias. Notwithstanding protestations to the contrary, people are generally not "color" blind to race, gender, religion, social class, or other demographic characteristics. More important,

research study involving some 700,000 participants, the most frequent (modal) answer in response to the question, "Who do you prefer, black people or white people?" was "I have no preference". In that same study, 70% of participants showed a preference for Whites over Blacks on the IAT.[33]

While these implicit associations are made without our express knowledge, and often contrary to our honestly held beliefs,[34] they nevertheless influence our responses and decisions.[35] From simple acts of courtesy to more consequential acts, such as the evaluation of work quality or of guilt or innocence, those who test higher in implicit bias measures have been shown to display greater discrimination.[36] That we may be cognitively sophisticated does not change this[37]—and judges,[38] lawyers,[39] and jurors[40] are not immune.

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participants systematically preferred socially privileged groups: Young over Old, White over Black, Light Skinned over Dark Skinned, Other Peoples over Arab-Muslim, Abled over Disabled, Thin over Obese, and Straight over Gay."); Brian A. Nosek, Frederick L. Smyth, Jeffrey J. Hansen, Thierry Devos, Nicole M. Lindner, Kate A. Ranganath, Colin Tucker Smith, Kristina R. Olson, Dolly Chugh, Anthony G. Greenwald & Mahzarin R. Banaji, *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 37 (2007).

[33] *See, e.g.*, Nosek et al., *supra* note 21, at 154.

[34] *See, e.g.*, Nosek et al., *supra* note 32, at 53–54; Patricia G. Devine, Margo J. Monteith, Julia R. Zuwerink & Andrew J. Elliot, *Prejudice With and Without Compunction*, 60 J. PERSONALITY & SOC. PSYCHOL. 817 (1991).

[35] *See, e.g.*, Nosek et al., *supra* note 21, at 15 ("The accumulated evidence shows that implicit measures can provide information that is distinct from self-report and uniquely predicts social behavior.") *But see, e.g.*, Ben R. Newell & David R. Shanks, *Unconscious Influences on Decision Making: A Critical Review*, 37 BEHAV. & BRAIN SCIENCES 1(2014) (calling into question emphasis on unconscious); Philip E. Tetlock & Gregory Mitchell, *Calibrating Prejudice in Milliseconds*, 71 SOC. PSYCHOL. Q. 12, 12 (2008) (reviewing psychological research on unconscious prejudice and finding it fundamentally flawed in psychometric terms and inapplicable in real world settings).

[36] *IAT Demo*, *supra* note 33, *Project Implicit*, *supra* note 28.

[37] Emily Pronin, *How We See Ourselves and How We See Others*, 320 SCI.1177 (2008); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009) (discussing judges' bias blindspot where most think themselves less biased than others); Richard F. West, *Cognitive Sophistication Does Not Attenuate the Bias Blind Spot*, 103 J. PERSONALITY & SOC. PSYCHOL. 506 (2012).

[38] *See, e.g.*, Pat K. Chew & Robert F. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); John F. Irwin & Daniel Real, *Judicial Ethics and Accountability: At Home and Abroad: Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1 (2010); Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Blinking on a Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Jeffrey J. Rachlinski, Chris Guthrie & Andrew Wistrich, *Inside the Bankruptcy Judges Mind*, 88 B.U. L. REV. 1227 (2006); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195 (2009); Maya Sen, *Is Justice Really Blind? Race and Appellate Review in U.S. Courts*, 44 J. LEGAL STUD. (forthcoming 2015),

The relevance of the concepts of implicit bias to jury selection and function is supported by research on ingroup and outgroup dynamics. The standard understanding of discrimination has been that discrimination stems from prejudice, generally defined as outgroup hostility. A revised view articulated by leading implicit-bias researcher Professor Anthony Greenwald is: "Our strong conclusion is that, in present-day America, discrimination results more from helping ingroup members than from harming outgroup members."[41]

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available at http://scholar.harvard.edu/msen/publications/justice-really-blind-race-and-appellate-review-us-courts; Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005). *See generally* Jeffrey J. Rachlinski, Andrew J. Wistrich, Chris Guthrie, *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium In Honor of Stephen Yeazell: Altering Attention in Adjudication*, 60 UCLA L. REV. 1586 (2013) (considering other cognitive constraints).

[39] Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran & Gary Blasi, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010); *see also* Evan P. Apfelbaum, Kristin Pauker, Samuel R. Sommers & Nalini Ambady, *In Blind Pursuit of Racial Equality?*, 21 PSYCHOL. SCI. 1587 (2010) (discussing impact of messages re: colorblind t elementary school level).

[40] Justin D. Levinson, *Media, Race and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009) (discussing role of implicit bias particularly in death penalty cases); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345, 347 (2007) (describing empirical study showing that "[j]udges and jurors may unintentionally and automatically 'misremember' facts in racially biased ways during all facets of the legal decisionmaking process"); Justin D. Levinson & Danielle Young, *Different Shades of Bias*, 112 W. VA. L. REV. 307 (2010) (offering empirical evidence that participants in mock juries were more likely to find a person guilty when primed with the information that the perpetrator was dark skinned as compared to a lighter skinned perpetrator); Barbara O'Brien, Samuel R. Sommers & Phoebe C. Ellsworth, *Ask and What Shall Ye Receive? A Guide for Using and Interpreting What Jurors Tell Us*, 14 U. PA. J.L. & SOC. CHANGE 201 (2011); Andrew E. Taslitz, *'Curing' Own Race Bias: What Cognitive Science and the* Henderson *Case Teach About Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1049 (2013).

[41] Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669 (2014); *see also*, e.g., Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); Kristin Davies, Linda R. Tropp, Arthur Aron, Thomas F. Pettigrew & Stephen C. Wright, *Cross-Group Friendships and Intergroup Attitudes: A Meta-Analytic Review*, 15 PERSONALITY & SOC. PSYCHOL. REV. 332 (2011) (analyzing cross-group friendships in relation to effects on group attitudes); Devine & Clayton, *supra* note 2 ("The notable finding in this area is that jury demographic factors interact with defendant characteristics to produce a bias in favor of defendants who are similar to the jury in some salient respect."); Bertram Gawronski, Galen V. Bodenhausen & Andrew P. Becker, *I Like It, Because I Like Myself: Associative Self-Anchoring and Post-Decisional Change of Implicit Evaluations*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 221 (2007); JAMES M. JONES, JOHN F. DOVIDIO & DEBORAH L. VIETZE, PSYCHOLOGY OF DIVERSITY: BEYOND PREJUDICE AND RACISM 134 (2013) (suggesting an approach of "'me' and 'you' instead of 'us' and 'them'"); Charles W. Perdue, John F. Dovidio, Michael B. Gurtman & Richard B. Tyler, *"Us" and "Them": Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 478–79, 482–84 (1990);

Our automatic group identification is substantial.[42] Research demonstrates that being a member of a group typically creates a preference for that group, the ingroup, and against others, the outgroup.[43] When we categorize people into groups, ingroups or outgroups, we tend to regard members of the same group as "more similar than they actually are, and more similar than they were before they were categorized together."[44] We tend to think more individually and with more detail about ingroup members,[45] and to perceive outgroup members as lesser.[46]

It is important to include in the consideration of implicit bias and group sensitivity an understanding of how our communications may reflect these responses particularly our perhaps-small, also unconscious, messages known as micromessages. One example of micromessaging is calling some participants by first name (or no name) and others by title, or allowing others to do so. Like implicit bias and ingroup preference, these micromessages are often unrecognized by the sender, but felt deeply by the recipient. They are cumulative, and they influence perceptions of fairness.[47]

When read together, unconscious biases, group dynamics, and micromessaging confirm the need to be more attentive in our approach to how our brain makes critical decisions. To the extent that we are motivated to become more aware of these biases and de-categorize and *de-bias* our approach at key points, we can

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Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006). *See generally* Scott E. Culhane, Harmon M. Hosch & Howard C. Daudistel, *Ethnicity and Court Processes: An Archival Review of Adjudicated Jury Trials*, 12 J. ETHNICITY & CRIM. JUST. 116 (2014) (reviewing literature and discussing jury selection and foreperson).

42. S*ee supra* note 41 and accompanying text.

43. In a now-classic experiment, researchers showed that this group loyalty occurred even if factors that put you in a group were random and arbitrary, that is, the very act of categorization may be enough to create an ingroup preference. *See* Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 SCI. AM. 96 (1970).

44 John F. Dovidio & Samuel L. Gaertner, *Intergroup* Bias, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 1089 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds. 5th ed. 2010).

45 JONES ET AL., *supra* note 41, at 132.

46. *See* Adam Benforado & John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 325–26 (2007); *see also* Perdue et al., *supra* note 41, at, 478–79, 482–84.

47 *See, e.g.*, STEPHEN YOUNG, MICROMESSAGING: WHY GREAT LEADERSHIP IS BEYOND WORDS (2007); Mary P. Rowe, *Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity*, 3 EMP. RESP. & RTS. J. 153 (1990); Mary P. Rowe, *The Saturn's Rings Phenomenon Also Referred to as Saturn's Rings II, with Racist and Sexist Incidents from 1974–1975*, 50 HARV. MED. ALUMNI BULL. 14 (1975); Caroline E. Simpson, Assoc. Professor Fla. Int'l Univ., Presentation, Accumulation of Advantage and Disadvantage or Nibbled to Death by Ducks (June 1, 2010), www.aas.org/cswa/MAY10/Simpson_UncBias.pdf.

expect more individual, less stereotyped outcomes.[48] The materials in the *AIJ Toolbox* provide support for this work.

MINDFUL COURTROOM CHECKLIST

Introductory Note on the AIJ Checklist:

The value of checklists to maintain focus is well-documented.[49] Such an approach can combat quick unconscious responses by calling on more conscious, deliberative, reflective thinking and responses.[50] The checklist points in this section of the *Toolbox* consider the environment of the courtroom,[51] the messaging and micromessaging in terms of how participants are treated in the courtroom,[52] the importance of training on these and other

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[48] Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 255 (2002) (reviewing research and finding "the results of these tests show that automatic stereotypes and prejudice can be moderated by a wide variety of events, including, (a) perceivers' motivation to maintain a positive self-image or have positive relationships with others, (b) perceivers' strategic efforts to reduce stereotypes or promote counterstereotypes, (c) perceivers' focus of attention, and (d) contextual cues. In addition, the research shows that group members' individual characteristics can influence the extent to which (global) stereotypes and prejudice are automatically activated").

[49] *See, e.g.,* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT (2009); Casey et al., *supra* note 6; Geoffrey Beattie, Doron Cohen & Laura McGuire, *An Exploration of Possible Unconscious Ethnic Biases in Higher Education: The Role of Implicit Attitudes on Selection for University Posts*, 197 SEMIOTICA 171 (2013).

[50] *See generally*, Casey et al., *supra* note 23 (summarizing strategies for courts to reduce bias); DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011) (explaining System 1 and System 2 thinking).

[51] *See, e.g.*, Casey et al., *supra* note 23, at 2; Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. RACIAL & ETHNIC JUST. 125, 144, 149 (2011) (discussing impact of Confederate flag at courthouse); Joyce Ehrlinger, E. Ashby Plant, Richard P. Eibach, Corey J. Columb, Joanna L. Goplen, Jonathan W. Kunstman & David A. Butz, *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, 32 POL. PSYCHOL. 131 (2011).

[52] *See, e.g.*, Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361 (2012) (citing Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at A14 (reporting father's response to prosecutors wearing neckties with nooses in a death penalty trial)); Kerry Kawakami, Curtis E. Phills, Jennifer R. Steele & John F. Dovidio, *(Close) Distance Makes the Heart Grow Fonder: Improving Implicit Racial Attitudes and Interracial Interactions Through Approach Behaviors*, 92 J. PERSONALITY & SOC. PSYCHOL. 957 (2007); Mary P. Rowe, *Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity*, 3 EMP. RESP. & RTS J. 153 (1990); John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20 (1983).

indicators of implicit bias,[53] and, more broadly, self-reflection and accountability.[54]

The following checklist is meant to be illustrative; developing more specific checklists for particular decision-points is recommended to fit particular courts and issues.

- ☐ The visual images in my courtroom and courthouse are representative of the community members served by this courthouse. (For example, they are not all pictures of former judges who are mostly White.)
- ☐ Everyone in my courtroom is immediately called Mr./Ms. or another appropriate title such as Dr. if known (That is, not some by first name and others more formally).
- ☐ Everyone in my courtroom is greeted politely without assumption as to his or her role or guilt or innocence. (For example, Judge Bennett reports using a strategy of shaking hands with all jurors and the defendant in his courtroom before the case).
- ☐ To avoid implicit cues regarding status, everyone in my courtroom is given similar time for responding and shown similar levels of attention.
- ☐ I and my staff have participated in training regarding implicit bias and the significance of ingroup preferences.
- ☐ I have encouraged others involved with my courtroom to participate in training regarding implicit bias and the significance of ingroup preferences as well.
- ☐ My staff has been instructed to report any bias seen (implicit or explicit), and I have in place a consistent process for this reporting to happen confidentially.
- ☐ I remind myself that I might not be as objective as I'd like or as I think I am.[55]
- ☐ I have a system where, at key decision points, I ask myself if my opinion or decision would be different if the people participating looked different, or if they belonged to a different group.[56]

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[53] *See, e.g.*, Marsh, *supra* note 21, at 17–19; AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT, Cannons 1–2.

[54] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 267–70 (1999).

[55] *See* Kang et al., *supra* note 5, at 1173–74 (suggesting that being thus reminded can improve objectivity).

[56] See Professor Lee's suggested instruction, *inf*ra at AIJ Suggested Jury Instructions.

- ☐ I have considered, and as appropriate incorporated, additional more specific checklists at key decision points.
- ☐ I have self-monitoring in place on training and checklist initiatives.

AIJ SUGGESTED JURY INSTRUCTIONS

Introductory Note on the Suggested AIJ Instruction:

As initially conceived, a jury instruction on implicit bias was thought to be a centerpiece of the *AIJ Toolbox*.[57] Such an instruction was already in place, for example, in the U.S. District Court for the Northern District of Iowa and in the California Model Instruction (provided below. As the Advisory Group discussed, and as others consulted formally and informally acknowledged, this approach was easier in concept than reality.

To the extent that research on de-biasing suggests that awareness of implicit bias is a critical step in de-biasing,[58] such an instruction making jurors aware of the possible influence of implicit, unconscious associations does seem valuable. However, as efforts got underway to draft an instruction on implicit bias, it became obvious that the drafting of such language was challenging. In addition to questions about form, length, wording, or how much time would be involved,[59] fundamental questions were raised as to whether a judge's highlighting of the notion of implicit bias would do more harm than good.[60]

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[57] Jury training using the Implicit Association Test was also considered by some to be an option. *See* Anna Roberts, *(Re) Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012). *See generally* Kang & Lane, *supra* note 30, at 465 n.163–64; Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 1, 27 (2009); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (discussing potential for jury training).

[58] Training to bring awareness of implicit biases is commonly described as a de-biasing technique. *See, e.g.*, Casey et al., *supra* note 23, at 5–6, 9. Recent research suggests that we may be more aware of our implicit biases than previously assumed. Hahn et al., *supra* note 21 ("The current set of studies showed that contrary to this widespread presentation, it is possible to accurately predict the pattern of one's implicit attitudes, without information from a test, even when the implicit attitudes are quite different from explicit feelings toward the same targets, and even when these attitudes might shed a possibly uncomfortable light on a person."). Additional research will likely clarify this information further.

[59] Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190, 195, 198 (2013), *available at* http://aja.ncsc.dni.us/publications/courtrv/cr49-4/CR49-4Elek.pdf.

[60] *See, e.g.*, Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (cumulating research on value of instruction to suppress stereotype and finding it mixed); Elek & Hannaford-Agor, *supra* note 59, at 193 (cumulating the research on such intervention); Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT

Research on this is obviously still young, and the question lingers. It should be noted that the National Center for State Courts' study on this point did not find such an effect.[61]

In this context, the group working on the *AIJ Project* did craft a model instruction,[62] which started from Judge Bennett's instruction and incorporated the advice of the Advisory Group's social scientists and later reviewers. Earlier drafts of the *AIJ Project* version were utilized at pilot sites and other presentations across the country. Responses to the draft were mixed, ranging from excitement, to concerns about length, and even to the underlying efficacy. Some reviewers raised concerns about the uniqueness of a courtroom, questioning whether something that works for one judge and his or her style might not work elsewhere.

If there is a common conclusion heard repeatedly throughout the pilots, presentations, and various interviews, and also supported by the research, it is that being mindful of one's own implicit associations and choosing more individualized consideration are important, both in deliberation and in *voir dire*.[63] The ability of the decision maker to de-categorize and steer clear of group stereotypes and associations, however it is achieved, will likely make for a more fair decision. In this context, a variety of approaches are offered here in the *Toolbox* as possibilities for judges desiring to use this kind of instruction. It is also worth noting that some research suggests priming or forewarning jurors may be more effective than waiting until the end of the evidence.[64]

DIRECTIONS PSYCHOL. SCI. 316 (2007); Jacquie D. Vorauer, *Completing the Implicit Association Test Reduces Positive Intergroup Interaction Behavior*, 23 PSYCHOL. SCI. 1168 (2012) (finding that White participants' taking race-based IAT led to their non-White (Aboriginal) partners feeling less well regarded than after interactions after a non-race-based IAT).

[61] The researchers found "no significant effects of the instruction on judgments of guilt, confidence, strength of prosecution's evidence, or sentence length"; but the study's authors also reported that they were unable to identify the more traditionally-expected baseline bias, "which prevented a complete test of the value of the instructional intervention." Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias?: New Questions Following a Test of a Specialized Jury Instruction*, NAT'L CENTER FOR STATE CTS. (Apr. 2014), *available* at http://ncsc.contentdm.oclc.org/cdm/ref/collection/juries/id/273. *See generally* Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW.U. L. REV. 1537, 1543–45 (2012); Alison C. Smith & Edith Greene, *Conduct and Its Consequences: Attempts at Debiasing Jury Judgments*, 29 L. & HUM. BEHAV. 505 (2005).

[62] See *infra* at n. 65 and accompanying text.

[63] See AIJ SUGGESTED *VOIR DIRE infra; see* Benforado *supra* note 46; John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 335 (2008).

[64] *See, e.g.,* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 232 (2013); Kurt Hugenberg, Jennifer Miller & Heather M. Claypool, *Categorization and Individuation in the Cross-Race Recognition Deficit: Toward a Solution to an Insidious Problem*, 43 J. EXPERIMENTAL

The following is the model instruction crafted by the AIJ Project as well as select model instructions used or suggested elsewhere. These latter versions are included to give courts other suggested approaches for consideration.

AIJ PROJECT PROPOSED INSTRUCTION[65]

The references included as footnotes with this section provide background on why certain points/words were included.

> Our system of justice depends on judges like me and jurors like you[66] being able and willing to make careful and fair decisions.[67] Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes.[68] Just like our knee reflexes, our mental

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SOC. PSYCH. 334 (2007) (finding that warnings given ahead of time about likely misperceptions of other race faces may be effective).

[65] *See* Elek & Hannaford-Agor, *supra* note 59, at nn. 8–19 (making many of the same points and adding additional citation).

[66] *This part of the instruction focuses on using common purpose to create the attributes of an ingroup with the judge and to offer a less authoritarian approach, one more likely to be effective in reducing prejudice. See generally* Lisa Legault, Jennifer N. Gutsell & Michael Inzlicht, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (But Also Increase) Prejudice,* 22 PSYCHOL. SCI. 1472 (2011) (discussing possible backfire for pressure for less biased approach); Marsh, *supra* note 21, at 17–19 (reviewing possible de-biasing approaches); Duane T. Wegener, Norbert L. Kerr, Monique A. Fleming & Richard E. Petty, *Flexible Corrections of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 629 (2000).

[67] *This part of the instruction continues to focus on creating a joint enterprise and also invites a collective intention and motivation to be fair. This intention has been shown to help de-bias one's approach. See, e.g.*, Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity and Cognitive Control*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION (T. Nelson ed. 2009); Maja Djikic, Ellen Langer & Sarah Fulton Stapleton, *Reducing Stereotyping Through Mindfulness: Effects on Automatic Stereotype-Activated Behaviors*, 15 J. ADULT DEV. 106 (2008); Kang & Lane, *supra* note 30, at 986; Marsh, *supra* note 21, at 17–19; Saaid A. Mendoza, Peter M. Gollwitzer & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY SOC. PSYCHOL. BULL. 512 (2010); Brandon Stewart & B. Keith Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1332 (2008).

[68] *This part of the instruction focuses on there being both social and neuroscience support for the idea that implicit bias is significant in decision-making. Both physical and social science support the view that we may all respond quickly without intent, it is just how all of our brains work. Virtually all of the trainers working on issues of implicit bias told us this was an important point. See, e.g.*, Jennifer T. Kubota, Mahzarin R. Banaji & Elizabeth A. Phelps, *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940 (2012); David Amodio & Patricia Devine, *On the Interpersonal Functions of Implicit Stereotyping and Evaluative Race Bias: Insights from Social Neuroscience*, in ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES (Richard E. Petty, Russell H. Fazio & Pablo Brinol eds. 2009); Elizabeth A. Phelps, Kevin J. O'Connor, William A. Cunningham, E. Sumie Funayama, J. Christopher Gatenby, John C. Gore & Mahzarin R.

responses are quick and automatic.[69] Even though these quick responses may not be what we consciously think,[70] they could influence how we judge people or even how we remember or evaluate the evidence.[71]

Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case:[72]

Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.[73]

Banaji, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000).

[69] *This part of the instruction continues to focus on the idea that our quick responses may not be indicative of our intent by using reflex terminology and the knee reflex reference as commonly recognized vocabulary helpful for distinguishing between intuitive and reflexive responses as compared to deliberative and reflective thinking. See, e.g.*, Casey et al., *supra* note 6; Matthew Lieberman, *Reflective and Reflexive Judgment Processes: A Social Cognitive Neuroscience Approach*, in SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES (Joseph P. Forgas, Kipling D. Williams & William Von Hippel eds. 2003).

[70] *This part of the instruction seeks to reduce stress that some jurors may feel around the idea of bias by re-emphasizing that our brains work sometimes consciously, sometimes unconsciously, and that this is true for all of us: again, we are all subject to unconscious associations, which may differ from our consciously expressed views and attitudes. See, e.g.*, DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); Merlin Donald, *How Culture and Brain Mechanisms Interact in Decision Making, in* BETTER THAN CONSCIOUS? DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS 191 (Christoph Engel & Wolf Singer eds. 2008); Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Racial Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 1 (2009).

[71] *This part of the instruction encapsulates and reflects the research.* For references on this point, *see, e.g., Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering,* 57 DUKE L.J. 345 (2007); Justin D. Levinson & Danielle Young*, Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010); Mally Schecory, Israel Nachson & Joseph Glicksohn, *Effects of Stereotypes and Suggestion on Memory,* 15 J. INT'L J. OFFENDER THERAPY & COMPARATIVE CRIM. L. 1113, 1113 (2010) ("Data analyses show that (a) when a suggestion matched the participant's stereotypical perception, the suggestion was incorporated into memory but (b) when the suggestion contradicted the stereotype, it did not influence memory. The conclusion was that recall is influenced by stereotypes but can be enhanced by compatible suggestions."); Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. RACIAL & ETHNIC JUST. 125 (2011) (reviewing possible implications of priming and implicit bias).

[72] *This part of the instruction introduces and reflects the current research on possible de-biasing techniques and offers specific approaches that can help replace implicit associations at key decision points. See, e.g.,* Nilanjana Dasgupta, *Color Lines in the Mind: Unconscious Prejudice, Discriminatory Behavior, and the Potential for Change,* in 21ST CENTURY COLOR LINES: EXPLORING THE FRONTIERS OF AMERICA'S MULTICULTURAL FUTURE (A. Grant-Thomas & G. Orfield eds. 2008); Nilanjana Dasgupta, Professor of Psychol. Univ. of Mass., Amherst, Presentation, *Debiasing Implicit Attitudes*, Mind Science Conference (Apr. 26, 2013); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

- Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.[74]
- Try taking another perspective.[75] Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?[76]
- You must each reach your own conclusions about this case individually,[77] but you should do so only after listening to and

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[73] *This part of the instruction reflects another part of the current research showing that reducing cognitive loads and taking the time to be reflective are helpful for de-biasing. See, e.g.*, Beattie et al., *supra* note 49; Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (cumulating research); Casey et al., *supra* note 6; Marsh, *supra* note 21, at 17–19; Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316 (2007); Jeffrey W. Sherman, Angela Y. Lee, Gayle R. Bessenoff & Leigh A. Frost, *Stereotype Efficiency Reconsidered: Encoding Flexibility Under Cognitive Load*, 75 J. PERSONALITY & SOC. PSYCHOL. 589 (1998); Alison C. Smith & Edith Greene, *Conduct and Its Consequences: Attempts at Debiasing Jury Judgments*, 29 L. & HUM. BEHAV. 505 (2005); Jennifer A. Richeson & Sophie Trawalter, *African Americans' Racial Attitudes and the Depletion of Executive Function After Interracial Interactions*, 23 SOC. COGNITION 336 (2005); Sommers & Norton, *supra* note 24, at 530.

[74] *This part of the instruction offers another reminder of mindfulness as a de-biasing strategy.* One way to counter a quick response or assumption that might not reflect one's conscious intent is to focus on individuation of facts and participants. *See, e.g.*, David M. Amodio & Saaid A. Mendoza, *Implicit Intergroup Bias: Cognitive, Affective, and Motivational Underpinnings*, *in* HANDBOOK OF IMPLICIT SOCIAL COGNITION 353 (Bertram Gawronski & B. K. Payne eds. 2010); Casey et al., *supra* note 23; Djikic et al., *supra* note 67; JONES ET AL., *supra* note 41, at 134; SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 256, 293 (1993).

[75] *This part of the instruction incorporates the research on another de-biasing technique, taking another perspective. See, e.g.*, Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-Term Reduction in Implicit Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2013); Lee, *supra* note 54, at 1600; Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, Part IV (2014); Jacquie D. Vorauer & Stacey J. Sasaki, *Distinct Effects of Imagine-Other Versus Imagine-Self Perspective-Taking on Prejudice Reduction*, 32 SOC. COGNITION 130, 145 (2014).

[76] *This part of the instruction repeats the call for juror attention to the individual and makes the instruction relevant to the juror himself/herself to encourage this attention. See, e.g.*, JONES ET AL., *supra* note 41, at 134; *see also generally* Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Pager, *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 16–17 (2007) (discussing conversational memory and offering example of tendency to relate to self).

[77] *This part of the instruction invokes another known approach to de-biasing, by suggesting that individuals be able to know/articulate their reasoning and feel accountable. See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693 (2014); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999) ("Self-critical and

considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.[78]

Working together will help achieve a fair result.[79]

1-1 CALIFORNIA FORMS OF JURY INSTRUCTION 113 (2012)

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other 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 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[, or [insert any other impermissible form of bias]].

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

JUDGE BENNETT'S INSTRUCTION

Introduction

Congratulations on your selection as a juror!…You must decide during your deliberations whether or not the prosecution has proved the

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effortful thinking is most likely to be activated when decision makers learn prior to forming any opinions that they will be accountable to an audience (a) whose views are unknown, (b) who is interested in accuracy, (c) who is interested in processes rather than specific outcomes, (d) who is reasonably well-informed, and (e) who has a legitimate reason for inquiring into the reasons behind participants' judgments.").

[78] *This part of the instruction uses the research on implicit bias in a slightly different direction by suggesting that jurors be mindful not to let implicit bias interfere with their ability to listen to and benefit from other jurors who may not look like them.* The call is for the jurors to take care to listen to a diversity of perspectives. *See, e.g.*, Evan P. Apfelbaum & Samuel R. Sommers, *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918 (2008).

[79] *See, e.g.,* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries: A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026–29 (2003).

defendant's guilt on the offense charged beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions.

Additional Instruction

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

PROFESSOR CYNTHIA LEE'S RACE-SWITCHING INSTRUCTION[80]

This instruction is part of Professor Lee's longstanding work in this area and offers a nuanced approach to some of the social science that suggests perspective taking (imagining how you would feel in the other's place) as a de-biasing tool.[81]

It is natural to make assumptions about the parties and witnesses based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group. If you are

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[80] Lee, *supra* note 54, at 1600 (reporting that this instruction was used in a criminal case and "may have helped defense attorneys secure a not guilty verdict for their client, a Black teenager charged with aggravated assault upon a White classmate." (citing James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, CHAMPION, 1999, at 22–23)).

[81] *See, e.g.*, John F. Dovidio, Marleen ten Vergert, Tracie L. Stewart, Samuel L. Gaertner, James D. Johnson, Victoria M. Esses, Blake M. Riek & Adam R. Pearson, *Perspective and Prejudice: Antecedents and Mediating Mechanisms*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1537 (2004).

unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you would imagine a Latino defendant and a White victim. If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.

AIJ SUGGESTED *VOIR DIRE*

Introductory Note on AIJ Voir dire:

Who asks the *voir dire* questions varies among jurisdictions. Because this is a new approach, it seems preferable that the judge ask at least these particular questions as a set or as follow on; working from these materials the judge will be more likely to have the background to consider the responses in context.

As discussed in the Introducing Implicit Bias Section, the research on implicit bias suggests that by definition a person may not be aware of his or her own implicit or unconscious associations and biases. Accordingly, in addition to the traditional methods of *voir dire* focused on identifying and addressing explicit bias, a goal of the jury selection process should be to discover, with the prospective juror, what life experiences and attitudes, if any, may implicitly affect how that juror might view the evidence and the law in the case.[82]

This is a two-sided inquiry. On one side, the effort is to determine which issues might impair a juror's ability to impartially view and listen to the evidence and the law; and on the other, to reveal where such experiences might have been de-biasing opportunities for the juror and improve his/her ability to approach the problem with more de-categorization and individuation.[83] Recognizing that traditional *voir dire* can be less than perfect even in revealing explicit bias,[84]

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[82] *See generally* Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, JUDGES J., Winter 2008, at 1(2008); O'Brien et al., *supra* note 40, at 201.

[83] Adapted from email communication from Richard Gabriel, President of the American Society of Trial Consultants Foundation to Sarah Redfield and Sarina Cox (June 18, 2013). *See also* JONES ET AL., *supra* note 41, at 134 (discussing de-categorization); Adam M. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2015) *available at* http://scholar.harvard.edu/files/msen/files/daughters.pdf.

[84] *See, e.g.*, Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 179–80 (2011) (citing examples of explicit bias reported from jury deliberations often despite voir dire questions on point).

this approach nevertheless shares its goal to see the truth by increasing the quality of information about the juror that the judge and attorneys can use to determine cause and peremptory challenges.[85]

As was the case with the jury instruction on implicit bias, the sample *voir dire* questions met with mixed reviews and similar questions were raised about their value.[86] For those who may wish to implement some or all of these *voir dire* questions, the specific questions and answers may well turn out to be less important than the overall result of making race or other group status salient.[87]

SAMPLE QUESTIONS

The questions that follow are based on these assumptions:

- The usual questions will be asked regarding explicit bias.
- Each case and each courtroom will be different.

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[85] Batson v. Kentucky, 476 U.S. 79 (1986); *see* James J. Tomkovicz, *An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393 (2012) (providing a primer on *Batson*); *see also, e.g.*, State v. Saintcalle, 309 P.3d 326 (2013); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092–93 (2011) ("Batson is a response to the 'fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Our study suggests that the Batson response is as ineffective as a lone chopstick."(internal quotation marks omitted)); 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. & POLICY REV. 149 (2010) ("Although Batson and its progeny purportedly prohibit striking members of a protected class on account of class membership alone, this limitation is easily circumvented if the prosecutor proffers a facially class-neutral justification and the defendant cannot establish purposeful discrimination to the court's satisfaction. Moreover, the Batson challenge process may allow the implicit biases of the judges and attorneys to go unchecked during jury selection.").

[86] Widely studied for at least forty years, voir dire and its general strengths and weaknesses as well as the issues surrounding peremptory challenge are beyond the scope of this project. *See generally, e.g.*, Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505 (1965) ("Voir dire was grossly ineffective not only in weeding out "unfavorable" jurors but even in eliciting the data which would have shown particular jurors as very likely to prove "unfavorable."); Rachel A. Ream, *Limited Voir Dire: What It Fails to Detect Juror Bias*, CRIM. JUST., Winter 2009, at 22, 27–28; *Symposium: Batson at Twenty-Five: Perspectives on the Landmark, Reflections On Its Legacy: Twenty-Five Years of Batson: An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393 (2012); *see also* Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 1, 27 (2009); Gregory E. Mize & Paula Hannaford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other*, 1 J. CT. INNOVATION 189, 208 (2008), *available at* http://www.courtinnovation.org/sites/default/files/documents/JournalCCI_Fall08.pdf.

[87] *See, e.g.*, Sommers, *supra* note 79, at 601; Sommers & Ellsworth, *supra* note 79 at 1026–29; Lee, *supra* note 54.

- We are all implicitly biased (and that most of us share the predominant associations, for example, those that favor White people, and link women to family activities rather than to careers).
- Still, in trying to select an unbiased jury, too much focus on how we are all biased seems counterintuitive.
- The court has already created a non-intimidating atmosphere where potential jurors are sufficiently comfortable to answer openly or to ask to discuss separately.
- There is a basic use of open-ended questions.
- There is attentiveness to answers that might reveal de-biasing opportunities and experiences.

Possible Introduction:

To achieve salience of race or other identity in *voir dire*, the attorney or judge may wish to illustrate with a story from his/her own experience. One judge described a defense attorney (for an African-American defendant) beginning with the question, "How many of you know what a drug dealer looks like?"—and watching all hands go up, and then, on reflection, slowly come back down.[88] If the judge or attorney does not have a personal experience, he/she might well use the now well-known story of the iconic civil rights leader Jesse Jackson who says of himself: "There is nothing more painful for me at this stage of my life, than to walk down the street and hear footsteps and start to think about robbery, and then look around and see somebody white, and feel relieved. How humiliating."[89]

Suggested lines of questioning and a few possible considerations around potential answers follow. (Remember this is an evolving approach.)

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[88] A similar illustration might be drawn from the prosecutor remarks criticized by Justice Sotomayor in a drug trial where the core issue was whether the defendant knew his associates were planning a drug deal or whether he was just along for the ride home: "You've got African Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say, This is a drug deal?" Later the prosecutor added "I got accused by [defense counsel] of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Okay, you got African-American[s] and Hispanics, do you think it's a drug deal? But there's one element that's missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [magnates]? None of them are real estate investors." Calhoun v. United States, 133 S. Ct. 1136, 1136–37 (2013) (Statement of Sotomayor, J.).

[89] RACE CRIME AND JUSTICE: A READER 84 (Shaun L. Gabbidon & Helen Taylor Greene eds. 2003). This book is also cited in Lee, *supra* note 54, at 1593.

- "What is your work environment/neighborhood like?"[90] (For example, "I live and work in Millinocket, Maine; it's a mill town; I pretty much know everyone in town." Think about this answer likely reflecting a predominantly, if not all, white working class rural environment, as compared to "I live in Houston, Texas and work at a hotel downtown." Perhaps follow on with more questions about who works there, the kind of work, and the kind of clientele. This may reveal that the work environment includes working, positive exposure to other groups or races, though it may not. Consider these answers again in later questions.
- "Where did you grow up? What was it like growing up there?"[91]
- "What experiences have you had with people who are different from you (e.g., from a culture other than your own)?" (Again, for example, the answer "served in the military" likely evokes different de-biasing experiences and attitudes than an answer "'those families' took over my neighborhood.")
- "What (other) experience have you had with persons of different races/ethnicities, with disabilities (mental or physical) or other groups (as may be appropriate to the case)?"[92]

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[90] *In the context of implicit associations, this kind of question seeks information on whether the juror has had opportunity for meaningful contact with persons of other races, etc. See, e.g.*, Shaki Asgari, Nilanjana Dasgupta & Nicole Gilbert Cote, *When Does Contact with Successful Ingroup Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals*, 41 SOC. PSYCHOL. 203 (2010); Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001); Casey et al., *supra* note 23, at 2; Kang et al., *supra* note 5, at 1170; Rhiannon N. Turner & Richard J. Crisp, *Imagining Intergroup Contact Reduces Implicit Prejudice*, 49 BRIT. J. PSYCHOL. 120 (2010), *available at* http://www.leeds.ac.uk/lihs/psychiatry/courses/dclin/cpd/past_events/positive_psychology/intergroup.pdf.

[91] *In the context of implicit associations, this question and the next two seek more background on possible experience with groups other than one's own, starting with early life experience and going on to a specific ask on the point. See* RACE CRIME AND JUSTICE: A READER 84 (Shaun L. Gabbidon & Helen Taylor Greene eds. 2003); *see also, e.g.*, Am. Bar Ass'n Criminal Justice Section, *Building Community Trust Model Curriculum*, A.B.A., http://www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html (last visited Mar. 24, 2015); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotypes*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001); Lauri A. Rudman, Richard D. Ashmore & Melvin L. Gary, *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001).

[92] *See, e.g.,* Greenwald & Pettigrew, *supra* note 41.

- "Do you have children in school here in _____, and, if so, what kind of school do they attend? What is this experience like?"[93]
- "What, if anything, do you know about implicit or unconscious bias?"[94]

**In each case, be mindful of nonverbal as well as verbal responses.[95]

DIVERSITY RECOGNITION POSTER—HOW TO

Introductory Note on the Poster Possibilities.

A diverse environment and positive exemplars[96] can be valuable de-biasing tools. The basic idea is to trigger a different perspective than the viewer might intuitively or implicitly have and to offer a chance to consider other perspectives. There are several approaches that reflect this, ranging from the use of a screensaver that circulates positive diverse counter-stereotypical images—to longer-term exposure of students to certain faculty as showing a reduction in implicit bias among women at all-women's colleges as compared to

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[93] *In the context of implicit associations, this question provides further potential for information on a person's experience with others, in what might (or might not) be an emotional subject area. See, e.g.,* Hana Shepherd, *The Cultural Context of Cognition: What the Implicit Association Test Tells Us About How Culture Works*, 26 SOC. F., 121–143 (2011) ("Individuals who differ in their chronic exposure to certain culture elements may have different associative structures, and thus respond to situational primes differently."); Max Weisbuch & Nalini Ambady, *Unspoken Cultural Influence: Exposure to and Influence of Nonverbal Bias*, J. PERSONALITY & SOC. PSYCHOL., 96 AM. PSYCHOL. ASS'N 1104 (2009), *available at* http://ase.tufts.edu/psychology/ambady/pubs/2009WeisbuchJPSP.pdf.

[94] *In the context of implicit associations, this is obviously a direct inquiry, which may provide insight into a person's own awareness and de-biasing experiences.*

[95] Comments from some of the social science experts in the Advisory Group might provide further direction: e.g., 1) "Personal contact with outgroup members may not always reflect a person's degree of implicit bias. But, if these questions can get a person's view about bias—i.e., do they think it is acceptable? Do they support the idea that all Americans have equal rights and are entitled to equal treatment—this could be informative"; 2) "I like the idea of asking these types of open-ended questions assessing the individual's everyday local environment and exposure to heterogeneous people who are different from oneself (based on research showing that positive intergroup contact reduces implicit bias; positive media exposure also reduces implicit bias). But the specifics of these questions should depend on the fact pattern of the given case. E.g., if the case is about gender and employment discrimination, then the "culture" question is less important than a question about positive contact with women in professional roles (as boss, leader). If the case is about race/ethnicity then these existing questions are likely to fit better. If the case is about sexual orientation or gender identity, these questions will have to be tweaked again."

[96] *See, e.g.*, Dasgupta & Asgari, *supra* note 91, at 649–54; Kang & Lane, *supra* note 30, 501–02 (summarizing research).

those at co-ed institution.[97] For this project a poster designed by E3 Photography will be made available to designated courts via grant funding and for others for purchase. Details will be available at the American Bar Association Criminal Justice Section website.

SELECTED ADDITIONAL RESOURCES

Introductory Note on these Resources:

This section offers suggestions for the next level of reading and viewing beyond the Recommended Orientation Materials Section above. Additional references are available at Appendix B.

POWERPOINT/TRAINING

- ABA Criminal Justice Section, Building Community Trust Model Curriculum and Instruction Manual at Unit 2, (http://www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html)
- ABA Section of Litigation, Implicit Bias Taskforce, Implicit Bias Toolbox, (http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html)

READINGS

- Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012). This lengthy article co-authored by many leading thinkers and researchers in the implicit bias arena attempts to answer the question, "what, if anything, should we do about implicit bias in the courtroom?" As the authors note, the article provides a "succinct scientific introduction" to implicit bias and then discusses bias and possible interventions in criminal and civil (employment) settings. (http://www.uclalawreview.org/?p=3576)
- Victoria Plaut, *3 Myths Plus a Few Best Practices for Achieving Diversity*, SCI. AM., Sept. 16, 2014. This is a very readable overview of the issues and possible approaches to de-biasing. (http://www.scientificamerican.com/article/3-myths-plus-a-few-best-practices-for-achieving-diversity/)

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[97] Sally Lehrman, *The Implicit Prejudice*, SCI. AM. (May 2006), http://www.scientificamerican.com/article/the-implicit-prejudice; *see also* Dasgupta & Asgari, *supra* note 91.

- MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2007). This book in Gladwell's much appreciated style captures the issues in engaging and thought-provoking terms.
- Samuel R. Sommers, *What We Do (and Don't) Know About Race and Jurors*, AM. SOC. OF TRIAL CONSULTANTS (July 1, 2010), Professor Sommers offers a short update on his extensive work on jury issues
- Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013). In this article Professor Lee uses the Trayvon Martin shooting as a vehicle to review implicit bias in the context of self-defense. The article offers extensive background and context with particular reference to social science expertise.
- AMERICAN BAR ASSOCIATION JUDICIAL DIVISION, PERCEPTIONS OF JUSTICE SUMMIT REPORT (Mar. 14–15 2013). This report summarizes the Judicial Division's work to address perceptions of bias and fairness in the judicial system. The report addresses assessment, community engagement and outreach, specifically speaking to the importance of training around implicit bias.

VIDEO

- California Courts, Continuing the Dialogue video series (all descriptions excerpted from the California web site, (http://www2.courtinfo.ca.gov/cjer/838.htm).
    - Neuroscience and Psychology of Decisionmaking, Part 1: A New Way of Learning (#6433)
      In this broadcast experts will discuss both emerging and well-settled research in neuroscience and social psychology, describing how unconscious processes may affect our decisions.
    - Neuroscience and Psychology of Decisionmaking, Part 2: The Media, the Brain, and the Courtroom (#6508)
      A group of nationally recognized experts will discuss exciting emerging research on how the brain reacts when different images are presented to us.
    - Neuroscience and Psychology of Decisionmaking, Part 3: Dismantling and Overriding Bias (#6537)
      This show highlights neuroscientific and psychological evidence that we can dismantle and override bias using specific techniques
    - From Oscar Grant to Trayvon Martin—A Dialogue about Race, Public Trust, and Confidence in the Justice System (#6942)
      This broadcast focuses on the role that courts may play in

reducing racial bias, disparity, and disproportionality in the criminal justice system.

- *The Lunch Date*. This is a very entertaining and engaging 10-minute film that illustrates perception and assumption, (http://www.youtube.com/watch?v=epuTZigxUY8)
- Rosabeth Moss Kanter, *A Tale of O Video on Diversity*. This is a very effective video clip on what it is like to be different, a minority, an outgroup, (https://www.youtube.com/watch?v=p56b6nzslaU)

Appendix A. Advisory Group for the AIJ Project

Achieving an Impartial Jury: Expert Advisory Group

Benny Agosto, Jr., Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, Houston, TX

Dr. David Amodio, Professor of Psychology and Neural Science, New York University, New York, NY

Nicole M. Austin-Hillery, Director and Counsel, Washington Office Brennan Center for Justice, Washington, DC

Hon. Mark W. Bennett, Judge, U.S. District Court, Northern District of Iowa

Sarina Cox, Staff Attorney, ABA Criminal Justice Section

Dr. Nilanjana Dasgupta, Professor of Psychology, University of Massachusetts, Amherst, MA

Sharon Davies, Professor of Law and Director of the Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, Columbus, OH

Michael Dean, Attorney, Wayne County Public Defender, IN

Dr. Patricia Devine, Professor of Psychology, University of Wisconsin-Madison, Madison, WI

Dr. Shari Seidman Diamond, Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern School of Law, Chicago, IL

Hon. Bernice B. Donald, Judge, United States Court of Appeals for the Sixth Circuit, Memphis, TN

Hon. William Dressel, President, The National Judicial College, Reno, NV

Allison Elgart, Legal Director, Equal Justice Society, San Francisco, CA

Fred Friedman, Chief Public Defender; Associate Professor University of Minnesota, Duluth, MN

Kim Greely, Attorney, Honolulu, HI

Basheera James, Cook County State's Attorney, IL

Peter Koelling, Director, ABA Justice Center

Justin Levinson, Director, Culture and Jury Project; Deputy Director, Institute of Asian-Pacific Business Law, University of Hawaii Law School, Honolulu, HI

Dr. Shawn Marsh, Chief Program Officer, Juvenile Law, National Council of Juvenile and Family Court Judges, Reno, NV

Wayne McKenzie, General Counsel, New York City Department of Probation, New York, NY

Seth Miller Executive Director, Innocence Project of Florida, Tallahassee, FL

Kelly Mitchell, Executive Director, Robina Institute of Criminal Law and Criminal Justice, Minneapolis, MN

Rachel Patrick, Director, ABA Coalition on Racial and Ethnic Justice; Center for Racial and Ethnic Diversity

Hon. Costa Pleicones, Justice, South Carolina Supreme Court, Columbia, SC

Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law, York, ME

Robin Rone, Director, ABA Council for Racial and Ethnic Diversity in the Educational Pipeline; Commission on Sexual Orientation and Gender Identity

Daniel Serrano, Director, ABA Commission on Racial and Ethnic Diversity in the Profession

Lauren Stiller Rikleen, President of Rikleen Institute for Strategic Leadership and Executive-in-Residence, Boston College Center for Work & Family, Boston, MA

Sarah Turberville, Director, ABA Death Penalty Moratorium Implementation Project

Artika Tyner, Director of Diversity, Clinical Faculty, University of St. Thomas School of Law, Minneapolis, MN

Appendix B. BIBLIOGRAPHY

Bibliography, sorted

This part of the bibliography is roughly sorted by topic. Obviously many topics overlap, but this listing offers a first cut at categorization for readers' convenience. The divisions are: Film, General reading and background; General background, mostly legal; General background, mostly social science; Implicit Bias; Implicit Bias / courts; Implicit bias / neuroscience; Implicit bias/ groups; De-biasing; Training Materials.

Film

Brains on Trial with Alan Alda, PBS, http://brainsontrial.com/ (last visited Mar. 24, 2015).

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SciAmBiasCut, Alan Alda, YOUTUBE (Jan. 6, 2011), https://www.youtube.com/watch?v=Tt9d8CKsyps.

A Tale of O Video on Diversity, Dr. Rosabeth Moss Kanter, TRAINER'S TOOLCHEST LLC (May 21, 2010), https://www.youtube.com/watch?v=p56b6nzslaU.

Test Your Awareness- Do the Test, YOUTUBE (Mar. 10, 2008), http://www.youtube.com/watch?v=Ahg6qcgoay4&feature=player_embedded.

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mostly standards, reports, popular press books, etc.

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APPENDIX C. TEN QUICK TIPS FOR DE-BIASING

BE MINDFUL.

De-biasing (1), remember it's all about you, you can be motivated to make more reflective decisions.

De-biasing (2), become aware, understand your own implicit associations and group loyalties.

De-biasing (3), individuate, be careful not to unintentionally rely on stereotypes.

De-biasing (4), notice your environment, be aware of what small and large messages you are sending/are being sent.

De-biasing (5), add different context and relationships to your environment; when you have the opportunity to work with others who are diverse from you, take it.

De-biasing (6), be open to different perspectives, think about the decision with roles reversed.

De-biasing (7), modify your approach to fit the decision, use checklists and other reminders to keep yourself reflective not reflexive at significant points in decisions.

De-biasing (8), modify your approach to fit the situation, take time when you need it, write when you need to clarify your thinking.

De-biasing (9), modify organizational approaches, remove unnecessary clues that trigger implicit associations, impose accountability standards and methods when useful.

De-biasing (10), be an active player or bystander, engage when you see examples of implicit bias or group association or negative micromessaging; engage in positive messaging.

A New Approach to Voir Dire on Racial Bias

Cynthia Lee*

INTRODUCTION

The shooting of Michael Brown in Ferguson, Missouri on August 9, 2014 renewed debate over whether racial stereotypes about Black men as dangerous, violent criminals encourage police officers and armed civilians to shoot unarmed Black men in cases where they would not have used deadly force had the victim been White.[1] Two diametrically opposed accounts of what happened emerged in

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1. I purposely capitalize the letter "B" in "Black" and "W" in "White" to acknowledge the fact

the weeks following the shooting. Brown's friend, Dorian Johnson, who was with Brown at the time Brown was shot, claimed Officer Darren Wilson shot Brown for no reason and continued shooting even after Brown turned around with his hands in the air, trying to show the officer that he was unarmed.[2] In contrast, Officer Wilson said he shot Brown in self-defense after a scuffle in which Brown shoved him into his patrol car and attempted to grab his weapon.[3]

Polls taken shortly after the shooting showed a racial divide in public opinion over whether the officer was justified in shooting Brown with fifty-seven percent of Blacks saying they believed the shooting was unjustified and only eighteen percent of Whites with the same opinion.[4] When protests erupted in Ferguson, Missouri over the shooting, the police responded with an unusually heavy-handed display of force.[5] Again, public opinion was split over whether the protesters or the police acted inappropriately.[6]

One question that prosecutors face in highly charged cases with racial overtones like the Ferguson case is whether to attempt to conduct voir dire into

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that Black and White are socially constructed racial categories. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 9–10 (1996).

2. Eliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know [http://perma.cc/SK6Y-YMZ8].

3. Julia Talanova, *Support Grows for Darren Wilson, Officer Who Shot Ferguson Teen Michael Brown*, CNN (Sept. 8, 2014, 7:11 AM), http://www.cnn.com/2014/08/19/us/ferguson-darren-wilson-support [http://perma.cc/72HL-H5MH]; *see also* Julie Bosman et al., *Amid Conflicting Accounts, Trusting the Officer*, N.Y. TIMES, Nov. 26, 2014, at A1 (reporting that Officer Wilson told the grand jury that Michael Brown reached into his police vehicle and fought him for his gun). An investigation into the shooting by the U.S. Department of Justice found that the physical and forensic evidence supported Officer Wilson's claim of self-defense and that the officer shot Brown as Brown was moving toward the officer. *See* U.S. DEP'T OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 5–8 (2015).

4. *Reactions to the Shooting in Ferguson, Mo., Have Sharp Racial Divides*, N.Y. TIMES (Aug. 21, 2014), http://www.nytimes.com/interactive/2014/08/21/us/ferguson-poll.html. The reaction of many African Americans to the shooting likely reflected their distrust of police given a long history of antagonistic police-citizen interactions in Ferguson, Missouri. After a five-month long investigation, from September 4, 2014 to March 4, 2015, the Department of Justice found significant evidence of racial bias, both implicit and explicit, in the Ferguson Police Department and criminal justice system. U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–63, 70–78 (2015).

5. Joe Coscarelli, *Why Cops in Ferguson Look Like Soldiers: The Insane Militarization of America's Police*, N.Y. MAG. (Aug. 14, 2014, 12:29 PM), http://nymag.com/daily/intelligencer/2014/08/insane-militarization-police-ferguson.html [http://perma.cc/NS5P-JPPC] (noting that the law-enforcement response to civilian protests against Michael Brown's death involved tear gas, flash grenades, and military-style rifles).

6. A YouGov poll found that forty-eight percent of Whites believed the protests were unreasonable compared to thirty-one percent of Blacks. Peter Moore, *Ferguson, MO.: Racial and Political Divide over Brown Shooting*, YOUGOV (Aug. 18, 2014, 8:01 AM), http://today.yougov.com/news/2014/08/18/ferguson-mo [http://perma.cc/N2SZ-GFBF] (referring to poll results at http://cdn.yougov.com/cumulus_uploads/document/ou4yi1g0z8/tabs_HP_police_20140817-2.pdf). The same poll found thirty-four percent of Whites believed the police response to the Ferguson protests to be reasonable compared to only sixteen percent of Blacks with the same opinion. *Id.*

racial bias.[7] Voir dire is the process of questioning prospective jurors to ensure that those chosen to sit on the jury will be impartial and unbiased. As Neil Vidmar and Valerie Hans explain, "[v]oir dire, a term with a French origin meaning roughly 'to see them say,' is used to denote the process whereby prospective jurors are questioned about their biases during the jury selection process . . . ."[8] In federal court, voir dire is generally conducted by the trial judge.[9] In state court, voir dire practice varies widely depending on the jurisdiction. In most states, voir dire is conducted by both the judge and the attorneys.[10]

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7. In the Ferguson case, since the grand jury convened by prosecutor Robert McCulloch declined to indict Officer Wilson in November 2014, prosecutors did not need to answer this question. Taylor Wofford, *After Grand Jury Decides Not to Charge Darren Wilson, What's Next for Ferguson?*, NEWSWEEK (Nov. 24, 2014, 9:35 PM), http://www.newsweek.com/no-charges-ferguson-michael-brown-shooting-case-285976 [http://perma.cc/6TNQ-N4MT]. Many thought McCulloch should have let someone else handle the case because of McCulloch's strong ties to law enforcement and the fact that his father was a police officer who was killed by a Black man when McCulloch was only twelve years old. *See* Pema Levy, *Ferguson Prosecutor Robert P. McCulloch's Long History of Siding with the Police*, NEWSWEEK (Aug. 29, 2014, 6:33 AM), http://www.newsweek.com/ferguson-prosecutor-robert-p-mcculloch-long-history-siding-police-267357 [http://perma.cc/ZU9A-QP9S] ("[McCulloch's] father was a St. Louis policeman killed in the line of duty by a Black man when McCulloch was 12. [McCulloch's] brother, nephew and cousin all served with the St. Louis police [department]"); *see also* Leigh Ann Caldwell, *Concerns Arise About Prosecutor in Michael Brown Case*, CNN (Aug. 20, 2014, 12:48 PM), http://www.cnn.com/2014/08/19/us/ferguson-prosecutor-mcculloch [http://perma.cc/6PSH-SEXY]. After it came to light that McCulloch knew some of the witnesses he presented to the grand jury were lying, the NAACP Legal Defense Fund asked a Missouri judge to reconvene a new grand jury panel to reconsider the case. Christopher Harress, *NAACP Calls for New Ferguson Grand Jury Citing Multiple Concerns with November Decision*, INT'L BUS. TIMES (Jan. 6, 2015, 7:25 PM), http://www.ibtimes.com/naacp-calls-new-ferguson-grand-jury-citing-multiple-concerns-november-decision-1775386 [http://perma.cc/Z5RD-2G2E]. The judge denied the NAACP's request to convene a new grand jury. Associated Press, *Judge Rejects Request for New Ferguson Grand Jury*, WASH. TIMES (Jan. 21, 2015), http://www.washingtontimes.com/news/2015/jan/21/judge-rejects-request-for-new-ferguson-grand-jury/.

8. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 87 (2007).

9. Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The* CSI *Infection Within Modern Criminal Jury Trials*, 41 LOY. U. CHI. L.J. 119, 145 (2009) (noting that in the federal system, judges ask most of the questions during voir dire, whereas in the state system, judges allow attorneys to ask most questions).

10. Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 378–79 n.44 (2010) (citing Valerie P. Hans & Alayna Jehle, *Avoiding Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1184 (2003)) (noting that in forty-three states, voir dire questioning is conducted by both the judge and attorneys); David B. Rottman et al., U.S. DEP'T OF JUSTICE, *State Court Organization 1998*, at 273–77 tbl.41 (2000), http://www.bjs.gov/content/pub/pdf/sco98.pdf [http://perma.cc/2SMK-7ETA] (listing four states—Connecticut, North Carolina, Texas, and Wyoming—in which attorneys only conduct voir dire, listing seven states—Arizona, California, Delaware, Illinois, Massachusetts, New Hampshire, and New Jersey—in which judges only conduct voir dire, and noting that both attorneys and judges conduct voir dire in the remaining states). In Missouri, judges usually allow the attorneys to ask the questions during jury selection, but the judge may, at her discretion, conduct some or all of the voir dire herself. Your Missouri Courts, TRIAL JUDGES CRIMINAL BENCHBOOK §§ 7.8–.9 (Kelly Broniec et al. eds., 2007), http://www.courts.mo.gov/hosted/resourcecenter/TJCB%20Published%20April%208.2011/TJBB.htm#CH_07_JurySelect_2d_files/CH_07_JurySelect_2d.htm (noting that voir dire is done first by the counsel for the state and then by the counsel for the defendant (§ 7.8), but also noting that in some instances—at the court's

It is important to note that racial bias is not unique to any particular group. While it is often assumed that racial bias means bias in favor of Whites and against Blacks, racial bias can cut in many different ways. In the Ferguson case, for example, those who believed Michael Brown was shot when he had his hands up before the Department of Justice's investigation into the shooting was completed[11] may have assumed Officer Wilson was lying when he claimed self-defense because of stereotypes about White police officers as racist individuals. At the same time, those who believed the officer's account of what happened before knowing all of the facts relating to the shooting may have assumed Michael Brown was acting in a threatening way because of stereotypes about Black men.

The Supreme Court has addressed the question of voir dire into racial bias in only a handful of cases. All of these cases dealt with the issue of whether a criminal defendant has the right to have prospective jurors questioned on racial bias, and the last time the Court dealt with this issue was in 1986, more than twenty-five years ago.

Reasonable minds can disagree as to whether it is good trial strategy to voir dire prospective jurors on racial bias. Perhaps the most common view is that reflected by Albert Alschuler, who suggested over twenty-five years ago that voir dire into racial bias would be "minimally useful."[12] Alschuler argued that asking a prospective juror whether he would be prejudiced against the defendant because of the defendant's race would be patronizing and offensive.[13] He also argued that no prospective juror would admit to racial bias, even if he was in fact prejudiced against members of a particular racial group.[14]

In this Article, I rely on empirical research on implicit bias to challenge Alschuler's view that voir dire into racial bias would be of minimal benefit to an attorney concerned about such bias. This research suggests that for an attorney concerned that racial stereotypes about the defendant, the victim, or a witness might affect how the jury interprets the evidence, voir dire into racial bias can be extremely helpful. Calling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make. While I agree with Alschuler that a simple, close-ended question like, "Are you going to be biased against the defendant because of his race?" is unlikely to be helpful, I believe that a series of open-ended questions

discretion—the judge can conduct some or all of the voir dire by herself (§ 7.9)); Michael L. Matula & G. Nicole Hininger, *The Law of Jury Selection in Missouri State Courts*, 66 J. Mo. BAR 136 (2010), https://www.mobar.org/uploadedFiles/Home/Publications/Journal/2010/05-06/The%20Law%20of%20Jury%20Selection%20in%20Missouri%20State%20Courts.pdf (noting that all parties have the opportunity to question jurors to expose juror bias or prejudice).

11. *See* U.S. DEP'T OF JUSTICE, *supra* note 3, at 5–8 (2015) (finding that the physical and forensic evidence supported Officer Wilson's claim of self-defense).

12. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 160 (1989).

13. *Id.* at 161.

14. *Id.* at 160 ("One doubts that Lester Maddox, Orville Faubus, George Wallace, Theodore Bilbo or anyone else would have responded to the proposed question by confessing a bias . . . .").

educating jurors about implicit bias and encouraging them to reflect upon whether and how implicit racial bias might affect their ability to even-handedly consider the evidence can be beneficial in helping to ensure a truly impartial jury.

My Article proceeds in four parts. In Part I, I provide an overview of the process of voir dire and review the Supreme Court's jurisprudence on voir dire into racial bias. In Part II, I examine social science research that helps answer the question whether it is a good idea to conduct voir dire into racial bias. Some of this research relates to the Implicit Association Test (IAT), an online test that measures implicit bias by comparing response times to selected words and images. Additionally, however, a wealth of less familiar empirical research on race salience conducted over the past decade indicates that calling attention to race can motivate jurors to treat Black and White defendants equally, whereas not highlighting race may result in jurors tending to be more punitive and less empathetic towards Black defendants than they might otherwise be without such attention.

In Part III, I examine a few recent studies calling into question whether making race salient is a good idea. These studies indicate that when White individuals perceive extreme racial differences in the prison population (i.e., when they believe there are many more Blacks and Latinos than Whites in prison), they are more likely to support punitive criminal justice policies than when they perceive that the proportion of minorities in prison is not so large. I analyze these studies and conclude that, while they may appear at first glance to contradict the race salience research, they do not in fact undermine that research.

In Part IV, I turn to the question of what steps can be taken to combat implicit racial bias in the criminal courtroom. I argue that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection. Voir dire can be used to both educate prospective jurors about the concept of implicit bias and help them to become aware of their own implicit biases. It makes sense to address the possibility of implicit racial bias early on, rather than waiting until just before the jury deliberates, as it may be too late by then to undo its effects.

I. VOIR DIRE

It is often said that a trial is won or lost when the jury is selected.[15] This is because "jurors bring to the courtroom biases and predispositions which largely determine the outcome of the case."[16] The process of voir dire presents an opportunity for the attorneys to influence who ends up sitting on the jury, at least in jurisdictions where attorney voir dire is permitted.

In this Part, I first discuss the process of voir dire and its role in jury selection.

15. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1557, 1590 n.223 (2013).

16. Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 576 (1985).

I also examine the benefits of attorney voir dire over judge-dominated voir dire. I then discuss the Supreme Court's jurisprudence on voir dire into racial bias.

A. The Process of Voir Dire

"Voir dire is the process of questioning prospective jurors about their qualifications to serve on the jury panel to decide the case."[17] In federal court, voir dire is usually conducted by the judge.[18] In state court, jury selection procedures vary widely with judge-dominated voir dire the practice in seven states, attorney-dominated voir dire the practice in four states, and a mix of judge and attorney questions in the remaining state courts.[19] Some courts allow the attorneys to propose questions that are then given to prospective jurors in the form of a written questionnaire.[20]

According to one source, jury selection in felony cases takes an average of 3.6 to 3.8 hours.[21] During the process of jury selection, the parties are given the opportunity to strike an unlimited number of prospective jurors for cause. A "for cause" challenge will be granted if the judge finds that the party has articulated a good reason that the juror should not serve, such as an inability to be impartial or a prior relationship with the defendant, the defense attorney, the prosecutor, the judge, or one of the witnesses.[22] Each side is also given a set number of peremptory challenges,[23] which can be used to strike a prospective juror for any reason or no reason at all, as long as the reason for striking the prospective juror is not based on the individual's race or gender.[24]

In order to guard against the possibility that attorneys may use their peremptory challenges to strike prospective jurors based on their race, the Court in *Batson v. Kentucky*[25] established a three-part framework much like the three-part framework used in the Title VII context to determine whether an individual has

17. 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, 158 (2010).

18. Lawson, *supra* note 9, at 145.

19. Rottman et al., *supra* note 10, at 273–77.

20. Roxanne Barton Conlin & Gretchen Jensen, *What, Me? Prejudiced? Absolutely Not!*, TRIAL, Dec. 2000, at 20, 22.

21. Collin P. Wedel, Note, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 STAN. J. C.R. & C.L. 293, 315 (2011).

22. VIDMAR & HANS, *supra* note 8, at 87 ("A 'challenge for cause' is an assertion by one of the lawyers that a potential juror is not impartial.").

23. For example, in federal court, a defendant charged with a felony is given ten peremptory challenges, and the prosecutor is given six peremptory challenges. FED. R. CRIM. P. 24(b)(2). If the defendant is in federal court and charged with a misdemeanor, both the defendant and the prosecutor are given three peremptory challenges. (b)(3). In a federal capital case, both sides get twenty peremptory challenges. (b)(1).

24. J.E.B. v. Alabama, 511 U.S. 127 (1994) (forbidding peremptory challenges based on gender); Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting peremptory challenges based on race).

25. *Batson*, 476 U.S. at 79.

been denied a job on the basis of unlawful discrimination.[26] Under the *Batson* framework, if one party believes the other party has used a peremptory strike to remove a juror because of the juror's race, that party may assert a *Batson* challenge.[27] The challenger must first set forth a prima facie case of intentional discrimination.[28] Under the original *Batson* framework, a defendant who asserted a *Batson* challenge could establish a prima facie case of purposeful discrimination in the selection of the jury by showing "that he [was] a member of a cognizable racial group . . . , and that the prosecutor [had] exercised peremptory challenges to remove from the venire members of the defendant's race."[29] Once the defendant showed that these facts and any other relevant circumstances raised an inference that the opposing party used its peremptory challenges to exclude individuals from the jury on account of their race,[30] the burden shifted to the opposing party to proffer a race-neutral reason for the strike.[31] After a race-neutral reason was proffered by the party opposing the *Batson* challenge, the trial court had to decide whether the challenger has met its burden of proving purposeful discrimination.[32] In *J.E.B. v. Alabama*, the Court extended *Batson* to forbid peremptory challenges based on gender.[33] At least one lower court has gone further, applying *Batson* to peremptory challenges based on sexual orientation.[34]

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26. Under the three-part framework established by the Court in *McDonnell Douglas Corp. v. Green*, the employee must first establish a prima facie case of unlawful discrimination by a preponderance of the evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The employee can establish a prima facie case by showing (1) he belongs to a racial minority; (2) he applied and was qualified for a job the employer was trying to fill; (3) though qualified, he was rejected; and (4) thereafter the employer continued to seek applicants with complainant's qualifications. *Id.* Once the employee establishes a prima facie case, the burden shifts to the employer to rebut this prima facie case by articulating a legitimate, nondiscriminatory reason for the employee's rejection. *Id.* The employee can prevail only if he can show that the employer's response is merely a pretext for behavior actually motivated by discrimination. *Id.* at 798.

27. Because *Batson* involved a defendant's challenge to a prosecutor's peremptory challenge, its holding left open the question whether a prosecutor could assert a challenge against a defendant if he believed the defendant was exercising its peremptory challenges in a racially discriminatory manner. In 1992, the Court answered this question in the affirmative, applying *Batson* to criminal defendants. Georgia v. McCollum, 505 U.S. 42, 46–48 (1992); *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618–19 (1991) (extending *Batson* to civil litigants).

28. *Batson*, 476 U.S. at 96.

29. *Id.* Subsequently, the Court broadened the *Batson* framework to include challenges based on ethnicity, *see* Hernandez v. New York, 500 U.S. 352 (1991), and later gender, *see* J.E.B. v. Alabama, 511 U.S. 127 (1994).

30. *Id.*

31. *Id.* at 97. The Court, however, has made it fairly easy for the opposing party to rebut the challenge, finding it is not necessary that the opposing party's race-neutral explanation be minimally persuasive or even plausible at stage two of the *Batson* inquiry. Purkett v. Elem, 514 U.S. 765, 768 (1995) ("The Court of Appeals erred by . . . requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i.e., a 'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected.").

32. *Batson*, 476 U.S. at 98.

33. J.E.B. v. Alabama, 511 U.S. 127 (1994).

34. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 476 (9th Cir. 2014).

While *Batson* was well intended, it has not proven to be very effective.[35] Attorneys facing *Batson* challenges have been able to survive these challenges by proffering fairly implausible "race-neutral" reasons for their strikes. For example, in one case, a prosecutor who faced a *Batson* challenge from a Black defendant charged with importing heroin proffered two ostensibly race-neutral reasons for striking a Black woman from the jury.[36] First, the prosecutor noted that the prospective juror was a postal employee and said that it was the U.S. Attorney's Office's general policy not to have postal employees on the jury.[37] When pressed by the defense attorney, the prosecutor backed down and admitted that the office did not have such a policy and proffered a second reason for the strike.[38] The prosecutor then suggested that because the prospective juror was a single parent who rented an apartment in an urban area, she "may be involved in a drug situation where she lives."[39] The judge accepted this second explanation as a race-neutral reason for the strike and denied the defense's *Batson* objection.[40]

In another case, the government used five of its six peremptory challenges to strike Black jurors.[41] When the defendant, a Black man, asserted a *Batson* challenge, one of the race-neutral reasons proffered by the government for striking a Black female from the jury was that her name, Granderson, closely resembled that of a defendant, Anthony Grandison, in a previous case tried by the same prosecutor.[42] Even though that case was completely unrelated to the case at hand and therefore the fact that the prospective juror's name was similar to the name of a defendant in a completely unrelated case would have had no bearing on the prospective juror's ability to be fair and impartial, the Court of Appeals agreed with the trial court that this was a neutral and nonpretextual reason for the strike and affirmed the defendant's conviction.[43]

In *United States v. Romero-Reyna*, the defendant, a Hispanic man charged with possession of marijuana and heroin with intent to distribute, challenged the government's use of its peremptory challenges against six prospective jurors of Hispanic origin.[44] The prosecutor proffered as a race-neutral reason for striking one of the individuals who worked as a pipeline operator that he had a "P" rule in which

35. Professor Jean Montoya surveyed prosecutors and criminal defense attorneys and found that most thought *Batson* was of limited effectiveness in eliminating racial discrimination in jury selection in large part because of the ease with which an attorney can come up with a race-neutral reason for the strike. Jean Montoya, *The Future of the Post*-Batson *Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 1006 (1996).

36. United States v. Uwaezhoke, 995 F.2d 388 (3d Cir. 1993).

37. *Id.* at 390–91.

38. *Id.* at 391.

39. *Id.*

40. *Id.*

41. United States v. Tindle, 860 F.2d 125, 128 (4th Cir. 1988).

42. *Id.* at 129.

43. *Id.*

44. United States v. Romero-Reyna, 889 F.2d 559, 560 (5th Cir. 1989).

he never accepted jurors whose occupations began with a "P."[45] The trial court accepted this explanation as nonpretextual and rejected the defendant's *Batson* challenge.[46] On remand, the prosecutor repeated adherence to his "P" rule, but added that he had been informed that marijuana use by pipeline operators was prevalent.[47] This time, the trial court rejected the prosecutor's "P" rule as a legitimate basis for the strike, noting that several other members of the venire had occupations beginning with the letter "P" and had not been struck by the prosecutor.[48] Nonetheless, the trial court found that the newly added explanation was race-neutral and not a pretextual reason for the strike and rejected the defendant's *Batson* challenge again.[49]

Another problem is that the attorney exercising the challenged strike may not even be aware that she would not have struck the prospective juror if that individual had been of another race. As Antony Page explains, an attorney may be unaware that she has relied on racial stereotypes in forming her opinions about the prospective juror.[50] When asked to provide a race-neutral reason for the strike, the attorney may sincerely believe that she struck the prospective juror for reasons not related to the juror's race, even though implicit racial bias may have in fact influenced the attorney's perceptions of the individual.[51] "By the time the lawyer exercises the peremptory challenge, stereotypes may have thoroughly affected her observation and interpretation of the information upon which she makes her decision."[52] In light of these and other problems with the *Batson* framework, critics of *Batson* have argued that it would be best to simply eliminate the peremptory challenge altogether and force attorneys to take the first twelve individuals in the jury box unless the attorneys can articulate reasons to challenge those individuals for cause.[53]

Regardless of whether peremptory challenges continue to exist in our criminal justice system, a critical question remains: which legal actor—the judge or the attorney—should conduct voir dire? Empirical research suggests that judge-dominated voir dire is less effective at discovering juror bias than attorney voir dire because prospective jurors often give what they think is the socially desirable

45. *Id.*
46. *Id.*
47. *Id.* at 561.
48. *Id.*
49. *Id.*
50. Antony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 228 (2005).
51. *Id.*
52. *Id.*
53. *See* Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369, 420–23 (1992); Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 374 (1990); *see also* Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (opining that the only way to stop the discriminatory use of the peremptory challenge is to completely abolish peremptory challenges).

response when the judge is asking the questions.[54] There are other reasons why a trial court should allow the attorneys to conduct voir dire, particularly when the case involves the possibility of racial bias. As Judge Mark Bennett notes, attorneys usually know the case better than the trial judge, and therefore "are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome."[55] Attorneys also have more of an incentive than the trial judge to use jury consultants and other resources "to develop voir dire strategies to address both explicit and implicit biases of prospective jurors."[56] This is because attorneys need as much information as possible about the prospective jurors in order to know which prospective jurors would have difficulty being impartial and should be stricken from the jury.[57]

B. The Supreme Court's Jurisprudence on Voir Dire into Racial Bias

The U.S. Supreme Court has addressed the question of whether a criminal defendant has a right to question prospective jurors on the issue of racial bias in only a handful of cases. Not surprisingly, the Court has gone back and forth on this issue.

Initially, the Court was sympathetic to the idea that a criminal defendant has a constitutional right to question prospective jurors about racial bias. In 1931, the Court reversed a Black defendant's murder conviction where the trial judge had refused a defense request to interrogate the venire on racial prejudice.[58] In *Aldridge v. United States*, a Black man charged with the murder of a White police officer was convicted of first-degree murder and sentenced to death.[59] The trial judge had refused a defense request to question prospective jurors on whether they had any racial prejudice based on the fact that the defendant was Black and the deceased was White.[60] The Supreme Court reversed the conviction, stating that fairness demands that inquiries into racial prejudice be allowed.[61] In response to the lower court's suggestion that such inquiry was unnecessary since African Americans were afforded the same rights and privileges as Whites, such as the right to practice law and the right to serve on juries,[62] the Court said, "Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice

54. *See* Bennett, *supra* note 17, at 160; Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 143 (1987) (finding that prospective jurors respond more candidly and are less likely to give what they think is the socially desirable response when attorneys are asking the questions during voir dire than when the judge is asking questions).

55. Bennett, *supra* note 17, at 160.

56. *Id.*

57. J.E.B. v. Alabama, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) ("[P]reventing bias . . . . lies at the very heart of the jury system." (citations omitted)).

58. Aldridge v. United States, 283 U.S. 308 (1931).

59. *Id.* at 309.

60. *Id.* at 310–11.

61. *Id.* at 313.

62. *Id.* at 316 (McReynolds, J., dissenting).

is so remote as to justify the risk in forbidding the inquiry."[63] Noting "[t]he argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices,"[64] the *Aldridge* Court concluded, "We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred."[65]

The Court did not revisit the question of whether a criminal defendant has a right to require the trial judge to question prospective jurors on racial bias until 1973, more than forty years later. In *Ham v. South Carolina*, a case involving a Black civil rights activist charged with possession of marijuana, the Court again sided with the defendant, holding that a trial judge's refusal to question prospective jurors as to possible racial prejudice violated the defendant's constitutional rights.[66] This time, the Court went further than it had in *Aldridge v. United States* and expressly grounded its decision in due process, holding that "the Due Process Clause of the Fourteenth Amendment requires that . . . the [defendant] be permitted to have the jurors interrogated on the issue of racial bias."[67] The *Ham* Court reaffirmed the trial court's discretion to conduct voir dire in the manner it thinks is best, noting that the trial judge is "not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by [the defendant]."[68] It also limited the right in controversy to questioning regarding possible bias to *racial* bias, refusing to require the trial court to question prospective jurors regarding bias against persons with beards even though the defendant, who sported a beard, had requested such voir dire.[69]

A mere three years later, the Court started backtracking from its support for voir dire into racial bias. In *Ristaino v. Ross*, the Court held that the mere fact that the defendant is Black and the victim is White is not enough to trigger the constitutional requirement that the trial court question prospective jurors about racial prejudice.[70] The defendants in *Ristaino v. Ross* were three Black men on trial for armed robbery, assault and battery by means of a dangerous weapon, and assault with intent to murder two White security guards.[71] Defendant Ross requested that the trial judge ask prospective jurors the following question: "Are there any of you who believe that a White person is more likely to be telling the truth than a Black person?"[72] The trial court not only refused to ask this particular question, it failed

63. *Id.* at 314.
64. *Id.* at 314–15.
65. *Id.* at 315.
66. Ham v. South Carolina, 409 U.S. 524, 529 (1973).
67. *Id.* at 527.
68. *Id.*
69. *Id.* at 527–28.
70. Ristaino v. Ross, 424 U.S. 589, 597 (1976).
71. *Id.* at 590.
72. *Id.* at 590 n.1.

to make any reference to race when giving jurors an overview of the facts of the case and when questioning the jurors about possible bias or prejudice for or against either of the defendants or the victim.[73] The jury convicted the defendants on all counts.[74]

In holding that the trial court did not err in refusing to question the venire on racial bias, the Court attempted to distinguish the case before it from *Ham v. South Carolina*. Somewhat unconvincingly, the Court explained that racial issues were "inextricably bound up with the conduct of the trial" in *Ham* because Ham, who had a reputation as a civil rights activist, claimed that he had been framed because of his civil rights work.[75] The *Ristaino* Court continued, "The mere fact that the victim of the crimes alleged was a White man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*."[76] The Court then established what some have called a "special circumstances" rule: a defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a "significant likelihood" of prejudice by the jurors.[77]

Even though the *Ristaino* Court refused to find a due process violation in the trial court's failure to question jurors on racial bias, it did acknowledge the usefulness of asking questions on racial bias as a prudential matter. "Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant."[78] The Court indicated that had the case been tried in federal court, it would have used its supervisory power to require the trial court to ask prospective jurors questions on racial bias.[79]

In 1981, the Court revisited the issue of voir dire into racial bias in a case involving a defendant of Mexican descent. The defendant in *Rosales-Lopez v. United States* was charged with smuggling undocumented Mexican immigrants into the United States.[80] The defendant requested that prospective jurors be asked the following questions: "Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect

73. *Id.* at 592 nn.3–4.

74. *Id.* at 593.

75. *Id.* at 596–97.

76. *Id.* at 597.

77. *Id.* at 596–97; *see also* Laura A. Giantris, *The Necessity of Inquiry into Racial Bias in Voir Dire, The Maryland Survey: 1994-1995*, 55 MD. L. REV. 615, 629 (1996). Giantris discusses *Hill v. State*, a Maryland decision in which the Maryland Court of Appeals held that the trial court's refusal to question the venire on racial or ethnic bias constituted constitutional error and concludes that "[a]s a result of *Hill*, Maryland criminal defendants no longer must meet the burdensome 'special circumstances' test as enunciated in *Thornton* and *Rosales-Lopez*." *Id.*; *see also* Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 672 (2004) ("*Ristaino* established a 'special circumstances' rule: the Constitution only requires a court to allow defendants to ask questions designed to elicit racial prejudice when the special circumstances of a case indicate a significant likelihood of prejudice by the jurors.").

78. *Ristaino*, 424 U.S. at 597 n.9.

79. *Id.*

80. Rosales-Lopez v. United States, 451 U.S. 182 (1981).

you?"[81] The trial judge did not pose either of these questions to the prospective jurors, nor did he pose any questions specifically addressed to possible prejudice against the defendant because of his race or ethnicity.[82] The trial judge instead asked the following questions of prospective jurors: "Do any of you have any feelings about the alien problem at all?"; and "Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?"[83]

In considering defendant Rosales-Lopez's appeal, the Supreme Court started by discussing the importance of voir dire, noting that "*[v]oir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."[84] The Court observed that lack of adequate voir dire impairs the trial court's ability to remove jurors who cannot act impartially.[85] Next, the Court noted that "federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*."[86] This is due to the fact that the responsibility to impanel an impartial jury lies with the trial judge.[87] Additionally, the trial judge is able to see the prospective jurors and their responses, both verbal and nonverbal, to the questions posed to them during voir dire.[88]

The Court next distinguished between questions directed at the discovery of racial prejudice that are constitutionally mandated and questions directed at the discovery of racial prejudice that are required of federal courts as a matter of the Court's supervisory authority over the federal courts.[89] The Court then established a new nonconstitutional rule for federal courts, holding that federal courts must inquire into racial prejudice "when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups."[90] In all other cases, the Court explained, reversible error will occur only when the circumstances of the case "indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury."[91] Because Rosales-Lopez was charged with smuggling, not a crime of interracial violence, the trial court was not required to ask questions directed at racial prejudice even though requested to do so by the defense unless there was a reasonable possibility that racial

81. *Id.* at 185.

82. *Id.*

83. *Id.* at 186. It could be argued that the trial court's use of the word "alien" to describe Rosales-Lopez encouraged the jurors to be biased against Rosales-Lopez. The word "alien," which is used to refer to one who is an immigrant to the United States, conjures up images of aliens from outer space. Because of this, many progressives use the phrase "undocumented immigrant" rather than "illegal alien."

84. *Id.* at 188.

85. *Id.*

86. *Id.* at 189.

87. *Id.*

88. *Id.*

89. *Id.* at 190.

90. *Id.* at 196.

91. *Id.* at 191. In other words, in all other cases, the special circumstances rule established in *Ristaino v. Ross* would control.

or ethnic prejudice influenced the jury.[92] The Court did not believe such a possibility existed in this case.[93]

While Rosales-Lopez may not have been happy with the Supreme Court's decision since the Court affirmed his conviction, the decision was partially good news for future defendants, as it established a new defense-friendly rule—albeit one that leaves discretion in the trial court's hands—for defendants seeking voir dire into racial bias in federal courts. In federal cases involving a defendant and a victim of different races or ethnicities and a crime of violence, the trial court should as a prudential matter conduct voir dire into racial prejudice if the defense requests that it do so.[94]

In 1986, the Court addressed the issue of a defendant's right to have prospective jurors questioned on racial prejudice for the last time to date.[95] In *Turner v. Murray*, Willie Lloyd Turner, a Black man, was charged with capital murder and other crimes after fatally shooting a White jewelry store owner with a sawed off shotgun in front of a police officer and three witnesses.[96] Apparently, Turner became upset with the store owner after learning that he had triggered a silent alarm to summon the police to the store.[97]

Prior to jury selection, Turner's attorney submitted to the trial judge a list of questions that he wished to ask the venire, including the following question: "The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a White Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"[98] The trial court refused to ask this question, instead asking the venire the more generic question "whether any person was aware of any reason why he could not render a fair and impartial verdict."[99] Everyone on the venire responded to this question in the negative.[100] At the time they were asked this question, the prospective jurors did not know that the victim was White.[101] Eight

92. *Id.* at 192.
93. *Id.* at 193.
94. *Id.* at 192.
95. The Court has mentioned voir dire on racial bias in other cases, but this was not the main issue in those cases. *See, e.g.*, Warger v. Shauers, 135 S. Ct. 521, 529 n.3 (2014). The court held that a plaintiff in a personal injury suit may not use a juror affidavit detailing alleged juror dishonesty to get a new trial while noting in a footnote, "There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. . . . We need not consider the question, however, for those facts are not presented here." *Id.*; *see also, e.g.*, Mu'Min v. Virginia, 500 U.S. 415, 422–24 (1991) (finding no error in trial court's refusal to further question prospective jurors about news reports to which they had been exposed while discussing cases involving voir dire into racial bias as examples of state cases on the extent of voir dire examination).
96. Turner v. Murray, 476 U.S. 28, 29–30 (1986).
97. *Id.* at 30.
98. *Id.* at 30–31.
99. *Id.* at 31.
100. *Id.*
101. *Id.*

Whites and four Blacks were selected to serve on the jury.[102] The jury found the defendant guilty of all charges, and after a separate sentencing hearing, recommended that Turner be sentenced to death.[103]

Turner appealed his death sentence, which the Supreme Court reversed.[104] The Court started by reaffirming what it stated in *Ristaino*: the mere fact that the defendant is Black and the victim is White is not a special circumstance of constitutional significance.[105] The Court then distinguished this case from *Ristaino,* noting that in addition to the fact that Turner was Black and his victim was White, Turner was charged with a capital offense.[106] The Court explained why this one fact mattered so much. The jury in a capital case, the Court explained, has an enormous amount of discretion.[107] First, the capital jury must decide whether aggravating factors merit putting the defendant to death. The jury must decide, for example, whether the defendant is likely to commit future violent acts, or whether his crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."[108] Additionally, "the [capital] jury must consider any mitigating evidence offered by the defendant."[109]

Next, the Court exhibited an amazing amount of prescience in its recognition of the concept of implicit racial bias. Even though *Turner* was decided in 1986, almost thirty years ago, the Court at that time realized the "unique opportunity for racial prejudice to operate but remain undetected":[110]

> [A] juror who believes that Blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of Blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[111]

The *Turner* Court noted that in cases like the one before it where the defendant was charged with a crime of violence and the defendant and victim were of different races, there was a real risk that racial prejudice might infect the proceeding and improperly lead to a death sentence.[112] "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality

102. *Id.*
103. *Id.*
104. *Id.* at 31–33.
105. *Id.* at 33.
106. *Id.*
107. *Id.* at 33–34.
108. *Id.* at 34.
109. *Id.*
110. *Id.* at 35.
111. *Id.*
112. *Id.*

of the death sentence."[113] The Court found the risk that racial prejudice may have infected Turner's capital sentencing "unacceptable in light of the ease with which that risk could have been minimized."[114] In the Court's view, the trial judge could have minimized this risk by questioning prospective jurors on racial prejudice but refused to do so.[115] The Court concluded by holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."[116] The Court made clear that "the trial judge retains discretion as to the form and number of questions on the subject."[117] Moreover, "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry."[118]

Turner thus established a constitutional right to voir dire into racial bias in all capital cases in which the defendant is charged with an interracial crime of violence, as long as the defendant specifically requests such voir dire.[119] Oddly, however, the Court limited its holding by reversing only the death sentence Turner received, not his guilty conviction.[120] Even though the twelve jurors who voted to have Turner executed were the same jurors who found him guilty, the Court refused to vacate Turner's conviction. The Court explained:

> At the guilt phase of petitioner's trial, the jury had no greater discretion than it would have had if the crime charged had been noncapital murder. Thus, with respect to the guilt phase of petitioner's trial, we find this case to be indistinguishable from *Ristaino*, to which we continue to adhere.[121]

The problem with this reasoning is that *Ristaino* is distinguishable from *Turner*. Ristaino was never at risk of being put to death, but Turner was. If Turner's jury had not convicted him in the first place, he would not have been at risk of being executed. Moreover, if a juror's racial beliefs might influence her to see the defendant as more violent and dangerous, and lead that juror to more readily accept evidence of aggravating factors and discount evidence of mitigating factors, then those same beliefs are likely to color the juror's weighing of the evidence presented at the guilt phase of the trial.[122]

The Supreme Court's jurisprudence on voir dire into racial bias leaves us with the following general rules. A capital defendant charged with an interracial crime of

113. *Id.* at 36.
114. *Id.*
115. *Id.*
116. *Id.* at 36–37.
117. *Id.* at 37.
118. *Id.*
119. *Id.* at 36–37.
120. *Id.*
121. *Id.* at 37–38.
122. As noted by Justice Clark in *Gideon v. Wainwright*: "How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted . . . ?" Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Clark, J., concurring).

violence in either state or federal court has a due process right to have prospective jurors questioned on racial bias, but the defendant must specifically request such voir dire in order to trigger the constitutional right.[123] A noncapital defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a significant likelihood of prejudice by the jurors.[124] The mere fact that the defendant and victim are of different races is not considered a special circumstance triggering the due process right to voir dire into racial bias.[125] A federal court overseeing a case involving a defendant charged with an interracial crime of violence should, as a prudential matter, allow the defense to question prospective jurors on racial bias as long as the defendant requests such voir dire.[126] The States of course are free to go further than the constitutional minimums set forth by the Supreme Court.

All of the Supreme Court cases on voir dire into racial bias to date have focused on whether the defendant has a right to such voir dire. The Court has never addressed the question of whether the government has a corresponding right to have prospective jurors questioned on racial bias. In certain cases, particularly in interracial cases involving a White defendant and a Black victim, the prosecutor may be concerned that racial stereotypes may lead jurors to sympathize with the defendant and have less empathy for the victim. Racial stereotypes about Black men as dangerous, violent criminals may encourage jurors to see the victim's actions as threatening and the defendant's actions as reasonable.

In perhaps the only law review article to focus on this question, Tania Tetlow argues that the Supreme Court should establish that the prosecutor shares the defendant's constitutional right to conduct voir dire into racial bias.[127] Tetlow notes that prosecutors are charged with "doing justice," and argues that "doing justice" includes ensuring equal protection of the law for defendants and victims alike.[128] One way to ensure equal protection for victims of color, Tetlow argues, is to allow prosecutors to question prospective jurors on racial bias so they can better ascertain which individuals can serve as truly impartial jurors.[129] Tetlow argues that the right to voir dire into racial bias should not be limited to capital cases in which the defendant is charged with an interracial crime of violence and cases involving a significant likelihood of prejudice in the jurors.[130] Although it is difficult to make a case for a constitutional right to voir dire into racial bias for prosecutors, I agree that as a prudential matter, courts should permit prosecutors as well as defense

123. *Turner*, 476 U.S. at 36–37.

124. Ristaino v. Ross, 424 U.S. 589, 596–97 (1976).

125. *Id.*

126. Rosales-Lopez v. United States, 451 U.S. 182, 192 (1981).

127. Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117 (2012).

128. *Id.* at 1125–26 ("Doing battle against discriminatory acquittal falls squarely within a prosecutor's ethical duty to 'do justice' . . . .").

129. *Id.* at 1148–51.

130. *Id.* at 1151–52.

attorneys to conduct voir dire into racial bias in any case in which racial stereotypes may influence the jury.

II. SOCIAL SCIENCE RESEARCH ON RACE SALIENCE

A. Implicit Bias

Over the past decade, social scientists have convincingly demonstrated that bias is largely unconscious and often at odds with conscious beliefs.[131] Even though one may sincerely believe that all individuals should be treated equally regardless of race, one may nonetheless have an implicit preference for individuals of one race over individuals of another race. This type of bias that exists outside of conscious awareness is called "implicit bias."

Social scientists have demonstrated that most Americans are affected by implicit bias through an online test known as the Implicit Association Test (IAT). The IAT measures the amount of time that an individual takes to associate different words and images viewed on a computer screen.[132] When individuals are asked to pair words and images and those pairings are consistent with widely held beliefs and attitudes, their response times are fairly quick.[133] When they are asked to pair words and images that do not correlate to widely held associations, response times are noticeably slower.[134] For example, individuals asked to pair names like Katie and Meredith with words or images reflecting pleasant and nice things and names like Ebony and LaTonya, names associated with African Americans, with words or images reflecting unpleasant or negative things were able to do this task fairly quickly. [135] When they were asked to pair White-sounding names with unpleasant or negative words and images and African American sounding names with pleasant or positive words and images, their response times were noticeably slower.[136] Since I have written at length about implicit bias in previous works, I will not repeat that discussion here.[137]

Over fourteen million IATs, measuring bias based on age, gender, sexuality, among other types of biases, have been taken.[138] IAT research has shown that both young and old individuals tend to favor the young and disfavor the elderly.[139] Most

131. Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001).

132. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1509–10 (2005).

133. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1130 (2012).

134. *Id.*

135. Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465–68 (1998).

136. *Id.* at 1469–70.

137. *See* Lee, *supra* note 15, at 1570–72 (2013); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 536–49 (2008).

138. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 69 (2013).

139. Becca R. Levy & Mahzrin R. Banaji, *Implicit Ageism*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 55 (Todd D. Nelson ed., 2002). Indeed, researchers have

heterosexuals taking the sexual orientation IAT have demonstrated an implicit bias in favor of heterosexuals over gays and lesbians.[140] Of those who have taken the race IAT, seventy-five percent have demonstrated implicit bias in favor of Whites over Blacks.[141]

B. Race Salience

In light of the research on implicit bias, social scientists have studied whether race salience can encourage individuals to overcome their implicit racial biases. "Race salience" is a term of art used by some social scientists to refer to the process of making salient the potential for racial bias.[142] "Race salience" does not simply refer to juror awareness of the races of the defendant and victim.[143] It involves "'making salient' the potential racism of jurors' attitudes."[144]

A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way.[145] For example, in one study, Steven Fein and others examined the effects of pretrial publicity on mock jurors.[146] The study found that most mock jurors were negatively influenced by newspaper articles that presented the facts in a way that disfavored the defendant, even when the mock jurors were told that the newspaper articles were inadmissible and should not be considered in deciding the defendant's guilt.[147] However, when mock jurors were given information suggesting that the media's treatment of the defendant was racially biased, the negative bias against the defendant that the mock jurors had previously exhibited disappeared.[148]

In another experiment conducted by Samuel Sommers and Phoebe Ellsworth, jury-eligible citizens and actual jury pool members from a county in Michigan were

found that implicit ageism or implicit bias against the elderly is even more prevalent than implicit racial bias against Blacks. *Id.* at 54–55.

140. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 19 (2007) (finding that sixty-eight percent of study participants showed an implicit preference for straight people over gay people).

141. BANAJI & GREENWALD, *supra* note 138, at 47.

142. Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599, 601 (2009).

143. *Id.* at 603–05.

144. *Id.* at 601.

145. *Id.*

146. Steven Fein et al., *Hype and Suspicion: The Effects of Pretrial Publicity, Race, and Suspicion on Jurors' Verdicts*, 53 J. SOC. ISSUES 487 (1997).

147. *Id.* at 497 ("Exposure to pretrial publicity that reported incriminating information about the defendant made our mock jurors more likely to reach guilty verdicts than the mock jurors in the control condition.").

148. *Id.* ("The notable exception concerns mock jurors who received the incriminating pretrial publicity along with other publicity designed to make them suspect that the incriminating information may have been released to the public because of racist motives.").

shown a videotaped summary of an actual rape trial involving a Black defendant.[149] Participants completed a voir dire questionnaire, watched a trial video, received actual State of Michigan pattern jury instructions, and deliberated on the case as members of six-person juries.[150] Although all the mock jurors viewed the same trial video, some received questions about their racial attitudes and general perceptions of racial bias in the legal system on their voir dire questionnaire while other mock jurors did not.[151] For example, some mock jurors read the following race-relevant question: "The defendant in the case is African-American and the victims are White. How might this affect your perceptions of the trial?"[152] Another race-relevant question was: "In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?"[153]

Sommers and Ellsworth found that regardless of their race, mock jurors who received the race-relevant voir dire questions were less likely to vote to convict the Black defendant than the mock jurors who did not receive race-relevant voir dire questions.[154] It is worth noting that the race relevant questions were not intended to identify jurors likely to exhibit racial bias in their judgments.[155] Rather, they were "designed to force mock jurors to think about their racial attitudes and, more generally, about social norms against racial prejudice and institutional bias in the legal system."[156]

Calling attention to the possibility of racial bias through witness testimony can also help minimize racial bias. In another study, Ellen Cohn and others found that White mock jurors were less likely to convict a Black defendant charged with attempted vehicular manslaughter after striking three White men with his car if presented with testimony from the defendant's wife revealing that the White victims shouted racial slurs at the defendant and his wife before the defendant got into his vehicle and sped away.[157] Calling attention to the possibility that the victims may have been racially biased against the defendant may have encouraged the jurors to consider the facts with a bit more empathy for the defendant than they otherwise might have had.

Racial bias can also be reduced if race is made salient by attorneys in their opening and closing statements. Donald Bucolo and Ellen Cohn found that when a defense attorney called attention to the possibility of racial bias in his opening and closing statements, White mock jurors were less likely to find the Black male

149. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries?: A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026 (2003).

150. *Id.*

151. *Id.*

152. *Id.* at 1027.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1959, 1964 (2009).

defendant guilty of assault and battery than when the attorney did not call attention to the possibility of racial bias in his opening and closing statements.[158] Statements making race salient included, "The defendant did what any (Black/White) man in this situation would do," and "The only reason the defendant, and not the supposed victim, is being charged with this crime is because the defendant is (Black/White) and the victim is (White/Black)."[159] Bucolo and Cohn concluded that highlighting race in an interracial trial was a beneficial defense strategy when the defendant was Black, "leading to decreased ratings of guilt."[160]

III. SOCIAL SCIENCE RESEARCH ON RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE CRIMINAL JUSTICE POLICIES

Some recent social science research on racial perceptions of crime and support for punitive polices calls into question whether making race salient is a good idea. In 2014, Rebecca Hetey and Jennifer Eberhardt published the results of experiments they conducted in San Francisco and New York City.[161] In each experiment, they manipulated the racial composition of the prison population and then measured the subject's support for or acceptance of a punitive criminal justice policy.[162] They found that when the prison population was represented as more Black, participants were more supportive of punitive criminal justice policies.[163]

In the first experiment, Hetey and Eberhardt tested support for California's Three Strikes Law.[164] This law, passed in 1994, mandated a twenty-five-years-to-life prison sentence for anyone convicted of a felony after having been convicted of two prior violent or serious felonies.[165] Even a minor third felony such as "stealing a dollar in loose change from a parked car" could result in a life sentence under the Three Strikes Law as originally enacted.[166] In 2012, critics of the Three Strikes Law sought to amend it by permitting a twenty-five-years-to-life sentence only if the defendant's third felony was a serious or violent felony.[167] The proposed amendment would appear on the November 2012 ballot only if enough signatures supporting the amendment were gathered.[168]

In the experiment, a White female recruited registered California voters from

158. Donald O. Bucolo & Ellen S. Cohn, *Playing the Race Card: Making Race Salient in Defence Opening and Closing Statements*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 293, 297, 299 (2010).

159. *Id.* at 297.

160. *Id.* at 299.

161. Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, PSYCHOL. SCI. 1–6 (2014).

162. *Id.* at 1.

163. *Id.*

164. *Id.* at 2.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* The ballot initiative, California Proposition 36, did appear on the November 2012 ballot and passed. STANFORD JUSTICE ADVOCACY PROJECT, https://law.stanford.edu/stanford-justice-advocacy-project/ [https://perma.cc/F9CE-Y8NZ] (last visited Sept. 16, 2015).

a San Francisco Bay Area commuter station to participate in the study, which was described to them as exploring Californians' views on social issues.[169] Participants, all of whom were Caucasian, were shown eighty color photographs of Black and White inmates on an iPad.[170] Some participants were shown fewer Black faces than other participants.[171] In the "less Black" condition, only twenty-five percent of the photographs were of Black inmates, which was about the same percentage of Blacks actually in California prisons.[172] In the "more Black" condition, forty-five percent of the photographs were of Black inmates, reflecting the approximate percentage of Blacks incarcerated under California's Three Strikes Law.[173] Next, the subjects were informed of California's Three Strikes Law and the initiative to amend it.[174] Subjects were asked to rate how punitive they thought the Three Strikes Law was.[175] The subjects were then told the study was over and that the experimenter had copies of the actual petition, which they could look at and sign if they wanted.[176] Subjects were told that if they signed the petition, their signature would be forwarded to the State Attorney General's office to be counted.[177]

Hetey and Eberhardt found that regardless of the condition they were in ("more Black" or "less Black"), subjects across the board agreed that California's Three Strikes Law was too punitive rather than not punitive enough.[178] Subjects in the "less Black" condition, however, were much more willing to sign the petition to amend the law to require that the third felony conviction be a serious or violent felony than subjects in the "more Black" condition.[179] Of the participants who saw fewer photos of Black inmates, 51.72% signed the petition, whereas only 27.27% of participants who saw more photos of Black inmates signed the petition.[180] Hetey and Eberhardt concluded that the Blacker the participant believed the prison population to be, the less willing the participant was to amend a law they acknowledged was overly punitive.[181]

Hetey and Eberhardt conducted a second study (Study 2) in New York City, this time testing support for New York City's controversial stop-and-frisk policy.[182] The researchers recruited White New York City residents to complete an online survey in October 2013.[183] Instead of showing participants photos of inmates, they

169. Hetey & Eberhardt, *supra* note 161, at 2.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 2–3.
180. *Id.* at 3.
181. *Id.*
182. *Id.*
183. *Id.*

simply presented participants with statistics about the prison population.[184] In the "less Black" condition, they told subjects that the prison population was 40.3% Black and 31.8% White, which was almost the actual percentage of Blacks in prisons across the nation.[185] In the "more Black" condition, they told subjects that the prison population was 60.3% Black and 11.8% White, approximately the actual percentage of Black inmates in New York City Department of Corrections facilities.[186] Next, participants were told that a federal judge had ruled that New York's stop-and-frisk policy was unconstitutional (this was actually true) and that the city was appealing the judge's ruling.[187] Participants were then asked a series of questions designed to measure their support for keeping New York's stop-and-frisk policy.[188] Finally, participants were asked whether they would sign a petition to end New York City's stop-and-frisk policy.[189]

Hetey and Eberhardt found that regardless of what condition they were in, participants across the board felt that New York's stop and frisk policy was "somewhat punitive."[190] Participants in the "more Black" condition, however, were "significantly less willing to sign a petition to end the stop-and-frisk policy than were participants in the less-Black condition."[191] Only 12.05% of participants in the "more Black" condition said they would sign the petition compared to 33.3% in the "less Black" condition.[192]

Also in 2014, The Sentencing Project published a report entitled, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*.[193] The Sentencing Project found that skewed racial perceptions of crime by White Americans bolster their support for harsh criminal justice policies.[194] Synthesizing two decades of research,[195] The Sentencing Project reported that White Americans consistently overestimate the proportion of crime committed by persons of color.[196] The report theorized that attributing crime to racial minorities limits White Americans' ability to empathize with offenders and encourages retribution as the primary response to crime.[197] The result: increased support for punitive criminal justice policies.

One might conclude that this recent research on racial perceptions of crime

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 4.
191. *Id.*
192. *Id.*
193. NAZGOL GHANDNOOSH, SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014), http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf [http://perma.cc/R4HH-GVRC].
194. *Id.* at 5.
195. *Id.* at 3.
196. *Id.* at 5, 13.
197. *Id.* at 6, 18–19.

leading to increased support for punitive policies means that calling attention to race is a bad idea as it may simply remind jurors of the association between Black and crime and encourage White jurors to act more punitively towards Black defendants. The research, however, does not support such a conclusion. Recall that The Sentencing Project's report identified *skewed* or inaccurate racial perceptions of crime as the problem.[198] Similarly, Hetey and Eberhardt's Three Strikes study suggested that when individuals believed there were more Blacks in prison than might actually be the case, they were more supportive of punitive criminal justice policies.[199] Indeed, the Sentencing Project explicitly supports making race salient, noting that "[m]ock jury studies have shown that *increasing* the salience of race in cases *reduces* bias in outcomes by making jurors more conscious of and thoughtful about their biases."[200] Making race and the possibility of racial bias salient, as opposed to highlighting extreme racial disparities in the prison population, can help reduce bias in jurors by encouraging them to think about and counter their own biases.

Implicit racial bias—unconscious racial bias even among people who explicitly disavow racial prejudice—contributes to inaccurate perceptions of race and crime because it encourages individuals to associate all or most Blacks and Latinos with crime when only some Blacks and Latinos are engaging in criminal behavior.[201] One way to overcome implicit racial bias is to recognize its existence. "Dispelling the illusion that we are colorblind in our decision making is a crucial first step to mitigating the impact of implicit racial bias."[202]

IV. COMBATING IMPLICIT RACIAL BIAS IN THE CRIMINAL COURTROOM

In light of the social science research on implicit bias, what steps can be taken to combat implicit racial bias in the criminal courtroom? This Section discusses a few different ways to address the problem of implicit bias in the courtroom. While the focus of this Article is on combating racial bias, the proposals discussed within can be helpful to attorneys concerned about bias of any kind.[203]

A. Raising Awareness of Implicit Bias Through Jury Orientation Materials

As Carol Izumi notes, "Awareness of bias is critical for mental decontamination success."[204] If so, then making sure jurors know what implicit bias

198. *Id.* at 3, 5.

199. Hetey & Eberhardt, *supra* note 161, at 2.

200. GHANDNOOSH, *supra* note 193, at 39.

201. *Id.* at 14.

202. *Id.* at 39.

203. For an excellent discussion on the difficulties of conducting voir dire when the concern is bias against gays, lesbians, and other sexual minorities, see Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407 (2014).

204. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 141 (2010) (citing Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001)).

is and that they are likely to be affected by it is critical. Anna Roberts suggests one way to make jurors aware of the concept of implicit bias: include discussion of implicit bias in juror orientation materials. Roberts argues that including information about implicit bias in jury orientation materials, particularly jury orientation videos, makes sense for several reasons.[205] First, information on implicit bias dovetails nicely with appeals to neutrality and egalitarian norms that are usually imparted to jurors during jury orientation.[206] Second, "impressions formed early on can shape the understanding of what follows."[207] If a juror is made aware of implicit bias early on, she can better guard against it influencing her own decision making. Third, addressing implicit bias during jury orientation insures that all prospective jurors are educated about it, not just those who serendipitously end up with a judge who believes it important to mention the topic.[208] Roberts goes further, suggesting not only that prospective jurors be informed about implicit bias during jury orientation but also that they should also be encouraged to take the IAT so they can experience bias within themselves.[209] Although there is some research that suggests being forced to take diversity training leads to backlash and resistance,[210] this research does not undermine Roberts' proposal because Roberts does not suggest that courts require all prospective jurors to take the IAT. She would merely have courts encourage prospective jurors to take the IAT on a voluntary basis.[211]

B. Raising Awareness of Implicit Bias Through Voir Dire

Voir dire on the topic of racial bias offers another way to make jurors aware of the concept of implicit bias. As discussed above, a wealth of social science research suggests that making race salient or calling attention to the possibility of racial bias can encourage prospective jurors to reflect on their own possible biases and consciously counter what would otherwise be automatic stereotype-congruent responses. Voir dire offers an opportunity to make race salient to prospective jurors.

Questions designed to explore the subject of racial bias through voir dire would have to be carefully formatted. Open-ended questions that encourage reflection and thought about the powerful influence of race would be better than close-ended questions that simply encourage the prospective juror to give the politically correct response.[212] Open-ended questions in general offer prospective

205. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 863–65 (2012).

206. *Id.* at 863.

207. *Id.* at 864.

208. *Id.*

209. *Id.* at 867–71.

210. *See* Rudman et al., *supra* note 204, at 857 (noting that involuntary diversity training has not been effective), 861 (noting that students who voluntarily enrolled in a diversity education seminar showed less implicit and explicit anti-Black bias at the end of the semester compared to students who did not take the class).

211. Roberts, *supra* note 205, at 874 ("The IAT would be optional . . . .").

212. Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320, 326 (2009).

jurors the chance to reflect and comment. Open-ended questions on racial bias in particular can give the attorney much more valuable information about which prospective jurors are likely to try to overcome their implicit biases than close-ended questions in which the juror is prompted to give a short "yes" or "no" response.[213]

Jonathan Rapping, President and founder of Gideon's Promise,[214] offers several examples of effective voir dire strategies for an attorney concerned about racial bias.[215] Rapping suggests that an attorney could start with the following:

> You have just learned about the concept of [implicit racial bias]. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I'd like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making. Let me start by asking for your reaction to learning about the idea of implicit, or subconscious, racial bias.[216]

If a prospective juror expresses skepticism about implicit racial bias, Rapping recommends that the attorney respond as follows: "'I appreciate your candor and thank you for sharing this view . . . it is certainly not an uncommon reaction to first learning about [implicit racial bias] . . . [D]o others share Juror Number X's skepticism?'"[217]

The attorney concerned about implicit racial bias will also want to find out which prospective jurors are motivated to act in egalitarian ways since social science research suggests that egalitarian-minded individuals are more likely than hierarchical individuals to try to counteract stereotypical thinking when made aware of the possibility of racial bias.[218] To find out which individuals are motivated to act in egalitarian ways, Rapping cautions attorneys not to ask questions like "How do you feel about racism?" or "Do you believe it is ever appropriate to judge someone based on their skin color?" because prospective jurors may answer such questions by simply giving what they believe to be the socially desirable response.[219] Rapping suggests that the attorney instead ask prospective jurors to "[d]escribe [their] most significant interaction(s) with a member of another race" or "[d]escribe a particularly impactful interaction that [they or someone close to them] had with a member of another race."[220] Such questions force the prospective jurors to think

213. *Id.* at 326.

214. Founded by Jonathan Rapping, Gideon's Promise is a nonprofit organization that provides comprehensive advocacy training and community building support for both entry-level and seasoned public defenders. *See FAQs*, GIDEON'S PROMISE, http://gideonspromise.org/faqs/ [http://perma.cc/K9Z5-7FP5] (last visited Sept. 16, 2015).

215. Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB POL'Y 999, 1032 (2013).

216. *Id.*

217. *Id.* at 1033.

218. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 14–15 (1989).

219. Rapping, *supra* note 215, at 1034.

220. *Id.*

about how they felt or acted in an actual situation as opposed to discussing how they think they would act in a hypothetical situation.[221] This is important because "people often aspire to act in ways that do not perfectly match how they have behaved in the past."[222] As Rapping notes, "The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations."[223] An attorney might also ask a prospective juror to discuss "the best . . . experience the [prospective] juror has had with a member of another race" or ask the prospective juror to identify a member of another race whom the prospective juror admires.[224] Such questions track the social science research on debiasing. This research indicates that encouraging people to think about admired African American figures, such as Barack Obama, Colin Powell, and Martin Luther King, and disfavored White individuals, such as Jeffrey Dahmer (the infamous serial killer also known as the Milwaukee Cannibal), Ted Kaczynski (the Unabomber), and Timothy McVeigh (the man responsible for the 1995 Oklahoma City bombing), can help jurors counter the impulse to associate Blacks with criminality.[225]

C. Possible Objections

My proposal that attorneys concerned about implicit racial bias use voir dire to counter the automatic stereotype-congruent associations that most individuals make based on race is likely to encounter resistance on a number of fronts. One possible objection echoes the concerns raised by Albert Alschuler several decades ago. Alschuler opined that voir dire into racial bias would be "minimally useful"[226] because any prospective juror asked whether he would be prejudiced against the defendant because of the defendant's race would find such a question patronizing

221. *Id.* Such questions could also force prospective jurors to think about whether they have ever had a significant interaction with a member of another race, which could also have a positive effect.

222. *Id.*

223. *Id.* (quoting Ira Mickenberg, *Voir Dire and Jury Selection*, NORTH CAROLINA DEFENDER TRIAL SCHOOL 6 (2011), http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf).

224. *Id.* at 1035. Rapping suggests that the attorney should also ask the prospective juror to discuss negative experiences with members of another race and times that the juror relied on a stereotype that turned out to be wrong. *Id.* Reminding prospective jurors of negative experiences with members of another race, however, may trigger negative stereotypes, so I would focus on encouraging jurors to think about positive experiences with members of other racial groups and admired individuals belonging to the racial group in question.

225. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803–05 (2001) (finding that exposure to famous admired Black individuals and infamous disfavored White individuals lead to a reduction in automatic pro-White preferences); Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137 (2010) (finding that exposure to admired Blacks and disliked Whites resulted in a weaker automatic preference for Whites, but exposure to admired Blacks and admired Whites did not reduce automatic preference for Whites).

226. Alschuler, *supra* note 12.

and offensive.[227] Alschuler suggested such voir dire would be akin to saying, "Pardon me. Are you a bigot?"[228]

Alschuler's objection, however, is not responsive to my proposal since I do not encourage attorneys to ask prospective jurors whether they will be prejudiced against the defendant on account of his race. I agree with Alschuler that a question like, "Are you likely to be biased against the defendant because of his race?" is unlikely to provoke an admission of bias. Individuals in today's society know that it is considered wrong to discriminate on the basis of race, so even an individual who might actually be biased against the defendant because of the defendant's race would almost surely answer such a question in the negative in order not to appear bigoted. Even an individual who truly disavows racism and racial discrimination might answer such a question in the negative, sincerely believing that he or she will not be biased against the defendant on account of the defendant's race, when social cognition research suggests that all individuals, even the most egalitarian-minded on explicit measures, are implicitly biased on the basis of race.[229]

I disagree, however, with Alschuler's claim that voir dire into racial bias would be "minimally useful" in cases involving racial issues. Voir dire into racial bias can and should take the form of encouraging prospective jurors to think about racial bias in general. As discussed above, making race salient, whether through witness testimony or questions asked during voir dire, can inhibit the automatic associations that otherwise are likely to come into play when the defendant, the victim, or a witness is a member of a racially stereotyped group.[230]

A second possible objection is more troubling and involves a burgeoning field of research on stereotype threat. As Song Richardson and Philip Atiba Goff explain, "[s]tereotype threat refers to the concern with confirming or being evaluated in terms of a negative stereotype about one's group."[231] Most of us are aware of the concept of stereotype threat from Claude Steele's research in the 1990s on African American undergraduate students faring poorly on standardized tests.[232] Steele's research showed that anxiety about confirming the stereotype that links African Americans to lack of intelligence results in African Americans doing poorly on

227. *Id.* at 161.

228. *Id.*

229. BANAJI & GREENWALD, *supra* note 138, at 158–59. Sheri Lynn Johnson explains that "[a]sking a general question about impartiality and race is like asking whether one believes in equality for Blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that Blacks are more prone to violence." Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1675 (1985). Johnson also explains that prospective jurors "would naturally be reluctant to admit [prejudiced attitudes], particularly since they know that social disapproval will be publicly expressed by dismissing them from the venire." *Id.*

230. *See infra* text accompanying notes 142–160.

231. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 124 (2014).

232. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); *see also* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

standardized tests.[233] Subsequent research has confirmed that "[t]he concern with being negatively stereotyped often provokes anxiety, leading to physical and mental reactions that are difficult, if not impossible to volitionally control such as increased heart rate, fidgeting, sweating, averting eye gaze, and cognitive depletion—often leading to a reported inability to think clearly."[234]

Stereotype threat affects not only African Americans, but also anyone who belongs to a group that is negatively stereotyped. For example, women as a group suffer from the stereotype of not being good at math.[235] When women are reminded of this stereotype, they tend to perform worse on math tests than when they are not reminded of the stereotype.[236] Stereotype threat afflicts not just members of historically disadvantaged groups; it has also been shown to afflict White police officers concerned with being seen as racist.[237] In *Interrogating Racial Violence*, Song Richardson and Phillip Atiba Goff document a study involving police officers with the San Jose, California Police Department.[238] Surprisingly, the officers most concerned with not being or appearing to be racist were found to be quicker to use physical force to control situations involving Black suspects than officers who were not as concerned with how they were perceived by others.[239] To explain these findings, Richardson and Goff theorize that an officer who fears that a suspect sees him as racist will believe that he cannot rely on moral authority to control the situation, and thus must resort to physical force.[240]

If White police officers concerned about being seen as racist (i.e., officers concerned about the White-cop-as-racist stereotype) end up acting in more racially disparate ways than White police officers not so concerned about being seen as racist, should we worry that White jurors made aware of their own implicit biases

233. Steele & Aronson, *supra* note 232.

234. Richardson & Goff, *supra* note 231.

235. Laurie T. O'Brien & Christian S. Crandall, *Stereotype Threat and Arousal: Effects on Women's Math Performance*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 782, 784 (2003) (noting the stereotype of male superiority in math).

236. *Id.* (finding that women who were told that the test they were going to take had been shown to produce gender differences did less well on math tests than women who were told that the test they were about to take had not been shown to produce gender differences); *see also* Paul G. Davies et al., *Consuming Images: How Television Commercials That Elicit Stereotype Threat Can Restrain Women Academically and Professionally*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1615, 1624 (2002) (finding that women exposed to gender-stereotypic television commercials underperformed on the math portion of a nondiagnostic test); Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance,* 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 13 (1999) (finding that women who were told that the math test they were about to take was one in which gender differences do not occur performed just as well as men taking the same test, but women told that the test they were about to take was one in which gender differences had occurred performed worse than men taking the same test).

237. Richardson & Goff, *supra* note 231, at 126 (describing study involving the use of force by police officers with the San Jose Police Department).

238. *Id.*

239. *Id.* ("[T]he more officers were concerned with appearing racist, the more likely they were to have used force against Black suspects, but not suspects of other races, throughout the course of their careers.").

240. *Id.*

will become overly concerned with not appearing racist and end up acting in ways that disadvantage Black defendants and victims over White defendants and victims? While certainly possible, I do not think this is likely because there is no prevailing stereotype of the White racist juror whereas at least in some communities, there seems to be an existing stereotype of the White racist police officer. While certain communities may view White jurors with distrust, most Whites do not think of themselves as racist and, more importantly, do not think others generally view them as racist. Nonetheless, the research on stereotype threat suggests that attorneys attempting to raise awareness of implicit racial bias during voir dire must be careful not to trigger anxiety in prospective jurors that they might be seen as racist. [241] Making jurors aware of their own implicit biases while not triggering stereotype threat is likely to be a difficult balancing act, somewhat like walking on a very thin tight rope.

CONCLUSION

In cases in which racial stereotypes about either the defendant, the victim, or a witness may influence the fact finder's assessment of who was at fault, it is important for attorneys concerned about minimizing the risk of racial bias to be aware of the social science research on race salience. This research suggests that calling attention to race can help reduce racial bias in legal decision making. Voir dire into racial bias offers one way an attorney can make race salient to the jury. Calling attention to race can help minimize racial bias by encouraging jurors to consciously think about the impropriety of racial stereotyping.

241. *But see* Phillip Atiba Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91 (2008) (finding that White, male undergrad students at Stanford University reminded of the stereotype that Whites are racist and told that they would be discussing the subject of racial profiling with two partners positioned their chairs further away from their partners when they thought their partners would be Black than when they thought their partners would be White).